Planning For Same-Sex Couples In 2011

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A. Overview Of Recognition Versus Non-Recognition States

1. States That Recognize Same-Sex Marriage. Five states and the District of Columbia currently recognize same-sex marriages celebrated within their borders. California recognizes some same-sex marriages celebrated within its borders.


   d. New Hampshire—by statute.

   e. Vermont—by statute.
f. District of Columbia—by statute.

g. California—Approximately 18,000 same-sex couples were married in California between June 16, 2008, and midnight of November 4, 2008 (the date of the general election that passed Proposition 8 stating that “Only marriage between a man and a woman is valid or recognized in California.”). California has also passed a statute, S.B. 54, that recognizes all valid marriages from other states post-November 4, 2008, as entitled to the same rights, privileges, and responsibilities of marriage, but not the name “marriage.”

2. **States That Recognize Valid Foreign Same-Sex Marriages**

   a. New York—Valid foreign marriages are recognized for most purposes, although not for state income tax purposes. There is no direct authority that covers recognition for state estate tax purposes.

   b. New Jersey—Marriages have been recognized for purposes of divorce, but not for other purposes.

   c. Maryland—The Attorney General issued an opinion in 2010 that valid out-of-state same-sex marriages should be recognized under Maryland law.

   d. New Mexico—The Attorney General issued a recent opinion that New Mexico would recognize valid out-of-state same-sex marriages.

   e. California—California recognizes valid out-of-state same-sex marriages that pre-date Proposition 8, November 4 (midnight), 2008.

3. **States That Recognize Spousal Equivalency**

   a. New Jersey—civil unions.

   b. California—registered domestic partnerships (includes rights to community property).

   c. Oregon—domestic partnerships.

   d. Washington—domestic partnerships (includes community property).

   e. Nevada—domestic partnerships (includes community property).

   f. Illinois—civil unions (effective June 1, 2011).

   g. Hawaii—civil unions (effective January 1, 2012).

4. **States That Recognize Status, But Only Provide A Handful Of Rights And Obligations**
### Hawaii
- **Reciprocal Beneficiaries**
- Couples must opt for either civil union or reciprocal beneficiary
- Created by legislature in 1997 in response to marriage case litigation
- Available for any two people who cannot marry and not just same-sex couples (for example, sisters can register)
- Limited rights, but does include inheritance and ability to own property as tenants by the entirety

### Maine
- **Domestic Partnerships**
- Limited rights
- Enacted in 2004

### Maryland
- **Domestic Partnerships**
- Limited rights (medical and taxation)
- Enacted in 2008 (effective 7/1/2008)

### District of Columbia
- **Domestic Partnerships**
- First enacted in 1992, but not funded
- 2002—health benefits for government employees enacted
- Additional medical, inheritance, and similar rights have been added, most recently in 2008, bringing the status closer to full parity with marriage
- Status is retained even though DC now recognizes marriages

### Colorado
- **Designated Beneficiary**
- Creates a central registry where a person can indicate a beneficiary (including different beneficiaries) for various types of rights

### Wisconsin
- **Domestic Partnerships**
- Limited rights

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5. **State Constitutional Amendments Banning Same-Sex Marriage.** Many states have adopted constitutional amendments regarding same-sex marriage. Some of these amendments (such as California’s) ban only same-sex marriage; others (such as Georgia’s) ban any sort of relations between same-sex couples.

   a. **Hawaii** was the first state to adopt a constitutional amendment. It was adopted in the midst of the state litigation over the right to marry. The amendment does not ban same-sex marriage. Rather, it leaves the definition up to the legislature.

   b. The chart below indicates how many states are restricted by constitutional amendments.
States that do not currently recognize marriage and are free to adopt marriage by legislative act (no constitution prohibition) | States that have constitutional amendments prohibiting marriage equality | States that have constitutional amendments prohibiting any recognition (for example, prohibiting RDPs and civil unions as well as marriage)
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Delaware | Alaska | Alabama
Hawaii* | Arizona | Arkansas
Illinois | California | Florida
Indiana | Colorado | Georgia
Maine | Mississippi | Idaho
Maryland | Missouri | Kansas
Minnesota | Montana | Kentucky
New Jersey | Nevada | Louisiana
New Mexico | Oregon | Michigan
New York | Tennessee | Nebraska
North Carolina |  | North Dakota
Pennsylvania |  | Ohio
Rhode Island |  | Oklahoma
Washington |  | South Carolina
West Virginia |  | South Dakota
Wyoming |  | Texas

*Hawaii has a constitutional provision but it does not ban marriage. It says that the legislature shall define marriage.

B. Overview Of Types Of Problems That Arise Under Existing Law

1. *Non-Recognition States.* Most states do not recognize the status of same-sex couples no matter how committed they are. As a result, tax law treats such partners as strangers. This is not a true reflection of the reality of their lives. Applying tax rules that do not recognize the reality of the couple’s property sharing and support for each creates both benefits and detriments. (For example, a two-earner couple,
filing as single or as single and head of household, avoids the marriage tax penalty, but is burdened by the estate and gift tax rules.)

2. **DOMA.** Under the Defense of Marriage Act, none of the Internal Revenue Code provisions that specifically reference “spouses” or “marriage” can be applied to same-sex couples. That puts all same-sex couples, even those recognized as married, in a disfavored position with respect to the following issues:

a. **No Marital Deduction For Gift Tax Purposes**

i. When one partner supports the other, the support may constitute a taxable gift, unless it qualifies as medical or educational payments under Internal Revenue Code §2503(e). (Unless otherwise indicated, all section references are to the Code.) Payment of support in states where the couple’s status is recognized under state law and where state law imposes an obligation of support should not be treated as taxable gifts. This difference in tax treatment depending on state family law creates geographical inequities and bad tax policy.

ii. Partners often acquire the principal residence together and do not always contribute equally to the purchase price. To the extent that one partner contributes more than $26,000 of separate funds to the cost of a jointly owned residence (50/50 ownership), that partner is making a taxable gift. The gift tax can be avoided by careful planning and by drafting documents that make ownership in the jointly owned property proportionate to contributions. The need for extra legal work, however, imposes a burden on such couples. And, often, couples are not advised of the gift tax issues at the time of purchase or of adding a partner to the title.

b. **No Marital Deduction For Estate Tax Purposes**

i. Spouses can accumulate property jointly during their relationship without fear that upon an untimely death of the first spouse, the second spouse will have to liquidate some of their estate holdings to pay an estate tax. As a result of the unlimited marital deduction, the combined estate is not taxed until the death of the second spouse, thereby creating something like a tax on wealth when it passes to the next generation. For same-sex couples, a tax will be levied at the death of the first partner to the extent that partner’s share of the estate exceeds the exemption amount ($5 million as of 2011).

ii. With proper estate planning, a same-sex couple can utilize bypass trusts to avoid a second estate tax at the death of the second partner. In such cases, the tax on the couple will similarly be levied only once at their generation.

iii. However, unlike with spouses, the tax will be levied at the death of the first to die, rather than at the death of the second to die. Although the $5 million exemption makes this a limited problem for other than the very wealthy, consider a wealthy same-sex married couple whose principal residence is the main asset and is valued at more than $10 million. Even after the exemption, the tax