

Legal Protections for Same-Sex Couples- More than a Checklist

By Susan Saxe

Last year I was invited to prepare a presentation for a rabbinic studies class on legal issues facing same-gender couples entering committed life partnerships. The notion was that I would hand out a “checklist of documents” that the couple should be advised to prepare to try to construct a legal parallel to civil marriage, a right denied to us everywhere in the world.

It quickly became obvious that I could not fully separate the legal challenges facing gay and lesbian people from the pervasive system of repression, exclusion and invisibility in which the legal discrimination is rooted, and that anyone calling him or herself an ally and hoping to counsel and support gay and lesbian couples needed to do a lot more than add a legal checklist to their standard pre-marital preparation package. The outcome was a 160 page working manual which can be ordered using the form at the end of this article.

The construction of legal protections, however, remains an important issue in its own right. There are just too many cases in which gay and lesbian people have been subject to heart-wrenching abuse that could have been avoided had they had the knowledge and foresight to take advantage of available legal safeguards. So, when I was asked to address this topic for New Menorah, I agreed, with the caveat that any discussion of the legal mechanics has to be understood as a stopgap, individual solution to an ancient, irrational and often violent system of oppression that cries out for deep and lasting repair.

When two heterosexual people marry, civil law automatically confers upon them an elevated social status which carries with it tangible benefits including tax advantages, property and inheritance rights, and the status of “next of kin” with the right to make decisions for each other in the event of illness or incapacitation. Social institutions including employers, insurers, health care providers and others likewise recognize and reward this status change with benefits such as added insurance coverage, “family” memberships and policies that assume marital privilege. Gay and lesbian people do not get these benefits or the responsibilities that go with them.

Same-gender couples have two avenues for attempting to gain parity. The first is the political route, campaigning to change unfair laws and practices and ultimately to have our unions recognized and rewarded on par with those of heterosexuals. The second is to try to construct a parallel structure of rights and responsibilities using civil and contract law. How far we can go in achieving this goal depends on a confusing array of laws and court rulings as well as bureaucratic and corporate policies.



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Areas of fiscal and legal concern include joint ownership of property, access to health, life insurance and other employee benefits, taxation, decision making powers, especially in event of illness or incapacitation and child custody issues. At best, only some of the many inequities can be addressed, but important protections can and should be put in place.

My best advice to any couple concerned with protecting their rights and interests is to obtain a copy of A Legal Guide for Lesbian and Gay Couples from Nolo Press. This comprehensive guide is revised annually as laws change and includes up to date resource lists of supportive legal service organizations. Visit their website at www.nolo.com.

The following documents are strongly advised for a couple who cannot legally marry and should be prepared by an attorney experienced in this area of law:

DURABLE Powers of Attorney. These differ from regular POA's in that they apply only if one party becomes unable to function on his/her own behalf. In most states this can provide important (but not absolute) insurance that a hostile family or insensitive institution cannot bar access to a gay partner in the event of serious illness or disability, and that visiting rights and the right to make financial and medical decisions will reside with the gay or lesbian spouse as they would with a heterosexual spouse.

Wills. If a gay partner dies without a will the surviving spouse may be deprived of everything from personal, sentimental items to jointly acquired property, even the home that both partners paid for. Although wills are important to anyone who wishes to avoid probate, reduce tax burdens and protect their heirs, a will is necessary to minimally bring the same-sex couple on par with an intestate heterosexual couple.

Guardianship arrangements if there are children. If there are no children yet, but the couple is planning for them, some provisional language may be included in the relationship contract.

A relationship contract. The creation of this document can be a meaningful and productive part of the pre-marital counseling process. The Ketubah or covenant document may serve all or part of this role, and can be cited in a separate civil agreement drawn up by an attorney competent in this area of law.

The agreement should clearly lay out the intent of the couple in forming the relationship, agreements about joint ownership of property, obligations of support, agreements of intent about children, if any (although generally, agreements regarding not yet existing children are not binding). This can be handled simply by stating that it is the intent of the couple to take on all the obligations and responsibilities that would be conferred with marriage in that state (if that is the case).



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The *Beit Hesed* Clause

Despite all the best intentions it is possible that decent caring people will sometimes find themselves in irreconcilable situations. Rather than resorting to an adversarial system which, in the case of gay and lesbian couples is out of touch at best and hostile at worst, parties can agree in advance to submit their dispute to binding arbitration, ruling out the prospect of one party dragging the other into an ugly winner-take-all legal slugfest.

One mechanism for this is the *beit hesed*, a modification of a traditional Jewish *beit din* (rabbinic court). It consists of three arbiters, bound not necessarily by halacha as traditionally understood but by common sense, compassion and a commitment to a just resolution of the conflict. One member of this panel is picked by each party to the dispute and the third member is chosen by the other two. Resort to the *beit hesed* might be preceded by a period of counseling, mediation or other steps that the couple might agree to in advance.

There are statutes making such agreements binding under contract law in all but a handful of states. The relevant statute will vary from state to state and should be cited by the attorney who draws up the agreement.

Use of a *beit hesed* clause is not limited to relationship contracts. All ALEPH professional contract contain this provision. I highly recommend it for anyone committed to restoring reason and *mentschlichkeit* to our way of resolving disputes.

Susan Saxe is the Chief Operating Office of ALEPH.

Points to Consider in Counseling Same-sex Couples for Marriage/Commitment Ceremonies

A working manual of thought-provoking questions, practical suggestions and useful resources for rabbis and rabbinic students who are considering or have already begun performing same-gender weddings or commitment ceremonies.

Addressing a wide range of questions from “Is it *kedusha*?” to “What if they need a *get*?” it includes a checklist of legal documents that a same-gender couple will need to protect their rights, extensive resource lists and bibliographies, sample forms, model ceremonies, position papers and articles from a range of Jewish sources. There is also a section designed to sensitize and introduce the non-gay clergy person to the gay and lesbian subcultures and life experience.

- The first draft of this manual, 160 pages spiral bound, is available from ALEPH for \$18 inclusive of shipping and handling.



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