



**The AIDS Legal Referral Panel *helps people living with HIV/AIDS maintain and improve their health by resolving their legal issues.***

### **SAME-SEX MARRIAGE: Should I take the leap?**

Following the landmark decision by the California Supreme Court to lift the ban against same-sex marriages, the importance of educating all Californians about the equal rights and responsibilities of marriage has become clear. For many individuals suffering from disabling conditions like HIV, there are various, additional issues to be considered before they make the decision to marry. The following information presents some of those issues.

Please note: the information in this document is intended to provide information about marriage for same-sex couples in California. It does not cover all aspects of the laws impacted by marriage and it does not constitute legal advice. For legal advice specific to your situation, please contact an attorney. If you are HIV-positive and live in the Bay Area, please call the AIDS Legal Referral Panel at 415-701-1100.

#### **Q: Can I marry my same-sex partner in California?**

**A:** Yes, you can. As of June 16, 2008, California will issue marriage licenses to same-sex couples. Marriage equality for same-sex partners is the result of the California Supreme Court decision entered on May 15, 2008, in which the Court held that barring same-sex couples from marriage is unconstitutional. If you are considering marriage and are suffering from any disabling conditions like HIV, it is especially important that you check with an attorney for more clarity on the status of equal marriage in California.

#### **Q: Will our marriage be recognized by the federal government?**

**A:** Unfortunately, no. In 1996, Congress passed and President Clinton signed into law the Defense of Marriage Act (“DOMA”). DOMA specifically defines the word “marriage” as a legal union between one man and one woman as husband and wife. DOMA also allows all states and territories of the United States the right to refuse another state’s recognition of a legal relationship between two people of the same sex. This means that same-sex couples will not have any of the rights, benefits, or protections that federal law provides to married, different-sex couples. According to the Human Rights Campaign, there are over 1000 federal rights that accrue to a married different-sex couple that will not be available to a married same-sex couple because the federal government will not recognize the union. Among such rights are the ability to file joint federal taxes, the ability to receive spousal benefits through Social Security and other

federal benefit programs, guaranteed access to COBRA continuation health coverage and the ability to avoid federal estate taxes upon the death of a same-sex spouse.

**Q: I am already in a registered domestic partnership. Do I have to get married to keep my rights?**

**A:** No. At this time, registered domestic partners do not have to get married to keep their rights. California domestic partners have the same rights, protections, and benefits, and are subject to the same responsibilities as different-sex spouses. In addition, registered domestic partners are not required to dissolve their partnership before they marry. The California domestic partnership statutes permit an individual to be *both* married and in a registered domestic partnership, so long as it is to the *same* person.

**Q: Will I automatically be married since I'm already registered?**

**A:** No. Marriage is not automatic. Couples who are registered domestic partners are free to decide whether or not they wish to marry. If you decide to get married, you must take the formal steps required to legally marry in California, including obtaining a license through the county clerk's office. The license is valid for 90 days and no blood test is required.

**Q: Is there any reason for couples who marry to also remain in, or enter, a domestic partnership?**

**A:** Yes. Being in a registered domestic partnership may protect you if you travel or move to another state that will recognize a domestic partnership but not a marriage. According to the National Conference of State Legislatures, there are presently 27 states with constitutional language defining marriage as a union between a man and a woman. In addition, 41 states have statutes limiting the institution of marriage to a man and a woman.

By contrast, only 8 states allow some state-level spousal rights to same-sex partners through civil unions or domestic partnerships, two states will issue marriage certificates to same-sex couples, and only Rhode Island, New York, Massachusetts and California will recognize a same-sex marriage performed in another state. Thus, until more laws change, your chances of securing your rights as a spouse outside of California are greater if you maintain your domestic partnership.

As far as we know, domestic partnerships will continue to exist under California law. Same-sex couples over 18 and different-sex couples over age 62 continue to be able to register as domestic partners; however, it is always possible that the law may change in the future.

**Q: Even though I really want to get married, I worry about what my partner or I could lose if we do it. Am I being too cautious?**

**A:** No! You are not being too cautious. You and your partner should be very careful when considering marriage, and its impact on your financial or medical stability. Marriage is a very serious commitment that is not just personal, but also legal. All couples considering marriage

should educate themselves about the rights and responsibilities of marriage. For same-sex couples in California, it is likely that a lot of questions will remain unanswered for as long as the federal government and other states continue to discriminate against same-sex couples. It is appropriate and important that you think about any benefits that you currently obtain from the government, about your tax position, about your debts and assets, and about your health insurance. As you read on, we hope you will understand just why it is so crucial for you to be thinking broadly about what marriage will mean to you and your partner.

If you receive public benefits or housing subsidies, you are an immigrant, you serve in the military, you are considering adoption from another country, or if you live outside California, it is imperative that you consult with an attorney prior to getting married in California.

**Q: I have public benefits. Can I keep them if I get married?**

**A:** That's the million dollar question. Most public benefits programs are federal and state programs. They may receive funding from federal sources, state sources or both. Eligibility for the programs is generally determined by the agency administering the program. Most benefit programs have income and asset eligibility criteria that vary depending on whether an applicant is single or married.

The challenge at this point is to determine how those programs funded or supplemented by federal money but administered at the state level are going to treat a same-sex marriage. There is no way to know how various agencies will proceed, but service providers certainly hope that certain state-administered programs like Medi-Cal, AIDS Drug Assistance Program (ADAP) and other federally funded programs continue to base eligibility for benefits on the individual's, and not a couple's, income and assets. Please read on for some thoughts on specific programs and the impact marriage may have on your collection of benefits through them.

**Q: Could the Social Security Administration reduce my benefits if I get married to my same-sex partner?**

**A:** If you collect Social Security Disability Insurance (SSDI), then the answer is no. Your SSDI is yours; you earned it during your career and it will not be reduced when you gain access to the assets of another through marriage. However, you should be aware that a same-sex spouse will not have access to any survivor benefits from Social Security until the federal government recognizes same-sex marriage.

Supplemental Security Income (SSI) benefits, on the other hand, are at risk of reduction if you get married, register as domestic partners, or live in the same household as your significant other. Because the purpose of the SSI program is to provide a *minimum* level of income, an additional source of income from someone you live with can affect the amount of your benefit.

**Q: If I get married, will my SSI benefits be reduced and, if so, by how much?**

**A:** At this point, because DOMA prevents the Social Security Administration from recognizing same-sex marriage, the income of your new spouse would be considered in the same way that

Social Security considers any support you receive from anyone. Because SSI is a needs-based program, any income and assets that are contributed to your household will be counted against your need, and your benefit. So, if you are living with someone and sharing household expenses, Social Security could reduce your SSI benefit by up to one-third.

Generally, for different-sex spouses, Social Security “deems” the income of a spouse to the eligible spouse. This means that SSI benefits could be eliminated entirely. However, because only different-sex married couples are considered “spouses” for SSI purposes, the SSA may only reduce benefits by one-third if you cohabit with your same-sex partner. This reduction is for the support and maintenance you receive from your partner. If you receive SSI and are considering marriage, please consider contacting an attorney to review your situation.

**Q: What happens to my SSI benefits if my significant other and I register as domestic partners?**

**A:** If you and your partner were not living together before registering as domestic partners, and then move in together, your SSI benefit may be reduced by one-third. Because the Social Security Administration does not recognize any same-sex union, living in the same house with your domestic partner only results in a one-third reduction of benefits.

If you and your domestic partner were living together before you registered, then your benefits should not decrease.

**Q: Will getting married pose any risks to my Medi-Cal?**

**A:** Maybe. Medi-Cal is a public healthcare program that receives federal and state funding. There are various programs that entitle individuals to Medi-Cal, and each of them has separate financial needs tests that would assess the income and assets of a couple in a different-sex marriage. The most common path to Medi-Cal is through receipt of SSI. If you receive a single dollar of SSI, you get Medi-Cal. Since California now allows same-sex marriage, it remains unclear whether Medi-Cal will seek to consider the financial status of a same-sex married couple the same way that it would a different-sex married couple. It is possible that Medi-Cal will defer to the federal government’s refusal to recognize gay marriage, in which case only the assets and income of an individual will be considered. It is also possible, however, that Medi-Cal administrators will choose to treat all marriages equally for purposes of Medi-Cal eligibility. If this happens, your spouse’s income and assets could disqualify you for Medi-Cal coverage. We really don’t know how marriage will affect Medi-Cal, so it is important to consult an attorney if you have Medi-Cal and plan to marry.

**Q: Should I be concerned about my Section 8 housing subsidy if I get married?**

**A:** At this point, yes. Because these subsidies are administered by housing authorities in your county, it is possible that they will consider the income and assets of your spouse once you are married. But, because Section 8 is federally funded, it is also possible that the housing authority will not choose to recognize a same-sex marriage. Generally, Section 8 already considers the

composition of the household when eligibility is assessed. If you have this subsidy, or any housing assistance, please consult an attorney before getting married.

**Q: If my partner and I have children in our marriage, will we also need to adopt them to make sure our custody is recognized?**

**A:** If you are married in California and have children, your rights and options are the same as if you had children in a registered domestic partnership. In California, children born into a marriage or domestic partnership are legally presumed to be the children of both partners. Thus, if you are married and have children in California, the state will recognize both spouses as the legal parents of the child.

However, the federal government and other states that do not recognize same-sex partnerships and marriages probably will not recognize parental relationships that are based exclusively on recognition of the legal relationship between same-sex parents. This means that even though you and your partner are both parents in California, you may not both be parents in the eyes of the federal government or if you travel or move outside California. To avoid this hardship and to protect your family, it is important to seek legal counsel to discuss the legal options available to secure your parental rights. Adoption is still likely to be the best way to ensure that you and your partner have equal and broadly recognized parental rights, regardless of where you live.

**Q: I have heard about community property in California, but never knew what it meant. Will it apply to same-sex marriages?**

**A:** Yes. Community property already applies to same-sex marriages and domestic partnerships in California. Under California law, each spouse or domestic partner jointly owns all property earned by either spouse from the date of the marriage or partnership registration to the date of separation, plus any profit made from these earnings. Community property is distinct from separate property, which is property acquired by either spouse or partner before marriage, after separation, or during the marriage as a gift or inheritance; separate property is not subject to any ownership interest by the other partner. If a marriage or domestic partnership is dissolved in California, all community property owned by the couple is divided equally, while separate property continues to be owned exclusively by a single spouse or partner. However, these rules can be changed by entering into a pre-registration or pre-nuptial agreement. If you are looking to protect your assets or debts prior to marriage, you should consider contacting an attorney to see if such an agreement is appropriate for you.

**Q: Can I file taxes jointly with my partner if we get married?**

**A:** Yes and no. When filing California state income taxes, married same-sex couples will be able to utilize the “married filing jointly” or the “married filing separately” status. However, when filing federal income taxes, married same-sex couples CANNOT use the “married filing jointly” or “married filing separately” status. Instead, each member of a married same-sex couple must file separately as single. As previously mentioned, under DOMA, the federal government does not recognize same-sex marriages, and, thus, same-sex couples cannot utilize the married status in their federal tax forms. If you decide to get married, there are some

arguments in support of notifying the IRS about your married status when you file, even though they won't recognize the marriage. It may be helpful to do so if you and your partner will be applying for a mortgage or loan in the future. You should consult a tax specialist to learn more about filing taxes after marriage.

**Q: What are the tax consequences of marriage to my partner and me?**

**A:** One of the major tax consequences you may suffer is paying more taxes than a different-sex married couple. Not only do you NOT get the "marriage bonus" afforded to a different-sex couple who files jointly, you also will have to pay taxes on the fair market value of any employer-provided health insurance coverage given to your spouse through your job. The only exception to this rule is when the non-employee-spouse qualifies as a dependent of the employee-spouse. According to a report published by the Center for American Progress in December of 2007, employees with a same-sex partner covered on their health insurance plan pay on average \$1,069 per year more in taxes than would a married employee who covers a different-sex spouse.

**Q: If we decide to get married, what can we expect after the ballot initiative in November?**

**A:** As you know, there is an initiative – Proposition 8 – that has been placed on the ballot by groups that oppose same-sex marriage. Proposition 8 seeks to revise the California Constitution by defining marriage as a union between a man and a woman. There is already a lawsuit pending to dispute the power of an initiative to make such a substantial change to the Constitution and the fundamental rights that it affords to all California citizens. At this time, it's unclear what will come of the litigation.

If the initiative remains on the ballot, there is no way to know which way the vote will go. If you marry before Election Day on November 4, 2008, your marriage should remain valid even if the ballot initiative succeeds, but the groups supporting the initiative will likely argue against that. We certainly hope that California voters will decline to support such a limitation in our Constitution.

*ALRP would like to thank the National Center on Lesbian Rights (NCLR), Lambda Legal, and Equality California for their hard work to obtain equal marriage in California, and their foresight to share information about the changing law. Thanks also to Positive Resource Center, the San Francisco AIDS Foundation and all the lawyers and advocates who chimed in on the impacts of marriage.*