Gay and Cohabitating in Texas?

You just might need a no-nup.

BY **CHRISTINA PESOLI**

Move over prenups and postnups—there's a new kid in town. I've named it the "no-nup." Before I explain who needs one, let me rule out who doesn't. If you're gay and living with your significant other and you and your partner either (a) already got married in a state where gay marriage is legal or (b) want to immediately get or be married here in Texas, you do not need a no-nup.

But if you're gay, are living with your significant other, and *don't* want to be married at this point in time, the U.S. Supreme Court's recent decision may have made things a little murky for you. That's because Texas recognizes informal or "common law" marriage.

To be informally married in Texas, the Texas Family Code provides that a couple must:

1. agree to be married;
2. live together in Texas as a married couple after making such an agreement; and
3. represent to others that they are married.

Proof of these three things is all that is needed to establish an informal marriage. And an informally married couple is every bit as married as a couple who takes the formal route of hiring a wedding planner, getting a marriage license, and shelling out thousands of dollars for the big day.

With that in mind, if an informally married couple later wants to part ways, the divorce process is exactly the same as it would be for any married couple. While you can get informally married in Texas, you cannot get informally divorced. So, what does this mean if you're gay and living with your significant other? Whether or not you knew it or intended it, you may already be at risk of being "deemed" married in the eyes of the law.

You may be thinking, "But wait—the very first factor is that I have to agree to be married. And if I didn't ever agree, how can I be married?" Texas caselaw on informal marriage is full of examples of people who did not see eye to eye on this. Whether there is sufficient proof of such an agreement (as well as the other two factors) is a question for the judge or jury to decide.

There are factors that make the situation even less clear for gay couples. First, straight couples using the terms "husband" and "wife" rather than "boyfriend" and "girlfriend" is evidence of both an agreement to be married and holding themselves out as being married—two out of the three necessary factors to establish an informal marriage. But with gay couples, the term "partner" is commonly used. One member of a couple may use that term thinking that he or she is married, while the other may have thought they were in a long-term, committed relationship but not necessarily married. This is exactly the type of uncertainty that leads to disputes that end up making caselaw.

Also, consider this: Up until the Supreme Court's ruling, a gay couple's commitment ceremony in Texas had no actual legal significance—and both members of the couple knew this. Whether each member of the couple would have gone through with the ceremony had they had known then that it would end up resulting in a legal marriage—complete with community property and community debt—is a matter of speculation. The answer would likely vary from couple to couple and person to person.

But after the Supreme Court's ruling, a commitment ceremony or a wedding that happened even before the ruling presumably serves as evidence of an intent to be married. That becomes a problem if one or both members would have structured things differently (like, for example, by getting a prenup) had they known that the ceremony would wind up having the full legal effect of a marriage.

And that's where a no-nup comes in. A no-nup is a notarized declaration by one or both members of a couple stating that there is no agreement between the two of them to be married. It cannot prevent a former partner from claiming that there was an informal marriage, but it can serve as an important piece of evidence establishing that there was no such agreement at a particular point in time, at least by one member of the couple.

In the wake of the Supreme Court's ruling, if you're gay, cohabitating with your partner, and do not want to be deemed married, you should execute a no-nup as soon as possible. Even if your partner won't sign it, it is still better than not having one at all. The legal landscape has changed, and a written declaration that eliminates any doubt as to what you (or you and your partner) consider your relationship status to be can prove valuable. **TBJ**

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