

ESTATE PLANNING FOR SAME SEX MARRIED AND UNMARRIED COUPLES

Presented by:

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Jennifer E. Peck is a partner at the law firm of Solomon, Steiner & Peck, Ltd. in Mayfield Heights, Ohio. Ms. Peck concentrates in the area of estate planning, medicaid planning, taxation and probate. Ms. Peck received her law degree from Cleveland-Marshall College of Law (cum laude), and received her undergraduate degree in political science from John Carroll University. Ms. Peck is a Certified Specialist in Estate Planning, Trust & Probate Law. Ms. Peck was named an Ohio Super Lawyer Rising Star in Estate Planning/Trusts for 2005 by Law & Politics. Ms. Peck has taught “Legal Issues and the Elderly” at Cuyahoga Community College. She is a past lecturer on income tax issues at the Ohio CPA Annual Accounting Show, the National Business Institute and the Ohio State Bar Association Continuing Legal Education Institute. Ms. Peck’s lecture on “Practical Approaches to Managing Finances: Powers of Attorney and Living Trusts” has been offered by the Ohio State Bar Association as an online CLE. She also speaks on Medicaid Planning, Estate Planning, Probate, Guardianship and Tax Planning to both professional groups and individuals. Ms. Peck is a member of the Ohio Bar and the Geauga County Bar Association. Ms. Peck was working on her LL.M. degree (Masters in Taxation) at Case Western Reserve University when she decided to pursue two other more interesting matters - her two daughters.

Estate Planning Considerations for Same Sex Couples

1. **Controlling Health and Financial Issues During Life**

HEALTH CARE POWER OF ATTORNEY & HIPAA – This document allows a person to appoint someone to make medical decisions if you cannot make one.

Example - Unmarried couple, Pat and Tom, have been together for twenty years. Tom goes into hospital and is unconscious. Pat has no legal right to make a decision just because of a twenty year relationship. If a guardianship is sought, the law presumes the next of kin not your companion is first in line to be appointed.

Example – Married Same Sex couple, Paula and Geri, have three adult children. Paula has an emergency and is in the hospital and is unconscious. Who do the doctors ask to help make the decision? Without the health care power, someone will need to seek a guardianship even though they are married. What if other family members disagree?

Solution - Health care power of attorney- you can appoint the person you want to make your decision for health care problems and avoid a guardianship.

LIVING WILL DECLARATION - Addressing end of life decisions.

FINANCIAL POWER OF ATTORNEY – Appointing someone to handle financial affairs.

Example - Pat and Tom. Tom becomes incapacitated. Who pays Tom's bills, handles his investments, has access to his IRA. Pat has no rights even if they have been together 20 years. A joint checking account might not be sufficient. You would need a guardianship. If a guardianship is sought, the law presumes the next of kin not your companion is appointed.

Factors to consider for a power of attorney

Trustworthiness

Knowledgeable

What powers to allow – gifting, changing beneficiaries, selling assets

Springing Power or immediate power

Multiple power holders – joint signatures, successors

Pointer - Even if Pat and Tom marry, the spouse doesn't have access to all of Tom's assets just because they are married.

2. **Controlling Funeral Arrangements**

DISPOSITION OF BODY – This document allows a person the right to appoint someone to handle the funeral arrangements including the type of burial or cremation.

Ohio law lists the priority of person who can make burial arrangements if you don't execute this document.

- Spouse
- Adult Children
- Parents
- Siblings
- Grandparents
- Grandchildren
- Descendants of deceased grandchildren
- Guardian
- Other

Example – Pat and Tom unmarried couple for 20 years. Tom told Pat how he wanted to be buried and where. Tom dies, but Tom's siblings to whom Tom has not spoken in years, step in and make the decision. There is nothing Pat can do.

Solution - Complete the Disposition of the Body document and specify who makes your decisions.

Pointer - Even if Pat and Tom marry, until same sex marriages become more common, they still may wish to complete this document. Ohio does not have a law banning discrimination.

3. **Passing Assets at Death**

LAST WILL AND TESTAMENT.

Without a Will, assets pass pursuant to Ohio law or if you die a resident of another state, that state's law. In Ohio, if a single person or an unmarried partner dies without a Will, the law provides that the estate is distributed as follows:

- Children or their issue
- Parents
- Brothers and sisters or their issue
- Other more distant relatives

BENEFICIARY DESIGNATIONS – beneficiary designations supersede the Will. Almost all assets can have beneficiary designations.

- IRA, 401k, pension benefits

- Life Insurance
- Annuities
- Bank accounts
- Brokerage accounts
- Real estate

Pointer - some retirement benefits only pay to a surviving spouse and some companies are eliminating unmarried couple benefits now that same sex marriage is legal.

4. **Providing for children**

NOMINATION OF GUARDIAN - Same Sex Couples with children will want to consider naming the other as the guardian of minor children. Alternatively, and with a better outcome, the same sex couples will want to consider adoption for married couples and a shared custody arrangement for unmarried couples. Without this prior arrangement, the person who did not give birth to or adopt the child may face losing custody or visitation rights.

NAMING CHILDREN BY NAME IN ESTATE PLANNING DOCUMENTS. This is especially important for a non adopting parent.

5. **Managing Assets at Death and During Life**

TRUSTS –

Why is a Trust needed? Not everyone needs a trust. There are many reasons to consider a Trust.

- Federal Estate Tax Savings
- Probate Avoidance (compare to non-Trust solutions)
- Handling assets for young beneficiaries
- Asset control for beneficiaries with creditor issues, addiction issues, etc.
- For unmarried couples additional protection from challenges at death.
- Preserve Privacy and avoid guardianship
- Providing for children (same sex couples can adopt)

Controlling your planning even with the recognition of same sex marriages leaves little to State and Federal Law interpretation and is the best practice.