

Probate and Estate Planning Methods Mistakes and Myths

How LGBT Community Members Can Protect Themselves

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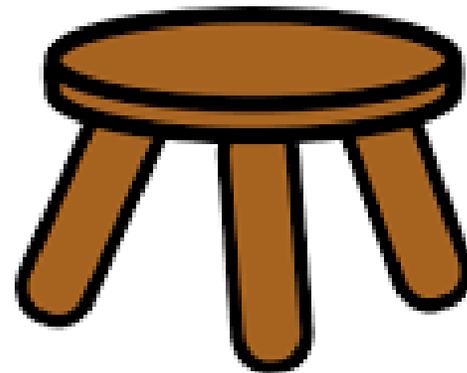
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The 3 Legs of the Stool

- The 3 most basic items for good life and estate planning in Michigan are:
 - --Durable Power of Attorney for Finances
 - --Designation of Patient Advocate (Medical Power of Attorney)
 - --Will
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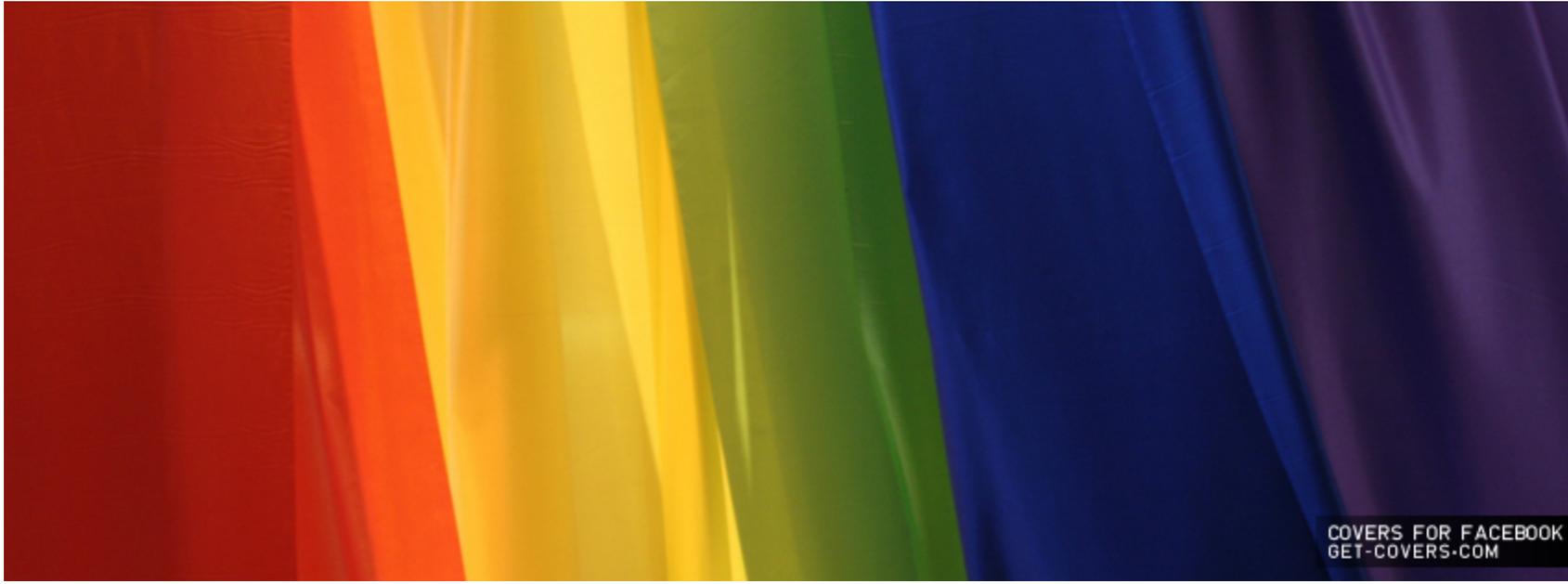


Additional Planning Documents and Ideas for the Community

- --HIPAA forms (see: <http://health.state.tn.us/hipaa/>)
- --Real Estate Sharing or Partnership or Buy Sell Agreements
- --Trust or Trusts
- --DNR
- --Funeral Arrangements—Pre Paid/Cremation/Body Donation?

Default Arrangements Without Planning





Non Traditional Families

Durable Power of Attorney

Power of Attorney

A Power of Attorney lets a Principal select an Agent to act on the Principal's behalf

If Oprah can have an agent, why not you?

Typically involves only the business affairs of life—finances, contracts, etc.

Under common law, an agent could only act if the principal could act

DURABLE language extends the usefulness of the document—agents can act when the principal, though alive, can not

Powerful documents, choose wisely your agent

Third party resistance at times

Michigan Designation of Patient Advocate Medical Power of Attorney

If I End Up On Life Support, My Family Knows The Type Of Long, Protracted
Legal Battle I Would Want

- **Feb 25, 2015** As one can only imagine from 'The Onion'

Terri Schiavo case 1990-2005 (approx. age 27-41)

Karen Ann Quinlan 1975-1985 (approx. age 21-31)

In re Martin, 450 Mich. 204, 538 N.W.2d 399 (1995) (approx. Age 41-48)

When you are not feeling in the pink—a designation of patient advocate (medical power of attorney) is helpful, particularly when two physicians or health care providers think you are unable to participate in decisions regarding your medical or mental health.

The patient's attending physician and another physician or licensed psychologist shall determine upon examination of the patient whether the patient is unable to participate in medical treatment decisions, and shall put the determination in writing.

By drafting/creating a designation of patient advocate, and naming someone to speak when you cannot, you put your care decisions in the hands of someone **you** select, and likely avoid a trip to the Probate Court.

One of the few internet forms to trust?

- The Michigan Designation of Patient Advocate form
- The state law lays out the requirements in fairly strict form
- MCL 700.5506 *et seq*
- <http://www.legislature.mi.gov/documents/publications/peaceofmind.pdf>
- http://www.michiganlegalaid.org/library_client/resource.2005-05-29.1117425939752/file0/at_download

Will

- A will is, simply the instructions we leave to those left behind as to what to do with our property; a will can also provide ideas about other wishes like, naming a guardian for a minor child, or making funeral arrangements, or even arranging care for pets.
- A will is a document, and under state law, various formalities are required for a will to be effective. Michigan allows holographic wills (will handwritten by the testator/testatrix) if they are signed and dated at the end of the will.

Will – and Probate Estate

- A will controls your “probate estate” and your probate estate consists of things that are in your name alone at the time of your death.
 - Autos or Boats?
 - Banking and Credit Union Accounts, Money Market Accounts, Stocks
 - Household Furnishings and Furniture
 - Real Estate
 - Sporting Goods, Recreational Equipment, Hobby Materials
 - Art and Antiques, Books and Music
 - Accounts Payable and some Business Interests
 - Sometimes, IRAs, or Insurances, if no beneficiary

Probate Avoidance Handy or Harmful?

- Many think they should avoid the “probate process” at almost any cost. But the strategies can have unintended consequences and do damage to your plans.
 - Costs, privacy, delays and challenges often cited
 - A cottage industry of sorts promoting trusts
 - ***BUT unless done wisely, the typical “probate avoidance” items can backfire:***
 - Joint (additional) names on accounts (pod or tod or jtwrs)
 - Adding names to real estate (tenants in common, lady bird deed, joint tenants with rights of survivorship, etc.)
 - Naming beneficiaries to IRA, life insurance, retirement plans, etc.
 - Trusts created but not properly funded

*Probate Avoidance Strategies
CAN be Great BUT can also
be Money Down the Drain*

Joint Accounts? Ability of non contributor to withdraw funds. Subject to creditor claims, even if only one person contributed to the account. Typically automatic transfer at death.

Real estate? Difficult or impossible to partition—ie force a sale or split, esp. if jtwros. Liens and liability. Ungrateful potential recipients. Possible capital gains issues or gift issues or uncapping issues. Problems with lenders regarding due-on-sale clauses.

Beneficiary designations? Loss of potential even treatment of heirs, esp. if one account much larger than another.



No will or other planning? Intestate Succession: O.K. for Ozzie and Harriet, but not for everyone.

- Intestate Succession—law outlines “who takes” if you die without a will—found in Estates and Protected Individuals Code (EPIC) under MCL 700.1101, and 700.2101-700.2405.
- Who loses out if no will or other provisions? Non traditional partners, non-married couples, step-children, almost anyone not thought of as heirs or next-of-kin under our law, charity.
- No Mich. Common Law Marriage since Jan. 1957 MCL 551.2
- But a Michigan Statutory Will may be o.k. for your purposes if you are Ozzie and Harriet? MCL 700.2519

Under EPIC -- *The intestate share of a decedent's surviving spouse is 1 of the following:*

(a) The entire intestate estate if no descendant or parent of the decedent survives the decedent.

(b) The first \$150,000.00, plus 1/2 of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent. * **adjusted to \$221,000-2015**

(c) The first \$150,000.00, (**see above adjusted figure**) plus 3/4 of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent.

- (d) The first \$150,000.00*, plus 1/2 of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has 1 or more surviving descendants who are not descendants of the decedent. * \$221,000.00-adjusted 2015
- (e) The first \$150,000.00*, plus 1/2 of any balance of the intestate estate, if 1 or more, but not all, of the decedent's surviving descendants are not descendants of the surviving spouse.
- (f) The first \$100,000.00, (\$148,000 for 2015) plus 1/2 of any balance of the intestate estate, if none of the decedent's surviving descendants are descendants of the surviving spouse.

Intestacy Continued

- ***MCLA 700.2103 Share of heirs other than surviving spouse.***
- Sec. 2103.
- Any part of the intestate estate that does not pass to the decedent's surviving spouse under section 2102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the following individuals who survive the decedent:
 - (a) The decedent's descendants by representation.
 - (b) If there is no surviving descendant, the decedent's parents equally if both survive or to the surviving parent.
 - (c) If there is no surviving descendant or parent, the descendants of the decedent's parents or of either of them by representation.
 - (d) If there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by 1 or more grandparents or descendants of grandparents, 1/2 of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and the other 1/2 passes to the decedent's maternal relatives in the same manner. If there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the 1/2.

Decisions, Determination, and DeBoer v. Snyder (the Michigan “gay adoption and marriage” case)

- Federal District Court DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. 2014) (Friedman, J.)
- U.S. 6th Circuit Court of Appeals DeBoer v. Snyder, 772 F.3d 388, 396 (6th Cir. 2014)
- Federal District Court (March 22nd 2014 marriages valid, Judge Goldsmith)
http://freemarry.3cdn.net/a23500c04c85189d47_50m6b90fz.pdf
- U.S. Supreme Court Cert Granted
<http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-571.htm> arguments April 28, decision expected in June, 2015?

US versus Windsor, or the DOMA Domino Effect?

- Section 3 of the Defense of Marriage Act (DOMA) struck down August 2013
- Too early to really say a domino effect has taken place and supporters should not be sanguine BUT now legally married same-sex couples often eligible for various federal benefits
- Examples include Social Security, Medicaid, Medicare, VA Benefits, ERISA changes, Taxes, Bankruptcy, etc.
- Current benefits analysis often requires we put same-sex couples in one of 3 or more boxes: 1) marriage in and residing in state allowing same; 2) marriage in a state allowing same, but living in a state not recognizing such marriage; 3) application made, while domiciled in recognition state, even if moved elsewhere later, 4) civil union or registry but not a legal marriage.

Mistakes and Myths? QUESTIONS?

Remember it's in your hands

and it's not that hard

- Every step a good step
 - Talk things through with folks
 - Gather information and review documents
 - Assess your own values, and what's important to you and any legacy
 - Craft your plan but then live your life!
 - And wait a long, long, time and hope to be the next Methusela 😊 He clocked out at 969.

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