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**Same Sex Marriage and Inheritance Rights of Children**

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If you are a same sex couple thinking of marriage in Oregon or some other state, you will want to explore any change the marriage may make in the status of your children. My clients include the parents and grandparents of same sex marriage couples, who also are worried about the effect of marriage on their existing estate planning documents. This client advisory for my Oregon estate planning clients might be useful to you.

Please take your questions to your lawyer for consultation about how your state law affects your situation. If you have children and a same sex marriage, you should evaluate your situation with your lawyer several times in the next few years, and whenever you move to a new state. Until the legal issues are resolved by the courts or lawmakers, your estate planning documents (and those of your parents and grandparents) will need to be carefully drawn to get the result you want. Clients with adult children have one set of concerns, and clients expecting children to be born during the marriage have a separate set of concerns.

**Your adult children and same sex marriage**

Oregon has a basic inheritance pattern established by statute, which can be varied by will. The basic rule about whether your adult children inherit depends on whether you leave a surviving spouse! So a same sex marriage can have the effect of reducing your child's inheritance.

Do you have adult children (over age 18 in Oregon)? If your children are adults, and **no second parent adoption has been done to give your same sex partner the status of a parent**, then your new marriage changes the basic inheritance pattern the children may expect. Your new spouse will, unless you have a will stating otherwise, be entitled to one-half of your separate property at your death. Your children from a prior marriage or relationship are entitled to the other one-half of your property. ORS112.025.

Do you have adult children, **who were adopted by the same sex partner**? Then these adult children, if adopted as a minor, or if adopted as an adult "after having been a member of the household of the adoptive parent while a minor," are "issue" of the surviving spouse, and inherit nothing at your death - only the surviving spouse takes your estate. However, the adopted children inherit from the adoptive parent, and the adoptive parent's relatives, unless expressly disinherited by the adoptive parent's will. If your partner adopted your adult children after age 18, and the

children DID NOT live in a household with the adoptive parent, then the children do not inherit from the adoptive parent's relatives unless the relatives will explicitly includes them. ORS 112.195

In my elder law practice, adult children have consulted me about being replaced in their parent's affections by the new spouse, about inheritance lost to the new spouse, about being kept away from the parent during a medical crisis, and about losing control of the family home or vacation home. Adult children can be marvelously accepting of a new marriage spouse, but you may need to respond to their anxieties. Sometimes the adult child's anxieties lie just beneath the surface, like a hidden reef, and can cause relationships to founder during the rough seas of a health crisis or death. Perhaps you should consult meet with an elder law attorney, to settle these questions with planning documents. My elder law clients with good planning documents can explain their wishes to both spouse and adult children, and reduce anxieties for all.

### **Inheritance rights for children born during the same sex marriage**

After the marriage, if there are children born, you might expect, and advocates would argue, that the children are "issue" of both parents, and that a parent/child relationship is automatically created. However, the law on the books about parent and child relationships does not clearly support such a reasonable expectation. The child can clearly inherit **in the absence of a will** from a natural or adoptive parent, but not from the same sex spouse.

During the next few years while same sex marriage is being implemented, I agree with second parent adoption lawyers who suggest that the married same sex couple go through a second parent adoption (permitted in Oregon and at least twenty other states). If no such adoption is completed, then the nongenetic parent will risk no recognition of the parental relationship for inheritance purposes.

To have the unadopted child inherit from the relatives of the nongenetic parent, those relatives will need to specifically mention the child by name and make specific provision for the child. For example, if a grandparent leaves \$25,000 to the spouse, and if she dies before the grandparent, the \$25,000 goes **to the issue of the spouse**, whether the child is adopted MATTERS. The minor child who is adopted by the spouse WILL inherit the \$25,000 for "issue" and the minor child who was not adopted gets nothing. What rights do you want for your child?

If the couple wants parental rights to vary from the normal parental rights and responsibilities, and do not want to do a second parent adoption, then they can create a domestic partner/marital agreement to nail down rights in event of dissolution or death of a partner, and create wills or trusts to implement their wishes upon the death of a partner.