

**CYNTHIA L. BARRETT**

Attorney at Law  
1500 SW First Avenue  
Portland, Oregon 97201  
503-294-0080  
[www.cynthiabarrett.com](http://www.cynthiabarrett.com)

## **Same-Sex Marriage Legal Alert**

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### **Validity of Same Sex Marriages**

**Validity of Same Sex Marriage.** Same sex marriages have been performed in Canada since 2003, and are valid in that jurisdiction. In the United States, the Massachusetts Supreme Court has ordered that the state issue marriage licenses to same sex couples commencing May 16, 2004. No same sex marriage licenses have yet been issued in Massachusetts, but after May 16, 2004 legal marriages in Massachusetts will commence. Oregon residents have been married in Canada, and may travel to Massachusetts to be married.

Same sex marriages performed in San Francisco in February and March, 2004, and in Oregon in March, 2004, are valid now, but lawsuits challenging the validity of the licenses, and thus the validity of the marriages performed based on the licenses, have been filed. As those lawsuits are fought through the courts, a California or Oregon court may someday issue an injunction declaring the spousal status “on hold” during the time the court considers the dispute. In California, the Supreme Court issued an injunction against further issuance of licenses. However, the marriages performed based on San Francisco-issued licenses have not been invalidated. Eventually, the Supreme Court of each state will speak the final word.

The Supreme Courts of Hawaii, Vermont and Massachusetts have all concluded that failure to grant same-sex couples the rights of spouses is discrimination. Other states are struggling with this issue as well. Oregon same sex couples who choose to marry will preserve the possibility of marital benefits, and will protect their possible marital rights, during the period of challenge.

The California and Oregon Supreme Courts are likely to rule as the other courts have, protecting same-sex couples from discrimination and granting them the rights and privileges and immunities of other married couples. Oregon lawyers will contend with not only the validity of the same sex marriage licenses issued in this state, but with the larger question of the validity of marriage licenses validly issued elsewhere (Canada, Massachusetts, & California at this time). The Oregon Supreme Court has stated the general rule: “...a marriage valid where solemnized is valid everywhere.” In re Estate of John L. Kelley, 210 Or. 226, 230-231, 310 P.2d 328 (Or. 04/24/1957)

**Federal Reaction.** The Defense of Marriage Act (DOMA), 1 U.S.C. 7, provides that “...[i]n determining the meaning of any Act of Congress...the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” Because of the Defense of Marriage Act, no marital privilege or immunity or statutory preference will be applied to the same sex married couples

without challenge. A same sex married spouse with a valid state marriage license will challenge the federal statute on constitutional grounds in the near future, and the case will wend its way to the unpredictable United States Supreme Court. While that DOMA challenge case is pending, the opponents of gay marriage will try to obtain approval of an amendment state constitutions, and to the United States Constitution, to prohibit the states from granting a marriage license, and the status of spouses, to same-sex couples. State and federal officials will try to create a civil union compromise, as now exists in Vermont, to remove the contentious marriage issue, with its religious connotations, from their plates. The end result is not predictable at this time. Optimists predict an improvement in the legal status of same-sex couples, and pessimists fear some overwhelming backwash of oppression.

### **Decisions and the Lawyer's Role**

A decision to marry is based on more than legal concerns, but marriage is a "civil contract" (ORS 106.010) and carries with it many legal benefits and burdens. Any pending legal matter -- personal injury, workers compensation, pension, domestic relations, probate -- might be affected by the marriage of a party. An estate planning lawyer can provide advice on the effect of same sex marriage on estate planning documents.

Many state laws giving a spouse an automatic preference or benefit do not depend on federal law, and will not be delayed by a DOMA statutory challenge. The state laws will have immediate application to validly married same-sex spouses. The state agencies and courts have not had to think this through before now, so these issues will be worked out step by step by brave spouses stepping forward to claim rights or preferences.

For lawyers, a quick review of the benefits and burdens of marriage and the impact of marriage on estate planning documents can help clients plan for the legal consequences of marriage.

### **Benefits of Marriage**

***State Inheritance Tax*** Oregon's inheritance tax exemptions do not parallel the federal exemptions. In 2004, Oregon imposes a tax on all assets of the decedent over \$850,000.00. In 2004, for example, an estate of \$1.5 million escapes federal tax completely, but an Oregon tax of \$64,400 would be assessed. Spouses can claim a marital deduction, and pay no state inheritance tax. Should the Oregon Supreme Court uphold the validity of the Oregon same sex marriages, then Oregon same sex spouses will not have to pay Oregon inheritance tax. See Oregon Attorney General Opinion No. 8268, concerning state income taxation of health insurance coverage for domestic partners, May 25, 1999.

***Personal Injury.*** Under personal injury law, a spouse may have rights in a wrongful death suit and rights for loss of consortium.

***Probate Law.*** Inheritance law provides rights for a surviving spouse, and as an heir a surviving spouse has protection if a court declares a will invalid. A spouse may also be able to claim a support allowance and the right to remain in the family home, rights that have priority over rights of creditors. Further if one spouse disinherits the other, the surviving spouse can claim an elective share of the estate.

**Workers Compensation.** A spouse has rights under workers compensation, including rights to monthly benefits as a survivor of a deceased worker

**Children.** Children born in wedlock are presumed to be the children of both spouses, but “legitimacy” is not equated with the terms “issue” and “lineal descendants” commonly used in estate planning and beneficiary designation documents. Advocates will argue that the non-biologically related same sex spouse will have legal standing as a parent in eventual dissolution of the marriage, and that the children born during the marriage will be heirs of both parents for inheritance purposes. Second parent adoptions to confirm the legal status of the children as issue and descendants of the nongenetic parent will be common. See ORS 112.195

**Testimony Privilege.** An evidentiary privilege bars spouses from testifying about communications between the spouses during a marriage, without the consent of the other spouse, regardless of whether the testimony is sought during or after the marriage. Rosie O’Donnell, who just married in San Francisco, cited this important privilege, which was woefully absent during her recent magazine litigation causing email and other communications between Rosie and her then-domestic partner to be admitted into evidence over her objection.

**Tenancy by the Entireties.** Spouses are permitted to use this form of real property ownership, which is accorded special protections from creditors of either spouse in some states.

## **Burdens**

**Support Obligations.** Family law imposes support obligations on spouses.

**Public Benefit Entitlement Programs.** A spouse’s income may affect entitlement for a spouse or children under public benefit entitlement programs such as Supplemental Security Income (SSI) and housing programs. These federal law burdens may not be imposed because of the Defense of Marriage Act, but the resolution of these issues has not yet been worked out.

**Medicaid.** The availability of resources for public benefit entitlement for spouses in the Medicaid program may be affected. This deeming of resources may not be applied because of the Defense of Marriage Act (DOMA), but if it is, then same-sex married couples will also be provided protections against spousal impoverishment.

## **Existing Domestic Partner Registrations, Affidavit, or Agreement**

If a client has already registered as a domestic partner with Multnomah County, or has signed an Affidavit of Domestic Partner Status with an employer, the client should *not* terminate the registration or affidavit. At this point of development of the law of same-sex marriage, the employer health and other benefits may be based solely on the registration or affidavit. Federal ERISA law governs many private employer job benefit programs, and DOMA currently prevents the employer from treating the same sex spouse as a “spouse” for ERISA governed job benefit plans. See PLR 200339001, for an example of IRS treatment of domestic partners and DOMA application. Although public employers (such as San Jose and Seattle, as their mayors announced) can recognize the married status of same sex spouses, some public employers will refuse to take

that step and indeed in some states will be prevented by law from recognizing same sex marriage.

Advocates will argue that the commonly used domestic partner registration and affidavit systems remain in effect for same sex spouse employee benefit purposes, until the spousal status is recognized. The Federal Defense of Marriage Act (DOMA) now prohibits ERISA governed private employers from recognizing same-sex marriages, although DOMA does not prevent those employers from granting domestic partner benefits. Thousands of employers do grant employee benefits to same-sex partners, using a domestic partner affidavit or registration procedure. The Defense of Marriage Act will be challenged soon, but advocates will seek confirmation from regulators and employers that domestic partner benefits continue during any period that the marriage status of the partners is unrecognized.

Some same sex couples have signed a domestic partner agreement, defining the nature and obligations of their relationship by agreement. An existing domestic partner written agreement should be reviewed if the partners marry. The lawyer may recommend amending the agreement, so that it serves as a marital agreement as well as a domestic partner agreement.

### **Advice to Estate Planning Clients**

Clients who have married in Canada, San Francisco or Oregon, or who intend to marry in Massachusetts after May 16, 2004, should execute codicils to confirm, ratify, and revive their existing wills. Under Oregon law marriage revokes a will executed before the marriage, unless the will indicates the testator's intent that the will not be revoked by a subsequent marriage. ORS 112.305. A will revoked by marriage may be revived by a codicil incorporating the prior will by reference. ORS 112.295 the children of a second parent adoption should qualify as both issue and lineal descendants now, but the status of children born during the marriage is not clear to this commentator. I am consulting with family law experts for pregnant same sex spouse clients now.

Estate planners for clients choosing same sex marriage should recommend dual planning, as domestic partners and as spouses. That is, the estate planning documents will recite the dual status and the intention of the parties to take advantage of both spousal and domestic partner status. The federal estate tax benefits of marriage (unlimited inter vivos gifts to spouses, unlimited marital deduction for testamentary transfers) will not be available until a DOMA challenge is successful, or other law changes occur. Whether the marriage status will permit the same sex spouses to claim a marital deduction for State of Oregon death transfer tax purposes is not clear to this commentator, although vigorous advocacy on that issue will undoubtedly ensue. Same sex marriage clients should be encouraged to review their estate planning documents OFTEN.

*Cynthia L. Barrett  
Portland, Oregon*