

LOVE AND ?
CHANGES IN ESTATE AND DISABILITY PLANNING
FOR SAME-SEX COUPLES
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I. OVERVIEW OF THE LGBT POPULATION

A. Introduction

The U.S. Census Bureau reported that the total population of the U.S. was 281,421,906 in 2000. Estimates of the numbers of lesbian, gay, bisexual, and transgender (LGBT) people in the U.S. range from 2% (or 5,628,438) to 10% (or 28,142,191) of the population. Estimates differ because of the lack of reliable data and the variety of definitions that are used.

1. The LGBT Aging Population is Growing. The U.S. Administration on Aging (AoA) published a fact sheet on LGBT Older Persons in May 2001 as part of a series entitled, "The Many Faces of Aging." The fact sheet stated that there were an estimated 1,750,000 to 3,500,000 LGBT Americans aged 60 and older, and that the number was expected to increase.¹

2. Many LGBT People Are Part of Same-Sex Couples. According to studies done in California and other states, 30% to 45% of gay men and 50% to 60% of lesbians are in relationships and living together. A 2007 market research report by Community Marketing, Inc., placed the percentage of gay men in couples at 46.3% and the percentage of lesbians in couples at 64.5%. The approximately 1,200,000 people who responded that they were living as part of an unmarried same-sex couple in the 2000 U.S. Census came from all 50 states, and almost all of the counties. However, the highest percentages of same-sex couples were concentrated in metropolitan areas on the east and west coasts.

3. Significant Numbers of LGBT People are Parents. The number of minor children living with at least one gay or lesbian parent in the United States has been estimated at between 6,000,000 and 14,000,000. The minor children are biological children from prior relationships, alternative insemination, or surrogate mothers; adopted children; stepchildren; and foster children.

¹The fact sheet was removed from the Administration on Aging web site, apparently in 2004. It is still available on the American Society on Aging web site, www.asaging.org/index.cfm. Click on "Constituent Groups," then on "LGAIN," then on "Recommended Resources," for a list of resources that includes the AoA fact sheet.

B. History of Violence and Prejudice

There have been major changes in how mainstream society in the U.S. views LGBT people and many LGBT people have "come out" by identifying themselves to family, friends, and associates. Continuing concerns about violence and prejudice can cause LGBT people to be cautious about revealing information about their sexual orientation and their relationships.

1. Government Action in Oregon.² Although Oregon is generally viewed as one of the more open and tolerant states, it has a history of institutionalized prejudice against LGBT people. Between 1913 and 1953, castrations, vasectomies, ovariectomies, and salpingectomies were performed on hundreds of gay men and lesbians who had been convicted of sodomy or who were determined to be "moral degenerates or sexual perverts" by the Board of Eugenics under Oregon's involuntary sterilization laws. LGBT people could be denied custody of their children or subjected to demeaning restrictions on custody if their sexual orientation became known. *See, for example, A. v. A.*, 15 Or App 353 (1973), *rev den* (1974). Oregon criminalized most gay and lesbian sexual activity until 1971, when the legislature repealed the state's consensual sodomy law as part of a comprehensive revision of the criminal code.

2. Government Action in the United States.

a. In the United States, sodomy laws continued to be selectively enforced against LGBT people until the remaining state laws that prohibited private, consensual, homosexual activity were finally struck down by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003).

b. Up through the 1970s, police would raid lesbian and gay bars, claiming that they were looking for violations of liquor laws. Bar patrons would be arrested and taken to jail and their names released to the press whether or not charges were filed. The annual Gay Pride celebrations commemorate the night in June 1969 when the gay men and lesbians at the Stonewall Inn in Greenwich Village, New York, fought back during a police raid.

c. One purpose of the military's "Don't Ask, Don't Tell" policy, codified at 10 USC §654, was to end the prior practice of periodic investigations and interrogations aimed at discovering and humiliating gay men and lesbians, who would then be discharged as "undesirable." However, the law specifically permits military authorities to discharge a member of the armed forces who engages in homosexual acts or who states that he or she is homosexual or bisexual or who has married or attempted to marry a member of the same sex.

3. Government Action Elsewhere. Many governments have classified homosexuality as a crime at different points in history. Records from the Middle Ages in Europe depict gay men being burned alive. Although the Nazis' primary targets were Jewish people, they rounded up thousands of gay men and sent them to the concentration camps in the 1930s and 1940s. Homosexual activity remains punishable by death in a small number of countries today.

²The information about Oregon's history comes from an article by George Painter, "The Sensibilities of Our Forefathers," at www.sodomylaws.org/sensibilities/oregon.htm.

4. Aversion Therapy. Psychiatrists have used various methods to try to change LGBT people into heterosexuals. In the 1950s and 1960s, the most common treatment was aversion therapy, in which nausea-producing drugs or electric shocks were administered to stop patients from responding to members of the same sex. For some, psychiatric treatment was part of a criminal sentence. Others were institutionalized by their families or committed by judges who equated homosexuality with mental illness. After being pushed to review the scientific evidence, the Board of Trustees of the American Psychiatric Association removed homosexuality from the list of mental disorders in the Diagnostic and Statistical Manual (DSM) in 1973.

5. Hate Crimes. The term "hate crimes" came into general use in the 1980s when Skinheads and others with similar views committed a series of bias crimes against African-American, Jewish, and LGBT people. The crimes ranged from vandalism and intimidation to assault, kidnapping, and murder. LGBT victims of hate crimes in Oregon include Hattie Mae Cohens and Brian Mock, who died when their house in Salem was firebombed during the Measure 9 campaign in September 1992, and Michelle Abdill and Roxanne Ellis, who were kidnapped, robbed, and killed, in Medford in 1995.

6. Continuing Stigmatization. Although prejudice based on sexual orientation has decreased, LGBT people still lose jobs and housing, face barriers in getting access to services, and experience harassment and intimidation due to their sexual orientation. LGBT teenagers, many of whom were kicked out by their families, make up 25% to 40% of the homeless youth population in large cities.

II. ADDRESSING CONCERNS OF LGBT CLIENTS

A. Identifying LGBT Clients. Most LGBT clients do not announce their sexual orientation when they make appointments, and most are not easily identifiable. Some LGBT clients will be open about their sexual orientation and their relationships after they are comfortable with the attorney, and some will not. The attorney should respect the LGBT client's choice about disclosure.

1. Intake Process and Materials. Many intake forms, particularly those used in estate planning, focus on married couples in a way that excludes LGBT clients. For example, a LGBT client who is part of a same-sex couple and who has children would find it extremely difficult (and probably offensive) to try to fill out the Confidential Family Information Sheet that the Professional Liability Fund provides as a practice aid for estate planning. Information sheets and other forms sent to clients should be worded neutrally to give the client the opportunity to identify a partner, if he or she has one. Including a blank for the client to fill in his or her marital status and using inclusive language, such as "spouse/partner" and "prenuptial agreement or domestic partnership agreement" can communicate that the lawyer is open to working with LGBT clients while eliciting information that is crucial for planning purposes.

Practice Tip: It is common for LGBT clients who are in committed relationships to refer

to each other as "my partner." However, some LGBT clients may use other terms, including friend, husband, or wife, or may choose not to name or claim a relationship. The practitioner should ask open-ended questions that give the client the opportunity to talk about his or her important relationships. During the interview, be alert for cues about familial relationships and follow up on the legal status of any children who are mentioned.

2. Considerations about Non-Clients. Be aware that other people involved in a case may be LGBT people, and consider how that may affect the legal work to be done. For example, notice of time for filing objections to a petition for guardianship or conservatorship must be served on "***[a]ny person who is cohabiting with the respondent and who is interested in the affairs or welfare of the respondent," ORS 125.060(2)(d), which includes a same-sex partner. An estate planning client may refer to the children born to the partner of an LGBT son or daughter as his or her grandchildren and may want to include them as beneficiaries. An adult child of a same-sex couple may need to make a will in order to protect both of his or her parents.

B. Concerns of Aging LGBT Clients. Aging LGBT clients face many of the same issues as their heterosexual peers, plus some different ones. The MetLife Mature Market Institute completed a study of lesbian and gay baby boomers, "Out and Aging," in November 2006³. Some of the interesting findings:

1. One quarter reported providing regular care for an adult friend or relative, which is higher than the national average of 21%;
2. More than one quarter had significant concerns about discriminatory treatment by healthcare professionals as they aged;
3. Over half had not completed wills or advance directives about health care, although almost three quarters had discussed their wishes about end-of-life care, often with a domestic partner;
4. Like most people in the United States, close to three quarters said that they wanted to die in their own homes, either with or without hospice support; and
5. About half believed that they would be able to pay for long-term care with Medicare or health insurance.

III. IMPACT OF HOUSE BILL 2007

The full impact of House Bill 2007 will not be known for some time. The analyses that follow are based on opinions shared by a number of thoughtful practitioners.

A. Probate and Trust Administration

1. Intestacy. House Bill 2007 gives a registered domestic partner the same rights as a spouse under the laws regarding intestacy, ORS 112.015 *et seq.*

³The study is available on the MetLife web site, www.metlife.com. To get to a list of the studies done by the institute, click on "Brokers and Consultants" on the toolbar at the top of the page, then on MetLife Mature Market Institute at the left of the next page.

2. Preference for Personal Representative. The surviving registered domestic partner would be entitled to the same preference that a surviving spouse would receive for being appointed as personal representative of the deceased partner's estate. ORS 113.085(1)(b).

3. Revocation of Will by Later Registration. A subsequent domestic partnership registration under House Bill 2007, like a subsequent marriage, will revoke a prior will unless the will contains language showing the testator's intent that the will not be revoked, in accordance with ORS 112.305. Similarly, a subsequent dissolution of a domestic partnership will operate like a divorce to revoke the provisions of an earlier will that benefitted the former partner, unless the will demonstrates a different intent. ORS 112.315.

4. Impact of Later Registration on Trust. Unlike a will, a revocable living trust is not automatically revoked by a subsequent marriage. ORS 130.530. The later registration of a domestic partnership under House Bill 2007 would also not revoke the revocable living trust. A subsequent dissolution of a domestic partnership will revoke all provisions of the trust in favor of the former domestic partner as well as any provision naming the former partner as trustee unless the terms of the trust provide otherwise. ORS 130.535.

5. Effect of Foreign Marriage, Civil Union, or Domestic Partnership Unclear. The extent to which Oregon can and will recognize marriages, civil unions, and domestic partnerships that same-sex couples enter into in other states and other countries is unknown. It is also unclear how any community property arrangements created by a same-sex couple under the laws of another state will be treated. Another question to be resolved is whether a same-sex couple that has entered into a marriage, civil union, or domestic partnership with each other in another state or country will be permitted to register as domestic partners in Oregon.

B. Estate Planning

1. Defining Family. Practitioners who represent same-sex couples (and other unmarried couples) already adapt the definition of family in their wills and revocable living trusts to include the domestic partner. If a couple has entered into a legally recognized relationship in Oregon or elsewhere, that information should be added to the family definition. For example:

1.1 DOMESTIC PARTNER. My domestic partner is [PARTNER NAME], and all references to "my domestic partner" are to [him/her]. I intend to provide generously for my domestic partner by this Will. My domestic partner and I registered as domestic partners with the State of Oregon on [DATE].

2. Identifying Children. Children who are an important part of the LGBT client's family should be identified, whether or not the client is a legally recognized parent. If the client or the same-sex couple has children, or if the client's partner has children, those children should be identified in the family section. Naming or describing the intended beneficiaries can avoid a variety of problems, including the ones that would arise in a jurisdiction that declines to

recognize Oregon’s domestic partnership law for inheritance purposes. The definition of “my children” may need to be adapted, depending on the facts and the client’s estate plan. For example:

1.2 DESCENDANTS. I am in the process of adopting a child, and I may adopt additional children in the future. References to “my children” include any child later born to or adopted by me.

Or:

1.2 DESCENDANTS. My domestic partner has one child:

[CHILD NAME], born [DATE].

I plan to adopt [CHILD NAME]. My domestic partner and I may have other children in the future, and I intend to benefit them by this Will. References to "my child" or “my children" include any child later born to or adopted by me and any child later born to or adopted by [PARTNER NAME].

Or:

1.2 OTHER FAMILY. My domestic partner has one child [CHILD NAME] of [CITY, STATE], whom I consider to be my child, and three grandchildren, whom I consider to be my grandchildren:

[GRANDCHILD 1 NAME], born [DATE];
[GRANDCHILD 2 NAME], born [DATE]; and
[GRANDCHILD 3 NAME], born [DATE].

References to “my grandchildren” include any grandchild later born to or adopted by [CHILD NAME].

3. Minor Children. House Bill 2007 gives both registered domestic partners legal parent status for a child born to one of them after the registration. Because a LGBT client cannot depend on another jurisdiction recognizing an Oregon domestic partnership registration, the recommended practice will continue to be a second parent adoption. Wills or other documents nominating the domestic partner as the guardian and conservator for the same-sex couple’s minor children and naming a trustee will continue to be important for the same reason.

4. Probate Avoidance Techniques.

a. Many same-sex couples own real property with right of survivorship using the Ericksen deed language from ORS 93.180. House Bill 2007 allows registered domestic partners to create a tenancy by the entirety in real property under ORS 108.090, which adds some

protections from creditors. However, the decision about the type of ownership, whether tenancy-in-common, Ericksen survivorship deed, or tenancy by the entireties, will still depend on a number of factors, including estate planning goals and estate tax considerations.

Practice Tip: Same-sex couples, whether they are registered domestic partners or not, should be advised to consult a tax professional before changing the ownership of property. If one partner adds the other partner's name to a deed or if one partner has made a bigger contribution to the purchase of the property, there may be a gift above the annual exclusion amount and a federal gift tax return (Form 709) may be required.

b. Oregon law creates a rebuttable presumption that a joint bank or credit union account is owned with right of survivorship. ORS 708A.470; ORS 723.480. House Bill 2007 does not change that presumption.

c. The ability to designate a beneficiary for an asset such as a life insurance policy or an account is not affected by House Bill 2007. Pension, retirement, and benefit plans that qualify for favorable federal tax treatment and plans regulated under ERISA are specifically exempted from House Bill 2007.

d. LGBT people who want to protect their privacy by avoiding probate or whose families of origin do not approve of their relationships may choose revocable living trusts as their primary estate planning tools.

5. Disposition of Remains. House Bill 2007 gives a surviving registered domestic partner the same priority as a surviving spouse in determining the disposition of remains under ORS 97.130(2). Since the registered domestic partnership may not be recognized if the death occurs outside of Oregon, it still makes sense for all same-sex couples to be given the option of completing a written Disposition of Remains instruction using the form found at ORS 97.130(7).

C. PLANNING FOR DISABILITY

1. Advance Directive for Health Care. Under House Bill 2007, a registered domestic partner has the same priority as a spouse to make end-of-life decisions in the absence of an advance directive for health care and a court-appointed guardian. *See* ORS 127.635(2). The decision making authority is limited and does not cover most of the health care issues that need to be dealt with when someone is incapable of making his or her own decisions. Those issues include access to information, obtaining care and treatment, and arranging for placement in a care facility. Using the Advance Directive for Health Care to appoint a health care representative who can make the full range of health care decisions will remain an important tool for all clients, including registered domestic partners and married couples.

2. Financial Power of Attorney. Spouses do not have any statutory authority to make financial decisions for each other, so financial powers of attorney for registered domestic partners are not directly affected by House Bill 2007. *See* ORS 108.100.

3. Guardianship and Conservatorship. A registered domestic partner will have the same statutory preference for appointment as a guardian for an incapacitated partner and as a conservator for a financial incapable partner as a spouse would have. ORS 125.200. Another jurisdiction may not recognize Oregon's domestic partnership law if the need for a guardianship or a conservatorship arises outside of the state, so making a written nomination of a guardian and a conservator as permitted by ORS 125.200 will still be important. Using advance directives for health care and financial powers of attorney to reduce the risk that a guardianship or a conservatorship will be needed remain useful strategies.

4. Health Care Costs. Registered domestic partners, like spouses, will be responsible for each other's necessary expenses and the expenses of their minor children, including stepchildren. *See* ORS 108.040 and ORS 108.045. Medical care, particularly long-term care for someone who has multiple chronic illnesses or disabilities, is increasingly expensive. Medicaid is the main source for assistance in paying for long term care for people who do not have private long term care insurance and who have limited financial resources. Since the Medicaid program is governed by federal law, it appears that registered domestic partners will not be subject to deeming of resources that applies to married couples. However, they also will not be entitled to the spousal impoverishment protections under the Medicaid laws and regulations. That means that an ill domestic partner must spend down the countable resources that he or she owns to the \$2,000 resource limit before qualifying for Medicaid assistance. A registered domestic partner who transfers an asset to his or her partner for less than fair market value within five years of applying for Medicaid assistance for long term care will be ineligible for benefits.

PRACTICE TIP: A domestic partnership agreement can be helpful in determining the parties' original intent with regarding to combining assets or keeping assets separate in the event that the domestic partnership needs to be dissolved for any reason.

D. TAXES

1. Income Tax. Beginning in 2009 (for tax year 2008), registered domestic partners will file Oregon income tax returns jointly or as married, filing separately. Since House Bill 2007 cannot change federal law, the domestic partners will file federal income tax returns as single individuals. Practitioners currently vary in their opinions about whether registered domestic partners should include an explanation of their registered status on their federal returns. Based on the experience in Massachusetts and New Jersey, the registered domestic partners will have to prepare an unfiled or "dummy" federal joint return in order to get the information needed for the Oregon joint return.

2. Oregon Inheritance Tax. After House Bill 2007 goes into effect, the registered domestic partner deduction will be the same as the marital deduction for Oregon inheritance tax purposes, and the personal representative will be able to make the QTIP election for qualified property.

3. Federal Estate and Gift Tax. House Bill 2007 has no impact on the federal gift tax and no impact on the federal estate tax.

E. REGISTRATION RISKS

Certain people may face significant problems under federal law if they register as part of a domestic partnership in Oregon. They include immigrants in the United States and members of the armed forces. LGBT clients in those categories should be advised to consult attorneys with expertise in the relevant areas before they register as domestic partners.

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