

Defensive Estate Planning For the LGBTQ+ Community

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The political landscape has shifted, and those of us in the LGBTQ+ community are worried about what the future may hold. There is a lot to lose, and the new administration promises to be decidedly anti-gay. The rights of same-sex couples, adoptive parents, transgender individuals, and queer youth could well be in jeopardy.

Among these is the simple right to get married. In *Dobbs v. Jackson*, the Supreme Court decision that overturned *Roe v. Wade*, one justice suggested revisiting *Obergefell v. Hodges*, the landmark ruling that legalized same-sex marriage nationwide. The right to marry was a milestone victory for the LGBTQ+ community. With the arrival of a new administration and conservative majorities in both houses of Congress, an emboldened Supreme Court could strike down marriage equality.

With so much at stake, it is more important than ever to harness the protections the law currently provides.

The Benefits of Marriage

For couples in committed relationships, the best protection may well be marriage itself. Marriage not only provides a wide range of federal and state legal benefits; it also ensures that in a crisis, your spouse has essential rights regarding inheritance, health care decisions, and other critical matters. Taking advantage of the right to marry now—while it is still secure—could be a prudent move.

Before tying the knot, talk to a lawyer to ensure that you understand the state and federal benefits, as well as the tax obligations. For example, being married means having to file your annual tax returns as a married couple, and some couples will pay more in income taxes under the “marriage penalty.” But most couples pay less in taxes, and they enjoy a sense of security that simply being partners may not provide.

If the Supreme Court decided to overturn *Obergefell*, it would mean that marriage equality would no longer be federally protected, leaving it up to individual states to determine whether to allow same-sex marriages. This could lead to a patchwork of state laws, some continuing to permit same-sex marriage and others outlawing it. Already having a marriage license will help guard against such uncertainty.

The Importance of Estate Planning

Marriage confers significant legal benefits, but a marriage license alone isn’t enough. No matter what the future holds for same-sex unions, an estate plan will help protect your relationship from some of life’s most significant uncertainties.

1. Will

The backbone of most estate plans, a will specifies how your assets should be distributed upon your death, who will care for any minor children, and who will be responsible for settling your estate. For same-sex couples, wills are particularly important to ensure that each partner is legally recognized as an heir. Without a valid will, your partner may not inherit your property automatically, and your assets could go to family members who do not have your best interests at heart.

2. Powers of Attorney

If you should ever become incapacitated, someone would need to pay your bills, file your taxes, and possibly even sell your home if the incapacity appears to be permanent. A power of attorney will authorize a partner, spouse, or other trusted individual to take on this role.

If you have no power of attorney, it could be necessary for someone to become your legal guardian. This is an expensive and time-consuming process, and it involves a court hearing. At just a few pages, a power of attorney can prevent the need for a guardianship and save your loved ones a lot of stress.

In Maryland, it's helpful to have the state's statutory power of attorney, which banks and other entities are obligated to accept. You can even include special instructions in the document, such as authorizing your attorney in fact to make gifts on your behalf.

3. Advance Medical Directives

An advance directive enables you to name a "health care agent"—someone you trust who will manage your health care if you ever become incapacitated. It also says what kind of care you want to receive in an end-of-life situation, like a terminal illness.

If you have a partner, naming them as your agent helps ensure that they have the legal right to make critical medical decisions on your behalf. Without such a document, hospitals or medical staff may default to family members who may not recognize or support your relationship.

Being married means your spouse automatically has the legal right to make medical decisions for you. But an advance directive is an important backup. It ensures that your spouse is in charge even if your marriage is not recognized, and it names a backup agent in case your spouse is not available.

For trans individuals, an advance medical directive can also help make their care as dignified as possible. For example, the document can instruct your healthcare providers to address you by your preferred name and pronouns, regardless of your legal name or the gender marker on your driver's license. This simple provision can prevent the distress of being called by the wrong name at an especially vulnerable time.

To help prevent being misgendered, you can also request that your appearance be maintained to align as much as possible with your stated gender. Including this instruction in an advance directive will alert your healthcare providers as to your wishes and also help your healthcare agent ensure that they are followed.

4. Trusts

In addition to a will, many people choose to set up a trust to manage their assets during their lifetime and distribute them efficiently upon their death. A trust allows you to specify how your assets will be used for the benefit of your loved ones, and it can enable them to bypass the lengthy probate process. A trust is also more private than a will. In a hostile political environment, having a trust can protect your privacy as a member of the LGBTQ+ community.

Second-Parent Adoptions

Less certain than the right to marry is the future of adoptions by same-sex couples. If one parent has a legal connection to a child, such as through birth, it's smart to have the other parent file for a "second-parent adoption" to create a clear legal

relationship. (This will require the consent of the child's other biological parent.) A court order giving the second parent full legal rights will prevent problems when enrolling the child in school or accessing their medical records.

Trans Individuals

The incoming administration has directed some of its harshest rhetoric at the transgender community. Because the laws may shift in ways that limit protections for trans individuals, it's a good idea to take steps now to safeguard your rights.

For someone who is transgender or in transition, these might involve legally changing their name to reflect their gender identity or choosing a gender-neutral name that aligns with their preferences. It's also important to update the gender marker on their birth certificate. In many states, a new birth certificate will be issued—rather than an amended version—showing the updated name and gender marker.

A legal name change can occur at any time, regardless of the stage of the person's transition. Once the change is final, they should notify Social Security and the Motor Vehicles Administration of the new name. Having a driver's license and Social Security card bearing the new name will make it easier for other agencies and businesses to update their records as well. And, of course, your will, power of attorney, and advance directive should be updated to reflect your new name as well.

Conclusion

These are challenging times. The good news is that the legal rights of the LGBTQ+ community are still largely intact, even with the future uncertain. By acting now, you can enjoy some peace of mind, knowing that you have taken important steps to protect yourself and those you care about.

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