

BERWITZ & DiTATA LLP

Attorneys and Counselors at Law

310 Old Country Road Suite 101
Garden City, New York 11530
Telephone (516) 747-3200 • Facsimile (516) 747-3727

Lawrence N. Berwitz

Maureen R. DiTata

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 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, retirement 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, 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.