

Maryland Attorney General Opinion: Implementation of Same-Sex Marriage

As a result of voter approval, the Maryland Code has been amended to provide: "Only a marriage between two individuals who are not otherwise prohibited from marrying is valid in this State." Same-sex spouses and couples in Maryland are entitled to the same rights and obligations under Maryland law as opposite-sex spouses and couples. On January 18, 2013, Maryland Attorney General Douglas F. Gansler issued an opinion addressing a number of issues and questions about the implementation of marriage equality in Maryland.

Implementation of full marriage equality in Maryland is complicated by the federal Defense of Marriage Act (DOMA). Among other things, DOMA prohibits recognition of a valid same-sex marriage for all federal law purposes. The Attorney General's opinion addresses implementation of marriage equality in light of the limitations imposed by DOMA.

The following summarizes a few of the key issues addressed in the 19-page opinion.

Code References to Husband and Wife

There are many provisions of the Maryland Code that use the terms "husband" and "wife" in a manner that would appear to exclude same-sex spouses. The Attorney General concludes that these Code sections should be interpreted to include same-sex spouses without waiting for the Legislature to amend the Code.

Insurance

Maryland law prohibits an insurance company from discriminating on the basis of gender in the issuance of insurance (life, annuity, health, etc.). These protections are extended to same-sex couples without requiring any further change in the Maryland Code. Church-sponsored fraternal societies remain exempt.

Employer-Sponsored Insurance Plans

The federal Employee Retirement Income Security Act (ERISA) governs many employee benefits, such as life and health insurance. Under ERISA, because of DOMA, a self-funded health or life insurance plan does not have to comply with Maryland's anti-discrimination laws. However, an employer plan that purchases insurance from an insurance company must comply with Maryland law prohibiting discrimination in insurance.

Open Enrollment Periods

An insurance plan that offers spousal coverage must recognize a new same-sex marriage as a qualifying event.

Titling of Real Estate

Tenancy by the entireties is a form of property ownership that is only available to married couples. Same-sex spouses are therefore entitled to use this form of ownership and to obtain title insurance.

Income Tax Filing Status

Maryland law currently requires a couple who filed separate federal income tax returns to file separate state returns. Because of DOMA a same-sex married couple must file separate federal returns. However, Maryland Comptroller Peter Franchot has announced his commitment to afford same-sex spouses the opportunity to file joint Maryland returns for 2013. This will be done by legislative action or by regulation.

Imputed Spousal Income

Because of DOMA, the health insurance premium paid by an employer for the same-sex spouse of an employee is treated as taxable income to the employee on the federal return. By contrast, the premium paid for an opposite-sex spouse is not taxable on the federal return. Maryland income taxes are tied in to federal law. Therefore, the premium will be taxable on the state return as well. The Maryland Legislature will need to amend the Code to alter this result.

Estate Taxes

Maryland estate taxes are tied into federal law. Same-sex spouses are not entitled to the unlimited marital deduction for federal estate tax purposes. In order to afford same-sex spouses the same treatment as opposite-sex spouses under Maryland law, the Legislature will need to amend the Code.

Other Tax Issues

There are a host of other tax issues that will be resolved if the Supreme Court declares DOMA unconstitutional as applied to same-sex couples in valid marriages or if Congress repeals DOMA. For state tax purposes, the Maryland Legislature can afford equal treatment to same-sex couples by amending the Code to decouple the Maryland income tax return from the federal return.

Family Medical Leave Act

Maryland adopted the federal Family and Medical Leave Act (FMLA) for state employees. It must be administered consistent with federal law. Therefore, because of DOMA, at present, the State may not grant FMLA leave to care for a same-sex spouse. However, an employee is entitled to FMLA leave to care for a child of a same-sex marriage.

Name Change

There are several ways that a person may change his or her name. The easiest and cheapest means of name change occurs where a spouse elects to change his or her surname upon marriage. He or she need only present a valid marriage certificate to the MVA to get a new driver's license and can use that to get a new Social Security card. This does not require a court order or payment of a fee. However, this procedure may not be sufficient for same-sex spouses to change a surname with the Social Security Administration. Therefore, same-sex spouses who wish to change a surname upon marriage may need to file a petition in court and pay the fees associated with a court-ordered name change.