

Overview of Financial Planning Issues for Same-Sex Couples

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History Behind Recent Overturn of DOMA

- 1993 - Hawaii State Supreme Court hears a case and suggests that disallowing same-sex marriage may go against State Constitution
- Many states rush to introduce anti-gay bills to disallow recognition of same-sex marriages
- 1996 - Federal Law is passed disallowing Federal Government recognition of same-sex marriages (DOMA, Defense of Marriage Act)



- Since DOMA became law (the supposed Defense of Marriage Act), gay-rights advocates have been working state by state to win marriage equality.
- Most battles have been in the courts such as NJ & CT while some states have been won in the legislature -such as NY.

What are the Criteria for Recognition of Same-Sex Couples' Marriages?

- Since DOMA was overturned in the Windsor v. USA Supreme Court Ruling, each Federal entity & agency has had to determine whether to recognize married couples based on:
 - **State of Celebration** - i.e. if a couple got married in a state that recognized same-sex marriage, then it would be recognized by the Federal government or agency.
 - **State of Residency** - i.e. if the couple's state of residence recognized their marriage, then the Federal Gov't./Agency would also recognize them as married.
 - **Civil unions and domestic partnerships** are currently not recognized by a Federal Govt / Agency as married. (*This is an issue to watch. Just last month a federal court employee united in a domestic partnership in their resident state that does not allow marriage, was afforded spousal recognition for health benefits.*)

How has Same-sex Marriage Recognition been Implemented?

- The recognition guidelines on Federal & State levels are still being determined and are changing on a weekly basis. They will be shifting as they are tested in the courts and legislatures for years to come.
- **IRS** - In Sept 2013 the IRS issued a ruling recognizing same-sex married couples based on state of celebration. (If the couple was legally married in any of the states with marriage equality, they are married for income, estate and gift tax purposes for all 50 states.)
- **For State Income, Gift and Estate taxes**, each couple is subject to their state of residency rules. Thirty states have Anti-Marriage Laws that prohibit marriage or relationship recognition for same-sex couples. However, one of those states - Missouri - has decided to recognize same-sex marriage for tax purposes only.

- **Social Security** - yet to be determined. In August 2013, the Social Security Administration issued a statement that they were working on their policies and encouraged any same-sex couples, regardless of their state of residence, who think they *may be eligible* for Social Security Benefits to apply now (as to protect against loss of any potential benefits.) Some applications for retirement spousal benefits are already being processed.
- **Family and Medical Leave Act for Non-Federal Employees (FMLA)** - Existing regulation looks to the law of the employee's state of primary residence. For a non-Federal employee, a same-sex spouse is unlikely to be considered a spouse for FMLA purposes.
- **Immigration** - US Citizenship and Immigration Services focuses on the place where the marriage was entered (place of celebration). As long as the marriage was validly entered into under the laws of the state or country of celebration, it should apply.

- **Retirement Plans under ERISA** - All Retirement Plans such as 401(k)s must now recognize same-sex spouses as the default beneficiary unless such benefits are waived with the spouse's consent. As plan records and documents get updated, it is highly recommended that participants with same-sex spouses update their beneficiary designations accordingly.
- **IRAs** - While same-sex spouses now qualify for the more favorable spousal treatment with inherited IRAs, regardless of state of residency, it is important to update forms and ensure the spouse is named as such. *(If the owner does not have a beneficiary and the IRA is distributed through the estate and the state's probate laws, it could be extremely problematic in the 30+ states with laws disallowing recognition of same-sex partners and without marriage equality laws.)*

“Should We Get Married?”

- First and Foremost, this is a question for the heart and a couple’s declaration of commitment.
- That being said, a sensitivity is needed to understand that it is not the same question for a same-sex couple as a straight couple. Being Gay & Lesbian has meant a lifetime of creating family(ies) outside all laws and marriage institutions. Under DOMA law, there were over 1,100 statutory provisions denied to same-sex married couples in benefits, rights and privileges. This still exists in many states.
- From a Planning Viewpoint, some of the Pro’s can be listed as:
 - Elimination of Federal Inheritance taxes for same-sex spouses
 - Spousal privileges for retirement plans and inherited IRAs.

- Federal Gift tax elimination for same-sex married couples allowing new freedoms to co-mingle and jointly own/register accounts/property.
- Some of the Planning reasons a couple might not want to marry for now are:
 - College Financial Aid for one partner's child.
 - One partner is a widow(er) from a heterosexual marriage of 10 yrs or more and can qualify for Social Security benefits as such at age 60.
 - A desire not to co-mingle finances or taxes or debt. Many couples have been happily together for years or decades without these considerations.

- **Income Taxes** may or may not be a big factor.
 - For a same-sex couple with only one income earner with children, Federal Income Tax savings are probable
 - For a same-sex couple with two high incomes, the marriage penalty in Federal Income Taxes can be huge
 - State Income taxes are based on State of Residence
- **Recommendations that haven't changed since DOMA:**
 - Same-Sex Couples (married or not) with children should continue to exercise co-parent adoptions where allowed regardless of which state they reside in.
 - With so many states not recognizing same-sex marriages, it is still essential to execute wills, health care proxies, living wills & power of attorney.

What are some resources with up to date information?

- FreedomtoMarry.org - provides state by state updates on marriage, civil unions and domestic partnerships recognition
- LambdaLegal.org - provides an “after DOMA” update for types of benefits and legal updates
- WilliamsInstitute.law.ucla.edu - contains a myriad of studies, research and LGBT demographics across the US
- LiveWoven.com - source of legal and financial education and services for LGBT individuals and couples.

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