

Awareness, Solutions, and Opportunities For Same-Sex Couples Denied Equal Marriage Rights

By Nan P. Bailey, MBA, CFP®, AIF®



1875 Palmer Avenue, Suite 206, Larchmont, NY 10538
nan@npbailey.com | www.npbailey.com | 914.834.9105

Securities and Advisory Services offered through Commonwealth Financial Network®,
Member FINRA/SIPC, a Registered Investment Adviser.

Awareness, Solutions, and Opportunities For Same-Sex Couples Denied Equal Marriage Rights

This article will consider the central issue that often makes wealth management for gay and lesbian couples far more complicated than it is for straight couples: *the failure of the federal government and most states to grant or recognize same-sex marriages and the consequent denial of the many rights and privileges associated with marriage*. To help gain an understanding of what's at stake here, we'll briefly consider the current legal situation across the federal government and the fifty states. And we'll also set out a partial annotated list of how the lack of universal same-sex marriage rights impacts gay and lesbian couples in a wide variety of areas.

A Complex, Evolving, and Volatile Legal Landscape

The legal situation with respect to same-sex marriage is volatile, complex, and evolving. It is complex, first of all, because it involves the intersection of federal law, state law, and the private sector, as well as the intersection of the laws of different states (and Native American and foreign nations) with each other. This is why it's so important to work with professionals who know the details of the legal situation where you live inside and out. It's also complex because the legal situation keeps evolving based on legislation, judicial decisions, administrative rulings, and ballot initiatives and referenda. Finally, it is volatile because same-sex marriage is obviously a tremendous "hot-button" issue, that is, many people and organizations feel strongly about it, one way or the other, and the issue is often seized on for political purposes.

A thorough historical review and detailed real-time snapshot of the evolving legal landscape is well beyond the scope of this article. (Fortunately, a number of organizations and websites are dedicated to keeping track of the evolving same-sex marriage legal landscape. These include <http://freedomtomarry.org>, <http://marriageequality.org>, <http://lambdalegal.org>, and Wikipedia at http://en.wikipedia.org/wiki/Same-sex_marriage_in_the_United_States.) Very briefly, however, the current situation can be summed up as follows.

First, in reaction to a Hawaiian court decision that suggested the Hawaiian state constitution contained a right to same-sex marriage, Congress passed the Defense of Marriage Act ("DOMA") in 1996. According to DOMA, no state or other political subdivision within the United States is required to treat a relationship between persons of the same sex as a marriage, even if the relationship is considered a marriage in another state. DOMA also specifically defined "marriage" as a legal union between—and only between—one man and one woman. Based on DOMA, according to the United States Government Accountability Office ("GAO"), there are over 1,100 U.S. statutory provisions where marital status is a factor in determining benefits, rights, and privileges (along with hundreds more on a state-by-state basis). In short, there are many legal and economic situations where, as far as federal law and the U.S. government are concerned, marriage to an individual of the

same sex—regardless of whether it is legal within the state in question—carries no weight whatsoever. (Therefore, civil unions, domestic partnerships, and other similar “legal bonds” also carry no weight.)

The states themselves have wide variability with respect to whether or not they allow same-sex marriages or recognize such marriages when granted elsewhere. Second, then, there is a minority of “pro” equal marriage rights states. At the time of this writing, same-sex marriages are legal (at least as far as the state is concerned) and being performed in New Hampshire, Connecticut, Iowa, Massachusetts, Vermont, and the Coquille Indian Tribe in Oregon, and are likely to soon begin in Washington, D.C. New York State recognizes same-sex marriages from other states and foreign countries, but doesn’t sanction their in-state performance. And a number of states, including New Jersey, Colorado, Hawaii, Maryland, Nevada, Oregon, Wisconsin, and Washington, have some form of civil union or domestic partnership granting varying degrees of the benefits, rights, and privileges reserved for married couples.

Third and finally, a majority of states could fairly be classified as being “anti” equal marriage rights states. At the time of this writing, roughly thirty states have explicit constitutional amendments barring the recognition of same-sex marriage. (This includes California, which famously allowed same sex marriages for a short period before a statewide voter initiative put a constitutional ban in place.) Similarly, roughly forty states—including some that offer civil unions or domestic partnerships—define marriage similarly to DOMA in terms of a legal union between two persons of the opposite sex.

It seems likely—or so we hope—that in the historical long run gays and lesbians will obtain their full civil and legal rights, including the right to marry. For the time being, however, all U.S. gays and lesbians wishing to marry are stuck with DOMA and its implications, along with an uneven, uncertain, and unsettling state-by-state tapestry of denied or restricted rights, privileges, and responsibilities.

A Positive Proactive Perspective

Despite our ongoing struggles in the political and legal arena, it’s important to note that this is most definitely not meant to be a “woe is me” article. In the first place, in response to decades of discrimination and an inability to universally legally marry, members of committed gay and lesbian couples have developed a great deal of inner strength, wisdom, and resiliency. Based on these inner qualities, gays and lesbians have developed their own traditions and unique ways of organizing themselves and their relationships, resulting in a wide variety of technical, legal, and financial “fixes” to circumvent the status quo. Finally, there are a fair number of instances *where not being able to legally marry can have specific advantageous consequences*. In other words, there are certain opportunities that are simply unavailable to opposite-sex married couples.

The idea, then, isn’t to downplay the substantial harms—legal, economic, psychological, and even health-related (research consistently shows that married individuals live longer and healthier lives)—that the inability

to legally marry inflicts on those in same-sex committed relationships. Instead, as the title of this article suggests, gays and lesbians in committed relationship can advantageously adopt the following three-part game plan or strategy:

- **DEVELOP AWARENESS:** Work to understand the particulars of your specific situation in terms of your long-term goals and resources and how the limited availability and legally uncertain status of same-sex marriage negatively impacts you, your partner, and your family.
- **MAKE INFORMED DECISIONS AND IMPLEMENT SPECIFIC SOLUTIONS:** There are workable solutions to many—and perhaps most—of the difficulties and inequities faced by those who cannot legally marry (or fully rely on their marriage). Some of these solutions come from embracing same-sex marriage, civil unions, and domestic partnerships (where available), but many others are specific legal and financial steps aimed at achieving particular goals. Such creative, albeit different, arrangements can be seen as “truly different” rather than as “less than,” and may involve far less hassle than what straight married couples go through.
- **TAKE ADVANTAGE OF OPPORTUNITIES:** As previously stated, there are distinct financial and long-term planning advantages and opportunities available to gays and lesbians who cannot legally marry (or who choose to forgo marriage, or a civil union or domestic partnership, even when available).

What types of opportunities are we talking about? As the table below indicates, there are specific viable, creative opportunities relating to marriage itself, taxes, insurance and health planning, raising and educating children, retirement and estate planning, and emergency medical authority. (Note that when the table says “legal spouses,” it means a married couple according to the federal definition of a marriage between one man and one woman, and that references to “partners” means same-sex partners.) As one simple example, consider charitable gifting by same-sex couples. Since joint federal tax returns are not allowed, a joint deductible charitable donation cannot be made. However, this enables the couple to have its higher income, and therefore higher tax bracket, partner make any larger donations, thereby yielding a greater economic benefit for the couple as a whole.

A final overarching advantage of being a committed same-sex couple emerges as you and your partner move down the path from awareness to solutions and opportunities. While every couple—gay or straight, affluent or of limited means—can benefit from becoming aware of long-term financial and other life goals and taking appropriate steps to wisely steward its resources, many couples simply assume everything will be all right and do little or no planning. Since you, as a member of a committed gay or lesbian couple, already know there are difficulties and challenges that you must overcome, you are far more likely to take the kind of long-term perspective that results in positive steps being made. That is, *the very inequities of the situation you face often catalyze the kind of awareness, communication, and action steps* that lead to much better and more desirable long-term outcomes.

Category/Specific Issue	Challenge	Alternative Approach or Opportunity
Marriage Itself		
Same-sex couples federally barred from legally marrying	Many legal and economic drawbacks: DOMA denies ¹ , 100+ rights, benefits, & responsibilities	Same-sex partners can be protected from bankruptcy or liability judgments against other partner
Other types of harms are inflicted by federal ban on legal marriage	Marriage generally associated w/self-esteem, security, and healthier longer lives	Inequities and "out of mold" aspects can catalyze: awareness, enhanced communication, customized partnership agreements
Ending a relationship	Divorce provides uniform system and specialized tools (QDROs, unlimited marital gifting) to sort out property, child custody and visitation, child/spousal support	Proactively plan, coordinate, and make legal agreements from beginning to avoid onerous taxes or inequities if a break-up; ideal candidates for advantageous mediation or collaborative law process
Title and home ownership	Asset titling, especially real estate, has significant income tax, estate tax, and break-up consequences	Careful titling provides similar results; JTWRROS registrations particularly useful, but can have negative long-term results
Taxes		
Federal joint filing only available to legal spouses, complicates state filings	If state permits joint filings, must be based on joint federal return, then file separate federal returns	Legal spouses often pay more federal tax ("marriage penalty"); can shift expenses and deductions to maximize tax advantages
Gifts	Legal spouses can unlimitedly gift each other without gift tax	Wealthier partner can max out annual gift limit; some states have TOD registrations
Charitable Donations	Same-sex partners can't make joint charitable donations	Higher tax bracket partner makes larger allowable donations, so greater tax savings
Insurance/Health Planning		
Employee health plans	Often restricted to legal spouse; if employer offers, benefit is considered federal taxable income	Some states require availability to same-sex partners; if not available, wealthier partner can help other purchase insurance
Medicaid	Same-sex partner may be forced to give up home for other to qualify	Income/assets of same-sex partners not counted in determining other's eligibility
Visitation rights, medical decision-making power	Often only legal spouse authorized to visit hospital, make decisions	Medical proxy/durable power of attorney can grant equal access, decision power
Separation upon illness	Married couples less likely to be separated in elderly care facilities	Choose residence facilities wisely; carefully review and customize contracts

continued next page

Category/Specific Issue	Challenge	Alternative Approach or Opportunity
Child-Related		
Hard/awkward for kids	Often socially difficult; many forms ask for "Mother/Father"	Not bound by traditional roles, each partner can excel in their own parenting strengths
Guardianship status denied to non-bio parent	Co-parent adoptions, even when available, are intrusive, expensive	Potential for 2 head of household tax filings, each partner claiming 1 dependent
College financial aid	Financial aid departments often awkward for same-sex families; non-custodial parent often ignored	Federal FAFSA form requires 1 custodial parent; if co-adopted child, lower income or assets parent can file as custodial parent
Retirement/Estate Planning		
Overall ramifications of partner's death	Legal spouse gets many automatic rights upon death; surviving same-sex partner vulnerable to contests	Carefully think through estate planning options, coordinate carefully with wills; no need for complex A-B trust arrangements
Social Security and pension benefits	When partner dies, no Soc. Sec. survivor's benefits; pension benefits under ERISA denied to same-sex partner under DOMA	Overall Soc. Sec. benefits may be greater w/ unmarried status; can leverage life insurance to provide sufficient results; pension beneficiary may be designated
Estate taxes	Unlimited deduction only for legal spouses, so onerous tax potential	Can use cross-ownership of life-insurance, or irrevocable life insurance trusts
IRAs	Non-spousal rules force payout w/in 5 yrs. or required distributions (RMDs) to start year after death	Carefully review traditional & ROTH IRA beneficiary designations, coordinate with other estate planning and gifting options

© 2010 NPB All rights reserved.

The world we currently live in is in many ways unfair and unnecessarily complicated, but with enough awareness, communication, and careful planning, along with the assistance of caring and knowledgeable professionals when needed, it is possible for you and your partner to take the right steps in virtually every important area. As you move from awareness to action steps, making good decisions about difficult challenges and taking advantage of a wide variety of opportunities, you will likely feel relieved and empowered. The effort required to work through the many challenges, solutions, and opportunities noted here is substantial, but certainly well worth it.

