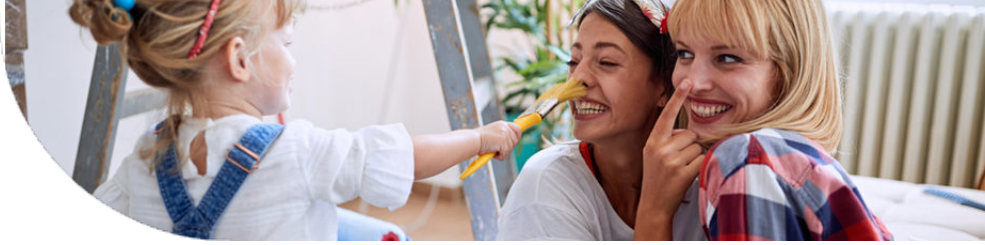

Wills and Estate Planning for the Modern Family: LGBTQ+ Couples

Throughout much of our country's history, the LGBTQ+ community have fought to be afforded the same securities heterosexual couples are guaranteed. Sadly, without proper LGBTQ+ estate planning, that fight can continue even after death. Therefore, LGBTQ+ clients must continue to be meticulous and thoughtful when it comes to planning their estate.

As tax, trusts and wills solicitors, we are used to dealing with sensitive topics; bereaved clients or issues that are very personal and emotive for the client. Being sensitive to the needs of our clients is the best way that we can provide the best level of advice. However, we as advisers, are still not as educated as we could be when it involves sensitive issues of concern for LGBTQ+ clients.

When it comes to estate planning, it's not that the law is different for LGBTQ+ clients, but that the nuanced interpretation of the law needs to be more bespoke for each client.

It is our role as Private Client advisers to create a safe space for all our clients no matter what their background. A space where they feel they can be open and transparent and talk freely.

Wills & Estate Planning

The idea of planning for after we die is a daunting and a scary topic that many of us like to put off if we can help it. Estate planning is however crucial for anyone who wishes to protect their assets and loved ones.

Statistically, same sex couples are more likely to live together (cohabit) than marry or enter into a civil partnership. Unfortunately, cohabitation is not a legal status for any couple, and neither is common law marriage, nor being a common law spouse of any gender.

The legal recognition of civil partnerships and same-sex marriages opened up a multitude of previously unattainable tax-saving tools that only heterosexual married couples were able to benefit from. Yet, LGBTQ+ couples may still have situations that require extra attention and careful planning, such as, surrogacy, adoption by non-biological parents or navigating complex dynamics with family members who may not accept them.

LGBTQ+ couples' estate plans could be more vulnerable to sabotage by unsupportive family members, such as:

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- Having their wills contested by a family member that may not recognise or support the validity of their relationship;
- Custody battles over non-biological children in the event of the biological parent's death or incapacity; and
- Family attempts to interfere with a spouse's ability to make medical and financial decisions for their partner

Non-domiciled clients

LGBTQ+ rights in the UK have come such a long way, however, remember that if we have a LGBTQ+ client that is non-UK domiciled and has come from a country where homosexuality is illegal, or one of the many countries where homosexuality is still not a cultural norm we will have to take more care and attention as to how their partner may want to be identified in the Will. We would have to be sensitive around the fact that they may not want to openly admit to their sexual orientation or gender status which might cause real issues if they then return home to their native homeland.

We will have to be sensitive and conscious of our use of pronouns in the Will and may have to discuss incorporating a secret trust in the Will whereby the identity of the beneficiary of such trust is not revealed. Clear accurate statements and advice is paramount, especially if there is a risk of forced heirship rules being applied.

LGBTQ+ and children

LGBTQ+ parents have a unique set of estate planning concerns when it comes to children, especially when only one partner is the biological parent.

Only those with parental responsibility can appoint a guardian to take care of their children in their Will. Their circumstances may be made more complex if they have children from a previous relationship or marriage that needs providing for.

It is important that the biological parent appoints the non-biological parent as a guardian for minor children in their will. Without a will, no guardianship is established, and the courts must choose guardians making its "best guess" as to who the biological parent would have preferred and what would be in the best interest of the child. The court may or may not choose their partner or spouse.

Adoption also plays an important role in the passage of assets. Typically, when parents die their assets are

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passed on to their children. If this is an estate planning goal for a same-sex couple, adoption should be considered since it's more common in same-sex marriages for only one parent to be biologically related to the child.

Transitioning and beyond

For many in the transgender community, the transition journey brings with it a host of physical and emotional challenges. Yet many people may not be aware that it can also pose a particular set of issues when it comes to estate planning.

If wills are not updated to clearly reflect new gender identities, disputes may arise further down the line, adding additional stress at an already difficult time.

Under the Gender Recognition Act 2004, which came into force on 4th April 2005, an individual's new affirmed gender cannot be legally recognised until they have secured a Gender Recognition Certificate (GRC). It's important to bear in mind that these are not retrospective. Therefore, Wills written before a British Trans person has obtained a GRC means that the Will won't recognise their change of gender.

Even before a GRC has been obtained, careful drafting of wills and other important documents can ensure they remain valid despite a beneficiary living as a different gender and being identified by a different name.

Any wills that have been made since 4th April 2005 could be affected if a beneficiary has changed gender:

Let's say Wilfred, who has two sons Jacob and Marcus and two daughters Alisha and Erica, makes a Will leaving "50% of his estate equally between his sons and 50% equally between his daughters".

After the Will is made Jacob transitions and acquires a female gender by obtaining a GRC and changes her name to "Julia".

If Wilfred made his Will before 4th April 2005, for succession purposes Julia would be recognised by what is on her birth certificate, so she would be treated as a son and therefore the estate would be divided 50% between Julia and Marcus and 50% between Alisha and Erica.

However, if Wilfred's Will was made after this date then the law provides that for succession purposes the estate devolves in accordance with your acquired gender. So, the estate would be divided as to 50% to Marcus and 50% equally between Julia, Alisha and Erica.

Clearly this would not be fair to the children and would not have been Wilfred's intention for one child to get more than the rest.

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Therefore, family members of those who are thinking of transitioning, or have already done so, it's worth considering re-drafting their own wills to incorporate gender-neutral terms such as "child", as opposed to those such as "son" and "daughter" or refer to their beneficiaries by name. This can help to ensure that all children are able to benefit, regardless of their gender.

For more information on any of the aspects above please contact our Tax, Trusts and Wills Solicitors on 01202 702699 or by emailing online.enquiries@LA-law.com.

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