

**McKINLEY IRVIN**   
LGBT PRIMER - WASHINGTON STATE

## Washington Law: A Primer for LGBT Persons

**THIS DOCUMENT IS INTENDED TO BE AN OVERVIEW OF WASHINGTON LAW TO BE USED FOR GENERAL EDUCATIONAL PURPOSES ONLY. IT IS IN NO WAY COMPREHENSIVE AND DOES NOT CONSTITUTE LEGAL ADVICE. THE LAWS CONCERNING SAME-SEX COUPLES AND THEIR FAMILIES ARE CHANGING RAPIDLY. THE IMPACT THAT THESE LAWS MAY HAVE UPON YOU WILL DEPEND UPON YOUR INDIVIDUAL CIRCUMSTANCES. YOU SHOULD RETAIN LEGAL COUNSEL TO ASSIST YOU IN THESE MATTERS.**

### I. HEALTH CARE

Legally married couples in Washington have various rights concerning their spouses' health care. These rights include the:

- Right to visit a spouse in the hospital;
- Right to obtain medical information about a spouse under certain circumstances; and
- Right to make informed health care decisions on behalf of an incapacitated spouse;

Until recently, same-sex couples could only obtain these rights by use of Hospital Visitation Authorization Forms and Powers of Attorney encompassing health care decisions. As of July 23, 2007, same-sex couples *who register their relationship with the state* under the new domestic partnership legislation will automatically receive these rights.

Unfortunately, Washington's domestic partnership registry is not likely to be recognized by other states. Thus, it is still important for same-sex couples to have Hospital Visitation Authorization Forms and Powers of Attorney that encompass health care decisions. Powers of Attorney can also be used to provide additional health care powers and financial powers.

#### **Hospital Visitation Authorization Form**

#### **Power of Attorney that encompasses health care decisions**

If you and your partner register for Washington's Domestic Partnership Registry, your appointment of your partner as your "Attorney in Fact" will be revoked upon entry of a Certificate of Termination of Domestic Partnership.

## II. FINANCIAL AFFAIRS

LGBT persons may also want Powers of Attorney that encompass financial matters, as well as health care decisions. This allows a person (a/k/a the "Principal") to grant his/her partner (a/k/a the "Attorney in Fact") various financial powers. These powers can include the:

- Authority to make gifts of the principal's property to family and friends;
- Authority to transfer the principal's property to trusts;
- Authority to amend, alter or revoke the principal's Will;
- Authority to transfer the principal's real or personal property; and
- Authority to deposit and withdraw money from the principal's financial accounts.

Powers of Attorney that encompass financial matters are powerful instruments that can easily be abused. You should not provide these powers to anyone that you do not trust completely!

### **Power of Attorney that encompasses financial matters**

If you and your partner register for Washington's Domestic Partnership Registry, your appointment of your partner as your "Attorney in Fact" will be revoked upon entry of a Certificate of Termination of Domestic Partnership.

## III. CHILDREN

### Second Parent Adoptions

When a lesbian couple conceives a child through artificial insemination, only the biological mother is considered the child's "legal parent," unless the non-biological partner adopts the child through a Second Parent Adoption. The same is true for gay male couples who conceive children through surrogacy arrangements.\*

Second Parent Adoptions allow a same-sex parent to adopt his/her partner's biological or adopted child without terminating the latter's parental status. Washington does not specifically authorize Second Parent Adoptions by statute, although they are frequently granted by the trial courts.

Adoptive parents have the same rights and responsibilities towards their children as biological parents. When a relationship ends, both parents are considered the child's "legal parents," and both parents have the right to seek custody and the obligation to pay child support. Second Parent Adoptions also provide children with a number of other protections, including the:

- Right to inherit from the "second parent;"
- Right to receive damages if the "second parent" is wrongfully injured or killed;
- Right to receive worker's compensation benefits based on the "second parent's" work-related injury;
- Right to receive social security benefits if the "second parent" becomes disabled; and
- Right to receive health insurance benefits from the "second parent's" employer.

Second parent adoptions are not possible where a same-sex partner has custody of a child from a previous heterosexual relationship, unless the former opposite-sex partner is willing to give up his or her parental rights.

\*Lesbians who intend to use a known donor should consult a knowledgeable attorney about the significant legal risks before undergoing any efforts to conceive. Your attorney may draft a Donor Insemination Agreement, which purports to terminate the donor's legal rights to the child and to

provide his consent to the non-biological mother's later adoption of the child. Likewise, gay male couples who intend to use a surrogacy arrangement should consult with an attorney about the need for a Surrogacy Agreement prior to any conception efforts.

### Joint Adoptions

Second Parent Adoptions should be distinguished from Joint Adoptions, which allow a same-sex couple to adopt a child with no pre-existing biological or adoptive relationship to either party.

### De Facto Parentage

The Washington Supreme Court recently held that a non-biological parent who failed to adopt her partner's biological child, conceived through artificial insemination with an unknown donor, had standing to seek custody under the doctrine of de facto parentage. *In re the Parentage of L.B.*, 155 Wn.2d 679, cert. denied sub nom, *Britain v. Carvin*, 126 S.Ct 2021 (2006).

To prevail under this doctrine, a non-biological parent must first be found to be a "de facto parent" by the Court. Even if a non-biological parent is successful in this regard, it is unclear whether s/he will be accorded the full set of rights and responsibilities of a legal parent. The only way to fully protect a child is through a Second Parent Adoption.

### Co-Parenting Agreements

Co-Parenting Agreements are private contracts between partners that are generally used to outline the parents' various rights and obligations towards the child(ren) during the relationship and upon separation.

 **Surrogacy Agreement or Donor Insemination Agreement (if applicable)**

 **Second Parent Adoption or Joint Adoption**

 **Co-Parenting Agreement (optional)**

## **IV. PROPERTY/LIABILITIES**

### During the Relationship

Legally married couples and same-sex couples are not treated equally for tax purposes. For example, transfers of property between married spouses during marriage or incident to divorce are not taxable events. This is not true for same-sex couples. Property that is transferred between partners during a same-sex relationship or incident to separation is subject to income and gift taxes. If the transfer is of real property, it will also be subject to real estate excise tax. If you and your partner have or acquire any significant assets, you should consult an attorney who specializes in tax and estate planning law.

 **Consult a tax and estate planning lawyer**

### Upon Dissolution

Washington is a community property state. In community property states, the assets and liabilities that a couple acquires during marriage are generally considered to be owned or owed by the marital community. These assets and liabilities are referred to as "community property" and "community debts." The assets and liabilities each spouse acquired prior to marriage, after

separation, or by gift or inheritance at any time are generally considered to be each spouse's "separate property" or "separate debt."

When a marriage dissolves, Washington courts have the power to divide a couple's community property/debts and separate property/debts as is "just and equitable." A married couple can divest the Court of this power by entering an enforceable prenuptial or postnuptial agreement that specifies how their assets/liabilities should be divided upon divorce.

The law treats same-sex couples similarly, *IF* they can prove that they had a "meretricious relationship." However, Washington courts currently do not have the authority to divide a same-sex couple's separate property/debts upon separation. The courts only have the authority to divide a same-sex couple's community property/debts. Same-sex couples who want to determine how their community and separate property/debts will be divided upon separation should enter into Domestic Partnership Agreements, which are similar to prenuptial or postnuptial agreements.

### **Domestic Partnership Agreement**

#### Upon Death

##### ***If You Have a Will***

You can leave your partner whatever property you wish pursuant to a validly executed Will or other estate planning instrument. Make sure to speak with the attorney preparing the Will or other estate planning instrument about ways to minimize the tax consequences that affect same-sex couples.

##### ***If You Have a Will AND are Registered as Domestic Partners with the State***

Your Will or other estate planning instrument may supersede the rights bestowed by the registry.

##### ***If You Don't Have a Will BUT are Registered as Domestic Partners with the State***

Your partner will be entitled to receive all of the community property (i.e. property that you acquired during your relationship). He/she will also be entitled to receive one-half of your separate property (i.e. property you acquired before your relationship or by gift or inheritance at any time) if you are survived by biological or adopted children. If you are not survived by biological or adopted children but are survived by one or more of your parents or siblings, he/she will be entitled to receive three-quarters of your separate property. If you are not survived by children, parents or siblings, he/she will be entitled to receive all of your separate property.

##### ***If You Don't Have a Will and are not Registered as Domestic Partners with the State***

Your partner can bring an action in Superior Court based upon a number of equitable theories. If he/she is successful, he/she is likely to get some portion of the community estate, but none of your separate estate.

### **Will or other estate planning instruments**

### **Domestic Partnership Registry**

## **V. MAINTENANCE**

Washington law currently does not authorize courts to award maintenance to partners in same-sex relationships. You should speak with an attorney about entering a Domestic Partnership Agreement that provides for temporary financial support should you or your partner leave the workforce to raise a child, become disabled, or otherwise anticipate a need for financial support upon termination of the relationship. Again, make sure to speak with your attorney about the possible tax consequences of any agreement that you enter.

### **Domestic Partnership Agreement**

## **VI. DOMESTIC PARTNERSHIP REGISTRY**

Starting July 23, 2007, same-sex couples can register their relationships with the Office of the Secretary of State. Registration forms can be obtained online and at the Office of the Secretary of State. There is a small filing fee.

Couples *who register their relationships with the state* will receive a number of rights and obligations, in addition to those addressed above, including:

- Right to bring a wrongful death action;
- Right to act as the Administrator of your partner's estate if she/he died without a will;
- Right to authorize an autopsy;
- Right to make burial arrangements;
- Right to make anatomical gifts; and
- Right to be listed as your partner's "Domestic Partner" on his/her death certificate.

You must file a Notice of Termination and pay a filing fee to terminate your state registered domestic partnership; it does not happen automatically.

**CAUTION:** You should consult an attorney before signing-up for the registry if you or your partner are in the military, if you or your partner receive public assistance from the state, or if you or your partner are in the U.S. on non-immigrant Visas.

### **Domestic Partnership Registry**