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Special Report

Legal Ways Gay Couples and Families Can Protect Their Interests

by Joel Shoemaker
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So you've found the love of your life.

The two of you have been shopping at Bed, Bath and Beyond on Saturdays picking out draped shower curtains and stainless steel-lidded trash cans. People are starting to notice how both of you have been dressing more and more alike. You finally start to get all those silly romantic-comedy movies you hated when you were single. Why? Because you're in love. Then one day, being two people who realize life isn't all roses, you both decide you want to make it so each of you is the primary decision maker in times of crisis for the other's care.

That's when you realize: crap—you're in Utah. This isn't going to be easy.

Even before the addition of Amendment 3 to the Utah Constitution, state laws prevented gay and lesbian couples from marrying and obtaining the same legal rights afforded to opposite-gender couples. But attorney Laura Milliken Gray—whose private practice has been helping queer couples and families coordinate their legal rights for over 10 years—emphasizes it's still possible to draw out those rights in a legally binding manner.

"This is a period of discrimination and we are living in a very hostile environment," says Gray, "but there are ways to protect ourselves."

Gray says there are three basic components of an estate plan she would recommend for most couples. First, a will that details what you want to have happen to your possessions after your death. Second, a disability plan that names powers of attorney for financial decisions and also powers of attorney for medical decisions (who would make decisions regarding your medical care if you were unable to speak for yourself). The third component is a living will that gives specific directives about what to do in the event you're comatose or in the late stages of an illness.

"Gay people need these documents so badly because there's no priority in the law to make a gay person's partner the one to make these decisions," says Gray. "Marriage gives a lot of that presumption."

Larger estates might require a living trust to avoid probate, the legal process to settle matters of a person's estate after his or her death. This avoids going into a legal hearing where people might try to challenge a will.

An average fee for drawing up an average "will package" is about \$600 per person, Gray says. "If something goes wrong, it's the best money you'll have spent."

Amendment 3 didn't change the validity of these types of documents, Gray says. "The right to name who you want for end-of-life decisions is separate from marriage rights. That doesn't mean some hospital won't make it difficult, but I think that would be illegal."

Still, Gray emphasizes it's important to make sure legal documents are put together properly, and not to attempt to do it yourself. "Everyone, but particularly gay couples, needs to have a lawyer to get these documents done properly. Pulling them off of the internet is very dangerous because each state is different and it is highly likely that mistakes or omissions will occur. You can create these documents and then have a false sense of security."

Protecting the rights of gay and lesbian parents, as well as the interests of their children, is much more complicated, Gray says, especially in Utah where in 2000 the state legislature banned adoption by co-habiting adults. In this area, Gray describes a three-tiered plan, but emphasizes each situation is different.

First, Gray has parents draw up a will naming the non-biological parent as the guardian in the event of the biological parent's death. Second, in a co-guardianship legal proceeding, the parents receive a court order naming the non-legal guardian.

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Third, the parents draw up a co-parenting agreement where the parents agree to both act as parents even in the event of a breakup. Gray says this last measure is meant to ensure that the biological parent can't shut out a non-biological parent after a breakup, protecting not only the parents, but also the child from losing a parent.

Gray says the co-guardianship proceeding and co-parenting agreement are new in Utah; they are two strategies she developed from lawyers facing similar issues in other states. "Some of it is untested, but it's better than having nothing at all," she says.

The broad concern with drafting documents that outline parental rights, particularly with adoption and surrogacy situations, is how they'll be regarded from state to state. The goal of these measures is to create lots of different documents that essentially say the same thing.

Gray is no stranger to being on the cutting edge of helping gay and lesbian families spell out their legal rights—shortly before the state legislature takes away those rights. She believes she may have been the first lawyer to help coordinate an adoption by a lesbian couple, only to end up losing a fight against the state legislature banning gay adoptions during its 2000 session. She says she doesn't have any political ambitions, preferring to "quietly help one couple at a time."