

The National Pulse

Patchwork Partnering: States Can't Agree on the Legal Status of Same-Sex Couples

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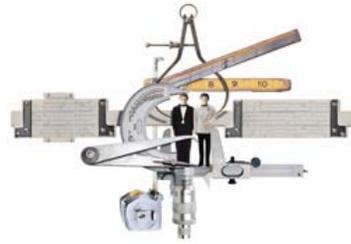


Illustration by Viktor Koen

While same-sex couples are gaining recognition, the variety of such relationships—marriages, civil unions or domestic partnerships—and each one's rights are creating a mishmash of legal problems. States differ among themselves and with the federal government over what properties each relationship has, forcing lawyers to keep track of which jurisdictions allow which rights.

"The recognition is so patchwork," says Richard Wilson of Grund & Leavitt in Chicago. "You have marriage, which is a universal status, even if it's same-sex marriage. Civil unions and domestic partnerships are specific to the state, and another state may not understand them even if it's willing to recognize them. Then you have federal law, which doesn't recognize any of this."

That legal confusion has led some to contend the laws result in separate but unequal status for same-sex couples. On June 29, several New Jersey couples sued, arguing the legislature's December 2006 adoption of civil unions failed to comply with the New Jersey Supreme Court's unanimous October 2006 edict that the state legislature must grant same-sex couples the rights of marriage. That denial, they argue, violates both the New Jersey Constitution and the 14th Amendment of the U.S. Constitution.

The couples argue that the legislature's adoption of civil unions rather than marriage delegates them and their children to a status inferior to that of opposite-sex families, resulting in unequal treatment. One couple, Daniel Weiss and John Grant, entered into a civil union in 2009. They alleged that after Grant was hit by a car, hospital administrators didn't acknowledge Weiss' legal right to make decisions about Grant's care. Another couple who entered into a civil union in 2007, Keith Heimann and Tom Davidson, allege they lost health insurance benefits for months for Davidson and the couple's children after the state audited Heimann's state-employer-provided coverage and didn't recognize same-sex marriage as a legally valid relationship.

Wilson says advocates may be contemplating a similar suit in Illinois. "But it was a political decision in Illinois. And in New Jersey there was a court decision, so it's somewhat different," he adds. "But the problem is the same: If it's all the same, why are we creating this separate institution?"

The mismatched laws "absolutely" result in inequality, says estate planning lawyer Caryn B. Keppler of New York City's Hartman & Craven. "It's created a system that's not equal by any stretch of the imagination."

Legal rights for same-sex couples have been gaining momentum. On June 1, Illinois legalized civil unions; and on July 25, New York began recognizing same-sex marriages. Nineteen states now recognize the relationships—whether they label them marriages, civil unions or domestic partnerships, according to Lambda Legal, the New York City-based group supporting the civil rights of lesbian, gay, bisexual and transgender people.

However, lawyers are having a tough time aligning the different states with their competing laws. "If someone is state-registered as having a domestic partnership in California, it triggers all marital rights," says Frederick Hertz, a solo in Oakland, Calif., who represents same-sex couples. "If they're city-registered, it doesn't trigger those rights. If California couples register their domestic partnership in Arizona, they're not treated as married. But Nevada does recognize California's domestic partnership registrations. The uncertainty of whether they're married or not is a problem that doesn't exist for heterosexual married people."

On the other hand, their relationships sometimes help same-sex couples in basic ways that heterosexual couples have never had to worry about. As an example, Wilson mentions same-sex couples' right to formally end their relationship, which didn't exist before the state recognized such relationships.

"I represent a number of couples who were married years ago in Canada and elsewhere and couldn't get divorced because they live here or in another state that doesn't recognize the marriage," he explains. "On June 1, when the Illinois law took effect, I was filing a number of petitions for dissolution."

KEEPING UNCLE SAM HAPPY

There will be continuing tension between state and federal requirements while the Defense of Marriage Act, which prohibits recognition of same-sex marriages, remains federal law.

Just weeks after New York recognized same-sex marriage, the state announced that such couples must file tax returns as a married couple. They'll be required to attach a dummy joint federal tax return—even though they can't file federally as a married couple—which will serve as the basis of their state return.

"It's going to create additional work and potential fees," says Keppler of New York City. "It's a sour pill. To a large extent it's what everybody wanted. But until DOMA is off the books, there's no way to deal with these issues on a federal level."

And though the Internal Revenue Service doesn't permit same-sex couples to file joint federal tax returns, it appears to be acknowledging same-sex unions for the federal adoption tax credit. The credit is available to couples who adopt, but not to stepparents who adopt their spouse's children.

"With DOMA in place, you'd think the IRS would say it's prohibited from recognizing a civil union or marriage, which means the tax credit should be able to be used by a same-sex spouse adopting a partner's child," says Debra Guston, a partner at Guston & Guston in Glen Rock, N.J. "But I've seen a rash of denials of the tax credit for same-sex couples over the past few months. The IRS is trying to recognize civil unions but taking away a credit that should be available."

Transgender individuals face an additional set of legal dilemmas. The most basic is changing their gender on their birth certificate. "Some states don't allow it at all, but in other states, if you can change it, the change doesn't date back to birth," says Keppler. "We have people who for all intents and purposes have changed their sex and established a transition under acceptable medical guidelines but can't change their identity papers. They can't get a passport and may not be able to get married."

Lawyers who represent same-sex couples say the weight of these conflicts will eventually topple DOMA.

"Sooner or later, DOMA has to fall," says Joyce Kauffman, a family law practitioner in Cambridge, Mass. "Personally, I think the most serious issues are of parentage. After that, there's the inability to divorce, and within that are things like the transfer of property without tax consequences. A lot of people think what's going to bust DOMA wide open is a tax case. The treatment is utterly different because same-sex married couples get none of the benefits, and we're talking major dollars."

THE BANKRUPTCY ANGLE

The act certainly was busted in a bankruptcy case this summer. In June, the U.S. Bankruptcy Court for the Central District of California shot down DOMA as a means to invalidate a same-sex couple's bankruptcy petition. In *In re Balas*, the court said a same-sex couple legally married under California law was entitled to the same protections in seeking Chapter 13 protection as any heterosexual couple.

"Although individual members of Congress have every right to express their views and the views of their constituents with respect to their religious beliefs and principles and their personal standards of who may marry whom," wrote Judge Thomas B. Donovan, "this court cannot conclude that Congress is entitled to solemnize such views in the laws of this nation in disregard of the views, legal status and living arrangements of a significant segment of our citizenry that includes the debtors in this case."

Of course, the outcome of California's same-sex marriage situation is awaiting a state supreme court review of whether opponents have standing to appeal a 2010 ruling that the ban was unconstitutional. They claim that Proposition 8, the 2008 voter-approved ban of same-sex marriage, should prevail.

Hertz counsels his clients to look on the bright side. "I explain that, if they live in a state that recognizes their relationship, how much better things are than 10 years ago," he says. "Imagine 20 years ago if you'd have said to someone, 'Twenty years from now, one of your biggest problems will be figuring out the federal income tax consequences of being married.' People see that as a victory that's incomplete as opposed to a problem."

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