Advising Same-Sex Couples in a Post Marriage-Equality World

By Frederick Hertz, JD

ow that gay and lesbian couples can get married in every state—and in many overseas jurisdictions as well—and have their marriages recognized both nationwide and by all federal agencies, the thorny legal complexities that had plagued the legal lives of same-sex couples have been largely resolved. Couples (and the professionals who advise them) no longer have to worry about the lack of recognition of same-sex marriages by the Internal Revenue Service or the Social Security Administration, and for the most part they no longer have to deal with couples being treated as married in one state but legally single in another state. These issues were resolved by the landmark decisions of the U.S. Supreme Court, which in 2013 granted federal recognition to same-sex married couples and in 2015 lifted all state bans on same-sex marriage.

But lifting the legal prohibitions does not mean that advising same-sex couples about financial matters has become entirely simple or that these clients are the same as your different-sex married clients. A financial advisor working in this growing niche market needs to know how to handle several sets of interlocking challenges to successfully serve this market sector.

What’s Their Marital Status?
The first set of complexities arises out of the convoluted legal and political history of gay family law over the past 20 years and the sometimes unwise and often inconsistent actions taken by many couples as a result.

Here’s the basic history. In the 1980s, many employers and counties (as well as some states) enacted domestic-partnership registration systems that provided a limited number of benefits to gay and lesbian couples—mostly in the arena of employment benefits and local tax exemptions, especially involving property taxes, transfer taxes, or employment benefits for government workers. Although of great symbolic importance, these creative regimes did not offer much substantive benefit. They didn’t (and couldn’t) offer any of the state-law benefits of marriage. Those benefits (and burdens) could be extended only by state legislative or court actions, and until fairly recently no state was willing to take the plunge.

Then, starting in 2000, a few states started offering civil-union or domestic-partnership registration that was, for the most part, equivalent to a marriage in the state where the couple registered. In some instances (such as Vermont) this was the result of a court challenge followed by legislative action, and in other locales it was the result of a ballot initiative. By the time that same-sex couples were able to marry legally in 2005 in Massachusetts, more than a dozen states offered a kind of “marriage equivalent” registration. Commencing in 2000 and continuing until same-sex marriage was legal nationally in 2015, hundreds of thousands of couples have registered. These registrations typically have been open only to same-sex couples, although in some states different-sex couples with one or both partners over age 62 were allowed to register.

Not surprisingly, great confusion abounds with regard to these registration systems. In some states the same term (domestic partnership) that had been used for the limited-benefits employer or local registration systems was retained, leading to uncertainty among couples as to which form of registration had been invoked. Many couples simply don’t remember which system they registered with, and finding the records and confirming the registration status is not always easy. Politics of the marriage-equality movement often stressed the symbolic inadequacy of a “just don’t call it marriage” legal structure, leading many registered couples to remain unaware that they were, in fact, treated the same as married couples under their state laws. Compounding these problems, some states would not recognize marriage-equivalent registrations from other states, and the federal government ignored them completely. As a result, these couples were married under the law of one state but single from a federal perspective and in most other states.

The lack of consistency in these systems and the widespread uncertainty among couples about their legal status led to a great deal of confusion. Each state presents its own set of questions and challenges. In some states (such as California), even after the marriage door started opening the domestic-partnership or civil-union systems were retained, and couples still are allowed to choose between the two options. In other states, registered couples automatically were upgraded to marriage and the registration systems were closed down. As a result of this messy history, many couples aren’t even sure whether they registered under a marriage-equivalent system or a limited-benefits local registration. Perhaps the biggest legal problems have been the result of the refusal of some states to grant divorces to couples that registered or married in another state. As a result, many people
have married to their new partners without terminating registrations with prior partners.

It’s not just the couples who have been confused. Many title companies, bank officers, investment advisors, and lenders have misunderstood the rules, and as a result ownership of property may be mistitled, bank accounts may be mislabeled, and loan agreements may have the wrong parties or misstate the borrower’s marital status. Beneficiary statements on retirement accounts may be technically invalid for failing to acknowledge the owner’s marital status, and wills or trusts also may be incorrect in how spousal obligations (and benefits) are treated. Often these problems are not even discovered—let alone repaired—until a major life event occurs and the consequences of the mishandling of the asset are uncovered.

Because of the impact that marital status has on a plethora of rules and the myriad decisions that your clients will be making, you cannot ignore these issues. As a result, before you provide any advice to any client who has a same-sex partner, it is essential that you ascertain their correct legal status.

And watch out: Single or married aren’t the only two available options. How can that be? The major difficulty arises with regard to the marriage-equivalent civil-union or domestic-partner registrations. Even though the law now requires national recognition of marriages from another state, that rule doesn’t apply to the marriage-equivalent registrations. Accordingly, some states will recognize the registrations of another state, but some won’t—and the legal rules for interstate recognition are changing constantly. It is crucial that you learn the laws of your particular state, so you can spot the issue for clients who are registered but not married. Of perhaps greatest importance, the federal government does not recognize domestic-partnership or civil-union registration as equivalent to a marriage, so couples with these kinds of registrations aren’t automatically eligible for most federal benefits and thus they cannot take advantage of the tax rules that often favor married couples. On the other hand, these couples aren’t subject to the marriage-tax penalty that is imposed on some married couples. At the same time, when it comes to applying the marital rules of community property, spousal support, or joint liability for debts.

Even though you aren’t acting as legal counsel for your clients, it is essential that you ask the key questions and help them clarify their marital status—and if necessary, work with them as they straighten out their legal problems. If they got married and never terminated a prior registration with another partner, they may need to go to court to terminate the prior registration. If they want to be treated as a married couple for all interstate and federal purposes, they may need to get married. Of course, it’s not your job to fix all these problems, but it certainly is appropriate for you to help them understand the issues and guide them to the appropriate resources so that they can resolve them. Meanwhile, you need to know their current marital status so you can set up their accounts in a proper way and give them advice in a manner that is consistent with their actual marital status.

Unlike most straight couples that are clear about their marital status and know the basic rules of marital law, many lesbian and gay-male couples are unaware of these key legal rules. There has been so much confusion and uncertainty in this area of law, and many couples simply haven’t been able to figure out where they stand legally. Your clients may be surprised to learn that some domestic-partnership registrations are equivalent to marriage and some are not, and many registered couples are totally unaware that the federal government doesn’t recognize them as a married couple. Acquiring a basic education about these rules will enable you to guide your clients through the messy legal landscape, and I’m certain that they will appreciate your assistance along the way.

Making Financial Decisions

No two couples handle their money issues in exactly the same way. Some are open communicators and sharers, whereas others are private and even concealing. I mediate all varieties of divorce, both straight and gay, and the range of behaviors regularly astounds me. No doubt some straight couples handle their finances in atypical ways, but most investment advisors feel comfortable assuming that married couples probably share their incomes and assets, and that financial decisions are being made in a coordinated manner. Even where one of the spouses has some inherited wealth, financial planning usually is undertaken jointly by the spouses in an open and shared manner. The couple considers themselves to be a single economic unit, for better or for worse, and most financial advisors enter the professional relationship assuming that this is the operative arrangement.

With same-sex couples, however, there are no such standard rules. Multiple factors are at play here, and one is gender. By definition same-sex couples are of the same gender, and so the social norms about husbands and wives simply don’t apply. Moreover, many same-sex couples have been together for a long time, well before marriage was allowed—let alone conceivable—so it is more likely that they have kept their assets separate. Even when these long-term couples have gotten married, many retain their pre-marital practices of keeping their finances separate.

This is not simply a matter of record-keeping or the separation of accounts. For many such couples the underlying issues of whose money it is and what assets are shared have not been addressed, and they have co-existed in a world of separate accounts, separate debts, and separate decision-making. In some instances one partner may have little or no concept of his or her partner’s financial situation, and so even the disclosure of one partner’s assets to the other can be unsettling. It may sound odd, but working with a financial advisor may be your client’s first opportunity to address these questions.
This is not always easy territory to explore. As every financial advisor knows, these questions tap deep underlying fears and anxieties about one’s future, as well as regrets about past decisions—both individually and for the couple as a family. They may not have thought about their individual long-term retirement and financial security, and as odd as it may seem, they may never have addressed the questions of whether they have joint versus individual financial futures. Very few couples will have evaluated their potential respective financial situations if they part ways, either straight or gay—but given the legal uncertainties arising out of the complex legal issues of same-sex marriage, one or both of the spouses may have expectations that are out of sync with their true legal situation. The core questions that every financial advisor needs to ask inevitably will trigger uncomfortable feelings and responses, as each partner considers what is his or her financial future and their future as a couple and a family. Couples with children often have focused on the needs of their children—which is a good thing—but many of these couples have ignored their individual (or shared) financial futures after their children have grown up.

These questions will arise throughout the advisory relationship, starting with the initial question of who is your client. The client who walks in the door may consider all of his assets to be all his, whereas legally the assets may be partially marital or community property. Conversely, you may be retained by a couple that views their assets as shared, even though legally each partner is the sole owner of his or her assets. Don’t make assumptions here. Ask your clients how they wish to handle this professional relationship. You may end up advising just one of the partners, or maybe both. It’s essential that you remain sensitive to these dynamics, as you consider what information needs to be kept private, who should be attending the meetings, and who has authority to make the various financial decisions.

Establishing Your Credibility
It is of utmost importance that your clients feel that your interest in their lives is genuine and that your entrance into the niche market of same-sex couples is motivated by care and concern for their financial futures, not simply a self-interested search for a new market opportunity.

You can demonstrate your commitment to their concerns by numerous means. First, be humble about your own level of experience and expertise, and don't exaggerate your biography. If you can, spend some time with a variety of lesbian or gay-male couples, whether or not they are potential clients, and ask them about their own experiences with financial planners. Learn what the sensitive spots are and get a sense of the right things to say—and not to say. I also encourage you to read up on the legal issues in advance of your meeting, following the latest developments in the tax and legal news affecting same-sex couples. Be prepared to talk about your own family life, and be ready to ask questions in an open and accepting manner. You and your staff should review your intake forms to be sure that you are not making heterosexist assumptions about gender, partnership status, and preferred pronouns; and be careful about how you and your staff demonstrate that you are truly welcoming of these new clients. Making charitable donations to local lesbian, gay, bisexual, and transgender (LGBT) groups is always appreciated, and showing up at fundraising events is an excellent way of displaying your concern for the broader community issues.

Lastly, don’t ever be afraid to ask your clients questions when you don’t know what is going on. Truly, there are no dumb questions. So long as you demonstrate good-faith openness to hearing their answers, your clients surely will be willing to respond to your inquiries.

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