Other Tools for Protecting Your Assets After You're Gone

Amalia Hervella and Margaret O'Neil were partners for 20 years, but were never able to establish a legal relationship. When Margaret died without having done any advance planning, her cousins claimed her assets and evicted Amalia from the couple's San Diego home. If Margaret and Amalia had owned their home "jointly with rights of survivorship," or if there had been some life insurance money to cover housing costs, Amalia, unable to afford new housing in her community, might not have been forced to move elsewhere. Lambda Legal was able to help get some justice, but there could have been so much more support for Amalia with advance planning. Take the power now so you or your loved ones aren't left saying "If only...."

Please note: This document offers general information only and is not intended to provide guidance or legal advice regarding anyone's specific situation.

FIRST STEPS

1. Think about how much money your loved ones will need if you die and who will get ownership of any home and/or assets you own.
2. Review how assets like investment accounts, bank accounts and real property are titled (i.e. who is listed as the owner(s) of the asset and in what form), as well as whom you have designated as a beneficiary or beneficiaries of any retirement plans or life insurance policies you may have.
3. Create a will—see the insert "Tools for Preparing a Will."
4. For legal help, consult Lambda Legal's Help Desk at 866-542-8336, www.lambdalegal.org/help or the other resources set out in "Tools for Selecting an Attorney."

PROPERTY OWNERSHIP WITH RIGHTS OF SURVIVORSHIP

Take the power! If you own a home, bank or investment accounts, or other assets, consider owning them with rights of survivorship, to make sure the person you want takes full ownership when you die.

Why do I need this power tool?

You may have a person in your life, whether a same-sex spouse or partner or someone else close to you, whom you want to be sure receives a particular piece of property or asset after you die. If you are married to or have a legal relationship with that person, you may be able to access the protections offered automatically to spouses who own property together, as well as spousal inheritance protections if you die without a will. If you cannot or decide not to access inheritance protections through marriage or another legal status in your state, and then you die without a will, your state's laws will require that your property go to your children, parents or other relatives rather than a partner with whom you have no legally recognized relationship. Even if you do leave a will giving property to your spouse/partner, relatives might challenge the will during the legal process of **probate** (see "Terms to Remember" at the end of this insert for all terms in **bold**) which settles a deceased person's affairs. While such challenges are far less common for LGBT people today, they still occur, especially when blood relationships are hostile or estranged. But property owned with rights of survivorship passes directly to the survivor regardless.

How it works: If you use this tool, both you and the person with whom you share the property will own the entire property together rather than each owning a separate share of it. If one of you dies, the other still owns the entire property. The words in your deed establish this right. You will need an attorney to prepare the deed for you. Spouses can access additional forms of joint ownership with survivorship rights, whether through community property rules or by establishing "tenancy by the entirety," but any two (or more) people can establish joint ownership with rights of survivorship. Here are other key points to remember:

- Even though you may take your home or other property out of the will and probate process, the property is still considered part of your estate for federal tax purposes. Married couples get a tax break under federal law, but unmarried couples (including those in civil unions or registered domestic partnership) do not. For such couples, the property is considered 100 percent owned by the deceased partner for federal tax purposes unless the survivor can prove otherwise. In other words, unless your surviving partner can document the contributions (either to the purchase or the improvement) he or she made to the property of their own resources, your estate will be taxed more heavily and there will be less remaining for your loved ones. There may also be estate tax issues at the state level depending on whether your state has its own estate tax and on whether your relationship is legally recognized. Consult a financial planner or attorney about the trade-offs in your circumstances.

EXTRA TOOLS IN THE BOX

Consult an attorney for other ways to title assets so that they will go to the person or people you choose whether you die with or without a will. These may include:

Payable-on-Death Accounts (a "POD" or Totten trust)
Ask your bank about this kind of account, which you establish and own, and which then is automatically transferred upon your death to a beneficiary you have named.

Transfer-on-Death Deeds (a "deed TOD")
If allowed in your state, this type of deed secures your full ownership and control of real property until you die, and then automatically transfers ownership to the beneficiary you have named.

Transfer-on-Death Vehicle (a "car [or other vehicle] TOD")
If allowed in your state, this document gives you total ownership and control over a vehicle, such as a car or boat. Upon your death, the vehicle is transferred to a beneficiary you have named.

- If you are not buying the home and sharing its ongoing costs together, and you simply want to add your partner to the deed, the federal government may consider that a gift of property and tax it. Also, a gift of real property made by changing the deed is not easy to revoke should your relationship end, unlike a gift planned for the future through a will, which can be changed easily at any time during your life. The efficiency of avoiding probate after your death may be less important to you than retaining greater control during your life. Consult a financial planner or attorney about whether giving ownership now or later is best for you.

- If the state you live in denies you the tax protection it gives to married different-sex couples, your death may lead to a reassessment of the property value. This is the unfair result of state tax systems that discriminate against same-sex couples. One way to reduce the impact of this type of discrimination is to take out life insurance, so when you die your spouse or partner has money to pay the increased taxes in the future.

LIFE INSURANCE

Take the power! Investigate whether you should purchase a life insurance policy.

Why do I need this power tool?

If you are lesbian, gay, bisexual, transgender or living with HIV, you may confront discriminatory forces—some that are written into the law itself—that put your loved ones at greater financial risk when you die.

How it works: When you purchase an insurance policy on your own life, you choose the amount of death benefit and the policy beneficiary. The size of the death benefit, the type of policy (e.g., term, whole life, universal life) and your health determine your premium payments, which can be paid at intervals ranging from annually to monthly. When you die, the death benefit goes directly to the beneficiary you have named, 100 percent income tax-free.

- Even though the life insurance proceeds are paid directly to your beneficiary with no income tax, the death benefit is still part of your taxable estate. This can make a big difference in the amount of taxes your estate owes and how much is left over for your loved ones. Ask a financial planner or attorney about approaches to remove insurance proceeds from your taxable estate, including:

1) transferring the ownership of your insurance policy to a partner. This gives your partner control over your life insurance and ensures the death benefit is not subject to estate tax at your death. You must, however, live at least three years after you make the transfer or the policy proceeds will be drawn back into your estate;

2) creating an **irrevocable life insurance trust** that benefits your partner. In this arrangement, the trust applies for and owns the insurance policy. The trust is also the policy beneficiary. Your partner can act as trustee for access to and control over the policy and any additional trust assets.

3) having your partner purchase and own the policy from the outset. In many cases, partners own insurance on each other's lives rather than owning their own policies. The purchase of a new policy rather than the transfer of an existing policy avoids the three-year look back (the requirement that you live at least three years after you make the transfer for it to be exempted from estate tax).

- Before you purchase a life insurance policy, consult a financial planner to help you determine the right amount of insurance, the type of policy best suited to your needs and the premium most appropriate for your budget. Keep in mind that insurance becomes more expensive as you age. You will never be as young and perhaps never as healthy as you are today, so take a good look at how life insurance can protect and benefit the ones you love.

TENANCY IN COMMON

Take the power! An alternative to joint tenancy is a form of co-ownership called **Tenancy in Common.**

Why do I need this power tool?

Tenants in common are considered to have distinct shares of the property. Only the share belonging to the first partner to die will be considered part of his or her taxable estate, thus avoiding the proof problem described above that occurs with property owned in joint tenancy.

How it works: If you use this tool, you and your spouse/partner will each own a separate share of the property. Unlike joint tenancy with rights of survivorship, property held by two people as tenants in common will not pass directly to the survivor upon death of the other.

If you hold property as tenants in common with your spouse/partner and want them to inherit the property, you may have to provide for that inheritance upon your death through your will or trust (depending on your state and your marital status). If you fail to do so, your spouse/partner may be in the undesirable position of co-owning the property with your legal heirs—who may be unfriendly or remote family members—and being subject to a forced sale of the property by those co-owners. Consult with your advisors to determine whether tenancy in common, joint tenancy with rights of survivorship, tenancy by the entirety, or another option is the better option for you.

TERMS TO REMEMBER

Irrevocable life insurance trust: A trust in which life insurance is the asset, and the proceeds are exempted from the insured person's taxable estate when he or she dies.

Life insurance: An arrangement for an insurance company to pay your beneficiaries an amount of money after you die, in exchange for which you make monthly payments during your lifetime. The proceeds are considered part of your taxable estate, unless you take an approach which keeps life insurance proceeds out of your estate, such as by transferring ownership of your policy to your beneficiary, or by setting up an irrevocable life insurance trust.

Ownership with rights of survivorship: A term in the deed to certain types of property that ensures that the person with whom you jointly own with the property takes full ownership when you die. Examples include tenancy by the entirety (spouses only in certain states), community property (spouses only in certain states), and joint tenancy with rights of survivorship or JTWROS (any two or more people).

Tenancy in Common: A term in the deed of certain types of property that ensures that the person with whom you own the property continues to separately own only his or her share when you die. If you want that person to inherit your share, you must specify that in your will or trust.