

Planning for Non-Traditional Couples: Part I - The Impact of Federal and State Laws

This is the first of a Four-Part series to address planning issues for same-sex couples and unmarried couples of the opposite sex. In Part I, we will review general Federal and State laws and how they restrict planning for non-traditional couples. In Part II, we'll review common tax planning obstacles and opportunities. In Part III, we'll discuss 10 common estate and gift tax issues and how these differ for non-traditional couples versus legally married ones. In Part IV, we'll look at more advanced estate planning strategies that may be used with non-traditional couples including how life insurance can play a critical role in this process. By having a general understanding of these issues, you can ensure that you work with your financial representative to develop a plan that will best protect you, your partner and your family.

Overview of Federal and State Laws

The most significant obstacle non-traditional couples face is the lack of legal rights and protections afforded to married heterosexual couples. This lack of legal protection poses significant planning hurdles that need to be addressed to ensure that you and your family are well protected. The first place to start is to familiarize yourself with the federal Defense of Marriage Act and relevant State laws to see how they impact your ability to plan.

Federal Defense of Marriage Act or "DOMA"

The *Defense of Marriage Act* or "DOMA" was signed into law on September 21, 1996. DOMA has two primary effects. First, DOMA specifically defines marriage for federal law purposes as being between one woman and one man. Second, no state or political subdivision of the United States is required to recognize a same-sex relationship even if that relationship is recognized in another state. Simply stated, the marital status of a same-sex couple legally married in Massachusetts does not have to be recognized under the laws of Missouri.

It is important to note that on February 23, 2011, the U.S. Attorney General announced that the Department of Justice will no longer defend DOMA, and cases are currently being litigated challenging its constitutionality. However, DOMA has not yet been declared unconstitutional.



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So, how does DOMA's definition of "marriage" affect non-traditional couples? According to a report issued by the United States General Accounting Office, as of December 31, 2003, there are approximately 1,138 federal statutory provisions in which benefits, rights and privileges are contingent upon marital status or in which marital status is a factor. This translates into 1,138 legal and financial planning opportunities unavailable to same-sex couples when compared to their married heterosexual counterparts.

Impact of State Laws

While it is clear that limited benefits and rights are provided under federal law, there are a few states that offer some level of protection for non-traditional couples. Here is a brief review of a few laws.

A. States That Issue Same-Sex Marriage Licenses

There are 9 states and the District of Columbia that issue marriage licenses to same-sex couples. These include Massachusetts (2004), Connecticut (2008), Iowa (2009), Vermont (2009), New Hampshire (2010), New York (2011), Maine (2012), Maryland (2013), Washington (2012) and the District of Columbia (2010). Note that under federal law there is no explicit prohibition against a state honoring same-sex marriages from another jurisdiction.

B. States That Provide State Level Spousal Rights

While the following states do not issue marriage licenses to same-sex couples, they do provide the equivalent of state-level spousal rights. These include California (1999/2005), Nevada (2009), Oregon (2007) and New Jersey (2007). Generally, with the exception of New Jersey, these states allow same-sex couples the right to register as domestic partners and receive essentially all of the rights and benefits of married couples under state law. New Jersey nevertheless offers same-sex couples state level spousal rights. However, rather than registering as domestic partners, same-sex couples must enter into a "civil union." Other states that allow civil unions between same-sex couples include Illinois (2011), Rhode Island (2011), Hawaii (2012) and Colorado (2013).

Also, a few states do offer some limited domestic partnership benefits to same-sex partners of *state employees*. These include New Mexico (2003), Arizona (2008), Alaska (2008) and Montana (2004).

C. States That Provide Some State Level Spousal Rights

Effective July 1, 2009, Colorado permits any two unmarried adults to enter into a Designated Beneficiary Agreement to provide for certain rights and responsibilities. Some of these include hospital visitation rights, medical decision making authority, and inheritance rights.

Effective July 2009, same-sex couples in Wisconsin can register as domestic partners and receive limited rights and responsibilities under state law (although not all the rights and responsibilities available to legally married spouses). These rights and responsibilities include hospital visitation, and the ability to take Family Medical Leave to care for a sick partner.

Currently, this is the extent of state law protection for non-traditional couples. The majority of states have laws prohibiting marriage for same-sex couples either in the form of statutory law or by amendment to the state's constitution. As a result, great thought and care must be exercised when developing a financial and estate plan to protect non-traditional couples and their families. In Part II of this Four Part Series on planning for non-traditional couples, we will discuss common income tax planning issues. While many of these planning concepts apply to all individuals, regardless of marital status, we will see that plenty of disparity exists between benefits provided to legally married couples versus unmarried ones.

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