

# **American Bar Association – Dispute Resolution Conference**

## **Mediating Same-Sex Dissolution Conflicts:**

### **Legal, Social, and Psychological Dynamics of the Gay Divorce**

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## **Outline of Issues**

### **I. Typical Conflicts Arising in Same-sex Dissolutions**

#### **A. Dissolutions of non-registered couples: claims based upon contract claims**

Excess contributor to jointly-titled property (the Joint Tenancy issue)  
Off-title contributor to home/property titled only in one name  
Claims for post-separation support based upon oral/implied promises  
Disputes over separately titled assets/businesses: claims based upon  
oral/implied agreement or equitable claims  
Allocation of joint/separate debt  
Disputes regarding interpretation of written agreements

#### **B. Dissolutions of registered/married couples:**

Application of marital rules, often with no expectation of marriage rules  
Complexities of applying marital rules to these disputes  
Disputes regarding pre-registration assets  
Jurisdictional challenges, esp. for out-of-state registrations/assets  
Complexities arising out of lack of tax exemption on transfers  
Relevance of pre-registration actions/agreements  
Spousal support for long-term relationships

C. Parentage/custody and adoption conflicts:

Custody disputes, where both are legal parents

Unique custody disputes (esp. re non-bio parent)

Parentage disputes, where one is not a legal parent

Conflicts with “non” parent (i.e. partner, donor)

“who is a parent” conflicts: step-parents, involved donors

## **II. Understanding the Changing Legal Rules of Gay Divorce**

A. The California Challenge: existing (and new) registrants subject to marital law as of January 2005, unless unilateral termination by either partner in 2004;

retroactive application of marital law to date of registration  
all state marital rules apply, including community property  
and spousal support rules  
law applies to “equivalent” out-of-state registrants but not marriages  
application of community property rules (esp. re: mixed assets)  
non-marital law applies to some pre-registration assets  
spousal support claims: amounts, duration (esp. re: long-term relationship)

B. Marital law also presumptively applies to registered/married couples in:

Vermont: civil union registrants

Connecticut: civil union registrants

New Hampshire: registered partners

New Jersey: newly-registered partners

District of Columbia: registered partners

Oregon: registered partners

Washington: registered partners (limited effect)

Massachusetts: married spouses (uncertain validity outside of MA)

Canada: married spouses (uncertain validity in US)

C. Major Legal Uncertainties:

Choice of law/non-recognition issues for couples registered in one state but living in state that does not recognize out-of-state registrations

Rights of couples married in MA or in Canada in states that do not recognize out-of-state gay marriages

Disputes between couples with assets in states that do not recognize their registration/marriage

Dissolution for couples in states that will not grant them a dissolution

Impacts of broad non-recognition by federal agencies  
(taxation of transfers, orders re distribution of pension, tax on support)

Parentage issues: validity of adoptions, interpretation of presumed parentage statutes (based upon parents' relationship), rights of donors/surrogates, impact of relocation on parental rights/duties, changing law regarding non-bio parent (de facto parentage claims)

### **III. The Compelling Arguments for ADR in Resolving Gay Divorces**

#### **A. The Needs of the Parties**

- Resolving the issues more quickly
- Avoiding contested issues/reducing legal fees
- Focusing on the expectations of the parties
- Creative strategies to deal collaboratively with legal complexities
- Avoiding the homophobic courtroom
- Addressing the personal / emotional needs of the parties

#### **B. The Needs of the Community**

- Avoiding high-visibility dissolutions
- Avoiding bad legal decisions
- Modeling a better way to deal with conflict

#### **C. The Concerns of the Lawyers**

- Dealing with ethical quandaries: limits on zealous advocacy
- Community values vs. legal arguments
- Working collaboratively with a small legal community
- Straight lawyers and gay clients: what are the issues
- Managing an angry client
- Limits on expertise (esp. re tax issues)
- The overlap of marital and non-marital law

#### **IV. Psychological Issues Arising in Same-Sex Dissolutions**

##### **A. Parentage Issues**

Who is the “real” parent: bio vs. non-bio parents  
What is the role of the step-parent  
Particular issues for women  
Particular issues for me  
The role of the “other” – the donor, the surrogate, the former partner  
Impacts of homophobia on parentage issues

##### **B. Issues of Money and Property**

Whose money is it: yours, mine or ours  
Absence of formal or legal commitment events  
Changing landscape of legal expectations  
Power imbalances and money negotiations  
Disputes regarding allegations of oral or implied agreements  
Underlying class issues  
The nullification issue: were we ever “a family?”  
Asking to be supported / the duty of support  
Particular issues for women  
Particular issues for men

## **V. Particular Process Issues in Mediating Gay Divorces**

### **A. The Role of the Law**

- Should legal rules dominate the dispute resolution process?
- When it is “a betrayal” to invoke legal rights and duties
- The need for court dissolution (registration/marriage)
- The involvement of lawyers
- The role of the court system/staff (i.e. custody evaluators)
- The impacts of homophobic laws (tax impacts, lack of adoption)
- The cost of dissolution (esp. for registered/married couples)

### **B. Unique Dynamics in Same-Sex Dissolutions**

- The lack of formal commitment: were we a family
- The heritage of oppression: angst, distrust, resentment
- The battle over the narrative
- The issue of retroactive nullification of the relationship
- The changing expectations: what is a “gay” family
- Being out and being perceived as a couple
- The role of parentage
- Particular issues for lesbians
- Particular issues for gay men
- The sense of exclusion and victimization
- The impacts of homophobic laws
- The notion of financial dependency in the LGBT community
- Moral obligations in the absence of legal protections
- Does the sexual orientation of the mediator matter?

### **C. The Role of the Psychological Dynamics in the Mediation Process**

- When is it helpful to go “deeper”
- The collaborative model: including therapists as coaches
- The knowledge and skills of the mediator
- The role of ongoing therapy/counseling as a separate process
- Particular issues for same-sex dissolutions
- Particular challenges for gender atypical partners