

After Obergefell: Florida Estate Planning for Same-Sex Married Couples

Quick Reference Guide

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I. Introduction


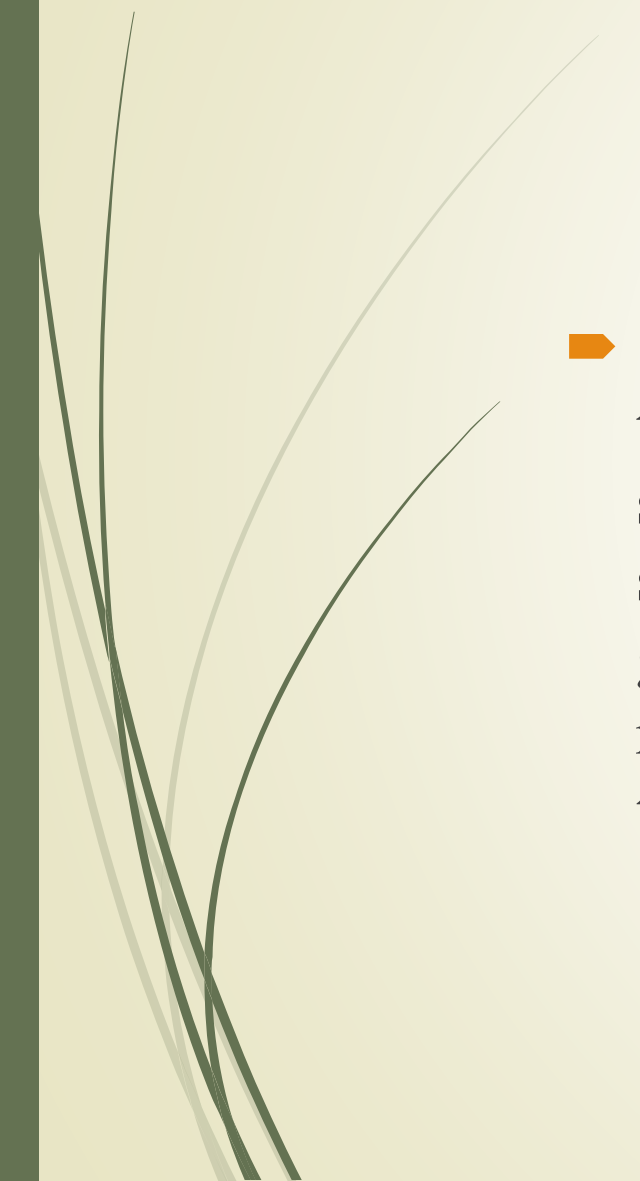
After decades of struggle, same-sex couples finally secured equal recognition of their marital union on June 26, 2015 when the U.S. Supreme Court issued its landmark decision in **Obergefell v. Hodges**. Justice Kennedy wrote for the Court:


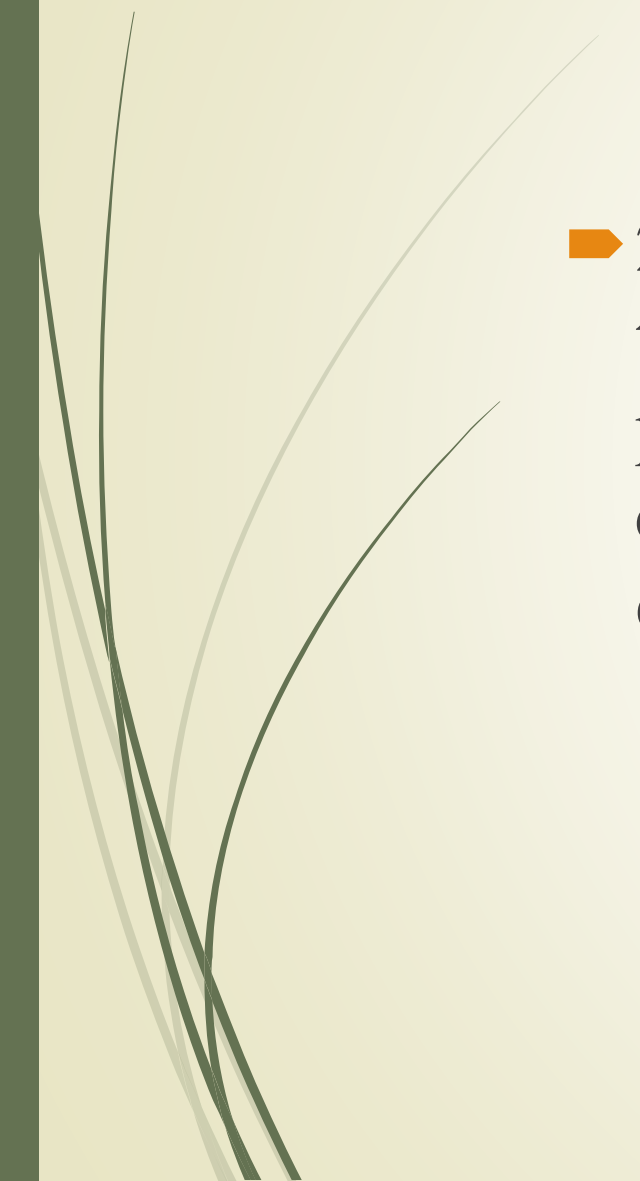
No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.


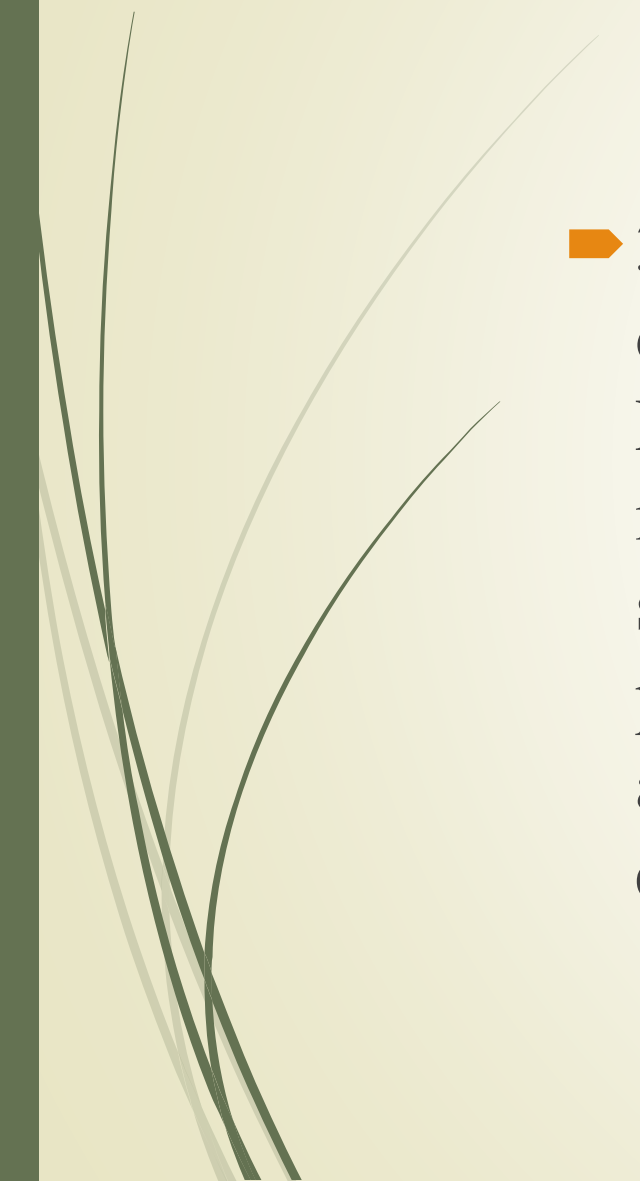
This decision, and the prior decisions such as **U.S. v. Windsor**, opened a “constellation” of benefits long denied to same-sex couples. This guide is a reference for Florida same-sex couples; it is designed to help such couples and professionals understand these new benefits and opportunities for estate and asset protection planning.



II. 7 Key Federal Estate Planning Benefits Now Available





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- ▶ 1. ***Unlimited Marital Deduction.*** Same-sex couples may now take advantage of the “unlimited marital deduction” for inter-spousal asset transfers. An enormous tax benefit, this will allow same-sex couples to gift within the marriage without having such gift trigger a reduction in either spouse’s estate or gift tax exclusion rights. The first spouse to die can give an unlimited amount of assets to the surviving spouse without any estate tax consequence.


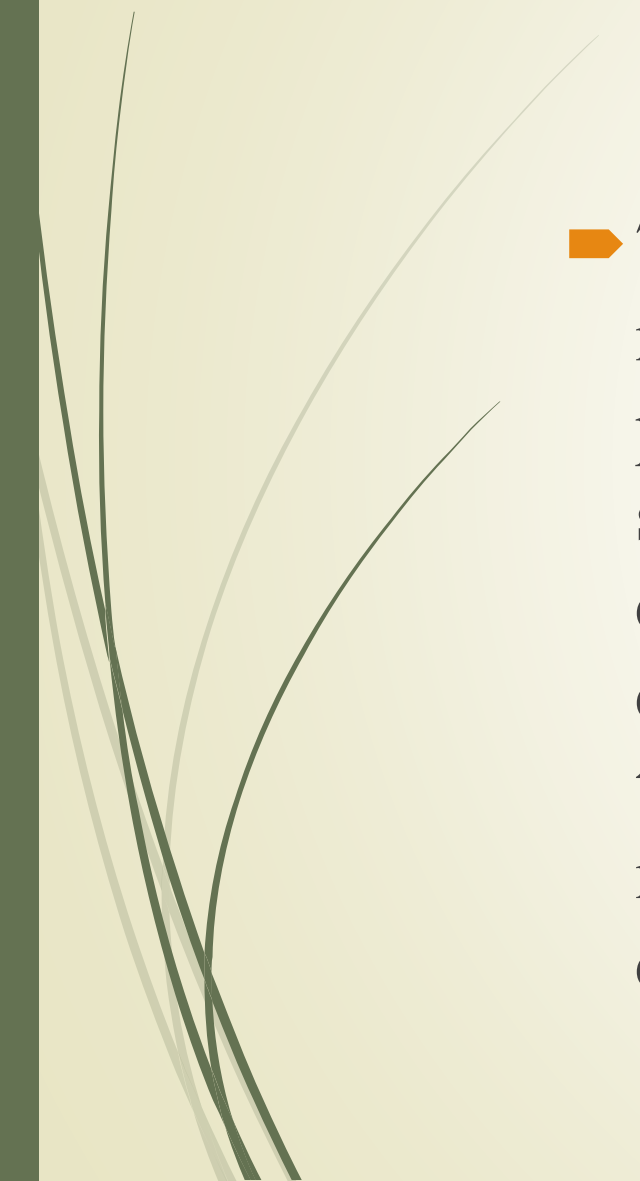
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- 2. *Gift Splitting*. Gift splitting allows same-sex couples to equally contribute into a conveyance of a gift to a third-party. More specifically, same-sex couples can now gift a combined amount of \$28,000 per recipient by combining each spouse's annual gift exclusion.

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- ▶ 3. ***Portability.*** Portability allows for the inheritance of a deceased spouse's unused federal estate tax exemption. Each spouse has a tax exclusion expected to be \$5.45 million in 2016. In the unfortunate event of a tragedy, a surviving spouse may claim any of the unclaimed tax portion which the deceased spouse left unutilized, as long as the surviving spouse files a timely estate tax return and elects the portability.

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- ▶ 4. *Retirement Accounts*. A surviving spouse may now rollover retirement account assets without the necessity for a required minimum or lump sum distribution. A surviving spouse now automatically qualifies as a spouse beneficiary under Federal pension laws known as ERISA – Employee Retirement Income Security Act.



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- ▶ 5. *Social Security*. A surviving spouse may now be entitled to Social Security benefits.


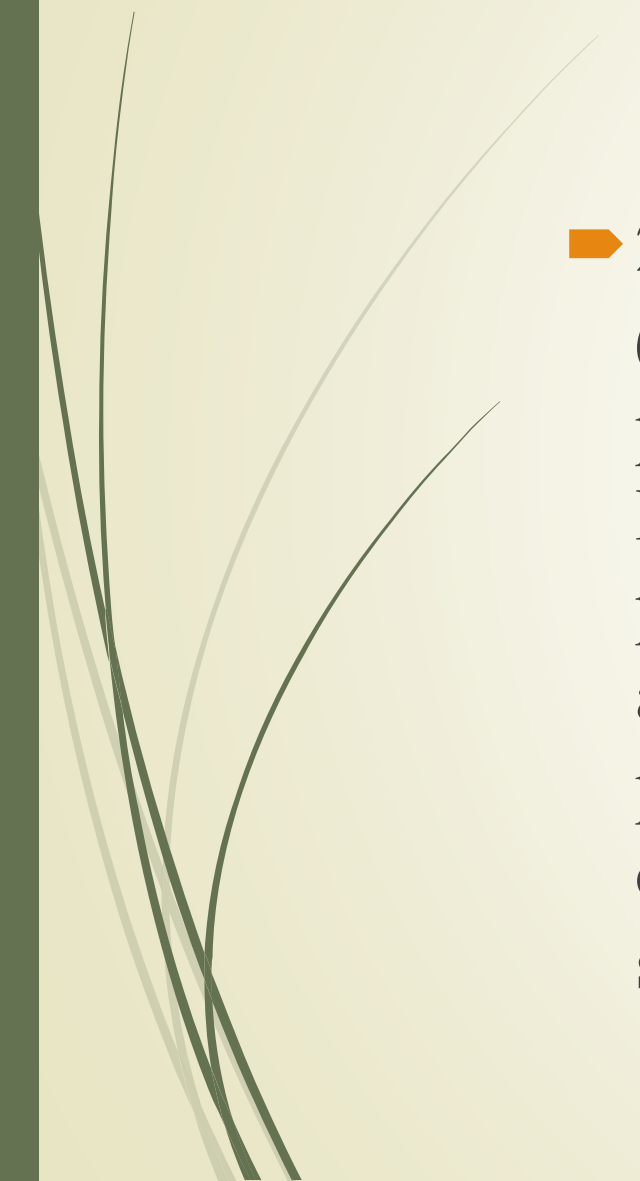
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- ▶ 6. *Joint Tax Returns*. All spouses have the option to file a joint federal tax return, regardless of whether the State of residence recognizes same-sex marriages.



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- 7. *Non-citizen spouses*: Until the Windsor decision, non-citizen spouses were not eligible for citizenship or permanent residency on the basis of their marriage to a spouse of the same sex who was a US citizen. Now, non-citizens may be eligible for permanent residency or citizenship on that basis. Though there are many benefits to becoming a permanent resident or citizen, there are also numerous tax and non-tax consequences that should be carefully considered before making this decision.


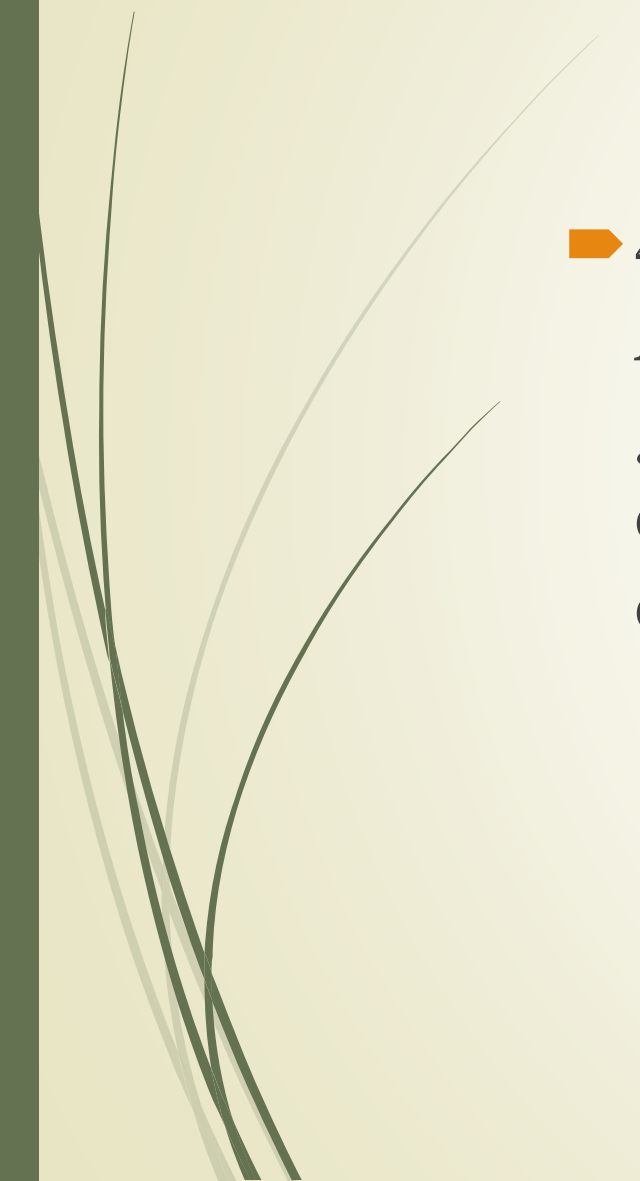
III. 5 Key Florida Benefits Now Available


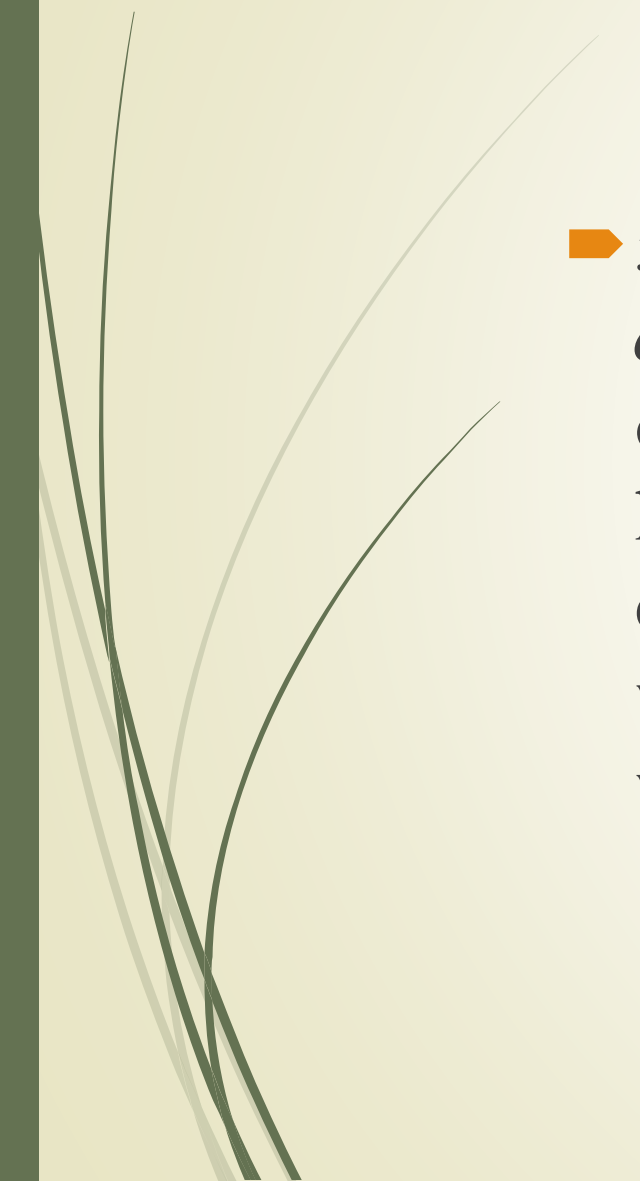


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- ▶ 1. *Florida Homestead*. The surviving spouse of a same-sex marriage now has the right to inherit homestead property. This is a valuable benefit because Florida likely has the strongest law in the country to protect your homestead from most unsecured creditors. Of course, Florida homestead also has valuable state tax benefits: the two most significant are the \$50,000 property tax exclusion and 3% Save Our Homes cap limiting how much the appraised value can be increased each year.

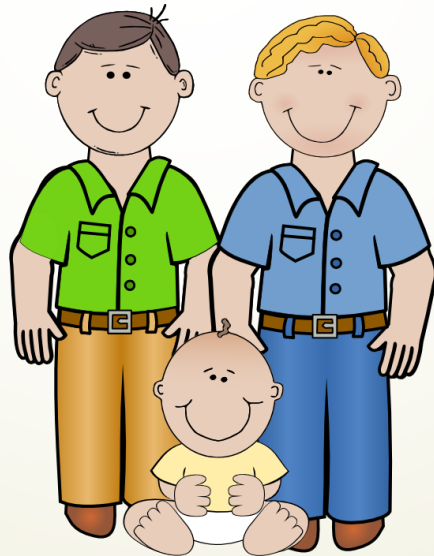
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- 2. *The right to own property as tenants by the entirety (TBE)*. This is an important right since it provides asset protection for same-sex couples owning property as TBE. It is a right available only to married couples. If the property is owned as TBE, a creditor cannot reach this asset unless it has a claim against both spouses. TBE property also avoids probate, because upon the death of one spouse the property is automatically transferred to the surviving spouse.

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- ▶ 3. *Elective Share.* The surviving spouse now has the right to claim their elective share of a deceased spouse's estate, which is 30% of the deceased's spouse's augmented estate. The elective share is designed to protect the surviving spouse in the absence of good estate planning. It can be eliminated by a pre or post nuptial agreement - or by the surviving spouse providing at least 30% to the surviving spouse in their trust or will.

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- ▶ 4. *Protection if Deceased Spouse had no will. Under Florida intestate law*, the surviving spouse will generally get 100%. F.S. 732.102. However, this law becomes complex if the decedent is not survived by a spouse or child(ren).


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- ▶ 5. *Pretermitted Spouse: The “Oops Law,” I forgot to change my will after marriage.* Context: Larry has an old Will and then marries Frank. Larry neglects to change his old will. Larry dies. Frank, as the surviving spouse is called a Pretermitted Spouse. Frank receives what he would have received if Larry had died intestate, unless the will clearly provide otherwise.

IV. Protecting the Same-Sex Couple Family: What Is Absolutely Needed?





A. Key Objectives of a Good Estate Plan for Most Same-Sex Couples

- ▶ Protect lifestyle of children
 - ▶ Secure quality education for children
 - ▶ Avoid Guardianship: In the absence of estate planning, this is the court process a person may fall into in the event of mental incapacity. In a guardianship, the court intervenes in your personal and financial affairs.
 - ▶ Avoid Probate: This is the bureaucratic, time consuming and costly court process a person's heirs may be compelled to go through without a well-structured estate plan that includes a fully funded living revocable trust.
 - ▶ Optimize step-up in basis for income tax planning: This has become the new focus for most estate planners since the estate tax is often not a factor.
 - ▶ Avoid estate tax: The tax is 40% over \$5.45 million in 2016 for an individual.
 - ▶ Keep Legal Control in the family: Almost all couples want to avoid having a court intervene in their personal or financial affairs in the event of disability or death. A well-structured estate plan can help make sure that persons you know and trust make your financial and medical decisions if you cannot.
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B. 4 Important Components of a Good Estate Plan for Many Same-Sex Couples

1. A **Joint Living Revocable Trust** with (1) Marital Trust for the surviving spouse and (2) an Educational/Safe Harbor Trust, if children.

2. **Durable Power of Attorney** fully utilizing Florida's new law (passed in 2012)
To provide super strong financial powers to the other spouse.

Note: If your Durable power attorney was drafted prior to October 1, 2012 it likely needs to be updated.

3. **Health Care Surrogate + Living Will.** Do not presume because you are married you can make medical decisions for your spouse. It is essential to have a super strong and updated Florida Health Care Surrogate to be able to access medical information for a second opinion, change doctors, and change hospitals.

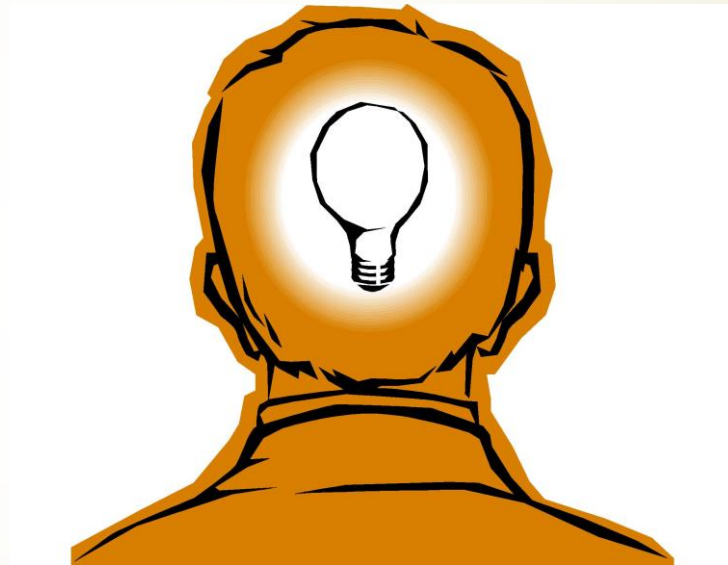
4. **Pour-Over will.** This is a simple will, but it is essentially a safety net to make sure that all assets flow into the living trust upon death.


V. Asset Protection Checklist for Same-Sex Couples



Action Item	Done
Homestead is under ½ acre if in municipality; if not in municipality then under 160 acres Note: Consider leaving mortgage on property – even if not necessary – as excellent asset protection option. The mortgage can be paid down to avoid creditor attack.	
Trust systems in place for children and loved ones and integrated with creditor protection structures	
Vacation home is titled in LLC, Limited Partnership, or Tenancy by Entireties	
Rental properties are titled in LLC or Limited Partnership.	
All Florida LLC's have (1) Operating Agreement with charging order protection; (2) separate bank account; (3) multi-member	
All corporate records have been annually reviewed by corporate attorney	
Exposed equity investments protected by asset protection structure Note: Exposed investments are those <u>not</u> protected by Florida law. Protected investments are IRA's, 401k's, annuities, pension plans, life insurance, Florida pre-paid tuition plans, and 529 plans.	
If married, checking/savings account owned as Tenancy By Entireties (TBE) Note: Confirm by going to bank and checking the bank signature card.	
Auto and motor vehicles : If married, title in name of person who drives vehicle the most; <u>not</u> in joint name	
Boats or jet skies: Title in name of LLC	
Adequate property and casualty insurance	
Adequate auto, vehicle, and boat insurance	
Umbrella liability insurance Note: Confirm with agent that there are no gaps	
If professional: adequate malpractice insurance and experienced malpractice agent who specializes in such coverage	
Team of caring and qualified advisors, including CPA, attorney, investment advisor, and insurance agent	

VI. Conclusion





The landmark Obergefell decision now guarantees equal protection and equal benefits on both the federal and state level. If you have not met with an estate planning attorney since June 26, 2015 you should do so immediately so you and your partner can take full advantage of the “constellation” of benefits that although long denied, are now available.

For further information contact **Rarick & Beskin** at **(305) 556-5209** or info@raricklaw.com.

Disclaimer: This is a short summary of federal and Florida law impacting same sex couples; it is not a full review of the law. This guide is only intended to address some of the most common questions regarding estate and asset protection planning for same sex couples. Do not rely on information presented here to address your individual legal concerns. If you have a legal question about your individual facts and circumstances, you should consult an experienced estate planning attorney.