

# Legal Protections for the Alternative Family

by Elizabeth F. Schwartz

**T**hose of us who are coloring outside the lines in our conception and formation of family must be particularly mindful of the legal consequences of our choices. More than one thousand rights are associated with civil marriage, and we can claim about a dozen crucial ones for ourselves through effective estate planning and contracts. We face obstacles in many areas including inheritance, health care planning and parenting. So listen up, folks — these are your issues to face. Give yourself and those you love the respect of self-protection.

## Estate Planning Tools

The primary means through which alternative families use the law to their advantage is **estate planning**. This means using certain tools the law provides to state what you want to have happen to yourself and your stuff in the event of incapacity or death. Because our relationships are not always recognized by the law, we have to worry about making our intentions known in the legally recognizable way that heterosexual married couples take for granted.

The law presumes that, if you are not married, you want your “next of kin” to receive all of your property and make all your medical decisions. The “kin” may be your kids or parents, but they will never be your partner unless you are married. Fortunately, you can prepare an estate plan through which you make different choices about how you want those matters handled when the time comes. You can make your wishes come to pass, whatever they might be.



## Everyone needs a will

Yes, even if you do not have much money or own any real estate, a will is a simple way to make your intentions clear. Otherwise, your lover or family of choice will be at the mercy of your biological family. Even if they seem cool now, they might be less so when they are asked to give up rights and property which, even if morally obligated from one point of view, they have no legal obligation to surrender. Death brings out the worst in people, especially family members looking for someone to blame.

## Making medical decisions

My law firm has gotten countless calls from distraught people who cannot get access to their lovers in the hospital because they are not considered “family.” By drafting a **Designation of Health Care Surrogate**, you can state



who you want to make important medical decisions for you in the event that you are unable to communicate them yourself.

If you become incapacitated — in other words, if a court determines you are unable to handle your medical and financial decisions — a guardian may be appointed for you. Drafting a simple **Designation of Preneed Guardian** would avoid a fight between your lover and your family because it allows you to state for yourself whom you would want to serve as your guardian if you ever needed one.

## Property ownership

Often called the “poor man’s estate planning”, titling your home and bank accounts jointly with **designated rights of survivorship**, means that in the event of death, the property automatically passes to the surviving partner. In most states, the title must specifically state **joint tenants with rights of survivorship**, or **J.T.W.R.O.S.**, for ownership to pass to the survivor. Otherwise, the presumption is that the property was held as “tenants in common”, which means each person’s half passes to the next of kin if there is no valid will stating otherwise. That can result in a real mess if there is no estate plan in place.



## Parenting Concerns

As an increasing number of non-marrieds decide to take the parenting challenge, we are learning creative ways to protect ourselves, our children, and, in the case of co-parents, our partners. Unfortunately, given that ours is a homophobic legal system and emotions run particularly high when it comes to

children, we must be especially careful to arm ourselves with knowledge and, frequently, document our intentions. What happens to children when a non-married couple breaks up or when the biological parent becomes incapacitated or dies?

The situation for non-biological parents is grave and extraordinarily painful, and one that is the subject of many court cases across the nation. Sporadic court decisions around the country, mostly in California, recognize the parental rights of non-biological mothers, but mostly the presumption is that these women are "legal strangers" to their kids because there is no blood relationship. Again, we are faced with the real pain of invisibility.



This kind of situation has unfortunately become all too common in our community. People are not managing their affairs properly when they separate and our kids are paying the costs. It is crucial that, as co-parenting non-marrieds, we avail ourselves of all available resources to document our intentions that both be considered legal parents.

Such a document, commonly called a **Co-Parenting Agreement**, should clearly state the rights and responsibilities of each parent regarding any children born of them. There should be a global acknowledgement of the intention to cooperate with and respect one another and foster a healthy family. Keep the focus on the best interests of the children. Among the provisions to include are:

- *Understanding that both parents are equally responsible for the child[ren]'s support, care, and expenses. Or, the contribution can be adjusted based on circumstances.*
- *Understanding that the agreement presents legal questions that are unsettled.*
- *Agreement that the non-biological parent will be given medical authorization and guardianship designation.*
- *Statement that in the event of separation, the child's best interests will be strongly considered and a close relationship with both parents should be maintained.*
- *Stipulation that, in the event of a dispute, the path of mediation shall be taken before proceeding directly into litigation.*

Of course, it is best to enter into a Co-Parenting Agreement before any children are conceived, and while the love relationship is happily intact. Hopefully, the breakup provisions of the Agreement will never be needed, but if they are, that will be the worst and toughest time to discuss these matters beneficially. It is precisely because this society is so hetero-oriented, and there is no system in place to handle our disputes, that we must take action to protect ourselves and document our intentions.

## Summing up

So these are some of the basics. These topics can get quite complicated depending on your circumstances, so it's best to consult legal counsel to be sure you are protected. It could not be more important that you seek out sensitive and competent legal counsel to help prepare documents evidencing your intentions. Try to find a lawyer who is BGLT- or queer-friendly and with whom you feel comfortable. Ask him/her/hir about other documents which might be appropriate in your circumstances, such as a living together agreement to spell out the financial terms of your cohabitation.



Please do not wait for tragedy to befall you before you handle these matters. Mortality or the end of a relationship never are fun issues to face, but the results of avoiding them can be heartbreaking. Give yourself peace of mind, because you never quite know what twists and turns life's path will have for you. Protect yourself — you are worth it.

*Elizabeth Schwartz is an associate in the law firm of Crockett & Chasen, P.A. in Miami Beach, Florida. She and her firm specialize in the legal representation of sexual minorities, including estate and health care planning, insemination, custody, tax-exempt organizations, as well as the large number of legal issues raised by HIV. She welcomes feedback at [eschwartz@sobelaw.com](mailto:eschwartz@sobelaw.com).*

## Do You Want More?

Before you take the leap and go see a lawyer, you might want to dig a bit deeper into some of these issues. The following resources provide valuable information for alternative families:

Peter Berkery, Jr. *Personal Financial Planning for Gays & Lesbians: Our Guide to Prudent Decision Making*. Burr Ridge, Ill.: Irwin, 1996.

Paul Hampton Crockett. *HIV Law: A Survival Guide to the Legal System for People Living with HIV*. New York: Three Rivers Press, 1997.

Hayden Curry, Denis Clifford and Robin Leonard. *A Legal Guide for Lesbian and Gay Couples*. Berkeley: Nolo Press, 1996.

Fred Hertz, *Legal Affairs: Essential Advice for Same-Sex Couples*. New York: Henry Holt and Company, 1998.

In addition, the San Francisco-based National Center for Lesbian Rights has an excellent catalogue of literature, including *Lesbians Choosing Motherhood: Legal Implications of Alternative Insemination and Reproductive Technologies*. They can be contacted at 415.392.6257 or visit [www.NCLRights.org](http://www.NCLRights.org).

— Elizabeth Schwartz