

“Wedlocked”: Using Mediation for Same-Sex Divorce

By Hon. Cynthia D. Wright, Senior Judge



In November 2003, Massachusetts became the first U.S. state to legalize same-sex marriage. Over the next decade, more states followed suit. By 2013, same-sex marriage was legal in a dozen U.S. states and in the District of Columbia.

This represented a massive cultural shift—and triggered a significant backlash. For each state that legalized same-sex marriage, nearly three banned the practice outright. These states—of which there were 37 in all—also refused to recognize same-sex marriages legally conducted elsewhere. To justify this position, they cited the 1996 Defense of Marriage Act (DOMA). In addition to defining marriage as “a legal union between one man and one woman,” DOMA relieved states of any obligation to honor same-sex marriages conducted in other states.

Some states—take Georgia, for example—went even further by refusing to grant divorces to same-sex couples who had married across state lines. This stance posed a whole host of problems. As detailed by Ellen Shapiro in a 2013 journal article titled “‘Til Death Do Us Part: The Difficulties of Obtaining a Same-Sex Divorce”:

“Without access to divorce, there is no way to ensure an equitable division of assets. Additionally, without a formal divorce, spouses may not receive alimony or child support even when they would be entitled to such. Another issue which may arise if a couple is unable to divorce is the presumed authority for end-of-life decision-making, by which an estranged spouse could have the final say on whether to grant or withhold life-saving treatment.”

Some divorcing same-sex couples cracked this conundrum by filing for divorce in the state in which they married. But some of these states had strict residency requirements—meaning that one or both

parties might be required to move for the divorce to be granted. For most couples, this was impractical at best—and more likely impossible. Unable to separate their assets or to move on with their lives, these couples were truly “wedlocked!”

Today, separating same-sex spouses have an easier time. In 2013, the U.S. Supreme Court struck down DOMA, weakening the case of states that refused to acknowledge same-sex marriages conducted in other states. And in 2015, the Court ruled that same-sex marriage was a fundamental right. This required *all* states—even those that had explicitly banned same-sex marriage—to issue licenses for same-sex marriages and to recognize same-sex marriages performed out-of-state.

These Supreme Court rulings had the added effect of resolving many of the problems associated with same-sex divorce. A few remain, however. Some are administrative in nature. For instance, one pertains to whether domestic partnerships or common law marriages—arrangements into which many same-sex couples entered before the legalization of same-sex marriage—are automatically dissolved in the case of divorce, or whether additional (and potentially costly) steps are needed. (The answer: It varies by state.)

Other problems are more complex—and perhaps more emotional—in nature. Here’s an example: When determining the distribution of property and spousal support in the case of divorce, some states base their calculations on *coverture*—that is, how long the divorcing couple was married. But many same-sex couples cohabited monogamously for years—decades, even—before being granted the right to marry. The laws in many states fail to account for this—meaning that property and spousal support could be distributed unfairly.

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Then there are custodial issues. When a same-sex couple has a child—whether by way of biology or adoption—it’s often the case that only one person in that partnership maintains legal custody of that child. If the other partner wishes to retain that same status, that person must formally adopt the child. If he or she fails to do so, and the couple divorces, the “non-parent” could be completely denied parental rights—even if he or she has been the child’s primary caregiver.

One simple solution to sidestep these (and other) serious snags is to seek the services of a professional mediator. A mediator can act as a friendly go-between for the two parties.

Mediation is far more flexible than the U.S. court system. Because it need not rely on years of case and statutory law that relates mainly to heterosexual divorce, mediation can facilitate fairer settlements for same-sex couples.

Mediation offers divorcing same-sex couples other advantages, too. For example, mediation insulates same-sex couples from judges (and in some cases juries) who might be biased against them based on their sexuality. Although the Pew Research Center reports that support for same-sex marriage has increased from 31% in 2004 to 61% in 2019, there are still those who strongly oppose it—particularly older Americans and white Evangelicals. In other words, just because the courthouse doors are open to same-sex divorce, it doesn’t mean the hearts and minds of those who will decide the outcome of a same-sex divorce case are!

Finally, mediation maintains the privacy of same-sex couples who seek a divorce. Where court proceedings are public record, mediations can remain confidential. This might be important for same-sex couples who have kept their relationship private from co-workers to head off workplace discrimination.

Add to these the general advantages of mediation—benefits that all parties (not just same-sex couples) enjoy. For example, mediation is more convenient, less time-consuming, and less expensive than litigation. Mediation also offers all parties greater control over the resolution process and a more predictable outcome. Perhaps most importantly, mediation increases the chances of an amicable split—especially important when children are involved.

Divorce is difficult. But for same-sex couples, it can seem even tougher. Same-sex couples fought tooth and nail for the right to marry; ending a marriage that was so hard-won can feel particularly painful. Working with a compassionate professional mediator can help ease this pain—and ensure a fair result for all parties.

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References

- Compton, Julie. 2016. *For Same-Sex Couples, Divorce Is a Legal Nightmare*. September 7. Accessed July 18, 2019. <https://www.nbcnews.com/feature/nbc-out/some-same-sex-couples-divorce-legal-nightmare-n643891>.
2018. *Differences Between Same-Sex Divorce and Straight Divorce, By the Numbers*. September 26. Accessed July 18, 2019. <https://www.brownlawoffices.com/blog/statistics/>.
- FindLaw. n.d. *Same Sex Divorce: What You Need to Know*. Accessed July 19, 2019. <https://family.findlaw.com/marriage/same-sex-divorce-what-you-need-to-know.html>.
- Glass, Andrew. 2019. *First Same-Sex Marriage in U.S., May 17, 2004*. May 17. Accessed July 18, 2019. <https://www.politico.com/story/2018/05/17/first-same-sex-marriage-in-us-may-17-2004-586604>.
- Heinig, Melissa. n.d. *Same-Sex Divorce: Everything You Need to Know*. Accessed July 18, 2019. <https://www.divorcenet.com/resources/same-sex-divorce-everything-you-need-to-know.html>.
- Hetrick, Nancy. 2019. “Advice for Boomer Same-Sex Couples Seeking Divorce.” *Forbes*, February 14.
- Levin, Rebecca G. n.d. *Retroactive Common Law Marriage Provides Pathway to Rights & Benefits for Same-Sex Couples*. Accessed July 18, 2019. <https://lgbtbar.org/bar-news/retroactive-common-law-marriage-provides-pathway-to-rights-benefits-for-same-sex-couples/>.
- Maran, Meredith. 2017. “I Got Gay Married. I Got Gay Divorced. I Regret Both.” *The New York Times*, January 7.
- O’Brien, Sarah. 2017. *Same-Sex Divorce Poses Complications for Some Splitting Couples*. November 13. Accessed July 18, 2019. <https://www.cnn.com/2017/11/10/same-sex-divorce-poses-complications-for-some-splitting-couples.html>.
- Petrow, Steven. 2019. “Celebrating My (Gay) Divorce.” *The Atlantic*, June 20.
- Pew Research Center. 2019. *Attitudes on Same Sex Marriage*. May 14. Accessed July 18, 2019. <https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>
- Pride Legal. 2019. *Gay Divorce and Straight Divorce: The Difference*. February 12. Accessed July 18, 2019. <https://pridelegal.com/gay-divorce-versus-straight-divorce/>.
- Shapiro, Ellen. 2013. “‘Til Death Do Us Part: The Difficulties of Obtaining a Same-Sex Divorce.” *Northwestern Journal of Law & Social Policy* 207-235.
- Smith, Karen E., Stephen Rose, and Damir Cosic. 2016. “How Might Legal Recognition of Same Sex Marriage Affect Retirement Incomes and Federal Programs?” *U.S. Department of Labor*. November 7. Accessed July 18, 2019. <https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/how-might-legal-recognition-of-same-sex-marriage-affect-retirement-incomes-and-federal-programs.pdf>.
- Whitley-Berry, Victoria. 2019. *The 1st Legally Married Same-Sex Couple ‘Wanted to Lead by Example’*. May 17. Accessed July 18, 2019. <https://www.npr.org/2019/05/17/723649385/the-1st-legally-married-same-sex-couple-wanted-to-lead-by-example>.
- Wright, Cynthia and Margaret Dorsey. 2015. “View from the Bench.” State Bar of Georgia Institute of Continuing Legal Education 4th Annual Same-Sex Legal Issues Seminar.