

How Senior Same-Sex Couples Can Take Advantage of the Dilution of DOMA



Recently the U.S. Supreme Court ruled that a big part of the Defense of Marriage Act (DOMA) is unconstitutional. The implications for same-sex elderly couples are significant, potentially reshaping in part the retirement years.

“The ruling is a game changer. Same-sex couples will now be treated like married couples,” says Bernard Krooks, a founding partner with the law firm of Littman Krooks, LLP.

However, the change only means something for same-sex couples who live in a state where same-sex marriage is legally recognized. According to an article by elder law attorneys, Ronald Fatoullah and Debby Rosenfeld of Ronald Fatoullah & Associates, the U.S. Supreme court action opens the door for same-sex couples in those states to be able to take advantage of more than 1,000 federal benefits and protections that they could not before, such as Social Security survivor and spousal benefits, Medicare spousal benefits, and veteran's benefits.

It's a whole new world. Here's how same-sex seniors can seize the opportunities.

Give gifts

Any one can make gifts of up to \$14,000 per year (in 2013), without having to pay a gift tax. Same-sex couples are now eligible to gift up to \$28,000 total without incurring taxes by “splitting” the gift so that the maximum \$14,000 comes from each spouse, explains Dale Terwedo, an Accredited Domestic Partnership Advisor with Terwedo Financial Services.

“This can provide an opportunity to increase annual contributions to college education funds for children and grandchildren,” he says “It is also important to note that spouses can also make unlimited gifts to each other, without incurring any taxes.”

Profit from portability

Currently, in addition to the \$14,000 annual gift limitation, you cannot give more than \$5.25 million to a non-spouse individual during their lifetime, or after death without tax consequences.

However, since the repeal of Section 3 of DOMA, same-sex married couples are now legally recognized as spouses and they can exceed the \$5.25 million amount without paying taxes, so long as they are giving to their spouse, due to the unlimited marital deduction, says Terwedo.

Estate planning pluses

Married same-sex couples can now make unlimited transfers for assets to one another while living, or after the death of the first to die, without incurring federal gift or estate tax, making a substantial impact in estate planning decisions for many couples, says Terwedo.

Assess the impact on Social Security

Married same-sex couples can now apply for spousal Social Security benefits. Generally, this is a good thing if one spouse's benefit is significantly higher than the others. Additionally, the repeal of Section 3 of DOMA, allows for divorced same-sex couples to be eligible for divorced spouse's benefits, as well as survivor benefits, says Terwedo.

Know that there is a lot of gray area for both of these provisions if one of the ex-spouses moves into a state that doesn't recognize same-sex marriages, cautions Terwedo.

Beware of these caveats

For sure there is a lot for elderly same-sex couples to cheer about, but there are caveats. Take for example veteran's benefits, while spouses of deceased veterans will be eligible to receive veterans benefits, there's a catch. Veterans whose same-sex spouses have significant income may lose benefits for which they are now eligible because a spouse's income is counted in determining veterans' eligibility for certain benefits, points out Fatoullah and Rosenfeld in their article.

Grantor Retained Income Trusts (GRITs) have been a primary means for same-sex couples to transfer wealth. GRITs are important because they allow you to transfer appreciated assets at a reduced gift tax cost to non-family members. However, now that same-sex spouses are now considered family members, they may no longer be able to use GRITs, says Terwedo.

"However, the IRS hasn't stated whether or not couples who were using GRITs before the DOMA repeal will be able to continue using them," he adds.

Medicaid long-term care protections will now apply to all legally married same-sex couples in any of the states where gay marriage is recognized. Wealthier healthy partners don't stand to gain much from this, as the asset and income protections primarily help lower-income seniors and, as such, income and asset limits apply. Fatoullah and Rosenfeld explain, "While same-sex couples will now be able to avail themselves of the same State benefits as other married couples, well same-sex couples will also be subject to the same liabilities." They offer an example. Under the Medicaid rules, married couples can transfer assets to each other without penalty and qualify for Medicaid, but they are subject to recovery of their assets by Medicaid as "legally responsible" relatives. But the healthy partner is an unmarried couple can keep all of his assets without limitation/liability, and only the nursing home partner need spend down his assets on his care.

Take action

Social Security benefits saves as many as 21 million seniors from poverty, says Mark Baer, a family law attorney and founder of Mark Baer, Inc. “The average value of the shared healthcare, retirement and survivor benefits is \$40,000 per year. This can amount to tens and possibly hundreds of thousands of dollars for each household. That does not even include the estate tax savings,” he says.

He warns though, “Retroactive benefits are limited and therefore, the longer people delay in applying for such benefits, the more of those benefits are lost for good.”

With so much at stake, there's much to get a handle on. Same-sex married couples should review their designated beneficiaries, as well as other estate planning documents to determine any changes that might be needed, advises Terwedo.

They should consider too, how they might benefit from changes in gift tax requirements. Be mindful of potential challenges to assets, particularly from family, and your desire to protect the future of your spouse. “The issue of children should be addressed, particularly if they are from a former marriage,” says Terwedo.

Make no assumptions, says Krooks. For example, don't assume that it is better to file your income taxes jointly. “Adding together two incomes could throw you into a higher tax bracket. Determine if you would pay less if you filed single,” he says.

“While it's nice to have this ruling, it requires thought. You can't assume that being legally married always works to your advantage for tax or other financial purposes. Meet with an advisor, an estate planning attorney to figure out what's best for you.”