

SAME SEX MARRIAGE IN MULTNOMAH COUNTY A CLIENT ADVISORY

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To those considering marriage, or who have already accomplished that major step:

Benefits: Personal injury law: Wrongful death suit rights, and loss of consortium rights

Inheritance law: if the deceased spouse has no will, the surviving spouse gets 100%, or splits the estate with stepchildren if any- so spousal status gives more protection for same sex couples - if those opposing the relationship seek to throw out a will, the laws of intestate inheritance will make the partner a major, perhaps only, heir - the angry relatives get nothing. If there are children from this marriage, then the children inherit from both parent's lines as legitimate issue; if the deceased spouse's will disinherits the survivor, the survivor can make a spousal election, and claim 25% in Oregon against the will. In addition, the spouse can seek a support allowance from the probate estate, and remain in the family home, and these rights have priority against creditors of the deceased spouse

Workers compensation - spousal rights, including rights to monthly benefits as a survivor of a deceased worker

Children: legitimacy of children born in wedlock, giving the spouse the benefit of a parent in eventual dissolution, giving the children the Benefit of inheritance as issue of either

Testimony Privilege - this 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 she and her then-domestic partner to be admitted into evidence over her objection

Tenancy by the entireties in real property - 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 under family law for spouses

Deeming of income for public benefit entitlement for children
Or spouses in the federal benefit programs i.e. Supplemental Security Income (SSI) and housing programs- in so far as these are federal law burdens, they may not be imposed because of the Defense of Marriage Act. - these issues have not yet been worked out, as marriage has been Available only since Valentines' Weekend, 2004, when San Francisco Began issuing marriage licenses to same sex couples

Availability of resources for public benefit entitlement for Spouses in the Medicaid program - this deeming of resources may not be applied because of the Defense of Marriage act, but if it is, then same sex married couples will also be provided protections against spousal impoverishment

Validity of Licenses:

Validity of License: Today (3/6/04), no marriage licenses have yet been issued in Massachusetts (after 5/16/04, legal marriages in Massachusetts will commence). The marriage licenses issued in California and Oregon are valid, but lawsuits challenging their validity have been filed. As those lawsuits are fought through the courts, a California or Oregon court may issue an injunction declaring the spousal status "on hold" during the time the court considers the dispute. Eventually, the Supreme Court of each state will speak the final word. Hawaii, Vermont and Massachusetts Supreme Courts 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. But you are preserving the possibility of benefits, and protecting your rights, during that 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.

Federal Reaction to Valid State Licenses The Congress passed a law in 1996, the Defense of Marriage Act, which prohibits federal laws applicable to spouses from being interpreted to include marriages between two persons of the same sex. That law will be

challenged by someone with a valid state marriage license in the near future, and the case will wend its way to the unpredictable US Supreme Court. While that case is wending its way up, the opponents of gay marriage will be trying to obtain approval of an amendment to the US 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 come up with some sort of 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.

Impact on Local Elected Officials A mayor in New York state who issued marriage licenses is being charged with a crime by a county district attorney. The county commissioners in Multnomah County are threatened with recall petitions. The Mayor of San Francisco is not threatened with criminal action or recall - his city's citizens are overwhelmingly in favor of issuance of licenses to same sex couples, which has so far brought economic benefit and civic pride to his community.

Existing Domestic Partner Registrations, Affidavit, or Agreement

If you have already registered as a domestic partner with Multnomah County, or signed an Affidavit of Domestic Partner Status with an employer, **DO NOT TERMINATE IT!** At this point of development of the law of same sex marriage, your employer health and other benefits may be based solely on the registration and/or affidavit. Although Seattle's mayor announced that Seattle City employees who are same sex marriage spouses may now have the status recognized for employee benefit purposes, not all employers can, or will, recognize the spousal status.

Advocates will argue that the domestic partner registration/affidavits remain in effect for employee benefit purposes, until the spousal status is recognized. The Federal Defense of Marriage Act now prohibits some private employers from recognizing same sex marriages, although it 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.

If you have an existing domestic partner written agreement, that agreement should be reviewed if you marry, and amended to serve as a marital agreement as well as a domestic partner agreement. **DO NOT TERMINATE THE AGREEMENT** without legal counsel.

Advice to Estate and Life Planning Clients

I have been contacted by many clients already, wondering whether a marriage in Oregon

is a good idea for them. I have an estate and life planning practice, and work extensively with elders and families with disabled relatives. Many domestic partner clients have done their wills, trusts, or other life planning work with my law office. I have represented some domestic partners as trustee, guardian or agent for a declining relative or partner, and after the partner or relative's death, have helped them settle the estate. These clients are both excited and worried. They often want the status of spouses, but dread the confrontation about gay marriage and worry about the legal impact of spousal status for them.

One client is on Social Security Disability and Medicare and wanted to know if marriage to her domestic partner would harm those benefits. Absolutely not, I replied. Had this client been receiving SSI or Medicaid, I would have had to counsel delay of the marriage until the law becomes clear about how the Defense of Marriage act will be applied to her situation and these needs based Medicaid and SSI benefits.

One client asked about the impact of marriage on the twins expected to be borne in June, 2004 - the twins born after the marriage will have the status of legal children of both parents, I expect, but will arrange a consultation with a second parent adoption specialist lawyer to review that situation.

Other clients have married, either in San Francisco or Oregon, and want to learn the impact of this new status on their situations. I am arranging for them to come in to do codicils to confirm their existing wills (necessary because Oregon law revokes prior wills by marriage - ORS 112.305).

The decision is yours

What should you do? My advice is from a lawyer's perspective, concerned with your welfare and the welfare of your partner.

I urge you to consult with your lawyer for any pending legal matter (personal injury, workers compensation, pension, domestic relations) before marriage to play out the impact on your case. I urge you to see your estate planning lawyer, for a codicil confirming your existing wills and a review of your children and spousal benefit rights.

There are many state laws, all giving a spouse automatic preference or benefit, that do not depend on a federal law, which will have immediate application to your same sex spouse. The state agencies and courts have not had to think this through before now, so this will all be worked out step by step by some brave spouse stepping forward to claim rights or preferences.

Consider: do you want your partner left out? Unable to claim a right or preference because no marriage had occurred?

Federal benefits (for example, federal employee benefits, pre-retirement spousal annuities, joint income tax filing, tax-frees gifts and transfers at death to a spouse) are not yet

available to same sex partners because of the Defense of Marriage Act. But state benefits are already there to be claimed if your situation triggers them.

You decide what you want, and when, and if, marriage is right for you.

The decision is yours - and maybe you worry about being left behind. Your decision about marriage is working its slow way through your personality, past, and particular concerns.

I respect your interior process, and leave you with words of caution about accepting given wisdom. Mary Oliver, the poet, wrote "Some Things, Say the Wise Ones", in the March 8, 2004, *New Yorker*, p. 35:

**Some things, say the wise ones who know everything,
are not living. I say,
You live your life your way and leave me alone.**

**I have talked with the faint clouds in the sky when they
are afraid of being left behind; I have said: Hurry, hurry!
And they have said, Thank you, we are hurrying.**

**About cows, and starfish, and roses there is no
argument. They die, after all.**

**But water is a question, so many living things in it,
but what is it itself, living or not? Oh, gleaming**

generosity, how can they write you out?

**As I think this I am sitting on the sand beside
the harbor. I am holding in my hand
small pieces of granite, pyrite, schist.
Each one, just now, so thoroughly asleep.**