

Same-Sex Couples Face Different Pitfalls

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By: Jennifer Woods,
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If you're a same-sex couple looking to tie the knot this Valentine's Day, there is good news and bad news.



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The good news is that a handful of states have changed their laws to allow gay and lesbian couples to legally marry or at least to legally recognize out-of-state marriages.

The bad news is, there are many other states, as well as the federal government, that still don't recognize these marriages as legal.

This means that while you may have some rights in the state where you live, in order to fully protect your union there is a lot of planning that needs to be done, from creating a comprehensive estate plan and understanding how to properly file your taxes to protecting yourself when traveling out of state.

"It doesn't matter where you get married as far as the federal government is concerned," says Jim Titus, a financial consultant with Schwab, adding, "The federal government does not treat [same-sex couples] as married couples and this creates financial and tax complications."



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In order to ensure you and your partner are adequately protected, the first must-do financial item is to create a will and a trust.

If you die and there is no will in place, there is no guarantee that your partner will receive anything, says Titus, who explains that in the absence of a will the laws of the state take over and it may award the assets to a conventional family member.

He adds that even with a will in place, it doesn't guarantee that your partner will

receive anything as family members can contest the will and may end up receiving some or all of the property that was meant for your partner.

This is where a trust comes in. Creating a revocable trust will allow the partners to dictate who will receive what at the time of death.

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"It doesn't escape the estate tax laws but it's a great advantage to a same-sex couple to have a trust in place as opposed to letting the state dictate," says Titus. (Note: To get a full understanding of gift and estate taxes that apply to same sex couples it is essential to speak with an estate planning attorney and/or tax advisor).

Suzette Rutherford, an estate planning attorney and certified financial planner with Rutherford Asset Planning, says it's also essential that same sex couples have advanced medical directives in place, including a health care proxy—a document that designates someone to make medical decisions in the event that the patient becomes incapacitated..

"Your partner is going to be concerned about your health but will have no rights unless designated by a health proxy," she said.

Rutherford also recommend having a durable power of attorney in effect. This document ensures that if one of the partners becomes incapacitated, the person with such powers can step in on financial matters.

She adds that these financial decisions only apply to property outside of a trust.

A HIPAA authorization form is also a document that you may want to consider as it allows your partner to have access to your medical records.

Of course, some things don't change and one of them is taxes.

According to Joan Burda, an estate planning attorney and author of "Estate Planning for Same-Sex Couples", when it comes to taxes, same sex couples need to keep as detailed records as possible—which means preparing individual and joint tax returns for both state and federal taxes, even if you can't file them.

This is necessary to avoid other issues that may arise in such areas as real estate. For instance, if you are legally married in your state and apply for a mortgage as a married couple, the bank asks to see tax returns.

However, because the federal government doesn't acknowledge same-sex marriages, which requires you file independently, a discrepancy will result.

It will be important to show that you prepared a joint return and that you disclosed on your independent return that you were unable to file jointly but would have if you could have.

Real estate, says Burda, can be particularly tough to navigate.

If one partner dies and the property is jointly held, the IRS will presume the entire property being transferred and the surviving partner is assuming all value, which can result in double taxation, she says.

In addition, putting a partner's name on real estate without talking to a lawyer can trigger gift tax problems.

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For example, Schwab's Titus says if you own a \$500,000 house and you make your partner a co-owner, it's considered a gift of \$250,000. That exceeds 13,000 annual tax-free gift limit.

Traveling out-of-state, particularly with adopted children, can also create

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major problems for couples.

"If you live in a state where same-sex marriage is legal, in that state you have the full protection of the law. But if you travel and you are in a state that doesn't recognize [same sex marriage] all of the documents you have may not be valid if something should happen," says Burda.

In a state that doesn't recognize marriage or second-parent adoption, for instance, if the biological parent dies in an auto accident, the children may be removed even if his or her partner has adopted the children.

In another example, Burda cites a couple on a cruise at which time one suffered from an aneurysm. Even though the couple had advanced directives it was hours before the healthy one was allowed to see the partner and be consulted about medical treatment.

Because of these issues, Burda says many same-sex couples, especially those with children, never leave their state and those that do travel with a lot of documents.

So if you are planning to marry or already have, you're in need of legal and financial advice for your own protection—whenever and wherever.

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