

GLAD



EQUAL JUSTICE UNDER LAW

Marriage Guide

for Rhode Island
Same-Sex Couples

December 2010

This document is intended to provide general information only and cannot provide guidance or legal advice as to one's specific situation. Moreover, the law is constantly changing and evolving and this publication is based upon the information that is known to us as of this printing. For guidance on your particular situation, you must consult a lawyer. You should not act independently on this information. The provision of this information is not meant to create an attorney-client relationship. Check our website, www.glad.org, for more information.

If you have questions about this publication, other legal issues or need lawyer referrals, call GLAD's Legal InfoLine weekdays between 1:30 and 4:30pm at:

800.455-GLAD (4523) or 617.426.1350

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INTRODUCTION

Although Rhode Island does not allow same-sex couples to marry at home, Rhode Island same-sex couples may legally marry in Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, the District of Columbia or Canada without needing to meet any residency requirement.

Whether you should enter a marriage and what it all means are questions this publication is meant to address. Inevitably, you will have questions to which there are simply no definitive answers at this time. We will continue to update our publications as new developments occur over time.

This document is intended to provide general information only and cannot provide guidance or legal advice as to one's specific situation. These questions and answers are based upon the information that is known to us as of this printing and that can change at any time. For guidance on your particular situation, you must consult a lawyer. You may call the GLAD Legal InfoLine at (800) 455-GLAD (4523) or check our website www.glad.org for more information and to obtain lawyer referrals.

AVAILABILITY OF MARRIAGE LICENSES FOR RHODE ISLAND SAME-SEX COUPLES

Will Rhode Island city and town clerks issue marriage licenses to same-sex couples in Rhode Island?

No. Rhode Island same-sex couples can legally marry in Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, the District of Columbia or Canada without needing to meet any residency requirement, but Rhode Island does still not allow same-sex couples to marry there. Those who want to help change Rhode Island law should contact Marriage Equality Rhode Island (MERI) at <http://www.marriageequalityri.org>.

Will the ability of Rhode Island same-sex couples to marry in Massachusetts, Connecticut, Vermont, New Hampshire, Iowa, the District of Columbia or Canada lead the Rhode Island Legislature to pass marriage legislation to expressly authorize same-sex couples to marry in Rhode Island?

GLAD and Marriage Equality RI (MERI) are hopeful that the Rhode Island Legislature will see the unfairness of Rhode Island's current marriage laws more clearly as greater numbers of Rhode Island couples marry and return home. The Legislature, as well as the couples' families, neighbors, friends and co-workers, have a direct opportunity to see that marriage equality is good for those couples and harms no one else. Those who want to help educate the Rhode Island Legislature on why Rhode Island should stop denying marriage to loving and committed same-sex couples should contact MERI.

How did marriage licenses become available to Rhode Island same-sex couples in these other places?

In most states that allow same-sex couples to marry, there has not been any question about the ability of couples who do not live in those

states to do so as well. When Massachusetts became the first state to grant marriage licenses to same-sex couples in the country in 2004, however, the state revived a rarely enforced statute¹ to exclude all non-resident same-sex couples. GLAD successfully challenged the state's application of that law, and a trial court cleared the way for Rhode Island same-sex couples to marry in Massachusetts on September 29, 2006. The Massachusetts legislature repealed that law in 2008.

Marriage equality became the law of Connecticut in 2008 and Iowa in 2009 after the Supreme Courts of those states ruled that it was unconstitutional to prohibit same-sex couples from marrying. Marriage bills passed through the legislatures of Vermont, Maine, and New Hampshire in 2009 as well. Vermont's law went into effect on September 1, 2009, and the District of Columbia's marriage equality law went into effect March 2, 2010. Unfortunately, Maine's marriage equality law was overturned by a voter referendum in November 2009 and so same-sex couples are not able to marry there. None of these places has a residency requirement for getting married.

In addition, Canada does not have a residency requirement for marriage and permits same-sex couples from anywhere to marry. Some people may also be able to wed in the Netherlands, Belgium, South Africa, Spain, Norway, Sweden, Portugal, Iceland, Argentina or Mexico City, but some of these places have requirements that make it difficult for non-citizens to marry. Moreover, you should speak with an attorney about other consequences of marrying outside the country, particularly with regard to potential differences in the treatment and respect of such marriages within the United States.

Between June 16, 2008 and November 4, 2008, same-sex couples were able to legally marry in California, but a ballot initiative, Prop 8, has for the moment taken away this fundamental civil right.

GLAD has prepared publications with detailed information about marrying in New England states where marriage is legal for same-sex couples and in Canada. These publications can be found at:

¹ M.G.L. c. 207, §§11-12 (the "1913 law").

<http://www.glad.org/rights/publications/c/marriage/>. For information about getting married in Iowa or the District of Columbia consult Lambda Legal, www.lambdalegal.org.

What was the case about in Massachusetts that let Rhode Islanders marry there?

When Massachusetts same-sex couples began marrying in 2004, former Massachusetts Governor Mitt Romney instructed municipal clerks to deny marriage licenses to all out-of-state same-sex couples, claiming that a Massachusetts marriage law – enacted in 1913 but not enforced for at least several decades – authorized his actions. This 1913 law said that an out-of-state couple could not marry in Massachusetts if their marriage was “prohibited” in their home state.

Believing that the Governor’s actions were discriminatory, GLAD filed a lawsuit, *Cote-Whitacre v. Dep’t of Public Health*, on behalf of 8 out-of-state same-sex couples who either had married or wanted to marry in Massachusetts. On March 30, 2006, the Massachusetts Supreme Judicial Court (SJC) agreed with GLAD that Massachusetts’s interpretation of this law was overbroad and denied the equal protection of the law to some out-of-staters. The decision allowed same-sex couples to legally marry in Massachusetts if they could show that their home states’ laws, constitutional provisions, and controlling appellate decisions did not expressly prohibit them from marrying at home.

On September 29, 2006, a trial court in Massachusetts ruled that Rhode Island laws, constitutional provisions, and controlling appellate decisions contained no explicit prohibition of marriage for same-sex couples. As a result, residents of Rhode Island could marry in Massachusetts without intending to reside there.

On July 31, 2008, Massachusetts Governor Patrick signed into law a bill that repealed this so-called “1913 law,” and from that date forward same-sex couples from anywhere have been able to legally marry in Massachusetts without having an intent to reside in Massachusetts,

provided the couple meets the other Massachusetts marriage requirements.

Does the decision by the Massachusetts Supreme Judicial Court in Cote-Whitacre make it more likely that a Rhode Island court would interpret Rhode Island law to allow same-sex couples to marry in Rhode Island?

No. Because the Massachusetts decision was based only on Massachusetts law, it does not provide a shortcut to marriage in Rhode Island.

The Massachusetts court's analysis of Rhode Island's marriage laws was intentionally superficial because the so-called "1913 law" only allows Massachusetts to look for *explicit* obstacles to the marriage in another state. In contrast, a Rhode Island court looking at its own marriage laws would conduct a deeper analysis, considering all *implicit and explicit* obstacles to the marriage (as well as constitutional principles). For example, a Rhode Island court might look at the gendered terms in its marriage laws -- like "bride," "groom," "husband," and "wife" -- and conclude, as all other state courts considering the same question of statutory interpretation have done, that same-sex couples cannot marry in Rhode Island, even though there is no express prohibition against these marriages in Rhode Island law.

Getting equal marriage rights in Rhode Island will require a change in Rhode Island law, either through the Legislature or the courts. At present, litigation in Rhode Island's courts challenging the denial of marriage licenses on constitutional grounds would be extremely risky. Experience has proven that lawsuits brought at the wrong time or wrong place can do far more harm than good, and thus the best course of action is to fight for the right to marry in the Rhode Island General Assembly.

If we married in Massachusetts prior to September 29, 2006 after fully disclosing our residence in Rhode Island and our intent to return to Rhode Island after the marriage, is our marriage valid?

Yes. The *Cote-Whitacre* decision confirmed that Massachusetts could not stop same-sex couples from Rhode Island from marrying in Massachusetts solely because they were of the same sex. Thus, if Rhode Island same-sex couples were otherwise qualified to marry in Massachusetts when they did, their marriages are validated by this decision and their licenses must be indexed and bound by the Massachusetts Registry of Vital Records & Statistics.

If we married in Massachusetts prior to September 29, 2006 and indicated that we intended to reside in Massachusetts but have not carried out that intent, is our marriage valid?

Yes, because couples from Rhode Island should never have been asked that question since they were always legally free to marry in Massachusetts.

RESPECT FOR THE MARRIAGE

If my same-sex partner and I marry, will our marriage be respected in Rhode Island?

Even though Rhode Island presently does not allow same-sex couples to marry, married same-sex couples have found a mix of both respect and disrespect for their marriages in a wide variety of circumstances.

On the one hand, there are good reasons to think that a valid marriage from anywhere that same-sex couples can legally marry will be respected in Rhode Island once the couple returns home. Rhode Island follows the longstanding legal tradition that states respect marriages legally celebrated in other jurisdictions unless the marriage runs contrary to a strong public policy of the state.² Applying this principle, many public and private entities in Rhode Island have respected the valid marriages of same-sex couples. In particular, in one case, GLAD helped a Tiverton, R.I. retiree receive health care benefits for her same-sex spouse.

Additionally, in both October 2004 and February 2007, Attorney General Patrick Lynch issued legal opinions recommending that governmental entities recognize the same-sex spouses of employees and retirees. In the latter opinion, the Attorney General said that, under established legal principles and a review of Rhode Island public policy, it was his opinion that a marriage validly entered into by a same-sex couple in another jurisdiction remains valid in Rhode Island. Though technically non-binding, this opinion is a clear roadmap of the relevant legal principles involved in considering whether a marriage will be recognized under Rhode Island law and makes clear that nothing in Rhode Island public policy prevents that recognition.

Examples of respect abound in the private context as well, as private employers and service providers in Rhode Island recognize that there are

² *Ex Parte Chace*, 26 R.I. 351, 58 A.978 (1904).

no obstacles to such recognition, and, indeed, in some instances, they may be obligated to do so.

On the other hand, however, legal uncertainty remains in this area. In the *Chambers v. Ormiston* case³, the Rhode Island Supreme Court countered this positive trend. The Court ruled that the Family Court does not have the jurisdiction to hear the divorce case of a same-sex Rhode Island couple who was married in Massachusetts. The Court avoided considering the established legal principles discussed above by focusing narrowly on the Rhode Island divorce jurisdiction statute. Although the decision does not therefore broadly disrespect the marriages of same-sex couples, it will certainly be used by those who seek to discriminate against the marriages of same-sex couples as an excuse to do so.

Until there are further court rulings or legislative action, the question of respect for a same-sex couple's marriage will proceed on a case-by-case basis. Thus for the moment, the caution recommended in the following question and answer with respect to other states applies to Rhode Island, though married same-sex couples have stronger grounds for expecting respect for their marriage than in many other states.

As same-sex, married Rhode Island couples encounter instances of respect (or lack of respect) for their marriages, GLAD encourages them to call the Legal InfoLine at 1-800-455-GLAD (4523) so that we can be kept informed of the most recent developments in this changing legal landscape.

If my same-sex partner and I marry, where will our marriage be respected?

Each state has the power to decide whether to respect a marriage legally celebrated in another state. Places in the United States that currently fully respect the marriages of same-sex couples are Massachusetts, Connecticut, Vermont, New Hampshire, Iowa and the District of Columbia. Both New York and Maryland appear to be

³ 935 A.2d 956 (R.I. 2007).

respecting the marriages of same-sex couples for most purposes, but check with Lambda Legal, www.lambdalegal.org, for the latest information about this.

Some states that have legal statuses that are parallel to marriage, like civil unions, may recognize your marriage as equivalent to the legal status they provide their citizens. This is the case in New Jersey. It is likely that other states will not respect your marriage for most or all purposes. Certainly, governmental respect may be inconsistent, respecting families for purposes of some programs, but not for others. It will be nearly impossible to predict what marital protections will be available under what circumstances in any given state or instance. It will take some time to resolve these issues, and in the meantime, same-sex couples who marry will face many legal questions and uncertainties.

If your primary purpose for getting married is to access legal protections at home or elsewhere, you should be aware that your ability to do so is not as clear as it should be. As a result, it is still particularly important to take all other available steps to protect your relationship and your children.

If my same-sex partner and I marry, will my marriage be respected by the federal government?

No. The federal government has a discriminatory law in place, called the Defense of Marriage Act (DOMA), that restricts marriage to a man and a woman for all purposes under federal law. Therefore, the federal government will not currently extend to legal spouses of the same sex approximately 1138 federal benefits, protections and responsibilities applicable to spouses in a different-sex marriage. This federal discrimination encompasses federal taxes, employment protections, Social Security, immigration, veterans' benefits and many other issues.

On March 3, 2009, GLAD filed a lawsuit, *Gill et al v. OPM et al*, in the Federal District Court of Massachusetts to challenge this discrimination. On July 8, 2010, that court ruled that DOMA was

unconstitutional, and on October 12, 2010 the United States Department of Justice appealed this decision to the United States Court of Appeals for the First Circuit. It will still be many months before there is a decision from the 1st Circuit. In the meantime, there is a stay in place, and so DOMA continues to discriminate against married same-sex couples.

On November 9, 2010, GLAD filed its second lawsuit against DOMA, *Pedersen v. OPM*, in the Federal District Court of Connecticut. It will be many months before there is a decision in this case, and whatever that decision is, it will most likely be appealed to the United States Court of Appeals for the Second Circuit.

Should GLAD succeed in these lawsuits, or should Congress repeal DOMA Section 3, some or all of the federal laws for which marriage is relevant will be applicable to married same-sex couples who live in states where their marriage is respected.

If a Rhode Island same-sex couple marries, will the marriage be respected by private employers and businesses?

Some private employers in Rhode Island have already extended health care benefits to married same-sex couples, but it is nearly impossible to predict how other private employers and businesses in Rhode Island and other states will treat these marriages. In most instances, private employers and businesses have the discretion to respect the marriages of same-sex couples even if the state in which they operate may not respect these marriages. For example, a private employer could grant family leave to an employee to care for his or her same-sex spouse even though the state in which employer operates would not respect the couple's marriage.

GLAD has prepared a publication to help you advocate with your employer for spousal benefits (<http://www.glad.org/uploads/docs/publications/ri-same-sex-couples.pdf>). Some of the steps you can take are:

- Find out what benefits your employer provides to married employees.
- Meet with your employer to ask for these benefits.
- If you belong to a union, meet with your union rep to ask for support.

THE DECISION TO MARRY

How do I determine what marriage will mean for me?

Any decision to marry is complicated, but the decision for same-sex couples is particularly complex. Married same-sex couples inevitably will face uncharted legal terrain. There are hundreds of laws in each state that confer benefits, protections and responsibilities upon married persons, and entering into that status will undoubtedly affect many aspects of a person's public and private life. Thus, it is important to plan for the worst (i.e., that other states and entities will not respect the marriage) while hoping for the best.

This is a rapidly evolving area of new law in which we do not yet have a great deal of guidance as to the application and implementation of the law. It is important to make an informed choice about whether to enter into a marriage based on your relationship with your partner and the unique circumstances of your life.

Should I consult with an attorney before marrying?

That's a good idea. Though we provide some general information in this document, it cannot provide guidance or legal advice as to anyone's specific situation. Thus, you should consult an attorney in your home state, presumably Rhode Island, for guidance on your particular situation before entering into a marriage. If you have questions or would like lawyer referrals, please contact GLAD's Legal InfoLine weekdays between 1:30 to 4:30 p.m. at 1-800-455-GLAD (4523) or 617-426-1350.

What are some of the potential pitfalls of marriage I should consider?

Assuming that your marriage would be respected in Rhode Island, here are a few issues to consider:

Adoption: Getting married may affect your ability to adopt as a "single" person from some other states and foreign countries. Virtually no foreign countries permit an openly gay or lesbian couple to adopt,

thereby likely barring all international adoptions for married same-sex couples. Some states in the United States also do not allow same-sex couples to adopt (e.g., Florida, Mississippi, Arkansas and Utah).

Government Program Disqualification: Being in a marriage could disqualify one spouse from certain state government programs because the other spouse's income and assets may be included in determining eligibility for the program.

Military: The military provides that an "attempted marriage" to a person of the same sex is grounds for discharge under "Don't Ask, Don't Tell."

Immigration: For bi-national same-sex couples, non-citizen spouses could be harmed by marrying. U.S. same-sex spouses cannot sponsor their non-citizen spouses for legal permanent residence due to the discriminatory federal DOMA law, but marrying may bring spouses to the attention of the government which could be dangerous if one spouse is "out of status." In addition, simply getting married could cause problems if one spouse is applying for a non-immigrant visa or status like a tourist or student visa. The marriage may inadvertently evidence an intent to stay in the U.S. permanently and, thus, undermine the application. For a more detailed explanation of the risks, consult GLAD's, *Warning for Same-Sex Bi-National Couples*, at: http://www.glad.org/uploads/docs/publications/Binational_Couples_Immigration_Warning.pdf. Individuals seeking further guidance may want to contact GLAD or Immigration Equality at: <http://www.immigrationequality.org>.

Debt Obligations: Under Rhode Island law, married persons are responsible for their spouse's debts such as medical bills, rent and the purchases of items that support the family or benefit the couple.⁴ This is true under the marriage laws of most other states as well.

⁴ See *Landmark Medical Center v. Gauthier*, 635 A.2d 1145 (R.I. 1994) (recognizing reciprocal obligation of support between spouses).

Inheritance: Under Rhode Island law, a spouse cannot completely disinherit a spouse by leaving the spouse out of her or his will unless the couple signed a valid pre-nuptial agreement.⁵ As a result, a spouse is entitled to a share of your estate. (Note: In Rhode Island, marriage automatically revokes an existing will;⁶ couples who decide to marry should consult an attorney about re-executing their old will or writing a new one). These general principles are the same under the marriage laws of most other states as well.

Prior Marriages: Marriage may disqualify a person for benefits obtained through a former spouse (like social security payments based on a former spouse's earnings; worker's compensation payments arising from his or her death; or ongoing alimony payments).

State-to-State Variations: Because the benefits and obligations of marriage are governed by state law, you may relocate to a state that imposes different marital requirements than where you live now. For example, whether you have community property depends on the state where you live, which may not be the same state where you were living at the time of your marriage.

A more detailed discussion of these and other things to consider before marriage is provided in GLAD's publication, *Marriage Tips and Traps*, available at:

<http://www.glad.org/uploads/docs/publications/marriage-tips-traps.pdf>.

What happens if we marry and then break up?

Though no one wants to think about divorce when they marry, divorces will be a fact of life for same-sex couples just as they have been

⁵ There are a multitude of protections a surviving spouse receives upon his or her loved one's death, including that a surviving spouse is entitled to household effects, supplies and personal property of the deceased (as long as they are exempt from attachment), see R.I.G.L. § 33-10-1; that a surviving spouse may receive support from the estate while the estate is open, for six months, and even beyond if the assets are sufficient to so provide, see R.I.G.L. § 33-10-3; that after estate debts and obligations are paid, if any surplus remains in the estate, the surviving spouse is entitled to \$50,000 plus one-half of the remainder if there are no children, and to one-half of the total if there are children, see R.I.G.L. § 33-1-10; and that a surviving spouse is generally entitled to a life estate in the real estate of the deceased spouse, see R.I.G.L. § 33-1-5 (establishing life estate).

⁶ R.I.G.L. § 33-5-9.

for different-sex couples. Divorce is one of the key protections of marriage because it offers an orderly way to dissolve the union. For example, in Rhode Island divorce proceedings, courts will determine property division, alimony, child custody and child support if the parties cannot agree on these issues themselves.⁷

The only way to end a marriage is through divorce or annulment, which thus requires same-sex couples to find a court willing to dissolve their marital relationship. At the moment, the courts of Rhode Island are unwilling to do so. In December 2007, the Rhode Island Supreme Court ruled that the Family Court does not have the jurisdiction to hear the divorce case of a same-sex Rhode Island couple who was legally married in Massachusetts. As was stated in the dissenting opinion, this ruling “places the parties, and all those similarly situated, in an untenable position. They are denied access to the Family Court and thus are left in a virtual legal limbo.” Though couples may be able to access the courts to address property dissolution and child-related issues, there is, at present, no mechanism for same-sex couples to dissolve the legal relationship of marriage in Rhode Island.

Unfortunately, this leaves Rhode Island residents to turn to the courts of other states. The most logical place to turn would be the courts of the states that allow same-sex couples to marry, or recognize their marriages. All of these states have residency requirements of varying lengths in order to get divorced there, however, despite that they have no residency requirements to get married.

For example, to get divorced in Massachusetts, at least one partner must reside in Massachusetts for one year before a Massachusetts court will have jurisdiction to grant the divorce. (See GLAD’s publication, *Separation, Divorce, and Marriage Equality*, available at: <http://www.glad.org/uploads/docs/publications/separation-divorce-equality.pdf>). For more specific information on divorce in Connecticut,

⁷ See, e.g., R.I.G.L. § 15-5-16.1 (recognizing the equitable division of property upon divorce); R.I.G.L. § 15-5-16(a) (providing for alimony upon divorce). Note that in some states, the court can consider any property owned by either or both of the parties as marital property subject to distribution, unless the parties enter into an otherwise valid pre-nuptial agreement addressing the question.

Vermont, New Hampshire and Canada, see the marriage publications for each of these locales at

<http://www.glad.org/rights/publications/c/marriage/>. For more information on divorce in Iowa and the District of Columbia, contact Lambda Legal (www.lambdalegal.org, 212-809-8585).

To make things more complicated, if a couple is unable to obtain a legal divorce, the marriage may still be recognized for other purposes and the couple may still be held responsible for the obligations of marriage, such as providing financial support and being held responsible for each other's debts.

The potential difficulty of obtaining a divorce (as well as the rights and obligations extended to couples engaged in divorce proceedings) is yet another reason why couples should think very carefully before getting married.

Will I need to tell people that I am married?

Yes. If you marry, you will be legally married, and your marriage will be a matter of public record. You will need to describe yourself accordingly, such as on applications or forms relating to employment, insurance, credit, mortgages, medical treatment, adoption home studies, etc. This principle of universal disclosure applies even in states that have discriminatory laws and practices in place and even on federal government forms like those relating to taxes, immigration, social security, and others. By indicating on government forms in some fashion that you are married to someone of the same sex, you avoid the risk that your answer could be considered dishonest or fraudulent or could potentially expose you to fines or other penalties.

Will marriage affect my legal relationship with my children?

If both spouses were legal parents before the marriage (e.g., through joint or second-parent adoption), both will remain parents. The marriage will not affect a person's pre-existing status as a legal parent.

If one spouse was not a legal parent before the marriage, the marriage will not change that. As a result of the marriage, he or she will likely be considered a stepparent if the marriage is respected, potentially carrying whatever weight that status has in their home state. The sure way to become a legal parent in this situation is for the non-legal parent to adopt the child. (Note: This option is presently available in Rhode Island for respected married couples,⁸ and despite no controlling case law, has also generally been available for unmarried couples in family court). The adoption decree from the court is a legal judgment that should be recognized broadly and has legal significance independent of the marriage.

If two people joined in a marriage later have a child in Rhode Island, both parties may be legally presumed to be the legal parents of a child born to either of them and both parties may be able to get their names on the child's birth certificate. This is so because in Rhode Island -- as in many other states -- a child born into a marriage is presumed to be the child of both the wife and the husband.⁹ It is possible, though by no means guaranteed, that this same presumption should extend to a child born into a marriage of same-sex partners. Nonetheless, this is just a presumption, even if reflected on a birth certificate, and does not have the same effect as a court judgment. **The parentage on a birth certificate is subject to being challenged and overturned, and thus, an adoption would provide the best legal protection.**

If both spouses plan to jointly adopt a child after marrying, be aware that international adoption is likely not available to married couples of the same sex.

⁸ R.I.G.L. § 15-7-4. The same provision requires that when a married person petitions to adopt a child, the spouse must also consent to the petition. This provision appears to be designed to protect both the child (by making sure both adults in the home are welcoming) and the other spouse (to ensure obligations are not imposed upon him or her unwillingly).

⁹ R.I.G.L. § 15-8-3 (man rebuttably presumed to be father of child if married to child's mother at the time of conception); R.I.G.L. § 23-3-10 (providing that the name of the husband shall be entered on the birth certificate if the mother was married either at the time of conception or birth, unless paternity has been determined otherwise by a court).

For all couples, because the marriage could encounter a lack of respect in some states, relying on the fact of the marriage alone to protect their children is not the best approach. It is advisable to continue the practice of securing a second-parent adoption in order to obtain a decree of legal parenthood that should be generally recognized and is independent of the marriage.

This document can only provide general information about the need to establish legal parenthood independent of any marriage. For you and your children, we cannot urge more strongly that you consult an attorney about undertaking co-parent adoption. Contact GLAD for more information and to obtain referrals to adoption attorneys.

- *Miller-Jenkins Sidebar*

Relying on a partner's good will, or even on the fact that a child was born into a marriage or civil union, is not the best way to ensure ongoing parental rights of both parents if a couple later separates. A case in point is *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006), cert. denied, 127 S.Ct. 2130 (2007), *Miller-Jenkins v. Miller-Jenkins*¹⁰, 49 Va.App. 88 (2006), cert. denied, 128 S. Ct. 1127 (2008). This case has been in litigation since 2004, has involved two state Supreme Courts (Vermont and Virginia), and has already made several trips to the U.S. Supreme Court. Proceedings are ongoing.

In that case, Janet and Lisa had a child, Isabella, while they were in a civil union. Janet did not adopt. After the couple separated, Lisa moved to Virginia and used both the lack of an adoption, and Virginia's laws hostile to same-sex relationships to thwart Janet's contact with their daughter.

In November, 2009, the Vermont Family Court issued an order granting Janet responsibility for the day-to-day care of Isabella while granting Lisa liberal visitation rights. The transfer of custody

¹⁰ Subsequently, the Vermont case went back to the Vermont Supreme Court after trial; and the prior ruling was affirmed in an unreported decision on March 14, 2008.

was to have taken place on January 1, 2010. However, Lisa failed to appear at the appointed time, and an arrest warrant has been issued.

On March 8, 2010, Liberty Counsel filed on Lisa's behalf an appeal of the custody order with the Vermont Supreme Court, and GLAD filed a response on behalf of Janet. The Vermont Supreme Court once again ruled in favor of Janet and affirmed the family court's Order transferring custody from Lisa to Janet. However, Lisa and Isabella have still not been found. GLAD and local counsel represent Janet in the Vermont proceedings. For more information about the case, go to <http://www.glad.org/work/cases/miller-jenkins-v-miller-jenkins>.

Will I be able to get health insurance through my employer for my spouse?

Most people think the answer to this question is straightforward, but it is not. It is difficult to predict whether you will be able to obtain coverage for your spouse by virtue of your marriage because many different factors affect the legal analysis.

Despite the existence of discriminatory marriage laws in certain states and at the federal level, all private employers have discretion to provide, on a voluntary basis, the same health benefit protections to same-sex couples that they provide to different-sex couples. Moreover, all employers can voluntarily provide same-sex spouses with federal health benefit protections automatically available to different-sex spouses like continuing coverage under the federal law known as COBRA and open-enrollment rights under the federal law known as HIPAA.

If you are a private sector employee and the question of health benefits is critical to your decision to marry, you should ask your employer whether it will enroll your intended spouse in its health plan(s). If your intended spouse is already participating in a domestic partnership plan offered by your employer, you should make sure that

your marriage will not disqualify your spouse from participating in the plan(s) offered by your employer.

If you are employed by the federal government, the federal DOMA law discriminating against legal spouses of the same-sex means that health plans offered through the Federal Employees Health Benefits Program do not cover same-sex spouses of federal employees. It seems almost certain that the federal government will not provide spousal health insurance coverage to an employee who enters into a marriage with someone of the same sex.

If you are employed by a state, county or a municipality, the outcome of this eligibility question will depend upon the laws of your state. It seems almost certain that states that have laws denying respect to the legal marriages of same-sex couples celebrated elsewhere will rely on such laws to deny health benefits to the same-sex spouses of their public employees. In Rhode Island, Attorney General Lynch's February 2007 opinion letter indicates that the state should be recognizing the same-sex spouses of state employees, though the experience of state employees has varied, and most have been told that they can only obtain benefits through the state's domestic partnership system. Being married may also have an impact on the domestic partnership health benefits state employees may receive if they complete an affidavit and meet certain criteria. One of the criteria is that neither partner is married to anyone¹¹ so getting married might disqualify a same-sex couple from domestic partnership benefits. However, if that were to happen, one could argue that the state is recognizing the marriage and so the couple should be eligible for spousal benefits. Nevertheless, there is uncertainty surrounding Rhode Island's approach to these issues at present.

For more information:

Individuals in New England seeking further guidance about eligibility for employment-based spousal health benefits outside Massachusetts may want to contact GLAD at 800-455-GLAD (4523).

¹¹ R.I.G.L. § 36-12-1 (3) (listing qualifications for "domestic partners").

For a discussion of health benefits available in Massachusetts, see *Same-Sex Spousal Health Benefits in Massachusetts after Goodridge*, a joint publication prepared by GLAD and Health Law Advocates, available at:

<http://www.glad.org/uploads/docs/publications/hla-glad-health-benefits.pdf>.

Assuming I obtain health insurance for my spouse through marriage, what should I know about the taxation of employer-sponsored health benefits for my spouse?

Because of federal tax laws and federal discrimination against the marriages of same-sex couples, if an employer extends coverage to the same-sex spouse of an employee (or even to a non-marital domestic partner), the “fair market value” of those benefits is treated as income to the employee for federal tax purposes and added to the employee’s W-2 at the end of the year. (In contrast, benefits extended to different-sex spouses of employees are tax free.) There is one exception to this general rule of federal taxation. If the same-sex spouse qualifies as a “dependent” under IRS rules, the value of the benefit to the “dependent” is not taxed as wages to the employee.

In terms of state income tax on spousal health benefits, Rhode Island recently passed a law that does not treat the value of those benefits as income for state tax purposes.¹² This applies to both same-sex married couples and those receiving health benefits from an employer as domestic partners. If you live somewhere other than Massachusetts, Connecticut, Vermont, New Hampshire, Iowa, Washington D.C. or Rhode Island (and probably New York and Maryland), as was indicated above, it is difficult to predict how your marriage will be recognized and whether the state will tax spousal benefits. Contact GLAD or a tax lawyer or accountant if you have concerns about the taxation of your employment benefits. You may also wish to consult GLAD’s *Taxes on Employment Benefits for Same-Sex Couples* available at:

¹² R.I.G.L. 44-30-12(c)(6)

<http://www.glad.org/uploads/docs/publications/taxes-employment-benefits-spouses.pdf>.

PLANNING FOR LIFE AFTER MARRYING

What can we do to help ensure respect for our marriage at home?

There are many ways for married couples to advance respect for their own marriage, while simultaneously playing a critical role in the struggle for full equality for all LGBT people, including advocacy, education, lobbying and legislative action. Couples should join with Marriage Equality RI (MERI, www.marriageequalityri.org) to educate the public, mobilize supporters, and lobby the state legislature.

Having more married same-sex couples in a state can be a powerful educational tool in and of itself because it helps others in the state put a face on what marriage means to LGBT families and their communities. Massachusetts's and Connecticut's experience with marriage has shown that the way to change public opinion is to show people that same-sex couples make the same kinds of commitments to each other that different-sex couples make. In most cases, winning the hearts and minds of our communities is more likely to be achieved by making our relationships more visible and directly advocating for the recognition of our relationships than through litigation.

Another way you can help is by sharing your experience with GLAD. This will help GLAD assess the developing legal landscape for legally married couples of the same sex, and in turn, allows GLAD to help other families navigate this relatively new terrain.

What if our marriage is disrespected at home?

Rhode Island couples who marry will be pioneers of a sort, navigating uncharted legal territory. Married same-sex couples inevitably serve as "ambassadors" to the non-gay world, demonstrating that families headed by same-sex couples exist and explaining why these families need the protections of law many other families take for granted. How couples respond to the disrespect of their marriages must be strategic and calibrated to the situation at hand in order to establish lasting change. Many effective options exist to advocate for equality, and we will need

to decide wisely about what to do (and when) in order to gain marriage rights and keep them.

Should we file a lawsuit to deal with the disrespect of our marriage at home?

Probably not. Some types of unfair treatment lend themselves to a lawsuit, and others don't. Even when litigation is an option, it is rarely the only option, and it can be risky. The history of marriage litigation in the United States has proved that these cases are quite tricky and the results swing widely depending on the unique circumstances of each case. Because each lawsuit seeking respect for a marriage requires courts to apply complex state law to a unique set of facts, there can be no guarantee in any particular case that a court will or will not reach a particular conclusion, no matter how obvious the discrimination may be or how much the spouses may be harmed by the disrespect of their marriage.

Bad results in lawsuits can have effects reaching far beyond your particular situation and affecting other families too. As explained by ACLU Attorney Matt Coles in his articles, "Don't Just Sue the Bastards! A Strategic Approach to Marriage," (available at: <http://www.aclu.org/lgbt/gen/12398res20040925.html>) and "The Constitutional Amendments: Don't Just Sue – Do Something Useful," (available at: <http://www.aclu.org/lgbt/relationships/12423res20041201.html>), and by the publication on our website, *Make Change, Not Lawsuits*, at <http://www.glad.org/uploads/docs/publications/make-change-not-lawsuits09.pdf>, lawsuits brought at the wrong time, in the wrong place, or with the wrong focus, can do far more harm than good to the LGBT community.

If you are discriminated against, please feel free to contact GLAD as we can assist you in sorting out the best options for gaining respect for your marriage.

What can we do to protect ourselves now in case our marriage is disrespected in the future?

Given the present legal landscape, married same-sex couples should take all available steps to make sure they can access basic legal protections for their relationship in the event their marriage is disrespected. This means that couples should do everything they could have done to protect their relationship and family before marriage became an available option. This includes:

- Writing a new will (including naming the guardian of your children) – in part because in most states, including Rhode Island,¹³ a marriage automatically revokes any existing will;
- signing documents authorizing others to make health care decisions;¹⁴
- signing documents authorizing others to make financial decisions;¹⁵
- directing the disposition of your remains;¹⁶
- gaining expert advice and using multiple strategies (through wills, trusts, pre-nuptial agreements, co-parenting agreements, co-habitation agreements, etc) to ensure your wishes can be met to the largest degree possible no matter what the situation at your death or upon the dissolution of your relationship;
- doing tax planning – income tax, gift tax, estate tax – at the state and federal levels;
- doing Medicaid and long term care planning, concerning issues like assets available to both spouses, asset transfer issues, and liens and estate recovery; and
- solidifying legal parenting rights through second-parent adoption, pre-birth declarations of parentage, legal guardianships, etc.

¹³ R.I.G.L. 33-5-9.

¹⁴ R.I.G.L. 23-4.10-2.

¹⁵ R.I.G.L. 18-16-1 et seq.

¹⁶ R.I.G.L. 5-33.3-4.

Protecting your relationship and your family is obviously important and means that you should consult a qualified attorney in your area for advice on your particular situation, especially since the legal options vary widely from jurisdiction to jurisdiction. For more information, see GLAD's publication, *Legal Planning for Same-Sex Couples*, at: http://www.glad.org/rights/Legal_Planning_for_Couples.pdf. GLAD also has sample legal planning documents that you can obtain by calling the InfoLine at 1-800-455-GLAD (4523).

If my partner and I marry, how should we file our taxes?

How to deal with federal and state income taxes is one of the areas of greatest legal uncertainty, made particularly complicated by the fact that even if Rhode Island might respect a person's marriage, the federal government will not. Also, many states, like Rhode Island, require that a person use the same marital status classification for state income taxes as for federal income taxes. Further, single people and married couples are often subject to different tax penalties, so incorrectly designating one's status may result in a person overpaying his or her taxes, or, more dangerously, underpaying his or her taxes, which may trigger penalties and interest payments. Without giving legal advice, to help same-sex married couples navigate these complexities, we provide some useful information below, but there is no substitute for contacting your own attorney or tax professional for assistance specific to your situation.

■ **Federal Income Taxes**

In light of the federal marriage restriction, the federal government will not consider a same-sex couple married for purposes of federal income taxes. As a result, each member of a married same-sex couple must file as single, but should strongly consider designating in some way that the marriage has occurred. Doing so could help to avoid penalties for underpaying taxes and could also prevent others from using the designation of "single" on the tax return to argue or prove that a person is not really married when that issue arises in other legal contexts.

In order to acknowledge both the discriminatory federal law as well as the truth of the marriage, accountants suggest two options:

Include a cover letter or disclosure form with the tax return. This form allows a taxpayer to highlight issues raised by the return to the IRS. It could include a statement that the taxpayer was legally married to a same-sex spouse (and the marriage certificate could be attached as well), and that the only reason he or she is filing as a single person is because of the federal law that disrespects the marriages of same-sex couples.

On the tax return itself, put an asterisk by the “x” in the “single” box, and indicate somewhere on the form that the taxpayer was married in Massachusetts (or elsewhere) to a same-sex spouse on a particular date and that this designation of “single” is for federal income tax purposes only.

Filing in this way (i.e., either with a disclosure or an asterisk) could be crucial for purposes of proving (or not disproving) the existence of the marriage in the numerous non-tax-related ways tax returns are used (i.e. applying for a mortgage).

■ State Income Taxes

At present, Rhode Island tax law requires tax filers to use the same filing status that they are using for their federal tax filings. This linkage has the effect of incorporating the federal government’s discriminatory law on marriage into state law. (However, this is not true in all circumstances,¹⁷ and it is crucial to consult with a tax attorney or CPA in your state.)

Thus, married couples have the same options with regard to their Rhode Island income tax forms as with their federal tax filings. That is, they should strongly consider designating in some way that the marriage has occurred when filing their taxes in compliance with the

¹⁷ For example, Rhode Island residents should be able to claim a tax credit on their individual tax filing for taxes due and paid to Massachusetts under a joint filing without having to recalculate the Massachusetts payment as if it were filed individually.

discriminatory tax laws. (See the above information for filing the federal tax forms for guidance).

To the extent a married Rhode Island resident is obligated to file state taxes in another state that recognizes the marriage (e.g., a Rhode Island resident earning income in one of those states or part-year resident of one of those states), the tax filer will be obligated to file as married in those states: either through a “joint return” or a “married filing separately return.” For more information on how to file your taxes (while simultaneously complying with the discriminatory federal tax law), see GLAD’s publication, *Navigating Income Taxes for Married Same-Sex Couples*, available at:

<http://www.glad.org/uploads/docs/publications/navigating-taxes-married-couples.pdf>.

Due to the complexity of tax matters, you should consult a tax attorney or an accountant to consider your specific situation and weigh the legal and financial risks involved.

Gay & Lesbian Advocates & Defenders (GLAD) is the leading legal rights organization in New England dedicated to ending discrimination based on sexual orientation, HIV status and gender identity and expression. Through impact litigation, education and public policy work, GLAD seeks to create a better world that respects and celebrates diversity—a world in which there is equal justice under law for all.

GLAD's Legal InfoLine and publications are provided *free of charge* to all who need them. We hope that those who are able will make a contribution to ensure that GLAD can continue the fight for equal justice under the law.

To make a tax-deductible contribution, visit our website, www.glad.org, or call us at (800) 455-GLAD (4523) with your credit card, or mail your check, payable to GLAD to 30 Winter Street, Suite 800, Boston, MA 02108. If your workplace has a matching gift program, please be sure to have your donation matched. Please contact us if you would like more information on becoming a GLAD partner.

Thank You!



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