

California Gay Marriage: What It Means for You and Me Legally

By Duane wells | 6/17/2008

As same-sex couples march toward the altar today, June 17, 2008 will forever be bookmarked in the annals documenting gay and lesbian history. As of 5:01 p.m. yesterday, same-sex couples in California are now afforded the opportunity to legally validate their unions in a manner that is not separate but equal, but instead totally equivalent in stature and status to that which is available to their heterosexual counterparts. And perhaps most hopeful of all, the rites of marriage that same sex couples will begin taking up today were affirmed by the conservative leaning California Supreme Court in a precedent setting ruling last month that was subsequently accepted and favorably acknowledged by California Gov. **Arnold Schwarzenegger**.



Behind the hoopla and excitement of the historic day there are, however, some practical legal concerns of which gay and lesbian couples must necessarily remain cognizant. Few people are more intimately aware of those considerations than **Jennifer Pizer**, Senior Counsel for Lambda Legal's Western Regional Office in Los Angeles. Pizer served as co-counsel for fifteen same-sex couples, Equality California, and Our Family Coalition in the California marriage cases that were successfully presented before the California Supreme Court.

"As of 5:01 on Monday June 16, 2008 marriage will be available equally to all adult couples irrespective of sexual orientation," says Pizer, who also advises policymakers in Sacramento and nationwide on laws to protect domestic partners and co-drafted AB 205, California's comprehensive *Domestic Partner Rights and Responsibilities Act of 2003*.

"[Today] We will see the first marriages performed in California for gay and lesbian couples with the full backing and endorsement and official civil blessing of the state. Those marriages will be as legal and valid and important under California law as any other marriages and there's no residency requirement," Pizer says.

"What that means legally is that couples who marry in California are entitled to full legal respect under California state law for all purposes."

For as momentous as that may sound on paper, however, Pizer is quick to point out that the change in California marriage is significant for reasons other than those that might seem readily apparent.

"It's not a big legal change from what has been available to gay and lesbian couples through the registered domestic partnership laws," she says. "The domestic partnership laws have had very

close to the same legal effect under state law so the reason that it has been important to have equal access to marriage has been not so much that gay and lesbian couples couldn't get legal rights and responsibilities but because there seemed to be a lot more confusion about the domestic partnership laws than we would have hoped and that status was not always respected as we had hoped it would be."

"I mean, every kindergartner knows essentially what marriage means but plenty of lawyers with decades of legal experience did not know what domestic partnership means. So I think it is a very important step forward to have all couples who want to make a seriously legally binding commitment to one another be able to participate in a legal and social institution that everybody recognizes and understands," Pizer continued.

Though the first hurdle to gay marriage has been crossed, there still remain obstacles that many gay couples must confront. First of all, despite the fact that there is no residency requirement for same-sex marriage in California, there is a residency requirement for divorce which means that, at some point down the line, some couples may be forced to deal with fuzzy legal issues similar to those faced by couples who married in Massachusetts or those who married in Canada or some other country prior to the California Supreme Court ruling. Perhaps more disturbing are the issues that couples from states that have banned gay marriage will face upon their return home.

"In terms of the happy turning of the page into a new chapter of full equality for gay and lesbian people in California, we will be seeing marriages of couples up and down the state including California residents and couples from out of state," Pizer says.

"California and Massachusetts allow gay and lesbian couples to marry and provide full legal respect for our marriages. New York and possibly Rhode Island likewise will respect the marriages. New Mexico may possibly as well, we don't know. But a great many states, the very significant majority, have laws on the books expressly denying respect to marriages that we can legally celebrate. So if people come to California from other states to get married and then go back home to those states, they need to be prepared as a practical matter and also emotionally that their government isn't likely to respect the marriage and that a lot more groundwork needs to be done in those states before that's going to change."

On this point Pizer is passionately clear expressing concern that couples understand the importance of making change and not lawsuits that might ultimately threaten the long-term prospects of gay marriage finding similar success in other pockets of the country.

"What we've seen over the past decade is that lawsuits about marriage in states lacking all that groundwork most often fail and when they fail they create additional obstacles that make it harder to achieve the step-by-step recognition that we need to achieve," Pizer says.

“When we lose in high stakes case, we create barriers not just on that particular issue... the issue of marriage... but we create legal precedents that tend to get used against us in other settings such as employment discrimination or parenting rights.”

"The reality is that our opponents would like nothing more than to see us bring lawsuits in dozens of states to demand recognition of California marriages because the likelihood is that those lawsuits won't fare very well and it will help our opponents by reinforcing not just that those laws are on the books but that those laws are going to be followed by the courts of those states. And that would be doing our opponents work for them."

"The same is true for lawsuits against the federal government.”

With that in mind, Pizer recommends that couples think not only long and hard, but strategically about the practical implications of marriage.

“There are a couple of key things for people who were not in registered domestic partnerships to keep in mind. Whether they were living in California or elsewhere, we have seen that society generally tends to understand and respect marriage and that it does seem to have important positive educational impact whether or not a person's home state respects their marriage. So among the most important things that couples can do if they go back to a state that does not respect their marriage or where their legal status is unclear is to be sharing with their co-workers and friends and relations and everyone in their live that they're married. And that it means a lot to them that they have had this opportunity and that they have this new status that should be respected socially even if it is not respected legally.”

"On the negative side there is a disconnect between federal law and state law, so even in states like California or New York or Massachusetts where marriage is respected for state law purposes there can be confusing legal situations because state law and federal law don't agree. So for example if your state respects your marriage, you may be entitled to and indeed required to file state income taxes jointly because you have that legal status, but the federal government does not respect the status and does not let you file jointly so sometimes couples may have to do their taxes multiple times and that's burdensome. And it may be more expensive. There are many other examples as well where it's confusing at best and sometimes it's actually problematic to have federal law and state law disagree."

"So we do strongly encourage people to get legal advice before they take this important romantic step of getting married because it's not a good idea for everyone depending upon an individual's particular legal situation.”

Further, according to Pizer, for some couples marriage could turn into a nightmare rather than a panacea of protection from the ills of the world.

“It may be a particularly bad idea if one or both members of the couple is active duty military where getting married to a person of the same gender may be considered to be coming out and grounds to be expelled from the military. And likewise if either member of the couple does not have permanent legal status in the U.S. For some couples it can put the foreign national partner in

jeopardy.”

And as for what happens to gay marriages conducted in California between now and election day if the ballot measure aimed at passing a constitutional amendment banning gay marriage is successful, Pizer is succinct.

“There’s not a clear answer,” she says. “Everything we say about what the constitutional amendment might do is our best guesses but we haven’t ever seen something like this, where a fundamental right is being taken away from a minority group that has been subjected to a history of discrimination and where discrimination against that group receives the most vigorous constitutional scrutiny because of that past history of discriminatory treatment. So there’s lots of constitutional questions [and] we can’t be sure what the answers are.”

“What we believe... what we feel reasonably confident ought to be the correct answer which does not guarantee that it will be the right answer... is that once couples marry with a valid license, they remain married even if the state stops respecting the marriage because when they did marry it was valid.”

But that is a question for another day. For today and the next several months at least, marriage is fundamental right that all Californians will be able to take part in and there can be no stealing the joy from this moment in history, legally or otherwise.
