



# Marriage

Tips and Traps

November 2011

This document is intended to provide general information only and cannot provide guidance or legal advice as to one's specific situation. Moreover, the law is constantly changing and this publication is based upon the information that is known to us as of this printing. For guidance on your particular situation, you must consult a lawyer. You should not act independently on this information. The provision of this information is not meant to create an attorney-client relationship. Check our website, [www.glad.org](http://www.glad.org), for more information.

If you have questions about this publication, other legal issues or need lawyer referrals, call GLAD's Legal InfoLine weekdays between 1:30 and 4:30pm at:

800.455-GLAD (4523) or 617.426.1350

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# **Introduction**

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In addition to the love and commitment associated with marriage, it is also an enormous legal institution, touching nearly every area of life and death. For most people most of the time, marriage is advantageous legally, conferring hundreds of state protections and over 1000 at the federal level.

Marriage also brings some burdens and yours may be a situation in which marriage's legal consequences are disadvantageous for you or your family. Getting married may disqualify you from certain government benefit programs, or may raise your profile or your sexual orientation to governmental authorities.

Even beyond the responsibilities associated with marriage, a same-sex couple will meet with a mixture of respect and disrespect from private institutions and government agencies and institutions. Given the discriminatory laws in place in many states and in the federal government, some protections will be denied to you and your family. One federal law says that all federal programs and laws will only treat marriages of a man and a woman as marriages. This means that same-sex married couples will be denied approximately 1138 rights and protections that are attached to marriage under federal law.

The following list doesn't tell you everything you need to know -- no list can -- but it illustrates some of the legal complexities of marriage, and sets forth a few things to consider before you make this personal and legal commitment to marry. GLAD encourages people to seek professional advice about your particular situation and how getting married will affect you and your family.

# **Forms – What Am I?**

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If you marry, you are married. No one can take that away from you, but they may discriminate against you.

- If you want your marriage to be respected, you should hold yourself out as married – because you are. That’s not always easy given the amount of discrimination we are likely to see.
- You should never lie on a form, particularly if you must sign it under oath.
- There may be consequences to filling out forms as single one day and married the next. For example, tax returns are often requested with mortgage loan applications. If you filed as single, you will want to have a statement on the form about why you did so (see tax section below).
- Even if other states and the federal government don’t respect your marriage, you can always indicate on a form that you were married in X state on X date to someone of the same sex.

# **Finances – Estate Planning**

## **■ Belt & Suspenders**

Because we are in a transition period and because the legal status of married couples will remain in flux in other states, it is important to do everything you could do before marriage was available. This includes:

- Writing a new will (including naming the guardian of your child(ren)) – in part because in most states, a marriage automatically revokes any existing will;
- signing documents authorizing others to make health care decisions;
- signing documents authorizing others to make financial decisions; and
- directing the disposition of your remains.

## **■ Estate Planning ... In An Uncertain World**

Since none of us can predict the future or the results of litigation, it is best plan for all possibilities. For example, when I die, is my marriage respected by my state or not? When I die, will federal DOMA still be on the books or not? It is helpful to:

- Gain expert advice and use multiple strategies (through wills, trusts, agreements) to ensure your wishes can be met to the largest degree possible no matter what the situation at your death;
- Do tax planning – income tax, gift tax, estate tax – at the state and federal levels; and
- Do Medicaid and long term care planning, concerning issues like assets available to both spouses, asset transfer issues, and liens and estate recovery.

## ■ Tax Time

- Remember that some married people may pay a “marriage penalty” on their income taxes. Others have a “marriage bonus.”
- You may well be in the position where you file your taxes as “married filing jointly” at the state level and “single” at the federal level. You may even need to fill out two federal forms – one as married and one as single – so that you can transfer the “married” numbers to your state form even though you won’t file the “married” federal form.
- On federal forms, it may make sense to file as single but to include a cover letter or disclosure form with the tax return. This would allow you to state you are married and that the only reason you are filing as single is because of federal DOMA (or a state DOMA). Another alternative is to put an asterisk by the “x” in the “single” box and indicate at the bottom of the form that the taxpayer was married on whatever date he or she was married, and that the taxpayer is saying they are “single” for purposes of income tax filing only.

For more information see GLAD’s publication, *Navigating Income Taxes for Married Same-Sex Couples*, at:  
<http://www.glad.org/uploads/docs/publications/navigating-taxes-married-couples.pdf>.

## ■ Credit

Some states require a spouse to assume the other spouse’s debts to creditors.

# **Benefits**

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## ■ Workplace Domestic Partnership Programs

If an employer-sponsored domestic partnership plan requires you to be unmarried, then your marriage may disqualify you from benefits. Check in advance with your employer to ensure that you are covered one way or another. If your employer is considering eliminating domestic partner benefits because marriage is now an option, encourage them to maintain the plan since not all people will want to marry, be able to marry, or be in a state that respects their marriage.

## ■ Disqualification From Government Programs

Getting married may make a person financially ineligible for, or reduce the amount of assistance a person may receive from, certain government programs. This is because such programs treat your spouse's income and assets as yours. Such programs may include, but are not limited to:

- Medicaid (both for insurance coverage and long-term care; called MassHealth in Massachusetts—as a matter of fact the Massachusetts legislature passed the MassHealth Equality Bill which treats same-sex married couples the same as different-sex married couples for all MassHealth programs);
- Cash Assistance for Low Income Families (Transitional Aid to Families With Dependent Children in Massachusetts);
- Subsidized Child Care for Low Income Families;
- Cash Assistance and other General Relief programs for other low income people (Emergency Aid to the Elderly, Disabled and Children in Massachusetts);
- Emergency Shelter for Homeless Families (emergency assistance in Mass.); and

- Food Stamps (eligibility based on household income so it should not be affected if you and your partner were previously seen as part of the same household).

## ■ Disqualification From Benefits Obtained Through Deceased Spouse

Both public programs and private benefits sometimes are available to a person because of a deceased spouse. Remarriage often terminates those benefits, such as:

- Social Security payments based on your former spouse's earnings;
- Worker's Compensation benefits for a former spouse killed on the job; and.
- A variety of pension, disability and retirement benefits based on the former spouse's employment or benefits.

## ■ Important Federal Benefits Will Be Unavailable

It is impossible to catalogue all of these, but married partners:

- will not be eligible to share in each other's social security;
- will be treated as single in all tax matters (particularly consequential after a death) sometimes requiring people to pay high taxes on their own jointly owned homes;
- will have no access to veteran's benefits available to spouses of veterans;
- will not have the ability to transfer property at divorce free of tax consequences, thus making it more difficult (and potentially depleting the couple's assets) to achieve a fair balance of assets;
- will be unable to freely transfer assets to a spouse with no loss of eligibility for public nursing home care.

## ■ Taxes on Health Insurance Benefits

Though married different-sex couples do not pay federal taxes on spousal health benefits, married same-sex couples will have to do so. Because of the 1996 federal Defense of Marriage Act, which defines marriage as between a man and a woman for purposes of federal law, the federal government will not recognize a marriage of a same-sex couple for federal tax purposes. The value of the coverage provided to the employee's same-sex spouse will be treated as wages for federal employment tax purposes.

There is one exception to the general rule of federal taxation. If your same-sex spouse qualifies as a "dependent" under IRS rules without regard to his or her status as a spouse, the value of the benefit to your "dependent" is not taxed as wages to you as the employee.

In states that recognize the marriages of same-sex couples, there is no state income tax on the value of spousal health insurance benefits.

Outside of states that recognize the marriages of same-sex couples, it is not clear how states will tax health insurance benefits provided to an employee's same-sex spouse. If you believe that your state is unfairly taxing your employee health insurance benefits for your same-sex spouse, please contact GLAD.

For more information see GLAD's publication, *Same-Sex Spousal Health Benefits in Massachusetts After Goodridge*, at: <http://www.glad.org/uploads/docs/publications/hla-glad-health-benefits.pdf>.

# Family

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## ■ Adoption

Getting married may affect your ability to adopt as a “single” person from some other states and foreign countries. Virtually no foreign countries permit an openly gay or lesbian couple to adopt, thereby likely barring all international adoptions for married same-sex couples.

## ■ Parenting In General

In Massachusetts (and other states that recognize the marriages of same-sex couples), a child born during a marriage is presumed to be the child of both spouses (209C, § 6), including a child born to a married woman with the use of donor sperm, who is presumed to be the child of the “husband,” and therefore presumably of the partner. That sounds good, but it is not the same level of protection as your family would gain by going through the legal process of jointly adopting any child born during the marriage (or a pre-birth declaration of parentage – see a lawyer about whether this makes sense for you). Adoptions are legal judgments entitled to respect in other states and by the federal government. This will help you and your children if you ever plan to travel outside of Massachusetts. It will also help in the event of one parent’s death because then the child can collect social security from the federal government based on the adoptive parent relationships. For more information see GLAD’s publication, *Adoption Questions and Answers*, at:

<http://www.glad.org/uploads/docs/publications/adoption.pdf>.

# **Divorce**

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Once married, you remain married until divorced by the state. You cannot remarry until your divorce is complete. In addition,

- You must live in Massachusetts for one year before you can file for divorce and for at least six months until the proceedings may be completed (all other states where same-sex couples can divorce also have some kind of residency requirement). People who marry from states that do not respect their marriage may find it difficult to impossible to divorce.
- In most places, divorce requires legal proceedings in which a judge decides or oversees a fair division of property (community or marital property) between the parties and can order support for the ex-spouse as well.
- If a couple has children, the judge will sort out parental rights and responsibilities (including child support obligations) based on the child's best interests.
- One party may claim that a particular child is not a child of the marriage and not within the jurisdiction of the court. It is important to secure the child's legal status to both parents through adoption or other means and not rely solely on the fact of the marriage.
- In some states, the (mis)conduct of the parties during the marriage (i.e., adultery) can affect the division of property disadvantageously to the party who acted against the marriage.
- Some of the legal rules in place that aid the transfer of property at divorce or provide security during this difficult transition period are not available to same-sex couples because of federal DOMA. These include rules allowing the house and some other assets to be transferred or sold without tax consequences, the ability to split a pension earned by one party during the marriage ("QDRO"), and the right to continue receiving health insurance coverage through a former spouse.

- Consider a premarital agreement (drafted before the marriage where both parties share all information and are each separately represented by attorneys) if you wish to vary the rules that would otherwise apply at divorce or to handle otherwise complicated tax and property issues.

For more information see GLAD's publication, *Separation, Divorce and Marriage Equality*, at:

<http://www.glad.org/uploads/docs/publications/separation-divorce-equality.pdf>.

# Special Circumstances

## ■ Immigration/Bi-National Couples

U.S. law affords many benefits to foreign (“alien”) spouses but those benefits will not be available to married same-sex couples. In addition, marrying can bring you to the attention of the government which can be dangerous if you or your spouse are “out of status.”

- Even if you marry, you cannot sponsor your non-citizen spouse for legal permanent residence. Immigration issues are controlled by federal law and the federal DOMA bars protections for same-sex spouses.
- Applying for legal permanent residence based on your marriage to a person of the same sex could lead to deportation.
- To qualify for some visas, you need to prove that you do not intend to remain in the U.S. after your visa expires. Being married to a U.S. citizen may be used to as proof that you intend to remain in the U.S. permanently and can result either in the denial of a visa or trigger removal proceedings.
- If an individual misrepresents any information at all, the misrepresentation can bar him or her from future immigration benefits or put him or her at risk for deportation.

For more information about this see [http://www.glad.org/uploads/docs/publications/Binational\\_Couples\\_Immigration\\_Warning.pdf](http://www.glad.org/uploads/docs/publications/Binational_Couples_Immigration_Warning.pdf).

Gay & Lesbian Advocates & Defenders (GLAD) is the leading legal rights organization in New England dedicated to ending discrimination based on sexual orientation, HIV status and gender identity and expression. Through impact litigation, education and public policy work, GLAD seeks to create a better world that respects and celebrates diversity—a world in which there is equal justice under law for all.

GLAD's Legal Infoline and publications are provided *free of charge* to all who need them. We hope that those who are able will make a contribution to ensure that GLAD can continue the fight for equal justice under the law.

To make a tax-deductible contribution, log on to [www.glad.org](http://www.glad.org), or call us at (800) 455-GLAD (4523) with your credit card, or mail your check, payable to GLAD to 30 Winter Street, Suite 800, Boston, MA 02108. If your workplace has a matching gift program, please be sure to have your donation matched. Please contact us if you would like more information on becoming a GLAD partner.

*Thank You!*



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# GLAD



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