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Estate Planning Issues For LGBTQ Couples—Part 2

Whether you are married or not, if you are involved in a committed partnership with another individual, estate planning is about so much more than planning for death. It's about planning for life and ensuring your beloved will be protected and provided for no matter what happens to you. If you are a member of the LGBTQ+ community, estate planning is even more critical: especially if you have complex family relationships.

Although same-gender marriage is legally recognized in all 50 states, long-held prejudices at both the political and family level continue to create complications for both married and unmarried same-gender couples. Indeed, while the federal government recognizes same-gender marriage, there are plenty of cities, businesses, and people who still refuse to recognize these unions. Moreover, a recent survey found that roughly 4 of every 10 LGBTQ adults say they have been rejected by a family member because of their sexual orientation or gender identity. https://www.pewresearch.org/social-trends/2013/06/13/a-survey-of-lgbt-americans/

As we discussed last week in part one, such discrimination can create unique estate planning challenges. Regardless of your marriage status, if you are an LGTBQ adult in a committed partnership you should be aware of several issues that can affect your planning strategies. Specifically, we discussed how relying on a will alone may not provide sufficient protection for your partner/spouse, and we explained why incapacity planning is particularly crucial if you want your partner/spouse to have a say in your medical treatment and the ability to access and manage your assets in the event you are hit with a debilitating illness or injury.
Here we'll address the final issue you should be aware of when creating your estate plan—securing parental rights for the non-biological parent of minor children.

Estate Planning Offers Alternative to Adoption

Although married same-gender couples now enjoy nearly all of the same rights as opposite-gender couples, there is one key right that's still up in the air—the automatic right to be legal parents. While parental rights are of course automatically bestowed upon the biological parent of a child, the non-biological spouse/parent still faces a number of challenges when it comes to obtaining full parental rights.

Since the Supreme Court has yet to rule on the specific issue of the parental rights of the non-biological parent in a same-gender marriage, there is a tangled and often contradictory web of state laws governing such rights. If you are a married same-gender couple, for example, some states consider the non-biological partner a legal parent based solely on your marriage while other states do not.

Given the conflicting nature of state laws, many same-gender couples have turned to second-parent adoption to gain parental rights for the non-biological parent, since the Supreme Court has ruled that the adoptive parental rights granted in one state must be respected in all states. However, it can be extremely difficult for same-gender couples to adopt. In fact, 11 states currently permit state-licensed adoption agencies to refuse to grant an adoption if doing so violates the agency's religious beliefs. In other states, the law specifically forbids such discrimination, but given the Supreme Court's ruling in *Fulton v. City of Philadelphia,* even those laws are susceptible to legal challenges.

In *Fulton*, the city canceled a contract with Catholic Social Services (CSS), a taxpayer-funded, faith-based foster care and adoption agency, after it refused child placement with LGBTQ families in violation of a city law prohibiting anti-LGBTQ discrimination. CSS sued the city, arguing that requiring it to follow the nondiscrimination policy violated its free exercise of religion since working with same-sex couples would go against its religious opposition to homosexuality.

In a unanimous judgment, the Supreme Court ruled in favor of CSS and found Philadelphia's contract with CSS to be unenforceable. However, the ruling was narrowly focused on specific contractual language. It does not create a broad free exercise exemption from non-discrimination laws as many in LGBTQ+ community feared.

That said, the *Fulton* case and cases like it that are sure to follow demonstrate that when it comes to same-gender couples seeking parental rights, second-parent adoption is not a panacea. Fortunately, same-gender couples do have an alternative to adoption—estate planning. Indeed, using a variety of estate planning strategies, as your estate planning lawyer, we can provide a non-biological, same-gender parent with nearly all parental rights, even without formal adoption.

Starting with our Kids Protection Plan, LGBTQ couples can name the non-biological parent as the child's legal guardian for both the short-term and the long-term while confidentially excluding anyone the biological parent thinks may challenge their wishes. In this way, if the biological parent becomes incapacitated or dies, their wishes are clearly stated so the court can do what the parent would've wanted and keep the child in the non-biological parent's care.

Beyond the Kids Protection Plan, we have several other estate planning vehicles—living trusts, power of attorney, and health care directives— that we can use to grant the non-biological parent additional rights. We can also create "co-parenting agreements," which are legal agreements that stipulate exactly how the child will be raised, what responsibility each partner

has toward the child, and what kind of rights would exist if the couple were to split or get divorced.

Experience You Can Rely On

In light of these issues, it's vital for LGBTQ+ couples, especially those with children, to always work with experienced estate planning lawyers and avoid using generic online documents at all costs. As your estate planning lawyer, we have the experience of creating plans specifically designed to prevent your plan from being challenged in court by family members who disagree with your relationship.

With the proper planning, we can ensure that no matter what happens to you, your partner and family stay protected and provided for in the exact manner you wish rather than facing a financial and legal nightmare. What's more, our specialized planning services can help ensure that non-biological parents in LBGT partnerships have as many parental rights as possible without resorting to second-parent adoption. Contact us, your estate planning lawyer today to get started with a Family Wealth Planning Session.

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