



Lawrence N. Berwitz, Esq. and
Maureen Rothschild DiTata, Esq.

Same-Sex Marriage in New York: One Year Later

On June 24th, 2011, New York became the sixth state, behind Massachusetts, Connecticut, Vermont, New Hampshire and Iowa, as well as Washington, D.C., to permit same-sex couples to marry. The law has been in existence for one year. It has garnered headlines, created controversy, and withstood challenge in our Courts. Many jurisdictions will not recognize a New York same-sex marriage, or will recognize the marriage only for certain purposes. This article will address some of these issues and will review the legal rights and obligations, tax ramifications and unanswered questions that result from the enactment of the law and its application.

Under the new law, in New York, same-sex spouses will enjoy the same rights and obligations as spouses in a traditional marriage. For instance: the surviving spouse of a same-sex marriage will share in the estate of the deceased spouse who dies without leaving a Last Will and Testament, and he or she is entitled to inherit such things as household items, electronic

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Is Assisted Suicide Legal?

Sometimes we are asked to give our clients information and advice on topics that we don't select. Recently we were asked about assisted suicide. Certainly this is a controversial topic. But what is the law? Although there is much debate about the *morality* of helping a terminally ill person end their life, the fact remains that it is illegal in most states.

In 1997, the United States Supreme Court ruled that there is no Constitu-

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When Parents Move In With Adult Children

Housing costs and nursing home costs continue to rise. Many adult children and their parents are exploring the possibility of living together. This arrangement should not be undertaken lightly. Preparation is the key to success and can incorporate everything from physical modification of the house to finances. The following are some things to think about.

Work out the financial details first. These can be very sensitive. Can the parent contribute to the cost of renovations? If the parent has other children, will they object to the parent's capital contribution to their sibling's home? Will this cause ill feelings in the family? Even if no renovations are anticipated, an extra mouth to feed can be expensive. How much can or should the parent contribute to the

household? What if the parent requires home health care? If the parent doesn't have sufficient assets to pay for room, board and care, will the other children contribute?

There are tax and other considerations. If the parent contributes to remodeling the house, should the parent receive an ownership interest? Should the parent gift their portion of the house to the children, retain an interest, or put it in a trust? These and

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and photographic devices, musical instruments, the family bible, pictures, books, and one car. The same-sex surviving spouse is also afforded equal protection against being disinherited by a spouse. Once legally married, each spouse has the right to recover damages in a personal injury or wrongful death action, and the spousal privilege against being compelled to testify against one's spouse. Same-sex spouses will automatically hold real estate as they would in a traditional marriage. The survivor owns the entire parcel should the other pass away, unless otherwise designated in the deed.

Marital obligations include a general duty to support the other spouse, and the duty, upon divorce, to pay maintenance (formerly called alimony) to the other spouse. Property obtained during the marriage, regardless of whose name it is in, will be divided equitably by a Court. Similarly, upon a divorce, the debt accrued during the marriage, regardless of whose name the debt is in, will be allocated equitably. During the marriage, a spouse is generally not responsible for debts of the other spouse that were incurred prior to the marriage, nor is a spouse responsible for debts incurred solely by the other spouse. However, creditors of the debtor spouse may try to collect the debt by levying upon jointly owned accounts or property.

Marital status greatly affects rights regarding children. It is unclear whether New York will recognize the biological child of one spouse born during the marriage as the legal child of both spouses. Even if New York



does recognize both spouses as the legal parents of the child, other states may not. A child born prior to the marriage will not be considered the child of the non-biological spouse without further legal steps being taken. A child born via artificial insemination to a married woman, with the written consent of her husband, is deemed the legitimate birth child of the couple for all purposes. The child born via artificial insemination to consenting same-sex couples should also be deemed the legitimate birth child of both parents but, because of the uncertainties surrounding this issue, it is recommended that the non-biological parent obtain a second-parent adoption. In a divorce, both partners can seek custody and visitation. Upon death, however, the remaining parent has always been regarded as the minor child's guardian, absent evidence that this is contrary to the child's best interests. There are also significant questions concerning inheritance rights relative to a child born of a same-sex marriage.

However, the most significant difference between same-sex marriage and traditional marriage is that only traditional marriage offers *federal* benefits and protections, such as Social Security benefits, veterans' benefits, health insurance, Medicare, estate tax exemptions and credits, re-

tirement savings and pension benefits, and unpaid leave from your job to care for family members. This will cause unintended and unanticipated problems. For example, a woman whose health insurance covers her female partner must pay federal income tax on the total employer cost for that insurance.

When a person dies, the federal government imposes an estate tax on the value of the estate exceeding \$5 million. Property left to a surviving spouse, however, is exempt from this tax if the spouse is a U.S. citizen (the "marital deduction"). Same-sex spouses are not eligible for the marital deduction. For federal income tax purposes, a married couple may choose to file taxes jointly or separately, i.e. "married filing jointly" or "married filing separately." On a joint return, the couple's combined income is reported and the combined expenses are deducted, resulting in potentially significant tax savings. A same-sex married couple cannot file joint income tax returns. The Internal Revenue Service website states: "For federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife."

All income-earning individuals may contribute to an Individual Retirement Account (IRA), the contributions to which are generally tax deductible. In addition, married couples can contribute up to \$5,000.00 annually to an IRA for a non-working spouse. Same-sex couples may not make these contributions for a stay-at-home partner. Because they are not able to benefit from decades of compounding returns, this can result in significantly smaller retirement accounts.

The same-sex spouse of a member of the military is not entitled to military benefits, such as education scholarships and loans, home loans,

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other decisions will affect the parent's future eligibility for Medicaid nursing home care. Should a contract be established by which the parent pays the children for providing care? Should promissory notes be utilized to reflect sums paid by the child or children on behalf of the parent?

Make the home senior friendly. Whether adding an addition or just fixing up a spare bedroom, adjustments should be made to accommodate the parent. Doorknobs can be replaced with levers, stair railings must be sturdy, grab bars should be installed in the bathroom, and rugs with non-slip backings should replace those that will present a falling hazard. Some homes require more significant adaptations. These may include the installation of a ramp for wheelchair accessibility, the conversion of a room on the first floor into a bedroom, the installation of a stair lift, or widening doors to accommodate a wheelchair or walker.

Personalize the home for the parent. Consider the parent's likes and dislikes. The goal should be to make the parent feel at home. Even if he or

she will occupy only a bedroom, it should be made to feel like it is their space. Prepare the grandchildren and discuss the advantages of having a grandparent in the home.

Look into a tax deduction. When considering the financial details of this new arrangement, ascertain whether the child is able to claim the parent as a dependent. A tax deduction may be applicable if the child provides more than half of the parent's support during the year.

To avoid fostering resentment and guilt among other family members, all of these issues should be addressed before the decision to move is finalized. It may be helpful to prepare and have all of the family members enter into a family agreement. Reducing the arrangements to writing, and asking everyone to participate in the agreement and to acknowledge their acceptance of its terms can significantly eliminate arguments. An elder law attorney can help your family create a plan that takes into account the contingencies so that everyone is on the same page and knows what to expect.



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tional right to assisted suicide, leaving states free to pass laws specifically prohibiting it. Under the laws of most states, helping someone to commit suicide is a felony.

Only two states have passed laws legalizing assisted suicide, and only in limited circumstances. Oregon's Death

with Dignity Act permits physicians to prescribe lethal medication that will allow terminally ill individuals to end their lives. There are very specific steps—including waiting periods and release forms—that must be followed before the medication can be prescribed. Washington has a similar law.

The Supreme Court of the state of Montana paved the way, in 2009, for a statute similar to Oregon's, ruling that physicians could be permitted to prescribe medication to help termi-

nally ill individuals end their lives, but lawmakers have, to date, not enacted a law that would allow this.

In New York state the law is clear. The Penal Law states that one who "intentionally causes or aids another person to attempt suicide" is guilty of promoting a suicide attempt, a class E felony and that one who "intentionally causes or aids another person to commit suicide" is guilty of manslaughter in the second degree, a class C felony.

310 Old Country Road, Suite 101
Garden City, New York 11530

TELEPHONE: (516) 747-3200

FACSIMILE: (516) 747-3727

WEBSITE: www.berwitz-ditata.com

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life insurance, healthcare, and housing allowances, among other such benefits. The same-sex surviving spouse of a military veteran, who has died either during or after service, is not entitled to survivor benefits, including death pension, dependency and indemnity compensation, home loans, medical coverage and life insurance proceeds, all of which are potentially available to a heterosexual spouse.

Because Medicaid is locally administered, it appears that same-sex married couples will be afforded

equal rights. Same-sex spouses are considered legally responsible relatives and the income and resources of both are considered when determining eligibility. Same-sex spouses are permitted to sign Spousal Refusal forms. Other budgeting rules, which protect the community spouse when the other spouse needs long-term nursing home care, and allow the institutionalized spouse to make transfers to the community spouse to qualify for Medicaid, will apply to same-sex couples.

Ultimately, this is an area of the law that is evolving and the questions and problems that are surfacing create a virtual minefield for same-sex couples and their families. If you, a relative or friend have questions or concerns, do not hesitate to give Berwitz & DiTata LLP a call.

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