

Denied divorce, some same-sex couples 'wed-locked' - CNN.com

By Elizabeth Landau, CNN
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"It's just like every other couple: Some make it and some don't," says Jessica Port, who is going through a divorce from her same-sex partner.

(CNN) -- On her wedding day, Jessica Port wore a tan and black dress to match the tan button-down shirt and patterned necktie of her spouse-to-be, Virginia Anne Cowan.

They had taken a vacation from their home in Washington D.C. to a San Francisco courthouse in 2008 to get married, since California had recently begun to allow same-sex marriages.

"We were just like every other couple, we really thought that this was it," said Port, 30, who works as a counselor at a special education school. "We had nothing to worry about. We were just focused on marriage and future."

They had no idea that one day their marriage would fall apart, and that their divorce would lead to a radical change in the legal status of same-sex marriages in Maryland.

Same-sex couples can currently marry in six states and the District of Columbia, and there's no residency requirement to marry. That means that couples who live outside of those states can just pop in for a day to get married and then go home. There are also five states that allow civil unions.

But if a marriage should fall apart in a state that doesn't recognize the couple's legal status in the first place, that's when things get complicated.

Some states that do not allow same-sex marriages to be performed also do not grant divorces for same-sex marriages that occurred outside of the state's borders. It's a tricky situation when a couple wants to dissolve their same-sex marriage, and neither spouse is a



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resident of a state that recognizes their marriage as legal and valid.

To satisfy the residency requirements, under these circumstances, you'd have to live in a state for six months to two years -- depending on local laws -- in order to get a divorce from a same-sex partner, said Susan Sommer, director of constitutional litigation at Lambda Legal, which represented Cowan.

And in the case of Port and Cowan, a Maryland judge ruled in 2010 that the state's constitution could not recognize their divorce, and denied their filing. They were both Maryland residents when they sought to dissolve their marriage, and Maryland was not a state that recognizes same-sex marriage.

It's a predicament that lawyers such as Deborah Wald, of Wald & Thorndal P.C. in San Francisco, call being "wed-locked." Wald is head of the National Family Law Advisory Council for the National Center for Lesbian Rights, which represented Port. "We're trying to help people sort out: Am I married or aren't I? Where can I get divorced?" Wald said. "These are all issues that do not come up for different sexed couples at all."

What's the big deal about divorce?

You might think that, if you live in a state that doesn't recognize your marriage, there's no need for a formal divorce.

But it becomes important because, if one spouse gives birth to a child in the state of the marriage, the other spouse is presumed to be a parent under the law. It also means that neither spouse can marry or enter into a civil union with a new partner, or else they would be opening themselves to bigamy charges.

"This has very significant emotional consequences," Sommer said. "Divorce is not only a legal termination of a relationship, but also gives a certain amount of closure."

Port can relate: She feared being emotionally and financially tied to her partner for the rest of her life, and wanted to move forward. She had also bought a house after they broke up, and worried about her assets and life insurance policy. And if she or her former partner wanted to have children, they could become embroiled in custody issues.

There is something ironic about a state that doesn't allow same-sex marriage to also not



Jessica Port, 30, believes same-sex couples should have equal rights in both marriage and divorce.

allow the dissolution of a same-sex marriage, lawyers said. "Some state courts say: We do not have the power under state law to

render a decision about a decision we're not allowed to recognize," Sommer said.

Port and Cowan's case went to Maryland's highest court. The judges decided in May that same-sex couples can file for divorce there, even though same-sex marriage was not yet legal there. "They found that it was unconstitutional to leave couples without a remedy" for getting out of marriage, Wald said.

How same-sex divorce is different

State laws are rapidly evolving with respect to same-sex divorce, but there's no universal rule on it. Especially if the couple resides in a state that doesn't recognize gay marriage, it's hard to know what to do with the fact that a marriage was never dissolved. Wald said she's surprised by the number of couples nationwide she's heard about who marry without ending their previous marriages.

Since same-sex marriages are not recognized on a federal level, a lot of retirement packages can't be divided up easily in a divorce, which creates financial issues that wouldn't exist for heterosexual couples, Wald said. The tax ramifications may be completely different for a same-sex couple looking to legally split.

Custody issues over children also add unexpected difficulties in same-sex divorces. With same-sex couples, more often than with heterosexual couples, a child may be biologically related to one parent but not the other, even though both parents raised the child together from the moment of birth. That creates a power dynamic that may lead to legal complexities in divorce, since states vary widely on what rights they give to the non-related parent, Wald said.

Wald has seen it again and again. For instance, a same-sex couple from Arizona went to get married in California when gay marriage was legal there, and then broke up back in Arizona. As far as Arizona is concerned, they were never married to begin with. But in California, they still were.

That's because California's Proposition 8, which voters passed in November 2008, banned gay marriage just months after couples like Port and Cowan got married there. Federal appeals court judges refused Tuesday to revisit the issue, so the fate of gay marriage in California may be taken up by the U.S. Supreme Court.

But as of January 2012, the statute has been amended to say that California can dissolve marriages that had taken place in that state, even if neither party is a resident there, Wald said.

A hazy legal situation

What Wald and other lawyers for same-sex couples in "wed-locked" situations push for is what's called a nunc pro tunc judgment, which means "retroactive to an earlier date."

For example, a woman came to Wald's firm in 2010 with a new spouse on whom she depended for insurance. But she had previously been in a civil union with someone else in Vermont, which had never been dissolved because California wasn't recognizing the other state's civil unions at that time. Wald's firm convinced the court in California that the civil union in Vermont could be retroactively dissolved.

With all of this complexity, many same-sex couples find themselves in legal quandaries such as this one, which one would not expect in the course of breaking up a heterosexual marriage.

"Things have been so confusing that there are a lot of honest mistakes being made," Wald said. "It's expensive to get all of this sorted out."

There's also a level of fear that some gays and lesbians have about the court system, said Dennis Collard, an attorney with Kessler & Solomiany in Atlanta, Georgia. "Even though in my experience courts treat them with respect, a lot of gay people are scared."

Collard doesn't see the residency requirements changing for divorce broadly, however, because that would open the door to anyone -- regardless of orientation -- shopping around for states that would favor them in a divorce. Certain states have reputations for doling out more child support, for instance, said Collard.

Since Georgia doesn't recognize same-sex marriages, Collard and colleagues can't get "wed-locked" couples official divorces. But they can help them navigate the legal process through certain issues: dividing real estate or bank accounts, or honoring contracts.

There is an alternative called "collaborative law," in which attorneys represent both parties, but it's a very structured process like a litigation.

Steven Petrow, an author who writes about gay issues, said a prenuptial agreement is sometimes the best way to ensure that a same-sex couple will have an "easier divorce."

"While not terribly romantic, these can be great tools to protect both spouses in the event things don't work out," he said in an e-mail. "Just don't wait to the last minute to bring it up with your fiancé."

Divorce as part of equal rights

Port sees the right to both marriage and divorce as parts of the fight for equality for same-sex couples.

In Maryland, the General Assembly passed a bill in February that would legalize same-sex marriage in the state, but which won't take effect until 2013. However, opponents are pushing for a November referendum. A similar scenario is playing out this week in Washington state.

Some experts say there is an added sense of guilt that comes with breaking up a same-sex marriage, since advocates have fought so hard for the right to marry.

Same-sex couples find their stride on wedding day

"Because so many of these first same-sex marriages are role models for the gay community, the breakdown of a relationship carries an added symbolic weight," Petrow said. "It's almost as though they are letting the rest of us down, which, of course, isn't true. But it can feel that way to these individuals."

But Port doesn't feel that way. "We want equal rights to marry as well as equal rights to divorce, and rights to recognize and protect our relationships just like everyone else," she said.

In her view, no one advocating for same-sex marriage is pushing for marriages to stay together if they are genuinely not working out.

"It's just like every other couple: Some make it and some don't," she said.

Port and Cowan are still waiting on the actual divorce, since a Maryland court has to reverse the decision to not dissolve their marriage. Port now has a new girlfriend, and wears a diamond ring to symbolize commitment to her, although they have no plans to marry.

Even a referendum blocks the ability for same-sex couples to get married in Maryland, Port is glad that her case has secured the ability for Maryland's same-sex couples who had been married in other states to divorce there.

"All couples in the state of Maryland will at least be guaranteed the same rights, regardless of where they got married," she said. "I'm grateful that my case will help at least ensure some rights and protections."

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