

To wait for the Law to Change or not to Wait, That is the Question: A Guide for Same-Gender Couples and Clergy on the Necessity of Using Private Law to Protect the Rights of Same-Sex Relationships

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Abstract

Due to the serious issues same-gendered couples living in states that do not legally recognize their relationships face, this article examines the very real need for same-sex couples to use private law, in the form of specific legal documents, to protect their rights. Moreover, the authors take the position that clergy who solemnize same-sex relationships should require these couples, as a precondition, to execute such documents as enumerated in this article. Clergy, by facilitating the assistance of legal counsel and integrating the execution of legal agreements, will help provide same-sex couples with a level of legal, emotional and financial well-being that may not currently be attainable without private legal agreements.

The article begins by examining the current state of the laws governing same-sex relationships at both the federal and state level. Specifically, we will examine two cases that have substantially impacted the landscape of rights for same-sex couples. The paper will then examine four areas of the law where uncertainty for same sex couples lies and the legal agreements that can be effectively utilized to reduce this uncertainty. These areas include: 1) medical/end of life decisions; 2) financial welfare of both parties and distribution of assets upon dissolution of the relationship; 3) distribution of the couple's property in the event of death; and 4) parental rights. The paper will conclude with recommendations for clergy in counseling same-sex couples prior to performing marriage and commitment ceremonies.

Keywords: Same-sex couples, protecting legal rights, contracts, clergy

1. Introduction

Jill and Sue were a same-sex couple in a committed relationship for nearly ten years. Two years ago, they were married in Vermont and then subsequently moved to Alabama. Jill had a daughter, Mary, from a previous relationship, and Sue helped raise the child over the course of their ten year relationship. On August 1, 2013, Jill was involved in an auto accident that left her with serious brain injuries and on life support. Prior to the accident, Jill had discussed with Sue that if she was ever seriously injured, she did not want to be placed on life support. Unfortunately, although Jill had verbally expressed this preference to her partner, Jill never put her wishes regarding her care into a written document, such as a medical directive. After hearing about the accident, Jill's parents flew to Alabama and proceeded to exclude Sue, not only from visiting Jill in the hospital, but also from the decision of whether to remove Jill from life support. Moreover, Jill's parents filed a petition with the court which allowed them to not only obtain custody of Mary, but to also take possession of all of Jill's assets. In the end, Sue was deprived of assets acquired by Jill over their ten year relationship, she had no say in her spouse's end of life care, and she was unable to retain custody of Mary.

Jill's family was ultimately able to exclude Sue from decisions regarding her partner's care, receiving any assets in Jill's name, and Mary's life because a number of states, including Alabama, do not recognize same-sex unions. Alabama, in particular, does not recognize marriage, civil unions, or domestic partnerships for same-sex couples (Lambda Legal n.d.a; Human Rights Campaign, 2014a). Currently, no state or federal mandates require states to legalize or recognize

same-sex unions or marriages (Defense of Marriage Act [DOMA] 1996). Same-sex couples who live in states that do not recognize their unions or relationships, have limited rights under the law regarding their ability to make medical decisions for their ailing partners or care for the partner's child if he or she passes away (Human Rights Campaign, 2014b; Gay & Lesbian Advocates & Defenders [GLAD] 2014). Because Alabama does not recognize same-sex relationships, Although Sue and Jill were legally married in Vermont, Sue's rights were limited and Jill's parents were able to step in and exclude Sue from medical decisions, marital assets, and parental custody.

While a number of states are moving towards legalizing same-sex marriages and unions by granting these couples the same rights as heterosexual couples, many jurisdictions still do not recognize same-sex marriages and unions. There are currently nineteen states plus the District of Columbia that provide marriage equality to same-sex couples. Marriage equality recognizes same-sex couples' marriages and provides these couples with the same marital rights as heterosexual couples. There are, however, thirty-one states that have constitutional amendments and/or state laws banning same-sex marriage. (Ahuja, Barnes, Chow & Rivero, 2014; ProCon.org. 2014). A number of these states' laws have been challenged in recent court cases. These include, but are not limited to, Virginia, Utah, Oklahoma, Indiana and Wisconsin. Courts in these states ruled in favor of marriage equality. (CBS Interactive, Inc. 2014). The Court of Appeals for the Fourth Circuit, Seventh, and Tenth Circuits struck down bans on same-sex marriages. The Fourth, Seventh, and Tenth Circuits include states such as West Virginia, North Carolina, South Carolina, Kansas, Colorado, and Wyoming. Recently, a number of these cases went before the U.S. Supreme Court, who ultimately decided not to hear the cases and allowed the decisions of the lower courts to stand. As a result, the number of states recognizing same-sex marriages will immediately move from nineteen to twenty-four states and will likely increase to thirty states once the Court's decision is fully implemented (Liptak, 2014a). These states include, but are not limited to, Indiana, Utah, Oklahoma, Wisconsin, and Virginia (CBS Interactive, Inc. 2014). In addition to the aforementioned rulings, federal district court judges in several states, including Texas, have also entered limited rulings in favor of recognizing same-sex marriages. Courts in Kentucky and Ohio, have entered limited rulings that both states (which currently ban same-sex marriages), must recognize same-sex marriages from other states (Chokshi, 2014).

Moreover, while the federal government is also moving towards granting same-sex couples increased rights many heterosexual couples already receive, such as social security benefits and ability to make end of life decisions for their spouses, many of these benefits may remain unavailable due to particular state's definition of marriage. This is in large part because when Section 3 of the Defense of Marriage Act was overturned in 2013 by the Supreme Court in the case of *U.S. v. Windsor*, (133 S. Ct. 2675), same-sex couples received the right to have their marriages recognized by the federal government. Same-sex couples now qualify for the federal benefits and programs that heterosexual couples already receive if they are married. Unfortunately, many agencies that confer benefits such as tax exemptions rely not on where a couple is married, but where they currently reside in determining benefits eligibility. For same-sex couples that live in states that do not recognize their unions or marriage, these couples still have no access to many federal benefits and protections. For couples living in states where their relationships are not recognized, these couples may have no access to the benefits and protections conferred by federal laws (Gay & Lesbian Alliance Against Defamation [GLAAD] 2014; [DOMA] 1996). Without state or federal protections and benefits, same-sex couples often face additional financial, emotional, and legal hardships not faced by heterosexual couples.

Due to the serious issues same-gendered couples living in states that do not legally recognize their relationships face, this article examines the very real need for same-sex couples to use private law, in the form of specific legal documents, to protect their rights. Moreover, the authors take the position that clergy who solemnize same-sex relationships should require these couples, as a precondition, to execute such documents as enumerated in this article. Same-sex couples, regardless of their gender, clearly feel the same love and joy in their relationships and experience the same heartache of separation as heterosexual couples. Unlike their counterparts, however, same-sex couples often face uncertainty and inequality in the law regarding their romantic relationships.

Much like their heterosexual counterparts, many same-sex couples seek to have clergy perform their marriages and unions. While clergy may be more than willing to perform such ceremonies, without recognition under the law, these marriages and unions are strictly religious ceremonies devoid of legal impact. While clergy should not give legal advice, they can, and arguably should, suggest the need for certain legal documents as a means to protect same gendered couple's rights, and therefore should familiarize themselves with such documents. In doing so, clergy can then become equipped to provide same-sex couples with referrals to attorneys who can give legal advice and draft the necessary agreements. By insisting that same-sex couples seek the advice of legal counsel to draft agreements to protect their rights, clergy can assist in ensuring that the marriage and commitment ceremonies they perform are not merely symbolic ceremonies, but instead have validity due to enforceable agreements that will be recognized in a court of law (Gross-Schaefer & Dixon, 2004). Clergy, by facilitating the assistance of legal counsel and integrating the execution of such agreements, will help provide same-sex couples with a level of legal, emotional and financial well being that may

not currently be attainable without private legal agreements. This paper, in addition to its legal analysis, can serve as an instructional guide to clergy in counseling same-sex couples prior to performing marriage and commitment ceremonies.

The article begins by examining the current state of the laws governing same-sex relationships at both the federal and state level. Specifically, we will examine two cases that have substantially impacted the landscape of rights for same-sex couples. The paper will then examine four areas of the law where uncertainty for same sex couples lies and the legal agreements that can be effectively utilized to reduce this uncertainty. These areas include: 1) medical/end of life decisions; 2) financial welfare of both parties and distribution of assets upon dissolution of the relationship; 3) distribution of the couple's property in the event of death; and 4) parental rights. The paper concludes with a discussion regarding how clergy may aide same-sex couples in protecting their legal rights with respect to areas of the law that remain uncertain.

2. Current Developments in Laws Governing the Rights of Same Sex Couples

2.1. Supreme Court Overturns Section 3 of the Defense of Marriage Act

In 1996, Congress passed and President Clinton signed into law the Defense of Marriage Act (DOMA). Section 3 of DOMA defined marriage as solely between a man and woman (GLAAD, 2014; DOMA, 1996). The section also delineated that the federal government could not recognize marriages between same-sex couples for the purpose of federal laws and programs. Thus, even same-sex couples that were legally married in their home states were ineligible to receive funding or benefits from federal government programs such as social security, hospital visitation rights, and healthcare benefits. DOMA remained in effect and continued to deny same sex-couples the same federal benefits as heterosexual couples until the summer of 2013 (GLAAD, 2014).

In the seminal case of *U.S. vs. Windsor*, Edith Windsor challenged the constitutionality of Section 3 of DOMA. Edith Windsor and Thea Spyer were married in Canada, but living in New York at the time of Spyer's death. After Windsor's spouse Spyer died, Windsor sought to claim a federal estate tax-exemption for spouses. Spyer had left her estate to Windsor upon her death. Although the state of New York recognized their same-sex marriage, due to Section 3 of DOMA, which defined marriage as solely between a man and woman, the federal government did not. The federal government denied her claim and Windsor was forced to pay the federal government over three hundred and sixty-three thousand dollars in estate taxes. Thea left her estate to Edith when she passed away. Edith sought to claim the federal tax-exemption for surviving spouses. Because Section 3 of DOMA defined marriage as solely between a man and woman, Edith was denied the exemption and forced to pay the federal government. Windsor was forced to pay over three hundred and sixty-three thousand dollars in estate taxes to the federal government. In her case against the United States, Windsor argued that Section 3 of DOMA was unconstitutional because it denied her the same protections afforded to married heterosexual couples (*U.S. v. Windsor*, 2013; Justia.com, 2013).

The U.S. Supreme Court ultimately heard Windsor's case. The Court determined that denying same-sex married couples the same rights as heterosexual couples under federal law was a violation of both due process and equal protection because the law interfered with the states' rights to place both same-sex marriages and heterosexual marriages on equal footing. The federal government, in effect, sought to treat differently and exclude a group of people (same-sex married couples), which New York sought to protect. DOMA failed to recognize the federal government's history of recognizing that states have the right to define marriage within their own borders. The effect of Section 3 of DOMA was to not only treat same-sex married couples differently at both the state and federal levels, but also to deny same-sex couples many federal rights and benefits that married heterosexual couples received in the state on New York. Finding this type of treatment to be inexcusable, the court declared Section 3 of DOMA unconstitutional (*U.S. v. Windsor*, 2013; Justia.com, 2013). As a result, same-sex couples living in states that recognize their marriages, would now have access to federal programs and benefits that were previously denied to them (GLAAD, 2014).

The Federal Government has continued to expand the rights of same-sex couples following the ruling in *U.S. v. Windsor*. For example, Attorney General Eric Holder recently announced that he and his office are preparing to issue policies to eliminate the distinction between same-sex married couples and heterosexual couples in the federal criminal justice system. Same-sex couples will now be covered under the federal spousal privilege that prevents the government from forcing spouses to testify against each other in court. Same-sex couples will also have the same visitation rights as heterosexual couples if a spouse is currently in prison. The Justice Department will now recognize same-sex couples when determining benefits eligibility for programs such as the 9/11 Victim Compensation Fund or benefits received after one's spouse was killed in the line of duty as a police officer. It should be noted, however, that these new federal rules would have no effect on state laws (Apuzzo, 2014).

Following the lead of the federal government, Attorney Generals in states such as Nevada, Oregon, Virginia, and Pennsylvania have come under fire for refusing to defend their states' constitutional bans on same-sex marriage. Attorney General Eric Holder recently issued a statement that states' attorney generals do not have to defend their

states' bans on same-sex marriage. According to Holder, "Attorneys general should base their decision on whether to defend their states in such cases, not on politics, but on questions of guarantees under the U.S. Constitution, such as equal protection of the law" (Johnson, 2014).

While Windsor's case was successful in overturning Section 3 of DOMA, she did not challenge Section 2 of DOMA. Section 2 declares that all states and territories do not have to legally recognize same-sex marriages that were performed in other states. States also continue to have the ability to deny same-sex couples the right to marry within their own borders. The implication of Section 2 is highly important because it passes significant power to an individual state to determine who can receive benefits based on the specific state's definition of marriage. Accordingly, many same-sex couples will continue to have difficulty gaining access to various federal benefits, programs, and protections (GLAAD, 2014).

2.2 The Case of Hollingsworth vs. Perry

In May 2008, the California Supreme Court ruled in favor of marriage equality. The ruling found that laws limiting the rights of same-sex couples to marry violated California's constitution (In Re Marriage Cases, 2008). Specifically, the Court determined that a same-sex couple's ability to marry was a fundamental right under Article 1, Section Seven of the U.S. Constitution. Based on this notion, the Court found that two statutes passed by the California legislature barring same-sex couples the right to marry were unconstitutional (Dolan, 2008). Following the court's ruling, same-sex couples were given the ability to marry just like their heterosexual counterparts.

As marriage licenses were being issued to same-sex couples in the state of California, in November 2008, the people of California passed the ballot initiative Proposition 8, which amended the state's constitution to reflect that only marriage between a man and woman would be recognized in California (Marin, 2013). Due to the passage of Proposition 8, California no longer recognized or allowed same-sex marriages (Liptak, 2013b).

Proposition 8 was challenged in the case of Hollingsworth vs. Perry (Hollingsworth v. Perry, 2013). The case ultimately made its way to the U.S. Supreme Court. In a five to four vote, the U.S. Supreme Court ruled on technical grounds that the proponents of the ban on same-sex marriage had no standing to bring their claims before the court. State officials in California had declined to appeal the lower court's ruling in the case that declined to uphold Proposition 8. The U.S. Supreme Court determined that the proponents of the ban could not step into the shoes of the state to appeal. The proponents were not an injured party. Same-sex couples would once again be allowed to marry in California and be granted the same marital rights as heterosexual couples. While the ruling in this case is undoubtedly a definite step in the right direction for public law protecting the rights of same-sex couples, the ruling only applies in California (Liptak, 2013).

3. Current Status of Same-Sex Relationships in the United States

Marriage, domestic partnerships and civil unions may provide same-sex couples with most, if not all the rights and protections afforded to heterosexual couples under the law. These terms, however, are not synonymous, and therefore it is critical to develop a deeper understanding of their distinct meanings and legal effect.

3.1 Marriage

There are currently nineteen states plus the District of Columbia that recognize same-sex marriages and are known as marriage equality states (ProCon.org, 2014). Given the U.S. Supreme Court's decision not to hear the issue of same-sex marriages, this will immediately increase to twenty-four states and will ultimately move to thirty states plus the District of Columbia once the U.S. Supreme Court's decision is fully implemented (Liptak, 2014a). For same-sex couples that choose to marry and are living in marriage equality states, they typically receive the same legal benefits and protections that heterosexual married couples receive. Same-sex married couples in states such as Massachusetts and Vermont, for example, have automatic inheritance rights for a surviving spouse and visitation rights for their children if the couple separates (Hertz & Duskow, 2012). Moreover, since the U.S. Supreme Court recently invalidated Section 3 of the Defense of Marriage Act, same-sex married couples within these states also now have access to federal benefits such as social security (Jacobs, 2013).

One of the major issues that same-sex couples currently face is that not all couples who legally marry in marriage equality states permanently remain in those states. If a couple marries in California, but has to move to another state for a spouse's job, questions arise as to whether the couple's marriage will be recognized by the laws in the new state. If the marriage is not recognized under the law, the couple will no longer have the benefits and protections afforded married couples. For example, the federal government determines eligibility for benefits such as Medicare and veteran's benefits based on the married couple's state of residence. If a same-sex couple was married in a state that recognizes same-sex marriages, but moves to a state that does not, they may no longer be eligible or qualify for Medicare or veteran's benefits (Jacobs, 2013; Hertz & Duskow, 2012).

Moreover, if the couple wishes to divorce, would such a divorce be granted in a state that does not recognize same-sex relationships? Two same-sex couples, who were legally married in states that recognized their unions, recently sought divorces in the state of Texas. Texas does not currently allow same-sex marriages in their state and does not recognize same-sex marriages performed in other states. Texas does not currently allow same-sex marriages in their state and does not recognize same-sex marriages performed in other states. Yet, one couple was granted their divorce and the other denied. The issue now before the Texas Supreme Court is whether a state which does not legally recognize same-sex marriage, may grant divorces to same-sex couples. While the Texas Supreme Court attempts to make a determination on the issue, both couples are currently left with uncertainty regarding their future and without clear legal recourse (Stutz, 2013; Associated Press, 2013).

It should be noted, that while Texas' constitutional ban on same-sex marriage remains in effect, the ban is currently in question. A Texas Federal District Court judge ruled in February 2014, that Texas' ban on same-sex marriage was unconstitutional. The judge, however, allowed the ban to remain in effect pending appeal (Hennessy-Fisk, 2014). The Texas Supreme Court heard the same-sex divorce case referenced above, in November 2013 and there has currently been no ruling in the case (Fikac, 2013). It is unclear if and how the most recent Federal District Court ruling finding Texas' same-sex marriage ban unconstitutional may impact the Texas' Supreme Court's decision in the divorce case.

Because situations like these arise, same-sex couples cannot simply rely on state law to provide a fair remedy, but need to enter into private legal agreements to protect their rights and allow for an agreed upon disposition of property.

3.2 Civil Unions or Domestic Partnerships

There are eight states plus the District of Columbia that have domestic partnership and civil union laws (Lamda Legal, n.d.b). Some of these states, including California, Washington, and Oregon provide same-sex couples entering into civil unions or domestic partnerships with largely the same benefits and responsibilities as married heterosexual couples, but with a different title. For example, in marriage equivalent states such as California, same-sex couples entering into a domestic partnership receive essentially all of the same rights and responsibilities as spouses under state law. Accordingly, domestic partners in California may have community property rights, receive the same employee benefits as spouses, make health decisions for a partner who has become incapacitated, and both have legal rights to any children born into the domestic partnership. (Hertz & Duskow, 2012).

There are also several states, including Wisconsin and Maine that have limited domestic partnership laws. In these states, same-sex couples entering into domestic partnerships receive some, but not all the rights and protections afforded married couples. For example, Wisconsin and Maine currently give domestic partners rights such as the ability to inherit if a partner passes away. These couples, however, are still not on equal footing with their married heterosexual counterparts (Hertz & Duskow, 2012).

Couples entering into domestic partnerships or civil unions must meet the following requirements: 1) both individuals must be at least eighteen years old; 2) the couple must be unrelated; 3) the couple must not be in a previous marriage or other legal relationship; 4) each individual must be of sound mind. The couple is required to register their civil union or domestic partnership with the state. Some states also require that a clergy member, judge, or justice of the peace who lives in the state where the couple entered into the domestic partnership or civil union certify the domestic partnership or civil union. Couples should inquire regarding their state's particular requirements (Hertz & Duskow, 2012).

While civil unions and domestic partnerships are a legal means to ensure same-sex couples receive many of the rights and protections afforded married couples, there are still significant issues with these particular legal relationships. One of the major issues is the inability to access federal rights and protections given to spouses. While Section 3 of DOMA was overturned earlier this year, the Act only applies to married couples. If a same-sex couple lives in a state offering only civil unions or domestic partnerships, or if the same-sex couple chooses to remain in a civil union or domestic partnership rather than marry, they will not be able to access federal protections and benefits (Laurence, 2014). Furthermore, same-sex couples are still left with uncertainty if they choose or are forced to move to a state that does not recognize same-sex civil unions or domestic partnerships from other states. These couples are left with no rights and little recourse should they choose to separate in a state that does not recognize their union (Hertz & Duskow, 2012). For these couples, legal agreements are still needed to protect their rights.

3.3 Reciprocal Beneficiaries Laws

There are some states that have reciprocal beneficiaries' laws in place for same-sex couples (Lamda Legal, n.d.b). These laws allow same-gender couples to fill out a form, designate each other as beneficiaries and choose from a list of rights to give to one another. Couples may choose to grant each other rights such as the right to hospital visitation if a partner becomes ill or the right to inherit if a partner passes away (Hertz & Duskow, 2012). While reciprocal

beneficiary laws do provide same-sex couples with some legal rights, these couples should still be vigilant about preparing appropriate legal documents to protect their rights.

4. Four Primary Legal Areas of Concern for Same-Sex Couples and the Private Agreements: These Couples Can Prepare to Protect Their Rights

Given that the protections afforded by public law vary greatly from state to state and are at best, uncertain for same-sex couples, there are at least four basic areas or issues that same-sex couples should address through legal documents prior to marriage or commitment ceremonies. These areas include the following: 1) medical/end of life decisions; 2) financial welfare of both parties and distribution of assets upon dissolution of the relationship; 3) distribution of the couple's property in the event of death; and 4) parental rights with respect to children (Gross-Schaefer & Dixon, 2004; Hertz & Doskow, 2012).

As this article is intended to serve as a guide for same-sex couples and clergy, clergy who perform same-sex marriages and commitment ceremonies, should familiarize themselves with the laws in their respective states and have some basic knowledge of the legal documents that are needed to protect same-sex couples rights. However, as previously cautioned, clergy should not give explicit legal advice. Rather, clergy should provide same-sex couples with referrals to legal counsel who may help the couple better understand the ever-changing landscape regarding same-sex relationships and identify the legal documents necessary to protect their rights.

4.1 Using Medical and Financial Directives to Ensure Medical and End of Life Decisions Are Carried Out Appropriately.

In many jurisdictions, without proper documentation, same-sex couples do not automatically have legal rights to make medical or funeral decisions for one another in the event of serious injury or terminal illness. Hospitals and courts generally look to the closest biological family member or spouse to make health care decisions for a person who can no longer make medical decisions for themselves. In states that do not recognize same-sex marriages or unions, a partner may be left out of decisions concerning their ill partner's care (Human Rights Campaign, 2014b). If an individual is suffering from terminal cancer in a state that does not recognize same-gender relationships, their partner may have no say in the individual's medical care, may not be able to visit their ailing partner if the family does not allow it, and may be left out of funeral arrangements.

4.1.1 Medical Directives

While it is certainly important for any couple to enter into the appropriate legal agreements to ensure that their wishes in terms of medical and end of life care are honored, it is especially important for same-sex couples. These agreements ensure that partners will have a say in their ailing partner's care. There are two documents that same-sex couples should prepare with regard to medical care: 1) health care declaration and 2) durable power of attorney (Hertz, 2014; Hertz & Doskow, 2012). Both documents should be completed to ensure that an individual's wishes regarding medical care are carried out.

Couples that are unmarried or reside in states that do not recognize same-sex marriages or unions must definitely prepare medical care documents to ensure their rights are protected. Same-sex couples that reside in states that recognize marriage equality or have broad civil union/domestic partnership laws generally do have the right to make medical or end-of-life decision for their spouse or partner. Even so, it is always a good idea to prepare medical care documents to ensure that a individual's wishes regarding their care are carried out (Hertz, 2014; Hertz & Doskow, 2012).

Health care declarations are specific written directions to medical personnel concerning an individual's care if he or she becomes injured or ill (Hertz, 2014). Depending on the state an individual resides in, these health care declarations are also known as living wills, declarations, or health care directives (Hertz & Doskow, 2012). Regardless of terminology, the document specifically details the medical care to be provided a person if they can no longer make decisions regarding their health care. Preparing a health care declaration ensures that medical personnel honor an individual's exact wishes concerning medical treatment and care if the person is no longer able to make decisions for themselves (Hertz, 2014).

In addition to the health care declaration, same-sex couples should also each prepare a durable power of attorney form for health care. The durable power of attorney for health care form allows an individual to designate another person as their "agent" or "attorney-in-fact" to make health care decisions on the person's behalf. An individual is able to designate the scope of their "agent's" power in the durable power of attorney documents. For example, an individual may designate their partner to be responsible for hiring and firing medical personnel and authorizing medical treatments. Same-sex couples may name their partners or spouses as their agent, in a durable power of attorney document to make certain that their loved one is not excluded from health care decisions (Human Rights Campaign, 2014b). Preparing both medical care and durable power of attorney documents ensures that same-sex partners are able to have the final say regarding their loved one's care.

4.1.2 Financial Directives

In addition to medical directives, there is also a need to consider financial directives. When an individual is dealing with a terminal illness, or has become mentally incapacitated due to serious injuries, the individual can often no longer take care of their own finances. If such a situation arises, a person's partner cannot simply take over the person's finances. Typically, a guardianship or conservatorship proceeding is filed with the court and the partner will have to petition to take over their ailing partner's finances. In these types of proceedings, courts tend to give priority to the closest biological family member. This can have serious consequences, especially if the same-sex couple has been together for some time and they share assets and bank accounts (Hertz, 2014).

By preparing a durable power of attorney for finances document, an individual may designate a person to handle their finances if they can no longer take care of these matters themselves. The individual may designate their partner to take care of such financial matters as keeping track of investments, paying bills, and making bank deposits. The document should clearly state what financial matters the designated person or "agent" will handle and the extent of power the agent will have over the individual's finances (Human Rights Campaign, 2014c). Without a clear delineation of authorized power, the durable power of attorney over finances document can be dangerous. Allowing someone unfettered access into one's finances may result in assets being sold and debts being paid that the ailing individual does not want to be sold or paid. Individuals need to make sure that they clearly define and limit their agent's power (Gross-Schaefer & Dixon, 2004; Hertz & Duskow, 2012).

4.2 *Using Co-Habitation Agreements to Ensure the Financial Well-Being of Both Parties if a Same-Sex Couple Separates.*

The issue of financial wellbeing of each partner often arises when same-sex couples choose to separate and are living in states that do not recognize their relationships (Hertz & Duskow, 2012). For example, Griffin and Joe have been a committed relationship for several years. Griffin is the primary wage earner and Joe stays at home to raise their daughter. Griffin and Joe have never discussed whether Joe's earnings are shared earnings or Griffin's sole property (Gross-Schaefer & Dixon, 2004). The couple has also never defined Joe's contribution to the relationship of taking care of their daughter in financial terms.

The couple decides to separate and litigation ensues over separation of their assets. Because Joe and Griffin live in a state that does not recognize their relationship, as the lesser-earning partner, Joe may have no legal claim to any assets that are not in his name (Hertz & Duskow, 2012). For example, if the home the two reside in is in Griffin's name, Joe will be left with no place to live. Griffin will also be under no obligation to provide any type of spousal support to Joe once the end their relationship (Gross-Schaefer & Dixon, 2004). If Joe and Griffin had entered into a written agreement or contract defining their financial contributions to the marriage and how assets would be divided upon separation, the couple could have avoided significant heartache and court time (Hertz & Duskow, 2012). An agreement could have ensured that both Joe and Griffin were financially taken care of upon separation (Gross-Schaefer & Dixon, 2004).

Legal agreements governing same-sex relationships that do not include marriage or domestic partnerships are known as co-habitation or living together contracts. These agreements are similar in many ways to pre-nuptial agreements (GLAD, 2014; Hertz & Duskow, 2012). Co-habitation agreements delineate the couple's intentions and expectations regarding finances, clarify separate and joint property, and have instructions regarding what will happen to the couple's property and finances upon separation (GLAD, 2014; Hertz & Duskow, 2012; Gross-Schaefer & Dixon, 2004). These agreements also often contain clauses regarding what type of dispute resolution will be used to resolve any conflicts between the separating couple. Dispute resolution options may include mediation or arbitration. Mediation involves both partners working together with a third party mediator to resolve their legal disputes upon separation. Arbitration involves each side presenting their case to a third party arbitrator, who then makes a final decision in the case. The parties typically have to agree in advance to be bound by the arbitrator's decision. (Hertz & Duskow, 2012).

While many couples prepare co-habitation agreements on their own, it is best to seek the advice of attorneys when preparing these agreements. Each party should have their own attorney to negotiate and draft the co-habitation agreement. Having two attorneys ensures that each side is represented fairly and there are no issues of coercion or misunderstanding in the document (Gross-Schaefer & Dixon, 2004).

Preparing a co-habitation agreement compels couples, while they are getting along, to discuss and write down expectations concerning how finances and property will be divided after separation. Many times, partners in a same-sex relationship have different expectations concerning division of finances and property upon separation. Couples need to

discuss these issues to come to a mutual understand and avoid significant conflict down the road (GLAD, 2014; Gross-Schaefer & Dixon, 2004).

4.3 Preparing a Will as a Means to Protect a Partner's Right to Inherit after an Individual Passes Away.

In states that do not recognize same-sex relationships, if a partner passes away during the relationship, his or her assets do not automatically pass on to the surviving partner (Cheung, 2013). Intestacy laws, while varying from state to state, often dictate that a deceased person's assets will be passed on to a surviving spouse and/or family members. Generally, state inheritance laws do not recognize same-sex relationships, unless the state has marriage equality or marriage equivalent status for same-sex couples. Same-sex couples residing in these states and that are in marriages, domestic partnerships, or civil unions may inherit some or all of the property of their deceased partner without a will (Randolph, 2014; Hertz & Duskow, 2012). For unmarried same-sex couples or those living in states that do not recognize their relationships, there is a key legal document that can protect a partner's right to inherit after their partner passes away.

A will is a powerful and inexpensive legal document that directs how an individual's assets will be distributed upon his or her death. When a person prepares a will, he or she may designate an executor for their estate and determine who will inherit their assets (Hannibal, 2014). Preparing a will is especially important for same-sex couples because it allows them to name their partners as beneficiaries who will inherit under the will. When distributing assets, courts will typically honor the wishes of deceased person as delineated in his or her will (GLAD, 2014). Generally, wills are only set aside by courts if the challenging party can prove fraud, duress, or legal incompetence of the will drafter (Hertz & Duskow, 2012).

Preparing a will also allow an individual to name who will be the caretaker or guardian for their child once the individual passes away (GLAD, 2014). When a child has two legal parents, the surviving partner retains custody of the child. While some same-sex couples share legal custody of their child, others do not. In cases where custody is not shared, the biological parent or adoptive parent is the sole legal parent. A guardianship clause is vital to same-sex couples who do not share custody of their child because it allows a legal parent to name their partner as the child's guardian after the legal parent passes away. While guardianship clauses are not binding, courts will look to these clauses in a will to determine what is in the "best interests of the child" and often honor the deceased wishes in terms of care for the child (Hertz & Duskow, 2012).

When preparing a will, individuals in same-sex relationships should consult an attorney to ensure that the will is prepared accurately and will be sustainable in a court of law. The document ensures that a person's wishes regarding his or her estate are honored and that their partner and children are provided for after the person passes away (Gross-Schaefer & Dixon, 2004).

4.4 Protecting and Securing Parental Rights through Legal Agreements

Legal parents are those individuals who have the right to live with their child and make decisions concerning the child's health, education, and well-being. Legal parents are required to support and care for their children both emotionally and financially (Guillen, 2014). The status of legal parent is given to parents who have a biological connection with the child, such as a biological mother or biological father (Human Rights Campaign, 2014e).

In same-sex relationships, typically, only one parent is the legal parent because only one parent is generally biologically related to the child (Hertz & Duskow, 2012). In many states, regardless of whether a partner brings a child into the same-sex relationship, the couple chooses to have a child, or the couple chooses to adopt, only one parent will have legal parent status (Hertz & Duskow, 2012; Human Rights Campaign, 2014e). The non-legal parent is known as the second parent. The second parent has no real rights with respect to the child either during or after the couple's relationship ends (Hertz & Duskow, 2012). However, with the creative use of legal agreements, the second parent can become a legal parent, or at the very least, maintain a relationship and have contact with the child if the couple chooses to separate.

It should be noted, that while many same-sex couples raise an adopted child together, only one parent is the legal parent because some adoption agencies do not allow same-sex couples to adopt. These agencies, however, will allow a single gay or lesbian individual to adopt (Human Rights Campaign, 2014d). In marriage-equality and marriage equivalent states, couples in same-sex marriages or domestic partnerships that adopt or have a child during the marriage or domestic partnership are both considered legal parents (Guillen, 2014). It is still advisable, however, that the non-biological parent move forward with adopting the child to ensure his or her parental rights.

4.4.1 Joint Adoption

One method of ensuring that both parents in a same-sex relationship are legal parents of a child is to jointly adopt (Guillen, 2014). Joint adoption involves both partners in a same-sex relationship adopting a child either from the biological parents or from the custody of the state. Currently, there are twenty-three states and the District of Columbia that allow for same-sex couples to jointly adopt. There are still currently eight states that have prohibitions against joint adoption for same-sex couples. In the remaining states, the laws are not clear regarding same-sex joint adoption. Parental rights are typically determined on a case-by-case basis. Same-sex couples should consult an attorney within their states to inquire if joint adoption is an option for them (Human Rights Campaign, 2013e). By jointly entering into an agreement to adopt a child, both partners in a same-sex relationship are ensured legal parental status. In the event the couple decides to separate, both partners will have equal legal rights to care for their child (Guillen, 2014).

4.4.2 Second-Parent Adoption

Another option for same-sex couples to obtain legal parental rights for both parents is to enter into a second-parent adoption (Human Rights Campaign, 2013d). The second parent adopts his or her partner's biological or adopted child (Hertz & Doskow, 2012). Once the adoption is finalized, both parents have legal equal parental rights (Hertz & Doskow, 2012; Human Rights Campaign, 2013d). A second-parent adoption allows the second-parent to be able to make decisions concerning the child's well-being, education, and maintain rights regarding custody and visitation if the couple separates. One of the major obstacles same-sex couples face with respect to second-parent adoption, is that not all states allow second-parent adoptions (Hertz & Doskow, 2012; Human Rights Campaign, 2014f). Currently, there are only twenty-four states and the District of Columbia that clearly allow second-parent adoptions. The remaining states either prohibit second-parent adoptions or the law is unclear with respect to second-parent adoptions. In states where the law is unclear, parental rights are often determined on a case-by-case basis. Same-sex couples should consult with an attorney in their state to determine their adoptive rights (Human Rights Campaign, 2014f). If a couple lives in a state where second-parent adoption is not an option or the laws are unclear with respect to second-parent adoption, then a co-parenting agreement is another option to protect parental rights (Human Rights Campaign, 2011h).

4.4.3 Co-Parenting Agreements

For same-sex couples living in states that do not allow joint or co-parent adoption, these couples may enter into co-parenting agreements to protect their rights. A co-parenting agreement is a legal document that delineates the rights and responsibilities of each parent in a same-sex relationship. Partners may delineate their intent to jointly and equally share parental responsibilities for the child, authorize each partner to make decisions regarding the child's medical care, and arrange a custody agreement before the couple separates in a co-parenting agreement (Hertz & Doskow, 2012; Guillen, 2014).

Until recently, co-parenting agreements were not legally enforceable in court if the legal parent chose not to abide by the terms of the agreement. While courts would take co-parenting agreements into consideration in determining the intent of the parties with respect to legal issues such as custody or visitation rights, courts were not bound by these agreements. Legal parents could effectively and successfully argue that they never had any intent to allow the second parent custody or visitation rights if the couple ever separated (Hertz & Doskow, 2012). Second parents could be left with no ability to see or take care of a child they may have helped raise for many years (Guillen, 2014; Human Rights Campaign, 2014e).

A recent decision by the Kansas Supreme Court, also indicates that the tide may be shifting towards enforcing co-parenting agreements. In the Kansas case of Frazier v. Goudschall, Goudschall and Frazier were in a same-sex relationship and Goudschall was the biological or legal parent of their two children. The women had entered into a co-parenting agreement that allowed for, among other things, shared parental responsibility and visitation rights for the non-custodial parent if the couple separated. When the couple separated, Goudschall sought to move to another state and exclude Frazier from the children's lives. Frazier sued to enforce the co-parenting agreement. The district court found in favor of Frazier and awarded her visitation rights and required her to pay child support. Goudschall appealed (Frazier v. Goudschall, 2013).

The Kansas Supreme Court upheld the trial court's initial ruling in favor of Frazier and enforced the co-parenting agreement. The court noted the following:

If...a parent has a constitutional right to make the decisions regarding the care, custody, and control of his or her children, free of government interference, then that parent should have the right to enter into a co-parenting agreement to share custody with another without having the government interfere by nullifying that agreement, so long as it is in the best interests of the children (Frazier v. Goudschall, 2013; Grossman, 2013).

The court noted that enforcing the co-parenting agreement places children of same-sex couples on equal footing with the children of heterosexual couples (Frazier v. Goudschall, 2013). In analyzing the basis for the Kansas Supreme Court's decision, Grossman notes the following:

...[I]t was important to Kansas' high court that denying enforcement to the co-parenting agreement would consign the children to having only one parent, which many other statutes and precedents counsel against. Enforcement...means that children of a lesbian couples can be treated on par with children of a traditional heterosexual marriage, as well as on par with children of opposite-sex unwed parents.... (Grossman, 2013)

The court ultimately concluded that the co-parenting agreement was enforceable. (Grossman, 2013).

Some courts also look to the doctrine of de facto parentage to provide second-parents some rights with respect to the child they helped raise. De facto parentage provides the second-parent with some parental rights because he or she has served as a parent to the child with the consent of the legal parent. Some states recognize the doctrine, while others reject the notion of de facto parentage. The doctrine, when utilized, does require courts to base their decision regarding de facto parentage on the specific facts of the case, including the relationship of the second-parent and child and whether this relationship should be maintained over the objections of the legal parent. The factors courts consider in making this determination vary from state to state (Grossman, 2013).

Co-parenting agreements are an important tool for same-sex couples to delineate their intent with respect to the care and custody of their children if the couple separates. If both parties are willing to abide by the terms in the event of separation, a co-parenting agreement can help to resolve issues without the need for costly litigation (Guillen, 2013; Hertz & Duskow, 2012). Even if a couple does go to court, a co-parenting agreement can provide guidance to the court and may ultimately be found valid and enforceable (Gross-Schaefer & Dixon, 2004).

5. How Clergy May Provide Guidance to Same-Sex Couples in Protecting Their Rights

Clergy who perform marriages or commitment ceremonies for same-sex couples should counsel their congregants prior to performing these ceremonies on the need to seek legal advice from competent counsel and prepare legal agreements to protect the couple's rights (Gross-Schaefer & Dixon, 2004). Even in states that have broad marriage-equality or marriage-equivalent laws, it is still important for clergy to advise same-sex couples to seek out counsel and discuss with him or her what key legal agreements the couples should sign prior to the marriage or commitment ceremony. This ensures that even if the couples moves from an area that recognizes their marriage or union to an area where there are limited legal protections for same-sex couples, their rights will still be protected through private legal agreements (Hertz & Duskow, 2012).

The authors do not advocate for clergy to provide legal advice to same-sex couples regarding the couples' rights and how to prepare the private legal agreements that will protect these rights. Instead, the authors advocate for clergy to utilize a model similar to the Jewish wedding ritual of the Ketubah. The exact date of the Ketubah's usage is unclear, many date its formalized practice to the highest Jewish legal body located in Jerusalem, the Sanhedrin, in the first century, B.C.E. The Ketubah was created as a legally enforceable agreement to protect the legal rights of the wife in case of the husband's death or in the event of a divorce, which was not otherwise protected. The signing of the Ketubah was required for a valid Jewish wedding. While some Jewish communities treat it more as a ceremonial covenant of relationship and others view the Ketubah as a legally enforceable contract, its over two thousand year history, as well as the extent to which it is discussed in Jewish legal texts such as the Talmud, evidence the Ketubah's serious legal significance (Maimonides, Yad, Ishul, xvi; Siegel, Strassfeld, & Strassfeld, 1973).

The Ketubah is an integral part of a Jewish wedding. It is generally executed the day of the wedding, just prior to the formalized wedding ceremony. It is then fully read during the wedding ceremony. The Ketubah is therefore an effective model for both the use of private legal agreements entered into prior to marriage to protect the couple's rights, as well as a model to demonstrate the role clergy play in ensuring such agreements are signed prior to the wedding ritual.

Using a model similar to the Jewish tradition of requiring a signed Ketubah prior to marriage, clergy should also require that prior to performing the marriage or commitment ceremony, same-sex couples seek out legal counsel and work with counsel to prepare the legal documents necessary to protect their rights. This will ensure that the couples' rights are protected from the beginning of the union (Gross-Schaefer & Dixon, 2004). A discussion regarding the same-sex couple's need to seek out legal advice and enter into private legal agreements should simply become part of the process of counseling same-sex couples prior to marriage or commitment ceremonies. Clergy should wait till the couple seeks legal counsel and enters into the appropriate agreements before performing the marriage or commitment ceremony.

Currently, there is very little education for clergy in the area of guiding same-sex couples to protect their legal rights through private law prior to marriage or commitment ceremonies. The authors' hope is that this paper will be used in seminaries and clergy organizations that have clergy performing same-sex marriages and unions as a learning tool for the clergy with respect to how to advise same-sex couples to seek legal counsel and prepare key legal agreements to

protect their rights prior to their marriages or unions. The authors acknowledge that not all clergy are willing to perform same-sex marriage or commitment ceremonies. The tide, however, seems to be shifting and for those clergy who do perform same-sex marriage and commitment ceremonies, this paper can provide them with the information they need to advise same-sex couples (Kaleem, 2013).

For example, smaller Christian denominations and non-Christian groups have started performing same-sex marriages or blessings. These include the United Church of Christ (congregations are largely autonomous and clergy can either choose or not choose to perform same-sex ceremonies) and the Unitarian Universalist Association of Congregations. The Episcopal Church now allows clergy to bless same-sex unions, even though individual priests had been performing these ceremonies for quite some time. The blessings do not count as marriage, though, because the church still defines marriage as between opposite sexes. That being said, in states that allow for same-sex marriages, clergy may perform these ceremonies. The Presbyterian Church also allows clergy to bless same-sex unions, (same-sex couples are not, however, included in the Presbyterian Church's rules regarding marriage). The Jewish faith, those following the reform and conservative, and Reconstructionist denominations allow same-sex marriages. Rabbis may choose whether to perform same-sex marriages and unions, with many opting to perform these types of ceremonies (Kaleem, 2013).

Until all states recognize and place same-sex marriages or unions on equal footing with heterosexual marriages, clergy can take the lead by advising same-sex couples regarding how they can protect their rights if they choose to marry or enter into a commitment ceremony. By doing so, clergy can perform marriages and commitment ceremonies that will not just have spiritual significance, but also legal significance (Gross-Schaefer & Dixon, 2004).

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