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“As the Same-Sex Landscape Evolves”

By Arlene G. Dubin and Sheila Agnew

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The state of New York does not yet afford same-sex couples the right to enter marriage; it does, however, recognize their right to end their marriages in divorce if their marriages were valid in the jurisdictions in which they were performed. In order to serve an expanding client base, New York matrimonial lawyers must recognize the transient state of matrimonial law regarding same-sex couples and anticipate the changes that are likely to materialize.

New York does not permit same-sex marriages to be performed within its borders despite the state having one of the highest percentages of same-sex couples in the nation (approximately 46,500).¹ Recently, however, the executive, legislative and judicial branches of state government have made great strides towards marital equality.

A Status Report

While the text of New York's Domestic Relations Law (DRL) neither permits nor prohibits same-sex marriage, the courts have consistently defined "marriage" as the exclusive domain of a man and a woman.² In 2006, the Court of Appeals, in *Hernandez v. Robles*, upheld the constitutionality of the state's prohibition on same-sex marriage.³ Courts throughout the state, however, have consistently upheld the recognition of same-sex marriages that are legally performed out-of-state.

Martinez v. County of Monroe concerned a lesbian couple, validly married in Canada.⁴ Denied spousal healthcare benefits by her employer, plaintiff filed suit, claiming that the denial violated her rights under the Equal Protection Clause of New York's Constitution.⁵

The court explained that New York has recognized marriages solemnized outside of New for over a century with two exceptions:⁶ (1) they are prohibited by positive law (legislation); or (2) they are deemed offensive to natural law (contrary to the public sense of morality, typically involving either incest or polygamy).⁷ The *Martinez* court held that neither of those two exceptions applied.⁸

The court noted that *Hernandez* stated that same-sex marriage would be upheld if the Legislature passed an act permitting it.⁹ If the Legislature could permit same-sex marriage, the court reasoned that same-sex marriage therefore could not be contrary to public policy.¹⁰ The court held that the valid Canadian marriage was entitled to recognition under New York law and extended spousal healthcare benefits to the same-sex couple.¹¹

Since *Martinez* was decided in February of 2008, many lower courts have followed the holding that the recognition of same-sex marriage is constitutional and consistent with public policy.¹² Such cases dealt with issues of spousal benefits as well as divorce,¹³ custody¹⁴ and adoption.¹⁵ The New York Court of Appeals is scheduled to hear oral arguments in the fall of 2009 on two cases involving the recognition of same-sex marriages validly performed outside the state.¹⁶

In tandem with judicial progress towards marital equality, Governor Paterson has used his executive power to promote acceptance of same-sex marriage throughout New York.¹⁷ On May 14, 2008, the governor issued an executive directive requiring state agencies to revise all policies and regulations to include same-sex marriage under the umbrella of marriage.¹⁸ These changes affect approximately 1,300 statutes and regulations.¹⁹

As of the time of this writing, three states allow same-sex marriage: Massachusetts, Connecticut and Iowa. Additionally, Vermont and New Hampshire have passed legislation permitting same-sex marriage that will take effect in September 2009 and January 2010, respectively.²⁰

Although Maine also passed similar legislation, which was due to take effect on Sept. 12, 2009, an anti same-sex marriage coalition group announced it collected enough signatures to place the issue on the November 2009 ballot.

Seven countries permit same-sex marriage: the Netherlands, Belgium, Spain, Canada, South Africa, Norway and Sweden.²¹

More Recent Developments

On April 16, 2009, Governor Paterson introduced a bill to amend the DRL to allow same-sex couples to marry.²²

The bill mandates that all provisions of state law apply equally to same-sex marriages regardless of whether the laws use gender specific or gender neutral language.²³ Same-sex spouses would enjoy the same legal status and treatment under New York law as heterosexual couples on issues such as property ownership, inheritance, health care and insurance coverage.²⁴

As a result of recent turmoil within the state Senate, Governor Paterson has announced that he will delay his plan to force a vote on the bill until September 2009.²⁵

The same-sex marriage movement has gained a wide array of influential supporters, including esteemed poet Maya Angelou, actress Cynthia Nixon and former NFL commissioner Paul Tagliabue.²⁶ In June of this year, the New York State Bar Association publicly announced its new position supporting same-sex marriage legislation and urged legislators to do the same.²⁷

Along with recent legal developments, the NYSBA noted that there have been significant social changes that affected its decision to support the achievement of marital equality for same-sex couples.²⁸ A recent poll of New Yorkers, taken by Quinnipiac University, showed that opposition to same-sex marriage has decreased since 2004,²⁹ and the younger the voter, the more likely he or she is to support same-sex marriage.³⁰

In addition, in May 2009, the Office of the New York City Comptroller presented the economic argument in favor of same-sex marriage by issuing an economic analysis estimating a \$210 million increase in the state economy in the three years following the legalization of same-sex marriage.³¹

Impact on Matrimonial Bar

While the legitimization of same-sex marriage will affect most fields of law, it will have the greatest impact, of course, in the arena of matrimonial law.

During the short period in which California allowed same-sex marriage,³² nearly 18,000 gay and lesbian couples legally married.³³ As the number of marriages increases with the passage of legislation providing marital equality, so too will the demand for prenuptial and postnuptial agreements as well as divorces.

Currently, one way for same-sex couples to legally protect themselves and their assets in the event of death or dissolution of the relationship is through cohabitation agreements and estate planning. In the absence of those legal devices, cohabitants are generally viewed as strangers in the eyes of the law in the event their relationships end.

Generally New York does not confer rights based upon implied-in-facts contracts, and it is difficult for cohabitants to establish the specific elements necessary to qualify for equitable remedies such as quantum meruit, constructive trusts, unjust enrichment, partnership and joint venture.

Although cohabitation agreements may seem similar to prenuptial and postnuptial agreements, there are substantial differences.

First and foremost, prenuptial and postnuptial agreements override, clarify and/or modify the marital rights and obligations that would apply in the absence of such agreements. Cohabitation agreements, on the other hand, bring into being rights and obligations that would not otherwise exist.

Next, prenuptial/postnuptial agreements are governed by specific statutory requirements, and in particular by DRL §236(B)(3), whereas cohabitation agreements are governed by principles of contract law.

Finally, prenuptial agreements generally take effect upon marriage, and have no effect if the parties do not marry; cohabitation agreements generally take effect upon execution and terminate upon the breakdown of the relationship.

Various issues arise concerning same-sex couples that have entered into cohabitation agreements and completed their corresponding estate planning documents or are contemplating doing so. To the extent that such documents have been completed, matrimonial attorneys must ascertain the

effect such documents will have in the event the parties marry under the laws of another state or country and such marriage is recognized as valid in New York.

For example, what is the legal status of a couple married in Connecticut that returns to live in New York? How does that marriage affect any previously prepared cohabitation agreement or estate planning documents? Also, lawyers must analyze the effect of such pre-existing documents in the event that same-sex marriage becomes legal in New York, and the client decides to marry under New York law.

In order to adequately protect clients whose marital status may potentially change, lawyers should consider the looming possibility of legislative action and judicial developments when counseling and drafting cohabitation agreements and related documents. Clients may expect such agreements to do double duty as prenuptial/postnuptial agreements in the event they marry either out-of-state or in New York, if and when it becomes possible to marry here.

In drafting cohabitation agreements, lawyers may wish to follow the standards applicable to prenuptial agreements and include provisions referring to prospective marital rights and the parties' intent in the event that they can and choose to marry. The following is an example of an anticipatory clause:

The parties intend this Agreement to continue in full force and effect and apply in the event a marriage between the parties is recognized in New York, and the parties agree to take all such action as may be necessary, appropriate and/or expedient to accomplish such purpose. In such event, the parties agree to accept the provisions of this Agreement in full and complete discharge of any and every claim and/or right he/she may hereafter have against the other party for an equitable distribution of marital property and for spousal support, maintenance and/or alimony, and the parties waive any such claims and/or rights except to the extent set forth in this Agreement.

What Do the Feds Think?

Even where same-sex marriage is recognized at state level, federal law is a different mountain that so far has proved immovable. To help clients work through their current and future legal issues, attorneys must be aware of the disparate treatment by the federal and state governments of same-sex and heterosexual "spouses."

The federal Defense of Marriage Act (DOMA) defines marriage as between one man and one woman.³⁴ DOMA prohibits the U.S. government from recognizing same-sex marriage, regardless of state law. Furthermore, DOMA specifically permits states to deny full faith and credit recognition for valid, out-of-state same-sex marriage licenses if they so choose.³⁵

In 2004, the U.S. General Accounting Office issued a report identifying 1,138 federal statutory provisions classified in the U.S. Code in which marital status was a factor in determining the award of benefits, rights and privileges.³⁶ These range from Senate employee child care benefits³⁷ to deportable alien regulations.³⁸ Perhaps the most significant of these are the federal tax income benefits afforded to the holy grail of matrimony.³⁹

The federal marital deduction for gift and estate tax purposes is not available to same-sex couples.⁴⁰ Consequently, estate tax may be triggered on estates greater than the exemption amount. Property settlements and support payable at the termination of a relationship may constitute taxable gifts or income. Gain or loss may be recognized on the transfer of appreciated property at the termination of a relationship. Payments made by one partner for shared living expenses may constitute taxable gifts or income. Transfers into joint names may give rise to gift tax if the parties don't contribute equally. Health care coverage under an employer plan may be a taxable benefit.

It is unlikely that federal law will evolve as quickly as state law. During the presidential debates, President Barack Obama openly expressed his opposition to DOMA. He stated:

I support the complete repeal of the Defense of Marriage Act (DOMA)-a position I have held since before arriving in the U.S. Senate. While some say we should repeal only part of the law, I believe we should get rid of that statute altogether. Federal law should not discriminate in any way against gay and lesbian couples, which is precisely what DOMA does.⁴¹

Yet on June 11, 2009, the U.S. Department of Justice filed legal papers in support of DOMA⁴² in a case involving allegations that DOMA violated the Full Faith and Credit Clause, Due Process Clause and various constitutional rights, including the right of privacy and of free speech.⁴³ The Department of Justice, however, insists that the President is still very much opposed to DOMA,⁴⁴ but believes that the impetus for change in the area of same-sex marriage should come from the U.S. legislature, not the Oval Office.⁴⁵

While still faced with much resistance, the national movement advocating for the repeal of DOMA is spreading. For instance, the National Marriage Boycott, a student-driven movement, is urging people to boycott marriage until DOMA is repealed.⁴⁶ The time-honored method of peaceful protest kicks off with a march on Washington on Oct. 11 and 12, 2009.⁴⁷

Conclusion

Upon introducing the bill for recognition of same-sex marriage, Governor Paterson said, "The time has come to bring marriage equality to the state of New York."⁴⁸

At the very least, the time has come for practitioners to prepare to serve this new group of matrimonial clients.

Arlene G. Dubin, a partner and co-chair of the matrimonial and family law practice at Moses & Singer, is the author of *'Prenups for Lovers: A Romantic Guide to Prenuptial Agreements'* (Villard Books, 2001). **Sheila Agnew** is a senior associate at the firm. **Christina Gaudio**, a 2009 summer associate at Moses & Singer, assisted in the preparation of this article.

Endnotes:

¹ The Williams Institute, Census Snapshot, Appendix A; Counts and Percentages of Same-Sex Couples by State (December 2007), available at <http://www.law.ucla.edu/williamsinstitute/publications/USCensusSnapshot.pdf>.

² *Hernandez v. Robles*, 7 N.Y.3d 338, 357 (2006).

³ *Hernandez*, 7 N.Y.3d at 356.

⁴ *Martinez v. County of Monroe*, 50 A.D.3d 189, 191 (4th Dept. 2008).

⁵ *Id.*

⁶ *Id.* at 192-93.

⁷ *Id.*

⁸ *Id.* at 192.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Martinez*, *supra*.

¹² See, e.g., *Lewis v. N. Y. State Dept. of Civil Service*, 60 A.D.3d 216 (3d Dept. 2009); *C.M. v. c.c.*, 21 Misc. 3d 926 (Sup. Ct. N.Y. County 2008); *Beth R. v. Donna M.*, 19 Misc. 3d 724 (Sup. Ct. N.Y. County 2008); *In re Adoption of Sebastian*, 879 N.Y.S.2d 677 (Sur. Ct. N.Y. County 2009); *In re Donna S.*, 23 Misc.3d 338 (N.Y. Fam. Ct. 2009).

¹³ *C.M.*, 21 Misc. 3d at 927.

¹⁴ *Beth R.*, 19 Misc. 3d at 725.

¹⁵ *In re Adoption of Sebastian*, 879 N.Y.S.2d at 682; *In re Donna S.*, 23 Misc.3d at 339.

¹⁶ *Godfrey v. Spano*, 57 A.D.3d 941 (2d Dept. 2008), *Lewis*, 60 A.D.3d 216 (3d Dept. 2009).

¹⁷ Memorandum from Governor's Program Bill on an Act to Amend the Domestic Relations Law, in Relation to the Ability to Marry (April 9, 2009).

¹⁸ Jeremy W. Peters, "New York to Back Same-Sex Unions From Elsewhere," N.Y. Times, May 29, 2008.

¹⁹ Id.

²⁰ Freedom to Marry, <http://www.freedomtomarry.org/states.php>.

²¹ Id.

²² Press Release, Governor Paterson Announces Landmark Civil Rights Legislation; Marriage Equality Legislation Will End Legal Discrimination Against Same-sex Couples Bill Recognizes Fundamental Civil Rights of Marriage (April 16, 2009), available at http://www.ny.gov/governor/press/press_0416091.html.

²³ Id.

²⁴ Id.

²⁵ Danny Hakim, "With Senate Astir, Governor Will Delay Same-Sex Marriage Bill," N.Y. Times, July 11, 2009.

²⁶ Dan Amira, "Some New York Celebs Lobby for Gay Marriage in Secret," New York Magazine (May 25, 2009), available at http://nymag.com/daily/intel/2009/05/where_are_the_celebrities_on_g.html

²⁷ Jeff Storey, "State Bar 'Refines' Position on Same-sex Couples, Says Marriage Is the Only Possible Path to Equal ity," 241 NYU, col. 4 (2009).

²⁸ Id.

²⁹ John P. Wise, "New Yorkers Still Divided on Gay Marriage: Poll," NBC New York.com, May 14, 2009, available at <http://www.nbcnewyork.com/news/localjGay-Marriage-Poll-NewYorkers.html>.

³⁰ Id.

³¹ Press Release, The Office of the New York City Comptroller, Thompson: NYS Economy Would Gain \$210 Million After Legalization of Marriage for Same-sex Couples (May 26, 2009) available at http://www.comptroller.nyc.gov/press/2009_releases/pr09-05-131.shtm.

³² *In re Marriage Cases*, 43 Cal. 4th 757, 765 (2008); Bob Egelko, "Justices Seem to Be Leaning in Favor of Prop. 8," San Francisco Gate.com, March 6, 2009 available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/03/05/BALP169S2G.DTL>; *Strauss v. Horton*, 46 Cal. 4th 364, 500 (2009); Ed Hornick, "What's Next for the Same-sex Marriage Debate?" CNN.com, May 26, 2009, available at <http://www.cnn.com/2009/POLITICS/05/26/same.sex.states/index.html>.

³³ Id.

³⁴ Defense of Marriage Act, Public Law No. 104-199, 110 Stat. 2419 (1996) (passed 85-14 in the Senate and 342-67 in the House, signed into law by President William Clinton in 1996).

³⁵ *Id.*

³⁶ U.S. General Accounting Office, "Defense of Marriage Act: Update to Prior Report," GAO-04-353R (Jan. 23, 2004).

³⁷ Legislative Branch Appropriations Act of 1992, 2 U.S.c. §2063.

³⁸ Deportable Aliens Act, 8 U.S.c. §1227.

³⁹ Internal Revenue Code, §6013(a).

⁴⁰ Internal Revenue Code, §2056(a).

⁴¹ Presidential candidate Barack Obama, 2008 (all from http://www.huffingtonpost.com/patrick-sauer/an-interview-withalexis_b_212716.html).

⁴² Memorandum of Points and Authorities in Support of Defendant United States of America's Motion to Dismiss, Case 8:09-cv-00286-DOC-MLG, Document 25 (June 11, 2009).

⁴³ *Smelt v. United States*, NO. SACV09-00286 DOC (MLGx) (C.D.S.D. Aug. 3, 2003).

⁴⁴ "Obama Justice Department Defends Defense of Marriage Act-That Candidate Obama Opposed," ABCNews.com (June 12, 2009).

⁴⁵ *Id.*

⁴⁶ Patrick Sauer, "An Interview With Alexis Ortega, a Director of the National Marriage Boycott," The Huffington Post, June 29, 2009 available at http://www.huffingtonpost.com/patrick-sauer/an-interview-withalexis_b_212716.html.

⁴⁷ *Id.*

⁴⁸ Hornick, *supra* note 32.

Arlene Dubin and Sheila Agnew
New York, N.Y.

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