

Tools for Protecting Your Assets After You're Gone

Amalia Hervella and Margaret O'Neil were partners for 20 years. But when Margaret died without a will, her cousins claimed her assets and evicted Amalia from the couple's San Diego home. Unable to afford new housing in her community, Amalia was forced to move elsewhere. 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 house you own.
2. Create a will—see separate insert "Tools for Preparing a Will."
3. Consult the following resources for legal help:
 - Lambda Legal's Help Desk, 866-542-8336 or send email by visiting www.lambdalegal.org/help/online-form (for legal assistance on LGBT and HIV related issues or help identifying an LGBT/HIV friendly attorney in your area)
 - www.lawhelp.org (for help determining whether there is an affordable attorney in your area)
 - www.abanet.org/legalservices/findlegalhelp/home.cfm (to find attorneys in your area who may reduce charges)

JOINT OWNERSHIP WITH RIGHTS OF SURVIVORSHIP

Take the power! If you own a home, consider owning it jointly 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 same-sex spouse or partner and live in a state that denies same-sex couples the protections offered automatically to different-sex married couples who own real estate together. 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. And even if you do leave a will giving property to your spouse/partner, relatives might challenge the will during the legal process of "probate," which settles a deceased person's affairs. While such challenges are far less common for LGBT people today, will "contests" still occur, especially when blood relationships are hostile or estranged. But a home owned jointly with rights

of survivorship passes directly to the survivor regardless.

How it works: If you use this tool, both you and your spouse/partner 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.

- Even though you may take your home out of the will and probate process, the property is still considered part of your estate for federal tax purposes. Married different-sex couples get a tax break, but because of discriminatory federal laws, same-sex couples, even when married, do not. So for federal estate tax purposes, the property is considered 100 percent owned by the deceased partner unless the survivor can prove otherwise. In other words, unless your surviving spouse/partner can document the contributions he or she made to the property, your estate will be taxed more heavily and there will be less remaining for your loved ones. Consult a financial planner or attorney about the trade-offs in your circumstances.

- If you are not buying the home and sharing its ongoing costs together, and you simply want to add your spouse/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 partner has money to pay the increased taxes in the future.

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.

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



Advance planning could have protected Amalia Hervella (pictured) from being forced to leave the home she shared for many years with partner Margaret O’Neil after Margaret’s death.

an insurance policy on your own life, you typically make monthly payments on the policy. At the time of purchase, you choose an amount (with larger amounts requiring larger monthly payments), and when you die that money goes to the beneficiary you have named.

- As with jointly owned property, even though the life insurance proceeds are paid directly to your beneficiary when you die—whether or not you left a will and outside the time-consuming probate process—that money is still part of your estate for tax purposes. That can make a big difference in the amount of taxes your estate owes and how much is left over for your loved ones. Consider approaches that take the insurance proceeds out of your taxable estate. Ask a financial planner or attorney about transferring ownership of the insurance to a partner, or setting up an irrevocable life insurance trust that benefits a partner. Both of these options involve giving

up control over the life insurance, and there are conditions that have to be met. Alternatively, your partner could buy insurance on your life and vice versa.

- Consult a financial planner or attorney before purchasing a policy and deciding on the right amount of insurance, balancing the monthly costs during your lifetime against your loved ones’ likely needs after you are gone.

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?

Because tenants in common are considered to have distinct shares of the property, only the share belonging to the first spouse/partner to die will be considered part of that 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 will have to provide for that inheritance upon your death through your will or trust. 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, or another option is the better option for you.

