

Estate Planning and Probate Issues for the LGBTQ+ Community

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ACRONYMS



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GLOSSARY OF TERMS

Human Rights Campaign
<https://www.hrc.org/resources/glossary-of-terms>

- **Lesbian** | A woman who is emotionally, romantically or sexually attracted to other women. Women and non-binary people may use this term to describe themselves.
- **Gay** | A person who is emotionally, romantically or sexually attracted to members of the same gender. Men, women and non-binary people may use this term to describe themselves.
- **Bisexual** | A person emotionally, romantically or sexually attracted to more than one sex, gender or gender identity though not necessarily simultaneously, in the same way or to the same degree. Sometimes used interchangeably with pansexual.
- **Transgender** | An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc.
- **Questioning** | A term used to describe people who are in the process of exploring their sexual orientation or gender identity.

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PRONOUNS

Don't assume, ask.
Using preferred pronouns is a respectful practice.

SUBJECTIVE	OBJECTIVE	POSSESSIVE	REFLEXIVE
He	Him	His	Himself
She	Her	Hers	Herself
They	Them	Theirs	Themselves
Ze	Zir	Zirs	Zirself
Sie	Hir	Hirs	Hirself

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**HISTORICAL OPTIONS
PRIOR TO SAME-SEX MARRIAGE**

- Domestic Partnerships
- Civil Unions
- Deeds as Joint Tenants with Right of Survivorship
- Pre-Nuptial Agreements
- Co-Parenting Agreements
- Trust Agreements
- Beneficiary Designations / Joint Ownership of Accounts

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**HISTORICAL OPTIONS
PRIOR TO SAME-SEX MARRIAGE**

- Domestic Partnerships
 - A domestic partnership refers to an interpersonal relationship between two individuals who live together and share a common domestic life, but are not married
 - Domestic partnerships provide some of the same benefits as marriages
 - A few cities and counties in Florida offer a registration program for domestic partnerships and/or extend benefits to them
 - *Must be formally terminated per rules of registration location*

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**HISTORICAL OPTIONS
PRIOR TO SAME-SEX MARRIAGE**

- Domestic Partnerships
 - Declares the co-applicant to act as his/her healthcare surrogate as provided in Chapter 765, Florida Statutes and, if determined incompetent, to act as their preneed guardian pursuant to Chapter 744, Florida Statute; and
 - Declares the co-applicant as his/her agent to direct the disposition of their body after death;
 - Agree to be jointly responsible for each other's basic food and shelter;
 - Agree to immediately notify the Clerk's Office in writing, by filing an Affidavit of Termination, if the terms of the Registered Domestic Partnership are no longer applicable or if one of the domestic partners wishes to terminate the domestic partnership.

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**HISTORICAL OPTIONS
PRIOR TO SAME-SEX MARRIAGE**

- Domestic Partnerships
 - Registration must be done in person by both partners with proof of identification.
 - The declaration of registered domestic partnership is required to be signed by both domestic partners under the pains and penalties of perjury, signed by two (2) witnesses and notarized.
 - All records received relating to the Domestic Partnership Registry are public records unless otherwise exempted by law

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**HISTORICAL OPTIONS
PRIOR TO SAME-SEX MARRIAGE**

- Domestic Partnership Benefits
 - Health Care Facility Visitation
 - Health Care Decisions
 - Funeral/Burial Decisions
 - Notification of Family Members
 - Pre-need Guardian Designation
 - Participation in Education
 - Employee Benefits

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**HISTORICAL OPTIONS
PRIOR TO SAME-SEX MARRIAGE**

- Civil Unions
 - A civil union is a legal relationship that provides protection to a same-sex or opposite-sex couple at the state level.
 - It is not a marriage, nor does it provide federal benefits, protections, or responsibilities to a couple.
 - Civil unions are not recognized in all states, but were established as an alternative for same-sex couples to receive state protections and benefits before marriage was available.
 - Connecticut, Delaware, New Hampshire, Rhode Island, and Vermont automatically converted to marriage
 - Must be formally terminated
- *PRACTICE POINTER: Some states automatically converted civil unions to marriage after Obergefell*
- *Civil Unions are NOT available in the state of Florida*

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COMMON LAW MARRIAGE

- **F.S. 741.211 Common-law marriages void.**—No common-law marriage entered into after January 1, 1968, shall be valid, except that nothing contained in this section shall affect any marriage which, though otherwise defective, was entered into by the party asserting such marriage in good faith and in substantial compliance with this chapter.

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COMMON LAW MARRIAGE

States that Recognize Common Law Marriage

- | | |
|--|--|
| <ul style="list-style-type: none"> • Alabama • Colorado • District of Columbia • Georgia (if created before 1/1/97) • Idaho (if created before 1/1/96) • Iowa • Kansas • Montana • New Hampshire (for inheritance purposes only) • Ohio (if created before 10/10/91) | <ul style="list-style-type: none"> • Oklahoma (possibly only if created before 11/1/98. Oklahoma's laws and court decisions may be in conflict about whether common law marriages formed in that state after 11/1/98 will be recognized.) • Pennsylvania (if created before 1/1/05) • Rhode Island • South Carolina • Texas • Utah |
|--|--|

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**RECOGNITION OF SAME-SEX MARRIAGE
IN THE UNITED STATES**

Historical Context / Marriage Equality

- Prior to 2004 – Same-Sex Marriage was not recognized in the United States
- 2004 – Massachusetts became the first state in the U.S. allowing same-sex marriage
- June 2008 – The first legal same-sex marriages are performed in California.
- November 2008 – Proposition 8 eliminated this right.
- Followed by Connecticut (2008), Iowa and Vermont (2009), New Hampshire and Washington, D.C. (2010), New York (2011), and Washington and Maine (2012)

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**RECOGNITION OF SAME-SEX MARRIAGE
IN THE UNITED STATES**

Historical Context / Marriage Equality

- June 2013 – California’s Prop 8 is struck down by the United States Supreme Court.
- 2013 – California, Delaware, Hawaii, Maryland, Minnesota, New Jersey, New Mexico, and Rhode Island
- 2014 – Alaska, Arizona, Colorado, Idaho, Illinois, Indiana, Montana, Nevada, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Virginia, West Virginia, Wisconsin, and Wyoming

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**RECOGNITION OF SAME-SEX MARRIAGE
IN THE UNITED STATES**

Historical Context / Marriage Equality

- On June 26, 2015, the United States Supreme Court ruled that same-sex marriage is a right guaranteed by the Constitution ([Obergefell v. Hodges, 576 U.S. 644 \(2015\)](#)).
- 2015 – all remaining states recognized same-sex marriage – Alabama, Arkansas, Florida, Georgia, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas

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**RECOGNITION OF SAME-SEX MARRIAGE
IN THE UNITED STATES**

**Same-Sex Marriages Rising
After Supreme Court Ruling**

- According to the U.S. Census Bureau, there were roughly 980,000 same-sex couple households in the United States in 2019 and most were married — around 58% compared to 42% unmarried.
- Compared with opposite-sex couples, same-sex couples are more likely to have higher incomes, have both people employed, and be more educated.

Jun 30, 2021, <https://www.commerce.gov>

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**RIGHTS AND BENEFITS (or detriments)
OF MARRIAGE**

- Government Benefits
- Elective Share
- Homestead Protection
- Creditor Protection
- Exempt Property Determinations
- Family Allowance
- Favorable Tax Treatment
- Retirement Benefits
- Military Benefits
- Medicare and Medicaid Eligibility

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RIGHTS AND BENEFITS OF MARRIAGE

Government benefits

- **Tax benefits:** ability to file joint tax returns to eligibility for creation of a family business partnership.
- **Government benefit eligibility:** Each spouse is eligible for family-related government benefit programs, such as Social Security benefits, Medicare, veteran and military benefits, public assistance benefits, and workers' compensation death benefits.
- **Estate planning benefits:** inheritance of a spousal share after death, receipt of exemptions from expensive estate and gift taxes, and the use of certain types of trusts.

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RIGHTS AND BENEFITS OF MARRIAGE

Private benefits

- **Employment benefits:** obtain insurance benefits through his or her spouse's employer; take certain types of leave offered by covered employers, such as family medical leave; and certain marriage rights to employee retirement plan benefits.
- **Medical benefits:** allowed to visit each other during restricted visitation and are allowed to make medical decisions for one another when no medical power of attorney exists.
- **Family benefits:** to pursue spousal support and property rights against the other, as well as child-related benefits, such as child support, custody, and visitation, when applicable
- **Consumer benefits:** Many companies offer discounts for purchases such as family memberships, insurance products, and tuition.

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RIGHTS AND BENEFITS OF MARRIAGE

Next of kin status

- When you marry, you become your spouse's next of kin. Next of kin can:
- Consent to medical procedures in cases of emergency,
- Enjoy special visiting rights, and after death, can
- Direct the disposition of the remains of the deceased spouse

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RIGHTS AND BENEFITS OF MARRIAGE

Inheritance rights

- In all states, the surviving spouse has the right to inherit from the deceased spouse's estate, regardless of what he or she puts in his or her will.
- In other words, a widow/widower can inherit, from her spouse's estate, regardless of what the wife/husband wants.
- A deceased cohabitant can leave the other with nothing.

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RIGHTS AND BENEFITS OF MARRIAGE

The right to file joint tax returns

- Married couples can elect how they will be taxed. They can choose to pay taxes separately or jointly, depending on which allows them to owe the least amount of taxes. Cohabitants must file separately.

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RIGHTS AND BENEFITS OF MARRIAGE

- Ability to bring certain types of lawsuits, such as a wrongful death lawsuit if your spouse is killed by the wrongful act of someone else
- Spousal privilege in lawsuits, which prohibits the opposing party from learning about communications that took place between spouses during their marriage.
- All of the marriage rights and benefits that couples receive apply regardless of whether the couple is opposite-sex or same-sex.

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RIGHTS AND BENEFITS OF MARRIAGE

ELECTIVE SHARE IN FLORIDA

- Section 732.201, Florida Statutes: "The surviving spouse of a person who dies domiciled in Florida has the right to a elective estate of the decedent as provided in this part, to be designated the elective share."
- Section 732.2065, Florida Statutes, provides that the elective share is " an amount equal to 30 percent of the elective estate"
- Determination of Elective Estate is complex
- Section 732.2035, Florida Statutes - What is included in elective estate
- Section 732.2045, Florida Statutes - What is excluded from elective estate
- Section 732.2055, Florida Statutes - Methods for valuing the elective estate

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ESSENTIALS OF ESTATE PLANNING

- Last Will and Testament
- Durable Power of Attorney
- Advanced Directives
 - Designation of Health Care Surrogate (or Durable POA for Health Care)
 - HIPPA Release
 - Living Will
 - Designation of Pre-Need Guardian
- Trust (revocable or irrevocable)
- Deeds with Right of Survivorship Language
- Prenuptial Agreement

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THE IMPORTANCE OF TAKING A GOOD PERSONAL HISTORY

- Marital Status History
- Client Health History
- Client Spouse Health History
- Family History - Client and Spouse
- Military/ Employment History and Benefits
- Identify Heirs by Birth or Adoption
- Prior Donations of Genetic Materials/Embryos
- Asset Inventory
- Prior Wills or Advanced Directives
- Funeral Directives
- Current Goals for Estate Planning

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ESTATE PLANNING DOCUMENTS AND PROBATE AFTER NAME AND GENDER CHANGES

- **Keeping your Documents in Order**
- Client names and pronouns need to be consistent across the board. If there are inconsistencies with terminology, clients may need to change:
 - Birth certificate;
 - Social Security card;
 - Driver's license;
 - Passport;
 - Security clearances; and/or
 - Professional licenses.

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ESTATE PLANNING DOCUMENTS AND PROBATE AFTER NAME AND GENDER CHANGES

- **Name Change:** In order for you to legally change your name in Florida, you must submit a petition to a court. Your fingerprints will need to be submitted for a criminal records check as well.
- **Gender Change:**
 - **Birth Certificate:** Florida "Vital Statistics" laws permit you to change your sex on your birth certificate with "original, certified, or notarized supporting documentary evidence." You will have to fill out an application, sign an affidavit, and get a letter from a physician. If you previously have changed the gender on your passport, you also may use that as evidence.
 - **Driver's License:** Florida law requires that you must submit a court order for your name change, and get an original statement from a physician that you are undergoing or have undergone gender transition.

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EFFECT OF DISSOLUTION OF MARRIAGE

- **Last Will and Testament**
 - 732.507 Effect of subsequent marriage, birth, adoption, or dissolution of marriage.—
 - (1) Neither subsequent marriage, birth, nor adoption of descendants shall revoke the prior will of any person, but the pretermitted child or spouse shall inherit as set forth in ss. 732.301 and 732.302, regardless of the prior will.
 - (2) **Any provision of a will executed by a married person that affects the spouse of that person shall become void upon the divorce of that person or upon the dissolution or annulment of the marriage.** After the dissolution, divorce, or annulment, the will shall be administered and construed as if the former spouse had died at the time of the dissolution, divorce, or annulment of the marriage, unless the will or the dissolution or divorce judgment expressly provides otherwise.

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EFFECT OF DISSOLUTION OF MARRIAGE

- **PRACTICE POINTER:** *May not apply to will written prior to marriage (Gordon v. Fishman, 253 S.3rd 1218 (Fla. 2nd DCA 2018)).*
- Timing of the Execution of Will vs. Entry of Divorce Judgment
- Prenuptial or Postnuptial Agreements to Consider
- **Advanced Directives**
 - Unless otherwise provided in the advance directive or in an order of dissolution or annulment of marriage, the dissolution or annulment of marriage of the principal revokes the designation of the principal's former spouse as a surrogate. Fla. Stat. 765.104(2).

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**“WAR STORIES” IN LGBTQ+
ESTATE PLANNING AND PROBATE MATTERS**

- Unmarried couples without any estate planning documents
- Squabbling with relatives
- Who’s entitled to the tangibles?
- Who gets the body?
- Whose pet is it anyway?

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Q & A

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**Estate Planning and Probate Issues for the
LGBTQ+ Community**

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