

WHETHER
to
WED

A LEGAL *AND* TAX GUIDE
FOR
GAY *AND* LESBIAN COUPLES

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Foreword by
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Introduction

On September 1, 2007, I became happily married to my husband, Shawn Hartman. We met during the summer of 2004 in Boston, just after the *Goodridge* decision had become effective in Massachusetts, the first state to legally recognize same-sex marriage. We found ourselves dating in a world where our relationship actually could result in marriage, something neither of us grew up contemplating would ever be possible. Shawn is from conservative and rural south-central Pennsylvania, and I am from a rather traditional Italian-Catholic household in upstate New York. As a result, in some respects, we were maybe more cautious than some about coming together as a married couple. We took our time deciding about this important commitment.

Presumably, many gay and lesbian couples today face the same happy and daunting reality. Indeed, in my private law practice, I have counseled hundreds of couples grappling with this question of “whether to wed.” This book is for them, to help, in part, sort through the legal, tax and financial planning issues surrounding this important question. It is particularly for those in non-recognition states who may still be unclear what federal benefit(s) they may get from becoming married when they return home to a state that doesn’t yet recognize their same-sex marriage.

This book is also for the many couples around the country who have long since made their commitments to one another, and who have sorted out the host of issues every couple grapples with when combining lives. Questions such as who is to take out the trash, or, more importantly, who pays for what, and how the house should be titled? Yet they remain unmarried, either because their state does not allow same-sex marriage, or

because they are unsure whether marriage makes sense, even now that the federal government does recognize it.

Before Beginning, a Note about Terminology and Scope

Today's broader gay community is typically referred to in social and political contexts as the LGBT (or GLBT) community. This stands for lesbian, gay, bisexual, and transgender people. More recently the letter "Q" has been added at the end of the list to stand for "queer" or "questioning," so you often see the acronym LGBTQ. All people who identify as such have unique and complex social, legal, tax, and financial planning issues, among other things. Advisors often play an important role in helping this community with these issues. Financial firms in particular are directing marketing efforts toward this demographic.¹

This book principally addresses the issues facing gay men and lesbian women in the context of a committed long-term relationship. Taken together, and for convenience only (not disrespect), I often refer to all of them herein as the gay community, gay relationships, or gay or same-sex marriage. Personally, I don't believe there are such things as "gay marriage" or "straight marriage," only marriage. The focus of this book is on couple and family relationships within the gay community, especially including committed relationships that attempt to benefit from rights historically provided through civil marriage. The book also includes issues related to the gay community having and raising children. Bisexual, transgender, and queer people have many of the same or similar issues, and some very different ones. Some of the issues addressed in this book will be helpful to those in these communities. To the extent I can point that out, I attempt to do so. I have intentionally kept the scope narrower for this initial publication to address issues related to marriage facing the gay community.

A Critical Inflection Point

The principle of "equal protection under the law" was enshrined in our Constitution by the Fourteenth Amendment, enacted shortly after passage of the Civil Rights Act of 1866. That amendment solidified certain individual

rights following the Civil War. Nearly a century later, the Supreme Court applied this principle to begin to dismantle racial discrimination in our country in the famous *Brown v. Board of Education* decision in 1956 that first articulated the principle that “separate but unequal” is not okay. Now, more than a half a century later, that same Supreme Court and other federal and state courts cite these same principles to begin to dismantle discrimination against gay and lesbian Americans as they seek equal protection under the law for equal access to the right of civil marriage. Some have referred to this effort as the “marriage equality” movement.

At the time of publication of this book, communities in the United States and around the world are experiencing dramatic and progressive advances in gay equality. In the United States, for the first time ever, citizens in several states, by popular ballot initiative, advanced equal marriage rights in the November 2012 elections.² Those same elections saw President Barack Obama re-elected to his second term of office, after a fairly acrimonious campaign against Republican Governor Mitt Romney. Governor Romney was fiercely opposed to gay marriage from its inception, when he was governor of Massachusetts where it started. President Obama became the first sitting U.S. president to support same-sex marriage when he announced on May 9, 2012 during his campaign for re-election that his views on same-sex marriage had evolved and he was then in favor of it. He did this despite the fact that some of his strategists advised against it during his re-election campaign.³ This followed a series of judicial and legislative victories (and some defeats) from the prior decade, including Congress’ repeal of the longstanding military policy “Don’t Ask; Don’t Tell.”⁴

More recently, the United States Supreme Court closed its 2012–13 term by announcing a landmark decision in the *Windsor*⁵ case by holding Section 3 of the Defense of Marriage Act, or DOMA, unconstitutional and opening the floodgates of federal rights and benefits for thousands of same-sex married couples in the U.S. (The Supreme Court also decided the *Perry*⁶ case the same day, which had the effect of allowing same-sex marriages to resume in California—the most populous state in the union.) With these decisions and other events of the past decade, the gay community has gained headway socially, electorally, legislatively, and judicially. Some historians believe that these developments for equality of the gay community,

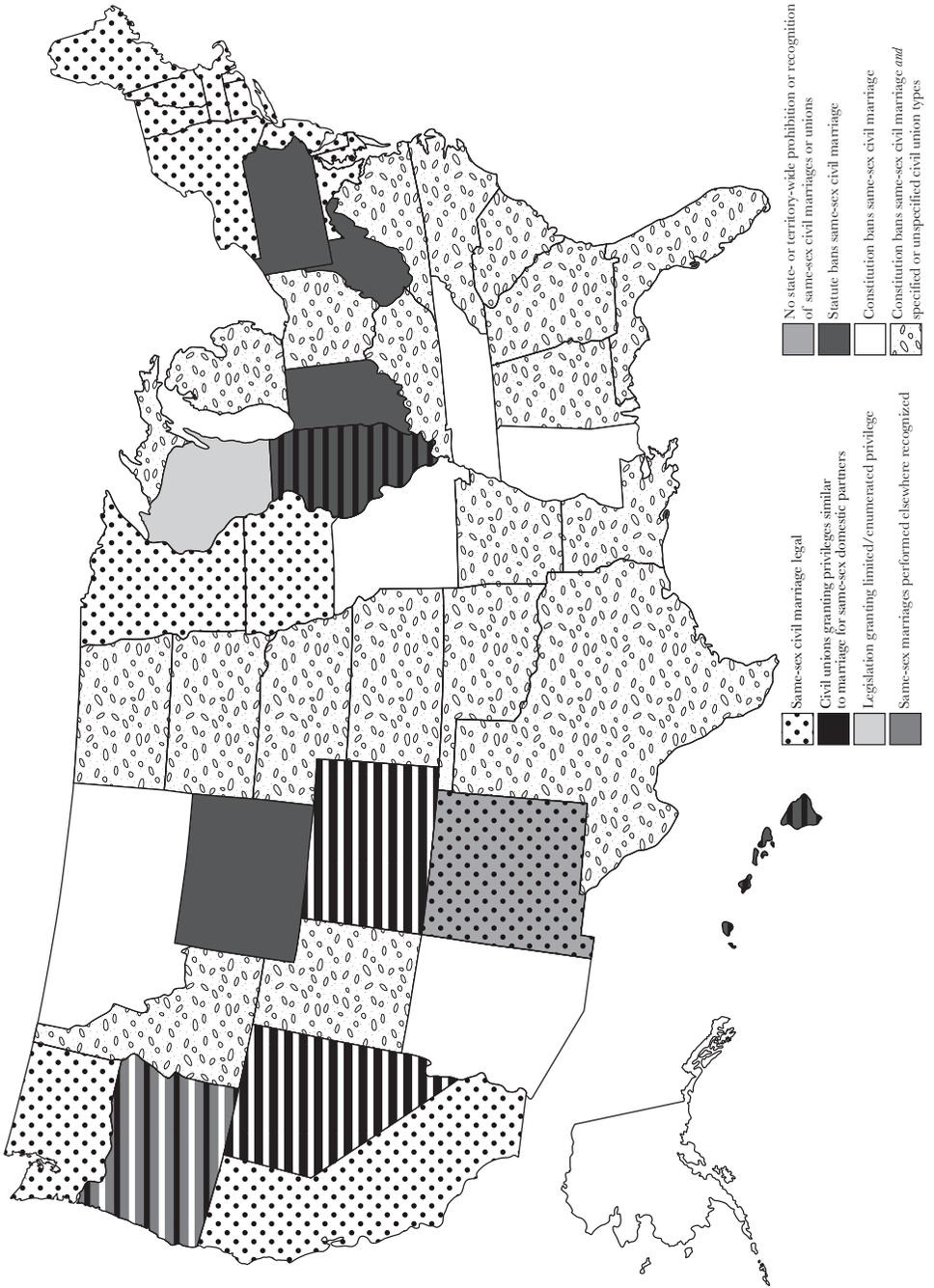
including marriage equality, are comparable in certain respects with the country's civil rights movement, and that the marriage equality movement is its next chapter.⁷

But, like all macro-social changes, these things take time. As of this writing, same-sex marriage is “legal” in fourteen recognition states: California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey*, New York, Rhode Island, Vermont, and Washington, and the District of Columbia. It is also legal in a variety of foreign countries. (See Appendix D for a more detailed account of the effective date of recognition of same-sex marriages in these states, courtesy of Gay and Lesbian Advocates and Defenders, or “GLAD.”) As mentioned, there are still thirty-five states that specifically prohibit same-sex marriage (although a few of those recognize out-of-state same sex marriages for some or all purposes). And there is one state (New Mexico) that neither allows, nor prohibits same-sex marriage. It remains unclear whether all federal rights and benefits will extend to same-sex married couples who move to, or live in, one of those thirty-five states, or whether any of those states will recognize out-of-state same-sex marriages even though they don't allow such marriages to take place there. (Oregon is a recent example of the latter, and is what I will call a “hybrid non-recognition” state.) Unless and until the United States Supreme Court settles the question of whether there is a federal constitutional right (perhaps under equal protection or due process guarantees) for same-sex couples to be married, we will continue to have this patchwork effect of laws around the country.

A map of the United States on the next page illustrates the “patchwork” effect of laws now.

* On October 18, 2013, the New Jersey Supreme Court⁸ cleared the way for same-sex marriages to begin in the Garden State based on a lower court ruling⁹ that found it now unconstitutional under that state's equal protection guarantees to deny same-sex couples the right to marry. This was because the federal government will only provide federal rights based on marriage, not civil unions, which New Jersey had fashioned as its solution to providing rights to same-sex couples. This ruling essentially secured equal marriage in New Jersey and is yet another example of the constant changing landscape in this area. This case, in particular, could become the roadmap for challenging other states' similarly discriminatory laws.

Legal Status for Same-Sex Couples in the United States as of October 2013



In addition to perhaps being the next iteration of our country's civil rights movement, developments in marriage equality reflect an evolving definition of marriage, much to the chagrin of many conservatives. Shortly after the landmark decision by Massachusetts' highest court in 2003, which found that same-sex couples have a constitutional right to marry (*Goodridge*¹⁰), there was serious backlash and an immediate attempt to reverse the decision. Governor Mitt Romney (of Massachusetts) and President George W. Bush were both quick to chastise the Justices of the Supreme Judicial Court of Massachusetts as being "activist judges" who were trampling on thousands of years of history of the institution of marriage. Governor Romney admonished: "Beware of activist judges. The legislature is our lawmaking body, and it is the legislature's job to pass laws. . . . While the law protects states from being forced to recognize gay marriage, activist state courts could reach a different conclusion, just as ours did. It would be disruptive and confusing to have a patchwork of inconsistent marriage laws between states. Amending the Constitution may be the best and most reliable way to prevent such confusion and preserve the institution of marriage."¹¹

President George W. Bush announced a proposal to amend the U.S. Constitution to ban gay marriage, stating, "The reason I did so was because I was worried that activist judges are actually defining the definition of marriage [sic]. And the surest way to protect marriage between a man and woman is to amend the Constitution. . . . I'm deeply concerned that judges are making those decisions, and not the citizenry of the United States."¹²

It only suffices, however, to study the history of the institution of marriage from a legal, social and religious standpoint to realize that it has been anything but static over the centuries. I will briefly review this at the outset of this book to put into context the legal developments we are experiencing. This book is not meant to be a complete exposition on the history of marriage—or even what gay marriage is all about, and why it is good for society. Indeed, that has already been done.¹³

Overview of the Chapters

Chapter 1 provides a look at the institution of marriage throughout history, including the various iterations of the institution of marriage as it has evolved over the centuries from a social, political, and religious perspective. I also touch on the blurry lines between civil and religious marriage, but point out that in both cases, the institution has evolved and changed and continues to morph in different ways.

Chapter 2 focuses on defining the gay and lesbian community in the United States. I review the demographic information readily available from Census reports and other recognized sources and discuss some of the complexities associated with self-identification and reporting by gay and lesbian people. This chapter also includes a brief overview of the modern gay rights movement, including the critical inflection point of the famous Stonewall Riots in 1969 and how that event led to the movement for equal marriage for gay and lesbian couples.

Chapter 3 tells the story of legal struggles (successes and failures) to recognize, from a legal standpoint, rights of same-sex couples. I also briefly review U.S. statistics of same-sex marriages since it has become lawful, and cite some information about the divorce rate of these marriages. I review the failed early cases on same-sex marriage; discuss the important Hawaii cases in 1993 and 1996 that triggered the debate in Congress which resulted in passing (the now partially defunct) Defense of Marriage Act (DOMA).¹⁴ I then review the history of civil union and domestic partnership legislation and conclude with a discussion of the cases, legislative efforts and ballot initiatives to either pass or outlaw same-sex marriage around the country.

Chapter 4 begins to dive deep into the whether to wed question by explaining in detail the many federal rights and benefits same-sex married couples are now entitled to, as well as pointing out some of the disadvantages and obligations of being married, from a federal law perspective.

Where Chapter 4 covered federal benefits available to same-sex married couples, Chapter 5 continues the whether to wed analysis by delineating the pros and cons of marriage from a state law perspective.

Chapter 6 helps the reader understand the current complexities same-sex couples face as they move (or even travel) around the United States

from a state that recognizes their marriage to one that does not. This chapter helps clarify which federal rights and benefits are available to lawfully-married, same-sex couples when they return home to a less friendly state where their marriage is not recognized. For this discussion, I will review, at a very high level, the categories of federal rights and benefits that are affected by where you live (or die), as opposed to simply where you were married. This is referred to as either “place of domicile” rights versus “place of celebration” rights. I will also discuss the hybrid non-recognition states that, while not allowing same-sex marriage in their own state, recognize it if performed in other states.

Chapter 7 then outlines many of the issues for children and families in the context of same-sex couple parenting and, in particular, the issues that arise when those parents get married. Adoption, surrogacy, and custody issues, and how they may factor into the whether to wed decision are broadly discussed.

Chapter 8 is intended to help couples and their advisors evaluate the legal, tax, and financial planning considerations for entering into civil marriage with a particular emphasis on estate planning. It will examine this both from perspectives of living (and dying) in a recognition state versus a non-recognition state.

Chapter 9 takes a look at other issues within the broader gay, lesbian, bisexual, transgender, and questioning community, including those unique to transgendered people, elders and youth—all as it relates to the marriage discussion. Some of the issues deal with gender identification and the challenges that may or may not arise as couples contemplate marriage.

Chapter 10 offers counsel and guidelines for finding qualified LGBT-savvy advisors to aid you in sorting out the issues identified here that may arise, whether or not you decide to wed.

Chapter 11 suggests some future litigation that will likely arise as a result of the complexities described in the earlier chapters and looks ahead to the future of the marriage equality movement.

Whether to Wed: Consider Love

On the question of whether to wed, I believe it is important to point out that there are, of course, many reasons beyond taxes and financial or estate planning to consider when contemplating marriage. Love and commitment, for instance, are among these and, indeed, are perhaps more important. I do not pretend to supplant love by the analysis of whether to wed in this book, but merely park it at the door to concentrate on the concrete and practical aspects of considering whether to wed from a legal, tax, and financial planning perspective. The love and commitment piece is up to you . . . *

Why Marriage?

Gay activists from around the country continually debate whether marriage equality is even the best strategy for legal recognition of same-sex couples. It is fraught with all the issues we know about, namely confusion with religious and historical views of marriage. Indeed, there was a push early on to “settle” for civil unions or domestic partnerships instead, so long as all the same legal rights and privileges were present. I will not elaborate further on this debate (which continues) other than to acknowledge it exists.

Personally, I subscribe wholeheartedly to the view that marriage matters. My friend, Jonathan Rauch, in his important work, *Gay Marriage: Why It Is Good for Gays, Good for Straights and Good for America*, articulates more clearly (and eloquently) than I could why marriage matters. Among other things, he makes the point that it is a “win-win-win.” He says, “It is good for homosexuals, good for heterosexuals and good for the institution of marriage: good, in other words, for American society.” It does this, he explains, by “shoring up the key values and commitments on which couples and families and societies depend.” I trust that what you find in this book will help reinforce this notion.

* For a more detailed discussion on a recent survey of why gay couples choose to get married see <http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/5/#chapter-4-marriage-and-parenting>. This research shows that 84 percent of gay adults and 88 percent of all adults view love as a very important reason to get married. Interestingly, 46 percent of gay respondents, however, found the legal rights and benefits also an important reason for marriage—as opposed to 23 percent of their straight counterparts.

My favorite and most succinct articulation of a response to this question about why marriage matters came early on in our national debate from author and commentator Andrew Sullivan, in his fine essay published by *Time* magazine (February 8, 2004): “Why the M Word Matters.” He said something that so profoundly resonated with me and touched my soul that our best man had the wisdom to read it as part of the toast at our wedding.

I share it here:

“As a child, I had no idea what homosexuality was. I grew up in a traditional home—Catholic, conservative, middle class. Life was relatively simple: education, work, family. I was raised to aim high in life, even though my parents hadn’t gone to college. But one thing was instilled in me. What mattered was not how far you went in life, how much money you earned, how big a name you made for yourself. What really mattered was family and the love you had for one another. The most important day of your life was not graduation from college or your first day at work or a raise or even your first house. The most important day of your life was when you got married. It was on that day that all your friends and all your family got together to celebrate the most important thing in life: your happiness—your ability to make a new home, to form a new but connected family, to find love that put everything else into perspective.”

For those of you reading this book for whom marriage is a real possibility, if this book helps you get to that most important day, then I am pleased to have helped in some small way.

A Friendly Disclaimer

It is important to note, that while I discuss the meaning, content, and use of legal and tax issues, documents, directives and such, nothing in this book should be considered legal/tax advice upon which you should rely in making important decisions about your life. I encourage you to consult your personal attorney and/or tax advisor before proceeding with any decisions that affect you and your loved ones. In Chapter 10, I offer some suggestions

for how to find qualified professionals who understand and can help you plan for the unique issues that arise with same-sex couples.

Finally, to ensure compliance with requirements imposed by the U.S. Internal Revenue Service, I inform you that any tax advice contained in this book (including any updates) was not intended or written to be used, and cannot be used, by any taxpayer for the purpose of (1) avoiding tax-related penalties under the U.S. Internal Revenue Code or (2) promoting, marketing or recommending to another party any tax-related matters addressed herein. Again, I encourage the reader to consult with his/her own personal legal and tax professional advisor(s) before making important decisions based on material presented herein.