

Tools for Protecting Yourself in Your Relationship

We've seen great progress in recent years in the availability of legal protections for same-sex couples, including the quest for full marriage equality. The dismantling of the federal Defense of Marriage Act (DOMA) extended federal marital rights and responsibilities to many married couples who were previously excluded from those protections. Despite these gains, however, the inconsistencies in the law across the states, the legacies of historical discrimination and the limiting of many critical protections to spouses may leave same-sex couples and their families legally vulnerable. For these reasons, if you are in a same-sex relationship, you should take certain steps to protect yourself and your family to the fullest extent that the law allows in the way that best reflects your family's needs and values. Lambda Legal can help you take the power to secure those protections.

Please note: This document offers general information only and is not intended to provide guidance or legal advice regarding anyone's specific situation.

FIRST STEPS

1. Consider what is right for your family regarding the decision to marry or enter into a more limited status like civil union, registered domestic partnership or reciprocal beneficiary.
2. Think about how you would like things to go if your relationship were to end due to a breakup or the death of either of you, and discuss your wishes with your partner.
3. Consult the following resources for legal help:
 - Lambda Legal's website, www.lambdalegal.org, for more information about the variation in relationship protections around the country.

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- Lambda Legal's Help Desk for general information and referrals in your geographic area at 866-542-8336, www.lambdalegal.org/help or the other resources in the insert "Tools for Selecting an Attorney."
- There are several excellent resources available now in print and online to help you and your lawyer build your legal protections. To get an idea of different approaches to drawing up partnership agreements, see samples in the book *Estate Planning For Same-Sex Couples*, by Joan M. Burda, published by the American Bar Association. For additional guidance as to whether entering into marriage or other legal relationship is the right decision for your family, see *Making It Legal: A Guide to Same-Sex Marriage, Domestic Partnerships & Civil Unions*, by Emily Duskow and Frederick Hertz.

MARRIAGE, CIVIL UNIONS AND REGISTERED DOMESTIC PARTNERSHIPS

Several states now honor the freedom to marry. Many others have created civil union, broad domestic partnership, or more limited laws to give some or most of the protections and responsibilities of marriage.

Take the power! If your home state respects the right of same-sex couples to enter into marriage, civil union or a form of domestic partnership, or respects such relationships when entered into elsewhere, consider whether this is the right step for your family.

Why do I need this power tool? There can be many tangible protections to entering into a formalized relationship, such as inheritance rights, health insurance benefits, income and estate tax benefits, hospital visitation and medical decision-making power, and parentage presumptions.

OTHER CONSIDERATIONS

Marriage, civil union and domestic partnerships are not right for everyone. Some couples opt not to formalize their relationship, whether due to personal conviction, a desire to remain financially distinct, or particular legal barriers. For example:

- These forms of recognition usually have property ownership and tax consequences that you may prefer to avoid.
- Entering a formal legal status with a same-sex partner may affect your ability to continue receiving alimony or other benefits from a former spouse or

your eligibility for means-tested safety net programs.

- Some foreign countries may not permit a person with a same-sex spouse or registered partner to adopt from that country.

You should consult an attorney about any of these issues that may affect you before deciding to marry or otherwise to enter a formal legal status with a same-sex spouse or partner.

Finally, even if your state does respect your marriage or otherwise grant you broad state law rights, you are still at risk if you travel or move to another state. Taking the range of Power Tool steps laid out in this toolkit will provide you and your loved ones with additional security in circumstances where your legal relationship may not be recognized, whether by ensuring your ability to be by each other's side and make decisions in medical emergencies or protecting each of your relationships with your children or securing each other's financial wellbeing. These tools are crucial while we continue to work for equal respect for the relationships and families of LGBT people.

PARTNERSHIP AGREEMENT

No matter what state you live in, if you're in a same-sex relationship you may benefit from having what often is called a "**partnership agreement.**" This agreement allows you to put into writing details about your relationship, such as who owns what property and whether you have promised to support each other financially, which can be helpful in negotiating your relationship jointly while

you're together or if you split up. Even if you have a marriage or civil union respected by the state you live in, a partnership or pre- or post-nuptial agreement will help you address in advance areas where your intentions concerning your property, financial arrangements or other matters differ from what state law would apply as a default in the absence of written agreements. This can be especially important when one partner earns a lot more than the other or significant assets are involved. A written agreement can clarify what you both intend so your wishes can be honored in these and other situations.

Take the power! Create a document that helps protect your relationship from discrimination and can protect you if your relationship ends.

Why do I need this power tool?

Having an agreement setting out your intentions for property, financial matters, and support provides a basis for addressing future disputes, whether through mediation or in the courts. If your state gives legal recognition to your relationship, you may have access to a legal process, like divorce, that allows for fair division of property, but current or past discrimination in the law can leave a lasting legacy that does not always address the realities of same-sex couples or families of choice. Inconsistent recognition of relationships other than marriage by federal agencies like the IRS or the Social Security Administration and by state entities can also leave you vulnerable. An attorney in your state can explain how a contract



Jim Darby and Patrick Bova (pictured left to right) were plaintiffs in Lambda Legal's suit for marriage equality in Illinois. Even though they were together for over 50 years, they weathered indignities as an "unmarried" couple, including the inability to get a mortgage together, to make healthcare decisions for each other without additional paperwork, and even the inability to purchase plots together at a veterans' burial ground. When Illinois' law changed, Jim and Patrick were finally able to marry.

like a partnership agreement or pre- or post-nuptial agreement may help you secure your assets and intentions.

Some couples have an even bigger need for a written agreement, like those in the following situations:

- one partner supports the other financially, for instance, if one partner is a stay-at-home parent
- one partner has far more assets or debts than the other
- each partner has substantial assets that are being merged
- you and your partner have been together for many years before entering into a legally recognized relationship

In any of these circumstances, if your relationship sours, an agreement can guide a court's consideration of your family's

history and reality in the divorce process. More critically, if your state does not give you access to divorce court, the importance of an agreement grows because it may be your only protection.

Splitting up can get contentious, regardless of a couple's sexual orientation. Unfortunately, some people who have been in a same-sex relationship have actually used antigay arguments against their former partners in court in order to invalidate prior agreements or arrangements between them. This tactic has yielded terribly unfair results and established damaging legal precedents. Creating an agreement in advance can help partners avoid harming each other, their children and everyone else.

How it works: You and your partner create a document, with attorney guidance. At the very least, the document has practical and moral

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significance because you both have worked through issues and agreed to things on paper. As to its legal significance, your attorney(s) can tell you whether the agreement is enforceable in your state or if it can serve as helpful evidence if there is a dispute in court. Keep the following tips in mind:

- Children are best protected in a separate “co-parenting agreement” (see insert “Tools for Protecting Your Children”).
- Consider listing the significant property that each of you brought to or acquired during the relationship, and then explain whether and how you envision ownership of that property. That will help reduce disputes during your relationship and if your relationship dissolves.
- You may want to put into writing how your respective incomes will be allocated to expenses. This could later affect the size of assets placed in a deceased partner’s taxable estate.
- If you have pets, you can use this document to declare how you will carry out your responsibilities to those pets if your relationship fails.
- Consider adding a provision that commits you both to counseling, mediation or arbitration in the event that your relationship dissolves. These are important alternatives to litigation, which is costly and can be unfair to people in same-sex relationships who may face discrimination in the courts.



Nancy Michael and Jane Fenton (pictured left to right, with son Drew) were one of three plaintiff couples in *McGee v. Cole*, the suit Lambda Legal launched seeking the freedom to marry in West Virginia. Nancy worried that Jane would not be recognized as Drew’s other mother in an emergency, or otherwise as a person authorized to make medical decisions for him. Because Jane and Nancy had been unable to secure their family relationship through marriage, they paid for alternate, but still inadequate legal documents to protect their family. Same-sex couples can now marry in West Virginia, but until marriage equality is the law in all states, Nancy and Jane must remember to carry these documents wherever they go.

- Have your attorney advise you on choices for dividing property fairly if your relationship ends—for instance, appraising it or refinancing it—and put your decisions in the agreement to avoid disputes later.
- If you have entered or are planning to enter a legal relationship in any state or country, consult with your attorney about how that affects any agreements you enter. States have different approaches to how agreements are viewed in regard to a couple’s marriage or other legal status.
- Your attorney will have a special responsibility when

helping you create a domestic partnership agreement because you and your partner may have conflicting interests. There are important ethical rules about attorneys representing two people with potential conflicts. Your attorney should raise options with you, such as an informed waiver, which allows the attorney to continue to represent both of you, or the possibility of retaining a second attorney for one of you.

- Because relationships often change, it’s a good idea to check the agreement every few years to make sure it still reflects your respective wishes.

EXTRA TOOL IN THE BOX:
DISSOLVING YOUR RELATIONSHIP

It is critical to keep in mind that it is much easier to enter into a marriage or civil union/registered domestic partnership than it is to end those legal relationships. Most states that deny same-sex couples the right to marry or enter another spousal status also deny them the right to divorce. And because nearly all states require that at least one spouse be a resident for a significant period of time in order for the state's courts to grant a divorce, you may be limited to the court system of the state where you currently reside—which may or may not recognize your legal relationship for the purposes of dissolving it—should your relationship end. Not being able to divorce will mean that you are legally tied to your spouse even if the relationship has ended. You will be recognized as spouses for many purposes, including taxes and other federal programs, and you will not be able to enter into a new legal relationship with anyone else. The difficulty of obtaining a divorce should be a significant consideration if you live in or might move to a state that does not respect the legal relationships of same-sex couples.

Some states that allow same-sex couples to marry or enter into civil unions or registered domestic partnerships also allow those couples to access the courts of those states to end the relationship, but only under certain circumstances. If you are considering traveling to another state to marry or enter a civil union, inquire into whether that state would allow you to do so and what the court would be empowered to adjudicate. For couples who have entered into more than one status with each other, it is also important to dissolve each of those statuses, whether through a court process or through filing the appropriate forms with the relevant agency in the state that issued the status.

