

Legal Issues Affecting Lesbian, Gay, Bisexual and Transgender People As They Age

General Information

For any person, especially those who are not legally married, it is very important to understand that when illness, accident or death renders you incapable of making decisions regarding your own health care, inheritance, end-of-life matters, burial, etc., the authority for making those decisions will automatically be granted to your closest living blood relatives. If there are no blood relatives available, the state will make those decisions. Every senior, regardless of sexual orientation or relationship status should have up-to-date versions of the following documents¹:

Healthcare Proxy: A *healthcare proxy* empowers a chosen representative to make decisions about your medical care in the event you become ill and are unable to communicate your wishes about medical treatment.

Living Will: Sometimes called a ‘medical directive’ or ‘advance directive,’ a *living will* is a statement of your medical wishes in the event of a healthcare emergency. Unlike a healthcare proxy, a living will does not empower another person to make important medical decisions if you are incapacitated. Instead, it provides guidance to your healthcare provider or chosen representative about your wishes regarding end-of-life care.

Durable Power of Attorney: With a *power-of-attorney* form, you can grant power to another person to act on your behalf in legal and financial matters. Some powers of attorney are valid as soon as you sign them and expire if you are incapacitated, unless you also make clear that you want them to remain in effect; others are triggered only by your inability to handle your affairs. Only a durable power of attorney will remain in effect if you are incapacitated. [A *Durable Power of Attorney* is a written power of attorney which contains the words ‘This power of attorney shall not be affected by my disability,’ or ‘This power of attorney shall become effective upon my disability,’ or similar words. In order to be valid it must be signed before you become disabled.” Definition: State Bar of Michigan] Copies of the above documents should be given to the persons named in them and who, if necessary, will implement your wishes in the event such need arises.

Last Will and Testament: To ensure that your property distribution wishes are recognized and legally enforceable, you should consult with an attorney to complete a *last will and testament*. Without a legal will that documents your specific wishes, laws known as intestacy laws automatically dictate that your biological family will inherit all your property. A valid will is essential for lesbians and gay men who want to give cherished possessions to or provide financial security for their partners, children, or other loved ones, since same-sex relationships are not recognized under current intestacy laws. Wills can also address burial and funeral preferences, and direct contributions to the charities you support.

It is recommended strongly that an attorney be consulted when drawing up a last will and testament to insure that it is a valid document that will be honored by the courts.

¹ Definitions from Lambda Legal Defense and Education Fund unless otherwise noted (www.lambdalegal.org).

Federal Law

Federal law treats all people who are not legally married as single individuals or widows/widowers, when applicable. It does not recognize marriage or civil unions for same-sex couples performed anywhere in the United States, Canada or in other countries. While New York State law protects some rights of LGBT seniors, as indicated above, many of those rights are not protected by federal law. **Under federal law, domestic partners are not entitled to any of the benefits of marriage, including²:**

- hospital visitation rights
- medical decision making
- sick/bereavement leave for partner
- access to health insurance and pensions
- shared rooms in nursing homes
- property distribution rights if relationship is terminated
- ability to give partner unlimited gifts without being taxed
- presumption of “tenants by the entirety” on title to jointly owned home
- creditor protection of marital home
- entitlement to financial benefits relating to spouses, such as disability
- pension and social security benefits
- ability to file joint tax returns
- ability to obtain joint home, health and auto insurance policies
- no need to prove ownership of household items for taxable purposes after partner’s death

Spousal Impoverishment Law³

Applies only to legally married couples, not same-sex couples or domestic partners.

(Section 1924 of the Social Security Act; U.S. Code Reference 42 U.S.C. 1396r-5) The expense of nursing home care, which ranges from \$4,000 to \$6,000 a month or more, can rapidly deplete the lifetime savings of elderly couples. In 1988, Congress enacted provisions to prevent what has come to be called ‘spousal impoverishment,’ which can leave the spouse who is still living at home in the community with little or no income or other resources.

The spousal impoverishment provisions apply when one member of a couple enters a nursing facility or other medical institution and is expected to remain there for at least 30 days. When the couple applies for Medicaid, an assessment of their resources is made. The couple’s resources, regardless of ownership, are combined, and Spousal Share, which is one-half the couple’s combined countable resources, is determined. When and if eligibility conditions are met, Medicaid pays the nursing home costs for the institutionalized spouse, while the spouse remaining at home is entitled to keep the marital home, household goods, an automobile, burial funds, a Protected Resource Amount up to \$87,000, and an income of \$2,175 a month, adjusted annually. [Amounts vary from year to year and state to state.]

Travel

When an LGBT senior or individual travels out of state, it is important to take with you all of the legal documents that you have created to insure that your wishes are followed in the event of sickness, injury or death. It also is important to know that some of these documents may not be honored by other states.

² Source: *Marriage Equality USA*

³ Source: *Centers for Medicare and Medicaid Services*

New York State

New York State has enacted a number of human rights laws that protect the rights of individuals and that are especially helpful to those in the LGBT community. The rights of Transgender persons are not protected under SONDA, but advocates currently are working toward the passage of human rights legislation that would include Transgender individuals⁴.

SONDA (Sexual Orientation Non-discrimination Act) - Enacted in 2003, this law extends the New York State Human Rights law -- which already banned discrimination on the basis of race, sex, creed, color, national origin, disability, age and marital status -- to ban discrimination on the basis of sexual orientation in the areas of employment, housing, public accommodations, education, and credit.

Visitation Access: In 2004, New York State guaranteed same-sex and opposite-sex domestic partners the same rights as spouses and next-of-kin when taking care of loved ones in hospitals, nursing homes and health-care facilities, including the same access rights as spouses in emergency rooms, intensive care settings and after visiting hours in hospitals.

Senate bill S.7688 and Assembly bill A.9872: A – defines **domestic partner** as “a person who has formally entered into a domestic partnership or similar relationship; a person who is recognized or covered as a beneficiary under the other person’s employment benefits or health insurance; and, a person who is dependent or mutually dependent on the other person for support.” The bill lists ways mutual dependence can be proved.

Control of Remains: In 2006, New York State guaranteed domestic partners, both same-sex and opposite-sex, the ability to make decisions about the disposition of partner remains and about funeral arrangements. This law places a domestic partner, just like a spouse, ahead of a surviving child or parent in deciding who gets control over decisions about burial.

Partner control of disposition of remains is not automatic. The law creates a simple proxy form for use by New Yorkers, recognizing that a written document expressing the wishes of the deceased always takes highest precedence in determining disposition of bodily remains and funeral arrangements. When no proxy exists, a priority list is followed to determine authority. In defining a domestic partner, the law provides for three different methods:

1. For same-sex couples who are able to register their partnership with a Government entity, the bill recognizes registration as sufficient proof for control of remains authority.
2. Being formally recognized as a beneficiary or covered under a partner’s employment benefits or health insurance also provides this authority; or,
3. If dependent or mutually interdependent on the other person for support, as evidenced by the totality of the circumstance indicating a mutual intent to be domestic partners including but not limited to: common ownership or joint leasing of real or personal property; common householding, shared income or shared expenses; children in common; signs of intent to marry or become domestic partners under subparagraph (i) or (ii) of this paragraph; or the length of the relationship of the persons. (Source: NYS Senate)

⁴ Definitions from Empire State Pride Agenda unless otherwise noted. For more info: www.prideagenda.org.

Local Governments: Domestic Partner Registration

A number of localities in New York State permit same-sex and opposite-sex couples to register as Domestic Partners. Benefits and responsibilities of Domestic Partnership Registration vary and are established by each locality independently. If you are a senior and have registered as a domestic partner or are considering doing so, it is important to know the specific rights and responsibilities that apply in the locale in which you have registered. Benefits may range from bereavement leave and childcare leave to health benefits for domestic partners of city employees⁵.

Localities in New York State where Domestic Partner Registration exists

City of Albany

Office of the City Clerk
City Hall, Room 202, Albany, NY 12207
Tel: 518/434-5090

There is no residency requirement for registrants. Open to opposite- and same-sex couples.

Town of East Hampton

Office of the Town Clerk
159 Pantigo Rd, East Hampton, NY
Tel: 631/324-4142

Open to opposite-sex and same-sex couples.

City of Ithaca

Office of the City Clerk
108 East Green St, Ithaca, NY 14850
Tel: 607/274-6570

There is no residency requirement for registrants.

City of New York

Office of the City Clerk
1 Centre St., New York, NY 10007
Tel: 212/669-2400

Registrants must be residents of the city or have at least one partner employed by the city.

City of Rochester

Office of the City Clerk
Rochester, NY 14614
Tel: 585/428-7421

There is no residency requirement for registrants. Open to opposite- and same-sex couples.

Southampton Town

Town Clerk
116 Hampton Rd, Southampton, NY 11968
Tel: 631/287-5740

Registrants must be residents of the City. Open to opposite-sex and same-sex couples.

Westchester County

Office of the County Clerk
110 Dr. Martin Luther King, Jr. Blvd.
White Plains, NY 10601
Tel: 914/995-3080

Open to opposite- and same-sex couples.

⁵ Source: *Empire State Pride Agenda*

