

# Same-sex Marriage = Equal Rights?

## That is, until the Feds Get Involved

By *MICHAEL J. GRILLI*

In Washington State, a federal judge recently dismissed a same-sex couple's joint filing for bankruptcy by upholding the Defense of Marriage Act and ruling that there was no validity in the couple's marriage. This was the first test of the Defense of Marriage Act in the bankruptcy arena, and it has set a clear precedent that the act will be an impediment to filing joint bankruptcy by a same-sex couple.

This is a major blow to same-sex marriage proponents who hoped that the 2003 Massachusetts ruling legalizing same-sex marriage would provide equal footing for same-sex married couples and traditional. While the ruling legalizing same-sex marriage sparked tremendous amounts of controversy both inside and outside the state, many thought it would open doors previously available only to those in marriages comprised of a man and a woman.

The reality is that bankruptcy is not the only issue affected by the Defense of Marriage Act with regards to same-sex couples. These individuals are learning that their rights are considerably compromised by it.

The Defense of Marriage Act was enacted in 1996 by the federal government. Within the act, marriage is defined solely as a union between a man and a woman. As a result, several of the rights under federal law that would normally be available for married couples are deemed unavailable to same-sex spouses in the Commonwealth of Massachusetts.

By way of example, under federal law, when a spouse dies, the surviving spouse is entitled to many benefits including Social Security, the continuation of vet-

erans' pensions, and survivor benefits for the spouses of federal employees. Because the federal government does not recognize the validity of a same-sex marriage, these benefits are not available to those spouses, even though their marriages were deemed to be valid under Massachusetts law. Even more important though, is the fact that the unlimited transfer of assets between spouses on death is not available to same-sex couples. This affects the prevention of estate taxes payable by a surviving spouse.

In the arena of bankruptcy, the effect the federal government's failure to accept the validity of same-sex couple marriages is tremendous.

Debt and other financial difficulties have always been major problems affecting American families, and same-sex couples are not immune. The bankruptcy reform measure that was implemented in October of 2005 made it more difficult for many Americans to file bankruptcy, and these hurdles are even higher for those affected by the government's failure to recognize same-sex marriage.

Under the Bankruptcy Code, married couples are allowed to file for bankruptcy jointly. This enables them to pool their debts and assets into one group and have the matter dealt with as a single case. This reinforces the notion that marriage is a partnership and that the financial situation of one spouse cannot be separated from that of the other. The income generated by one spouse goes to help support the other, and while the debts may not be in both names, in most cases they were incurred in order to support the family unit. The Bankruptcy Court allows for the two spouses

to file the matter as one case and to pay only one filing fee. This results in a savings to the couple.

Because a bankruptcy filing is a proceeding under federal law, and the federal Defense of Marriage Act states that same-sex marriage is not recognized as valid, the consequences are:

- A same-sex couple cannot file a joint bankruptcy proceeding;
- Sex-sex spouses' financial situations must be dealt with separately;
- They are required to pay two filing fees; and
- Attorney's fees are doubled since two cases must be presented.

And that's not all. The bankruptcy law allows for a debtor to take exemptions to protect certain property subject to some limitations. One of these exemptions allows a debtor to claim his or her rights to a homestead in real property under the laws of the Commonwealth. This right covers property for which one has an ownership interest even if he or she is not the spouse that claimed the homestead, since a homestead declaration covers all members of the family that reside in the home. In a same-sex marriage, where spouses cannot file jointly, the non-declaring spouse cannot claim this exemption because the validity of the marriage is not recognized as part of the proceeding.

Under the new bankruptcy laws, the court also takes a closer look at the income of the individual in determining whether he or she may file a Chapter 7 Bankruptcy, (wherein most of not all of their debts will be wiped out in most circumstances,) or a Chapter 13 Bankruptcy, (wherein a percentage of their debts will

have to be paid back over time.)

In most circumstances, a debtor would prefer a Chapter 7, because the objective is to relieve oneself of the obligation to pay debts in their entirety as opposed to having to pay them back over time. Also, in many instances of a joint bankruptcy between spouses, one spouse earns substantially more than the other, however, in a joint filing, the court looks at the combined income, and the lesser-earning spouse offsets the income of the other, creating a situation where a Chapter 7 bankruptcy is a viable option.

In the instance of a same-sex marriage, the spouses will be compelled to file separate bankruptcy cases, conceivably creating a situation wherein one spouse is able to relieve debts by filing a Chapter 7, while the other is forced to file a Chapter 13. The purpose of the bankruptcy laws is to provide debtors with relief and allow them to get a fresh start. In the context of same-sex married couples, the Defense of Marriage Act prevents spouses from getting this benefit to the fullest extent available.

It is a harsh reality when Massachusetts same-sex couples' rights are impeded by the federally imposed Defense of Marriage Act. Until federal and Massachusetts laws synch up, these contradictions will continue to impose cruel injustices to same-sex couples who believe they are on equal footing with traditional couples. ❖

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