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Lawyers: Be Aware of These Legal Needs of the LGBTQ Community

There are many unresolved issues, especially for individuals who are lower income, transgender, people of color, living in rural communities, and much more. We can't cover it all but, over the course of a few columns, we'll endeavor to share some areas to consider.

By **Elizabeth F. Schwartz** | September 10, 2019



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If you think that the nationwide recognition of same-sex marriage means that there are no more legal issues to think about with respect to the still-marginalized LGBTQ (Lesbian, gay, bisexual, transgender, and queer or questioning) community, please know that you are woefully mistaken. While essential to LGBTQ liberation, marriage is not a panacea that brings full-lived equality to the entire community. There are many unresolved issues, especially for individuals who are lower income, transgender, people of color, living in rural communities, and much more. We can't cover it all but, over the course of a few columns, we'll endeavor to share some areas to consider. Whether you have seen LGBTQ folks in your office yet, or just want to be prepared for that eventuality, these are matters of concern to many.

Divorce and Date of Marriage

Should your practice include any matrimonial law, you are aware that assets and liabilities are typically divided, and spousal support awarded, based on the duration of marriage. However, for some same-gender couples who have been together for many years before the law entitled them to wed, that outcome might not be the fairest means of resolutions. Of course, marriage cannot be imputed. But using a homophobic legal system to advantage our client is not desirable either. For example, let's say your Floridian client was married in New York in 2012 because it wasn't yet legal for LGBTQ people to marry in Florida until 2015. Now that the marriage is dissolving, she wants to make the argument that her "date of marriage" should be deemed 2015 despite always living in Florida because the resulting asset split would be more favorable. That is not fair. She knew she was getting into a legal marriage when she flew up to New York to get hitched. She could have done a prenuptial agreement to modify the default of the law with regard to what happens at divorce or death, and chose not to. Florida was the 36th state in the United States to lift the ban against marriage equality—your client should not be able to benefit from that delay. If you find yourself in a position to convey to a client that she can truly honor the equality wished and worked for, do it. While we have the duty of zealous advocacy, try to resist the temptation to make immoral arguments that set the LGBTQ community back.

Also, consider doing a prenuptial agreement that memorializes the length of the relationship. Or if the couple is already married, Florida allows a post-nuptial agreement to modify the defaults of the law.

Gender Marker Changes

A gender marker is the male or female designation (M or F). Florida law doesn't specifically allow, nor does it prohibit, gender marker changes. Having one's identity documents such as a driver's license or passport, accurately reflect one's gender presentation can be a matter of life and

death. For example, let's say you are a transgender woman (born assigned male at birth but you identify and present as a female) and you get pulled over by a police officer for speeding and an expired automobile tag. If the officer decides it prudent to impound the vehicle and remand you to custody, you'll likely be incarcerated with your biological gender. In my example, that could be a very scary result for you as a trans female to be incarcerated with bunch of guys. The chances of you being treated as a woman (in all ways including incarceration) are greatly increased if your identifying documents match your gender presentation.

While circuit judges have powers to do equity, what that means to specific judges differs. Some judges feel comfortable granting this relief. It is usually unopposed (unless petition is a minor and the parents disagree) and they understand that having one's gender identity align with one's presentation is critical. Some judges feel that they need specific statutory or authority to grant this relief. In fact, since there is nothing in law or policy that forbids the changing of gender markers, the circuit courts' powers of general jurisdiction give them the authority to grant this relief. Because of the essential nature of the remedy, they not only can but should.

If you have a transgender client who wishes to do a name change, be sure to suggest that they pursue a gender marker change if that is something they also seek. It's not something everyone knows they need or could and should request. I've even been in court on other matters and, since name changes are typically handled on the uncontested divorce calendar (UCD), seen a trans person there pro se getting a name change and I've offered to the litigant my assistance in making an ora tenis motion to add the change of gender marker to the relief requested and judges have been very welcoming of the support.

If you see a free legal clinic being offered, please consider joining. You can easily be trained to assist these litigants, and the chances of their relief being granted is greatly increased if they are represented both in the document preparation and at the court hearing.

Thank you for your attention and concern regarding the legal needs of the LGBTQ community. Substantial vulnerabilities remain, but conscious and competent advocacy can certainly make a difference.

Upcoming columns will address other issues that arise in the family and estate contexts. Have questions/feedback, or requests for future columns, please share at liz@elizabethschwartz.com
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Elizabeth F. Schwartz *has been practicing law since 1997 and is a native of Miami. She worked on litigation challenging Florida's bans against LGBTQ people marrying and adopting, and is board certified by the Florida Bar in adoption law. She is the author of "Before I Do: A Legal Guide to Marriage, Gay & Otherwise (<http://elizabethschwartz.com/beforeido/>)" (The New Press, 2016).*

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