



The  
**TotalPath**



Home Buying for Same Sex Couples

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## Home Buying for Same Sex Couples

Purchasing a home is a major undertaking for any couple, but same-sex couples must be especially diligent to make sure their investment and their interests are protected. This is due in part to inconsistent marriage laws in America and because of varying laws handling the disposition of a property with multiple owners. Purchasing a home with your partner is an exciting time in both of your lives, but it is absolutely imperative that you plan ahead so that you can avoid potentially serious financial and emotional stress in the future.

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# 1 Planning for the Inevitable

It is inevitable that a partnership will end, either by death or divorce. All couples (not just same sex couples) need to establish the appropriate type of ownership for their particular situation. The means of ownership will determine what happens to a home when one of the partners dies. Property laws vary greatly from state to state, so it is advisable to speak with a property lawyer in order to understand your options.

## **Joint Tenancy With Rights of Survivorship (JTWROS)**

In the case of a joint account, on the death of one account holder ownership of the account assets is transferred to the remaining account holder. Filing for (JTWROS) is crucial if the dying partner wishes to relinquish all of his or her assets to the surviving partner. If this action is not taken, the family of the deceased will, by law, become the rightful owner(s) of the property/assets along with the surviving partner. Overall, JTWROS is the best option for same sex couples that wish to leave their assets to their partner. Unless they are married (or in a civil union or domestic partnership that provides all the state rights

of marriage) and live in a state where that relationship is recognized. In this case, they may be able to hold property as Tenants by the Entirety (see below).

## **Tenants in Common**

In the case of tenants in common, each partner owns a percentage of the property. The shares do not need to be split evenly, especially if one partner makes more money than the other and is investing more of his or her money into the property. However, if one of the partners dies, their share will not go to the surviving partner. This method is not suggested for same sex couples that wish to relinquish their assets to the survivor.

## **Tenancy by the Entirety**

A majority of the states do not offer this option to same sex couples because they don't recognize same sex marriage. Tenancy by the entirety allows both partners to own 100% of the property equally as if they were purchasing the property as one person. If one partner dies, the property remains with the survivor. This option is only available to couples who are married (or in a civil union or domestic partnership that provides all the state rights of marriage) and live in a state where that relationship is recognized.

## 2 Important Documents

The paperwork will be extensive and tedious, but it is important to be aware of the documents that need to be filed when you are purchasing a new home. It is not just about the house, but also about leaving your assets to the appropriate people in the instance of death. Here are some options for protecting your assets and your family, in life, and for the years to follow:

### **The Will**

The will is a document that must be filed with the probate court upon the death of the testator. This process can be both timely and expensive. A person uses a will to allocate whom he or she will leave their estate and assets to upon their death. In the instance of same sex partnerships, this would be a preferable way for one partner to ensure the other partner receives any and all intended assets.

### **Trusts**

A trust is created when property is transferred by one party, the settlor, to be held by another party, the trustee, for the benefit of a third party, a beneficiary. The beneficiary, either immediately or in the future, will receive income or property from

the trust. Trusts are more difficult than wills to contest in court, which will help to protect the survivor from family members of the deceased. However, if you elect to take this route in insuring your assets, you must be thorough because anything that's not named in the trust will be subject to probate.

### **Living Trusts**

A living trust is a trust created and in effect while you are still alive, rather than a trust created at your death. Living trusts are a type of trust that is often used by same sex couples who are in an unmarried partnership. These trusts name the beneficiaries who will receive any assets and the trustee who will divide and allocate said assets upon death.



## **Transfer on Death Deed**

A transfer on death deed allows a property owner to directly transfer the ownership of real estate at the owner's death to whomever the owner designates by name. This is an affidavit, which relinquishes full ownership of the property to the surviving partner upon death. The beneficiary can be changed at any time while the holder is alive, so along with a will, a transfer on death deed is a convenient document to have on file.

## **Cohabitation Agreements**

A cohabitation agreement is a contract that both parties enter into in order to express their rights and obligations to one another while they coexist on the same piece of property. This is a business arrangement that is financially effective, especially if both parties involved are of similar financial worth. Even if the relationship fails, under the terms of this agreement, the parties may still be required to support one another.

## **LLC/LLP**

You and your partner have the option to form a Limited Liability Company/ Partnership, so that you will own your property and home as business partners. In states where same sex marriage is not permitted, this method will help you and

your partner to avoid double taxation on your assets and property. You both will own the property equally and will be able to transfer assets back and forth, as well as to your children (regardless of biological ties).

This process can be difficult and tedious. There are initial filing requirements and fees that would not accompany some of the other options in this guide. LLCs and LLPs also need to file articles of organization and include a business description in their application. They must also register with the IRS and the state department of revenue. Some states (including Connecticut) require the owners to obtain workers' comp insurance even if they do not hire any employees.

## **Domestic Partner Agreement**

This is a written agreement that establishes property rights. A domestic partner agreement is especially important if you and your partner don't have a joint partnership agreement. In the event of a break up, this agreement will address questions like:

- Does the house have to be sold?
- Can one partner buy out the other?
- If the house cannot be sold, should both partners contribute to the

mortgage to preserve their credit?

- If the house is sold, but one partner had contributed more financially, how will the proceeds be divided?

There are plenty of questions that could, and most likely will, be asked if a relationship comes to an end. If you and your partner predetermine the answers to these questions as a precaution, then you will save yourselves a lot of excess stress.



### Document Checklist

- The Will
- Trusts
- Living Trusts
- Transfer on Death Deed
- Cohabitation Agreements
- LLC/LLP
- Domestic Partner Agreement

## 3 Types of Partnerships as Recognized by Various States

Laws pertaining to same-sex partnership vary from state to state. Some states allow gay couples to get legally married while others offer alternative options. Also, some states recognize certain legal relationships even when that state does not offer that relationship. For example, Connecticut, New Hampshire and Vermont only offer marriage, but they will recognize civil unions and domestic partnerships that offer all the rights of marriage and provide those couples with all the state rights of marriage. This is an ever changing landscape, and you should check with LGBT legal organizations like Gay & Lesbian Advocates & Defenders ([glad.org](http://glad.org)), or Lambda Legal ([lambdalegal.org](http://lambdalegal.org)), for the latest information.

Also, because of the 1996 federal Defense of Marriage Act (DOMA), NO same-sex couple (even couples who are married) is able to access the 1138 federal laws that pertain to marriage. This means that married same-sex couples cannot file married federal income tax returns, or apply for Social Security spousal benefits or receive any of the other numerous rights and protections that the federal government provides to married couples. The United

States Supreme Court will most likely address the issue of whether DOMA is constitutional during its 2012-2013 session.

### **Legal Marriage**

As of publication in late 2012, two people of the same sex can be legally married in the following places: Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York, and The District of Columbia. In those places, same-sex married couples receive all the rights that place provides to married couples, but none of the federal rights and protections.

### **Civil Union**

Civil unions provide all the state rights of marriage but not the name and are only recognized by certain states. The states that currently provide civil unions are New Jersey, Illinois, Hawaii, Delaware, and Rhode Island, although several other states that do not offer civil unions will recognize them.

### **Domestic Partnership**

This is a very confusing term because it is used in a variety of contexts. However, in terms of local and state governments, domestic partnerships are designed to extend rights to unmarried couples. The laws and rights included in the partnership vary among states, cities, and counties.

Four states, California, Nevada, Oregon and Washington, have domestic partnerships that provide all the state rights and protections that married couples in that state receive.

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## **4** *Monetary Issues to Consider*

When you and your partner first go to apply for a mortgage, you will find that there is no difference between same sex couples and straight couples. The bank does not care about your sexual orientation; all they care about is your credit. They will pull the credit for each individual who will be on the mortgage. It is important to get your ducks in a row before taking out a mortgage, but that is not the only thing to keep in mind when you are preparing to purchase your new home.

### **Taxes**

Marriage can help couples avoid getting nailed with estate taxes at the state level. Currently, if the estate is worth over 5.12 million dollars then federal taxes will become an issue, but there are few options to avoid this. The Unlimited Marital Deduction allows one member of a married couple to pass their assets to their spouse without taxation. Unfortunately, because

of the Defense of Marriage Act, same sex couples cannot apply for this benefit. This means that if a gay couple has joint tenancy of a property and one partner dies, then if/when the other partner obtains the deceased share of the property, it is taxed.

### **Real Property**

Although it is unlikely that same sex couples will be granted the right to own a property as tenants by entirety, in the rare occasion that they would, both partners would be considered one person. In other words, both partners would each own 100% of the property and could not sell without the permission of the other. Upon a divorce or break up, the relationship would be dissolved into tenants in common, where each person would own their own percentage of the home, totaling 100% of the home's value. At this point each partner could sell their portion as they pleased.

### **Rented Property**

If you are renting a home or property, make sure you have renters insurance. In addition to insurance, be sure to have both names on the lease in the event that one partner dies. This way the survivor could continue to live in the apartment if he or she pleases.

### **Declaration of Homestead**

You and your partner might want to consider filing a Declaration of Homestead to protect your property from forced sale. The declaration is a formal, written, recorded assertion by an owner that the dwelling in which he or she resides is exempt from forced sale. In general, to be eligible the property must be the owner's primary residence. The owner is defined as tenants, joint tenants and/or sole owners. Homestead laws vary by state.

### **Automobiles**

Most states have provisions for the transfer of automobiles to the surviving spouse or blood relative upon death. However, very few states have this transfer provision for same sex couples. Again, it would be beneficial to look into your state's laws regarding this matter.



The bank does not care about your sexual orientation; all they care about is your credit.



## 5 Potential Roadblocks

In some localities there are laws in place that prevent same sex couples from being granted the same rights that straight couples enjoy. It is because of these laws that same sex couples have to be that much more careful when filling out their documents for a home or mortgage.

### **Intestacy Laws**

These laws vary by state, and have been put in place to protect couples from losing assets in the event one of the partners dies without a will. Often these laws do not protect same sex couples unless the couple is in a legal relationship that is recognized by that state. In fact, if a partner dies without a will, the survivor may not receive any of his or her partner's assets. It is particularly important that same sex partners have wills drafted if they are buying a home or have any assets they want to go to their partner.

### **Federal "Defense of Marriage Act (DOMA)"**

One part of the 1996 federal Defense of Marriage Act (DOMA) states that no state is required to recognize a same sex marriage, and another part of DOMA states that for all federal purposes marriage is only between one man and one woman. This means that

no married same-sex couple can benefit from the federal laws that offer protections and benefits to married couples.

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## 6 Tips to Finding a Gay-Friendly Neighborhood

When you and your partner are searching for your new home, you may also want to consider the type of neighborhood that you will move into. Although it's 2012, there are still narrow-minded people out there. If you and your family don't feel comfortable and safe in your new home then a great experience will inevitably be ruined. Here are a few things to keep in mind when you're searching for your ideal neighborhood.

### **Safety and Comfort**

Do a little research on recent, local hate crimes. Life is stressful enough, and you shouldn't have to worry about holding hands in public, or your child being accepted at their new school.

### **Consider the City**

If the city life is for you then you're in luck. American cities generally have larger and stronger gay communities, which will naturally make you and your family feel more comfortable with your surroundings.

### **Affordability**

Don't spread yourself too thin because you think you found a great neighborhood or home to live in. Like all new home buyers, you need to purchase property within your means.

### **Amenities**

You know yourself better than anyone. It's okay to take suggestions and advice when searching for a place to live, but in the end you need to live somewhere that can support your lifestyle. It makes sense to buy a home that is surrounded with activities and attractions that spark your interest.

### **Ask for Advice**

You are never alone. If you don't want to rely on your real estate agent or lawyer to direct you towards the best neighborhood then ask your friends and family for advice.

## **7** Conclusion

All couples, same-sex or otherwise, must prepare for the death of their partner. While this may seem grim and unappealing to think about, it is a necessary part of responsible home ownership. This guide is not legal advice but an introduction to some of the legal concepts surrounding home ownership. Before making any decisions regarding home ownership, we urge you to speak with an attorney.

*Special thanks to Bruce Bell, Legal InfoLine Manager at GLAD for his input and support.*



That's it! You have completed the **TotalPath to Home Buying for Same Sex Couples**. You have made an important step on another path—the one that leads to the American Dream!