THE LGBT BAR ASSOCIATION OF GREATER NEW YORK

The Impact of Marriage Equality In New York

A CLE Program Presented by LeGaL

Nov. 1, 2011
6:00p.m. – 8:30p.m.
The LGBT Community Center (Manhattan)

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About LeGaL – The LGBT Bar Association of Greater New York

LeGaL was one of the nation's first bar associations of the lesbian, gay, bisexual, and transgender (LGBT) legal community and remains one of the largest and most active organizations of its kind in the country. Serving the New York metropolitan area, LeGaL is dedicated to promoting the expertise and advancement of LGBT legal professionals while serving the larger community.

Through the LeGaL Foundation, the organization publishes *Lesbian/Gay Law Notes*, the most comprehensive monthly publication summarizing legal developments affecting the LGBT community here and abroad, conducts a weekly walk-in pro bono clinic at Manhattan's LGBT Community Center serving hundreds of individuals each year and a monthly clinic on Long Island, sponsors the Dr. M.L. Hank Henry, Jr. Fund for Judicial Internships and, among its many other activities, runs the area's only career fair dedicated to first-year LGBT law students.

For more information on LeGaL, visit http://www.le-gal.org.

To contact our Attorney Referral Service, e-mail referral@le-gal.org.

CLE Certificates/Course Evaluations

CLE certificates will be provided to you ***via e-mail*** in connection with your attendance at this program. We hope to provide certificates within two weeks after the program is held and typically sooner. Please be sure that you have signed in and out of the program.

Please also take a moment to complete and return your course evaluation.

Thank you.

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November 1, 2011

A CLE presented by LeGaL – The LGBT Bar Association of Greater New York
(3.0 Credits: Areas of Professional Practice; Transitional/Non-Transitional)

AGENDA

I. Welcome/Introductions, 6:00 – 6:05

II. Overview of the Massachusetts Experience, 6:05 – 6:30
(Joyce Kauffman)

III. Estate Planning, Probate, Estate and Gift, Tax Filing, 6:30 – 6:55
(Erica Bell)

IV. Family Law, Parenting, Second Parent Adoptions, Blended Families Visitation, 6:55 – 7:20
(Carol Buell)

Break 7:20 - 7:25

V. Matrimonial - Pre & Post Nuptials, Support and Distribution of Assets, 7:25 – 7:50
(Eric Wrubel)

VI. Income Tax and Medicaid, 7:50 – 8:10
(Greg Matalon)

VII. Questions & Answers, 8:10 – 8:40

Faculty Bios

The Impact of Marriage Equality in New York -- November 1, 2011
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Erica Bell is a member of the firm of Weiss, Buell & Bell, concentrating in all aspects of estate planning, wills and trusts, and probate matters. She is a frequent lecturer on trusts and estates topics, especially issues pertaining to estate and financial planning for domestic partners, same-sex spouses, and non-traditional families, at the Bar Association of the City of New York, UJA-Federation New York Estate, Tax & Financial Planning Conference, Practising Law Institute, New York County Lawyers Association, American Institute of Certified Public Accountants, US Trust, and various charitable and community service organizations. She was co-counsel with Lambda Legal Defense and Education Fund before the Appellate Division, First Department in *Matter of H. Kenneth Ranftle*, 81 A.D.2d 566 (1st Dep't 2011), which affirmed the New York County Surrogate Court's holding that the surviving spouse in a valid Canadian same sex marriage was the sole distributee of his deceased partner.

Ms. Bell is a 1983 graduate of the Fordham University School of Law. Before joining Weiss, Buell & Bell, Ms. Bell was an associate at the firms of Willkie Farr & Gallagher and Stillman, Friedman & Shaw, and served as law clerk to Hon. Inzer B. Wyatt in the Southern District of New York.

Ms. Bell has served on the Committee on Trusts, Estates and Surrogates Courts at the Association of the Bar of the City of New York and is a member of the New York Women's Bar Association (Former Co-Chair, Trusts and Estates Committee); New York State Bar Association; American Bar Association; LeGaL – The LGBT Bar Association of Greater New York; and the Fordham Law Review Alumni Association.

Carol L. Buell has been in private practice in New York City since 1985. She is a partner in the law firm of Weiss, Buell & Bell. Carol specializes in non-traditional family law, assisting clients with second-parent adoptions, re-adoptions, agreements regarding donors, co-parents and domestic partnerships. She also specializes in estate planning and real estate law, representing individuals in the sale or purchase of cooperative and condominium apartments, and homes. She is a founding member of the LGBTQ Collaborative Professionals of New York City, a group of attorneys, mental health professionals and financial advisers committed to the structured processes and principles of collaborative practice, and is dedicated to serving the LGBTQ community in the New York City area. She has also received an intensive mediation training through The Center for Understanding in Conflict & The Center for Mediation in Law.

As the number of same sex New York couples who marry has grown elsewhere, and now that marriage equality is a reality in New York State, the need for counsel in preparing prenuptial and postnuptial agreements, as well as alternative methods of assisting LGBTQ families with custody, support and visitation issues for non-intact families becomes critically important. Carol's practice has evolved in order to assist her clients in this area as well.

Carol is a honored to serve on the National Center for Lesbian Rights' National Family Law Advisory Council, and is former member of the *Association of the Bar's Committee on Lesbians and Gay Men in the Legal Profession*, and has served on various boards of directors in the LBGT community, including *S.A.G.E.*, (1980's) and *Lambda Legal Defense & Education Fund, Inc*., (1986-1992) three of six years as the co-chair of the Board of Directors. Carol has also been a lecturer at other CLE programs including *New York County Lawyers Association*, *New York State Bar Association*, *and NYS Judicial Training Panel on Non-Traditional Family Law*, and is

the author of *"Legal Issues Affecting Alternative Families": A Therapist's Primer, appearing in the Journal of Gay and Lesbian Psychotherapy, 2001 Edition*.

Carol is a 1980 graduate of Brooklyn Law School. She resides in Brooklyn, New York with her spouse and life partner of twenty-nine years, Olivia Hicks, and their eleven year old daughter, Helen.

Joyce Kauffman is a 1992 graduate of Northeastern University School of Law and a 1981 graduate of Lesley University, with a Master's degree in Counseling Psychology. She is a trained Mediator and Collaborative Lawyer. Her practice focuses exclusively on family law, with an emphasis on issues impacting the LGBT community. On brief in *Adoption of Tammy*, the Massachusetts case that secured the right for same-sex couples to adopt, Attorney Kauffman also represented the first lesbian couple in Massachusetts to obtain a birth certificate without benefit of adoption upon the birth of their child, conceived through IVF using the eggs of one of the women but born to the other woman. She has represented a number of families who have successfully obtained three-parent adoptions; since *Goodridge*, and the beginning of same-sex marriage in Massachusetts, Attorney Kauffman has represented a number of individuals in same-sex divorces as well as in the preparation of prenuptial agreements.

Attorney Kauffman is privileged to have been a member of the National Family Law Advisory Council of the National Center for Lesbian Rights since its inception, former co-chair of the Massachusetts LGBTQ Bar Association and former chair of that organization's Family Law Section; and a member of the Emeritus Board of Directors of Family Equality, a national organization advocating for the rights of LGBT families. Attorney Kauffman speaks frequently at continuing legal education seminars, conferences, community organizations, and universities and has published a number of articles concerning the legal rights of LGBT families. She appeared on the Tucker Carlson show in 2008 after Catholic Charities in Massachusetts closed their adoption program rather than place children in LGBT families. She is the recipient of the Gwen Bloomingdale Pioneer Spirit Award, Massachusetts Lesbian and Gay Bar Association, 2007; the Fisher Davenport Award, Family Pride Coalition and COLAGE, 2004; and the Barney Frank Award, Massachusetts School of Law, 2003. Attorney Kauffman has been selected for inclusion in New England's Super Lawyers each year since 2008 and was selected by Massachusetts Lawyers Weekly as one of the Lawyers of the Year in 2009.

Gregory L. Matalon is a partner in the law firm of Capell Barnett Matalon & Schoenfeld LLP. Gregory's practice areas include estate planning, estate administration, Medicaid planning, tax law, the Not-For-Profit Corporation Law and the Religious Corporations Law. Greg's legal activities have included the representation of numerous families who lost loved ones on September 11, 2001, and his involvement in establishing one of the largest 9/11 charities - Lutheran Disaster Response of New York. He is a member of the NYSBA and was the appointed liaison to the Tax Law Section. In addition, he was granted a seat on the House of Delegates, the policy-making body of the NYSBA.

Greg is also a member of LeGaL - The LGBT Bar Association of Greater New York, where he serves as Vice Chair of the Solo Practitioner and Small Firm Committee, the Nassau County Bar Association, the Board of Trustees of the Kew-Forest School, where he serves as Vice Chair and the Lutheran Schools Association, where he serves on the Board of Directors. Most recently, he was selected to serve on the 2011 Supreme Court Independent Judicial Screening Panel.

Gregory continues to share his practice area knowledge by lecturing for various bar associations, certified public accountant groups and community organizations. He has authored numerous

articles for various professional journals. He is a graduate of Skidmore College and Hofstra University School of Law.

Eric Wrubel is a Partner with McLaughlin & Stern, LLP and has fifteen years of experience in family and matrimonial law as well as significant experience navigating the consummation and dissolution of gay and lesbian relationships.

Mr. Wrubel is a magna cum laude graduate of Brandeis University and a cum laude graduate of Brooklyn Law School. He is a member of Phi Beta Kappa and is a Fellow of the American Academy of Matrimonial Lawyers. He was recently rated by his peers as BV through Martindale.

Mr. Wrubel has been a member of the Matrimonial Law Committee of the Association of the Bar of the City of New York and served as Chairman of the Same Sex Marriage Sub-Committee. He was a member of the Lesbian, Gay, Bi-Sexual and Transgender Committee of the Association and has been a member of the Family Law Section of New York State Bar Association and the Matrimonial Law Committee of the New York County Lawyers Association. He is a delegate to Interdisciplinary Committee on Financial matters of the American Academy of matrimonial Lawyers.

Mr. Wrubel has lectured on numerous issues relating to finances in matrimonial cases, as well as legal problems stemming from gay and lesbian unions. He has written several articles for publication on matrimonial laws issues as well as those relating to gay and lesbian relationships.

The issues emerging around contracts, financial and property protections and dissolutions for gay and lesbian relationships are numerous. As a leading advocate for same-sex marriage with years of experience in family and matrimonial law, Mr. Wrubel is well-suited to provide counsel and ensure safeguards for parties seeking assistance in these areas.

He was also been named in *The Best Lawyers in America* since 2010.

IMPACT OF MARRIAGE EQUALITY ACT ON ESTATE PLANNING AND PROBATE MATTERS FOR SAME-SEX SPOUSES AND NON-TRADITIONAL FAMILIES

Erica Bell, Esq.
Weiss, Buell & Bell

Marriage Recognition versus Marriage Equality

The Marriage Equality Act, which became effective on July 24, 2011, provides that not only may same sex couples now legally marry in the State of New York, but that all New York laws and all state government agencies must give full recognition to same sex spouses, including those married elsewhere, on the same footing as opposite sex spouses. *See* N.Y. DOM. REL. LAW § 10-a. ("When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law.")

Even before the Marriage Equality Act was passed, extensive New York case law had already established that valid marriages between same sex couples performed in other jurisdictions are recognized under the laws of New York. The earliest cases, ***Godfrey v. Spano***, 13 N.Y.3d 358, 892 N.Y.S.2d 272 (2009); and ***Funderburke v. New York State Department of Civil Service***, 49 A.D.3d 809, 854 N.Y.S.2d 466 (N.Y. App. Div. 2nd Dep't. 2008), were premised on the application of Governor Patterson's 2008 Executive Order directing all state agencies and held that spousal employment benefits must be extended to same sex spouses of state employees. The Fourt Department decision in ***Martinez v. County of Monroe***, 50 A.D.3d 189, 850 N.Y.S.2d 740 (N.Y. App. Div. 4th Dep't. 2008) went further by relying on New York's long established common law doctrind of mariage recognition, but still addressed spousal employments of a state employee. Common law marriage recognition was then applied in ***Matter of the Estate of H. Kenneth Ranftle,*** *NYLJ* 2/3/2009, p. 27, col. 1 (N.Y. Co. Sur. Ct. 2009), *aff'd,* ***In re Estate of Ranftle***, 81 A.D.3d 566, 917 N.Y.S.2d 195 (N.Y. App. Div. 1st Dep't. 2011) to determine that a same sex spouse of a deceased person was the decedent's legal next of kin ("distributee"), which meant that the decedent's surviving siblings had no standing to participate in the probate proceeding. From these cases, it was fairly evident that marriage recognition would extend to all situations within the purview of common law interpretation, including intestate succession.

However, many marital rights and protections are created by state statutes that are not amenable to reinterpretation based solely on marriage recognition principles. The hard fought precedents establishing marriage recognition addressed matters of state executive authority or common law only, and did not have the force to change certain statutory provisions.

The most notable area *not* reached by marriage recognition alone was New York's tax laws, which were drafted in a manner that recognized only those deductions and statuses that would be recognized under the Internal Revenue Code. Since federal law, under DOMA, prohibits recognition of same sex marriages, the New York tax laws until now have not permitted same sex spouses to take the state estate tax exemption for assets inherited by a surviving same sex spouse, which has been in some ways even more burdensome to same sex surviving spouses than DOMA, because of New York's relatively low estate tax threshold (the New York estate tax applies to all amounts above the first $1 Million, as compared with the current federal estate tax exemption for the first $5 Million.) However, on July 29, 2011, the New York State Department of Taxation issued a series of technical memoranda which clarify all the changes in the tax laws arising from passage of the Marriage Equality Act, specifically including estate tax. *See* New York State Department of Taxation TSB-M-11(8)C, *et sec*.

Effect of the Marriage Equality Act on Estate Planning for Married Same Sex Couples

Inheritance and Probate Matters –

Kinship – Recognition as a deceased spouse's "legal heir" (called "distributee" under New York law). The recognition of spousal status has enormous significance in matters pertaining to decedents' estates: the right to serve as administrator of the estate, determination of the persons who do and do not have standing as necessary parties to a probate or administration proceeding, the entitlement to share in a decedent's estate are all determined first and foremost by marital status. If the decedent has no issue, the surviving spouse is the sole distributee. E.P.T.L§ 4-1.1(a) (1) and (2).

Intestate share – In the absence of a Will, a surviving spouse is entitled to 100% of deceased spouse's estate if the deceased spouse has no children **or** $50,000 + 50% of the remainder of the estate above that amount if the deceased does have children. E.P.T.L§ 4-1.1(a) (1) and (2). This was presumptively true even under common law marriage recognition, based on the *Ranftle* case (*supra*), but there was no reported case specifically holding so. However, under the Marriage Equality Act, there is no doubt that a same sex surviving spouse would be entitled to the same intestate share as any other spouse in New York.

Priority for Appointment as Administrator – Absent a Will that validly designates an Executor, the Surrogate's Court will appoint an Administrator to handle a decedent's estate. As with intestate succession, the law lays out the order of priority for appointment of an Administrator of an estate: First priority goes to the surviving spouse. Next, the adult children of the deceased have co-equal rights to serve, then the decedent's parents, and so on.

Right of Election – Regardless of the provisions of a deceased spouse's Will and/or testamentary substitutes, a surviving spouse has a right to receive an amount equal to the greater of $50,000 or One Third of the net capital value of the deceased spouse's estate. E.P.T.L. § 5-1.1-A. This "right of election" (i.e., the right to elect to set aside the terms of the decedent's Will and/or testamentary substitutes to the extent they would result in the surviving spouse receiving less than

the elective share) can be voluntarily waived but it cannot be defeated unilaterally by the other spouse. This right, which exists in some form in all states, is a recognition that spouses form an economic unit and that it would be contrary to public policy to allow one spouse to leave the other impoverished.

Practice Note: Although marriage is a status whose recognition is a matter of law, it is recommended that for same sex married couples there be a recitation in their Wills of the date, location and applicable law governing the marriage. This may help avoid any need to produce a copy of the marriage certificate in the event of the death of a spouse. An example of a typical provisions is as follows:

> JOHN DOE and I have been domestic partners, as that term is commonly understood under New York law and practice for XX years, and we entered into a Civil Marriage in New York City on September 21, 2011, which under the laws of the State of New York qualifies each of us as the spouse of the other. Accordingly, any reference in this Will to JOHN DOE, shall be deemed to refer to him as my spouse for all purposes or circumstances with respect to which such status is legally recognized and is relevant, and as my domestic partner for all purposes or circumstances with respect to which said status is not legally recognized.

Practice Note: Prior Wills – Marriage does *not* automatically revoke pre-marriage Wills or bequests. E.P.T.L. § 5-1.3. The new spouse will have the Right of Election to overcome provisions in a pre-marriage Will that would provide less than the elective share, but dispositions to others that are in excess of the elective share would still be effective. Accordingly, it is very important for couples contemplating marriage (or who have married since the last time one or both executed a Will) to review and update their Wills and beneficiary designations.

Practice Note: Revocatory Effect of Divorce – Divorce, annulment, legal separation or other dissolution of the marriage *will* have the effect of automatically revoking bequests and other dispositions in favor of a spouse. E.P.T.L. § 5-1.4. But it would be very unwise to rely on that alone. In the event of dissolution or legal separation, the parties should specifically update their Wills and beneficiary designations to make them consistent with the change in the relationship and its legal status.

Estate and Gift Tax –

Unlimited Marital Deduction – Recognition of unlimited spousal deduction on New York State estate tax returns for married persons who die on or after July 24, 2011. For estates that exceed the federal threshold of $5 Million, this will require that the Executor file a federal Form 706 as if the deceased spouse were single and then a "dummy" Form 706 to attach to the New York ET-706 reflecting that the decedent was married and taking the marital deduction on assets passing to the surviving spouse.

Practice Note: In light of the possibility that DOMA may be overturned on constitutional grounds, protective claims should be filed by the estates of deceased same sex spouses for refunds of federal estate taxes paid because of the unavailability of the marital deduction at the time of filing. However, since the Marriage Equality Act clearly establishes that it is effective only with respect to decedents who were married and who died on or after July 24, 2011, there is no retroactive claim for New York estate tax paid by surviving same sex spouses of decedents who died prior to that date.

Credit Shelter and QTIP Trusts – On its face, New York's reinterpreted estate tax laws will recognize the use of credit shelter and QTIP trusts for the benefit of a surviving same sex spouse. But, for couples with assets in excess of the federal exclusion amount (currently $5 million), these tax-saving devices will not be effective to reduce federal estate or gift tax. Furthermore, the widely used mechanism of the so-called Disclaimer Credit Shelter Trust (whereby the surviving spouse determines the funding of the credit shelter trust by disclaiming assets otherwise directly bequeathed to the surviving spouse) may run into an obstacle because it is essentially a product of federal tax law. It is therefore recommended that any tax saving trust provision for the surviving spouse be drafted to give the Executor full discretion to determine whether the Trust will be deemed a credit shelter trust of a QTIP trust. (Reminder: The important difference between a credit shelter trust and a QTIP trust is that assets passing through a credit shelter trust will ultimately pass to the remainder beneficiaries free of any estate tax while assets passing through a QTIP trust will be taxable in the estate of the second-to-die trust.)

Practice Note: It is recommended that Wills with tax saving trusts for surviving same sex spouses give the Executor maximum flexibility to make the QTIP election to at least defer estate tax on the trust assets if it is determined that full tax avoidance cannot be accomplished. Sample wording: "My Executors shall have full discretion to determine whether to make a qualified terminable interest election under IRC § 2056(b)(7) and/or applicable state law. I intend my estate to take maximum advantage of the available marital deduction under applicable state and federal law, to the extent that is consistent with my Executors' best judgment of the overall effect on my estate and that of my spouse. All decisions of my Executors in the exercise of this discretion shall be binding upon all persons interested in my estate, and all provisions of this Will shall be interpreted and construed in a manner consistent with the discretion conferred herein."

Estate Tax Apportionment – The standard tax allocation provision in Wills for married persons typically states that no estate tax may be paid out of assets that qualify for the marital deduction. However, the current disconnect between New York and federal estate tax laws may require that there be an exception made for federal estate imposed on assets passing to a surviving same sex spouse, and this should be made explicit in the tax apportionment clause in the Will.

Gifts – Unlike the federal government, the State of New York does not impose any form of tax on lifetime gifts. However, lifetime gifts will be counted toward reducing an individual's federal exemption from federal estate and gift tax. At present, the disparity between the New York estate exemption ($1 Million) and the federal estate and gift tax exemption ($5 Million), may offer an opportunity to couples with larger estates, where the wealth is unequally distributed between them, to shift assets via gifting from the wealthier partner or spouse to the less wealthy one. This can result

in creating two tax exempt estates of less than $5 Million each. (The amounts between the first $1 Million and $5 Million could then pass tax free from the wealthier spouse to the less wealthy spouse under the New York marital deduction.) However, there is no guarantee that the federal exemption will remain at its present level. The current law is set to expire after 2012 so couples wishing to take advantage of the opportunity are well advised to act before the end of next year.

Retirement Benefits –

An opposite-sex spouse can roll over a 401(k) or IRA account belonging to a deceased spouse into his or her own retirement account, without being subject to yearly required minimum distributions until they begin drawing down on their own account. Due to the federal DOMA definition of spouse, same sex spouses do not have the same option. Accordingly, at best, a surviving same sex spouse can benefit, in the same manner as any other beneficiary, from two provisions of the 2006 Federal Pension Protection Act:

Section 829, which allows any designated beneficiary of any defined *contribution* plan (401(k), IRA, or other plan to which the owner contributes tax deferred funds)to elect to take withdrawals over the beneficiary's own life expectancy, thereby maintaining a substantial portion of the income tax deferral for a significant period.

Section 826, which allows "hardship withdrawals", without early withdrawal penalty, for the benefit of the designated beneficiary of a defined contribution retirement plan. Previously such withdrawals were permitted only to meet the medical or other urgent expenses of the account holder, or the account holder's federally recognized spouse or dependent child. Such withdrawals are still subject to ordinary income taxes however.

Because DOMA prevents same sex spouses from claiming a deceased spouse's Social Security or defined benefit pensions (i.e. Employer funded pension benefits governed by ERISA laws), it is still necessary to plan for replacement of the lost income of a deceased spouse through life insurance or a focused program of savings for that purpose.

Medical Decision Making –

Recognition of first priority next of kin for purposes of access to patient and making medical decisions in case of incapacity if there is no Health Care Proxy in place. However, it is still vitally important to have a properly executed Health Care Proxy in place rather than relying on statutory priority.

Note: This right had already been extended to domestic partners under the Family Health Care Decisions Act, N.Y. Public Health Law § 2993(d) (2011), enacted in 2010, which gave domestic partner's the same level of priority as spouses to make medical decisions for an incapacitated partner/spouse. (Legally, a domestic partnership can and often does exist in the absence of any form of registration, but the lack of readily ascertainable registration creates a burden of proof on the partner claiming domestic partnership, which can be extremely problematic in an emergency situation.)

Right to Control Disposition of Spouse's Remains –

First priority as to funeral arrangements, consent to autopsy, anatomical donations, and so forth. NY Public Health Law § 4201. But, again, it is far preferable to have a specific written authorization to make arrangements for disposition of remains.

Note: This right was extended to domestic partners under NY Public Health Law § 4201(c) in 2008. Domestic partners are given the same priority to control a deceased partner's remains as a spouse. However, proof of domestic partnership is not always readily obtainable if the couple is not registered as domestic partners with the applicable city or county authority. (As noted above, legally, a domestic partnership can and often does exist in the absence of any form of registration, but the lack of readily ascertainable registration creates a burden of proof on the partner claiming domestic partnership, which can be extremely problematic in an emergency situation. Funeral homes have ready access to the New York City domestic partnership registration records, and to marriage records, but may be hesitant to accept any other form of evidence of domestic partnership.)

Divorce –

As will be discussed in more detail elsewhere in this program, one of the major pitfalls of marriage between same sex partners is that the many states that have mini-DOMA laws will not recognize the marriage for any purpose, including divorce. One area of potential difficulty is that non-resident couples who marry in New York and resident couples who later relocate to non-recognition states may not be able to obtain divorces in the event they later wish to dissolve the relationship. This could result in a long separated but not legally divorced surviving spouse retaining certain inheritance rights in New York (and if the deceased spouse died owning real property or other assets deemed to have a New York situs, those rights could be significant.)

Spousal Claims Against Third Parties –

Wrongful Death – A surviving spouse can sue for the wrongful death of his or her spouse E.P.T.L. § 5-4.1. Again, this recognizes that spouses are economically interdependent and that the death of one spouse causes an economic injury to the surviving spouse (as well as to the other distributees of the decedent, such a dependent children.)

In contrast, a party to a Vermont Civil Union cannot recover for the wrongful death of his or her partner, even though a Vermont civil union is purported to carry all the same rights as marriage and the partners were clearly economically interdependent so that the surviving partner was economically injured by the wrongful death of the other. *Langan v. St. Vincent's Hospital*, 25 A.D.3d 90, 802 N.Y.S.2d 476 (2nd Dept. 2006), *app. dismissed*, 6 N.Y.3d 890, 817 N.Y.S.2d 625 (2006).

Worker's Compensation - A spouse may make a claim under Workers Compensation for injury to spouse which causes economic loss (such as loss of household income) or other damage to the uninjured spouse.

Property Ownership –

Same sex spouses can hold title to New York real estate as "tenants by the entirety", a special form of joint ownership with rights of survivorship that is limited to married couples. Ownership in that form of title provides enhanced protections against creditors, especially in the event of the death of one of the spouses. In theory, this form of property ownership had already become possible as a result of common law marriage recognition. However, many title companies expressed hesitancy about insuring title in that form based on marriage recognition alone. That obstacle should no longer exist.

Domicile –

For opposite sex married couples, the question of domicile is rarely significant as the laws of most states are essentially similar with respect to marital rights in estates (although there is s significant difference between states that apply community property laws, such as California, and those that do not, including New York State.) However, since so many states have mini-DOMA laws that preclude recognition of same sex marriages, the question of a decedent's domicile at time of death may have great significance.

Precisely this issue was recently raised in another Surrogate's Court decision concerning the Estate of H. Kenneth Ranftle, *Matter of Application of Ronald J. Ranftle a person interested in the Estate of H. Kenneth Ranftle*, New York County Surrogate's Court File No. 2008-4585 ("*Ranftle II*") a copy of which is attached. In *Ranftle II,* a surviving sibling of the decedent sought to overcome the First Department's clear holding that the Canadian marriage of Ken Ranftle and Craig Leiby must be given full recognition, by claiming that Ken Ranftle was not domiciled in New York, but in Florida, at the time of his death and that Florida's mini-DOMA statute and state constitutional amendment prohibiting recognition of same sex marriages was therefore the applicable law to determine the marital status of the decedent. Surrogate Glen, in a beautifully written decision, held that the surviving spouse had met the burden of proving by clear and convincing evidence that Ken Ranftle had indeed changed his domicile from Florida back to New York prior to his death. *In the Matter of Ranftle*, 2008-4585, N.Y.L.J. 1202515287643 at 1 (Surr. N.Y. Decided September 14, 2011. However, a Notice of Appeal has been served, and it is possible (though not likely, given the compelling facts of the case) that the Surrogate's Court decision could be overturned.

Practice Note: Since domicile is a technical legal issue that is rarely given much thought by non-lawyers, drafters of Wills and other legal documents for same sex spouses are strongly advised to educate their clients about these issues and the need to clearly document any change of domicile from a mini-DOMA state to New York or any other state that confers or recognizes same sex marriages. Even if the Surrogate's Court decision in *Ranftle II* is affirmed on appeal, that will not preclude other challenges to domicile on the basis of other fact patterns.

Practice Note: It is highly advisable to recite in the Will that, regardless of residence or domicile at time of death, the testator directs that New York law is to be applied and that probate is to take place in New York State. S.C.P.A. § 206 and E.P.T.L. § 3-5.1.

Out-of State Property –

Many couples who are unquestionably domiciled in New York State own real property in other states. Transfers of real property are governed by the law of the jurisdiction where the property is located. Accordingly, given the number of states that have some form of prohibition against recognition of marriages between same sex couples, there is a high probability that out of state property will not qualify for a state level marital deduction or otherwise benefit from any of the protections afforded to a surviving spouse. The estate plan must, therefore, take into account the potential for estate or inheritance tax on such property, as well as the potential requirement of ancillary probate in which family members other than the surviving spouse (and the decedent's children) may have standing as legal heirs and, hence, an opportunity to challenge the Will or the disposition of the property.

Practice Note: The simplest expedient is for the couple to own all out of state real property as joint tenants with rights of survivorship. That will avoid the need for ancillary probate on the death of the first spouse, but it will not protect against local estate or inheritances taxes and will not avoid ancillary probate in the estate of the second-to-die spouse. Far more effective is to place out of state real property in a revocable trust, to obviate any need for ancillary probate and ensure the maximum application of New York law. Better yet is to transfer ownership of the property to an LLC or other business entity, with the spouses as members or stockholders, so that the real property is effectively converted to personalty and fully under the jurisdiction and law of New York State, including the New York marital deduction.

What Has Not Changed

Obviously, the benefits and protections offered to same sex spouses under the Marriage Equality Act are important and valuable. However, unless and until DOMA is repealed, both as to matters of federal law and as to the exemption of states from the requirement of giving full faith and credit to same sex marriages, nothing will really change in the way we do our estate planning for our same sex clients. Proper estate planning will continue to be the most important way to protect couples, married or not, in the event of the death of one of them and in emergency situations such as illness and disability, and we will still need to plan to address the lost of a deceased spouse's Social Security benefits and qualified pension benefits and for the possibility that federal or out-of-state estate tax may be owed. That said, perhaps one of the greatest boons of the Marriage Equality Act is that couples of limited means, who might not be able to afford to have Wills and other legal documents prepared for them, can, for the first time, protect one another to a significant extent for the cost of a marriage license.

Useful Resources:

New York State Department of Taxation, Marriage Equality Act: TSB-M-11(8)C, TSB-M-11(8)I, TSB-M-11(7)M, TSB-M-11(1)MCTMT, TSB-M-11(1)R, TSB-M-11(12)S.

New York State Bar Association: "New York Marriage Equality – Frequently Asked Questions",

published July 18, 2011. www.nysba.org and www.nysba.org/LGBTCommittee.

Lambda Legal website: www.lambdalegal.org (FAQs on same sex marriage in New York)

Freedom to Marry website: www.freedomtomarry.org

New York Times: http://bucks.blogs.nytimes.com/2011/06/24/how-gay-marriage-will-change-couples-financial-lives

THE IMPACT OF MARRIAGE EQUALITY IN NEW YORK:
FAMILY LAW, PARENTING, SECOND PARENT ADOPTIONS, BLENDED FAMILIES MEDIATION AND COLLABORATIVE LAW

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The LGBT Bar Association of Greater New York CLE on Tuesday, November 1, 2011

With the stroke of Governor Cuomo's pen, the lives of the children of LGBTQ people just got either easier or more difficult. For children born to or adopted by LGBT parents prior to the passage of Marriage Equality, their financial security may be dependant upon whether their parents had the wherewithal and foresight to travel outside of the state of New York to marry prior to their birth or adoption, and whether they had sufficient assets to complete an adoption. For children born to or adopted by parents after its passage, it will be important for biological parents to marry their partners and consent to second parent adoptions in order to fully protect their children. Many look at Marriage Equality as progress. But some are concerned that our pursuit of marriage equality leaves some of our families and the children born or adopted into these families, vulnerable and unequal in the eyes of the law. The purpose of this outline is to review the most important cases, trends, issues, facing LGBTQ families, how marriage equality helps shore up families while at the same time making other kinds of alternative families less safe and secure.

I. How Marriage Protects Children

A. Presumption of Legitimacy of a child born during a marriage

(1) "The [common law rebuttable] presumption that a child born to a marriage is the legitimate child of both parents 'is one of the strongest and most persuasive known to the law'." Laura WW v Peter WW, 51 AD3d 211, 216 (Third Dept 2008), citations omitted. Here, the Husband was deemed legal parent of child born to wife by anonymous donor insemination (ADI), where written consent requirements of DRL 73 (see below) were not met. Court imposed rebuttable presumption of consent to ADI, thereby creating common law presumption of legitimacy for children conceived through ADI, and shifting burden to husband to demonstrate lack of consent by clear and convincing evidence.

(2) See also In re Adoption of Sebastian, supra., 25 Misc. 3d 567 , finding that child of a lesbian married couple has recognized and protected child/parent relationship with both mothers (gestational and genetic).

(3) "The strength of the presumption derives from 'an aversion to declaring illegitimate . . . thereby depriving them of rights of inheritance and succession . . And likely making them wards of the state'." Debra H, supra ., 14 NY3d 576, 611 (concurring opinion of Judge Smith at page 5), citing Michael H. V. Gerald D., 491 US 110, 125 (1989)

(4) See also, State ex rel H v. P, 90 AD2d 434 (1st Dept 1982) in which the Court held that the wife was estopped from contesting husband's parentage of child born during marriage based on presumption of legitimacy. Husband's sterility did not disturb presumption where Wife had attempted to get pregnant though ADI, with husband's consent, but Wife now claimed that she conceived as a result of an affair with an unnamed man.

B. There is a statutory presumption that a child born before or during a marriage is the child of both spouses. DRL 24, and FCA 417.

(1) It is an evidentiary rebuttable presumption, that may be rebutted by clear and convincing evidence, such as a paternity test. Thus, statute is not helpful where parenthood is contested. See e.g. Crane v. Crane, 81 AD2d 1033 (4th Dept 1981), *lv to appeal den*, 54 NY2d 609.

(2) However, the doctrine of equitable estoppel may be applied to preclude paternity testing if determined to be in the best interest of the child born to a married woman.

The court, on its own motion or motion of any party, when paternity is contested, shall order the mother, the child and the alleged father to submit to one or more genetic marker or DNA marker tests of a type generally acknowledged as reliable by an accreditation body designated by the secretary of the federal department of health and human services and performed by a laboratory approved by such an accreditation body and by the commissioner of health or by a duly qualified physician to aid in the determination of whether the alleged father is or is not the father of the child. *No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel or the presumption of legitimacy of a child born to a married woman.*

FCA 418, emphasis added.

(a) FCA 418 applies to support proceedings. FCA 532, and 516-a, applying to paternity proceedings, contain identical language. There is no similar statutory provision pertaining to custody proceedings.

(3) "Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband [sic], shall be deemed the legitimate, birth child of the husband [sic] and his [sic] wife for all purposes". DRL 73 [1]

(a) See Laura WW, supra., 51 AD3d 217, creating common law presumption that spouse consented to ADI occurring during intact marriage

(b) See also, Beth R. V. Donna M., 19 Misc.3d 724 (Sup Ct., NY County, 2008) in which court implies that child born via ADI during same sex marriage "may require finding that she is the legitimate child of both parents". (In this divorce action, where parties were married in Canada, court prevented by estoppel the birth mother from denying that her former spouse was a parent, ruling that policy concerns for the welfare of the child demanded that married parents be unable to reject their own parental status and its accompanying responsibilities. This argument was rejected in Debra H, supra. , affirming Alison D, supra.)

C. There must be a marriage for presumption to apply.

See e.g., KB v. JR, 887 NYS2d 516 (Sup Ct., Kings Co 10/14/09). In this Integrated domestic violence court case, Petitioner, a female to male transgendered person, married Respondent female in 1998 after undergoing gender reconciliation steps. Child was born during the marriage after both parties consented to Artificial insemination. Respondent left Petitioner, alleging he was physically abusive to her, leaving the then approx. 6 yo child with him. Petitioner filed for custody, Respondent cross petitioned for custody and filed a family offense proceeding. Child remained with Petitioner throughout duration of proceedings, and upon evidence of Respondent's unfitness. Respondent filed a matrimonial proceeding during the pendency of the family court proceedings, which resulted in a declaratory judgment issued on consent adjudging the marriage to be void. (One might question why Petitioner consented to this during pendency of custody proceeding) Then, Respondent alleged amongst other things that since marriage was void because Petitioner was "really a woman", Petitioner had no standing in custody proceeding. Court held that, based on totality of circumstances, Petitioner sustained his burden of proof of extraordinary circumstances to proceed with hearing on best interests of child. Court also held that Respondent is equitably estopped from challenging his standing to seek custody. Court considered that Petitioner was legal parent at time of child's birth as factor in totality of circumstances.

D. Recognition of parentage created by civil union law of sister state is required by principles of comity. (Alison D with a Marriage Twist!) Debra H. V. Janice R, 14

NY3d 576 (2010), *cert den* 131 S. Ct 908 (2011).

Court held that NY is required to recognize the parentage of a child created by the Vermont Civil Union Law. Under Vermont statute, a child born to one partner of a civil union is considered the child of both spouses. Vt Stat Ann tit 15, section 1204 (a) and (f). In Miller Jenkins v Miller Jenkins, 180 VT 441 (2006) , a hotly litigated and highly publicized interstate lesbian custody dispute, Vermont's highest court applied statute to child born by artificial insemination to party to civil union. In Debra H, child was born through ADI one month after couple entered civil union. The concurrence of Judge Graffeo notes that it is permissible to "predicate[] parentage on objective evidence of a formal legal relationship" between the parents/parties. Id at 606.

(1) See also Dickerson v. Thompson, __ AD3d__, 2011WL 2899241, (3rd Dept 2011), noting that partner to intact civil union may have legal rights to children born to her partner, even after separation

(2) And see, Wesley v. Smith-Lasofsky 105819/10, NYLJ 1202508854947 (Sup Ct, NY County, 7/18/11, Drager, JSC), Where Plaintiff adopted his niece after parties to civil union separated, defendant CU partner did not establish parental relationship with girl, and neither party sought to impose parental rights or obligations upon Defendant, court held that no such rights or obligations would be imposed

II. How Marriage Equality Fails to Protect some of our Children

A. The Reemergence of Illegitimacy - Alison D is still the law in NY Absent a Marriage. When the Court of Appeals chose to reassert Alison D rather than expand the concept of defacto parentage in the state of New York, a concept which is quite prevalent in most states which have adopted all or part of the Uniform Parentage Act, it separated our community's children into two separate and distinct camps, that is, some of our children are worthy of protection based upon the marital or civil union status of their parents, and the rest of our children are illegitimate and not worthy of protection. As American University Washington College of Law's Professor Nancy Polikoff blogged, (beyondstraightandgaymarriage.blogspot.com) soon after the Court of Appeal's decision was handed down, "Beginning in 1968, the US Supreme court held in a series of cases that marriage of a child's parents could not be a factor determining which children were eligible for, among other things, wrongful death recovery, worker's compensation death benefits, and financial support and care by both parents. Today, however, that principle is under attack, in New York and in Massachusetts...No court has yet extended to the children of same-sex couples the well-established principle that the law should not discriminate against children born outside marriage."

The passage of Marriage Equality in New York State does nothing to correct this issue, and in fact, requires LGBT New Yorkers to marry in order to protect their children. And what about all the children who were conceived or adopted prior August of 2011? If their parents could not afford an adoption or if their parents

did not have the foresight to travel outside of New York to marry, the stigma of illegitimacy will follow these children forever.

B. DOMA creates portability problems, even for Married Clients.

(1) Creation of parent child relationship based on same sex marriage may not afford sufficient protection of the relationship in states that don't recognize the marriage, or for purposes of federal rights and benefits because of DOMA. See a detailed analysis of the "portability" issues of our marriages in ***Matter of Sebastian***,http://www.nylj.com/nylawyer/adgifs/decisions/041009glen.pdf 25 Misc.3d 567, 879 N.Y.S.2d 677 (N.Y. Co. Sur. Ct. 2009), where only a court order of adoption granted to the non-biological co-parent could provide the protections of full faith and credit to the parentage of both parents in other states. Until our clients' marriages are recognized in every state in the country (or at least the states your clients choose to travel to or through) it is important to advise them to adopt adopt adopt!!! Unless the rights and obligations of parenting flow directly from parent to child through an adoption, (instead of through marriage to your partner) the family unit might not be fully recognized in states that have mini-DOMAs or are otherwise disinclined to recognize same sex unions as a basis for co-parenthood.

(2) But note that DOMA does not preclude a non-biological child of a member of a Vermont CU from qualifying for Child Insurance Benefits under the Social Security Act. (Memorandum opinion for the acting general counsel of the Social Security Administration, dated 10/16/2007). "Although DOMA limits the definition of "marriage" and spouse" for purposes of federal law, the SSA does not condition eligibility for CIB on the existence of a marriage or on the federal rights of a spouse, but in the State's recognition of a parent-child relationship, and specifically, the right to inherit as a child under state law."

C. Is Marriage Equality the end of the road in New York State for Equality for **all** Families?

There are a growing number of LGBTQ families who are creating families in even more unconventional ways, such as three parent and four parent households, single straight women and gay men parenting together, two lesbians and their straight male friend/donor parenting together, etc. Will there be a way for these children's rights to be protected, if the model remains a two parent/married model? As usual the laws are a decade behind in the family creation area. Will the laws be able to protect the rights of these children? How will the marital presumption harm known

donors who wish to parent? Will known donors be required to assert rights of paternity prior to birth, or will biology trump marriage for our families? Should the burden of proof be different for our community? How fair is it that a biological sperm donor can assert rights through biology but a non-biological co-parent has no standing, absent an adoption? How will our community become educated about these issues?

III. Parental Rights and Obligations

A. Rights of Parents

Parents have a due process right to make decisions concerning the care, custody and control of their children. Troxel v. Granville, 530 US 57 (2000). This fundamental right includes directing the child's upbringing, raising the child as she/he deems appropriate, making medical, legal and educational decisions for the child, deciding where the child resides, determining with whom the child associates, and managing the services and wages of the child, all without interference from the state and/or third parties. These rights include, but are not limited to:

(1) Right to consent to adoption, or at least a right to notice thereof. DRL 110. See section V below

(2) Standing to seek custody or visitation pursuant to DRL section 70.

(a) If an individual has no legal relationship to the child, that individual is a legal stranger and must show extraordinary circumstances to have standing to seek custody/visitation before the court will even reach the analysis of what is in the child's best interests. Bennet v. Jeffreys, 40 NY2d 543 (1976); Mtr of Ronald FF v. Cindy GG, 70 NY2d 141 (1987). Extraordinary circumstances include parental abandonment, persistent neglect, unfitness, extended disruption of custody and other equivalent circumstances. See also, Alison D. V Virginia M, 77 NY2d 651 (1991); Debra H v. Janice R, 14 NY3d 576 (2010) .

(b) Note: while NY does not recognize doctrine of de facto or psychological parenthood, other states do have statutes which do not rely on biology or adoptive relationships to assess the relationship between the parties and their children, and thereby standing to seek custody/visitation is not as limited. See discussion in Debra H, including concurring opinions.

(c) Note: Should the LGBTQ community be promoting the passage of some form of Uniform Parentage Act in order to protect the growing number of families that are not based upon a two parent model? Should we be pursuing a more broadly defined doctrine which recognizes the rights and obligations of known sperm donors, three parent and four parent households, step parents and

other blended families?

(3) Right to Presumptive custody in the event of death of other parent

(4) Rights of child to inherit from parent under rules of intestacy

(5) Right to the services and wages of their children

(6) Rights of child to Dependent Benefits, such as social security, worker's compensation and life insurance in the event of death or disability, and parent's employer provided health insurance coverage; and

(7) Mutual right to sue for wrongful death.

B. Obligations Associated with Parenthood

(1) Duty to support child financially

(a) FCA 413 (child support standards act) sets forth a parent's duty to support child under the age of 21, pursuant to statutory formulae set forth therein, including employer provided health insurance benefits if available, or cash contribution if the child is eligible for medical assistance or the state's child health insurance plan. See also DRL 240 [1b] applicable to matrimonial actions and custody proceedings

(b) This duty may be imposed based on doctrine of equitable estoppel, even if parental rights have not been established, when the legal parent seeks child support and the situation warrants it.

(i) See FCA sections 418 (a) and 532 (a)

(ii) HM v. ET 14 NY3d 521 (2010), holding that biological parent may seek child support from her former same sex partner in family court

(iii) Mtr of Shondel J v. Mark D., 7 NY3d 320 (2006), where respondent held himself out as child's biological father for first 4 ½ yrs of her life, and Petitioner mother sought child support after parties' separation and respondent requested DNA testing, court held that father may be estopped from declining paternity and forced to pay child support when the child justifiably relied on man's representation of paternity to the child's detriment declined paternity requesting

(2) Duty to provide day to day care for and nurture child.

(a) State may not intervene unless conduct rises to the level of failure to exercise a minimum degree of care that impairs child's physical mental or emotional condition or places it in imminent danger of becoming impaired. See e.g. FCA Article 10.

(i) e.g. Failure to obtain medical treatment though having financial and other means to do so,

(ii) e.g. violation of compulsory education provisions of state education law article 65

(iii) e.g. excessive corporeal punishment

(b) May be held liable for own negligence in supervising child that results in injury to other

C. What are we to make of the simultaneous decisions of HM vs. ET and Debra H?

How do we reconcile as a community the notion that a parent may have no rights with respect to custody or visitation and yet is liable for the support of her child? If a biological parent refuses to consent to the adoption of her child by an unmarried co-partner, what recourse will the co-parent have?

IV. Rights and Obligations of Step Parents or Parents with No Standing

A. In general terms, step parents have no legal relationship to child and therefore do not possess parental rights or obligations, unless they adopt the child.

(1) for example, the step child can not inherit from the step parent according to the rules for intestacy. If the step parent provides for the child in her will, she should do so in non-ambiguous language, and the inheritance tax rates apply

(2) e.g. step parents can not consent to medical care for a child, unless explicitly authorized by the legal parent to do so in a written consent statement

(3) step parent may not be able to cover child with her employer provided health insurance benefits unless the child is an income tax dependent of the married couple, depending on policy coverage

B NY does however impose certain obligation on step parents:

(1) upon separation from the child's legal parent, step parent is obligated to support a step child who receives public assistance, limited to the amount of the public assistance grant for that child and subject to court's discretion. FCA 415. See also Mtr of Rockland County Department of Social Services v. Alexander, 151 Misc2d 447 (Family Court, Rockland Co 1992)

(2) Upon separation, the step parent may be equitably estopped from denying obligation to pay child support for step child

(3) In litigation between two legal parents, step parent's income may be considered to the extent he actually contributes to the child's needs. Mtr of Dora TJ v. Jean-Paul AS, 224 AD2d 420 (2nd Dept 1996).

(4) The step -parent's income may also be used to calculate monies available to a child for purposes of federal financial college aid assistance.

(5) Step parent may also be determined to be a personally legally responsible for the child in a child protective proceeding, and subject to the jurisdiction of family court, liability and court ordered services. See FCA 1012 (g) defining the child's "custodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child."

V. Second Parent Adoptions - Yes, still necessary!

A General

(1) Adoption is the creation of a parent-child relationship, with all the rights and responsibilities thereof, through a judicial proceeding. Adoptive parent takes the child as his/her own, and acquires all the rights and responsibilities as if the child was biologically born unto him/her.

(2) Adoption is a creature of statute (DRL Article 7) and strict adherence to the statutory provisions are required.

(3) "Although there is no Supreme Court decision on point, federal courts that have considered the issue have held that a judicial order of adoption in one state must be afforded full faith and credit in every other state, and that there can be no 'public policy' exception to that mandatory recognition . . . This is also the view of most commentators". In re Adoption of Sebastian, supra, 25 Misc. 3d at 584 (citations omitted).

(a) But see Adar v. Smith, 639 F. 3d 146 (5th Cir 2011), *petition for certiorari recently denied*, upholding Louisiana state registrar's refusal to recognize NY adoption decree by refusing to issue accurate birth certificate listing two fathers.

B. Different types of adoptions

(1) Agency: The matching of the adoptive parent(s) to the biological parents(s) of a child for the purpose of adoption is made through a New York State licensed agency. The placement of the child for the purpose of adoption is made through the agency. See DRL section 112. Child is placed with agency after voluntary surrender or court ordered termination of parental rights by biological parents. (SSL 383, 384, 384-b)

(2) Private: Any adoption other than an agency placement is a private (independent) adoption. See DRL section 115. Parent or legal guardian may place out child for adoption. Except as noted, biological parents rights and obligations are terminated. May include:

(a) Step-parent: one spouse adopts the child/children of the other.

i. spouse of adopting step parent retains parental rights.

(b) Unmarried couple/Second Parent: one partner adopts the

child/children of the other partner in a domestic relationship

i. Partner/First Parent retains parental rights.

ii. child may be born or adopted by the first parent prior to the relationship, or a child born/adopted during the relationship

(c) International: adoption of child born and living in a foreign country.

C. Who may adopt - see generally DRL 110

(1) An unmarried adult

(a) applications for adoption may not be denied on basis of sexual orientation. See e.g. 18 NYCRR 421.16(h) ; In re Adoption of Anonymous, 209 AD 2d 969 (Fourth Dept 1994)

(b) Second Parent Adoption: unmarried partner of a child's parent, gay or straight, can become the child's second parent by means of adoption, without terminating rights of first parent/partner. Mtr. Of Jacob and Dana, 86 NY2d 651 (1995).

(c) Two unmarried adults living together may jointly adopt a child who is not the biological child of either of them. See e.g. In re Adoption of Emilio R, 293 AD2d 27 (1st Dept 2002); Adoption of Carolyn B., 774 NYS2d 227 (Fourth Dept 2004) (including joint adoption by unmarried same sex couples).

(2) A married couple together

(a) one spouse cannot adopt a child without the other spouse's knowledge or over the other's objection

(3) An adult married person who is legally separated or has been living separate from spouse for a period of at least three years.

(a) Consent of non adopting spouse is not needed

(b) Non adopting Spouse is not deemed parent of child for any purpose

(4) Note: A recent codification of Matter of Jacob (L 2010, Chapter 509) to add "any two unmarried adult intimate partners together" to the list of persons who may adopt.

(a) Query whether a non-intact family may complete an adoption, or two close but unmarried and unpartnered individuals, eg. a gay man and his straight female friend.

(b) Anecdotally, family court judges and surrogates have been unwilling to construe the term "intimate partners" broadly enough to include these types of families. Do we push for a broader definition of "intimate partner"? Intimacy is defined as "a close acquaintance or association, or a familiarity relating to or indicative of one's deepest nature" Does this statutory amendment mean that three parent adoptions are not possible? Could the intimacy one experiences in raising a child be enough to satisfy this requirement, if the parents are not intimate partners?

(5) Step parent: Spouses together may adopt a child born to either of them or either spouse may adopt child of other

(a) Although adoption severs the legal ties with biological family, in step parent and second parent adoption, biological/ first adoptive parent retains parental rights and duties. DRL 117 [1] (d); Mtr of Jacob, supra.

(b) Moreover, intestate rights of child to inheritance and succession from both birth parents does not terminate upon the adoption. DRL 117 [1](e). See e.g., In re Davis, 27 AD3d 124 (2nd Dept 2006)

(6) A foster parent who had cared for a child continuously for a period of 12 months or more may apply to the authorized agency for adoption

(a) Will have preference and entitled to first consideration. SSL 383

D. Whose Consent is Required? see generally DRL 111, applies to all adoptions.

(1) The adoptive child if over 14

(2) Parents or surviving parent of a child conceived/born of wedlock

(3) Mother of a child born out of wedlock

(4) Father of a child born out of wedlock where certain legal criteria have been met regarding his relationship to the child and/or the biological mother

(a) if child over 6 months old, consent required if father maintained substantial and continuous or repeated contact with the child by payment of support AND visiting monthly when physically/financial able to do so and not prevent from doing so by custodian OR regular communication with child or custodian if physically/financially unable to visit

i. father who lived with child for 6 months within 1 year of placement shall be deemed to have

maintained substantial and continuous contact

(b) If child is under six months of age, consent required only if Father lived openly with child or mother for 6 months immediately preceding placement [held unconstitutional in Raquel Marie X., 76 NY2d 387 (1990)], openly held himself out as the father during 6 months preceding placement and paid a fair and reasonable sum for medical, hospital , nursing expenses for pregnancy, birth.

(5) Person or authorized agency having lawful custody of child

(6) Parent's consent not required where

(a) Parent abandoned child by failing to visit or communicate for a period of 6 months although able to do so

(b) Parent surrendered rights pursuant to SSL 383-c or 384

(c) Parent is mentally ill or mentally retarded to extent that parent is presently and foreseeable future unable to care for child

(d) Parent executed irrevocable denial of paternity instrument after conception and acknowledged (as a deed would be)

(e) Adoptive child over 18 if judge determines adoption in child's best interest and consent cannot be obtained

E. Notice of Adoption - must be given to:

1) to one whose consent is required but who has not provided consent (Domestic Relations Law § 111 sub 3; Note: Purpose is to allow appearance to contest allegations. These individuals are referred to as "notice fathers, under DRL 110a

(2) DRL 111-a notice is to allow the person to give testimony regarding best interests only

(a) any person adjudicated to be the father by a court of another state or territory of U.S. if the order is filed with the putative father registry

(b) any person who filed an un-revoked notice of intent to claim paternity

(c) any person recorded as "father" on birth certificate

Arguably should include mother of same-sex partner

(d) any person openly living with mother who is holding himself out to be the father

(e) any person named by mother as the father in a written sworn statement (Example: DSS case, out-of-wedlock affidavit)

(f) any one married to the mother within 6 months after birth of child

(g) any one who filed with putative father registry

F. Is adoption necessary to establish parentage when child born during marriage?

(1) It shouldn't be

(a) In Re Donna S, 23 Misc3d 338 (Fam Ct., Monroe Co 2009) same sex

married spouse of biological mother not required to pre-certify as qualified adoptive parent of biological mother's child for purpose of adopting. Based on marriage recognition, adoption may not be necessary of child born during marriage. "Simple execution of a consent should be sufficient to establish legal parent.

(b) In re Adoption of Sebastian, 25 Misc3d 567 (Sur Ct., NY Co, 2009). Two women married in Netherlands and M1 was birth mom and M2 was genetic mom. In granting second parent adoption to Petitioner of child, Court noted that adoption should not be necessary for child born to marriage, but because M2 might have difficulty establishing standing in custody case if relationship terminates, court concluded in best interest of child to grant adoption

(c) Debra H. V. Janice R, supra., 14 NY3d 576 (2010)

(2) **but . .**

(a) Appellate Division affirmed dismissal of motion to set aside second parent adoption on grounds that Respondent fraudulently concealed her prior use of an alias in the adoption papers ; motion made during course of contested custody case between former same- sex partners. Turner v. Hembrooke, 12 AD3d 966 (Third Dept 2004). Case underscores that adoption orders can not be lightly set aside in custody disputes.

(b) C.M. v. C.H., 6 Misc. 3d 361 (Sup Ct. NY Co, 2004) where unmarried same sex couple had two children, born to Respondent, and Petitioner had adopted the first child, and the parties planned for Respondent to adopt the second child but did not do so before separating, court held petitioner only had standing to seek custody and/or visitation with respect to first child.

(c) KB v JR, supra 887 NYS2d 516 , custody dispute involving child born using ADI during marriage that was subsequently declared void.

(d) For all the reasons already stated in In re Adoption of Sebastian DOMA and super DOMA states require adoption so that parental rights are portable, should your clients move to non-recognition state or travel to or through a non-recognition state.

VII. Child Custody: Standards of Conduct: The GLAD Document

In 1999, a brochure was developed by Gay & Lesbian Advocates & Defenders (GLAD), in collaboration with a working group of lawyers, mediators, social workers and parents as well as Lambda, NCLR, Family Pride Coalition (now Family Equality) and the ACLU Lesbian and Gay Rights Project, setting forth Standards of Conduct same sex families should strive to follow. This brochure was recently updated and revised by various organizations and is once again being disseminated in the LGBTQ communities addressing the challenges our families face within the legal community. Families are created which are not recognized by the courts. Parents with legal rights "pull rank" on those with little or no rights when their families are breaking apart.

Brochure available at www.glad.org/protecting-families.

VIII . Mediation and Collaboration - Why are these Alternative Dispute Models So Important for Our Families?

For LGBTQ people, same-sex spouses and their children, alternative forms of dispute resolution such as Mediation and Collaborative Law may be the most advisable way to formalize family agreements regarding parenting, custody and support, and dissolve those families. Because these relationships and the ways in which the families are created may not reflect traditional norms, or follow statutory presumptions, Mediation or Collaboration is an effective framework in divorce or dissolution (for civilly unioned spouses), for prenuptial and postnuptial contracts, and for agreements regarding parenting arrangements.

A. ALTERNATIVE DISPUTE MODELS: MEDIATION AND COLLABORATIVE LAW

This is not meant to be a comprehensive discussion of alternative dispute models. Attorneys must be thoroughly trained, and affiliate with like-minded attorneys, mental health professionals and financial advisors who have also been trained using these models. As part of that training, attorneys become knowledgeable about the ethical issues involved in drafting limited purpose retention agreements with their clients. Ethical issues of client confidentiality and privilege as well as the zealous representation of clients is also discussed in great detail. Most practitioners continue their training by regularly attending workshops and participating in practice groups with other professionals. A list of some of the New York State-based organizations appears at the conclusion of this outline.

(1) Mediation

Mediation is a voluntary process in which the parties make decisions together

based on their understanding of their own views, each other's and the reality they face. Mediation occurs with one neutral mediator (generally either an attorney or trained social worker) working alone in meetings with the parties, and their role is to assist the parties in reaching an agreement. Mediators are not able, however, to meet privately with clients outside the mediation sessions to help them clarify and express concerns. In some divorce situations, the mediator will recommend that the parties also consult with a neutral child specialist to assist them in developing a parenting document which reflects their agreement with respect to the children of the marriage. The mediator drafts a document reflecting the parenting and financial agreements reached by the parties which they each review with their own counsel prior to signing. In some cases each of the parties seeks the advice of independent counsel before or during the process of mediation (which can occur over many sessions, depending on the complexities of the situation), but the parties agree to remain in the mediation process to reach decisions together.

(2) Collaborative Law

Collaborative Law, a model which was created in the 1980's by Stu Webb, a Minnesota lawyer, as an alternative method of assisting divorcing couples to work as a team with trained professionals to resolve disputes respectfully, has expanded to apply the methods to commercial disputes, family business disputes, probate disputes among families. It is an effective method to reach agreement in family creation arrangements which may not follow traditional family models, such as three parent agreements, or parenting agreements between non-intact families.

(a) What is Collaborative Law? Collaborative Law a way for a separating/divorcing couple to work as a team with trained professionals to resolve disputes respectfully, without going to court. While collaborative lawyers are always a part of Collaboration, some cp models provide child specialists, financial specialists and divorce coaches as part of the clients' divorce team. Although Collaborative Practice comes in several models, it is distinguished from traditional litigation by its inviolable core elements. These elements are set out in a contractual commitment among the clients and their chosen collaborative professionals (generally called a "participation agreement"). The most important elements are as follows:

(i) agreement by the participants to negotiate a mutually acceptable settlement without using a court to decide any issues for the clients;.

(ii) agreement by the professionals to withdraw if either client goes to court;

(iii) agreement by all participants to engage in open communication and information sharing; and

(iv) agreement to create shared solutions that take into account the highest priorities of both clients.

(b) The Collaborative Philosophy is built on a belief in human dignity and respect. Individuals may cease being partners, but they don't cease being worthy human beings. Every part of the Collaborative Practice– from open communications to solutions-based negotiation to out-of-court settlement-is intended to foster respect. When respect is given and received, self esteem is likely to be preserved, making discussions more productive and an agreement more easily reached This philosophy becomes even more critical when the parties involved may not have the full protection of the laws for their families. Use of the collaborative model may be the only way to preserve the self esteem of all involved, if the laws themselves exclude one of the parents from participating in the process altogether due to lack of legal standing.

Example: Sue and Joan have been together for 20 years and live in Ithaca, New York. Ten years ago they decided to start a family. They used anonymous sperm from a sperm bank and Sue gave birth to Henry. The couple was too busy raising Henry to complete a second parent adoption, and anyway, they were in love and knew they would stay together forever. Four years ago they were married in Massachusetts. A year later Joan gave birth to a girl, using the same anonymous sperm donor. Joan is now seeing Sara and wants a divorce. Joan wants joint custody of the two kids and is willing to support both kids. Sue comes to see you because her friends think the best strategy is for her to tell Joan she can't see Henry anymore because Joan is a legal stranger to Henry. Her "Greek Chorus" of friends tells her she can then use Henry as "leverage" to get a bigger support settlement. After a lot of discussion about what makes the most sense for her and for her kids, Sue decides to proceed with the divorce using collaborative law. The child specialist works with the couple to develop an equitable parenting program for both children and second parent adoptions are completed by the women, one for each child, prior to the finalization of the divorce Both attorneys help finalize the financial and support aspects of the divorce.

(3) Comparison of Mediation and Collaboration

(a) One neutral mediator vs. two attorneys. In mediation there is one neutral

mediator who works alone in meetings. In collaboration, each party has separate counsel, can meet separately with their counsel outside of the "four way meetings", the term used to describe the meetings between the parties and the attorneys. (Five-way meetings occur if a neutral child specialist is included or a neutral financial specialist.

(b) Independent Legal Advice outside of discussion vs. advice built into the

discussion. In mediation, each party is free to seek the advice of an attorney, but the attorney does not participate in the settlement discussions. In collaborative law, the attorneys are present in the "four way" meetings and the two attorneys are guided by the participation agreement to assist the partners to reach a fully informed resolution.

(c) Focus on Settlement vs. communication. In mediation, the parties and the mediator strive to reach a resolution in which both parties have their interests served. In collaboration, the focus is on teaching the parties how to communicate better during and after the divorce and will offer assistance in how to effectively participate in the four way negotiations so that real progress is made to reach settlement.

(d) Costs. Generally the costs in mediation are less than in collaboration. The costs of collaboration can be extensive but are typically less than litigation. In a negotiated but uncontested ("settled") matrimonial action, the costs may be less than collaboration, but collaborative professionals would wonder if agreements negotiated in a more adversarial manner would have lasting effect between the parties. Agreements reached using collaborative methods (where real and effective communication techniques are utilized and developed) could give the parties a framework for future disputes, thereby minimizing long term costs and a trip back to court.

(4) Alternative Methods of Dispute Resolution are not Recommended in Every Situation

There are situations in which alternative dispute models may not (or cannot) work. This is true for LGBTQ families as well. Mediation and/or Collaboration may not be a good choice when:

(a) One or both partners have a serious mental illness or drug or alcohol

problem that is not under control;

(b) Domestic violence or other forms of coercion exists between the parties;

(c) One or both of the parties lack the ability to participate fully and freely in the discussions that will lead to resolution;

(d) One or both of the parties lack the capacity to make and keep commitments about behavior and follow-through.

(e) One or both partners are prepared to lie in order to conceal information about finances.

B. WHY DO ALTERNATIVE DISPUTE MODELS MAKE SENSE FOR LGBTQ FAMILIES?

LBGTQ couples and families have been operating "under the radar" for decades, forming relationships, creating families, and dissolving those families and creating new ones. As Marriage Equality becomes a reality, some couples will choose to marry, and some will not. Some LGBTQ couples in long term relationships who now choose to marry have formed financial and emotional bonds in which they may or may not have intended to follow traditional concepts of marital or separate property. Forcing these "square peg" families into the "round holes of the law" may not be appropriate. In most cases, using mediation or collaborative methods to resolve disputes would give the practitioner an opportunity to encourage creativity in resolving conflict between parties in order to achieve a more equitable result for everyone.

(1) **LGBTQ couples have had to develop their own concepts of Marital and Separate Property. Even for couples who choose to marry, the lack of recognition of the marriage creates many problems in defining and categorizing assets and dividing employer benefits. Some couples have considered themselves "married" for years despite a lack of legal recognition. Others have shunned any formal notion of "commitment" or "marriage" despite living intertwined lives. Almost everyone is confused (including most attorneys and accountants) about what rights and obligations extend (or don't extend) to LGBTQ couples, and many couples have made financial choices based on laws in effect a decade ago without bothering to keep things current. Others have considered marriage a means of fighting for civil rights and did not make intentional choices to commingle assets or share in financial lives. Thinking "outside the box" to assist divorcing couples to equitably dissolve assets becomes**

critical. And utilizing mediation or collaboration to discuss and develop prenuptial agreements or postnuptial agreements would also be advisable.

Example: Dave and Homer were gay activists, and devoted all of their spare time to pushing for gay rights. They were married in Toronto years ago when gay people could marry. Later, when Marriage became an option in Massachusetts, they married there as well. They were in Chicago on vacation when marriage equality was passed in Iowa, rented a car, and drove to Iowa City where they were married on the first day the law went into effect. Now Homer wants a divorce and Dave, who has never lived with Homer, and has never commingled finances with Homer, is outraged to learn that Homer thinks he has rights to his Condo, his bank account and the trust fund his grandfather set up for him. "Doesn't Homer know that it didn't mean anything in New York?" asks Dave, when he comes to see you in your Saratoga office.

Example: Beth and Ellen have been together 30 years and live in New York City. They met while they were in college, moved in together and have joint bank accounts and reciprocal wills. Their coop, purchased in 1990, is in Ellen's name, and their country home, purchased in 2000, is in Beth's name. In 1993 they had a commitment ceremony and exchanged rings in front of all their friends and Ellen's family (Beth is estranged from her family). They recently married in New York State. Last week, Beth called you to say that Ellen wants a divorce. She advised you that Ellen has been waiting to marry so that she could divorce and claim an interest in their country home, since they purchased that property after their commitment ceremony. Ellen considers that property a marital asset, at least that is what her friend, the accountant, has told her. Can you help her figure out what she should do or say? She doesn't want this to go to court because her parents still don't know she is lesbian. Her father is very religious and it would "kill him" if he heard about this whole business.

Example: Carla and Penelope have been together for many years and consider marriage to be a less than satisfactory institution. Nevertheless, they have substantial assets and wish to protect them and preserve them for the couple. But they realize their relationship can be rocky and wish to be pragmatic about the realities of divorce. They want to make absolutely sure that their wishes with respect to marital and separate property are clear. They meet with their longstanding attorney who mediates a reasonable and equitable agreement regarding their assets, and drafts a prenuptial. They each take the agreement to separate counsel for further review. Final changes are incorporated and they sign the prenuptial prior to marrying on the steps of City Hall.

(2) Because of DOMA, federal taxation issues complicate marital settlements, even for the most well-intentioned parties. Working

together in a collaborative or mediation setting helps all parties feel the results are equitable and fair for everyone.

Example: Trudy and Barbara have been together five years and live in Buffalo. Each has a good job and has been able to save money towards retirement.. Trudy's parents gave Trudy $30,000 for a party when they had a commitment ceremony in 2009. Trudy used $10,000 to pay for the party, and placed the remaining $20,000 in her own savings account. They have a child and completed a second parent adoption. They recently were married in Connecticut. When Trudy decided she wanted a divorce, Barbara agreed to work collaboratively though Barbara felt betrayed by Trudy, and did not want to divorce. They were able to work through all the financial issues, meet with a child specialist to come up with a parenting program and met with a financial neutral to work through the tax issues of the divorce. Barbara felt strongly that the gift Trudy received towards the commitment ceremony should have been considered a marital asset and wanted half of the savings account. After much discussion, Trudy was willing to consider this family gift a "marital" asset. After much discussion Trudy was also willing to give Barbara $30,000 from her 401K account, but the divorce settlement indicates these payments will be gifted to Barbara over many years so that there is no tax implication for Trudy.

(3) For many reasons, some LGBTQ people cannot or will not marry. Yet, they are very committed to each other and may want to dissolve their relationships with dignity and respect. In some cases children are being raised by parents who are no longer an intact family and for whom second parent adoption is not an option. Mediation and Collaboration will continue to be viable options for these individuals.

Example: Robin and Terry were together for ten years. During their relationship they had two children, Jack, 6, and Helen, 8. Terry conceived Jack using anonymous sperm from a sperm bank. Terry conceived Helen, using a known donor, Ted, who occasionally babysits for the kids and pays for their summer camp. The couple never completed a second parent adoption for either child. Recently the couple ended their relationship and now that they aren't together anymore Ted is unwilling to terminate his rights, so that Robin can adopt Helen. This is because Robin has "come out" as a FTM transgendered male. Robin is now transitioning and wants his kids to refer to him as a male. Ted says he never wanted to "share the stage" with another man, and thinks this whole thing is "bad for his daughter. Both Robin and Terry are furious with Ted, but Terry has her own issues of betrayal to resolve. In the meanwhile, the kids are acting out in school when they used to be at the top of their class. They are all willing to meet with a mediator to "air their differences" and hope that they can resolve some of these issues and to agree on a parenting plan of joint custody with minimal but stated visitation for the donor.

Example: Stan and Bernie live together in Plattsburgh. Bernie is a professor at SUNY Plattsburgh and Stan is a stay at home Dad to their twin girls, Emma and Kate. They didn't have the $120,000 to pay a surrogacy agency in Boston, so when Bernie's best friend, Nancy, offered her services they were so very grateful. The only costs were the fertility clinic's fee to inseminate Nancy with Bernie's sperm. They were lucky and a year later, the girls were born. They didn't bother terminating Nancy's rights as a parent because she was living with them and helping to raise the girls. They were one big happy family. Stan and Bernie took the ferry across Lake Champlain and were married in Vermont as soon as it was possible. Sure, there were some "speed bumps" in their alternative family, but everyone was working out the issues. A few weeks ago, Bernie told Stan he wanted a divorce. Nancy is very worried that the divorce will interfere their careful arrangements. She begins to resent the situation more and more, but wants what is best for the girls. Stan and Bernie, while they have many issues to resolve, do not want to upset Nancy, especially since now that the girls are four and are ready for pre-school, they realize that Stan can't even take the girls to the school to register them without Nancy, and anyway, how do they describe this family? It is time to figure all this out and make sense of their non-traditional arrangement. Someone suggests that they start with mediation.

(4) For some families, alternative dispute models will help with issues of custody and parenting, especially when the parents choose to form families in nontraditional ways. Disputes over parenting occur much more prevalently in the LGBTQ community because the factors which typically are considered in recognizing who is a parent (such as biology and genetics, or procreative intent, or parental conduct, or marital presumption) all must be considered. Same sex couples generally require the assistance of a third party in order to become parents, such as a known egg or sperm donor, or a traditional surrogate. Families who have formed very non-traditional families may wish to negotiate a resolution without having to involve a court action, where they have less control over the outcome of the case.

Example: Hector and Jason are married and have two kids, Miguel and Anna. Both children were conceived using a surrogate. Miguel is Hector's biological child and the couple paid over $100,000 to a surrogacy agency who located an unknown egg donor and a gestational carrier, and made all the arrangements prior to Miguel's birth. They really wanted another child but could not afford the agency fees. Hector's sister, Carol, was willing to be a traditional surrogate for them. The couple was thrilled and Anna was born using Jason's sperm and Carol's egg. Because it was all in the family, they never saw an attorney about terminating Carol's rights and her name is still on the child's birth certificate. Unfortunately, they have decided to divorce and while the divorce is

somewhat amicable, Hector's sister is really upset that she may not be able to see her biological child as often as she can now. She is now demanding formal visitation.

Example: Erica and Roxanna have two sons, age 4 and 3. Erica is the biological mother of both kids and their friend Dave is the known donor. They have a written agreement in which Dave sees the kids every 8 weeks, but Roxanna is being transferred by her company to Vermont and they are moving. Dave is furious. The women have never wanted to rock the boat and so never asked Dave to terminate his rights so that Roxanna could adopt, and now they fear he will use it against them that they didn't move more quickly. They all agree to see a mediator to work through all these issues.

Example: Raul and Herman are married in New York. Raul really wants to be a parent but is not quite ready to be a full time parent and anyway, he thinks a kid really needs a mother. He places an ad on Craigslist, to find someone who might be willing to enter into a non-traditional way of parenting. Sarah, a straight single woman who has finally given up on finding the man of her dreams, responds to his ad and they start to talk. They each find a collaborative attorney to represent them in reaching agreement regarding support/visitation and other parenting responsibilities. The parties use standard custody and visitation models to reach agreement regarding a shared parenting plan. The collaborative process works well, as the initial disputes are minimal, although they were surprised when questions of religion and other cultural issues arose while in the process. The parties used the collaborative model to explore an interest based approach to resolving the issues. They continue to raise the child in this non-traditional manner.

C. RESOURCES

(1) LGBTQ Collaborative Professionals of NYC, www.lgbtqcollabnyc.org.

(2) New York Association Of Collaborative Professionals, Inc., www.collaborativelawny.com

(3) Family Divorce & Mediation Council of Greater New York, http://fdmcgny.org/

(4) New York State Council of Divorce Mediation, http://www.nysmediate.org/search/ny.html

(5) Association of Conflict Resolution of Greater New York, http://fdmcgny.org/

(6) CUNY Dispute Resolution Consortium at John Jay College http://johnjay.jjay.cuny.edu/dispute/

(7) *Protecting Families, Standards for LGBT Families*, available at www.glad.org/protecting-families

(8) *All Children Matter, How Legal and Social Inequities Hurt LGBT Families*, report available at www.familyequality.org

Many thanks to my colleague, Geri Pomerantz, for sharing her outline in preparing for this presentation:

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Marriage Equality: Potential Pitfalls in Divorce

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I. Prenuptial Agreements

A) Portability of Prenuptial Agreements:

Are prenuptial agreements between gay and lesbian couples enforceable in jurisdictions with mini-DOMAs in place?

1) Consideration for the pre-nuptial agreement is the future marriage

2) If the marriage is not recognized as legal, there is no consideration

3) Prenuptial agreement will not be recognized.

4) Choice of law provision will not save the agreement.

B) How do you save the agreements if consideration of marriage is not recognized?

Incorporate additional consideration into the agreement:

1) Transfer $10, $100 etc. between the parties.

2) Recite a waiver of legal rights: constructive trust; equitable accounting, partnership claims.

C) Enforceability of Agreements between Same-Sex Couples:

Gonzalez v. Green, 14 Misc.3d 641, 831 N.Y.S.2d 856 (N.Y.Sup. 2006)

- In Gonzalez v Green, a "separation agreement" between two gay men living in NY but married in MA was upheld even though the parties' marriage was void under MA law. The Court found sufficient consideration in the waiver of legal rights to enforce the agreement. Parties were married in Ma.

D) Tax Planning when Drafting Prenuptial Agreements:

IF support is going to be decided in the agreement

IF there are going to be lump sum cash payments;

IF there are going to be transfers of property from one party to the other (homes, bank accounts, stock accounts) or a buyout of the other parties' interest in the home

THEN, may want to do some tax planning and incorporate into the terms of the agreement as to how the aforementioned payments or transfers will be handled.

II. Residency Requirements

- NY requires a minimum of one-year residency to enter the Courts and request a divorce pursuant to the Domestic Relations law. DRL Sec. 230.

- Foresee situations where gay, married couples enter NY jurisdiction from foreign jurisdictions seeking a divorce because their marriages are not recognized in the jurisdiction where they previously lived.

- Do the states permitting same-sex marriage have an obligation to alter their residency requirements to permit same-sex married couples seeking a divorce to use NY for their divorce by waiving their state's residency requirements?

III. Spousal Support

- A Spouse may be paying/receiving spousal support at the end of a case, either pursuant to an agreement or by decision of the Court. *Pendente lite* support may be involved either by agreement or by a decision and order of the Court.

- Support payments can be taxable to the recipient and deductible to the payor; similarly spousal support may be non-taxable to the recipient and non-deductible to the paying spouse. IRC Sec. 71; IRC Sec. 215

- <u>Support can take many different forms</u>:

  1) Direct payments to a third party on a spouse's behalf (i.e., mortgage payments, real estate tax payments, utility payments, etc.)

  2) Payment of a percentage of a spouse's earned income to an ex-spouse

However, the (non)taxability and (non)deductibility (and deductibility) of support payments as afforded by the Internal Revenue Code are only available to heterosexual couples. DOMA precludes the applicability of IRC Sec. 71 and IRC Sec. 215 to same-sex married couples.

- NYS Tax Code provides that New York State personal income tax follows the Internal Revenue Code. See N.Y. Tax Code § 611 (a) (2009).

- A conflict now exists between the NYS Tax Code and New York's Marriage Equality Act, which provides that "[n]o government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex."

- As a result, receipt of support by a spouse in a same-sex legally performed marriage by the other spouse could be treated as income (or a gift) by the United States Internal Revenue

Service and thereby taxable to the recipient or donor; the taxability of these payments by the United States Internal Revenue Service would be regardless of whether those payments were court ordered (or by judgment of divorce) or arranged by an enforceable separation/settlement agreement.

- DOMA precludes application of Section 71 and 215 of the IRC to the payment of support between legally married same-sex couples.

- Situations will arise where a spouse will need support during the pendency of a divorce action and Courts will be called upon to award such support. The tax treatment of those awards will be interesting.

- The New York State Department of Taxation and Finance recently issued two memorandum regarding the implementation of the Marriage Equality Act:

    - TSB-M-11(8)M provides that for New York estate tax purposes, the term spouse shall now include same-sex spouses.

    - TSB-M-11(8)C provides that same-sex legally married couples must file New York personal income tax returns as married even if their marital status is not recognized for federal tax purposes.

IV. Equitable Distribution

- The Internal Revenue Code (the "IRC") treats transfers between spouses (and former spouses) incident to a divorce as a non-taxable event. I.R.C. § 1041.

- Transfers between spouses (and former spouses) following a divorce are rather frequent events:

    1) lump sum cash payments to be made between spouses;

    2) former marital residence may be transferred from one spouse to the other (either immediately following the granting of the divorce or years later when the last child leaves for college);

    3) personal property is routinely transferred between spouses;

    4) assets held in retirement vehicles and securities accounts transferred between spouses to equalize.

- Section 1041 of the IRC permits the aforementioned transfers to be made tax-free if the transfer occurs between heterosexual spouses (or former spouses) incident to a divorce.

- DOMA precludes the non-taxability of the above-mentioned transfers between same-sex married spouses incident to their divorce. In the event of a divorce between a same-sex couple legally married in New York, the transfers could be considered by the US Federal tax authorities as a taxable event.

- Examples:

  1) transfer of the marital residence between same-sex spouses incident to their divorce could be considered a "third party" sale, which could trigger capital gains taxes owed by the transferor (i.e., the seller).

  2) lump sum cash payment between same-sex spouses legally married that is incident to a divorce could be recognized by the US Federal tax authorities as gift by the payor spouse triggering taxable event.

THE IMPACT OF MARRIAGE EQUALITY IN NEW YORK: MEDICAID AND INCOME TAX ISSUES

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Same-Sex Medicaid Eligibility

WGIUPD **GENERAL INFORMATION SYSTEM** 08/20/08
DIVISION: Office of Health Insurance Programs **PAGE** 1
GIS 08 MA/023

TO: Local District Commissioners, Medicaid Directors, Temporary Assistance Directors, Legal Staff, Fair Hearing Staff, and Staff Development Coordinators

FROM: Judith Arnold, Director
Division of Coverage and Enrollment

SUBJECT: Medicaid Eligibility for Legally Recognized Same-Sex Marriages Performed Elsewhere

EFFECTIVE DATE: Immediately

CONTACT PERSON: Local District Support Unit
Upstate (518)474-8887 NYC (212)417-4500

The purpose of this General Information System (GIS) message is to advise Local Departments of Social Services (LDSS) of new Medicaid eligibility policy regarding equal treatment and recognition of same-sex marriages that have been legally performed elsewhere.

A February 1, 2008 Fourth Department court decision in *Martinez v. County of Monroe* held that legal same-sex marriages performed in other jurisdictions are "entitled to recognition in New York in the absence of express legislation to the contrary." Effective immediately, therefore, individuals who declare that they have been legally married in a jurisdiction that recognizes and performs same-sex unions must, regardless of gender, receive full faith, credit and comity as all other legally married persons when a district makes any Medicaid eligibility and case decision in New York State.

Equal treatment means that terms such as "husband", "wife", and "spouse" are construed in a manner that encompasses legal same-sex marriages. Factors including but not limited to the following must be evaluated in the same manner for all legally performed marriages:

- Required signatures on applications;
- Household composition and size;
- Budgeting methodology;
- Determination of Legally Responsible Relatives;
- Spousal and Child Support issues;
- Health insurance premium payments;
- Chronic/long term care budgeting issues, including transfers of resources;
- Income from trusts;
- Homestead resource exemptions;
- Burial funds;
- Estates; and,
- Liens and recoveries.

Currently, same-sex marriages are legal in Canada, South Africa, Spain, Belgium, the Netherlands, California and Massachusetts. The Department will make every effort to keep informed of states and jurisdictions that perform legal same-sex unions, and to forward any new information to LDSS. However, it is the responsibility of all LDSS to stay informed as well, because the list may be updated frequently.

Documentation of a legally recognized same-sex marriage is only necessary in the same limited circumstances as documentation of any other marriage -- for example, when an individual seeks spousal budgeting for long term care. LDSS staff are instructed to call their Local District Support Unit Liaison at the number(s) listed above with any questions.

CNS notice language, the Electronic Eligibility Decision Support System (EEDSS), and trainings and protocols are being updated to reflect this change. Districts are reminded to be sure that any manual notices for married individuals are worded in a gender-neutral manner before the notices are used.

Medicaid Eligibility Rules

1. Medicaid:

    a. Insurer of last resort
    b. Community Medicaid covers home care services, acute hospital care, physician services and all other medical services. Medicaid covers assistance for "activities of daily living," including but not limited to toileting, dressing, cooking, and similar activities.
    c. Chronic Care Medicaid covers nursing home care services in a facility.
    d. Cost of the Medicaid program is covered by federal, state and local governments.

2. Requirements for Eligibility:

    a. Residency: Applicant must be a resident of the state.
    b. Citizenship: Applicant need not be a citizen, however, legal residency is required. Most aliens who have been granted permanent residency will only qualify for Medicaid benefits five (5) years following their entry into this country.
    c. Age and related eligibility requirements: to be eligible for Medicaid, must be under the age of 21 or older than 65. If applicant is between these ages, eligibility for Medicaid can only be established if he or she is either:
        i. Disabled;
        ii. Blind;
        iii. Eligible for public assistance; or
        iv. A recipient of Supplemental Security Income.

3. Medicaid Income Standards:

    a. Income of one spouse is deemed available to the other spouse
    b. Home Care Income Standards:
        i. $767 per month for one individual
        ii. $1,117 per month for two individuals

c. Nursing Home Income Standards:
    i. Medicaid recipient keeps $50 of monthly income which is considered his or her personal needs allowance.
    ii. If there is a spouse living in the community, he or she can retain the sum of $2,739 as his or her Monthly Maintenance Needs Allowance ('MMNA'). If the community spouse's income is less than the MMNA, income from the Medicaid recipient will be budgeted to the community spouse. If the community spouse's income exceeds the MMNA, Medicaid will request (but cannot require) a contribution towards the cost of the Medicaid recipient's care.
    iii. Medicaid will permit applicant's income to be used to pay Medicare part B and approved health insurance premiums.
    iv. Balance of applicant's income will be applied towards the cost of his or her nursing home care.

4. Medicaid Resource Standards:

a. Definition: property of all kinds, including personal, real property, tangible and intangible. Property includes cash and other property that can be readily converted to cash, bank accounts, stocks, bonds, and the cash value of any life insurance policy.
b. Resources include assets belonging to the Medicaid applicant and his or her spouse.
c. Home Care Resource Standards:
    i. $13,800.00 plus $1,500 burial reserve
    ii. $20,100.00 for a couple
d. Nursing Home Resource Standards:
    i. $13,800 plus $1,500 burial reserve
    ii. Community Spouse can have between $74,280 and $109,560, plus $1,500 burial reserve
e. Exempt assets:
    i. Homestead
        1. must be primary residence of applicant, applicant's spouse or applicant's minor, disabled or blind child
        2. Net equity in name of applicant cannot exceed $750,000
    ii. Burial space
    iii. German and Austrian reparation payments
    iv. Irrevocable prepaid funeral account
    v. Retirement funds of the Medicaid recipient: If the recipient is entitled to periodic payments from the retirement fund, and is receiving the maximum available periodic payments, then the principal of the retirement fund will be considered an exempt asset. The periodic withdrawals (including minimum required distributions for certain counties) will be considered income to the Medicaid recipient. Note that Roth IRA's are <u>not</u> considered exempt.

5. Medicaid Transfer Rules:

a. Definitions:

i. Look Back Period: review of asset history for the period prior to the submission of the Medicaid application.
ii. Penalty Period: Period of ineligibility resulting from gifting of assets during the applicable Look Back Period.

b. There is no Look Back Period for community based Medicaid.
c. Look Back Period for nursing home Medicaid:
    i. For applications submitted prior to February 8, 2006 (effective date of Deficit Reduction Act of 2005 (DRA)):
        a. 36 months for assets except those held in a trust; and
        b. 60 months for assets held in a trust.
    ii. For applications submitted on or after February 8, 2006:
        a. Look back is extended to 5 years for all transfers made after February 8, 2006.

d. Calculation of applicable penalty period:
    i. Medicaid will calculate the applicable penalty period by dividing the gift amount by the average monthly cost of nursing home care. The resulting amount is the number of months of Medicaid ineligibility.

        2011 Average Cost of Nursing Home Care:
        NYC: $10,579
        Long Island: $11,445

    ii. Prior to the effective date of DRA, the Penalty Period commenced as of the date of the gift.
    iii. As of the effective date of DRA, the Penalty Period commences when on the later of such date on which the individual is eligible for Medicaid… and would otherwise be receiving institutional level care… based on an approved application for such care but for the application of the penalty period. (See 42 U.S.C 1396(c)(1)(D)(ii), as added by Sec. 6011 (b) of DRA. Accordingly, for the Medicaid penalty period to commence, (1) the Applicant must have less than $13,800 in nonexempt resources; (2) the applicant must be in a nursing home or otherwise receiving institutional level of care; and (3) the applicant must have formally applied for institutional Medicaid benefits.

6. Exempt Transfers:

a. Transfers between spouses
b. Transfer of homestead to:
    i. Spouse
    ii. Minor child
    iii. Disabled or blind child
    iv. Adult child of applicant who has lived in home of the parent for at least 2 years prior to the parent's institutionalization and who has been a care giver to the parent
    v. A sibling of the Medicaid applicant who has lived in the home for at least 1 year prior to the institutionalization of the Medicaid applicant and who has an equity interest in the home.
c. Transfers to or for the sole benefit of a disabled child

d. Purchase of a life estate in someone else's home, so long as applicant stays in the home for 1 year prior to institutionalization.

7. Annuities: As a result of DRA, the purchase of an annuity will be treated as a transfer of assets unless:

a. The State is designated as a beneficiary in the second position assuming the spouse or disabled child is designated in the first position; and
b. Either:
    i. The annuity was purchased in a retirement account; or
    ii. The annuity (a) is irrevocable and non-assignable; (b) is actuarially sound according to standards of the Social Security Administration; and (c) must provide payments in equal amounts, with no deferral or balloon payments made.

Personal Income Tax Rules

1. Same-sex married couples must file New York personal income tax returns as married, even though their marital status is not recognized for federal tax purposes. This means they must file their New York income tax returns using a married filing status (e.g., married filing jointly, married filing separately), even though they may have used a filing status of single or head of household on their federal returns. In addition, to compute their New York tax, they must recompute their federal income tax (e.g., their federal income, deductions, and credits) as if they were married for federal purposes.

For personal income tax purposes, the Act is effective for tax years ending on or after July 24, 2011. Same-sex married couples who are married as of December 31, 2011, will be considered married for the entire year. They must file their returns using a married filing status starting in tax year 2011. The Act is not retroactive. Therefore, a same-sex married couple who was legally married in another state prior to July 24, 2011, is not married for New York tax purposes until July 24, 2011, and may not use a married filing status prior to tax year 2011.

(NYS Dept. of Taxation and Finance – Taxpayer Guidance Division)

2. Withholding tax information regarding same-sex married employees-
Same-sex married employees**:**

- You may want to file a new Form IT-2104, *Employee's Withholding Allowances Certificate,* with your employer because you'll file a New York return using a married status beginning in tax year 2011.

- Provide proof to your employer that you're legally married to have them stop withholding New York tax on the value of certain benefits (e.g. health benefits that are treated as domestic partner health benefits for federal tax purposes). This applies if your federal taxable wages subject to withholding include the value of the benefits, and the value of these benefits wouldn't be included in taxable wages if provided to a different-sex married spouse.

3. Employers

- Don‘t withhold New York tax on certain benefits provided to a same-sex married employee. You don't need to withhold tax for New York State, New York City, or Yonkers income tax purposes on the value of certain benefits (e.g. health benefits that are treated as domestic partner health benefits for federal tax purposes), even though it's subject to federal withholding. This applies if the employee's federal taxable wages subject to withholding include the value of the benefits, and the value of these benefits wouldn't be included in taxable wages if provided to a different-sex married spouse.
- When reporting the annual wage totals on Form NYS-45, *Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return*, Part C, column d; report the federal wages minus any amount of benefits discussed above that you don't withhold on for New York purposes (plus any amount of any taxable 414(h) retirement contributions and any IRC 125 amounts from a New York City flexible benefits program for governmental employees).
- Continue to use the rules described in the NYS-50, *Employer's Guide to Unemployment Insurance, Wage Reporting, and Withholding Tax* for reporting State and local wages on federal Form W-2, *Wage and Tax Statement*.

(NYS Dept. of Taxation and Finance, http://www.tax.ny.gov/pit/withholding_mea.htm)

4. Sales and use tax information for same-sex married couples-Sales and use tax exemption for certain sales of motor vehicles:

Sales of motor vehicles between certain family members are exempt from sales and use taxes. Starting on July 24, 2011, sales of motor vehicles between same-sex spouses, or between a same-sex spouse and his or her spouse's child, are exempt from sales and use taxes.

(NYS Dept of Taxation and Finance, http://www.tax.ny.gov/pit/sales_mea.htm)

5. Metropolitan commuter transportation mobility tax information regarding same-sex married individuals -

Employers

- For payrolls paid on or after July 24, 2011, reduce your payroll expense by the value of certain benefits (e.g. health benefits that are treated as domestic partner health benefits for federal tax purposes) provided to a same-sex married employee who is a covered employee. This only applies when the value of these benefits if provided to a different-sex married spouse wouldn't be subject to social security tax.

6. Same-sex married self-employed individuals (including partners)

- For tax years 2011 and after, to compute your net-earnings from self-employment allocated to the MCTD, you must recompute your federal income tax return as if you had been able to use a married filing status (*federal as-if-married* return), including your net earnings from self-employment. You must apply all the federal rules for

married taxpayers. Don't submit the *federal as-if-married* return; keep it with your tax documents.

- Apply the $10,000 threshold after you recompute your net earnings from self-employment allocated to the MCTD.
- If you make estimated tax payments, recompute your estimate based on a married filing status.

(NYS Dept. of Tax and Finance, http://www.tax.ny.gov/bus/mctmt/mctmt_mea.htm)