
GRAY ZONES OF MARRIAGE LAWS

What should lenders do when two states disagree on the legality or form of same-sex marriages?

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The Equal Credit Opportunity Act prohibits discrimination on the basis of marital status. We used to know what that meant. Things aren't quite so easy today.

Critical issue for bank protection

When it comes to compliance and lending, marital status matters because it governs property ownership. Much of marriage law addresses who owns or has control of property. For banks, knowing that is crucial. Property ownership deals with rights to balances in deposit accounts, obligations to pay loans, and access to property securing a loan.

State law controls property ownership and marriage laws.

ECOA defers to state law when questions of marital rights or property ownership arise. Single persons and married persons have different property rights in most states. Some of these property laws deal with how married and unmarried couples can hold title to personal and real property. Other laws create inchoate rights in property—a right or interest to property that arises without being listed on the title. Inchoate rights can be important because if such a right exists and a secured creditor does not correctly address it, the lender can lose the property to a surviving spouse. In a way, marriage can create a passive property right that activates under certain circumstances, such as the death of the spouse.

Some states have different definitions of marriage than others. Some allow same-sex marriages while others do not. Some provide for a type of marriage by contract which provides limited marital status rights.

When there is a question of whether the applicants are married, what should you do?

The simple answer is that you look to state law—the law of the state in which the transaction is made, whether opening a deposit account or taking a loan. If state law recognizes a marriage, that should mean that all marriage-based property law applies.

This may sound simple, but it is only the beginning.

When is a marriage a marriage?

Let's suppose that a same-sex couple married in a state that recognizes such marriages. Then the newlyweds come to open an account and apply for a loan from a bank located in that state. Because state law recognizes the marriage, they are married and you treat them accordingly—just like other married couples. This situation is easy.

But things can get complicated.

Some states authorize a marriage-like contract but do not go the whole distance to treating the couple as married.

The contract provides some marriage-like privileges, such as being treated as a spouse in a hospital visit, but is not a full legal equivalent of traditional marriage. In this situation, you need to know precisely what property rights the law recognizes and creates, because the property ownership and interests are what matter to the bank. In such states, the property rights should be clearly spelled out.

When couples cross borders

The really interesting question arises when a same-sex couple has been married in a jurisdiction that recognizes same-sex marriage and then moves to a state that does not recognize same-sex marriage—or specifically repudiates it. What is the couple's status?

Generally, the law of marriage carries from state to state.

If a marriage is valid in State A it should be treated as valid in State B. But this requires State B recognizing that State A's law is valid.

It is one thing to recognize that the ceremony or procedure was legally recognized and correctly performed. For that, we look to the law of the state in which it is performed. For example, if State B requires three vows and State A only requires two, a marriage performed in State A with two vows is valid and should be recognized in State B.

It is a different issue when the question is whether the marriage could be performed at all or whether the ceremony, no matter what the design, was legal. This is a question that underlies same-sex marriages. Suppose State C recognizes and authorizes same-sex marriages but State D considers them illegal. When a same-sex couple that married in State C presents a loan application in State D, are they married or not?

The question here is whether something that State D specifically prohibits can occur in another state and be “imported.” We are still waiting for answers.

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What to do in the meantime

Given this confusion, what should a bank do when presented with the situation?

Banks should follow two basic principles.

First, treat all customers with courtesy and respect.
This includes treating the relationship with respect.

Second, the bank must consider, fairly and squarely, what its rights and obligations are with respect to property ownership and perfecting security agreements.

Treating customers with respect is going to be easier than being certain about rights and obligations with respect to property when we lack clear answers about whether marital property rights do or do not exist.

What should you do to determine what is right and legal? Here are some ideas.

1. Ask about concept and property rights. Request an opinion from your state attorney general to clarify when a same-sex marriage should be recognized and what property rights arise from the marriage.

Under ECOA, you need to have a reason for what you do that is based in good faith. Taking the step to ask the state AG is one way of getting good information and showing good faith.

2. Ask about marriage contracts. While you are at it, ask the same questions about marriage contracts for same-sex couples. Contract questions raise slightly different issues about property ownership.

3. Talk to your regulators.

Discuss the issues with your examiner, and also find out what sorts of documentation an examiner expects. For example, does the examiner think you may make copies of the marriage certificate or contract? This raises a question of the balance between differential treatment and prudent practices with respect to property ownership and security.

4. Talk to your suppliers.

Check with your forms and software providers to find out whether they have addressed same-sex marriage issues in their forms.

5. Discuss these issues with your lenders—all of them. Anyone can get the question from a potential applicant and everyone should be prepared to either give the right answer or avoid giving an incorrect answer.

6. Consider whether this should be addressed in your loan policy. If the situation has never come up, you can put this off for a while. But sooner or later your policies could need updating. Be ready.

7. Share ideas and information with your peers. It's never fun to deal with a problem alone. •

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About Lucy Griffin

"Lucy and Nancy's Common Sense Compliance" is blogged by both Lucy Griffin and Nancy Derr-Castiglione, both longtime ABA Banking Journal

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- Lucy, a Certified Regulatory Compliance Manager, has over 30 years experience in compliance. She began as a regulator, including stints with the Federal Reserve Board, the Federal Trade Commission, and the Federal Home Loan Bank Board. For many years she managed the ABA Compliance Division. Since 1993 she has served as a compliance consultant as president of Compliance Resources, Inc., Reston, Va. She is also editor of Compliance Action newsletter and senior advisor with Paragon Compliance Group, a compliance training firm.

In addition to serving as a Contributing Editor of ABA Banking Journal, Lucy serves on the faculty of ABA's National Compliance Schools board. For more than a decade she developed and administered the case study at ABA's National Graduate School of Compliance Management. She can be reached at lucygriffin@earthlink.net