

Same-sex couples struggle for legal protection

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By DOUG ERICKSON / Lee Newspapers

MADISON — Once the initial shock and anger began to ebb, Jackie Hind and Kelli Neal assessed the Nov. 7 statewide vote to ban gay marriage and civil unions and decided they needed to take action.

They'd been living in a cocoon in Madison, surrounded by supportive neighbors and co-workers, they concluded. They felt the vote as a rude slap — 59 percent of Wisconsin residents approved a constitutional amendment banning gay marriage, civil unions and anything with a legal status "substantially similar" to marriage.

"The vote just made us realize that so many people around the state are not supportive of us," said Hind, a speech pathologist at the University of Wisconsin-Madison. "It lit a fire under us to get our financial and legal guardianship issues in order as soon as possible."

The couple, together 13 years, have two children.

Madison attorney Sandy Holtzman, whose law practice concentrates on services to the lesbian, gay, bisexual and transgender community, said the amendment has had a similar effect on many couples.

"It has thrown a lot of people into a real state of chaos," she said. "There are only a handful of legal protections available for same-sex couples to begin with, and the amendment served to prevent any further protections that are so sorely needed."

Attorneys do not know yet whether the amendment will alter any of the legal protections currently available to same-sex couples, but its passage certainly could embolden someone to contest them, said Leslie Shear, director of the Family Law Project at the Frank J. Remington Center at UW-Madison Law School.

"As you put together these various legal documents, you're starting to create a status that is substantially similar to marriage," Shear said. "To me, it's somewhat ironic that the more you'd do to protect your family, the more open to a challenge you might be."

Attorneys stress that the legal documents available to same-sex couples are just as applicable to any unmarried couple. And some of the items, such as an estate plan, are fundamental for everyone but particularly crucial for unmarried couples.

In many cases, the documents and forms can be completed without the cost of an attorney. However, "the reality is that you rely on these documents most likely in a crisis when things are called into question, so the best approach is to use a lawyer," said Jennifer Chrisler, executive director of Family Pride, a national organization that advocates for full family equality.

Health care

One of the most basic documents for a person in a same-sex relationship is the power of attorney for health care, said Jennifer Chrisler of Family Pride.

“The reality is that unless you are a legal relative, hospitals can choose not to grant you access,” Chrisler said.

The document allows a person to make medical decisions on behalf of an incapacitated partner, said Madison attorney Michele Perreault.

“Sadly, we have had cases in Wisconsin where domestic partners have been kept out of hospital emergency rooms and intensive care units and their partners have died before it could get sorted out,” she said.

The document also is important if there is disagreement among family members over a course of treatment, she said.

A power-of-attorney document also can incorporate a medical release form addressing the federal Health Insurance Portability and Accountability Act of 1996, which led to privacy standards in 2001.

The law limits who can look at and receive your health information, but a release form can allow medical professionals to share the information with a same-sex partner, Perreault said.

People should talk to their health-care providers and extended family members so that there are no delays in honoring the documents, she said.

Hind and Neal: Hind has filled out a power-of-attorney form that includes a HIPAA clause through her employer. Neal intends to do so soon.

Children

Wisconsin’s adoption law allows single homosexuals to adopt, but the state Supreme Court ruled in 1994 that the same law prohibits “second-parent adoptions.”

Second-parent adoptions are those in which a same-sex parent adopts his or her partner’s biological or adoptive child without terminating the legal rights of the first parent.

Three other states also expressly prohibit second-parent adoptions, while 24 states have granted them. In the remaining 22 states, it is unclear whether the law permits them.

“Right now, with a patchwork of protections across the country, it’s sort of a mess,” said Kara Suffredini, an attorney with the National Gay and Lesbian Task Force. Other options are available, but none is as legally binding or as comprehensive as an adoption decree, she said.

One alternative is legal guardianship, which expands the rights and responsibilities of another adult without taking away any legal rights of the biological parent, said Fitchburg attorney Iris Christenson.

Guardianship does not confer inheritance rights, and it can’t guarantee standing in family court in a custody dispute, but it does help in dealing with school and health-care officials, Christenson said. For example, a legal guardian can view school records and authorize medical care.

Securing legal guardianship usually takes about four months and costs about \$250 for a court-appointed third party called a guardian ad litem to represent the child’s interests. Attorney fees

can run an additional \$800 or so if all goes smoothly, more if complications arise, Christenson said.

A recent development in the last five years in Wisconsin is "parentage," in which full parental rights and responsibilities are conferred by a court to both persons in a same-sex relationship, said Madison attorney Judy Sperling-Newton, who has worked extensively in the area.

With this process, the couple proves to the court that both partners are equal parents based on their intent in creating the child or their taking on of responsibilities for the child, Sperling-Newton said.

The process is different from an adoption, she said. She likened it to man who successfully seeks the paternity of a child he does not need to adopt the child because he's already the father based on biology. In the case of a same-sex partner, the claim is based on intent instead of biology.

Sperling-Newton thinks parentage, which costs about \$5,000, is not threatened by the passage of the amendment because the relationship in question is between a child and an adult, not between two adults.

Other attorneys in Madison say they question the validity of the parentage approach and have declined to offer it as a service for that reason.

Hind and Neal: Hind adopted the couple's children, Alexander, 6, and Elena, 4, from Guatemala. Because only one person could be named on the adoption papers, Neal has no legal standing if something were to happen to Hind.

"I have no rights to my children, and I feel very vulnerable," Neal said.

The couple has considered a move to a state that permits second-parent adoptions. Currently, they are seeking legal guardianship.

Finances

Madison attorney Sandy Holtzman has mediated many a dispute between couples who didn't foresee an argument over money.

She recommends a co-habitation agreement, a contract of sorts that is advisable for any two people living together, even platonic roommates.

The document, similar to a prenuptial agreement, spells out who is responsible for paying which day-to-day bills, such as mortgage, groceries and vehicle costs, Holtzman said. It can be especially important when there is a disparity in assets or debts between partners.

"It's always nice to agree to these things when everyone is getting along," Holtzman said.

Another important document is the power of attorney for finances, which allows a person to handle a partner's obligations if he or she becomes temporarily or permanently incapacitated. Its value extends to other situations, Holtzman said.

"Say two people are living together and one travels out of the country a lot. The person he or she has designated as an agent can sign checks in their absence and pay bills."

Hind and Neal: The couple has neither a power of attorney for finances nor a co-habitation agreement.

"We are seeking legal advice to find the best way to protect our family," said Neal, an

occupational therapist who currently is a stay-at-home mom while the children are young.

Inheritance

Without a will, state law falls back on marriage and blood relations to determine the distribution of assets, which could exclude a person in a committed relationship, said Madison attorney Sverre Roang.

It is especially critical that estate plans of same-sex partners be well-crafted because anecdotal information suggests these couples face court challenges at a higher rate than the population as a whole, said Roang, who wrote about the topic with colleague Brian Larson in the November issue of "Wisconsin Lawyer." Often in these challenges, money is of secondary importance.

"The fact is that these relationships are not accepted by everyone," Roang said. "The risk in one of these relationships is that someone in the family will use the probate process to make their views known or to cause trouble because they didn't like the relationship in the first place."

Roang advises people to be explicit in their plans, especially if they've decided to leave out relatives. "This lets people know it wasn't a mistake and that there was thoughtful reflection behind it."

The choice of a disinterested witness also is critical, Roang said. "Typically you want someone who knows the person only in passing, someone who would have absolutely no ulterior motive."

Beyond the division of property, an estate plan can address a multitude of issues, including child custody and who gets to handle funeral and burial arrangements, Roang said.

Also, same-sex couples should discuss with an attorney options for minimizing gift and estate taxes items not handled in a will but important to consider, he said.

A relatively basic estate plan will cost \$500 to \$1,500 in the Madison area, Roang said. Complex estate plans that involve business succession and tax planning can cost many thousands of dollars.

Hind and Neal: Neither has an estate plan. "We need to do that," Hind said. "The hectic life of raising two children has kept us from getting around to it."