

NOVEMBER 17, 2009, 5:10 PM

For Gay Couples, ‘Traditional’ Divorce Isn’t Always an Option

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It’s divorce week here on the Bucks blog. Ron Lieber recently explored the financial consequences of divorce in a [series of columns](#), and readers can [send their questions](#) to Lili A. Vasileff, a certified divorce analyst, about the financial aspects of splitting up.

But what happens when divorce isn’t a possibility? That’s the bind (or nightmare) that some gay couples can easily find themselves in. This post will serve as the first installment in a two-part series on gay divorce.

Consider this: A Florida couple travels to Massachusetts to get married. Seven years later, they decide to divorce, only they can’t — unless one partner first moves to Massachusetts for at least a year.

Or one spouse can move to New York, where gay couples aren’t allowed to marry, but can divorce. California, meanwhile, makes splitting up slightly easier. Registered domestic partners in that state can legally dissolve their relationship no matter where they live, but it’s unclear how much power the divorce courts have to divvy up out-of-state assets.

The biggest problem for some gay couples is the inability to get a “traditional” divorce. Without one, states that do recognize same-sex marriage may continue to view a former spouse as your next-of-kin, and it may be impossible to remarry.

“By far the biggest and most common problem is that same-sex couples are denied the machinery designed to provide a fair and reasonably efficient separation process, which a great many couples need when a relationship has failed irrevocably,” said Jennifer Pizer, director of Lambda Legal’s national marriage project.

But even a couple who marries and divorces in a state like Massachusetts — where gay marriage is legal — can face higher costs. The Internal Revenue Service hasn’t issued any guidance, but gay couples may not be entitled to the same tax-free division of assets as their heterosexual counterparts (at least as far as federal taxes are concerned) because of the Defense of Marriage Act, which bans federal recognition of same-sex marriage. Dividing the proceeds from a \$500,000 home, for instance, could potentially translate into a \$250,000 gift, subject to federal gift taxes (or at least use of part of your \$1 million lifetime gift-tax exemption). For wealthy couples, the stakes are even higher.

All of this raises a thorny question: If you live in a state that doesn't recognize gay unions — or one that doesn't allow you to legally split — is getting married worth the risks (and potential costs) of not being able to divorce?

“Frankly, I would be hesitant to marry if I lived in a nonrecognition state — you may not be able to get divorced, you couldn't remarry, your status would always be in question, and you wouldn't get the benefits of marriage anyway,” said Joyce Kauffman, a lawyer in Cambridge, Mass., who has worked with divorcing gay couples. “On the other hand, if you believe, as I do, that sooner or later, same-sex marriages will be universally recognized, then you might still want to marry anyway.”

Legalizing same-sex marriage at the federal level would only solve part of the problem gay couples encounter. They would no longer face potentially higher federal tax bills when splitting up assets (we'll detail these costs in a separate post). But since states handle divorce actions, there could be some that still exclude same-sex couples from the divorce courts, Ms. Pizer said. “There could be a federal law requiring equal access,” Ms. Pizer added, but repealing the Defense of Marriage Act “wouldn't go that far.”

In an upcoming post, we're going to talk about the specific problems that gay couples encounter when splitting up and where to find legal advice.

Are there any specific issues you'd like us to address? Let us know in the comment section below.