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THE TAX LAWYER

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Biggest Injustice Of Denying Same-Sex Marriage? Tax-Free Divorce

The gay marriage debate raises big issues, but as a tax lawyer for 30 years, I see taxes front and center. You might think the main tax issue would be whether same-sex couples can file joint tax returns. That's nothing compared to the tax aspects of dissolving a relationship, which are **very** different inside and outside marriage.



(Image credit: Getty Images via @daylife)

If you're married, there's no limit on the money or property you can transfer between spouses. There's no gift tax and no limit (unless the spouse receiving assets isn't a U.S. citizen). If you're **not** married, you are limited to \$13,000 per year tax free. Gifts beyond that trigger an immediate gift tax or eat into your lifetime gift-tax exemption.

If you are married and divorce, you can divvy up property tax free. Again, there's no limit. So if you jointly bought a house, you can transfer your interest to your ex without tax.

Not married? Same sex or not, **if you're not married** unwinding a relationship can be **very** taxing, including income taxes, gift taxes or

both. Suppose you give your half of the house to your ex-partner and receive nothing in exchange? You've made a taxable gift.

Suppose you're not feeling that generous and instead deed your half of the house to your ex in exchange for some of your ex-partner's stock holdings. You **both** could be hit with income taxes. As the departing partner, you'll be treated as **selling** your half of the house to your former partner.

Suppose you bought the house together decades ago for \$400,000 and it is now worth \$1,000,000? Your half has a \$200,000 basis and a value of \$500,000. That means you, the departing partner, will have a \$300,000 gain. If you qualify for the exclusion on sale of a principal residence (up to \$250,000 per person), only \$50,000 of it is taxable.

What about the ex-partner who is keeping the house and handing over \$500,000 in securities? If the staying-put partner's basis in the stock is \$300,000, he or she will have a \$200,000 gain. ***But here's the kicker: If the same couple had been married, there would be no taxes paid on these asset transfers.***

This is one simple example. If you look at a many-year relationship with significant assets, the taxes at stake can be **enormous**. The tax bill can be so big that in some cases, unmarried couples trying to untangle joint assets might consider getting married ***just so they can then qualify for the benefits of a tax-free divorce!*** (For a real life example of a couple doing just that, see [Five True Tales From A Tax Lawyer.](#))

Despite my focus on tax law, I realize the non-tax aspects of marriage are considerably more important than taxes. Still, taxes matter, especially if you have to unwind a relationship. Divorce isn't pleasant for anyone, but at least the tax laws don't contribute to the difficulty. (For more on the tax aspects of divorce, see [How To Make Divorce Less Taxing.](#))

In contrast, unwinding cohabitation can be a tough job for a tax adviser and expensive for the couple.

For more, see:

[How To Make Divorce Less Taxing](#)

[One More Tax Filing Status: Same Sex Partners?](#)

[Gay Or Straight, Marriage Matters–For Taxes](#)

[Tax Filing Status For Same-Sex Partners](#)

[Watch Out Assigning Assets in Divorce](#)

[Legal Fees and Tax Deductions](#)

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