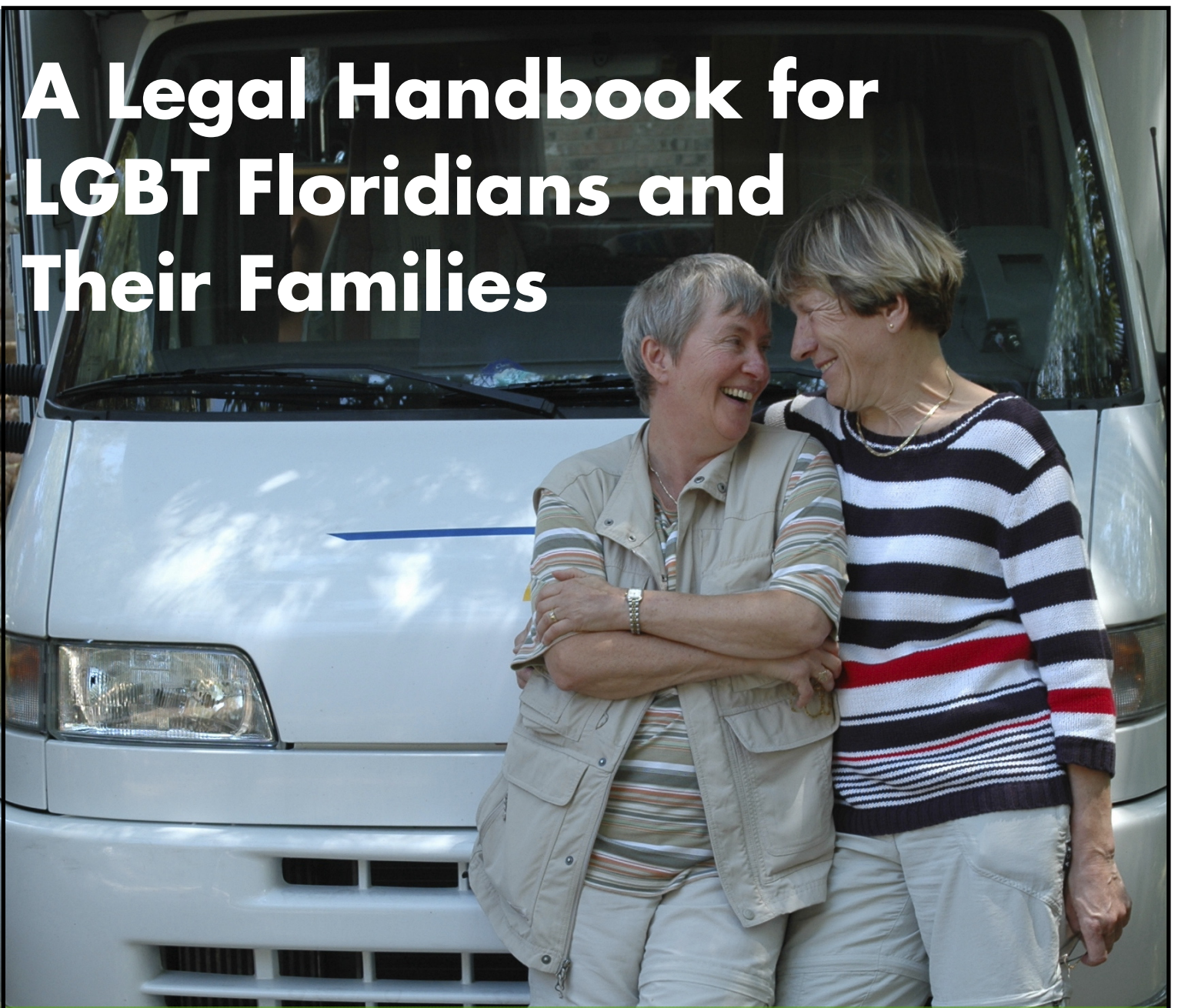


A Legal Handbook for LGBT Floridians and Their Families



A Resource for Lesbian, Gay, Bisexual and Transgender Families

**CARLTON
FIELDS**
ATTORNEYS AT LAW



PREFACE

This first edition of **A Legal Handbook for LGBT Floridians and Their Families** was a *pro bono* project of the law firm of Carlton Fields. Portions of the Handbook were derived from the 5th 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 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. 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.

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

First Edition.....December 1, 2010

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**Welcome Letter from
Nadine Smith, Equality Florida Executive Director**

Friends,

Even as we continue the work of securing full equality for the lesbian, gay, bisexual and transgender community, we know it is important that our members understand how 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 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, 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 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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"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. WHAT ARE YOUR LEGAL RIGHTS IN FLORIDA?

Miscellaneous Civil and Criminal Laws Affecting LGBT Rights

A. DISCRIMINATION LAWS

1. 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, Florida Statutes. The federal anti-discrimination laws are administered and enforced by the Equal Employment Opportunity Commission (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. 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.

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 the same-sex as you 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, e.g., 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.

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 HMO, Section 627.429 and Section 641.3007 of the 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. Section 400.6095 of the Florida Statutes provides that hospice facilities shall make their services available to all terminally ill

"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

persons and their families without regard to sexual orientation, and Section 397.501 similarly provides that service providers may not deny an individual access to substance abuse services on the basis of sexual preference.

2. 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, Miami-Dade County, Leon County, Monroe County, Palm Beach County, Orlando, Tampa, Gainesville, Jacksonville, Miami Beach, Sarasota, West Palm Beach, St. Petersburg, and others. Additional information on ordinances existing as of the date of this publication are included in Section III, 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, for assistance in determining whether your municipality has a relevant ordinance.

3. Hate Crimes/Bullying Laws

There is a federal hate crimes law, the Matthew Shepard Act, which makes it a federal crime to commit a physical assault or property damage based on bias against someone because of their sexual orientation or gender identity, among other classifications. Florida has a hate crimes law that includes sexual orientation (but not gender identity). 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 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 treble 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 statute provides penalty enhancements for offenses under this statute and establishes civil remedies for victims. Florida law requires the state to collect and disseminate data on hate crimes based on sexual orientation.

"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**

As a direct result of Equality Florida's efforts, Florida protects 1.7 million students from bullying and harassment based on sexual orientation and 1.1 million of those are also protected from bullying and harassment based on gender identity and expression.

Florida also has an "anti-bullying" law that requires school districts to adopt and enforce strict policies against bullying. 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). Ironically, Florida law requires that school districts, if they provide instruction or course material on human sexuality,

teach "the benefits of monogamous heterosexual marriage." Section 1003.46, Florida Statutes.

B. PUBLIC/PRIVATE EMPLOYERS

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 Co. and Blue Cross Blue Shield of Florida. 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 potentially could afford you some relief.

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.

C. MARRIAGE/RELATIONSHIP RECOGNITION LAWS

Florida's Constitution (Article I) and Section 741.212 of the Florida Statutes effectively ban "gay marriage" by defining marriage as the legal union of only one man and one woman, and 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.

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.

Const. Article I, Section 27) These same laws 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 healthcare, 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.

If you are a gay couple, legally married in a state or country that performs such marriages, one significant issue that arises is the ability to file your federal income tax return as married even though the federal government refuses to acknowledge your marriage. Many tax advisers have warned same-sex married couples not to file as married (either jointly or separately) because of the possible imposition of penalties for doing so. Yet the federal return requires you to swear under penalties of perjury that all statements in the return are true. If you object to signing this statement on a return in which you have been forced by the federal government to lie about your marital status, there are some things you can do.

- You could file separately, but include an asterisk by the single box and a statement at the bottom of the form or on an attachment to the form indicating that you are only single as defined in the Defense of Marriage Act.
- You could file two single returns (including the attachment affirming the marriage) and then file an amended return, filing jointly. This option would avoid penalties because your original return would be filed according to the statute.
- You could submit two returns to the IRS, one filed jointly, showing the tax due on a joint return, and one filed as a single taxpayer, showing the tax due on a single return. Explain your constitutional and moral theory entitling you to file a joint return. Pay whatever amount is due on the single return and ask the IRS to choose which return to accept.

If you are concerned about your federal income tax filing status, 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.) Equality Florida also has a more detailed memorandum regarding this issue available upon request.

D. ADOPTION

On September 22nd, the Florida Third District Court of Appeal held as unconstitutional, a state law, that for more than 33 years had expressly forbid gay men and lesbians from becoming adoptive parents.

Both the Florida Department of Children and Families (“DCF”) and the Florida Attorney General declined to appeal the Third District’s decision in Gill to the Florida Supreme Court. As a result, the Third District decision is binding on every trial court in the State of Florida and though the statute (Florida Statutes Section 63.042(3)) remains on the books DCF announced that it had changed its forms and procedures to comply with the Third District decision, removing all references to sexual orientation.

The lawsuit centered around Martin Gill’s effort to adopt his foster sons and has paved the way for individuals to adopt regardless of sexual orientation. Because second parent adoptions 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 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).

1. [Fla. Dep’t of Children & Families v. In re: Matter of Adoption of: X.X.G & N.R.G., Case No. 3D08-3044 (Fla. 3d DCA Sept. 22, 2010)(referred to as the “Gill” case)].

E. ISSUES FACED BY TRANSGENDER INDIVIDUALS

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, employers will fire employees 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 often face is an inability to travel, especially if using commercial airlines. The Transportation Flight 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, however, 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.

1. Passports: 2010 State Department Policy Should Loosen Requirements

In June 2010, the State Department implemented a new policy for applicants seeking a gender change on their passports. The State Department no longer requires that an applicant has undergone sexual reassignment surgery. Instead, an applicant can submit a certification from a physician confirming that the applicant has undergone treatment for gender transition. The certification must include:

- Physician's full name;
- Physician's medical license or certificate number;
- Issuing state of medical license/certificate;
- 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 applicant 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 should 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.

2. Florida Driver's License, Identification Card, and Birth Certificates: Proof of Sex Reassignment Surgery Necessary for Change in Gender Designation

Florida allows for a change in sex designation on birth certificates, driver's licenses, or identification cards only if the applicant has undergone sex reassignment surgery. Section 382.016, Florida Statutes; Fla. Admin. Code Ann. R. 64V-1.003.

The applicant must provide:

- A sworn affidavit from the physician who performed 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 circumvent this law by establishing residency in one of the twenty-six states without the sex reassignment surgery requirement and having his or her gender designation changed there. When the individual moves back into the state of Florida, the changed records are transferred without any additional paperwork or requirements. Most individuals, however, are unable or do not wish to move to another state for this purpose.

3. The Federal "Real ID Act"

The Real ID Act was signed into law under President Bush in 2005, but has yet to go into effect. Pursuant to the Real ID Act, the state Departments of Motor Vehicles must maintain digital copies of the documents each person presents when establishing their identity to attain a driver's license or identification card. 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. The Real ID Act has yet to affect the procedures of state DMV's, but it is important to be aware of its likely future impact on privacy.

4. 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 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
- Equality Florida – step by step guide to changing name and gender on birth certificates, driver's licenses, social security cards, passports, and identity cards: <http://eqfl.org/issues/namechange.doc>
- Travel Tips for Transgender Individuals: <http://transequality.org/Issues/travel.html>

II. PLANNING FOR THE FUTURE

A. WILLS, TRUSTS, GIFTS AND ESTATE PLANNING

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, 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, 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 the "default" disposition of those assets upon death under existing law.

1. Wills

Why do I need a Will? – The law of Intestate Succession in Florida

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” (ie, 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 among many. 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 which 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, nevertheless many people wish to avoid it in any event.

According to Florida law, the property of a person who dies without a Will passes as follows:

IF DECEASED IS SURVIVED BY

**Spouse & No
Lineal Descendants:**

spouse receives entire estate

**Spouse & Lineal
Descendants:**

(who are also descendants
of spouse):

spouse gets the first \$60,000
of the intestate estate plus
½ the balance of the estate.
The rest, if any, to the descendants

(who are not descendants
of spouse):

½ of the intestate estate
to spouse and remainder to the
descendants

**Lineal Descendants
But No Spouse:**

estate distributed among
descendants as follows:

to decedent's lineal descendants
in equal shares; 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

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 kin 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. This 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 kin 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 adjudication 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 the greatest 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). As with guardians, personal representatives must be Florida residents, or financial institutions having trust powers in Florida, or, as to non-residents, the same limitations are as set forth for pre-need guardians discussed below. **Note that 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.)

Legal Requirements

To be valid, a will must meet certain requirements. The requirements vary from state to state. These are the requirements in Florida:

1. the maker (called the testator for a man, or testatrix for a woman) must be at least 18 years or an emancipated minor;
2. the testator must be of sound mind at the time the will is prepared;



3. the will must be **in writing (either typed or hand-written)**. It cannot be oral;
4. the will must be signed by the testator at the **end** of the will, and **in the presence of two witnesses**;
5. 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
6. 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 723.503, 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.

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 a magical “simple will” form is often shown to be 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.

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 often leaves your intentions somewhat unclear. The best way to cancel a will and the only valid way to alter your will is the execution of another will or separate written instrument, signed and witnessed. **Note: The same formalities required for the execution of a will are required for an instrument which revokes or alters a**

will. You should consult an attorney to obtain details about the most effective ways to revoke or alter your will.

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.

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, any 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.**

Making a Bequest to Equality Florida

Equality Florida relies on the generosity of its constituents to support its work. If you are interested in making a bequest to Equality Florida, please contact us and we will be happy to assist you. Suggested language for wills follows:

Specific Bequest

I devise and bequeath to Equality Florida, Inc., a Florida not-for-profit corporation, having its principal office at 2549 37th Avenue North, St. Petersburg, Florida 33713, the sum of \$_____ to be used for its general purposes.

Residual Bequest (Percentage/General Purposes)

I devise and bequeath to Equality Florida, Inc., a Florida not-for-profit corporation, having its principal office at 2549 37th Avenue North, St. Petersburg, Florida 33713, an amount which is _____% (_____ percent) of my residuary estate, to be used for its 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

Residual Bequest (Percentage/Endowment)

I devise and bequeath to Equality Florida, Inc., a Florida not-for-profit corporation, having its principal office at 2549 37th Avenue North, St. Petersburg, Florida 33713, 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.

2. Joint Ownership and Beneficiary Designations

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.

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 wary**. 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 (say, you wish to sell it and your partner does not) you will be stymied or 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.

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. If used wisely in conjunction with a will, however, joint ownership can be a useful legal device in helping distribute your estate after you die. **It is wise to consult an attorney.**

Beneficiary Designation

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 current and 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 predeceased 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 which allow beneficiary designations, increasingly bank accounts and brokerage accounts often 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 insure that they capture your current estate planning goals given the relative value of your assets and current situation.

Special Considerations Regarding Real Estate

As noted above generally, 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:

1. Upon your death title passes automatically and immediately to the surviving owner and does not pass through probate. Note, 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.
2. If the joint owner dies before you, you become the sole owner again since you are the surviving joint owner.
3. If the joint owner is living at the time of your death, he or she will be certain to get the property. For example, 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:

1. 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.
2. 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.
3. 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.

One frequently hears that 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 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. As of 2010, you can give up to \$1,000,000 during your lifetime, plus another unrestricted \$13,000 per year per person to anyone you want, without negative tax consequences. In other words, if the value of the interest in real estate exceeds \$13,000, or if you place restrictions on the \$13,000 gift, 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 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 that 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 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 that unmarried couples (including LGBT couples) that jointly own and reside at the same permanent Florida residence, but who jointly own other 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 regarding joint ownership of property as a means of avoiding probate, it is advisable to consult an attorney and tax professional, as applicable, to advise on the best approach to take, given your particular circumstances.

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 (for example, what percentage each 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 predeceases 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.

Bank and Brokerage Accounts, Pension Plans, IRAs 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.**

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. Note, 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.

3. Trusts

Basic Information About Trusts

A trust enables an individual to transfer his or her property to others via a legal document that is different from a will. Wills are only in effect after the death of the maker, 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 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. Note, 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.

Revocable Trusts (Living Trusts)

It has become very popular to encourage everyone to have a so-called “Living Trust” in addition to a will. 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.

Some, in their exuberance about Living Trusts, promote them 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 above, there are a number of 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; you will want also to consult with a lawyer to be certain that the document you sign is effective and carries out your wishes.

Other Trusts – for Minor Children, Disabled Persons, or Charitable Purposes

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, 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 like entities. These are just examples but offer important opportunities for you. A lawyer experienced in estate planning can guide you.

4. 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.

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 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 that 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.

5. Organizing Your Personal Records

Getting your financial and personal records in order will save 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 your income, for making investments, or for retirement and estate planning.



People are at a high risk of failing to meet their legal claims and responsibilities when their personal documents are not adequately maintained. Organizing your records can also alleviate your loved ones from bureaucratic burdens. During an emergency situation, your partner, a friend or relative caring for your health or legal affairs, will spend less time digging 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
- 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 record
- Religious affiliation, name of church or synagogue, and name of clergy (if desired)
- Living will, anatomical gifts
- Preferences or prearrangement for 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

Today, 5.7 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.

6. DOMESTIC PARTNERSHIP AGREEMENTS

A domestic partnership agreement is a contract between unmarried persons (not limited to same-sex couples) living together. A domestic partnership agreement expresses in a contract how 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 domestic partnership agreements include:

- Certainty as to the disposition of property of each partner during the partnership, as well as upon separation, disability or death;
- Reduced chance of litigation upon separation, disability or death;
- Clear understanding of the duties and rights of each partner both during and after the relationship;
- Documenting the parties' desire to be in a committed and equal partnership.

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 agreements. If the primary consideration for the agreement is not sexual intercourse, then the mere fact the parties are not married does not preclude them from contracting according to law for permanent sharing of and participating in one another's lives. For example, cohabiting parties may enter into a valid contract to purchase property with their joint or separate funds.

In *Posik v. Layton*, 695 So. 2d 759, 761 (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 has prohibited same-sex marriages and same-sex adoptions, “it has not prohibited this type of agreement.”

The agreement provided that, in consideration for on 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 party should fully disclose to the other their assets, debts and income. Domestic partnership agreements must be in writing and should be signed by both parties before two witnesses and a notary with the same formalities of a will. Each party to a domestic partnership agreement should be represented by independent counsel.

Contents of the Agreement

A partnership agreement should address obligations during the partnership as well as upon separation, disability or death. The agreement should identify each party’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 (e.g., mortgage, household expenses), support and division of assets and debts upon conclusion of the relationship and should provide for vacating, selling or otherwise disposing of the home in which the parties may have been residing together upon the termination of the parties’ relationship.

Obligations during the partnership

A domestic partnership agreement should include the date the relationship began and the names of the parties. The agreement should describe the financial arrangements during the partnership. For instance, how will living expenses be divided? The parties should also define how assets acquired during the partnership will be treated. If the parties have children or intend to have children (for example, through a legal out-of-state adoption that Florida would be required to recognize), then the parties 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 (see Family Law Form 12.995(a) and 12.995(b)).

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 will be 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, taxes) should also be discussed in the agreement as well as who will be responsible for payment.

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 or disposition 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 parties may wish to consider including 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.

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 cash contributions, i.e. one partner agrees to pay \$500 a month in exchange for utilities and rent.

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 in any event.



B. HEALTHCARE ADVANCED DIRECTIVES

Under current Florida law, 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 healthcare information in the event of an emergency or life-threatening condition. In the absence of written 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 issue 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.

An advanced directive may be revoked by a competent principal 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.

1. End of Life Decisions – 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 principal's physician to provide, withhold or withdraw life-prolonging procedures, or to designate another to make the treatment decision for him, 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 which 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):

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. A copy of the statutory form including the above language is attached (**Form A**).

Note that 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 life 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.

2. Designation of a 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 and has no right to obtain or provide healthcare 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.

Rights and 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.

What Events Trigger the Authority of the Surrogate

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.

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, this 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.

A form of Health Care Surrogate Designation, including the express right of visitation and HIPAA Release Authority, is attached (**Form B**).

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.

3. 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.

4. 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 (Florida Statutes, Section 709.08). Initially, they 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 and is of sound mind can serve as an attorney-in-fact under a durable power of attorney, as can any financial institution having a place of business in Florida and authorized to conduct trust business in the State.

Legal Requirements

Durable powers of attorney must be witnessed by two persons and also notarized 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 709.08 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 specifically among the 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 709.08(7)(b), Florida Statutes, for 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, do not name an attorney-in-fact in whom you do not have great confidence! Because of the wide and 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.

Revocation

You may revoke any durable power of attorney you make, but for the revocation to be effective, it must be in writing and must be served (by any form of mail that requires a signed receipt or by personal delivery in the same manner as service of process for a law suit) upon the attorney-in-fact and any third persons relying upon the 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. Frequently this is because they have their own forms that have been approved by their management or general counsel, and the "line" person you are dealing with is uncomfortable with anything other than the form in the corporate manual. 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. If they say "no" because it is not on their form, then sign their form as well – just be sure that it is consistent with the statutory form you signed (i.e., you do not want to name one attorney-in-fact on the statutory form and someone else on the bank form).

5. Declaration of a 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 preneed 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 preneed guardian is found to be unqualified to serve as a guardian.

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, a legally adopted child or adoptive parent of the person, a spouse, brother, sister, uncle, aunt, niece or nephew of the person, or someone related by lineal consanguinity 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.

Designating Pre-Need Guardians for Minor Children

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.

6. 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.

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.

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.

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.

Preneed contract: Florida law requires that all money paid for preplanned 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.

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.

7. 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, or by calling the Agency for Healthcare Administration at (888) 419-3456. A donor card can be found online at 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 on-line 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 on-line or via license renewal or otherwise, you may change your mind or the terms of your donation at any time.

C. CHILDREN

1. 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 discussed in the qualifications of pre-need guardians above.

2. 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.

3. 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, it is strongly advised that you consult an attorney to carry out your wishes.

4. Non-Biological Children

Florida's limitations on a gay parent adopting a child are discussed at the beginning of this Handbook. Obviously, however, a same-sex couple's family unit may include the individual partners' biological children. Granting the non-biological parent 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.

The partner's concerns with the 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 the biological parent's 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.

5. Other Practical Considerations

Because of the inability to adopt and marry, 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 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). Thus, a complete financial analysis may suggest that adoption in another state overall could be cost effective when you consider all the attendant factors, costs and risks.

III. REFERENCE AND REFERRAL INFORMATION

Guardianship

Guardianship, often 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. 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. Note, however, the restrictions on non-residents; 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. 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. 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>

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 for assistance. The following are places you may wish to contact.

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.

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				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	X	S	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									X	R,C			
Orange Co. Chapter 22	X	X	S	X	X			X	N			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	X				H			R			
Tallahassee	X	X	S	X	X			X	NE		X	X				H			R			
Tampa Chapter 12	X	X	S	X	X			X	N		X	X				H			R			
Tequesta [*]	X	X	G	X	X			X	NA		X	X			X	D		X	R	X		
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
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PLEASE VISIT: [HTTP://EQFL.ORG/ISSUES/HRO.HTML](http://eqfl.org/issues/hro.html)**

MUNICIPALITY ORDINANCE	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		
Broward Chapter 16-1/2	X	X	X		X						Public/ Private	http://library.municode.com/HTML/10288/level2/PTIICCOOR_CH16.5HURI.html
City of Miami City Charter "Citizen's Bill of Rights"									X		Public	http://library.municode.com/HTML/10933/level2/PI_SA.html#PI_SA_s52
Dunedin Chapter 42		X									Public/Private	http://library8.municode.com/default-test/home.htm?infobase=10668&doc_action=whatsnew
Gainesville Chapter 8	X	X	X	X	X						Private	http://library.municode.com/HTML/10819/level2/PTIICCOOR_CH8DI.html
Gulfport Chapter 26	X	X	X	X		X					Public/ Private	http://library8.municode.com/default-now/home.htm?infobase=10876&doc_action=whatsnew
Juno Beach Res. 2007-02, Art. I, Sect. 8	X										Public	http://www.juno-beach.fl.us/vertical/Sites/%7B88BB90E0-AD94-4F43-B7CD-B77B19081932%7D/uploads/%7BBC14B998-ADF9-4E2D-8828-2993B96C1C20%7D.PDF
Key West Chapter 38	X	X		X	X						Public/ Private	http://library.municode.com/HTML/10053/level2/SA_C38.html
Lake Worth Chapter 20	X	X	X	X	X						Public/Private	http://library.municode.com/HTML/10091/level2/PII_C20.html
Largo [*] Chapter 14	X			X							Public/Private	http://search.municode.com/html/13786/level1/PII.html
Leon Co. Chapter 9	X	X	X	X	X						Public/Private	http://library8.municode.com/default-now/home.htm?infobase=10008&doc_action=whatsnew
Miami Beach Chapter 62	X	X		X	X						Public/ Private	http://library.municode.com/HTML/13097/level2/SA_C62.html
Miami-Dade Co. Chapter 11A	X	X		X	X					X	Public (Dade Co. Empl. only) Private	http://library.municode.com/HTML/10620/level2/PTIICCOOR_CH11ADI.html
Monroe Co. Chapter 14	X	X	X	X	X						Public/ Private	http://library.municode.com/HTML/14298/level2/PTIGIOR_CH14HURE.html
Oakland Park Chapter 2	X										Public	http://library.municode.com/index.aspx?clientId=10938&stateId=9&stateName=Florida
Orange Co. Chapter 22				X	X						Public/ Private	http://library.municode.com/HTML/10182/level2/PTIICOROCO_CH22HURI.html
Orlando Chapter 57	X	X	X	X	X						Public/ Private	http://library.municode.com/HTML/13349/level2/TITICICO_CH57DI.html
Palm Beach Co. Chapter 15		X	X	X	X						Public/ Private	http://library8.municode.com/default-test/home.htm?infobase=10323&doc_action=whatsnew
Pinellas Co. Chapter 70	X	X	X	X							Public/Private	http://library.municode.com/HTML/10274/level2/PII_C70.html
Sarasota Chapter 18	X	X	X	X	X						Public/ Private	http://library8.municode.com/default-test/home.htm?infobase=11553&doc_action=whatsnew
St. Petersburg Chapter 15	X	X	X	X							Public/ Private	http://library.municode.com/HTML/11602/level2/PTIISTPECO_CH15HURI.html
Tallahassee	X	X	X	X							Public/Private	http://library.municode.com/HTML/19980/level2/PTIICOGIOR_CH11HURI.html
Tampa Chapter 12	X	X	X	X							Public/ Private	http://library.municode.com/HTML/10132/level2/CODE_C12.html
Tequesta [*]	X										Public	http://library8.municode.com/default-test/home.htm?infobase=13868&doc_action=whatsnew
West Palm Beach Chapter 42	X	X		X	X						Public/ Private	http://library.municode.com/HTML/10017/level2/PTIICCOOR_CH42HURE.html
Wilton Manors Chapter 2 Sec. 269-272	X						X	X			Public	http://library8.municode.com/default-test/home.htm?infobase=11820&doc_action=whatsnew

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IV. 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.

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).



*Special thanks to all those at Carlton Fields, P.A.
and at Equality Florida, including its volunteer advisors,
who contributed to the drafting and editing of this handbook.*



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 when planning your estate. If you would like more information regarding planned giving, please contact Nadine Smith at 813-870-EQFL (3735).

www.eqfl.org