

Insurance Strategies for Gay Couples

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Abstract: *Gay couples face unique challenges to achieving financial goals due largely to the lack of legal recognition as couples in most states and at the federal level. This article seeks to inform the advisor what these challenges are and how insurance can be part of the solutions, and offers additional guidance in how to work with gay couples and families.*

Introduction

The financial goals of gay couples and other non-traditional and gay families are fundamentally similar to those of heterosexual couples and families: financing retirement, educating their children, building wealth, protecting assets, and charting a course toward overall financial independence. In some states, laws allowing same-sex marriage or civil unions have been passed,¹ but there is currently no federal recognition of these relationships since the passage of the Defense of Marriage Act (DOMA) in 1996.² This law specifically prohibits the recognition of same-sex unions for purposes of federal law. In states without marriage or civil unions, protections for these households can also be lacking on the state level.

Gay couples could thus be considered legal “strangers” depending on the jurisdiction in question. For these reasons, same-sex families face unique financial challenges that can undermine some of their best intentions. It is important for the financial advisor who currently works with same-sex households, or wishes to do so, to be able to identify and understand where federal and state laws do not adequately protect gay couples, and

how to strengthen their knowledge base to provide competent timely advice. Unique work-around strategies can be crafted to address these gaps and ultimately provide a stronger financial foundation for clients. Attention should be paid to all aspects of a client’s financial plan including property protections, health, disability, survivorship and long-term care planning, retirement and education planning as well as estate planning. This article will focus on how each of these strategies can be used to help the same-sex couple or family.

General Planning Concerns

At the initial planning meeting with a same-sex couple, the financial advisor should attempt to find out how the couple would like to be addressed, as there is no particular “standard.” In a heterosexual marriage, the union is referred to as husband and wife. But gay couples can refer to each other as partners, husband and husband, wife and wife, or spouse. This simple step can demonstrate a level of sensitivity that gets the meeting on the right footing from the outset. The fact finders utilized should also be adapted for the gay couple, particularly if the advisor provides a copy to the clients either in advance or at the meeting. A form that indicates Client A and Client B or Client 1 and Client 2 is gender neutral and allows the advisor to fill in the preferable titles. A form that says husband/wife is not welcoming to gay couples. The same is true for planning software. Herein lies a particular challenge for the advisor to identify and use a planning software program that works with a same-sex couple so that it allows for flexibility in data input and results. Some programs won’t allow the advisor to adapt for gay couples and they may have problems with how taxes are filed as well as survivorship assumptions for Social Security or pensions. The advisor will want to study closely the various programs available, contact planning support staff at the software company for assistance,

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and consider the option he/she feels will best serve what the advisor needs for the clients. Some advisors use simple Excel™ spreadsheets, which is also a possibility.

It is imperative for the advisor to understand how the couple manages their money and whether their finances are joint or separate. Also important is whether they share the same financial goals. With legal recognitions more limited for same-sex couples and families, many elect to keep their finances completely separate, which can create a unique set of problems for these couples.

If the couple chooses to plan separately, the advisor will need to account for this. Additionally, privacy considerations are important. The advisor must understand how “out” the clients are to their friends, colleagues, workplace, and other advisors. It is necessary that the advisor understand privacy needs and sensitivities when conducting research or if the advisor is called upon to help implement the plan beyond the client meetings.

Property & Casualty Insurance

Insurable interest is key when it comes to protecting property, whether it pertains to owning and operating a car, residing in an apartment or home, or liability exposure. The advisor should have a clear understanding of how titling of the property in question can impact recovery due to loss, damages, or litigation. In a hypothetical couple, Jeff is the sole owner of an automobile and his partner, Rich, is not a listed driver. If Rich drives Jeff's car and causes an accident, damages and liability may not be covered by Jeff's auto insurance or umbrella insurance policy. In another scenario, if Jeff is the sole owner on the deed of a home they both occupy, Jeff's homeowner's policy would not extend to Rich, who would be considered a renter in this case. If there were a fire, for instance, and Rich did not have his own renter's insurance, Jeff's possessions would be protected but Rich might be out of luck. But if Jeff and Rich buy a home together and both are on the deed and Rich accidentally starts a fire, homeowner's insurance should cover damages.

The advisor should have his/her clients verify titling of cars and homes and other possessions so that any adjustments can be made to provide fuller protection against loss, damages, and liability. More specifically, the advisor should have his/her clients check corresponding automobile insurance policies to make sure a nonowner resident driver is listed and also should review homeowner's or

apartment policies to confirm a nonowner or nonlessee has his/her own renter's insurance. Clients might also explore whether being a couple would allow them to obtain discounts they perhaps otherwise are unaware of such as multiple policy discounts in the household.

Health Insurance

Gay couples and families will need to pay close attention to health insurance considerations that could impact them. In many jurisdictions across the country, a same-sex couple, with or without children, do not have the ability to add a partner or a partner's children to their health insurance policy. The advisor will need to take steps to understand the applicable laws.

In a hypothetical couple, Pat and Jane, Pat works full-time and received health insurance benefits through her work when she was hired, and Jane works part-time and does not receive health insurance through her job. Pat and Jane could explore whether Jane can be added to Pat's health coverage. If yes, Jane might be able to be added to Pat's policy without answering health questions, but the additional premium due to adding Jane will cause the “economic benefit” to be taxed to Pat at the federal level and possibly at the state level.³

Jane could buy an individual policy, instead, which would avoid the economic benefit taxation but then might subject her to having to answer health questions and risk possibly being denied coverage. Also of importance is how a child in the family would be covered. If Jane is the natural parent of the child or has adopted the child herself in a jurisdiction that prohibits adoption by same-sex couples, can the child be added to Pat's policy? Is shared or coadoption available as a remedy? These can be complications that require critical, careful decisions about health insurance for the child.

It cannot be stated strongly enough that gay couples must have an updated health care proxy, living will, and durable power of attorney. These are essential safeguards for a same-sex couple to allow them to have visitation rights, the ability to make medical decisions for an ill or injured partner, and the authority to make financial decisions on behalf of an incapacitated partner.

Disability Income Insurance

Disability income insurance might not seem an obvious concern for a same-sex couple. However, there

are some areas that could have an impact on a couple that are important to acknowledge.

Consider a hypothetical couple, Tom and Stan. If Tom becomes seriously ill, Stan may be able to pay Tom's hospital bills directly to the facility and thus not be restricted by the annual gifting limit (\$13,000 in 2011).⁴ But what about Tom's other bills such as rent, mortgage, and utilities? Could there be gifting concerns in this scenario? If Tom has ample disability income insurance in place, this could help alleviate Stan's having to pay much toward Tom's welfare and thus avoid or reduce the possibility of running up against the gifting limit or the need to file a gift tax return.

Survivorship and Estate Planning

Gay couples can face some significant challenges when it comes to survivorship and estate planning, and the advisor should explore these areas carefully with the clients.

Social Security Benefits

Federal laws do not recognize same-sex couples for Social Security survivor benefits. This could be critical in cases where there is a large income differential between two partners. In the hypothetical case of Janet and Lisa, Janet's salary is \$200,000, and she has earned that inflation-adjusted salary above the maximum wage base for Social Security taxes for quite some time, whereas Lisa is a stay-at-home spouse who has not worked enough to qualify for Social Security benefits of her own. In the event of Janet's death, Lisa would not be entitled to any Social Security survivor benefits even if she did have her own Social Security benefits, and Janet's benefits would have been higher. In the case of a marriage between a man and woman, the surviving spouse would be entitled to the higher benefit. If Lisa has her own children, she can petition the Social Security Administration for survivor benefits but the burden will be on her to prove a parental connection with Janet.

Defined-Benefit Pension Survivor Benefits

A same-sex couple residing in a state where their relationship is not recognized by law may not be eligible for any kind of pension survivor benefit from a traditional defined-benefit pension plan. In states where the couple's relationship is recognized, the couple will still not be eligible for a federal level, ERISA-covered, defined-benefit pension plan but may be eligible for a state level survivor

benefit. In Massachusetts, for example, a partner who is covered under a qualifying municipal pension can legally name his/her same-sex married spouse to be eligible for survivor benefits if he/she predeceases his/her partner.

Cash-balance ERISA pension plan survivor benefits do not recognize same-sex couples. The covered partner would not be allowed to name his/her partner, a "non-spouse" beneficiary, for survivor benefits before retirement. However, after retirement, the client may be able to roll over the cash balance pension plan to an IRA and then name a beneficiary of his/her choice, including a same-sex partner. Even when the client is able to plan ahead and roll over a cash-balance pension plan to an IRA and name the client's partner as a beneficiary, the survivor is generally still required to begin mandatory withdrawals by the following year over a five-year period or the lifetime of the beneficiary.⁵ Thus, the partner loses the ability defer all of the inherited IRA. This is in contrast to a heterosexual marriage where the surviving spouse can roll over the deceased spouse's retirement account in full and generally is not required to begin withdrawals right away. The tax laws can be complex in survivorship situations so a consultation with the client's tax advisor may be needed.

Retiree Health Insurance

For clients who receive retiree health insurance from their employers, the potential loss of that benefit to the same-sex couple also can have financial implications that should be factored into the planning analysis. If the surviving partner would have to purchase health insurance on his/her own, the partner may not be able to receive a potential subsidy from the employer retiree health plan.

Recommendation of Life Insurance

In situations where there could be a loss of survivor benefits due to any of the above scenarios, the advisor will find that additional research to take this into account for planning purposes will be necessary to uncover the pertinent details. When it is determined that a loss of benefits could affect the surviving partner, the recommendation of life insurance may be the optimal approach to make up for the deficit. Where mandatory withdrawals cause taxation to begin sooner in retirement accounts, life insurance proceeds can be factored in for the impact of taxes and loss of deferral. Planning software programs generally allow flexibility for the advisor to be able to demonstrate

these concepts in the financial plans and thus can underscore the utility of life insurance for the same-sex couple.

In any life insurance recommendation, it is important for the advisor to discuss ownership of the life insurance with the clients to make sure it coincides with a properly drafted estate plan.

Potential Estate Planning Concerns

Same-sex couples are limited to \$13,000 (2011 gift limit) of gifting between each other unless they file and use up some of their lifetime gift allowance under federal tax law (\$5,000,000 in 2011).⁶ Under the federal estate tax, same-sex couples also do not benefit from the unlimited marital deduction that heterosexual married couples receive. This could result in a significant tax burden at the death of the first partner and a reduction in assets for support and benefit of the surviving partner. The recommendation of life insurance as wealth replacement for the additional estate or gift taxes that might need to be paid could be appropriate for a same-sex couple. Placing the life insurance in an irrevocable life insurance trust (ILIT) might be in order for these clients to address ownership and privacy concerns as is often done in heterosexual marital estate planning.

The taxation of an estate could be more immediate at the first death; therefore, survivorship life insurance is probably not as compelling a solution for a same-sex couple. Some, though not many, companies offer first-to-die joint life insurance, which could be considered here. Additionally, there still could be a need for survivorship life insurance if there are children involved or there are other estate planning goals that are important for the couple to achieve, such as charitable bequests. The amount of life insurance needed could be higher if there are significant estate taxes expected at the first death that could not be deferred.

Long-Term Care Insurance

Planning for a long-term care (LTC) event for a same-sex couple can be complicated by several factors that should be well understood by the financial advisor and be included in financial and estate planning discussions. Heterosexual spouses can transfer assets to each other to help protect some assets for the purposes of Medicaid applications. This can include changing the title on some jointly owned assets. However, both of these strategies are limited for same-sex couples for the simple fact that they are not recognized as legal couples in the Medicaid program in

most states and, therefore, cannot take full advantage of these approaches. Changing the title on jointly owned assets, e.g., an investment portfolio, for the purpose of LTC planning could be impacted in that negative tax consequences could result from this strategy.

In an application for Medicaid benefits that is properly completed, the primary residence is usually considered a noncountable asset. If the applicant is in a recognized marriage, this can forestall a lien being placed on the home if the ill spouse is receiving Medicaid benefits, though a lien could still come into play if the recipient remains on the deed at death. In practical terms, the healthy spouse or partner in a recognized marriage can generally change the deed of the primary residence after the ill spouse or partner begins receiving benefits and sell it and move or live off the proceeds. For a same-sex couple where the marriage is not recognized, if the ill partner applies to Medicaid for benefits, a lien could be put on the primary residence immediately even while the healthy partner is residing there, though it wouldn't be enforced until the house is sold or the Medicaid recipient dies. Generally, the healthy partner can still remain in a jointly owned home while the ill partner is receiving Medicaid benefits. The problem arises after the ill partner's death or if the house is sold during the recipient's lifetime, at which time the lien will be enforced and Medicaid will seek to recover any benefits paid.⁷

Another factor that can affect LTC planning for same-sex couples is that statistically, gay couples are still less likely to have children who could serve as caregivers, a common occurrence for heterosexual married couples. For many couples, their support network of friends is often in the same age range and cannot be counted on for long-term support because it is likely they may have their own health issues or die first.

LTC insurance can be a good fit for many same-sex couples who might face some of the complications outlined above by providing them with the option to use such insurance to pay for care and thus reduce or delay the need to pursue other planning strategies.

The following hypothetical scenario also underscores the usefulness of LTC insurance. Consider Jennifer and Rachel: Jennifer, age 56, earns \$100,000 a year, has \$1 million in assets, and owns her home. Rachel, age 58, earns \$35,000 a year, has \$30,000 in assets, and does not own a home. Jennifer could buy LTC insurance for herself so that,

in the event she needs care, the insurance can help preserve assets to be left for Rachel's support and benefit. Since the couple is not recognized for Medicaid purposes in most states and Jennifer's assets would not be countable to Rachel, Rachel could qualify for Medicaid after a brief spend-down.

Thus, LTC insurance might not be needed for Rachel, unless the couple still prefers more options such as insurance for home care or assisted-living benefits in a state where Medicaid only pays for nursing home care. If Jennifer's and Rachel's assets are more equally matched and affordability to purchase insurance is feasible, both members of the couple might want LTC insurance to help preserve assets for each other and to help avoid the Medicaid spend-down restrictions discussed earlier.

An interesting twist that could help a same-sex couple is available if one partner owns a business and employs the other partner in the business. The business owner could offer the employee LTC insurance as an employee benefit and be able to deduct 100% of the premium as a business expense without the premium being subject to the usual eligible LTC insurance age-based deduction limits that would apply to most business owners who are in heterosexual marriages.⁸ One important point to note is that most LTC insurance companies can recognize same-sex couples for partner premium discounting as long as certain requirements are met. These discounting requirements can differ from one company to the next so it is important for the advisor to understand the distinctions and guide the advisor's clients appropriately.⁹

Conclusion

The hopes, dreams, and goals of a same-sex couple can mirror those of any heterosexual couple. Since same-sex couples can face a variety of financial planning complications, it is very important that the financial advisor have a solid understanding of the many challenges they face. Insurance programs can be very effective in helping to fill the financial holes that exist for these couples. The complex work-around strategies that often must be utilized can make or break the financial success of a same-sex couple. ■

The views and opinions expressed in this article are those of Stuart Armstrong. The information provided is not to be interpreted as legal or tax advice. For information regarding your own specific situation please contact your attorney or tax advisor.

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- (1) For a current listing of states that have passed marriage or civil unions laws for same-sex couples, consult Human Rights Campaign, http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf.
- (2) "Defense of Marriage Act: An Update to Prior Report" (Washington, DC: General Accounting Office) <http://www.gao.gov/new.items/d04353r.pdf>.
- (3) For an overview on taxation of domestic benefits, consult Human Rights Campaign, http://www.hrc.org/issues/workplace/benefits/domestic_partner_benefit_taxation.htm.
- (4) For an overview on gifting implications, consult IRS Department of the Treasury, "Introduction to Estate and Gift Taxes," Publication 950 (Dec. 2009); <http://www.irs.gov/pub/irs-pdf/p950.pdf>.
- (5) IRC Section 72(s).
- (6) "Introduction to Estate and Gift Taxes."
- (7) 42 U.S.C. Section 1396p. On April 1, the Department of Health and Human Services advised states that they can henceforth treat gay couples—whether married or in domestic partnerships—similarly to straight couples with respect to benefit programs. For example, Medicaid has exemptions to avoid forcing a healthy spouse to give up the family home and retirement savings in order to qualify a spouse for long-term care; that protection will now be permissible for same-sex as well as heterosexual couples.
- (8) IRC Secs. 162(a) and (l).
- (9) There is a constitutional challenge against DOMA in federal court in California where the LTC rules in IRC Sec. 7702B (in combination with DOMA) are specifically at issue.

APPENDIX

The following resources are available:

- Human Rights Campaign (www.hrc.org) has extensive resources on state and federal laws that apply to same-sex couples and families and keeps a current listing where marriage and civil unions are recognized.
- PridePlanners™ (www.prideplanners.org) is a national membership organization that provides marketing, education, and networking for advisors who work with gay individuals, couples, and families.
- National Gay and Lesbian Task Force (www.thetaskforce.org) has extensive resources on how state and federal laws apply to same-sex couples and families and compiles a periodic study on observations and statistics in the aging gay community called *Out and Aging*.
- *Money Without Matrimony*, by Sheryl Garrett, CFP, and Debra Neiman, CFP, is an excellent resource book on financial planning for gay couples and families and unmarried couples.