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Marriage Equality Remains an Aspiration

Non-recognition statutes pose legal complications for same-sex unions.

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NEW YORK STATE has now made same-sex marriage legal,[1] but the title of the new law, the Marriage Equality Act, remains aspirational. Non-recognition statutes and other factors create issues that family law practitioners must be aware of in counseling same-sex couples planning for their future…or those seeking to end their marriages. This article will address many of those issues.

Although New York courts and executive branch officials repeatedly gave effect to same-sex marriages performed in jurisdictions where they were legal before the legislature sanctioned the performance of such marriages in New York,[2] the federal government and most states have enacted legislation denying recognition to same-sex marriages,[3] greatly complicating the legal landscape for same-sex married couples.

The federal Defense of Marriage Act (DOMA)[4] obstructs marriage equality for same-sex partners in two ways. First, it creates an exception to the statutory implementation of the Constitution's Full Faith and Credit Clause, by providing that "[n]o State…shall be required to give effect to any public act, record or judicial proceeding of any other State…respecting a relationship between persons of the same sex that is treated as a marriage under the laws of any other such State…or a right or claim arising from such relationship."[5]

Second, it bars recognition of same-sex marriages by the federal government, specifying that "[i]n determining the meaning of any act of Congress, or of any ruling, regulation, or interpretation of the various administrative agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife."[6]

The latter provision is widely understood as barring the parties to single-sex marriages from all of the benefits provided to married people under federal law. This includes widows and widowers, who are also deprived of their valuable rights.

The former provision invited states to refuse recognition to same-sex marriages performed in jurisdictions that allowed them. There were no such jurisdictions when DOMA was adopted, but same-sex marriages are now legally performed in Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont, and the District of Columbia, as well as in 10 other countries, including Canada.[7]

Most states have accepted that invitation, enacting statutes or constitutional provisions that not only bar the performance of same-sex marriages within their boundaries but deny recognition to out-of-state same-sex marriages, a departure from the normal rule under which states typically give full legal effect to marriages that were legal in the state where they were performed, with only very limited exceptions.[8] The effects of those "state DOMAs" vary with their wording and the manner in which they have been or will be interpreted by the courts.

In our highly mobile society, however, they create enormous uncertainty for same-sex couples, who cannot know to what states or countries their careers, lifestyle preferences and/or family obligations may cause them to move, or where they will find themselves when fate lands one spouse in the hospital.

The non-recognition of same-sex marriages by the federal government and individual states is being challenged in courts around the country, and Attorney General Eric Holder recently announced that the Justice Department will no longer defend in court the constitutionality of DOMA's bar on federal recognition of same-sex marriages that are legal in

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the jurisdictions where they are performed, because the President has concluded that that bar is unconstitutional. Nonetheless, both DOMA and the state DOMAs remain in effect, and the outcome of the constitutional challenges to them is uncertain.

Financial Rights

DOMA deprives same-sex spouses of numerous rights with respect to federal income taxes, such as the right to file joint federal tax returns, the right of one spouse to claim the other, and possibly their children, as dependents, and, in the event of divorce, the right to deduct spousal support payments from one's income and the right to make transfers of property between spouses to effect the agreed-upon or court-ordered distribution of property without tax consequences. The same will be true with respect to state taxes for same-sex couples residing in states that have passed their own non-recognition statutes or constitutional provisions (non-recognition states).

As a result of DOMA and the state DOMAs, the health insurance plans of parties to same-sex marriages who work for the federal government and, in many non-recognition states, for state and/or local government as well, will not cover the non-employee spouse. The non-employee spouse will likewise be deprived of other spousal benefits, such as the right to receive survivor pension benefits.[9] Some non-recognition states, however, do provide domestic-partner benefits, or permit political subdivisions to do so.

Whether *local* governments in non-recognition states are constrained from providing health insurance and other benefits to a same-sex spouse will depend on the wording of the non-recognition statute or constitutional provision. In *Leskovar v. Nickels*,[10] the court upheld an executive order issued by the mayor of Seattle directing city agencies to recognize the same-sex marriages of city employees "for purposes of granting employee benefits and other benefits ordinarily received in the course of employment," finding that the order was not violative of Washington's DOMA, which provides, inter alia, that "[a] marriage between two persons that is recognized as valid in another jurisdiction is valid in this state only if the marriage is not [between 'persons other than a male and a female']."[11]

The court in *Leskovar* reasoned that there was "no direct conflict" between the foregoing language and a state statute that authorizes cities, counties and other political subdivisions to provide health benefits to their "employees and their dependents,"[12] leaving it to the local governments to define "dependents."[13] The court contrasted the language of Washington's DOMA with that of Michigan, which specifies that "the union of one man and one woman shall be the only agreement recognized as a marriage or similar union for any purpose."[14]

Kathe Davridge, left and Kim Dodd wait on line to get married at 80 Centre St. on July 24.

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In *National Pride at Work Inc. v. Governor of Michigan*,[15] the court found that that language prohibited public employers in the state from granting health benefits to the domestic partners of same-sex employees. Where one spouse *is* covered by health insurance provided by the other spouse's employer, whether governmental or private, the value of the coverage for the non-employee spouse will be treated as *taxable income* by the federal government and non-recognition states, since same-sex spouses will not be regarded as family members of the employee, for whom such benefits are tax-free to the employee recipient.[16]

In the event of the death of one spouse in a single-sex marriage, non-recognition can severely affect the rights of the surviving spouse. If one spouse dies without a will while the couple is residing in a non-recognition state, the law of intestacy, which typically provides that the surviving spouse inherits, will not apply because, in the eyes of the state, the surviving spouse will be a legal stranger.

Likewise, while state laws typically protect a spouse from disinheritance by providing that a surviving spouse shall be entitled, at a minimum, to an "elective share" of a deceased spouse's estate, that requirement

will not apply in a non-recognition state. And if a deceased spouse has sufficient wealth to subject his or her estate to inheritance taxes, a surviving spouse inheriting pursuant to a will will be subject to federal inheritance taxes (and, in a non-recognition state, state inheritance taxes, if any) on the value of assets inherited from the deceased spouse, whereas inheritance by a spouse is normally not a taxable event.[17] Wherever the parties were residing prior to the death of the deceased spouse, DOMA will bar the surviving spouse from receiving Social Security survivors' benefits.[18]

Moreover, in non-recognition states, same-sex couples will not be able to own real property as "tenants by the entirety." This is the form of ownership that provides a spouse with the maximum protection in the event of the death of a spouse and also prevents one spouse from selling or transferring to another any partial interest in a jointly owned property.

Parentage and Custody

In the event of the **death** of one spouse in a **single-sex marriage**, non-recognition can **severely** affect the **intestacy rights** of the **surviving spouse** because, in the state's eyes, that spouse will be a **legal stranger**.

New York law provides that, when a married woman is artificially inseminated with the written consent of both spouses, the resulting child is the legal child of the spouse as well.[19]

But non-recognition states likely will not recognize the parentage of the non-biological mother based on a same-sex marriage. In *Debra H. v. Janice R.*,[20] New York's Court of Appeals recognized the parentage of the non-biological mother in a same-sex couple, based on the legal effect under Vermont law of the parties' Vermont civil union, but New York, of course, had not enacted a state DOMA.[21]

By contrast, in *Miller-Jenkins v. Miller-Jenkins*,[22] a Virginia case also involving a child created by artificial insemination and a female couple who had obtained a Vermont civil union, the parental rights of the non-biological mother, Janet, were vindicated only because of a tactical blunder by the biological mother, Lisa.

Specifically, Lisa, who was by then residing in Virginia alone with the child, first sought dissolution of the civil union and a custody-and-visitation order in Vermont, where the parties had resided together with the child until two months earlier. By the time Lisa commenced an action in Virginia, on the very day on which Virginia's state DOMA became effective, seeking a declaratory judgment that she was the "sole parent" of the child and that any parental rights claimed by Janet were "nugatory, void, illegal and unenforceable," the Vermont court had already issued a temporary custody order granting Janet visitation.

Accordingly, the Virginia court dismissed Lisa's action for lack of subject-matter jurisdiction, based on the provisions of the federal Parental Kidnaping Prevention Act (PKPA),[23] which requires the courts in any state to defer to a pre-existing custody proceeding in another state, so long as the proceeding in the foreign court meets certain jurisdictional requirements.

Otherwise, the state DOMA, which forbids the state or any of its subdivisions to "create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effects of marriage"[24] would presumably have dictated a result in Lisa's favor.

To ensure the portability of the parentage of a same-sex spouse who is not the birth mother, the non-birth mother should adopt the child. This creates a conundrum, since the non-birth mother is already the child's legal parent under New York law. But in a case involving a same-sex couple who had legally married in the Netherlands and was residing in New York, New York County Surrogate Court Judge Kristin Booth Glen resolved such a conundrum in favor of the non-birth mother,[25] to safeguard her status as legal parent in light of DOMA and the State DOMAs:

> [A]lthough…an adoption should be unnecessary, because Sebastian was born to parents whose marriage is legally recognized in this state, the best interests of this child require a judgment that will ensure recognition of both Ingrid [the birth mother] and Mona [whose embryo was fertilized and implanted in Ingrid] as his legal parents throughout the entire United States.[26]

The foregoing reasoning was clearly premised on a strong presumption that U.S. courts will give full faith and credit to adoptions granted by a court in any state. And, indeed, the passage of DOMA and the various state DOMAs does not appear to have weakened that presumption. See *Adar v. Smith* (affirming order directing Louisiana state registrar to issue birth certificate naming as parents of child in question the same-sex couple who adopted Louisiana-born child in New York, because New York adoption was entitled to full faith and credit in Louisiana, notwithstanding Louisiana statute prohibiting adoptions by unmarried couples, followed by an en banc reversal on other grounds; the full Fifth Circuit left undisturbed the prior holding that the New York adoption was entitled to full faith and credit in Louisiana);[27] *Embry v. Ryan* (Florida statutory law required the court below to give full faith and credit to Washington state adoption by a woman of her same-sex partner's biological child, "regardless of whether [it] believed that the Washington adoption violated a clearly established public policy in Florida").[28]

Divorce

The courts of many states, primarily those that have adopted state DOMAs, are likely to refuse to adjudicate divorces between same-sex couples, denying them access to the courts to obtain a definitive and, one hopes, fair determination of their respective rights and duties going forward.

In *Marriage of J.B. and H.B.*, the Texas Court of Appeals held that Texas courts lack divorce jurisdiction with respect to same-sex marriages, citing the state DOMA, which, inter alia, declares same-sex marriages and civil unions to be "contrary to the public policy of this state and…void in this state," and forbids the state or any subdivision thereof to give effect to "a marriage between persons of the same sex" or any "right or claim to any legal protection, benefit or responsibility asserted" based on a same-sex marriage or a civil union.[29]

The court explained that "in this very case appellee seeks to 'give effect' to his marriage under Texas law by seeking a division of the parties' community property… Community property is a paradigmatic legal benefit that is associated intimately and solely with marriage."[30]

Georgia's state DOMA expressly denies to its courts divorce jurisdiction with respect to same-sex marriages.[31] No divorce means no court order with respect to, inter alia, issues such as property division, child custody, visitation, spousal and child support, with potentially resultant chaos in the wake of the termination of the marriage.

Coping With the Uncertainty

New York law contains some features that may be helpful in promoting equitable results in the event that a same-sex marriage ends in divorce.

The factors upon which "equitable," as opposed to "equal," property distribution, is based[32] may be sufficiently flexible to allow the court to take into account and compensate for the countless deprivations faced by the same-sex spouse. These include ineligibility to succeed a deceased spouse as beneficiary of a defined-benefit pension plan,

to receive a portion of a spouse's pension benefits and to do so tax-free, as part of the division of property in a divorce, to receive Social Security payments based on the work history of his or her spouse,[33] or to receive COBRA benefits to ensure continued medical coverage for a spouse who has relied on family coverage obtained through the other spouse's employer.[34]

The 2010 legislation that authorized "no fault" divorce in New York also, inter alia, added to the factors to be considered in determining spousal maintenance "the existence and duration of a *premarital* joint household."[35] Because same-sex couples were barred from marrying for so long, many same-sex marriages were, or will have been, preceded by long-term joint-living arrangements in which the contributions of the respective spouses might merit more or less generous treatment with respect to maintenance or equitable distribution.

Prenuptial (or postnuptial) agreements provide a means by which, with sufficient forethought, parties to a same-sex marriage may chart out their own financial futures while at the same time protecting themselves from the vagaries of the present highly uncertain legal environment.

For example, the parties might agree that, no matter where they reside in the future, any financial issues in a divorce will be decided in accordance with New York law, except as to matters where the parties have specifically agreed to depart from it. Such departures could include provisions for property division to be controlled by title, or entitling each spouse to a specified percentages of all marital assets, or including premarital assets in the marital pot, to be divided in the event of divorce.

A prenuptial agreement could also delineate the parties' understandings and agreements as to their rights and obligations vis-à-vis their children, even though the courts would still, as parens patvriae, have the last word on custody and child support. Or the agreement might simply set forth rules of decision that mirror those of New York law, except where the parties might opt for a distinctly different path.

An agreement could provide that neither spouse would move to a state with a state DOMA without the written consent of the other spouse, or that, if they are residing in a state that will not grant divorces to same-sex couples, they will take certain specified steps to entitle them to invoke thea divorce jurisdiction of New York, or of another specified state that will adjudicate their divorce. It could also include an exchange of health-care proxies and durable powers of attorney, or specify financial devices that will be employed to ameliorate the effects of DOMA and other non-recognition statutes on one spouse or the other.

If the parties previously obtained a civil union, the agreement should specify whether the parties will dissolve or maintain the civil union, whose continuation may provide various advantages or disadvantages, if the applicable state law permits marriage and civil union to coexist. At the same time, same-sex married couples may want from a prenuptial agreement the same thing that heterosexual couples want: a roadmap to the future that suits them, protecting their interests in areas where they feel vulnerable or fear exploitation.

Conclusion

Advocates of marriage equality have made remarkable breakthroughs in recent years in the courts, in state legislatures and, most important, in public opinion. But, as this article shows, same-sex married couples must inform themselves about the myriad gaps in their legal rights and exercise due diligence in planning their lives together.

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1. DRL §10-A.

2. E.g., *Godfrey v. Spano*, 13 N.Y.3d 358 (2009) (upholding legality of directive by Westchester County Executive and State Civil Service Commissioner ordering recognition of out-of-state same-sex marriages legal where performed); *In re Estate of Ranftle*, 81 A.D.3d 566 (1st Dept. 2011) (affirming decision of Surrogate's Court holding that same-sex spouse of decedent pursuant to Canadian marriage was entitled to rights of spouse with respect to administration of the deceased spouse's estate); *Martinez v. County of Monroe*, 50 A.D.3d 189 (4th Dept. 2008) (ordering that community college grant spousal health-care benefits to employee's same-sex spouse based on Canadian marriage); *C.M. v. C.C.*, 21 Misc.3d 926 (Sup. Ct. N.Y. Co. 2008) (Supreme Court has jurisdiction to adjudicate divorce between same-sex spouses married in Massachusetts). See 2004 Ops. Atty. Gen. No. 2004-1, at 16 (3/3/04), concluding that, although the Domestic Relations Law did not authorize same-sex marriages in New York, "New York law presumptively requires that parties to such unions must be treated as spouses for purposes of New York law."

3. As an example of the state-law rights and duties linked to legal marriage, see "1324 Reasons for Marriage Equality in New York State," a compendium of the New York statutes conferring legal rights and imposing legal duties by virtue of marriage, compiled and published jointly by the Empire State Pride Agenda Foundation and the New York City Bar.

4. PL 104-199, Sept. 21, 1996, 110 Stat 2419.

5. 28 U.S.C.A. §1738C.

6. 1 U.S.C.A. §7.

7. In Mexico, same sex marriage is legal in some jurisdictions and not in others. At least 20 additional countries perform civil unions.

8. Other countries will recognize but will not perform same-sex marriages, such as Israel, Aruba and Curacao.

9. See 29 U.S.C.A. §1055(a).

10. 140 Wash. App. 770 (Ct. App. Div. 1 2007).

11. RCW 26.04.020(3), 26.04.030(1).

12. RCW 41.04.180.

13. *Leskovar*, 140 Wash. App. at 779.

14. M.C.L.A. Const. Art. 1, §25.

15. 274 Mich. App. 147 (Ct. App. 2007).

16. See *Massachusetts v. U.S. Dept. of Health and Human Services*, 698 F. Supp. 2d 234, 243 (D. Mass 2010).

17. As reported by the New York Law Journal on July 12, 2011, the constitutionality of that application of DOMA is presently being challenged in the Southern District of New York in *Windsor v. United States*, 10-cv-8435.

18. 42 U.S.C.A. §§402, 416(a)-(c), (f)-(g).

19. DRL §73. The statute confers legal parenthood in this manner on the "husband" of the inseminated woman, but the newly enacted DRL §10-A requires statutes relating to marriage to be read in a gender-neutral manner.

20. 14 N.Y.3d 576 (2010).

21. Many state DOMAs go beyond barring recognition of same-sex marriages performed under the law of other jurisdictions, and prohibit recognition of civil unions or other relationships that confer marriage-like benefits. See, e.g., Va. Const. Art. I, §15-A; Ohio Const. XV Sec. 11; Utah Const.. Art. I, § 29; Tex. Fam. Code Ann §6.204.

22. 49 Va. App. 88 (Ct. App. 2006).

23. 28 U.S.C. §1738A.

24. Va. Const. Art. I, §15-A.

25. The terms "biological mother" and "non-biological mother," used supra, are not adequate for the facts of this case, in which ova of one female spouse were fertilized in vitro with donated sperm and then implanted in the womb of the other female spouse, who carried the resulting embryo to term. The birth certificate issued by the New York City Department of Health and Mental Hygiene named only the birth mother as a parent.

26. *Adoption of Sebastian*, 25 Misc.3d 567, 587 (Surr. Ct. N.Y. Co. 2009).

27. 597 F.3d 697 (5th Cir. 2010), rev'd, 639 F.3d 146 (5th Cir. 2011) (en banc).

28. 11 So.3d 408, 410 (Fla. Dist. Ct. App. 2009) (citing §63.192, Fla. Stat.)

29. 326 S.W.3d 654 (Ct. App. 2010) (citing Tex. Fam. Code Ann. 6.204[b]-[c]).

30. Id. at 666.

31. Art. I, §IV. Par. I, Ga. Const.

32. DRL §236(B)(5)(d).

33. See 42 U.S.C.A. §402(b)-(c).

34. See 29 U.S.C.A. §§1161-63.

35. DRL §236(B)(6)(a)(6) (emphasis added).

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