



LGBT OLDER ADULTS AND ESTATE TAX AND INHERITANCE

September 2010



ISSUE SUMMARY

Unlike their heterosexual counterparts, unless a lesbian, gay, bisexual or transgender (LGBT) elder has specific legal documents in place upon their death, state laws generally hand over financial decision-making and inheritance to spouses or blood relatives rather than domestic partners or families of choice. This means that surviving LGBT partners or other loved ones can be totally shut out of an inheritance, resulting in the loss of critical retirement savings, forfeiture of a family home, or impoverishment. Additionally, even when a surviving partner does inherit a deceased loved one's assets, inequitable tax treatment of same-sex couples can mean paying 45% in taxes on an inheritance that a surviving heterosexual spouse would inherit tax-free.

LGBT ELDERS OFTEN ARE DENIED, OR FACE EXTRA TAXES ON, AN INHERITANCE

Inheritance Laws

The death of a life partner is devastating for all elders. However, heterosexual spouses take for granted that, when one person dies, the couple's relationship and the life they built together will be both recognized and valued under the law, and their life savings and family home will pass to the surviving spouse. Same-sex couples have no such assurance.

In most cases, same-sex couples must put in place a series of specific and often expensive legal arrangements that attempt to ensure that financial decision-making and one's inheritance will pass to a partner. Common documents that specify inheritance include a will, a revocable living trust (which is more difficult to contest than a will), and a pour-over will (which ensures that anything left out of the living trust is included). A financial power of attorney designates someone who can act as a financial agent in case of incapacitation or death. Unfortunately, many elders are not aware of the need for these documents or do not have the means to seek professional help, and might end up without the proper legal documents (or with documents that are improperly executed).

Legal Documents Can Cost LGBT Older Adults Thousands

A recent *New York Times* analysis estimated that gay couples might spend "\$5,500 more than their heterosexual counterparts on their additional paperwork," including a revocable living trust, a pour-over will, financial powers of attorney, health care proxies, living wills and a domestic partnership agreement.¹

Real-life costs are often much higher. Legal documents for Illinois couple Stephen Lev and Chad Feltrin included four powers of attorney (two each); two privacy waivers that allow each access to the other's medical records; two wills; and a trust for the property they own together. Similarly, Howard Wax and Robert Pooley, Jr., who have been together nine years, paid \$10,000 for an attorney to help them draw up wills, trusts, and financial and medical powers of attorney that together approximated some of the legal protections of marriage.

"I feel at least like we're secure now," said Wax. "It's not perfect, but we're OK."²

Even with legal documents in place, LGBT elders, whether single or coupled, may face legal challenges from biological family members, incurring additional expense.

Without these documents, state laws direct who will inherit property. Rules vary by state but generally prioritize spouses and, secondarily, legal family members. This means a life partner or members of a family of choice can be completely denied shared retirement savings and/or the family home. Same-sex couples who can legally marry in their state have the same right to inherit

¹ Tara Bernard and Ron Lieber, "The High Price of Being a Gay Couple," *New York Times*, October 2, 2009.
² "\$10,000 for Peace of Mind: Same-sex Couples Find Replicating Legal Protections of Marriage Costly," McClatchy-Tribune News Service, January 21, 2010, drawn from: http://www.cleveland.com/nation/index.ssf/2010/01/10000_for_peace_of_mind_same-s.html.

Survivor Challenged for Home and Assets of Partner of 28 Years

For 28 years, Frank Vasquez and Robert Schwerzler shared a life together in rural Washington state, including a home, business and other property. When Schwerzler died suddenly, leaving all of the couple's property titled only in his name and no legal documents stipulating his wishes, Vasquez was left with no claim to the assets they had accumulated over the years.

Schwerzler's elderly siblings — his legal heirs — demanded that Vasquez move out of the house and turn over the business and all the couple's other assets to them, contending that Schwerzler had not been gay and that Vasquez had been merely a boarder taking advantage of Schwerzler's generosity. After a series of trials and legal appeals, the dispute was settled, with Vasquez retaining the ability to stay in his home but receiving no financial assets for his ongoing living expenses. He therefore ended up with only a small portion of what he would have received had Washington's inheritance laws automatically recognized same-sex couples.³

AP Photo/Lauren McFalls



Terry Barnett, the attorney for Frank Vasquez whose long-time companion died without a will, leaves the podium after presenting arguments to the state Supreme Court Tuesday, Feb. 13, 2001 in Olympia, Washington.

as heterosexual couples, and a few states, such as Colorado, provide mechanisms for domestic partners to designate each other to inherit property in the absence of a will. However, most state laws do not recognize domestic partner relationships.

LGBT legal services organizations have collected many stories of surviving partners of long-term same-sex relationships losing their homes and life savings to hostile or acquisitive members of the deceased partner's family. Additionally, single LGBT elders who are estranged from their biological families might end up unintentionally leaving their life savings to relatives who disparaged them, rather than to loved ones, close friends or trusted caregivers.

Estate Taxes

Unlike a heterosexual spouse, a surviving LGBT partner who does inherit an estate may have to pay an estate tax. As of this writing, federal estate tax law continues this disparity. The current law expires in 2010, eliminating all federal estate taxes at the present time. However, unless Congress acts, estates over \$1 million in assets will be subject to a 45% tax as of 2011.

While only a small fraction of all estates are affected by the estate tax, the burden can be especially heavy on more affluent same-sex couples. The federal government allows a surviving heterosexual spouse to inherit all of the couple's assets without incurring any tax penalty. By contrast, a same-sex partner pays taxes on any inheritance over the federal exemption limit. The 2011 exemption limit of \$1 million per individual will affect any same-sex couple with more than \$2 million in joint assets (home values are included in the estate valuation). UCLA's Williams Institute estimates that, in 2011, same-sex couples affected by estate taxes will lose an average of \$1.1 million per couple due to inequitable laws.⁴

In addition to the federal estate tax, 23 states and the District of Columbia collect estate and/or inheritance taxes.⁵ In all these states, transfers of assets to a legal spouse are exempt from the tax—and in some states, transfers to children and close relatives are also exempt.⁶ Some of these states, because they recognize same-sex marriage or grant domestic partner benefits, treat same-sex couples the same as heterosexual couples. Other states treat same-sex couples differently, and while most of this inequitable treatment only affects high net worth same-sex

³ Excerpted/adapted from Lambda Legal at <http://www.lambdalegal.org/in-court/cases/vasquez-v-hawthorne.html>

⁴ Michael D. Steinberger, "Federal Estate Tax Disadvantages for Same-Sex Couples," Williams Institute, March 2009. This report notes that same-sex couples are also "excluded from Family-owned Farm and Closely Held Business Provisions in the estate tax, further limiting their ability to transfer assets to their children." The discussion of this provision is beyond the scope of this report.

⁵ An inheritance tax is an assessment made on the portion of an estate received by an individual (e.g., John inherits \$75,000 and must pay tax on it). An estate tax is levied on an entire estate before it is distributed to individuals (e.g., George leaves an estate of \$500,000. The state taxes this estate before distributing the remaining funds). As of 2009, the District of Columbia and the following states impose a separate state estate tax: Connecticut, Delaware, Illinois, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Vermont and Washington. The following states collect a state inheritance tax: Indiana, Iowa, Kentucky, Maryland, Nebraska, New Jersey and Pennsylvania. (Note that Maryland and New Jersey collect both state inheritance taxes and state estate taxes.) <http://wills.about.com/od/understandingestatetaxes/tp/estateinheritancedeath.htm>

⁶ Retirementliving.com, <http://www.retirementliving.com/RLtaxes.html>

couples, some states tax much smaller estates and inheritance amounts. See *Table 1*. For example, Ohio taxes estates over \$338,333 and Pennsylvania has a 4.5%-15% inheritance tax on all estate transfers between legal strangers,⁷ meaning a surviving same-sex partner could end up having to sell the home to pay the estate or inheritance tax.

**Table 1: Worst States for Same-Sex Couples
Passing on an Estate⁸**

State	Estate Tax Limit	Inheritance Tax
Indiana	N/A	1% to 20%
Kansas	\$1 million	N/A
Kentucky	N/A	4% to 16%
Minnesota	\$1 million	N/A
Nebraska	N/A	1% to 18%
New York	\$1 million	N/A
Ohio	\$338,333	N/A
Oregon	\$1 million	N/A
Pennsylvania	N/A	4.5% to 15%
Rhode Island	\$675,000	N/A
Tennessee	\$1 million	N/A

POLICY SOLUTIONS

Marriage for same-sex couples would solve both the issue of inheritance and the unfair taxation of estates passed between LGBT partners (as well as provide older same-sex couples with access to critical safety net programs). Congress must repeal the Defense of Marriage Act (DOMA) and states must establish marriage for all couples.

However, barring full marriage equality, states can pass more inclusive default intestacy (inheritance) laws that recognize domestic partners, or create mechanisms that make it easier to designate a domestic partner or other loved one for inheritance, such as the designated beneficiary registry in Colorado. This would also protect a broad range of unmarried elders, such as two siblings or close friends who live together and are financially interdependent. Finally, when a same-sex or domestic partner does inherit an estate, states can eliminate their estate and inheritance tax for such partners.

Federal law does not govern issues of inheritance, but is relevant for the purposes of federal estate tax. Since the federal government does not recognize same-sex marriages under DOMA,⁹ even the small percentage of same-sex couples who can legally marry are treated as strangers for the purposes of federal estate tax. Barring full marriage equality, the federal government could address this unfair taxation with legislation that makes married same-sex couples, “permanent partners,” “domestic partners” or those in “civil unions” exempt from estate taxes.¹⁰

Finally, advocates and service organizations can provide education, tools and legal services to help LGBT elders get legal documents in place. Note however that these documents do not provide fail-safe or comprehensive protection, and would not, for example, affect estate taxes levied on a surviving LGBT partner.

⁷ As of 2009, the District of Columbia, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Oregon, Rhode Island and Tennessee all have estate taxes at or below \$1 million, and therefore, would have the greatest potential adverse consequence for LGBT elders bequeathing assets. See <http://wills.about.com/od/stateestatetaxes/a/stateestatetaxchart.htm>. States such as Iowa provide equal treatment for married same-sex couples, but still tax gifts to families of choice at exemption levels lower than most other states. As of 2009, Indiana, Iowa, Kentucky, Maryland, Nebraska, New Jersey and Pennsylvania collect a state inheritance tax. Of these, all states exempt transfers between spouses, while only New Jersey and Maryland exempt transfers between same-sex partners. <http://wills.about.com/od/stateestatetaxes/a/inheritancetaxchart.htm>

⁸ This list does not include the District of Columbia, Iowa, Maine, Maryland, Massachusetts and New Jersey, which have various lower-limit estate and inheritance taxes, but exempt same-sex married couples and/or domestic partners.

⁹ Note that on July 8, 2010, the U.S. District Court of Massachusetts ruled DOMA unconstitutional in its lack of recognition of same-sex couples for the purposes of Social Security benefits, federal employee benefits and tax returns (*Gill v. The Office of Personnel Management*). At time of writing, it is unclear how this decision will affect other aspects of DOMA. Additionally, the case is expected to be appealed.

¹⁰ This could be done, for example, by creating a unique definition of domestic partner for this act for which any same-sex couple would qualify and/or by recognizing formalized unions in other states (domestic partnerships, civil unions, marriages) as domestic partners for the purposes of estate taxes.

ABOUT THIS BRIEF

This is one of a series of issue briefs based on content from *Improving the Lives of LGBT Older Adults*, a report which provides an in-depth examination of the issues facing LGBT elders, and potential solutions for improving their lives. For more information, visit www.lgbtmap.org or www.sageusa.org.



movement advancement project ▶



2215 Market St. • Denver, CO 80205
www.lgbtmap.org

305 7th Avenue, 6th Floor • New York, NY 10001
www.sageusa.org



1333 H Street NW, 10th Floor • Washington DC, 20005
www.americanprogress.org