

# LEGAL HANDBOOK

## FOR LGBT FLORIDIANS AND THEIR FAMILIES



CARLTON FIELDS  
JORDEN BURT

A RESOURCE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILIES | 3RD EDITION

## PREFACE

This third edition of A Legal Handbook for LGBT Floridians and Their Families was a pro bono project of the law firm of Carlton Fields Jordan Burt in cooperation with Equality Florida, with valuable research and writing contributions from students and faculty at Stetson University College of Law. Portions of the Handbook were derived from the 5<sup>th</sup> Edition of the *Older Floridians Handbook: Laws and Programs Affecting Older Floridians (2007)*, which was a joint project of Carlton Fields and the Florida Justice Institute. Copyright in the *Older Floridians Handbook*, and all unchanged portions of the *Older Floridian Handbook* included in this Handbook, are owned by the Florida Justice Institute and are included with the permission of the Florida Justice Institute. Carlton Fields Jordan Burt and Equality Florida Institute thank the Florida Justice Institute for its cooperation in the use of certain materials of general interest that are included.

Primary funding for this Handbook was provided by Carlton Fields Jordan Burt. In order to facilitate access to this publication, the Handbook also will be available on the Internet through the websites for Equality Florida Institute and Carlton Fields Jordan Burt.

Equality Florida Institute and Carlton Fields Jordan Burt welcome comments and suggestions for future editions.

Third Edition.....[January 1, 2014]

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Welcome Letter from  
Nadine Smith, Equality Florida Chief Executive Officer

Friends,

For over 17 years, Equality Florida has worked to secure full equality for the lesbian, gay, bisexual and transgender (LGBT) community. We know first-hand how important it is that LGBT Floridians understand the best ways to protect themselves and their loved ones under the laws that currently exist.



This Handbook is intended to be an easy reference source for same-sex couples in Florida – particularly with respect to long-term planning related to health, family and financial considerations. It contains useful legal and practical information on topics of special interest to our community, but its use is by no means limited to LGBT couples. Single Floridians, including all unmarried couples, should find this booklet informative and helpful.

The material provided is based on the laws and practices of the State of Florida and its agencies, and in some cases, the laws and practices of the federal government. This Handbook cannot answer every question, nor can it replace the advice and counsel of an attorney when needed. Rather, it provides information of a general nature and answers to some of the more common questions that LGBT Floridians often have.

This Handbook deals with laws and policies that may change often, particularly in the area of LGBT rights. Consequently, when the Handbook directs you to a particular statute, rule or agency, please check to make sure that the information is current.

Equality Florida Institute, Inc. is a tax-exempt, nonprofit organization that relies on the support of our member through annual memberships and legacy gifts. Please consider our organization in your giving plan.

We'd like to thank our partner, Carlton Fields Jordan Burt, for their generous support in producing this valuable guide. We hope you find this to be a useful tool in navigating the challenges that gay couples face. Thank you for supporting Equality Florida Institute as we work toward the day when this handbook is no longer necessary.

Sincerely,



Nadine Smith  
Executive Director

NOTICE: Equality Florida and Carlton Fields Jordan Burt make no express or implied warranties or guarantees concerning the contents of this publication. Laws and regulations frequently change. Coverage is as of the date of publication. You are strongly encouraged to seek the services, if needed, of a lawyer. A list of places to contact when you need the services of a lawyer but do not know how to find one or cannot afford one is provided in the Reference and Referral Information section toward the end of the Handbook.

## A LEGAL HANDBOOK FOR LGBT FLORIDIANS AND THEIR FAMILIES

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## Introduction

Congratulations! By opening a copy of this Handbook, you have taken the first step to protecting your rights, the rights of your loved ones, or the rights of your clients. Thanks to the advocacy work of Equality Florida and similar advocacy groups across the country, federal and state laws have changed dramatically in the recent past. While there is still much work to be done to improve the legal environment for the LGBT community, both the laws of the United States, and those of Florida, now contain many provisions that specifically protect the rights of LGBT people.

One exciting development that will be described in the Handbook is the federal government action designed to protect LGBT people in the area of public housing, defining families broadly to include LGBT people. The fact that the federal government has begun to take proactive steps to protect LGBT people is a terrific sign of support from the current federal administration. Further, some laws that have specifically denied LGBT people equality finally have been repealed. Examples of those repeals include the repeal of the federal “Don’t Ask Don’t Tell” policy in the military, and the statutory ban on gay adoptions in Florida.

This Handbook, now in its Third Edition, is designed to empower LGBT people and their allies with an awareness of those federal and local laws. This Handbook will also suggest certain planning steps where the law by itself may not be sufficient to protect the interests of LGBT individuals. There is power in knowledge, and this Handbook is intended to impart that power to its readers. The Handbook is organized in a way that is intended to let you hone in on those issues that are affecting you, your loved ones, or your clients today.

- Part I highlights Federal, State, Local and Private Laws aimed at discrimination;
- Part II discusses issues related to Transgendered individuals and the unique issues they face daily;
- Part III highlights the laws relating to marriage and other legally recognized relationships in Florida and other states;
- Part IV explains and outlines the significance of a domestic partnership agreement for those couples who want to more clearly define their relationships;
- Part V deals with growing families by way of adoption and surrogacy;
- Part VI addresses the importance of Estate Planning for LGBT people and detailed information about the various ways of implementing those plans;
- Part VII focuses on health care-related issues especially those dealing with end-of-life care;
- Part VIII is dedicated to only those issues concerning elder law and the rights of the elderly in the LGBT community;
- Part IX provides reference to other important resources available to you; and
- Part X provides sample forms that might be useful when getting start with legal issues.

Whether you need information about Discrimination, Marriage, Adoption, Estate Planning, End of Life Planning, Elder Law Issues, or simply want to know more about your legal rights, this Handbook should be a valuable resource. As always, you should consult an attorney before making any legal decision, but this Handbook provides a great place to start.

**“When I moved to the Tampa Bay area and researched non-profits, Equality Florida stood out as a organization making a real impact for everyone. As a longtime member, I'm proud to be a part of what Equality Florida has accomplished.”**

**- Eunice Fisher, St. Petersburg**

## I. DISCRIMINATION LAWS

LGBT people face enormous challenges, and in some cases, discrimination is rampant. Some states have laws that prevent or exclude LGBT people from being able to get married while others make it difficult, if not illegal, to pursue the dream of having children. And some people in our community have even lost jobs because they are gay or are a transitioning transgendered

person. Yet despite all of that, there is hope. Laws have been passed at the federal, state, and municipal levels that protect the rights of LGBT people. Moreover, LGBT people are more vocal, more open, more united, and more organized than ever before. With a little knowledge and some careful planning, LGBT people can protect themselves and their relationships from the discrimination and inequality that has prevailed in the past. This section will help empower LGBT people by detailing some of the legal rights that do exist for LGBT people and some strategies that can be employed to protect those rights.

Discrimination laws are something of a misnomer. They are probably better described as “anti-discrimination laws” and there are several that all LGBT people should be aware of both at the state and federal level.

### A. Federal and State Laws

Civil rights laws have been passed by the U.S. Congress and by the Florida Legislature that provide legal protections against discrimination in areas such as employment, education, housing, and public accommodations, on the basis of certain specified categories, including race, national origin, sex, age, disability, and others. There are a number of different federal laws that provide these protections, including the Civil Rights Acts of 1964 and 1991. The Florida Civil Rights Act is found at Chapter 760 of the Florida Statutes. The federal anti-discrimination laws are administered and enforced by the Equal Employment Opportunity Commission ([www.eeoc.gov](http://www.eeoc.gov)). The Florida anti-discrimination laws are administered and enforced by the Florida Commission on Human Relations (<http://fchr.state.fl.us>).

Currently, the federal and Florida anti-discrimination laws provide very little legal protection to LGBT citizens subjected to discrimination. Neither the federal nor Florida anti-discrimination laws include “sexual orientation” or “gender identity” in the list of classifications protected from discrimination. However, there is pending legislation, the Employment Non-Discrimination Act, which would add these classifications to the federal laws if passed by Congress and signed into law.

Take Action!

If you are aware of any sex discrimination happening, let that person know that they may have recourse under the law.

1. Sexual Harassment

In some jurisdictions, courts have interpreted the laws prohibiting “sex” discrimination to include same-sex sexual harassment and “gender stereotyping,” which may provide a potential basis for relief to LGBT citizens under some circumstances. Same-sex sexual harassment occurs when one or more co-workers of your sex target you because of your sex and create a hostile work environment or demand that you perform sex acts as a condition of your employment. Gender stereotyping occurs when you are discriminated against in the terms of your employment because you are perceived as not conforming to the generally accepted “norms” of your gender, for example, a man who is perceived as effeminate or a woman who is perceived as masculine. If you believe you may have been subjected to either of these forms of discrimination, you should promptly contact a qualified attorney to advise you of your rights.

Take Note!

“Family” now includes LGBT families for purposes of federal housing laws.

2. HUD Policies

In February of 2012, the Department of Housing and Urban Development (HUD) refined its policies, creating a new rule that prohibits owners of HUD-assisted housing or whose financing is insured by HUD from discriminating on the basis of sexual orientation or gender identity. This is a milestone for lower-income LGBT partners and families because it now creates protections for LGBT families within the scope and definition of family as defined by HUD. The policy applies not only to HUD’s rental assistance program, but also to the homeownership, Federal Housing Administration (FHA) mortgage insurance, community development, and public assisted housing programs. For more information visit [www.hud.gov](http://www.hud.gov).

**"I think Equality Florida does great work fighting for LGBT civil rights and, as someone who came out later in life, I'm glad to do what I can to support this important work."**

**- Stephen Gundlach, Lantana**

### 3. Health-related Issues and Discrimination

There are a few Florida laws that provide protection on the basis of sexual orientation in specific limited circumstances. With regard to applications to purchase insurance coverage and to subscribe to an Health Maintenance Organization (HMO), Sections 627.429 and 641.3007, Florida Statutes, provide that sexual orientation shall not be used in the underwriting process or in the determination of which subscribers or applicants for enrollment shall be tested for exposure to the HIV infection, and that information disclosed during the underwriting process shall not be used to establish an applicant's sexual orientation. Hospice facilities must make their services available to all terminally ill persons and their families without regard to sexual orientation (Section 400.6095, Florida Statutes), and providers of substance abuse services may not deny an individual access to services on the basis of sexual preference. (Section 397.501, Florida Statutes)

#### Take Note!

Hospice facilities must serve all terminally ill people, regardless of sexual orientation.

Florida law provides increased penalties for hate crimes based on sexual orientation and has been interpreted to include hate crimes targeted at the transgender community. Adding specific protections for gender identity to our hate crimes law continues to be a priority.

**CARLTON FIELDS**  
**JORDEN BURT**



#### A. Municipal Laws

Although the federal and Florida anti-discrimination laws do not specifically prohibit discrimination against LGBT citizens, some cities and counties in Florida have passed their own anti-discrimination ordinances that do prohibit such discrimination within their geographic boundaries. Some of these municipalities include Broward County, Leon County, Miami-Dade County, Monroe County, Palm Beach County, Gainesville, Jacksonville, Miami Beach, Orlando, Sarasota, St. Petersburg, Tampa, West Palm Beach, and others. Additional information on ordinances existing as of the date of this publication is included in Section X, below. If you believe that you have been subjected to discrimination because of your sexual orientation or gender identity, you should check your local municipal codes to see if they include anti-discrimination ordinances covering those categories. If so, the ordinance will describe how to go about asserting a claim for discrimination to the appropriate investigative authority. You can contact an attorney, or contact Equality Florida at [www.eqfl.org](http://www.eqfl.org), for assistance in determining whether your municipality has a relevant ordinance, whether the ordinance provides the basis for a civil suit and, if so, whether your attorneys' fees are recoverable if you prevail.

#### B. Hate Crimes/Bullying Laws

Federal hate crimes law, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, makes it a federal crime to commit a physical assault or cause property damage based on bias against someone because of their sexual orientation or gender identity, among other classifications. Florida also has a hate crimes law that includes sexual orientation (but not gender identity) in Section 775.085, Florida Statutes. Florida's hate crimes law does not create a separate chargeable offense, as does the federal version, but is merely a penalty enhancement that can result in the reclassification of a charged offense to a more serious offense. Florida's hate crimes law

**"My thanks to everyone would not be complete without a special shout out to Equality Florida donors and volunteers. Your tremendous support has allowed me to stand up to an opponent who sought to divide our community, to weaken our bullying policy and play politics with students' safety."**

**- April Griffin, Hillsborough School Board Member**

further provides that a person or organization that establishes that it has been coerced, intimidated or threatened in violation of the hate crimes law has a civil cause of action for triple the amount of actual damages, an injunction, or any other appropriate relief. As part of the Criminal Gang Prevention Act, criminal gangs include "hate groups." Section 874.03 of the Florida Statutes defines a "hate group" to include organizations whose primary purpose is to promote animosity, hostility, and malice against a person or persons or against the property of a person or persons because of sexual orientation. Similar to the hate crimes law discussed above, the Criminal Gang Prevention Act provides penalty enhancements for offenses under this law and establishes civil remedies for victims. Also, Florida law requires the state to collect and disseminate data on hate crimes based on sexual orientation.

**As a direct result of Equality Florida's efforts, Florida protects 1.7 million students from bullying and harassment based on sexual orientation and 1.5 million of those are also protected from bullying and harassment based on gender identity and expression.**

Take Note!

Florida has:  
(i) a hate crimes law that includes sexual orientation; and  
(ii) an anti-bullying law that requires schools to combat bullying.

Florida also has an “anti-bullying” law that requires school districts to adopt and enforce strict policies against bullying in Section 1006.147, Florida Statutes. This law does not separately list out classifications of protected groups, but the legislative history provides a strong case that anti-gay bullying is covered by the law. A number of counties and school districts have also adopted anti-bullying policies (for example, Hillsborough County). Interestingly, Florida law requires that if a school district provides instruction or course material on human sexuality, it must teach “the benefits of monogamous heterosexual marriage.” (Section 1003.46, Florida Statutes)

C. Employment

Even if your municipality does not have an anti-discrimination ordinance that covers sexual orientation and gender identity, some public and private employers have internal policies that prohibit such discrimination. Public employers with such policies include many of the same cities and counties identified above that have enacted anti-discrimination ordinances for their general population, as well as a majority of Florida’s public universities. Many private employers have also enacted such policies, including such prominent Florida companies as Walt Disney and Florida Blue. Review your employer’s policies or check with your employer’s human resources department to see if your employer has such a policy. Such internal policies do not have the force of law, and therefore cannot be enforced in formal legal proceedings, but they may provide an internal complaint procedure that could afford some relief at your place of employment. You may wish to consult an attorney if you feel that your company’s internal policies have been violated to see if there are any other remedies available to you.

In addition, many professions have governing bodies that regulate the conduct of their members which include protections from discrimination on the basis of sexual orientation. For example, Section 4-8.4 of the Rules Regulating the Florida Bar (which governs the conduct of all lawyers licensed to practice law in the state of Florida) prohibits lawyers from disparaging or discriminating against litigants, jurors, witnesses, court personnel, or other lawyers on the basis of sexual orientation. If you believe that you have suffered discrimination or unfair treatment by someone acting in a professional capacity, check to see if that person’s profession is governed by a code of conduct that might afford you a course of action to make a complaint.

II. TRANSGENDER ISSUES

Transgender individuals may encounter difficulties when their records and documents do not reflect their current name and gender. Transgender individuals may have their privacy violated and transgender identity revealed without their permission in the workplace through the customary practices of their employers or the Social Security Administration (SSA). For example, the SSA compares its records with employee-provided information. If the employee-reported gender and the gender in the SSA records do not match, then the SSA will notify employers of the discrepancy. These notifications often reveal an employee’s transgender identity to an employer without the employee’s consent. In some

circumstances, an employer may fire an employee whose employee-provided information is not the same as the SSA information, if the discrepancy is not resolved within a short period of time. Another situation transgender individuals face is an inability to travel, especially if using commercial airlines. The Transportation Security Administration (TSA) instituted a secure flight program that went into effect for both domestic and international flights on October 31, 2009. Under this program, the TSA mandates that all passengers present their name, gender, and date of birth when making an airline reservation. Transgender individuals may encounter delays, embarrassment, or discrimination if the gender listed on their passport or driver's license is not the same as the gender indicated when the reservation was made.

Transgender individuals, therefore, have a growing need to ensure that their documents and records are uniform and mirror their current name and gender. Changes in federal and state laws have made it increasingly hard for transgender individuals to maintain privacy and to change their driver's licenses, birth certificates, passports, and Social Security records. This guide should help to explain the current status of federal and Florida laws and their effect on the requirements for name and gender designation change on documents and records.

#### A. Passports: U.S. Department of State Policy

The U.S. State Department no longer requires that an applicant undergo sex reassignment surgery in order to seek a gender change on their passport. Instead, an applicant can submit a certification from a physician confirming that the applicant has undergone treatment for gender transition. The certification must include:

#### Take Action!

If you are transgendered, you should confirm that your documents and records are uniform and reflect your current name and gender.

- Physician's full name;
- Physician's medical license or certificate number;
- Issuing state of medical license/certificate;
- Drug Enforcement Administration (DEA) registration number;
- Name of the patient;
- Indication that the physician is either an internist, endocrinologist, gynecologist, urologist, or psychiatrist;
- Indication that the patient had appropriate clinical treatment for gender transition to the new gender; and
- A written oath signed by the physician stating, "I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct."

The State Department does not require any specific treatment or details about the type of treatment undergone. If an applicant is just beginning gender transition and needs to travel abroad, the State Department will issue a two-year provisional passport. The temporary passport has the same force as a regular passport. After the applicant has

completed the appropriate clinical treatment, the applicant can obtain a full, regular passport.

The application procedures for passport name change are unaffected by this new legislation. An applicant must still submit a completed DS-19 form along with a certified copy of the applicant's Final Judgment of Name and his or her current valid passport.

Government officials hoped that this new policy would alleviate the danger and anxiety transgender individuals face when traveling with a passport that does not state the individual's correct gender. Despite this new policy, however, many transgender individuals have yet to secure name and gender changes on their passport. As a result, these individuals may be unable to travel outside of the United States.

#### B. Florida Documents and Requirements

Effective July 29, 2011, the Florida Division of Motorist Services revised its policies to align with those of the U.S. Passport Agency to allow persons undergoing appropriate clinical treatment for gender transition to apply for gender reassignment on a Florida driver's license or identification card -- completion of sex reassignment surgery is no longer a prerequisite. See, General Information Policy 034-2011, Gender Reassignment Requirements 047-2010 (Rev.). For birth certificates, Florida allows for a change in sex designation only if the applicant has undergone sex reassignment surgery according to Section 382.016 of the Florida Statutes and the Florida Administrative Code Annotated Revised 64V-1.003. The applicant must provide:

- A sworn affidavit from the physician who performed the sex reassignment surgery;
- The medical license number of the physician;
- A statement that the applicant has completed sex reassignment surgery in accordance with appropriate medical procedures;
- A statement that the applicant is now considered a member of the reassigned gender; and
- The required fee.

A transgender individual may be able to circumvent this law by establishing residency in one of the twenty-six states that do not require sex reassignment surgery as a condition of for change of gender designation on the birth certificate changes. If the gender designation on a birth certificate has been changed in one of those states, the changed records will be transferred without any additional paperwork or requirements when the individual moves back to Florida. Of course, this can be quite burdensome and most individuals are unable to move to another state for this purpose alone.

#### C. The Federal "Real ID Act"

The Real ID Act was signed into law under President Bush in 2005, and went into effect in January of 2013. Under the Real ID Act, all state Departments of Motor Vehicles must maintain digital copies of the documents each person presents when establishing their identity to obtain a driver's license or identification card in that state. The Real ID Act also provides that these records, including gender designation, are linked into one shared



database. Law enforcement officers and others will have complete access to this database. The new regulations established by the Real ID Act will make personal information more freely available and may disrupt the privacy of transgender individuals. It is important to be aware of this law's likely future impact on privacy.

### More Information

There are many other legal challenges facing transgendered persons that are beyond the scope of this Handbook – particularly relating to immigrants, refugees, and issues arising from differences between states on appropriate “standards” for determining “gender.” For more information about new and existing laws or the procedures for changing name or gender designation on a passport, driver’s license, identity card, social security card, or birth certificate, consult the following websites:

I added Equality Florida to my will years ago because I want to make a lasting, permanent contribution to ending discrimination. I am thrilled at the launching of the Legacy of Equality Society and hope it inspires many others to include Equality in your will or estate plans as well.

-Thom Leffler

- National Center for Transgender Equality – this website contains information regarding federal requirement for changing information on Social Security cards and passports:

[http://www.transequality.org/Issues/federal\\_documents.html#ss\\_gender](http://www.transequality.org/Issues/federal_documents.html#ss_gender)

- Equality Florida – visit [www.EOFL.org](http://www.EOFL.org) for a step-by-step guide to changing name and gender on birth certificates, driver’s licenses, social security cards, passports, and identity cards.

- Travel Tips for Transgender Individuals:  
<http://transequality.org/Issues/travel.html>

### III. MARRIAGE/RELATIONSHIP RECOGNITION

#### Take Note!

Floridians passed a Constitutional Amendment in 2008 making any marriage between same-sex couples invalid. Advocacy groups like Equality Florida are fighting to reverse that.

Florida’s Constitution (Article I) and Section 741.212 of the Florida Statutes banned marriage for same-sex couples by defining marriage as the legal union of only one man and one woman. Florida’s Constitution further mandates that “no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.” Fla. Const. Article I, Section 27. These same laws also prohibit Florida from recognizing valid same-sex marriages performed in other jurisdictions. Currently, Florida does not have any form of statewide recognition of same-sex relationships. However, similar to municipal ordinances banning discrimination on the basis of sexual orientation and gender identity, some Florida municipalities as well as public and private employers offer domestic partner benefits to their employees, and some municipalities provide domestic partner registries that

allow same-sex couples within their jurisdiction to register and receive certain benefits.

Among many other considerations, the inability to enter into a legally recognized marriage means that same-sex partners do not automatically have authority to make health care, childcare, and related life decisions with respect to each other, nor will they automatically inherit each other's property upon death. Nonetheless, various legal documents are available in order to insure that a partner's wishes are followed in these matters and the various mechanisms and related considerations are discussed in greater detail in later sections of this Handbook.

#### A. Marriage and Civil Unions

States that allow same-sex couples to get married also allow non-residents to take advantage of those rights. However, an important thing to consider is that if you decide to take advantage of this right in a state that allows it, the rights that you would have in the issuing state do not follow you to back to Florida because of the provision in Florida's Constitution banning marriage or unions significantly equivalent to marriage. That isn't to say that marriages performed in other states are without their benefits. For you and your family, a marriage could bring a feeling of commitment that you feel has been denied to you, and therefore that feeling of recognized commitment may be even more important than any legal rights that might accompany the marriage. States that currently allow marriage include California, Connecticut, Delaware, Hawaii, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Washington, Vermont, and the District of Columbia. However, this list is ever changing due to new laws being introduced in state legislatures across the country to both allow same-sex marriage and repeal laws permitting same-sex marriage in those states that have passed such laws. In some states the issue is taken to the people by way of popular vote, but historically, that has never had a positive outcome for the LGBT community.

Some states allow "civil unions" – legal contracts between partners that are recognized by the state as conferring some or all of the rights conferred by marriage, but without the implicit historical and religious meaning associated with the word "marriage." As is the case with a marriage between same sex partners that is performed outside Florida, those rights are not recognized once you return to Florida. It is important to keep in mind when considering civil unions in other states that this is a union of fewer rights than marriage, so whatever your personal circumstances are, be sure to do your research and discuss all of your options with your partner before taking any steps toward either marriage or a union in another state. States that currently allow civil unions include Delaware, Hawaii, Illinois, New Jersey and Rhode Island, but like same sex marriage, this list is constantly evolving. With marriage and civil unions alike, it is important to understand the specific laws in that state regarding same-sex marriage and civil union. A good place to start is Lambda Legal. That organization has valuable information on its website that provides legal issues by state and can be found at [www.lambdalegal.org](http://www.lambdalegal.org).

#### B. Domestic Partnership Registries

An increasing number of cities, counties, towns, and communities all over Florida are passing laws to allow for domestic partnership registries. This concept is somewhat

Take Note!

An increasing number of communities in Florida are establishing domestic partnership registries.

different from marriage and civil unions in that these registries guarantee unmarried partners (gay or straight) some of the same protections as married people, but not all. Those rights typically include rights to hospital visitation, and may include life-and-death decision-making and even access to shared children. But those protections only apply within the geographic boundaries of the local government in which the registration was made, and the specific protections provided will depend on the provisions of the local enabling ordinance. So going to a town or county that offers the registry will not grant you more rights if you are not a resident there, and you should not assume that the protections provided by all local registries will be the same. Communities that offer a domestic partnership registry in Florida include Miami-Dade County, Orange County, Broward County, Pinellas County, Sarasota, Tampa, and West Palm Beach, to name a few. This list is rapidly growing as more communities have determined to do

what they can to address historical in equality for gay partners. If you would like to learn more about domestic partnership visit Equality Florida at [www.eqfl.org](http://www.eqfl.org). Equality Florida also provides a Domestic Partnership Toolkit for those people interested in bringing a domestic partnership registry to their own community. Note that a Domestic Partnership Agreement (a contract between unmarried partners, discussed in greater detail in section below) can afford different and additional rights and obligations beyond those provided by registration in local Domestic Partnership Registry.

C. Divorce

No couple -- whether gay or straight -- wants to think about the possibility of a divorce. However, the unfortunate truth is that divorce is a possibility and because of the many legal complexities facing divorcing gay couples, it is a possibility that needs to be considered even more carefully for same-sex couples. Divorce can bring unexpected consequences to a same-sex couple that was married in a state in which they do not reside. Some states that allows same-sex marriage and allow non-residents to marry there, do not allow a divorce to be granted if the couple is not resident in the state. So, for example, if a Florida couple gets married in a state that allows same-sex marriage without a residency requirement (for example, New York), returns to Florida and then later decides to separate and divorce, they may be unable to do so. They won't be able to get divorced in Florida because the marriage was never recognized in Florida, and they may be prevented from getting a divorce from the state in which they were married because the state has a residency requirement before it will issue a divorce. While this might not seem like a major issue if the individuals simply stays in Florida where the marriage was never legal in the first place, however, any second marriage without a legal divorce could constitute a violation of anti-bigamy laws.

To avoid this issue LGBT couples should seek to marry in a jurisdiction where gay marriage is allowed but residency is not a requirement for divorce. Washington D.C. is one such jurisdiction. There are also planning devices for protecting yourself against the unforeseen consequences of a marriage or other legal recognizable relationship breaking down, such a prenuptial agreements and domestic partnership agreements (discussed in a

later section of the Handbook), but these documents are not fool-proof. While it might be uncomfortable to discuss the possibility of divorce with a potential spouse, it should be discussed, along with options for addressing the risks. Prenuptial or domestic partnership agreements are complex legal documents that can have hidden and unintended consequences. It is important to seek legal advice before entering into any such legal agreements.

#### D. Windsor and its Practical Implications

On June 26, 2013, in *United States v. Windsor*, the U.S. Supreme Court decided that Section 3 of the Defense of Marriage Act (DOMA), which had previously barred the federal government from recognizing same-sex marriages legalized by the states, was unconstitutional. In *Windsor*, the plaintiff, Edie Windsor, sued the federal government after the Internal Revenue Service (IRS) denied her refund request for the \$363,000 in federal estate taxes she paid after her spouse, Thea Spyer, died in 2009. Edie and Thea had been together for many years and had married in Canada. They resided in New York, which recognized their Canadian marriage.

When Thea died in 2009, she left her entire estate to Edie. Edie then tried to claim the federal estate tax exemption for surviving spouses (that would have excluded the inheritance from taxation), but was not allowed to because of Section 3 of DOMA, which prohibited the federal government from recognizing any same-sex marriage.

The District Court that first heard the *Windsor* case declared Section 3 unconstitutional, and on appeal, the Second Circuit Court of Appeals agreed. The U.S. Supreme Court agreed, as well, deciding that Section 3 of DOMA was unconstitutional under the Fifth Amendment. See *U.S. v. Windsor* opinion available at <http://www.supremecourt.gov/opinions/opinions.aspx> (last accessed August 19, 2013).

*If you have specific questions about how these rulings may affect you, you should consult with an attorney specializing in this area of the law. This Handbook is intended for information purposes only and does not apply to any individualized or particular situation and is not intended to provide legal advice or create an attorney client relationship.*

It is important to note that while *Windsor* is a step in the right direction for the LGBT community, its actual impact on the rights of Floridians is an open and developing body of law. The *Windsor* decision struck Section 3 of DOMA, thus ending the law that prohibited the federal government from recognizing same-sex marriage. But, it left in place the various federal statutes, rules and regulations that refer to spouses and grant benefits and responsibilities to spouses. These include, but are not limited to laws, rules and regulations involving taxes, social security, immigration, and veteran's benefits, although these federal agencies have developed, and are continuing to develop, internal policies that reflect the *Windsor* decision.

As discussed, Florida does not recognize same-sex marriages, and under Section 2 of DOMA (which was not addressed in *Windsor*), states that do not provide or recognize same-sex marriages can continue to refuse to recognize same-sex marriages. Because the federal

laws, rules, and regulations governing relating to benefits and responsibilities of spouses, do not use the same test or definition of a spouse, same-sex spouses in Florida may receive some federal benefits, but not others. The determinative factor at this time is whether the federal law, rule or regulation recognizes a marriage if it is recognized in the state (a) where the marriage occurred (place of celebration) or (b) where the couple resides (place of residence). For example, Social Security looks to whether you are married under the law of your state of residence. For Floridians, that means you are not married, although the Social Security Administration is actively encouraging all such individuals to apply for benefits now to prevent the loss of any potential benefits while it works with the Department of Justice to develop and implement policy and processing instructions on this issue. Conversely, federal immigration statutes look to whether your marriage is recognized by the state where you were married, regardless of where you live. So, Floridians are now entitled to benefits under federal immigration laws. As discussed below, the Internal Revenue Service has also adopted the approach that if your marriage is recognized by the state where you were married, it is not relevant where you currently reside. So, married Floridians can file joint federal tax returns as a married couple.

The Obama administration has announced that they will move quickly to implement the *Windsor* decision and apply its benefits to same-sex couples across the country. That is a work in progress. For example, on February 10, 2014, the Attorney General issued a Memorandum to all employees of the Justice Department setting forth specific steps the Justice Department has taken to implement the *Windsor* decision and recognize all marriages valid in the jurisdiction where the marriage was celebrated. As a matter of policy, the Justice Department will recognize same-sex marriages that are valid in the state of celebration regardless of where the couple reside. The Department policy extends to all benefits and compensation programs administered by the Justice Department, such as the Public Safety Officers' Benefits Program and the September 11<sup>th</sup> Victim Compensation Fund. The Department of Justice will also recognize valid same-sex marriages in litigation, even if the couple resides in a state that does not recognize their marriage. For more detailed and up-to-date information on these topics, go to the Lambda Legal website. See <http://www.lambdalegal.org/publications/after-doma>.

If you have specific questions about how your situation may have changed after *Windsor* you should contact an attorney who can advise you based on your particular circumstance.

In addition, in an important ruling for the LGBT community in California, the U.S. Supreme Court entered an order in *Hollingsworth v. Perry* regarding "Prop 8", the California law that made same-sex marriage illegal in California. The Supreme Court decided that the sponsors of Prop 8 had no standing to appeal the federal trial court decision that Prop 8 is unconstitutional. As a result, the trial court's decision became final, which allowed same-sex marriage to resume in California. Although this decision had a big impact in California, it does not impact the rights of Floridians. For more information on this case please visit <http://www.Lambdalegal.org> or consult an attorney specializing in this area.

#### E. Federal Income Tax Issues

Effective as of September 16, 2013, the Internal Revenue Service issued Revenue Ruling 2013-17, 2013-38 IRB 201, which provided guidance on the effect of the *Windsor* decision on the IRS's interpretation of the sections of the federal tax code that refer to taxpayers' marital status. That Revenue Ruling clarifies that, for federal tax purposes, the IRS looks to state or foreign law to determine whether individuals are married and the IRS will generally recognize a marriage of same-sex spouses that was validly entered into in any jurisdiction the laws of which authorize same-sex marriage even if the married couple resides in a jurisdiction that does not recognize the validity of same-sex marriages. For the 2013 tax year and going forward, same-sex spouses generally must file their federal income tax returns using a married filing separately or jointly filing status. For the 2012 tax year and all prior years, same-sex spouses who file an original tax return on or after September 16, 2013, also generally must file using a married filing separately or jointly filing status. For the 2012 tax year and all prior years, same-sex spouses who filed their tax return before September 16, 2013, may choose (but are not required) to amend their federal income tax returns to file using married filing separately or jointly filing status, provided the period of limitations for amending the return has not expired. A taxpayer generally may file a claim for refund for three years from the date the return was filed or two years from the date the tax was paid, whichever is later. Thus, married individuals living in Florida can, and should, file as a married couple – whether jointly or separately – for all years after 2012.

Since marriage is still not recognized in Florida, if you are not legally married (in any jurisdiction), there are still advantages that a gay couple can take advantage of in order to decrease their tax burden that are a direct result of not being recognized as legally married. For example, there are several anti-tax-avoidance provisions in the tax code that apply to married couples, but would not apply to same-sex unmarried couples. When married couples file jointly, they are effectively decreasing their tax burden because of the concept of income splitting. This means simply that if one spouse makes all of the money in the household (or more money), the tax burden is lowered by "splitting" the income between the two spouses. Originally, this provision was set up to benefit those households where there was only one wage earner. Today, this single wage household scenario is much less prevalent than it was in 1948 when the provision was introduced. Consequently, this opens the door for same-sex couples to use the law for their favor.

Assume, for example, that a same-sex couple would like to have one of the partners stay home with the children or simply spend more time in the home. The lower wage earner could be eligible for the earned income credit, thus lowering the couple's overall tax burden. That option would not be possible for a similarly-situated married couple.

Another interesting aspect of this system is the ability for one partner to "hire" the other partner as a way of reducing the overall family tax burden. Since the two people are not legally married, one partner could legally be hired as domestic help. While there are certainly emotional considerations to think about, some families might find this as a way to save money and protect their future wealth.

Since the same-sex couple is treated as two economic units, other tax advantages include:

- (i) *Capital Gains.* A same sex couples can claim twice the amount of capital losses that is allowed for a married couple. While there are complex issues surrounding Capital Gains and Losses, consider this example. If your capital losses exceed your capital gains, the excess can be deducted on your tax return and used to reduce other income, such as wages, up to an annual limit of \$3,000, or \$1,500 if you are married filing separately. Since you are not married, this allows each partner to claim the maximum amount of \$3,000. *The Child Tax Credit.* This credit is for an individual filing as "single" or "head of household." Having more than one child in the home under 16 could allow each parent to file as "head of household" as well as allow each to file with a \$1,000 Child Tax Credit, thus reducing the total amount of tax liability per parent.
- (ii) *The Adoption Credit.* Married couples are not allowed to claim the Adoption Credit when adopting the child of their partner. However, since gay couples cannot marry in Florida, but are now able to adopt, the "second parent" can claim this credit for qualifying expenses.

Many of these advantages can truly benefit same-sex couples, but specific questions are best answered by a tax professional. In addition, the use of trusts can have benefits for same-sex couples and are discussed at more length in Part VI (C) of this Handbook.

If you are concerned about your federal income tax filing status, you should seek legal and accounting advice. If you cannot afford legal assistance, contact your nearest legal services, legal aid, or bar association low-fee or pro bono referral panel. (See References and Referral Information.) Equality Florida also has a more detailed memorandum regarding same sex couple taxation available upon request. Lambda Legal also provides information about tax filings for same-sex couples on its website at [www.lambdalegal.com](http://www.lambdalegal.com).

#### IV. DOMESTIC PARTNERSHIP AGREEMENTS

**Today, 6.7 million Floridians have access to Domestic Partner benefits and protections either through DP registries or public employee benefits programs. Equality Florida will keep working to secure protections for all LGBT families in Florida.**

A domestic partnership agreement in many ways attempts to recreate the marriage contract. It is a contract between unmarried persons (not limited to same-sex couples) that expresses how those parties wish to define their property and support rights during the course of their relationship or upon the end of their relationship during their lifetime or upon death. With a domestic partnership agreement, parties can set forth in an enforceable, binding contract, procedures for handling their support, expenses, and finances while they are

together and support if they separate, can provide for the division of their assets and liabilities when they separate, and can define their rights in each other's estate upon death or disability. Such agreements work much the way premarital (prenuptial) agreements or postnuptial agreements do for parties who are marrying or have married. In a domestic partnership agreement, parties can set forth their rights, obligations, emotional commitment, financial interdependence, and, if applicable, co-parenting responsibilities.

The benefits of having a domestic partnership agreement include:

- Documenting the parties' desire to be in a committed and equal partnership;
- Creating certainty as to the disposition of property of each partner during the partnership, as well as upon separation, disability, or death;
- Clarifying the duties and rights of each partner both during and after the relationship; and
- Reducing the chance of a dispute upon separation, disability, or death.

#### A. Enforceability of Domestic Partnership Agreements in Florida

Florida courts have recognized and upheld domestic partnership agreements as valid and enforceable, so long as there is sufficient "consideration" for the agreement. The mere fact that the individuals are not married does not prevent them from entering into a binding contract that addresses critical issues such as permanent sharing of and participation in each other's lives or the joint ownership of property with joint or separate funds.

In *Posik v. Layton*, 695 So. 2d 759 (Fla. 5th DCA 1997), the Florida Fifth District Court of Appeal held that a "support agreement" entered into by a lesbian couple was binding and enforceable. The court described the agreement as, "a nuptial agreement entered into by two parties that the state prohibits from marrying" and held that, even though Florida prohibited same-sex adoptions (that was the case in 1997, but no longer!) and same-sex marriages, "it has not prohibited this type of agreement." The support agreement provided that, in consideration for one woman giving up her job, selling her home, moving with the other woman, and maintaining and caring for her home, the other woman would provide all the support for both women, would make a Will leaving her estate to the woman who gave up her job and would maintain bank accounts and other investments in the moving woman's name. The agreement further provided for payment of a monthly sum upon termination of the parties' relationship for various triggering events.

Prior to entering into a domestic partnership agreement, each individual should fully disclose to the other their assets, debts, and income. Domestic partnership agreements must be in writing and should be signed by both individuals before two witnesses and a notary with the same formalities of a Will. In addition, each party to a domestic partnership agreement should be represented by independent counsel.



## B. Contents of the Agreement

A partnership agreement should address obligations of the parties during the partnership as well as upon separation, disability, or death. The agreement should identify each individual's separate property and how they plan to own property they may acquire together. The agreement should address how joint expenses will be handled during the relationship (for example, mortgage or household expenses), support and division of assets and debts upon conclusion of the relationship and should provide for selling or otherwise disposing of the home in which the couple may have been residing together upon the termination of the relationship.

### 1. Obligations During the Partnership

A domestic partnership agreement should include the names of the individuals involved and the date the relationship began. The agreement should describe the financial arrangements during the partnership. For instance, how will living expenses be divided? The couple should also define how assets acquired during the partnership will be treated. If the couple has children or intend to have children (for example, through a legal adoption), then the couple should consider entering into a separate "Parenting Plan" that can address various aspects of time-sharing, decision-making, and support of the child. The components of a parenting plan are beyond the scope of this Handbook, but, for guidance, parenting plan forms approved by the Florida Supreme Court for use in family law cases can be found at [www.flcourts.org](http://www.flcourts.org) (see Family Law Form 12.995(a) and 12.995(b)).

### 2. Obligations upon Separation, Disability, or Death

The agreement should state what types of property (bank accounts, life insurance policies, retirement benefits, real property, tangible personal property, intangible personal property, property acquired by gift or inheritance, or an interest in a trust or family business) should be treated as separate property or jointly owned property. If property is to be shared, the parties should describe how such property will be divided upon separation or death. For example, upon separation, each party may share all bank accounts equally regardless of the amount of contribution during the relationship. Another choice is to share according to how jointly owned property is titled. Additionally, the agreement should state whether property acquired in the future should be divided or remain separate when the relationship ends. Responsibility for each party's debts and jointly acquired debts during the relationship (e.g., mortgage, loans, credit cards, or taxes) should also be discussed, as well as who will be responsible for payment of the debt.

The agreement should state whether either partner will be entitled to financial support similar to alimony upon separation, disability, or death. The parties should also decide which partner will own or continue to reside in the primary residence and how to dispose of the residence upon separation or death. The parties may wish to include provisions in the domestic partnership agreement for obtaining and maintaining



life insurance or disability insurance under certain conditions. The couple may also want to include confidentiality provisions in their agreement to protect their privacy.

Finally, like all contracts, the domestic partnership agreement should include an enforcement provision. This provision should indicate what law will apply in the event of a lawsuit, whether the prevailing party will be entitled to attorneys' fees and costs and whether the parties will mediate the dispute prior to filing a lawsuit.

### C. Execution and Consideration

In order to be enforceable under Florida law, a partnership agreement must be in writing. In addition, it is crucial that domestic partnership agreements be supported by "consideration" in order to be valid. In this context, "consideration" means some right, interest, or benefit to one party or some detriment, loss, forbearance, or obligation undertaken or given by the other party. The consideration may not consist solely of a promise for sexual services and may not be a promise to commit an illegal act. One form of consideration is a cash payment, for example, one partner agrees to pay \$500 a month in exchange for utilities and rent. Consideration need not be solely monetary, and can take the form of a one-time or period obligation.

If the partnership agreement includes provisions to take effect post-death of one or more of the partners, it is essential that the agreement be signed with the same formality as one would sign a Will – it must be signed by the partners and by two witnesses, as to each signature, who were in the presence of the persons executing the agreement, and those witnesses must sign and print their names. Even if the partnership agreement does not include post-death provisions, the better practice would be to have it witnessed and notarized.

## V. HAVING CHILDREN

Many LGBT individuals have children, and adoption, artificial insemination, and surrogacy are allow LGBT singles and couples to grow their families in ways that were not possible in the past. As more strides are made in this area, the ability of LGBT people to have life-fulfilling relationships with children of their own is ever-increasing. The information below is designed to get you started on the path to parenthood, or at least help point you in the right direction.

### A. Adoption

Gay men and women now are allowed to adopt in Florida. On September 22, 2010, the Florida Third District Court of Appeal held a state law unconstitutional that, for more than 33 years, had expressly forbid gay men and women from becoming adoptive parents. *Fla. Dep't of Children & Families v. In re: Matter of Adoption of: X.X.G & N.R.G.*, 45 So. 3d 79 (Fla. 3d DCA 2010) (referred to as the "Gill" case). The Third District decision in the *Gill* case is binding on every trial court in the State of Florida and, although the statute (Florida Statutes Section 63.042(3)) remains on the books, the Department of Children and Families (DCF) has changed its forms and procedures to comply with the *Gill* decision, removing all

references to sexual orientation. Since the court's decision, hundreds of gay men and women have entered into or completed the adoption process.

Now that the gay adoption ban has been removed, second parent adoptions also are being granted in Florida. Because second parent adoptions may raise different legal questions, couples interested in pursuing a second-parent adoption should seek advice from a lawyer who is knowledgeable about this issue.

For those who have adopted out-of-state, it is important to note that unlike an out-of-state marriage, a valid adoption by a gay parent in another state must be recognized and given effect in Florida. *Embry v. Ryan*, 11 So. 3d 408 (Fla. 2d DCA 2009).

#### B. Artificial Insemination

For many lesbians, artificial insemination is the answer to the question of how to have a biological child. In an artificial insemination scenario, the intended mother purchases or otherwise obtains donor sperm and inserts that sperm into her own body for the purpose of having her own biological child. Many reproduction professionals suggest using an anonymous sperm donor to avoid custody or other visitation and relationship complications down the road. Typically, contracts are signed by sperm donors and by end users and, accordingly, individuals interested in this procedure should seek appropriate legal and professional advice.

The Florida Supreme Court, in *D.M.T. v. T.M.H.*, SC12-261, 2013 WL 5942278 (Nov. 7, 2013), determined that courts must apply the same principles to determine the parentage of a child born through assisted reproduction to a same-sex female couple as it applies to children born through assisted reproduction to opposite-sex couples. Section 742.14, Florida Statutes, provides that, except in the case of a "commissioning couple"—defined in section 742.13 as the intended mother and father of a child who will be conceived through assisted reproductive technology using the biological material of at least one of the intended parents—and fathers who have executed a preplanned adoption agreement, an egg or sperm donor must relinquish any claim to parental rights or obligations to the donation or the resulting child. See §§ 742.13(2), 742.14, Fla. Stat. The Florida Supreme Court held section 742.14, Florida Statutes, is unconstitutional, thereby allowing for the protection of the parental rights of same-sex couples who use assisted reproduction technology to have children together. This decision is not final and is subject to revision or withdrawal until released for publication following ruling on a pending motion for reconsideration.

#### C. Surrogacy

For many gay men, surrogacy is the answer to the question of how to have a biological child. With a surrogacy relationship, a surrogate agrees to go through a pregnancy for an intended parent or parents, typically using the intended parent(s) sperm and a donated egg. The surrogate further agrees that the intended parent(s) will ultimately be the legal parent(s) of the child and will get custody of the child immediately after birth.

Take Action!

If you are interested in a surrogacy arrangement, contact a surrogacy professional and consider using an egg donor who is different from the surrogate to better ensure ultimate custody.

There are two kinds of surrogacy arrangements: 1) traditional surrogacy and 2) gestational surrogacy. With traditional surrogacy, the intended parent(s) use a surrogate for both her egg and for the gestation of the child. With gestational surrogacy, the intended parent(s) use an egg from an egg donor and then use a surrogate only for gestational purposes, i.e. to carry the fetus to term and to give birth.

One of the biggest fears with surrogacy is that the surrogate will deliver the child and then decide that she wants to keep the child. Traditional surrogacy is not recommended because the biological ties between the surrogate and the child make it easier for the surrogate to challenge the ultimate custody of the resulting child. With a gestational surrogate, there is no biological tie between the surrogate and the child and as a result, any claim for

custody is weaker.

Florida does have a surrogacy statute (Section 742.15, Florida Statutes), but that statute only provides for binding surrogacy agreements between a surrogate and intended parents who are married. Accordingly, surrogacy agreements made in Florida between an LGBT couple (who cannot legally marry in Florida) and a surrogate may not be binding in a Florida court. Nonetheless, LGBT couples and singles are entering into surrogacy arrangements that are sometimes drafted as “pre-planned adoption agreements” pursuant to which the surrogate agrees that the intended parent(s) will be the legal parents of the resulting child through whatever legal process necessary. Other surrogacy agreements are drafted with a choice of law clause that designates a law other than Florida to control the contract, in the hope that a Florida court would honor that choice and enforce the agreement between the parties.

The American Surrogacy Center has a wealth of information on surrogacy including articles and message boards for those looking at surrogacy as an option. See <http://www.surrogacy.com/>. Also, The Center for Surrogate Parenting, Inc. has information specifically geared to helping LGBT persons through the surrogacy process. The Center’s website provides a step-by-step guide to how surrogacy works from the egg donation to the pregnancy and beyond. <http://www.gaysurrogacyagency.com/default.htm>.

While surrogacy is a means by which LGBT partners can grow their families, there are of course legal implications to taking this route. Because entering into a surrogacy agreement involves creating a legal contract and constitutionally protected rights of parenthood and reproduction, it is essential to speak with an attorney in order to fully understand your rights.

## VI. ESTATE PLANNING

Planning for the future, from both a monetary and life-issues perspective, can prove to be quite complicated for LGBT individuals. Traditionally, laws have favored the married

Take Action!

Make your life easier for yourself and your family, get your finances organized!

couple in regard to planning for your future. In addition, the concept of “heirs” has evolved to include only those relationships that are legally considered “family.” Because of this deep historical inequality, LGBT parents must take extra steps to ensure their loved ones are taken care of during and after their lifetimes. The following sections are intended to provide some insight into these complex issues and provide a starting point for those individuals and families needing help with that planning. The issues covered in this section begin with (A) getting organized, and then include (B) Wills and Related Planning, (C) Trusts, and (D) Other Estate-Planning devices. This section contains dense material that might seem

overwhelming at first. The best advice is to take one step at a time and consult an attorney for those issues that require expertise.

A. Organizing Your Personal Records

Getting your financial and personal records in order will help you understand your own current financial situation, plan for your own future, and arrange for the transfer of your estate after your death. Good organization will help you maximize your financial strength, and ultimately will save you time and energy in your daily affairs. Basic personal information is necessary for almost any application for benefits and legal transactions. Financial records can be useful for budgeting, maximizing returns on your investments, and retirement and estate planning.

People are at a high risk of failing to meet their legal obligations and responsibilities when their personal documents are not adequately maintained. Organizing your records can also spare your loved ones from bureaucratic burdens should something happen to you. During an emergency situation, your partner, a friend, or relative caring for your health or legal affairs, will spend less time searching for papers if he or she knows the location of the necessary documents.

A simple way to organize your records is to write down an inventory of important papers. Describe the document and include its location, whether it is in a safe deposit box at the bank or a file box in your closet. Location is particularly important when referring to your Will (remember you do not have to reveal the contents of Wills or Trusts), birth certificates, and certificates of marriage and citizenship.

Depending on your personal situation, there will be additional items you should include in your document inventory. The following is a list of basic items that your personal and financial records file should contain:

Personal Records:

- Full legal name
- Social Security number
- Legal residence
- Date and place of birth

- Names and addresses of spouse and children (or location of death certificates if any are deceased)
- Names of parents
- Location of Will and Trust (if any)
- Location of birth certificate and certificates of marriage, divorce, and citizenship, including passports and visas
- Combinations to safes or lock boxes or location of keys
- Names and addresses of other relatives, close friends, doctors, and lawyers or financial advisors
- List of employers and dates of employment
- Education and military records
- Religious affiliation, name of church or synagogue, and name of clergy (if desired)
- Living Will, anatomical gifts
- Preferences or prearrangement for funeral and burial

#### Financial Records:

- Social Security and Medicare information
- Investment income (stocks, bonds, property)
- Sources of income and assets (pension funds, interest income, etc.)
- Insurance information (life, health, and property), with policy numbers
- Bank accounts (checking, savings, and credit union), including information about any automatic payments
- Utilities and manner of payment (particularly if payments are made automatically)
- Credit cards
- Location of safe deposit boxes and keys
- Copy of most recent income tax return
- Power of attorney
- Liabilities - what is owed to whom and when payments are due
- Mortgages and other debts - how and when paid
- Property taxes
- Location of personal items such as jewelry or family treasures

#### B. Wills

Once you have gotten a good understanding of your own financial situation, you should then consider whether it makes sense for you to execute a will. Because Florida law does not allow same-sex partners to marry and does not recognize any legal rights of life partners, it is especially important to do all that you can through written, binding documents to protect yourself during your lifetime and to be sure that to the extent you wish, your partner and other loved ones have access to you and your property upon your death or incapacity. "Estate planning" is the process of planning for and documenting wishes for the disposition of assets and the care of a partner and children upon your death in a manner that will be honored under applicable law. In the following sections of the Handbook, we look at each of the major areas of estate planning, and explain the issues facing same-sex

partners under current Florida law. We then provide some options, tools, forms, and considerations for insuring your wishes are met.

From a legal standpoint, there are several classes of property: real property (for example, land and interests in land such as easements and buildings), tangible personal property (for example, cars or other personal belongings) and intangible personal property (for example, cash, bank accounts, leases, and other contract rights). Even in the absence of a right to same-sex marriage, there are a wide variety of legal documents available and recognized under Florida law that can be used to facilitate the orderly transfer of various types of property upon death, in the event of incapacity, or to otherwise avoid a "default" disposition of those assets upon death under existing law. The amount of thought and consideration and planning involved in putting together these documents can be very beneficial to any couple. Going through this process, while cumbersome, tedious and perhaps uncomfortable, can make things go more smoothly when unexpected events occur.

#### 1. Why Do I Need a Will?

It is sometimes said that if you die without a Will, "the State will get it all." That is not necessarily true, but if you die owning anything in just your name alone and for which you have named no beneficiary, and if you have no Will, then Florida law designates who inherits from you -- and under Florida law, that list does not include a same-sex life partner.

Dying without a Will is legally known as "dying intestate" (i.e., without a "testament"). If you die without a Will, all of your property will be distributed by the Probate Court among your surviving relatives, as set forth in the law. The probate process has a terrible reputation. It is important, however, to understand what "probate" is. First, it has nothing to do with whether estate taxes will be owed. It is simply the process by which a court determines the disposition of property that the decedent owned in his or her own name alone and for which there were no beneficiaries named. While there has been substantial reform over the years in Florida in regard to the probate process, many people still wish to avoid probate if possible. According to Florida law, the property of a person who dies without a Will passes as follows:

#### IF THE DECEASED IS SURVIVED BY:

Spouse & No Lineal Descendants:	spouse receives entire intestate estate
Spouse & Lineal Descendants: (who are also descendants of spouse):	spouse receives the entire intestate estate; lineal descendants receive nothing
(who are not descendants of spouse):	1/2 of the intestate estate to spouse and remainder to the descendants
Lineal Descendants	estate distributed among

But No Spouse:

descendants as follows:

to decedent's lineal descendants;  
if none, to decedent's father and mother  
equally, or to the survivor of them;  
if none, to decedent's brothers and sisters  
and descendants of deceased brothers  
and sisters

Take Note!

If you don't have a Will, the state will dictate how your assets are distributed, and will likely exclude any domestic partner.

In Florida, any intestate property distributed among lineal descendants (children, grandchildren, etc.) is distributed *per stirpes* or by representation. "*Per stirpes*" means that the children of a deceased beneficiary receive equal shares. If a child of a deceased has died before his parent, the children of that child will receive the share to which their parent would have been entitled. An adopted child is considered a lineal descendant of the adopting parent and a natural relative of all members of the adopting parent's family; the child is not considered a lineal descendant of his or her natural parents nor an heir of any member of his or her natural parent's family. An exception to this is when a child is adopted by a natural parent's partner if the

natural parent is a co-petitioner in the adoption. Fla. Stat. Section 63.172(a). Such an adoption has no effect on the relationship between the child and the natural parent or the natural parent's family."

A person born out of wedlock is a lineal descendant of his or her mother and a natural relative of all members of his mother's family. This child is also a lineal descendant of the father. A child born out of wedlock also may inherit from his or her father if the paternity of the father is established by a judgment in court before or after the father's death or if the father acknowledges paternity of the child in writing.

Beyond those persons, other more remote family members are named (see Section 732.103, Florida Statutes, for the entire list), but, needless to say, the list never gets beyond the "family" as the law has traditionally defined it. Only if there is no "family" will the decedent's property pass to the State of Florida.

Thus, having a legally executed and binding Will in place is of great importance. In your Will you can provide for bequests to your partner, as well as family members, and anyone else (persons or charities) you wish; and only a legally recognized spouse or minor children have rights that can trump your bequests.

If you have minor children, you can and should designate in your Will the person (or persons) to serve as guardian for your minor children (whether naturally born or adoptive). Also, you should designate the Personal Representative (the term Florida gives to the person responsible to administer the Will upon your death – sometimes called an "executor" in other states). Personal representatives must be Florida residents, or financial institutions having trust powers in Florida, or, family members, even if they are non-residents. A non-resident partner or friend cannot serve as a Personal Representative. You can name your



partner as your Personal Representative, so long as your partner is a Florida resident, even if your partner is a named beneficiary of your Will.

If you are concerned about the distribution of your estate, you should seek legal advice. If you cannot afford legal assistance, contact your nearest legal services, legal aid, or bar association low fee or pro bono referral panel. (See References and Referral Information.)

## 2. Legal Requirements

To be valid a Will must meet certain requirements. The requirements vary from state to state. The requirements in Florida include:

- a. the maker (called the testator for a man, or testatrix for a woman) must be at least 18 years or an emancipated minor;
- b. the testator must be of sound mind at the time the Will is prepared;
- c. the Will must be in writing (either typed or hand-written). It cannot be oral;
- d. the Will must be signed by the testator at the end of the Will, and in the presence of two witnesses;
- e. the witnesses do not need to know the contents of the document, but they must acknowledge that the testator knows he is signing his Will, and the competent witnesses must sign the Will in the presence of each other and of the testator; and
- f. it is also advisable to have your Will notarized in Florida. This makes the probate process simpler. A form for self-proving signatures on a Will is provided by Section 732.503, Florida Statutes, a copy of which is attached (Form C).



If you move out of Florida, your Will may still be valid, but you should check the requirements of your new state.

## 3. Use of Form Wills

While there are various form books available in print and online for Wills, you will benefit from the counsel of a lawyer who is experienced in estate planning who can help you decide what documents are appropriate given your personal circumstances. The idea that there is one "simple Will" form is often misguided. Probate matters can be very complicated and it is always best to consult an attorney when drafting a Will. Each individual's personal and real property assets, tax considerations, circumstances, and testamentary wishes are unique. Therefore, it is appropriate to consult an attorney to draft a Will and other estate planning documents that are customized to your needs and wishes.

## 4. How Long Does a Will Remain Valid?

A validly executed Will remains valid until you change or revoke it. If you are of sound mind, you have the right to revoke or change your Will at any time prior to your death, but you must follow specific legal procedures. In Florida, if you change or revoke your Will through the use of another Will or written instrument, the new Will must be executed with the same formalities required for the original Will.

It is important to regularly reexamine your Will and update it if necessary to account for any changes in the tax laws, the death or change in status of a beneficiary, changes in your property holdings, or the value of those holdings, or other important matters.

You may revoke your entire Will by burning, tearing, canceling, defacing, obliterating, or otherwise destroying it if, at the time of your act, you have a present intent to revoke it. However, it is best not to revoke your Will by these methods. Burning, tearing, or scratching through a Will may leave your intentions unclear. The best way to cancel a Will and the only valid way to change your Will is the execution of another Will or separate written document, signed and witnessed. The same formalities required for the execution of a Will are required for a document which revokes or changes a Will. You should consult an attorney to obtain details about the most effective ways to revoke or change your Will.

#### 5. Restrictions on Distributing Property by Will

Generally, in Florida you may distribute your property by Will as you wish. However, there are certain types of property which cannot be freely transferred by Will. For example, there are certain restrictions on, or conditions to, the devise of homestead, jointly held property, property held in trust, many retirement accounts, and life insurance.

##### Take Note!

A validly executed will is valid until you change or revoke it.

Homestead laws are designed to preserve the home. Homestead property is the place of residence owned by any natural person. A homestead may not be conveyed by Will (devised) by the owner if he or she is survived by a legally recognized spouse or any minor children. If you do not make a Will, your legal spouse will have the right to reside in your home for his or her life and then your children will own it.

Property that is owned jointly -- with the right of survivorship -- also cannot be distributed by Will. The law provides that the last surviving joint owner automatically becomes the sole owner of all jointly owned property (such as real estate, bank accounts, motor vehicles, and household goods) when the joint tenant dies. You can change the devise of jointly owned property by removing or changing the co-owner with their consent by court action; but not through your Will.

#### 6. Making a Bequest

All non-profit organizations, including Equality Florida, rely on the generosity of their constituents to support their work. It is possible to make a bequest to a non-profit organization through your will. If you are interested in making a bequest to Equality Florida Institute, please contact Equality Florida's Executive Director, Nadine Smith, at 813-870-3735, who will be happy to assist you. Here is some suggested language for sample bequests that could be written into a Will:

#### Specific Bequest

*I devise and bequeath to Equality Florida Institute, Inc., a Florida not-for-profit corporation, having its principal office at 855 14th Ave S, Saint Petersburg, FL 33701, the sum of \$\_\_\_\_\_ to be used for its general purposes.*

#### Residual Bequest (Percentage/General Purposes)

"My wife and I know Equality Florida will never stop fighting for justice and fairness, and we want to be sure our support never stops either. We recently amended our wills and life insurance policies to include Equality Florida. It was easy to do and now our dedication to Equality will live on forever."

- Matt Solan, St. Petersburg

*I devise and bequeath to Equality Florida Institute, Inc., a Florida not-for-profit corporation, having its principal office at 855 14th Ave S, Saint Petersburg, FL 33701, for its general purposes, an amount which is \_\_\_\_\_% (\_\_\_\_\_ percent) of my residuary estate.*

#### Residual Bequest (Percentage/Endowment)

*I devise and bequeath to Equality Florida Institute, Inc., a Florida not-for-profit corporation, having its principal office at 855 14th Ave S, Saint Petersburg, FL 33701, an amount which is \_\_\_\_\_% (\_\_\_\_\_ percent) of my residuary estate, to establish an endowment fund, from which a unitrust amount of 5% is to be allocated annually by its board of directors for the most appropriate needs at the time.*

#### C. Trusts – the Basics

A trust enables an individual to transfer his or her property to others through a legal document that is different from a Will. Wills are only in effect after the death of the maker of the Will, but a trust may be in effect prior to one's death. In Florida, in order to be valid, a trust must be written and signed by the creator of the Trust in the presence of two attesting witnesses.

A trust is established by a settlor (sometimes also called the "grantor" or "trustor"), the one who transfers property to the trust via the written document. These assets become the "corpus" (body) of the trust. Ownership of the corpus is then given to a trustee for beneficiaries selected by the settlor in the trust agreement. Although title to the corpus

rests with the trustee, the trustee's ownership is merely a fiduciary function. The settlor may select a life-partner, trusted friend, relative, or a financial institution, to serve as trustee over the trust. Remember, however, that financial institutions charge an annual fee to administer the trust.

The settlor can direct the trustee to distribute the trust income and corpus in a variety of ways. The structure of the trust can be tailored to meet your specific needs and circumstances. The amount of control you retain over the trust property will vary depending upon what type of trust you choose and how you design the trust. There are different tax consequences depending on the form of trust you select. The creator of a trust may limit the investment vehicles in which the assets of the trust may be invested.

#### 1. Revocable Trusts (Living Trusts)

One type of trust is a so-called "Living Trust". There are many different kinds of trusts for many different purposes and with many different terms and outcomes, but the popularity of the "Living Trust" is that it is revocable as long as you are living; so you can revoke it, amend it, add property to it, and take property from it if your wishes or your circumstances change.

Sometimes Living Trusts are promoted inaccurately. They do not offer creditor protection, and while they can be written to save estate taxes, typically Wills (without Revocable Trusts) can be written to save estate taxes, as well. However, there are two elements to a Living Trust that are in fact helpful to many people:

- Assets effectively transferred into a trust existing at your death are not subject to the court probate process.
- A Living Trust properly prepared (which would normally name you as the initial trustee) can name successors -- such as your life-partner -- who can seamlessly step into the office of trustee in the event of your incapacity. (See also the discussion regarding Durable Powers of Attorney, sometimes called "the poor man's trust" utilized by many persons perfectly capable of having trusts if they wished).

As noted below, there are a number of other ways to avoid the probate process if you wish to do so. A good way to do that is to execute a Living Trust and then, very importantly, follow through and be certain that you transfer all of your assets into the trust.

It is disheartening how often people go to the expense of establishing revocable trusts but then fail to "fund" them (fail to transfer assets effectively to the trustee), and as a consequence their estates are subject to probate anyway. Accountants, financial planners, trust officers, and others may advise you to execute a revocable trust agreement;

#### Take Note!

A Trust is an alternative to a Will and allows the maker to transfer assets by design even before death and without having to ever go through probate.

you will want also to consult with a lawyer to be certain that the document you sign is effective and carries out your wishes.

## 2. Other Trusts – for Minors, Disabled Persons, or Charities

It is beyond the scope of this discussion to cover all of the various trusts that may be appropriate for you. Certainly for minor children or other minor beneficiaries, or for beneficiaries who may not handle property and money well, or who are disabled or become disabled, trusts [whether testamentary trusts established through your Will or your Living Trust, or trusts that you may fund during your lifetime (“inter vivos” trusts)], may be an important part of your estate plan. Beneficiaries suffering from disabilities, particularly if they are entitled to government benefits, ought to be remembered through “special needs” trusts. You may wish to provide for charities while at the same time provide for an income stream to individual beneficiaries through “Charitable Remainder Trusts” or provide an income stream to a charity with the remainder to individuals (“Charitable Lead Trusts”). There are discount opportunities (thus a potential savings of estate taxes) through Qualified Personal Residence Trusts and through some limited partnerships and other similar entities. These are just examples but offer important opportunities for you. A lawyer experienced in estate planning can guide you.

## D. Other Estate-Planning Devices

There are other ways to arrange for your assets to transfer to people or organizations of your choice that don’t involve anything as involved as a Will or a Trust. Some of those simple devices will be discussed here.

### 1. Joint Ownership

Property held in joint ownership with rights of survivorship remains with the surviving joint owner and does not pass through probate. Therefore, it is possible to use joint ownership of various forms of property, instead of a Will, to distribute assets to a partner upon death, and thus spare the partner probate court proceedings or other issues posed by death without a Will (but not necessarily estate taxes). Assets which are titled in your name along with your partner, so long as it is clearly specified that you hold the asset as joint tenants with right of survivorship (and not as tenants in common), will at the death of one of the owners pass by “operation of law” to the surviving owner and not be subject to probate.

#### Take Note!

Property held in joint ownership with rights of survivorship remains with the surviving joint owner and does not pass through probate.

Depending on your circumstances, joint ownership may or may not be advisable. If you are considering joint ownership as a way to bypass probate, be aware that it gives your partner equal control during your lifetime over the joint property. For example, a joint owner of a bank account can withdraw all of the money from the account while you are living, without permission, even if you only intended that person to have the money in the account after your death, or if

you had an “understanding” about limitations or access to the account.

While joint ownership can be very helpful, be very careful. Other owners may “infect” your property with their creditor problems. Also, if you have a difference of opinion as to the disposition of the asset (for example, you wish to sell it and your partner does not) you could be hindered and may need to seek a court order to govern the outcome. Further, unless disposition of proceeds upon sale is otherwise governed by a binding contract between the parties, the joint owner will be legally entitled to an equal share of the proceeds.

Take Note!

Beware -- joint ownership also means ceding control over your assets to your joint owner.

Remember, using joint ownership as a means of helping your partner to avoid probate proceedings after your death may cause considerable problems during your lifetime and is difficult to “un-wind” if necessary. Additional issues related to real estate are discussed below. However, if used wisely in conjunction with a will, joint ownership can be a useful legal device in helping distribute your estate after you die. It is wise to consult an attorney.

## 2. Special Considerations Regarding Real Estate

As noted above, you can hold title to real estate (a house, condominium, unimproved land, etc.) with your partner as *Joint Tenants with Rights of Survivorship*, so that both you and your partner own the property while alive, and upon the death of one partner, the surviving partner will have sole title without the need to go through the probate process.

### Advantages:

- a. Upon your death, title passes automatically and immediately to the surviving owner and does not pass through probate. Keep in mind, however, this may be of lesser benefit if the property is subject to an existing mortgage and the joint owner is not a signatory to the mortgage, since the mortgage will continue to encumber the property.
- b. If the joint owner dies before you, you become the sole owner again since you are the surviving joint owner.
- c. If the joint owner is living at the time of your death, he or she will be certain to get the property. In contrast, however, if a home is left by Will to a non-relative there is always the danger that it may have to be sold in order to cover debts or expenses of the estate. It should be noted that any mortgage or lien on the property remains.

### Disadvantages:

- a. You lose sole control of your property. If you should wish to sell the property or give it to someone else, you need the joint owner's permission.
- b. If the joint owner should become incompetent, difficulties may arise because you may need to establish a guardianship to obtain their permission to transfer or mortgage the property.
- c. A co-owner can demand a partition or sale of the property, and half of the property would be subject to claims of creditors of the co-owner.

Generally speaking, adding a partner on the title to real property can be done simply by the owning partner signing and recording a quit-claim deed conveying his or her interest into the names of both partners "as joint tenants with a right of survivorship." Beyond the general warnings discussed above regarding jointly held property, there are other considerations particular to the conveyance of real estate that should be carefully considered before proceeding:

- **Documentary Stamp Tax.** A documentary stamp tax is payable to the State of Florida upon the conveyance of an interest in real property in the amount of \$0.70 for each \$100 of the fair market value of the interest being conveyed. Valuation of the interest in the absence of a current appraisal is beyond the scope of this Handbook.
- **Gift Tax.** The conveyance of the interest in real estate (or any other property) constitutes a "gift" which has federal tax consequences – both for the grantor and for the person receiving the interest (although gifts are not considered "income" to the recipient for income tax purposes). For 2013, the lifetime gift exemptions total \$5,250,000 and will be indexed in future years. In 2013, the "annual exclusion" from gift taxes (which is in addition to the lifetime exclusion) has increased to be \$14,000 per recipient per year. If the value of the interest in real estate exceeds the annual exclusion amount or if you place restrictions on the gift which would otherwise qualify for the annual exclusion, you should consult a tax adviser to fully consider the tax implications of the transfer. Beyond that, federal tax issues, generally, are beyond the scope of this Handbook.
- **Violation of Existing Mortgage.** Unless property is owned "free and clear" (i.e. without a mortgage) in most cases it is likely that the conveying partner will have purchased the home or property using conventional bank financing. Most conventional bank mortgages and loan documents prohibit the conveyance of any interest in the property by the owner while the mortgage remains outstanding. Further, such an act constitutes an "event of default" entitling the bank to all remedies specified under the mortgage, which generally include acceleration of the loan and foreclosure. While it may be unlikely that a bank would take such a step if the loan is otherwise in good standing, it is possible and should be taken into consideration.
- **Repayment Obligation and Refinancing.** Despite a conveyance to a partner "as joint tenants with a right of survivorship," the conveying partner remains

liable on any existing note and mortgage. The bank is under no obligation to accommodate a request to add the life partner to the existing note and mortgage obligation, and any request to do so will likely require complete refinancing of the property under current loan underwriting and market conditions (for example, taking into consideration the salaries and debts of both partners, the current property value, current interest rates, etc.).

- **Homestead Exemption.** To alleviate the property tax burden, Florida grants its homeowners relief under a homestead exemption provision. This exemption is available to any person who holds legal title to real property in Florida and uses the property as his or her permanent residence. Currently, the homestead exemption allows the homeowner to subtract \$25,000 (\$50,000 but with some exceptions) from the assessed value of the home. For example, if the home is assessed at \$75,000, the owner pays taxes only on \$50,000 once the homestead deduction has been claimed. The homestead tax exemption also caps the rate at which the assessed value of the real property may be increased each year to the lesser of 3% or the rate of inflation. (This is commonly known as Amendment 10 or the "Save Our Homes" amendment). Note: the addition of a partner onto title after the initial purchase of a residence can cause a partial loss of the cap on increases in taxable assessed value (assuming value of the property has otherwise increased since original acquisition). Other exemptions are available for disabled persons, veterans, and widows or widowers as long as they remain unmarried, for senior citizens (those persons over \_\_\_ in age) and certain persons with physical disabilities.

Application for homestead exemptions for next year's taxes must be made at the Property Appraiser's Office of your county prior to the March 1 deadline. The applicant must have resided in the home before January 1 of that year. If a new deed has been filed with respect to your property -- for example in the event that a partner is added to the title -- you will lose your homestead exemption unless you reapply in person. Each taxpayer wishing to apply for an exemption should contact the county property appraiser's office. The property appraiser's offices have detailed information concerning eligibility and the necessary documents and forms required to apply for each exemption.

Note: unmarried couples (including LGBT couples) that jointly own and reside at the same permanent Florida residence, but who jointly own a second Florida real property, cannot claim the homestead exemption on both properties. The homestead exemption may be claimed only once for the permanent residence.

If you have any questions on how to obtain these exemptions, you should call your Property Appraiser's office listed in the white pages of your telephone directory under your county's name. A list of the property appraiser's offices can be found at <http://dor.myflorida.com/dor/property/appraisers.html>.

For these reasons, as well as those discussed above regarding general considerations of joint ownership of property as a means of avoiding probate, it is advisable to consult an



attorney and tax professional for advise on the best approach to take given your particular circumstances.

### 3. Beneficiary Designation

#### Take Action!

Make sure you have designated appropriate beneficiaries on life insurance, retirement accounts, annuities, bank and brokerage accounts.

It has been common practice for life insurance policies to have beneficiaries listed, and it is important that you keep the beneficiary designations on your life insurance policies up to date. Upon death of the insured, the proceeds will pass to the named beneficiaries in the shares and as specified in the beneficiary designation. You may name your partner, or anyone else, as a beneficiary. If you name no beneficiary, or if the beneficiaries you named have died before you, then by default the beneficiary is your estate -- your probate estate -- and the proceeds of the policy will pass through the law of intestate succession described above -- perhaps defeating your intentions.

In addition to life insurance policies, other investments, including retirement accounts (both IRAs and employer sponsored accounts) and annuities allow beneficiary designations. Increasingly, bank accounts

and brokerage accounts also allow beneficiary designations, with such options as P.O.D. ("payable on death") or T.O.D. ("transfer on death") designation.

By all means, take advantage of these simple, inexpensive means of estate planning, but just be sure they are consistent with your overall estate plan and that you periodically review your designations to insure consistency with your plan. For example, if you wish to make provision for your partner and other family members through your estate plan, you may make provisions for your partner and/or family members through your Will and various beneficiary designations in life insurance, bank accounts, and retirement plans based upon the relative value of those assets at the time the estate plan was established. As we have seen in recent years -- there can be significant fluctuations in both the real estate and stock markets. As a result, it is recommended that you establish regular evaluation of any estate plan and related document to ensure that they capture your current estate planning goals given the relative value of your assets and current situation.

### 4. Life Insurance

A life insurance policy is a contract between the insured and the insurance company to pay the amount specified in the policy upon the death of the insured. As the insured, you must tell the insurance company who should receive the money (the insurance proceeds) when you die, i.e., who you want to be the "beneficiary." There is no legal restriction limiting who can be designated as beneficiary (or beneficiaries). Generally, the insurer requires the insured to complete a form or write a letter naming the specified persons, and the nature of the interest to be granted to each person (for example, what percentage each person is to

receive). You can also name *alternate or contingent* beneficiaries, in case your first named beneficiary dies before you do. If a named beneficiary dies before you, and you have not named an alternative or contingent beneficiary, then the interest intended to pass to that person will pass to your probate estate. Of course, you must remember to change the named beneficiaries on the policy in the event you change your mind or in the event of the death of any named beneficiary.

#### 5. Bank and Brokerage Accounts, Pension Plans, and Retirement Plans

There are a variety of options available for jointly managing your banking affairs, and for making provision for orderly transfer of your bank account or right to manage your accounts to your partner upon death, including: (a) joint account, (b) joint account with right of survivorship, or (c) an account payable on death ("POD") or transfer on death ("TOD"). Most bank or brokerage firms will have their own specific forms to be filled out in order to accommodate the desired arrangement.

#### 6. Motor Vehicles

When you acquire a motor vehicle, you complete an application for certificate of title. On that form, you can provide the owner's and the co-owner's names, so that the vehicle will be co-owned by both persons. You can also check a box indicating "with rights of survivorship," so that the surviving co-owner will be entitled to the vehicle upon the other co-owner's death. Remember, however, that if the vehicle is not owned "free and clear" the lender will hold the certificate of title. Also, it should be noted that joint ownership exposes both owners to possible significant liability in the event of an accident, or, given the times in which we live, a "staged" accident. You should speak to an insurance agent to determine if your insurance is adequate, particularly if you jointly own a car, in order to protect your assets in the event of an accident.

#### 7. Social Security Payments – the Representative Payee

You can designate a person to receive your Social Security checks if you are not able to manage your own affairs. That person is known as a representative payee. The representative payee must use the Social Security money only for your basic or personal needs including food, shelter, and uncovered medical needs. Note, however, that same-sex partners cannot get survivor benefits in the event of the death of their partner.

The representative payee is usually a spouse or parent (in the case of children receiving benefits) but may be a life partner, friend, or legal guardian. An institutional administrator can also be designated as the representative payee.

This process begins when a friend or relative notifies the Social Security office that an individual is incapable of handling his or her own affairs. A doctor's statement to that effect also must be filed. The Social Security Administration then determines whether or not the individual is capable of receiving their checks. Note: a power of attorney is not effective for Social Security purposes. Any appointment can be challenged. For more details, call or visit your local Social Security office.

## VII. HEALTH CARE

End-of-life decision-making can be one of the most important conversations you ever have with your loved ones that will be left to deal with a loss. However, just as laws have not historically favored the LGBT community in areas of end-of-life finances, the same holds true for health care decisions. For that reason, it is of the utmost importance to discuss these issues with loved ones, regardless of how uncomfortable it might be. The following sections outline such important issues as: (A) Advanced Directives, (B) Living Wills, (C) Health care Surrogates, (D) Do Not Resuscitate Orders, (E) Power of Attorney, (F) Pre-need Guardians, (G) Planning Your Funeral, (H) Organ and Body Donation, and (I) Planning for Your Children.

### Take Action!

Consider executing an Advanced Directive naming your partner as a person who can make health care decisions if you can't.



### A. Advanced Directives

Under current Florida law, absent an Advanced Directive, a same-sex partner has no right to participate in decision making in the area of health, life, and death decisions and has no right to obtain or provide health care information in the event of an emergency or life-threatening condition. In the absence of written Advanced Directives to the contrary, only your biological family is entitled to make life and death decisions for you if you are unable to do so.

An advance directive is a witnessed written document or oral statement by a person expressing their instructions about health care, through documents including, but not limited to, the:

- designation of the health care surrogate;
- a living will; or
- a do-not-resuscitate order.

A competent adult has the fundamental right of self-determination regarding decisions pertaining to his own health, including the right to choose or refuse medical treatment. This right is subject to certain interests of society, such as the protection of human life and the preservation of ethical standards in the medical profession. If one is unable to provide or withhold consent to a medical procedure, one can delegate these decisions to another person (a "surrogate") to direct the course of his or her medical treatment, or by making a Living Will.

The execution of an Advance Directive does not affect the sale, purchase, or issuance of the terms of any policy of life insurance, or modify the terms of an existing policy (in spite of provisions to the contrary). A person cannot be required to make or waive an Advance Directive as a condition for obtaining or receiving health care services or insurance.

Should you decide to write an advance directive, be sure to advise your family, friends, and physician that such a directive has been made. You can write your own advance care directive by using the forms that follow. To be certain you are complying with Florida law, you may want to seek the advice of an attorney.

Take Action!

Consider including in your Advanced Directive your wishes regarding whether to be kept on life support.

An Advance Directive may be revoked by a competent person at any time by a signed, dated writing; physical cancellation or destruction of the document; an oral expression of intent to revoke; or by a materially-different, subsequently-executed declaration.

B. The "Living Will"

A "Living Will" or "Advance Directive" is a written document that provides guidance as to your wishes at the end of your life, when the addition or enhancement or withdrawal of a treatment would simply prolong your dying rather than your living. A "life prolonging procedure" means any medical procedure, treatment, or intervention which utilizes mechanical or other artificial means to sustain, restore, or supplant a spontaneous bodily function (including the provision of nutrition and hydration). The Living Will instructs the person's physician to provide, withhold, or withdraw life-prolonging procedures, or to designate another to make the treatment decision for him or her, in the event that such person should be found to be incompetent and diagnosed as suffering from a terminal condition.

By directing that life prolonging procedures be withdrawn or withheld, the writer of a Living Will is not instructing that medical procedures that provide comfort or alleviate pain be withheld. There are many forms of Living Wills (not to be confused with so-called "Living Trusts" discussed above). Section 765.303, Florida Statutes, suggests, but does not require, the following format:

LIVING WILL

Declaration made this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, I, \_\_\_\_\_, willfully and voluntarily make known my desire that my dying not be artificially prolonged under the circumstances set forth below, and I do hereby declare that, if at any time I am incapacitated and

\_\_\_\_(initial) I have a terminal condition

or \_\_\_\_ (initial) I have an end-stage condition

or \_\_\_\_ (initial) I am in a persistent vegetative state

and if my attending or treating physician and another consulting physician have determined that there is no reasonable medical probability of my recovery from such condition, I direct that life-prolonging procedures be withheld or withdrawn when the application of such procedures would serve only to prolong artificially the process of dying, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide me with comfort care or to alleviate pain.

It is my intention that this declaration be honored by my family and physician as the final expression of my legal right to refuse medical or surgical treatment and to accept the consequences for such refusal.

In the event that I have been determined to be unable to provide express and informed consent regarding the withholding, withdrawal, or continuation of life-prolonging procedures, I wish to designate, as my surrogate to carry out the provisions of this declaration:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_ Zip Code: \_\_\_\_\_

Phone: \_\_\_\_\_

I understand the full import of this declaration, and I am emotionally and mentally competent to make this declaration.

Additional Instructions (optional):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

IN WITNESS WHEREOF, I have signed this Declaration on the day and year first above written.

Signature: \_\_\_\_\_  
Print Name: \_\_\_\_\_

The declarant is known to me and I believe [him/her] to be of sound mind. I am neither the spouse nor a relative of the declarant.

The declarant is known to me and I believe [him/her] to be of sound mind. I am neither the spouse nor a relative of the declarant.

\_\_\_\_\_ (signature)  
Print Name: \_\_\_\_\_  
Witness  
Address: \_\_\_\_\_  
\_\_\_\_\_  
Telephone: \_\_\_\_\_

\_\_\_\_\_ (signature)  
Print Name: \_\_\_\_\_  
Witness  
Address: \_\_\_\_\_  
\_\_\_\_\_  
Telephone: \_\_\_\_\_

You may wish to add the following language as to whether you wish nutrition and hydration be continued or withheld (the Florida Legislature several years ago came within a vote or two of providing that if you did not specifically authorize the withholding of nutrition and hydration, they could not be withheld – the bill did not pass – but be forewarned if this is important to you). Example language may include:

*I desire that nutrition and hydration (food and water) be withheld or withdrawn when the application of such procedures would serve only to prolong artificially the process of dying.*

Some prefer a more detailed Advance Directive, with many specific directions in various circumstances. A popular one is called "Five Wishes". Information about that form may be obtained online from [www.agingwithdignity.org](http://www.agingwithdignity.org).

The statutory form allows you to name another person who can be the advocate for your directions. That person is called a "surrogate" and may be a partner or other friend.

An original signed copy of your Living Will should be provided to your physician and health care facility (if you are currently in the care of such a facility). You may also wish to provide several original, signed copies of your Living Will to your partner, or whomever you choose to name as your surrogate, so that in the event you are incapacitated, the Living Will can be provided to your physician and health care facility.

### C. Health Care Surrogate

Under current Florida law, a same-sex partner has no inherent right to participate in decision-making in the area of health, life, and death decisions of his or her partner, and has no right to obtain or provide health care information in the event of an emergency or life-threatening condition, or in the event of temporary or permanent incapacity.

A Health care Surrogate can be designated to act for you if you are unable to act for yourself in matters relating to your health. Sometimes this is confused with a Living Will, but a Living Will is designed to be used only at the end of life. A Health care Surrogate may need to make health-care decisions for you having nothing to do with impending death.

You can name anyone, including your partner, as your Health care Surrogate. Also, you can name *alternate* surrogates, in case your first choice is unable or unwilling to perform his or her duties.



#### 1. Responsibilities of the Surrogate

A Health care Surrogate, unless your document expressly limits his or her authority, will have the authority:

- to make all health-care decisions for you while you are incapacitated, including consulting with health-care providers to provide informed consent for treatment or the withholding of treatment, the authority to provide consent to a physician's order not to resuscitate;
- to be provided access to your medical records;
- to apply on your behalf for public benefits, including Medicare and Medicaid
- to have access to information regarding your income and assets and your financial and banking records sufficient to make such application and may authorize the release of information and medical records to insure the continuity of your health care; and
- to authorize your admission, transfer or discharge from health-care facilities.

It is the duty of the Health care Surrogate to make the health-care decisions the surrogate believes the principal would make under the circumstances if he or she were capable of making the decision.

#### 2. What Events Trigger the Authority of the Surrogate?

The authority of the Health care surrogate must be triggered to become effective. An attending physician can enter an evaluation in your medical records that it is believed that you do not have the capacity to provide informed consent in regard to health-care questions. If an attending physician has a question as to whether you lack capacity, another physician will evaluate you, and if the second physician agrees that you lack the

capacity to make health-care decisions or provide informed consent, the health-care facility enters both physicians' evaluations into your medical records and is required then to notify your Health care Surrogate, if one has been designated and that is made known to the facility, that his or her authority under the Designation instrument has commenced. A surrogate steps in and makes decisions only after the principal is incapacitated and unable to make health care decisions. Once the principal regains capacity, the Surrogate's decision-making authority ceases.

### 3. Requirements of a Health Care Surrogate Designation

Section 765.203, Florida Statutes, sets out a form for a Designation of Health care Surrogate, which reads as follows:

#### DESIGNATION OF HEALTH CARE SURROGATE

Name: \_\_\_\_\_ (Last) \_\_\_\_\_ (First) \_\_\_\_\_ (Middle Initial)

*In the event that I have been determined to be incapacitated to provide informed consent for medical treatment and surgical and diagnostic procedures, I wish to designate as my surrogate for health care decisions:*

Name: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip Code: \_\_\_\_\_  
Phone: \_\_\_\_\_

*If my surrogate is unwilling or unable to perform his duties, I wish to designate as my alternate surrogate:*

Name: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip Code: \_\_\_\_\_  
Phone: \_\_\_\_\_

*I fully understand that this designation will permit my designee to make health care decisions and to provide, withhold, or withdraw consent on my behalf; to apply for public benefits to defray the cost of health care; and to authorize my admission to or transfer from a health care facility.*

Additional instructions (optional):

*I further affirm that this designation is not being made as a condition of treatment or admission to a health care facility. I will notify and send a copy of this document to the following persons other than my surrogate, so they may know who my surrogate is.*

\_\_\_\_\_  
(signature)  
Print Name: \_\_\_\_\_  
Designator



The foregoing Designation of Health care Surrogate was acknowledged before us by the Designator, whose signature appears above, on the \_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
(signature)  
Print Name: \_\_\_\_\_  
Witness  
Address: \_\_\_\_\_  
\_\_\_\_\_  
Telephone: \_\_\_\_\_

\_\_\_\_\_  
(signature)  
Print Name: \_\_\_\_\_  
Witness  
Address: \_\_\_\_\_  
\_\_\_\_\_  
Telephone: \_\_\_\_\_

Florida law does not require that the Section 765.203 form be followed, saying that it “may, but need not be” in that form. The advantage of executing a designation in the statutory form, or something very close to it, is that health care providers in Florida will be accustomed to it. In any event, to be effective your designation of Health care Surrogate must be in writing and must be signed by you and also two subscribing adult witnesses who were in your presence when you signed it. (Notarization is not required.) An exact copy of the designation must be provided to your surrogate (and to any alternate surrogate whom you name). The surrogate may not be one of the witnesses, and at least one witness must not be a blood relative of yours.

There is anecdotal evidence that some providers have refused to give surrogates access to medical records, citing privacy laws. Accordingly, you may wish to add the following language to your designation:

#### HIPAA Release Authority

*I intend for my surrogate (and alternate surrogate) to be treated as I would be with respect to my rights regarding the use and disclosure of my individually identifiable health information or other medical records. This release authority applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 (a/k/a HIPAA), 42 U.S.C. 1320d and 45 C.F.R. 160-164. I authorize:*

*any physician, health care professional, dentist, health plan, hospital, clinic, laboratory, pharmacy, or other covered health-care provider, any insurance company and the Medical Information Bureau, Inc., or other health-care clearinghouse that has provided treatment or services to me, or that has paid for or is seeking payment from me for such services,*

*to give, disclose and release to my surrogate, without restriction,*

*all of my individually identifiable health information and medical records regarding any past, present or future medical or mental*

*health condition, including all information relating to the diagnosis and treatment of HIV/AIDS, sexually transmitted diseases, mental illness, and drug or alcohol abuse.*

*The authority given my surrogate shall supersede any prior agreement that I may have made with my health-care providers to restrict access to or disclosure of my individually identifiable health information. The authority given my surrogate has no expiration date and shall expire only in the event that I revoke the authority in writing and deliver it to my health-care provider.*

You may also wish to include a specific statement in your designation of Health care Surrogate that your Surrogate (and anyone else your surrogate names) shall have the right to visitation while you are confined in any health care facility – hospital, rehabilitation facility, assisted living facility and nursing home. Hopefully, the issue of right to visitation will become less of an issue once President Obama's April 15, 2010, Memorandum and the resulting rules from Health and Human Services take effect.

At least one original executed copy of your designation of Health care Surrogate should be provided to each named surrogate. If you designate someone other than your partner as your Health care Surrogate, you may also wish to provide your designation of Health care Surrogate to your partner or other trusted person, so that in the event you are incapacitated, your partner can contact the surrogate and provide a copy to your physician and/or health care facility.

#### D. Do Not Resuscitate Order

In addition to designating a Surrogate and executing a Living Will, a person may choose to issue a "do not resuscitate order." Emergency medical service personnel will honor a "do not resuscitate order" if the appropriate Department of Health Do Not Resuscitate Order, or "yellow form," is signed by the individual or the individual's health care representative and by a physician and is presented to the emergency medical services personnel when responding to a call for assistance. Unless it is revoked, it is legally valid and does not need to be periodically renewed. Every person is presumed to consent to the administration of cardiopulmonary resuscitation in the event of cardiac or respiratory arrest, unless there is consent to the issuance of a do not resuscitate order as provided by Florida law.

## E. Durable Power of Attorney

The importance of a “durable” power of attorney, which is established by statute, as contrasted with a common law power of attorney is that the durable power is in force (if not revoked by the person who gave it) unless and until a court of competent jurisdiction declares the person to be legally incapacitated. The common law power of attorney, on the other hand, could be questioned at any time, forcing the person who gave it to prove that he or she still had mental capacity. Florida law has recognized durable powers of attorney since 1974, and, effective October 1, 2011, there was enacted the “Florida Power of Attorney Act” (Florida Statutes, Sections 709.2101 through 709.2402) which includes substantial revisions to the previous statute (Section 709.08, now repealed) governing durable powers of attorney. Initially, such instruments were referenced as durable family powers of attorney, limiting those who could serve as attorneys-in-fact. There is not that limitation today. Any “natural” person who is 18 years of age or older can serve as an attorney-in-fact under a durable power of attorney, as can any financial institution that has

### Take Note!

A durable power of attorney assigns to another person the right to act on behalf of the maker of the document; it remains in force until the person designated is deemed legally incapacitated.

trust powers, has a place of business in Florida and is authorized to conduct trust business in the State.

### 1. Legal Requirements

Durable powers of attorney must be signed by the principal and by two subscribing witnesses and be acknowledged before a notary public or other person authorized to take oaths and can be recorded in the public records of any county in Florida (but there is no requirement for recording). You should seek assistance from a lawyer licensed to practice law in Florida to prepare a durable power of attorney for you. Discuss with the lawyer the powers that you wish to give your attorney-in-fact. It is usually wise to give very broad powers so that your attorney-in-fact can act under whatever circumstances may occur. Examples of powers are listed in Section 709.2201, Florida Statutes, and include the authority to execute stock powers or similar documents in the name of the principal and the authority to convey real property in the name of the principal.

As noted, a number of powers are presumed, but the better practice is to spell out in detail the powers you wish your attorney-in-fact to have. It is permissible to include the specific powers given to your attorney-in-fact in a durable power of attorney the power to make all health care decisions on your behalf, but the better practice is to execute a separate designation of Health care Surrogate, which is discussed above.

Unless you expressly authorize your attorney-in-fact to create, amend, modify, or revoke any document or other disposition that would be effective at your death and to have the right to transfer assets to a Trust you created, the durable power of attorney will not

include those rights. See Section 709.2202, Florida Statutes, for requirements as to separate signed enumerations and other limitations on the attorney-in-fact's powers.

In terms of planning ahead, it is helpful to execute a power of attorney so that if you are not able to conduct your business on your own, whether through travel or illness, someone else whom you designate would be able to do so for you.

Durable powers of attorney are very powerful documents. Accordingly, you should not name an attorney-in-fact in whom you do not have great confidence! Because of the broad financial power granted to an attorney-in-fact, and because an attorney-in-fact can act on your behalf from the grant of authority specified in the document, extreme caution should be used before you grant someone else the power of attorney. You only should grant a power of attorney if you fully trust that your attorney-in-fact will not misuse the power over your property, now or ever.

## 2. Revocation

You may revoke any durable power of attorney you make only by expressing the revocation in a subsequently executed power of attorney or other writing you sign. Otherwise, the mere execution of a subsequent power of attorney, under the new law, does not revoke a previously executed power of attorney. It is recommended that notice of the revocation be delivered to the previous attorney-in-fact and any third persons relying upon the previous durable power of attorney. Particularly if you have previously recorded your power of attorney in the public records, be certain that you also record the revocation (in which case it should be witnessed and notarized as was the power of attorney).

Even though you execute a Durable Power of Attorney in accordance with Florida law, still you may find that some banks, brokerage houses, real estate title insurance companies, or other entities will not honor it. Under 2011 revisions to the law, such third parties must accept or reject the power of attorney within a reasonable time and must state in writing its reason for rejection. For financial institutions, four days, excluding Saturdays, Sundays and legal holidays, are presumed to be a reasonable time to accept or reject. Thus, it is highly recommended that in addition to executing a Durable Power of Attorney in accordance with Florida law you should take a copy of it to your banks or brokers, show it to them, and ask if they will honor it and obtain their written response.

## F. Pre-Need Guardian

If you have in place an effective Durable Power of Attorney and an effective Health care Surrogate Designation, hopefully it will never be necessary that a court appoint a guardian for you. However, any Florida resident, believing that you lack capacity, mental or physical or both, to handle yourself and your affairs, can petition a court to have you declared "incapacitated" (a term that replaced "incompetent" in Florida law some years ago). While you will have a right to a lawyer, this petition will trigger the appointment of a three-person examining committee (made up of health professionals and appointed by the court) to advise the court as to whether you are in fact incapacitated, and if the court finds that you are, the court will appoint a guardian for you. In that case, it may be very important that you, while competent, have previously signed (in the presence of at least

two attesting witnesses present at the same time) a written declaration naming a pre-need guardian. You may name a guardian for your “person” (to make personal decisions for you) and/or for your “property” (to handle your “business” affairs), and it need not be the same person. You may (but are not required) to file the Pre-Need Guardian Declaration with the Clerk of the Court (in most counties, with the Probate Division, sometimes with a “Mental Health Division”), but in any event it should be produced to the court if someone files a petition alleging your incapacity. Production of such a declaration in a proceeding for incapacity “shall constitute a rebuttable presumption that the pre-need guardian is entitled to serve as guardian” (Section 744.3045, Florida Statutes). The court is not bound to appoint that person but only if the pre-need guardian is found to be unqualified to serve as a guardian.

#### 1. Qualifications of the Pre-Need Guardian

A very important limitation in Florida regarding guardians is that while any resident of Florida who has not had his/her own rights removed and is 18 years of age or older may serve as a guardian, a non-resident may only be appointed a guardian of a Florida resident if related by lineal consanguinity to that person (in other words, as a direct descendant, a legally adopted child or adoptive parent of the person, a spouse (but not a same-sex spouse), brother, sister, uncle, aunt, niece or nephew of the person, or someone related by lineal consanguinity (relationship among persons who are blood relatives where one person is the direct descendant or ascendant of the other, for example, a father and a son to any such person or the spouse of a person otherwise so qualified). In other words, an out-of-state friend or partner may not serve as your guardian if you are a Florida resident. If your choice for guardian is out of state and not a “relative” as defined above, you have a heightened need for an effective Durable Power of Attorney and an effective designation of Health care Surrogate as discussed above (for neither of which is there a residency requirement) so that hopefully there will never be a need for a guardian to be appointed for you even though you become, in fact, incapacitated.

#### 2. Designating Pre-Need Guardians for Minor Children

##### Take Action!

Although it may not be pleasant to contemplate, do your partner and family a favor and plan for your own end of life arrangements.

You should consult with a lawyer if you wish to designate a pre-need guardian. If you have minor children, you can, and probably should, sign pre-need guardian designations for them as well. If their other parent is living, the court will almost always prefer that other parent to anyone else you name, but still you should consider making a designation because at your death the other parent may not be qualified to serve, may decline to serve, or may not be living.

#### G. Planning Your Own Funeral

There are good reasons for same-sex partners to make and pay for your own burial arrangements. Most importantly, it increases the likelihood that your wishes will be honored in death, particularly if they are

at odds with those of your biological family. Also, you relieve your partner and family of a financial burden at a time when they are most vulnerable, as all too often bereaved partners and family members feel guilty about economizing on a funeral of a relative.

Although most funeral directors and cemetery representatives operate ethically, some do not. Some funeral directors may try to insist that you purchase services you do not need to increase their profits. Even the wisest person is vulnerable to exploitation at a time of loss. It is always wise to consult someone who is not grieving when making decisions concerning funeral arrangements. Do not allow yourself to be rushed into making decisions. You have the right to take all contracts and informational brochures home with you for close examination. Never sign anything you have not examined closely or do not fully understand.

### 1. Funeral Expenses

The ceremony you choose can be based upon religious and practical considerations. For many, the simplest and least expensive way is by cremation with your ashes either returned to your next of kin or scattered.

If you choose a traditional burial, you may need to make two contracts -- one with the funeral home and one with the cemetery. Many cemeteries operate their own funeral homes enabling you to take care of funeral requirements with only one contract, eliminating secondary and hidden costs. Funeral home expenses are usually divided into two portions; charges for professional services (such as preparation of the body) and the cost of a casket. Embalming is not required by law. Because professional service fees vary you should shop around for a funeral home. Ask to see the least expensive casket if you wish, as it may not be on display. How expensive the funeral is will be largely determined by the price of the casket you choose. In addition to the casket, the funeral home will charge you for removal of the body, embalming, any private viewing, transportation to and from funeral services outside the funeral home, transportation to the cemetery, and for attendants. Funeral directors are required by State law to give you an itemized cost breakdown of all funeral expenses. Be sure to ask for it before you contract for services.

### 2. Cemetery Expenses

Many people choose below-ground burial. This type of interment is costly because it includes expenses for opening and closing the grave, grave vault or liner, marker for the grave, and endowment care (future grave-site maintenance fees).

The grave site is priced according to its location in the cemetery. The gravestone can be purchased at a private monument firm, but make sure that it meets cemetery specifications. The cemetery will charge a setting fee.

### 3. Different Ways of Paying

As you can see, traditional below-ground burial is costly (approximately \$5,000) and can require complex decision making by your family at a time of great emotional stress. Accordingly, you may want to consider cremation to protect your survivors from both

financial and emotional distress. As with every other contract you enter into, a burial contract needs to be negotiated very carefully to make sure that the final payment is not more than anticipated. Take a friend with you for support when you go to the funeral home so that you are not intimidated into spending more than planned.

#### 4. Pre-need Contract

Florida law requires that all money paid for pre-planned funerals be placed in Trust. The money from the Trust Fund will be paid to the funeral director upon receipt of proof that services were carried out in conformance with your wishes. By law you must be able to get your money back from the Trust if you decide to cancel the contract within 30 days. Thereafter, the refund may be subject to liquidated damages in certain percentage amounts allowable by state law and stated in the contract. Likewise, if the funeral services are not performed, the entire amount shall be reimbursed within 30 days.

#### 5. Membership in a Burial Society

There are both for-profit and not-for-profit burial societies that provide simple ceremonies (usually cremation) for a membership fee. The balance of the purchase price can be negotiated either as a pre-paid or post-paid contract, with the bulk of the money to be paid out of your estate after death.

#### H. Organ and Body Donation

You can perform a public service and avoid costs by donating your body to a medical school and your organs to someone that needs them. Organ donation means that you can live on in a special way by saving the life of someone in need of an organ transplant. You may be able to donate a heart, kidneys, or some other organ if you so request. Organ transplants are done at no cost to the donor; the recipient hospital will cover the cost of donation. Following organ donation, the family of the deceased may hold funeral and memorial services. To become part of the donor program, you may sign the State of Florida Organ Donor Registry form in the presence of two subscribing witnesses. It must then be returned to the Department of Motor Vehicle Office or returned to the Tallahassee address on the Florida Organ Registry brochure. That brochure is available online at [www.fdhc.state.fl.us/MCHQ/Health\\_Facility\\_Regulation/Organ\\_Donors/Regform.html](http://www.fdhc.state.fl.us/MCHQ/Health_Facility_Regulation/Organ_Donors/Regform.html), or by calling the Agency for Health care Administration at (888) 419-3456. A donor card can be found online at [www.myflorida.gov](http://www.myflorida.gov). You may also indicate such intent on your driver's license at time of renewal. In addition, you may register for organ donation online at Donate Life Florida - a non-profit 501(c)3 organization contracted by the State of Florida, Agency for Health care Administration to create the state's organ, tissue and eye donor registry (<https://www.donatelifeflorida.org>). Where you register online or via license renewal or otherwise, you may change your mind or the terms of your donation at any time.

## VIII. PLANNING FOR YOUR CHILDREN

Part III, above, discussed a variety of ways in which LGBT couples are having children more often. As LGBT families now frequently include children, it is important to consider planning devices to make sure that your children are well cared for in the event that anything should happen to you to prevent you from caring for them. This part outlines some of those concerns and available planning tools.

### A. Declaration of a Pre-Need Guardian for Minor

Just as you can make a declaration of who you wish the Court to appoint as your Guardian in the event of your incapacity, you can also declare who your minor child's guardian should be upon your death or incapacity. This declaration must provide the minor's name, date of birth, and social security number, and must be filed with the Clerk of Circuit Court. A guardian can be designated for the minor's person, the minor's property, or both. Residency restrictions apply to anyone who is not a Florida resident. A guardian must be a Florida resident or a legally recognized "family" member as discussion in the qualifications of pre-need guardians above.

### B. Medical Power of Attorney for Minor

A medical power of attorney allows a parent to designate other persons who are authorized to consent to medical care or treatment of his or her minor child. This document, authorized by Florida Statutes Section 743.0645, is used only if the treatment provider, after a reasonable attempt, is unable to reach the parent with legal power to consent to medical care. A medical power of attorney gives the designee power to consent to medically necessary surgical and general anesthesia services for the minor child, unless such services are specifically excluded by the individual executing the power of attorney.

### C. Children and Financial Resources

Even if you declare a guardian for your minor child before your death, there remains a concern as to how to ensure that your financial resources go to your minor child's care. If you have a minor child and have financial resources or insurance that you want to be sure benefit your child in the event of your death, you should consider establishing a trust for your child's benefit. You may also want to designate the trust as the beneficiary of any life insurance that you may have. Because instruments of this sort are complex legal documents, it is strongly advised that you consult an attorney to carry out your wishes.

### D. Non-biological Children

Florida now permits adoption by gay men and women. An attorney should be consulted about possible pathways of adopting a partner's biological children. Obviously, however, a same-sex couple's family unit may include the individual partners' biological children who have not been adopted. Granting the non-biological partner authority over and access to the children will





vary depending upon the family's circumstances, including whether the children have another biological parent whose parental rights have not been terminated.

A partner's concerns regarding children likely encompass the practicalities of day-to-day life. The biological parent may want to contact the children's schools, day-cares, health care providers, religious centers, after-school lesson providers, activity directors, and even friends' parents and carpoolers, and give permission to release the child and the child's records to the biological parent's partner. Many of these entities will have their own forms that they will ask to be completed, by either or both of the children's biological parents. Ask for the forms, and be sure to keep copies of the completed forms for your records.

#### E. Other Practical Considerations

Because same-sex unions are not recognized in Florida, gay parents should consider obtaining life insurance -- or increasing the limits of existing coverage -- if they can afford it. Keep in mind that in the event of the death of a partner with children, the surviving partner will not get survivor benefits from Social Security -- which could be quite substantial -- particularly when taken over a long period of time. There's also the consideration that a surviving partner and non-biological, non-adopted children are not "survivors" under Florida law, so if a parent is killed, for example in an accident of some kind where another party is at fault, the surviving partner and children will not be able to sue and recover for their own damages (the estate of the deceased partner could -- but damages would be much less than providing for partner and minor children).

### IX. ELDER LAW AND LGBT RIGHTS

There are specific concerns that elder LGBT individuals face. This section of the Handbook is designed to address those issues, and highlight the laws that exist on both the federal and Florida state level to protect elder LGBT individuals. This part will also present some arguments that elder LGBT individuals might use to assert their rights and choices.

#### A. Housing and Care Programs

Housing and care programs are particularly relevant to elder citizens of Florida, yet present their own challenges and difficulties for LGBT residents seeking aid and comfort.

##### 1. Congregate Homes

Life in a congregate home (i.e. nursing home or assisted living facility) poses unique challenges for LGBT residents. Currently, there is little LGBT-specific programming offered in congregate homes, and facility staff members are rarely trained to provide culturally-competent services to LGBT residents. Furthermore, although illegal, LGBT residents may be subjected to discrimination from both the facility's staff members and fellow residents. This is particularly problematic in the areas of (A) visitation rights and (B) cohabitation with LGBT partners.

There are two types of congregate homes available for residence in Florida, each with their own unique set of rules: nursing homes and assisted living facilities. Nursing

home residents are under the 24-hour supervision of nursing staff, and typically require daily assistance in their care. Assisted living facility residents are typically provided with only limited custodial assistance for daily tasks, such as dressing or bathing. The type of facility ideal for residence should be evaluated based on the individual's needs, and what would be best for his or her circumstances.

## B. Visitation Rights

Nursing home residents in Florida have the right to receive whatever visitors they want at any time during visiting hours. The nursing home's visiting hours period is required by Florida law to be flexible enough to allow for out-of-town guests and working persons. Outside of these visiting hours, nursing home residents are allowed to see family or other relatives at any time of day. Because the terms "family" and "relative" are never clearly defined by the Florida Statutes, nursing home staff may limit the ability of LGBT residents to receive their same-sex partners or spouses as visitors outside of visiting hours. Even though most nursing homes receive federal funding, the federal rules for nursing homes found in the Nursing Home Reform Act (NHRA) and Medicare and Medicaid regulations have similar limitations on nursing home visitation, and thus do not provide any further protections or rights for LGBT residents. However, the Department of Housing and Urban Development (HUD) has recently changed the definition of "family" to include LGBT partners or spouses and their children, opening the possibility for change in visitation rights for same-sex couples. A visitor deprived of access based on a discriminatory interpretation of the definition of "family" may consider consulting an attorney, or seeking assistance from an organization such as Equality Florida, Lambda Legal or the National Center for Lesbian Rights.

### Take Action!

Don't be afraid to shop around for the perfect congregate home. There are many factors to consider, such as the facility's policy on same-sex partners cohabitating and LGBT programming. Determine what your or your loved-one's wants and needs are, and ask the facilities what they can do for you.

According to Florida law, assisted living facilities must allow residents the right to receive any visitors they want between the hours of 9:00 a.m. and 9:00 p.m. at a minimum. This period of time can be extended based on the individual facility's rules. Additionally, the assisted living facility must extend these hours upon request to accommodate visiting caregivers and out-of-town guests. Florida statutes never define the term "caregiver," potentially allowing LGBT residents to receive their same-sex partners or spouses outside of visiting hours. The LGBT resident who wants to receive his or her same-sex partner outside of visiting hours should request information from the assisted living facility staff on how to designate the partner as a caregiver.

## C. Cohabitation Rights

LGBT residents living in a nursing home in Florida may have a difficult time being placed in the same room as their same-sex spouse or partner. Currently, there are no Florida statutes related to a resident's right to share a room with a spouse, partner,

or roommate of their choice. Federal regulations of nursing homes allow a married resident to share a room with his or her spouse so long as both spouses live in the same facility and consent to the arrangement. However, federal law still relies on the Defense of Marriage Act (DOMA) to define marriage as being strictly between a man and a woman, and as such, would probably not extend the same cohabitation rights to same-sex couples or spouses. The executive branch of the federal government is attempting to distance itself from DOMA, meaning there could be substantial policy change in the near future for cohabitation of same-sex spouses in nursing homes.

Conversely, cohabitation rights for assisted living facilities are governed by Florida law. Any resident of an assisted living facility is allowed to choose his or her own roommate. Under this law, LGBT partners or spouses living in the same facility may have the option of sharing a room, so long as both parties agree to the arrangement.

#### D. Other Resident Rights

Residents of both nursing homes and assisted living facilities in Florida are guaranteed certain rights under Section 429.28, Florida Statutes, also called the "Resident's Bill of Rights." These freedoms include the right to:

- Be treated with consideration and respect, and in recognition of personal dignity and privacy
- Exercise civil and religious liberties
- Live free of abuse and neglect
- Access adequate and appropriate health care
- A 45 day notice of relocation or expulsion from the facility

Furthermore, residents of Florida nursing homes are offered additional protections by the Florida law. Nursing home residents have the right to:

- Be free from government intrusion into their lives
- Be free from mental and physical abuse, including physical and chemical restraints and extended seclusion
- Privacy in treatment and in their own rooms
- Receive protective and support services, such as therapeutic and recreational activities

All congregate homes are required to provide staff members with a copy of these rules, as well as training on residents' rights. While some Florida municipalities protect LGBT rights specifically, the state of Florida has no law prohibiting discrimination on the basis of

#### Important Telephone Numbers

Long-Term Care  
Ombudsman Program  
(1-888-831-0404)  
Florida Abuse Hotline  
(1-800-962-2873)  
Elder Helpline  
(1-800-963-5337)  
Medicaid Fraud Control  
Unit (1-866-966-7226)  
Division of Medical  
Quality Assurance  
(1-888-419-3456)  
Agency for Health care  
Administration  
(1-888-419-3456)  
Disability Rights Florida  
(1-800-342-0823)

sexual orientation in congregate homes, thus failing to protect LGBT residents. Therefore, LGBT residents of congregate homes must rely on the protections offered by the Florida statutes to all residents equally. Even so, this list of rights should be sufficient to make an argument for legal protection of LGBT residents. *Lawrence v. Texas* was a Supreme Court case decided in 2003 that protected same-sex relationships from government intrusion under the constitutional right to privacy. Using this case law in reference to the rights of residents in both assisted living facilities and nursing homes, a cause of action might exist if an LGBT resident is discriminated against by congregate home staff. For further information, contact an experienced elder law or constitutional attorney.

#### E. Grievance Procedures for Violation of Residents' Rights

There are many options available to residents of both nursing homes and assisted living facilities to officially submit a complaint for an infringement of their rights. First, all residents of congregate homes have the right to present grievances to the Long-Term Care Ombudsman Council, a program run by the Florida Department of Elder Affairs (DOEA). The Ombudsman Council is an organization that investigates complaints lodged by congregate home residents, trains facility staff about resident rights, monitors the implementation of state and federal laws related to congregate homes, and annually assesses each facility to ensure the welfare of the residents. Residents also have the right to submit a complaint to the DOEA directly, which will then investigate the claim. Also, there is a hotline to report resident abuse at the hands of congregate home staff, as well as Disability Rights Florida (formerly the Advocacy Center for Persons with Disabilities), a group that advocates for elders whose disabilities are not taken into consideration by congregate home staff.

According to Florida law, all nursing homes must provide an explanation of how to submit a grievance, and must also respond to the complaint within a reasonable time after submission. Similarly, the Resident's Bill of Rights requires that assisted living facilities provide the name, address, and telephone number of the local Ombudsman Council, the central abuse hotline, and Disability Rights Florida.

A resident's submission of a grievance cannot be met with restraint, interference, coercion, discrimination, or reprisal by the congregate home's staff. If these rights to submit a complaint are hindered, the resident can bring a lawsuit against the facility. If the resident is unable to bring a lawsuit, then a legal guardian or personal representative of the resident's estate can bring legal action on the resident's behalf. In either case, it is recommended to discuss the issues with an experienced elder law attorney who can advise further on any possible causes of action.

#### Take Action!

Designate a health care Power of Attorney to ensure that your partner or spouse can make care decisions on your behalf.

#### 1. Hospital and Hospice Care

Just as discrimination against LGBT people can occur in congregate homes, so too it can occur in hospitals and with hospice programs. Visitation privileges may be restricted for LGBT patients under hospital or hospice care. Similarly, many states restrict same-sex partners or spouses from making

health care decisions for patients, and the states that do allow it typically prioritize relatives by blood as caregivers over the same-sex partner or spouse. One way around this problem is to designate your partner or spouse with health care Power of Attorney. Doing so would allow your same-sex partner or spouse a say in all of your care decisions, regardless of Florida statutes. LGBT patients can appoint their partners or spouses through a simple document, a form of which is included in the appendix of this Handbook.

a. Hospital Care

Patients staying in a hospital are entitled to a “Patient’s Bill of Rights and Responsibilities” through the Florida Department of Health that includes a requirement that health care facilities and providers must observe a patient’s right to individual dignity and privacy. While there is a provision prohibiting discrimination in the Patient’s Bill of Rights, sexual orientation and gender identity are not included in the list of qualities by which facilities cannot discriminate. Both the Patient’s Bill of Rights and the Florida Statutes also fail to address visitation rights of hospital patients.

The federal government has created regulations that affect the visitation rights of all patients staying in hospitals that receive either Medicare or Medicaid funds, meaning almost all hospitals in the United States. These rules state that a patient can designate anyone, including a same-sex spouse, partner, or friend, as a visitor. Furthermore, hospital staff are not allowed to deny visitation privileges based on sex, gender identity, or sexual orientation. If the patient is unable to say whether or not a certain visitor is allowed, then a designated “support person” has the authority to make that decision. If no support person is designated by the patient, then hospital staff is required to respect the statement by the patient’s support person that he or she is that person. If two or more people claim to be the patient’s support person, the hospital may require proof of a valid relationship. Hospital staff then makes the decision of who the support person is based on the available information; however, this decision cannot be made on the basis of either the patient’s or the claimed support person’s sexual orientation or gender identity.

b. Hospice Care

Hospice programs are designed to provide care for terminally-ill patients or patients who may not be terminally-ill, but who want “comfort care” instead of aggressive treatment-oriented care. Hospice care can be provided at inpatient facilities with beds licensed specifically for the hospice program, or in the patient’s own home. The Florida Department of Elder Affairs (DOEA) works with the Agency for Health care Administration (AHCA) to oversee all hospice care programs in the state of Florida.

According to Florida law, each patient of a hospice program is designated a “plan of care,” which includes the identification of a “primary caregiver.” The Florida statute does not define who the “primary caregiver” must be, thus leaving an opportunity for a LGBT patient to designate their same-sex partner or spouse with Power of Attorney.

Hospice care is required by Florida law to be available to all terminally ill patients regardless of sexual orientation, age, gender, national origin, disability, diagnosis, cost of therapy, ability to pay, or life circumstances. However, the laws forbidding discrimination in

hospice care only apply to hospice programs that operate in a hospital or in the patient's own home, and do not apply to standalone hospice facilities that provide a residence for their patients.

## 2. Care and End-of-Life Decisions

Any patient of a hospital or hospice program is allowed to designate a "health care surrogate" of their choosing to make health care and end-of-life decisions for the patient. However, if the designated surrogate is not the patient's spouse, the spouse or the adult children of the patient must be informed of the designation. Furthermore, while LGBT patients can make this designation in advance, Florida hospitals may still not recognize the patient's directive; Florida law allows either the attending physician or the health care facility to review the surrogate's decisions and seek judicial intervention when they feel it is necessary. There are certain requirements that the physician or facility would have to prove in order to do this, such as that the surrogate was making decisions against the patient's known wishes or that the surrogate was improperly appointed or had abused his or her powers. While these considerations are largely subjective, they still must be proven by the health care provider in a court of law to strip the surrogate of decision-making powers.

If the patient has designated no health care surrogate, the Florida Statutes specify the order of individuals who are allowed to make health care and end-of-life decisions for the patient:

1. Judicially appointed guardian who is authorized to consent to medical treatment
2. The patient's spouse
3. The adult children of the patient
4. A parent of the patient
5. The adult siblings of the patient
6. A close and familiar adult relative of the patient
7. A close friend of the patient
8. Clinical social worker

Under Florida law, "spouse" does not include a patient's same-sex spouse, even if they were married out-of-state. The most likely designation for a LGBT patient's same-sex spouse or partner would be as a close friend of the patient. In order for an individual with this designation to make health care and end-of-life decisions for the patient, there has to be no available, willing, or competent individuals from categories 1-6 who could make decisions for the patient's care.

## 3. Access to Care Giving

There is no Florida state law that requires private employers to grant employees time off to provide care for an ailing family member. However, most Florida employers with 50 or more employees are subject to the federal Family and Medical Leave Act (FMLA), which allows an employee to take unpaid leave for up to 24 weeks in order to care for a spouse, child, or parent with a serious health condition. While the FMLA covers children adopted by LGBT men and women, the federal definition of marriage as being between a man and a

woman currently prevents the Act's application to same-sex spouses. Employers are allowed to expand this benefit beyond what the government requires, so you should check with your employer to see if there are more generous leave benefits available.

Florida state employees are offered protections similar to those provided by the FMLA, with parallel limitations. Florida law allows employees of the state to take up to 6 months of leave for a serious family illness or accident. "Family" is defined by the statute to mean a child, parent, or spouse, with no further definitions of each. However, a different Florida law defines marriage as between one man and one woman, and refuses to recognize same-sex marriages from out-of-state. While same-sex partners and spouses are not protected by the Florida law allowing leave to care for family, individual employers might extend this benefit to LGBT employees. For more information, ask your employer what their policy is on leave to care for family, and whether that policy includes same-sex spouses or partners.

## **F. Medicaid**

In Florida, Medicaid eligibility is controlled by either the Department of Children and Families (DCF) or the Social Security Administration (SSA), depending on who the beneficiary is. The SSA handles Medicaid for individuals who receive Supplemental Security Income (SSI), while the DCF determines Medicaid for aged and disabled residents NOT receiving SSI. SSI acts as an allowance provided by the federal government for the elderly, blind, and disabled. Individuals who are eligible to receive SSI are automatically eligible for Medicaid coverage through the SSA. State residents who do not qualify for SSI must meet certain requirements to qualify for full Medicaid benefits through the DCF. Specifically, the individual must:

- Be at least 65 years old or permanently and totally disabled
- Have an income below 88 percent of the federal poverty level
- Have assets within the defined asset limit
- Not be eligible for Medicare unless they are receiving assisted care in a congregate home or hospice program.

The Agency for Health care Administration (AHCA) administers all Medicaid services for the state of Florida.

### **1. Spousal Impoverishment Protections**

Patients who intend to rely on Medicaid to receive long-term care are often forced to sell their homes and possessions to qualify for the service. Recognizing the effect that the Medicaid provisions could have on married patients, the government provides several protections for the patient's spouse to prevent homelessness and poverty; for example, the patient's house does not have to be sold if he or she has a spouse living there, because doing so would cause the spouse to lose his or her home, too. Due to the Defense of Marriage Act (DOMA), these benefits are not extended at the federal level to same-sex spouses or partners. States are allowed to expand Medicaid spousal protections to include same-sex spouses and partners; however, Florida does not legally acknowledge same-sex

marriages or partnerships, and as such, has not yet chosen to extend protection to residents living in committed LGBT relationships.

a. Federal Liens on Property

The federal government enacted the Tax Equity and Fiscal Responsibility Act (TEFRA) in 1982, which allows states to seize the real property of a living and permanently institutionalized Medicaid recipient if the patient is unable to pay for his or her treatment. States that exercise this power are not allowed to take the patient's property if there is a spouse, child under the age of 21, or child with a disability living there at the time the patient is institutionalized. States are allowed to expand this protection to same-sex spouses and partners living in the patient's home as well.

The state of Florida has not yet exercised its power to seize a Medicaid patient's property under TEFRA.

b. Transfer of Assets Relief

Residents who apply for Medicaid assistance are often required to sell their homes to ensure eligibility under the Medicaid limits on asset ownership. However, federal rules prohibit an individual from transferring their real property and assets to another person within five years before applying for Medicaid. Any applicant who transfers their assets during this period is ineligible for long-term care benefits. There are federal exceptions that allow an applicant the unlimited transfer of his or her assets to a spouse; however, this provision does not cover same-sex spouses or partners.

Medicaid provisions also provide exceptions to individuals who transfer their property exclusively for a purpose other than to qualify for Medicaid, and to individuals who would suffer an undue hardship due to the penalty. The states are left to determine what constitutes an undue hardship under this exception. In Florida, it is left to the DCF to determine whether the applicant would suffer an undue hardship due to the penalty. The DCF has stated that an undue hardship exists when the ineligibility period would endanger the life or health of the individual, which must be shown by documented proof from the applicant's doctor. Furthermore, an exception exists when the applicant would be deprived of food, shelter, clothing, or other life necessities by the penalty period. However, to qualify for the undue hardship exception, all other methods of accessing the resources or income of the individual must be exhausted.

c. Estate Recovery

Once the Medicaid recipient has passed away, the state typically recovers expenses for long-term care from the deceased's estate. Usually, this includes the deceased patient's home. The patient's estate will be seized when the State has imposed a lien on the property, or when the recipient was aged 55 or older and received nursing facility service, home service, or related hospital and prescription drug services. This lien system, which Florida uses, is different from TEFRA because the property is seized post-death.



There are exceptions that prevent the State from being able to seize the deceased's estate. First, estate recovery is prohibited if the patient has a surviving spouse, child under the age of 21, or a disabled child of any age. "Spouse" here does not include a same-sex spouse or partner. Additionally, Florida law provides homestead protection that prohibits the forced sale of the deceased's home if a spouse or heirs survive. Furthermore, Florida will not recover the deceased's estate if it would lead to an undue hardship for the deceased's spouse or heirs. Florida state courts decided in *Dep't of Health & Rehabilitative Services v. Trammell* that the term "heir" for determining undue hardship does not include heirs designated by will, but only heirs recognized by state inheritance law. According to Florida law, these heirs only include blood relatives, thus excluding the possibility of a same-sex spouse or partner from claiming homestead protection or undue hardship as deterrents for estate recovery.

#### G. Veterans' Benefits

Veterans receive benefits for their service from both the state and federal government.

However, veterans who received "other-than-honorable" discharges are at risk of having their benefits negatively impacted. Several military policies over the years have resulted in LGBT soldiers receiving other-than-honorable discharges from service. These include "blue discharges" prior to 1947, "general" or "undesirable" discharges, and, most recently, discharges under Don't Ask Don't Tell (DADT). DADT, which was repealed in 2011, allowed the military to discharge personnel for "homosexual conduct." Veterans who were discharged for homosexual conduct prior to 2011, however, are eligible to apply for a discharge review. Aside from these considerations, veteran's benefits are largely unrelated to LGBT status, yet remain significant to LGBT residents who served in the military.

##### 1. Federal Benefits

Federal benefits for veterans and their families are provided by the Department of Veteran Affairs (VA). These benefits include disability compensation, death pension, and health care. Disability compensation is a tax-free benefit paid to the veteran because of some injury or disease suffered from active duty. Death pension provides payments to a surviving spouse or child of a deceased veteran. Health care benefits are reimbursements for medical expenses provided for the veteran through the VA, and for dependents and survivors of the veteran through the Civilian Health and Medical Program of the Department of Veteran Affairs (CHAMPVA), or through the VA under TRICARE. Any benefit that is eligible to be extended is available only to opposite-sex spouses and children under the age of 18 or up to age 23 if enrolled in school and not married.

The VA has recently released a Transgender Health care Directive that forbids its health care facilities from discriminating against transgender veterans. All transgender patients of the VA will be referred to and treated in consideration of the patient's self-identified gender, without any harassment and with the utmost confidence for the patient's private information. Additionally, the VA will provide all medically necessary transition-related health care needs for transgender patient. This includes hormone therapy, mental

health care, pre-operative evaluation, post-operative care, and routine health screenings. The benefit does not, however, include actual sex reassignment surgery.

## 2. Florida State Benefits

In addition to the benefits offered veterans by the federal government, the state of Florida extends certain benefits to state residents who served in the military. These benefits include homestead tax exemption, employment benefits, and education benefits. A homestead tax exemption is extended to veterans who are disabled as a result of their service. If the veteran is permanently disabled, his or her home becomes exempt from property taxes. If the veteran has non-permanent service-related disabilities rated 10% or greater, he or she receives a \$5,000 property exemption on his or her home. Employment benefits make it easier for a veteran to find a career following service through job placement assistance. Education benefits help veterans of WW II, the Korean War, and the Vietnam War receive their high school diplomas, and provide scholarships for dependent children of veterans killed in action.

The state of Florida also provides housing programs for elderly or disabled veterans. There are two kinds of congregate homes available for veterans in Florida: a veteran's nursing home and a veteran's domiciliary home. The nursing home is set up for veterans who are recovering from an illness or who are not in need of inpatient hospital care. Nursing home residents who earn more than \$35 per month must contribute to paying for their support; the amount to be contributed is determined by the resident's overall income level. The domiciliary home is for veterans who are disabled by age or disease, but who do not need nursing or inpatient hospital care. Domiciliary home residents who earn more than \$100 per month must contribute to paying for their support; again, the amount of the payments depends on the resident's income. To qualify for residency in either, the veteran must:

- Be in need of care
- Have been a Florida state resident for at least one year prior to admission
- Not owe money to the Florida Department of Veteran Affairs
- Have applied for all financial assistance reasonably available through the government
- Have been approved as eligible for care and treatment by the federal VA

In addition, to qualify for residency in the domiciliary home, the veteran must not be mentally ill or addicted to drugs or alcohol. Neither facility is allowed to refuse residency on the basis of race, age, sex, religion, national origin, or "any other reason that would thereby create a practice of discrimination," suggesting that veterans cannot be discriminated against on the basis of sexual orientation.

## X. REFERENCE AND REFERRAL INFORMATION

There are many resources out there for LGBT individuals, partners, and families that could help answer questions either legal or otherwise that might come up in the course of one's life. Below are just a few resources that you might find helpful as you begin to ask some of the important questions referenced in this handbook and begin to apply some of

the ideas discussed into your own life. Aside from the information contained in this Handbook, you might consider exploring the topics below: (A) Guardianships, (B) Legal Problems, and (C) Legal Services and Legal Aid.

#### A. Guardianship

Guardianship (not to be confused with the Guardian Ad Litem program), is the process designed to protect and exercise the legal rights of individuals whose functional limitations prevent them from being able to make their own decisions, and they have not made plans for this time in their life. People who need guardianship may have dementia, Alzheimer's disease, a developmental disability, chronic mental illness, or other such conditions that generally cause functional limitations. Before a guardianship is established, it must first be determined that the alleged incapacitated person lacks capacity. Generally, there are three types of guardians in Florida: 1) If a court determines a person needs a guardian and that person has family or friends that can serve, then the court may appoint that family or friend. However, the same limitations apply to non-residents who may serve as guardians as set forth in the qualifications for pre-need guardians above. These people are considered non-professional guardians. 2) If the incapacitated person does not have a loved one that can and will serve but they have assets, the court may appoint a professional guardian. 3) If the incapacitated person does not have family or friends and is of limited financial means, then the court may appoint a public guardian, if available. In Florida, the Statewide Public Guardianship Office designates Offices of Public Guardian.

A current list of local offices may be found on the Statewide Public Guardianship Office web page at <http://elderaffairs.state.fl.us>.

If you have further questions about public guardianship or would like information on how to become a professional guardian, you may contact the Statewide Public Guardianship Office at (850) 414-2000 or write to:

Statewide Public Guardianship Office  
4040 Esplanade Way, Suite 360-I  
Tallahassee, FL 32399-7000  
<http://elderaffairs.state.fl.us>

#### B. Legal Problems

Every citizen in Florida should seek representation by an attorney in a civil lawsuit, whether the citizen is suing to uphold a right they claim, or whether the citizen is being sued. Civil lawsuits are cases other than those in which a citizen is charged with criminal activity by the state or local government. If you have a civil legal problem, but cannot afford to hire a private attorney to represent you, you may be able to obtain an attorney through your local legal aid or legal services organization, which provides free legal services to those in need. In criminal cases, the court will appoint a lawyer if you qualify.

Remember, legal problems have time limits, after the expiration of which your rights may be lost. Therefore, immediately contact a lawyer if assistance is needed. The following are places you may wish to contact.

C. Legal Services and Legal Aid

Legal Aid and Legal Services offices can advise you in most areas of civil law, for example: consumer cases; employment cases; landlord/tenant cases; food stamp cases; health cases; social security; public welfare benefits; and family law matters such as dissolutions of marriage.

Legal Aid and Legal Services are meant for persons of low income who cannot afford an attorney. Most Legal Aid and Legal Services offices base their eligibility criteria on both the income of the applicant and the size of the family of the person seeking assistance, and sometimes on other additional criteria, such as being 60 years old or older. In order to determine whether or not you would qualify for Legal Aid or Legal Services, it is necessary for you to contact the local Legal Aid or Legal Services office. The best information on Legal Aid or Legal Services offices and whether it handles your particular legal need, addresses of all offices, hours of operation, financial qualifications, and other valuable information is found at [www.FloridaLawHelp.org](http://www.FloridaLawHelp.org).

The following chart lists relevant ordinances existing in the various municipalities in Florida at the time of this publication.

MUNICIPALITY ORDINANCE	PROTECTED CATEGORIES																					
	Sexual Orientation	Gender Identity	Sex / Gender	Age	Race	Racial Profiling	Physical Characteristics	Color	Nat. Origin / Ancestry / Ethnic Origin / Birth Place	Citizen	Marital Status	Familial Status	Domestic Relation Status	Parental Status	Pregnancy	Disability / Handicap	Source of Income	Political Affiliation	Religion / Creed	Veteran Status	Relation with Person Affected	
Broward Chapter 16-1/2	X	X	S	X	X			X	N		X	X			X	D		X	R			
City of Miami City Charter "Citizen's Bill of Rights"	X	X	S		X	X		X	N			X	X	X				X	R	C		
Dunedin Chapter 42	X	X	S		X			X	NA										R			
Gainesville Chapter 8	X	X	G	X	X			X	N		X					D			R			
Gulfport Chapter 26	X	X	G	X	X		X	X	NA		X	X				D			R			
Juno Beach Res. 2007-02, Art. I, Sect. 8	X		S G	X	X			X	N	X	X	X				D		X	R			
Key West Chapter 38	X	X	S		X			X	NAB		X	X		X		H	X		R			
Lake Worth Chapter 20	X	X	S	X	X			X	N		X					H			R			
Largo* Chapter 14	X	X	S	X	X			X	NAB		X	X			X	X			R	X		
Leon Co. Chapter 9	X	X	S	X	X			X	NA		X	X				H			R			
Miami Beach Chapter 62	X	X	G S	X	X			X	N		X	X				D			R			
Miami-Dade Co. Chapter 11A	X		S	X	X			X	NA		X	X			X	D	X		R			
Monroe Co. Chapter 14	X	X	S	X	X			X	NA			X				D			R			
Oakland Park Chapter 2	X		S	X	X			X	A, N							D		X	R, C			
Orange Co. Chapter 22	X	X	S	X	X			X	N		X	X				D			R	X		
Orlando Chapter 57	X		S	X	X			X	N		X	X		X		H			R			
Palm Beach Co. Chapter 15	X	X	S	X	X			X	N		X	X				D			R			
Pinellas Co. Chapter 70	X		S	X	X			X	N		X					D			R			
Sarasota Chapter 18	X		G	X	X			X	N		X	X				D			R	X		
St. Petersburg Chapter 15	X		S	X	X			X	NBA		X					H			R			
Tallahassee			S	X	X			X	NE		X	X				H			R			
Tampa Chapter 12	X	X	S	X	X			X	N		X	X				H			R			
Volusia County Chapter 36	X	X	S	X	X			X	N		X	X				D			R			
West Palm Beach Chapter 42	X	X	S	X	X			X	N		X	X				D			R			
Wilton Manors Chapter 2 Sec. 269-272	X	X	G	X	X			X	NA		X	X			X	D		X	R	C	X	X

\* City or Village Employment Discrimination Policy includes sexual orientation and gender identity

WHAT'S COVERED										Public/ Private Empl	LINK TO ORDINANCE
Employment	Public Accommodations	RE Transactions	Housing	Credit / Financing	Education	Financial Assistance	City Contracts	All City Actions	Family Leave		
X	X	X	X	X		X				Private	<a href="http://library.municode.com/HTML/10288/level2/PTIICOOR_CH16.5HURI.html">http://library.municode.com/HTML/10288/level2/PTIICOOR_CH16.5HURI.html</a>
								X		Public	<a href="http://library.municode.com/HTML/10933/level2/PI_SA.html#PI_SA_s52">http://library.municode.com/HTML/10933/level2/PI_SA.html#PI_SA_s52</a>
	X									Public/Private	<a href="http://library8.municode.com/default-test/home.htm?infobase=10668&amp;doc_action=whatsnew">http://library8.municode.com/default-test/home.htm?infobase=10668&amp;doc_action=whatsnew</a>
X	X	X	X	X						Private	<a href="http://library.municode.com/HTML/10819/level2/PTIICOOR_CH8DI.html">http://library.municode.com/HTML/10819/level2/PTIICOOR_CH8DI.html</a>
X	X	X	X		X					Public/ Private	<a href="http://library8.municode.com/default-now/home.htm?infobase=10876&amp;doc_action=whatsnew">http://library8.municode.com/default-now/home.htm?infobase=10876&amp;doc_action=whatsnew</a>
X										Public	<a href="http://www.juno-beach.fl.us/vertical/Sites/%7B88BB90E0-AD94-4F43-B7CD-B77B19081932%7D/uploads/%7BBC14B998-A0F9-4E2D-8828-2993B96C1C20%7D.PDF">http://www.juno-beach.fl.us/vertical/Sites/%7B88BB90E0-AD94-4F43-B7CD-B77B19081932%7D/uploads/%7BBC14B998-A0F9-4E2D-8828-2993B96C1C20%7D.PDF</a>
X	X		X	X						Public/ Private	<a href="http://library.municode.com/HTML/10053/level2/SA_C38.html">http://library.municode.com/HTML/10053/level2/SA_C38.html</a>
X	X	X	X	X						Public/Private	<a href="http://library.municode.com/HTML/10091/level2/PII_C20.html">http://library.municode.com/HTML/10091/level2/PII_C20.html</a>
X			X	X						Public/Private	<a href="http://search.municode.com/html/13786/level1/PII.html">http://search.municode.com/html/13786/level1/PII.html</a>
X	X	X	X	X						Public/Private	<a href="http://library8.municode.com/default-now/home.htm?infobase=10008&amp;doc_action=whatsnew">http://library8.municode.com/default-now/home.htm?infobase=10008&amp;doc_action=whatsnew</a>
X	X		X	X						Public/ Private	<a href="http://library.municode.com/HTML/13097/level2/SA_C62.html">http://library.municode.com/HTML/13097/level2/SA_C62.html</a>
X	X		X	X					X	Public (Dade Co. Empl. only) Private	<a href="http://library.municode.com/HTML/10620/level2/PTIICOOR_CH11ADI.html">http://library.municode.com/HTML/10620/level2/PTIICOOR_CH11ADI.html</a>
X	X	X	X	X						Public/ Private	<a href="http://library.municode.com/HTML/14298/level2/PTIGEOR_CH14HURE.html">http://library.municode.com/HTML/14298/level2/PTIGEOR_CH14HURE.html</a>
X										Public	<a href="http://library.municode.com/index.aspx?clientId=10938&amp;stateId=9&amp;stateName=Florida">http://library.municode.com/index.aspx?clientId=10938&amp;stateId=9&amp;stateName=Florida</a>
X	X	X	X	X						Public/ Private	<a href="http://library.municode.com/HTML/10182/level2/PTIIORCOCO_CH22HURI.html">http://library.municode.com/HTML/10182/level2/PTIIORCOCO_CH22HURI.html</a>
X	X	X	X	X						Public/ Private	<a href="http://library.municode.com/HTML/13349/level2/TITIICICO_CH57DI.html">http://library.municode.com/HTML/13349/level2/TITIICICO_CH57DI.html</a>
	X	X	X	X						Public/ Private	<a href="http://library8.municode.com/default-test/home.htm?infobase=10323&amp;doc_action=whatsnew">http://library8.municode.com/default-test/home.htm?infobase=10323&amp;doc_action=whatsnew</a>
X	X	X	X							Public/Private	<a href="http://library.municode.com/HTML/10274/level2/PII_C70.html">http://library.municode.com/HTML/10274/level2/PII_C70.html</a>
X	X	X	X	X						Public/ Private	<a href="http://library8.municode.com/default-test/home.htm?infobase=11553&amp;doc_action=whatsnew">http://library8.municode.com/default-test/home.htm?infobase=11553&amp;doc_action=whatsnew</a>
X	X	X	X							Public/ Private	<a href="http://library.municode.com/HTML/11602/level2/PTIISTPECO_CH15HURI.html">http://library.municode.com/HTML/11602/level2/PTIISTPECO_CH15HURI.html</a>
		X	X							Public/Private	<a href="http://library.municode.com/HTML/19980/level2/PTIICOGEOR_CH11HURI.html">http://library.municode.com/HTML/19980/level2/PTIICOGEOR_CH11HURI.html</a>
X	X	X	X							Public/ Private	<a href="http://library.municode.com/HTML/10132/level2/CODE_C12.html">http://library.municode.com/HTML/10132/level2/CODE_C12.html</a>
										Public	<a href="http://library.municode.com/HTML/11665/level2/PTIICOOR_CH36CIRI.html#TOPTITLE">http://library.municode.com/HTML/11665/level2/PTIICOOR_CH36CIRI.html#TOPTITLE</a>
X	X	X	X	X						Public/ Private	<a href="http://library.municode.com/HTML/10017/level2/PTIICOOR_CH42HURE.html">http://library.municode.com/HTML/10017/level2/PTIICOOR_CH42HURE.html</a>
X					X	X				Public	<a href="http://library8.municode.com/default-test/home.htm?infobase=11820&amp;doc_action=whatsnew">http://library8.municode.com/default-test/home.htm?infobase=11820&amp;doc_action=whatsnew</a>

XI. FORMS

- A. LIVING WILL: Florida Statute § 765.303 Form (Modified as Discussed in above Text)

LIVING WILL

Declaration made this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, I, \_\_\_\_\_, willfully and voluntarily make known my desire that my dying not be artificially prolonged under the circumstances set forth below, and I do hereby declare that, if at any time I am incapacitated and

\_\_\_\_(initial) I have a terminal condition

or \_\_\_\_ (initial) I have an end-stage condition

or \_\_\_\_ (initial) I am in a persistent vegetative state

and if my attending or treating physician and another consulting physician have determined that there is no reasonable medical probability of my recovery from such condition, I direct that life-prolonging procedures be withheld or withdrawn when the application of such procedures would serve only to prolong artificially the process of dying, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide me with comfort care or to alleviate pain.

It is my intention that this declaration be honored by my family and physician as the final expression of my legal right to refuse medical or surgical treatment and to accept the consequences for such refusal.

In the event that I have been determined to be unable to provide express and informed consent regarding the withholding, withdrawal, or continuation of life-prolonging procedures, I wish to designate, as my surrogate to carry out the provisions of this declaration:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_ Zip Code: \_\_\_\_\_

Phone: \_\_\_\_\_

I understand the full import of this declaration, and I am emotionally and mentally competent to make this declaration.

Additional Instructions (optional):

I desire that nutrition and hydration (food and water) be withheld or withdrawn when the application of such procedures would serve only to prolong artificially the process of dying.

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IN WITNESS WHEREOF, I have signed this Declaration on the day and year first above written.

\_\_\_\_\_ (signature)  
Print Name: \_\_\_\_\_

The declarant is known to me and I believe [him/her] to be of sound mind. I am neither the spouse nor a relative of the declarant.

The declarant is known to me and I believe [him/her] to be of sound mind. I am neither the spouse nor a relative of the declarant.

\_\_\_\_\_ (signature)  
Print Name: \_\_\_\_\_  
Witness \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
Telephone: \_\_\_\_\_

\_\_\_\_\_ (signature)  
Print Name: \_\_\_\_\_  
Witness \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
Telephone: \_\_\_\_\_



B. DESIGNATION OF HEALTH CARE SURROGATE: Florida Statute Form §765.203 (Including Optional Sections Discussed Above)

DESIGNATION OF HEALTH CARE SURROGATE

Name: \_\_\_\_\_ (Last) \_\_\_\_\_ (First) \_\_\_\_\_ (Middle Initial)

In the event that I, have been determined to be incapacitated to provide informed consent for medical treatment and surgical and diagnostic procedures, I wish to designate as my surrogate for health care decisions:

Name: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip Code: \_\_\_\_\_  
Phone: \_\_\_\_\_

If my surrogate is unwilling or unable to perform his duties, I wish to designate as my alternate surrogate:

Name: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip Code: \_\_\_\_\_  
Phone: \_\_\_\_\_

I fully understand that this designation will permit my designee to make health care decisions and to provide, withhold, or withdraw consent on my behalf; to apply for public benefits to defray the cost of health care; and to authorize my admission to or transfer from a health care facility.

Additional instructions (optional):

HIPAA Release Authority. I intend for my surrogate (and alternate surrogate) to be treated as I would be with respect to my rights regarding the use and disclosure of my individually identifiable health information or other medical records. This release authority applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 (a/k/a HIPAA), 42 U.S.C. 1320d and 45 C.F.R. 160-164. I authorize:

any physician, health care professional, dentist, health plan, hospital, clinic, laboratory, pharmacy or other covered health-care provider, any insurance company and the Medical Information Bureau, Inc., or other health-care clearinghouse that has provided treatment or services to me, or that has paid for or is seeking payment from me for such services, to give, disclose and release to my surrogate, without restriction, all of my individually identifiable health information and medical records regarding any past, present or future medical or mental health condition, including all information relating to the diagnosis and treatment of HIV/AIDS, sexually transmitted diseases, mental illness, and drug or alcohol abuse.

The authority given my surrogate shall supersede any prior agreement that I may have made with my health-care providers to restrict access to or disclosure of my individually identifiable health information. The authority given my surrogate has no expiration date and shall expire only in the event that I revoke the authority in writing and deliver it to my health-care provider.

Visitation Rights of Surrogate. The above-designated health care surrogate (and anyone else the named surrogate names) shall have the right to visit me while I am confined in any health care facility – hospital, rehabilitation facility, assisted living facility or nursing home.

I further affirm that this designation is not being made as a condition of treatment or admission to a health care facility. I will notify and send a copy of this document to the following persons other than my surrogate, so they may know who my surrogate is.

\_\_\_\_\_ (signature)  
Print Name: \_\_\_\_\_  
Designator

The foregoing Designation of Health Care Surrogate was acknowledged before us by the Designator, whose signature appears above, on the \_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
(signature)  
Print Name: \_\_\_\_\_  
Witness  
Address: \_\_\_\_\_  
\_\_\_\_\_  
Telephone: \_\_\_\_\_

\_\_\_\_\_  
(signature)  
Print Name: \_\_\_\_\_  
Witness  
Address: \_\_\_\_\_  
\_\_\_\_\_  
Telephone: \_\_\_\_\_

C. SELF-PROVING WILL SIGNATURES: Florida Statute § 732.503

Florida Statute Section 732.503 provides that a will may be made self-proved by notarized signatures "in substantially the following form":

.....

I, \_\_\_\_\_, declare to the officer taking my acknowledgment of this instrument, and to the subscribing witnesses, that I signed this instrument as my will.

\_\_\_\_\_

Testator

We, \_\_\_\_\_ and \_\_\_\_\_, have been sworn by the officer signing below, and declare to that officer on our oaths that the testator declared the instrument to be the testator's will and signed it in our presence and that we each signed the instrument as a witness in the presence of the testator and of each other.

\_\_\_\_\_

Witness

\_\_\_\_\_

Witness

Acknowledged and subscribed before me by the testator, \_\_\_\_\_ (type or print testator's name), who is personally known to me or who has produced \_\_\_\_\_ (state type of identification – see § 117.05(5)(b)2.) as identification, and sworn to and subscribed before me by the witnesses, \_\_\_\_\_ (type or print name of first witness) who is personally known to me or who has produced \_\_\_\_\_ (state type of identification – see § 117.05(5)(b)2.) as identification and \_\_\_\_\_ (type or print name of second witness) who is personally known to me or who has produced \_\_\_\_\_ (state type of identification – see § 117.05(5)(b)2.) as identification, and subscribed by me in the presence of the testator and the subscribing witnesses, all on \_\_\_\_\_ (date).

# THANK YOU

## **CARLTON FIELDS** **JORDEN BURT**

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## Equality Florida Institute™

**Equality Florida** is the largest civil rights organization dedicated to securing full equality for Florida's statewide lesbian, gay, bisexual, and transgender community. We work to change Florida law so that no one suffers harassment or discrimination on the basis of sexual orientation or gender identity and expression. Please consider Equality Florida Institute, Inc. when planning your estate. If you would like more information regarding planned giving, please contact Nadine Smith at 813-870-EQFL. For more information on Equality Florida, visit [www.EQFL.org](http://www.EQFL.org).

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