NYS Marriage Equality: Focus on Estate Planning

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As a result of decades of advocacy and activism, New York State enacted the Marriage Equality Act - a new law that allows the LGBT community marriage equality, and all of the rights and benefits that married couples have enjoyed for centuries in New York State.

The Marriage Equality Act represents a fundamental shift in the way that New York State government interacts with its residents. The new law, which takes effect in late July 2011, allows New Yorkers to marry the person they love, regardless of their sex. Specifically, the Marriage Equality Act makes a series of amendments to New York's Domestic Relations Law (a series of statutes that regulates intra-family relationships) providing that (1) a marriage between two parties may exist regardless of whether the parties are of the same sex or of the opposite sex;[2] (2) municipalities issuing licenses shall not deny applications based on whether the applicants are of the same sex or of the opposite sex;[3] and (3) that religious organizations objecting to marriage equality may refuse to officiate marriages between parties of the same sex.[4]

Now, New Yorkers married to a same-sex spouse are entitled to full recognition of their marriage, regardless of whether the couple was married in New York or married in another jurisdiction that allows same-sex marriage. Prior to the 2011 amendments to the Domestic Relations Law, New York courts had long recognized same-sex marriages performed in other jurisdictions that had afforded marriage equality before New York.[5] However, full marriage equality renders these cases a historical footnote in the battle for LGBT civil rights.

As tens of thousands of LGBT couples plan to take advantage of the new law, the time is ripe for us to examine what benefits and responsibilities marriage confers on these spouses-to-be. It is also equally as important to examine the effect a marriage will have on the existing estate planning documents these couples have spent a great deal of time and money creating to attempt to overcome the shortfalls the lack of marriage equality had previously denied them. Finally, it is important to inventory the inequalities that remain as a result of the Federal Defense of Marriage Act,[6] which

denies coupled LGBT New Yorkers a litany of fundamental rights and benefits in areas governed by Federal law.

A. Practical effects of marriage equality on estate planning matters

Various New York statutes control the descent and distribution of Decedents' Estates. For example, the Estates, Powers, and Trusts Law (EPTL) governs the inheritance, and the Surrogate's Court Procedure Act (SCPA) provides the logistics for how estate proceedings move through the Surrogate's Court (the Court that handles Decedent's Estates). By redefining the word "spouse," the Legislature has changed the way these laws impact the LGBT community.

Clearly, the largest impact of the new law is allowing the surviving member of a same-sex couple to be classified as a distributee of the Estate. A distributee is any person who is entitled to take a share of a Decedent's Estate if the Decedent had died intestate[7] - a person that most people would refer to as a next-of-kin or an heir-at law. Absent a pre-nuptial agreement, a surviving spouse is almost always a distributee,[8] and, if the Decedent left no living descendants, the surviving spouse is the sole distributee.[9]

For those Estates where the Decedent dies intestate (without a valid Will), New York's intestacy statute[10] governs the distribution of the Decedent's Estate. In drafting the intestacy statute, the Legislature endeavored to re-create the Decedent's intent - providing for distribution to the persons he or she would have most likely favored if he or she had executed a Will. According to the intestacy statute, the surviving spouse inherits the first $50,000.00 plus one-half of the remaining funds if the Decedent was survived by a surviving spouse and descendants,[11] and the entire estate if the Decedent left no living descendants.[12] In the past, members of the LGBT community often saw vast sums of money paid to their deceased partners' remote relatives while they were left completely penniless. Now, those couples who marry will be entitled to the surviving spouse's share if their spouse dies intestate.

Moreover, distributees hold a lot of cards upon the death of a Decedent. For example, with a few very minor objections, only distributees can object to the probate of a Will.[13] In the past, a large part of drafting an estate plan for an LGBT couple was to consider whether their blood relatives (usually parents, siblings, or nieces and nephews) would contest their otherwise-valid Wills, motivated either by greed or out of objection to the Decedent's "choice" of sexual orientation. All too often, a surviving partner would have to endure the needless trauma, frustration, and expense involved with a Will contest brought by family members objecting simply because the law allowed them to do so. By affording all New Yorkers marriage equality, LGBT couples can prevent such a collateral attack on their estate plans simply by getting married.

Another major change marriage equality brings is full enjoyment of the "spousal rights" that the law affords a surviving spouse simply because of their status as such. These rights include, but are not limited to:

- priority over all other family members to authorize or decline artificial or heroic measures, such as artificial respiration or tube-feeding, to extend the life of a terminally-ill spouse;[14]
- priority over all other family members to control the disposition of a deceased spouse's remains, including making anatomical gifts, deciding between cremation and burial, making arrangements for a religious or secular memorial service, and determining the final resting place of the coffin, urn, or ashes;[15]
- priority over all other family members to serve as Administrator or Administrator c.t.a. of an Estate where the Decedent either died intestate or failed to name an Executor in their Wills;[16]
- the right to have their reasonable funeral expenses (or other costs advanced on the Decedent's behalf) reimbursed on an expedited basis where the Decedent leaves only a very minimal Estate;[17]
- default ownership of real property and cooperative apartments owned by the spouses as tenants by the entirety, allowing for automatic inheritance of the property or apartment between the spouses;[18] and
- the right to take immediate ownership of various items of tangible personal property (up to a certain dollar value), including household furnishings, appliances, electronics, family records and memorabilia, domestic animals, motor vehicles and up to $25,000.00 in cash. The surviving spouse receives these items irrespective of whether the Decedent died with a Will or the terms of that Will, and before creditors satisfy their claims if the Estate is insolvent.[19]

Another major change is the availability of the marital deduction from New York State estate taxes. When a Decedent dies, the government levies a tax upon his or her "gross taxable estate" - generally all assets that change hands by reason of death. Among the various deductions available against the estate tax is the unlimited marital deduction, which deducts the full value of any assets passing to the surviving spouse outright from the gross taxable estate, often greatly reducing (or even eliminating) estate taxes due.

As discussed below, the Marriage Equality Act only confers this benefit upon same-sex married couples for purposes of the New York State estate tax, not the Federal estate tax. However, the effect should not be understated: for Decedents with multi-million dollar estates, the unlimited marital deduction could save hundreds of thousands of dollars in New York State estate tax liability. All too often, surviving spouses had to mortgage or sell their longtime homes to raise money to pay the estate tax liability. Hopefully, alleviating at least the payment of New York State estate taxes will help make this nightmare a thing of the past.

Finally, unless waived in a valid pre-nuptial agreement, New York law provides that a surviving spouse is entitled to a minimum distribution of the Deceased spouse's Estate (usually a one-third required minimum distribution). This required distribution - known as the right of election or the elective share - is only required in the sense that the surviving spouse is automatically entitled to it if he or she requests it. If a surviving spouse chooses not to request his or her elective share (or fails to request it within the statutory timeframe), the surviving spouse is not compelled to take it.

B. Effect of subsequent marriage on existing estate planning documents

Prior to the Marriage Equality Act, New York placed LGBT couples at a marked disadvantage when drafting estate planning documents. All too often, LGBT couples would take elaborate steps to (1) avoid probate (and the potential Will contest between a surviving partner and the Decedent's biological family members that accompanied it) using revocable trusts, corporations, or limited liability entities; (2) ensure priority visitation in hospitals; (3) ensure access to information if one member of the couple became ill; and (4) allow for surrogate medical decision-making to ensure that the health partner would have such rights over the ill partner's biological family. Usually, this involved a great expense of time and money by the couple to find a trusted advisor to put such a plan in place.

Now that the statutory defaults (many of which are discussed above) are more accommodating to LGBT couples who choose to marry, some of these elaborate steps may prove unnecessary in the future. However, the question remains: are the existing pre-marriage equality documents still valid, or is an overhaul necessary?

Now is the time for LGBT couples who have existing estate planning documents to review them with their attorneys, either before or shortly after marrying in New York State. Some things that should come up in conversation:

- the couple should review their assets with the attorney to determine whether or not the surviving spouse will face Federal estate taxes - even despite the reduction (or elimination) of the New York State estate taxes described above;
- the couple should consider whether they wish to engage in estate tax planning, such as credit shelter, marital, or disclaimer trusts designed to reduce (or eliminate) the amount of estate taxes due upon the death of the second spouse - when the assets finally reach their ultimate beneficiaries;
- if the couple has adopted a common distribution pattern (both Wills provide for uniform distribution between each spouse's chosen beneficiaries upon the death of the second spouse), the couple should evaluate whether any blood relatives will object to probate upon the death of the second spouse, thus undoing the plan - this is especially important where the couple has no children or more remote descendants; and
- the couple should ensure that the existing Wills explicitly refer to each other by name (as opposed to "my domestic partner" or other such moniker, unless the Will explicitly identifies that person at some point in the document), to ensure that there is absolutely no confusion as to the beneficiary's identity upon death.

In addition, all people, whether coupled or not, should review their estate planning documents and ensure that the documents include:

- a Power of Attorney that allows a trusted person(s) (and perhaps one or more alternate(s)) to make financial and/or business decisions on their behalf - a right not automatically afforded to anyone (even spouses) under New York law;

- a Health Care Proxy that appoints a trusted person (and perhaps one or more alternate(s)) to make medical decisions on their behalf, ranging from minor to major medical procedures;
- a Living Will that states their wishes artificial or heroic measures to keep them alive, as well as a statement of wishes concerning the administration of pain medication to comfort a patient with a terminal diagnosis, even if the administration of such pain medication hastens death; and
- a Will that names an Executor (and, ideally, at least one alternate), that fully distributes their assets upon death, adequately addressing what happens to the various bequests if the named beneficiary dies before (or simultaneously) with the person writing the Will.

C. DOMA still denies LGBT couples rights and benefits conferred by Federal law

New York's Marriage Equality Act ushers in a new era of equal rights and dignity for LGBT couples by conferring literally hundreds of benefits (a small number of which are described above) under New York State law. Unfortunately, several rights and benefits are conferred either exclusively by the Federal government or jointly between the Federal and New York State governments. As the LGBT community is painfully aware, the so-called Federal Defense of Marriage Act (DOMA) presents a significant obstacle to achieving full equality.

Enacted in 1996, DOMA provides that the Federal government need not recognize any marriage except marriage between heterosexual couples.[20] As a result of DOMA, LGBT couples who marry in New York will still lack a variety of Federal benefits conferred upon married couples, including, but not limited to:

- rights of a surviving spouse to receive a portion of a Decedent's Social Security benefits;
- rights of a surviving spouse to a Decedent's veteran benefits;
- entitlement to the marital deduction against estate taxes (discussed above) for purposes of the Federal estate tax, which carries significantly higher tax rates than the New York State estate tax;
- entitlement to make Federal estate tax exemption amounts "portable" between spouses, decreasing the overall amount of Federal estate taxes payable;
- entitlement to make elections on a Federal estate tax return to defer payment of estate taxes until the death of the second spouse;
- where the spouses owned property either jointly or as tenants by the entirety, a presumption that each spouse contributed one-half of the purchase price, preventing full inclusion of the property in the gross taxable estate (joint owners that are unmarried under Federal law do not receive the favorable presumption, leading to many audits);
- complete exemption from gift taxes on the lifetime transfer of assets between spouses;
- ability to treat gifts to non-spouses as "split gifts," thereby reducing the amount of transfers subject to the gift tax;

- for intergenerational couples, spouses are automatically treated as exempt from the generation-skipping transfer tax; unmarried inter-generational couples may face a significant tax liability;
- ability to transfer funds from a Deceased spouse's retirement account into a rollover IRA; and
- ability to file a joint Federal income tax return

However, there is hope on the horizon. A series of cases challenging the Constitutionality of DOMA are brewing in the Federal Courts,[21] and the Obama administration has taken what could be, at best, called a disinterested attitude in seeing the Federal judiciary uphold DOMA.[22] Many commentators see the fall of DOMA as imminent. On a personal note, I sincerely home that the next article I author on the subject of marriage equality will be triggered by the repeal of DOMA, and I enthusiastically hope that I get to write it sooner rather than later.

In the meantime, it is essential that LGBT couples remain vigilant in ensuring that their estate planning documents afford them the greatest protection until this country offers full marriage equality. By consulting with their attorneys, financial planners, and accountants, the savvy LGBT couple can overcome many of these obstacles and ensure adequate protection for their relationships and estate plans.

D. Conclusion

In conclusion, decades of advocacy and activism have finally afforded LGBT couples all of the most basic rights and benefits their heterosexual counterparts have enjoyed for hundreds of years under New York law. However, the lack of Federal marriage equality still presents a final hurdle the LGBT community in New York State (and other states that allow same-sex marriage) must overcome to achieve full equal rights and protection of their relationships.

Now is the time for LGBT couples to review their estate planning documents to ensure they are taking full advantage of every benefit the Marriage Equality Act offers, and to remedy any shortfalls.

Finally, now is also the time to celebrate!

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[2] Marriage Equality Act § 3, creating a new § 10-A of the Domestic Relations Law.

[3] Marriage Equality Act § 4, amending § 13 of the Domestic Relations Law.

[4] Marriage Equality Act § 3, creating a new § 10-B of the Domestic Relations Law; Marriage Equality Act § 5, amending § 11(1) of the Domestic Relations Law.

[5] See, e.g., Matter of Ranftle, 81 A.D.3d 566 (1st Dep't 2011); Lewis v. N.Y. State Dep't of Civ. Svcs., 60 A.D.3d 216 (3rd Dep't 2009), aff'd 13 N.Y.3d 358 (2009); Godfrey v. Spano, 57 A.D.3d 941 (2nd Dep't 2008), aff'd 13 N.Y.3d 358 (2009); Martinez v. County of Monroe, 50 A.D.3d 189 (4th Dep't 2008).

[6] See 1 U.S.C. § 7 (defining marriage, for purposes of Federal law, as "a union between one man and one woman as husband and wife" and limiting the definition of the word spouse as "a person of the opposite sex as a husband or a wife"); 28 U.S.C. § 1738C (exempting the various States from recognizing same-sex marriages performed in other States or countries).

[7] See SCPA § 103(14).

[8] See EPTL § 4-1.1(a)(1), (2).

[9] See EPTL § 4-1.1(a)(2).

[10] See EPTL § 4-1.1(a).

[11] See EPTL § 4-1.1(a)(1).

[12] See EPTL § 4-1.1(a)(2).

[13] See SCPA § 1410.

[14] See Public Health Law ("PHL") § 2965(2)(a)(*ii*); see also PHL § 2994-d(1)(b).

[15] See PHL § 4201(2)(a)(*ii*).

[16] See SCPA § 1001(1)(a). The impact of this first point should not be understated. I have seen several surviving partners have to idly stand by and watch a distant relative or government agency administer the Estate of their deceased partner.

[17] See SCPA § 1310(3)(a).

[18] See EPTL § 6-2.2(b), (c).

[19] See EPTL § 5-3.1(a).

[20] See 28 U.S.C. § 1738C.

[21] See, e.g., Commonwealth of Massachusetts v. U.S. Dep't of Health and Human Svcs, 698 F. Supp. 2d 234 (D. Mass 2010)(ruling DOMA unconstitutional). An appeal of this case is currently pending in the United States Court of Appeals for the First Circuit.

[22] See, e.g., U.S. Department of Justice brief in Golinski v. United States Ofc. of Personnel Mgmt (filed summer 2011), stating that "the federal government has played a significant and regrettable role in the history of discrimination against gay and lesbian individuals."