

FROM THE JULY ABA JOURNAL, July 1, 2004

ABA CONNECTION

THE CHANGING FACES OF GAY LEGAL ISSUES

Lawyers Advising Clients Face Uncertainties on Issues Ranging From Parental Rights to Estate Planning

BY JILL SCHACHNER CHANEN

When the city of San Francisco began issuing marriage licenses to same-sex couples earlier this year, attorney Frederick Hertz received a call from a client seeking advice on whether she and her lesbian partner should obtain one. Hertz, whose office is across San Francisco Bay in Oakland, had no easy answer. "I said to her that when you get married and apply for a loan, the bank's loan application does not have a box next to 'Single,' 'Married' and 'Divorced' that says 'Marriage license applied for, validity in question,' " recalls Hertz.

That kind of uncertainty is becoming increasingly prevalent for same-sex couples as more and more states grapple with the question of just what kind of legal recognition to give their unions.

So far, only a few states have recognized some form of same-sex marriage or civil union, but already those measures are creating a patchwork of laws and court decisions with little uniformity. The issue is so fluid that no one can predict whether any consensus will be reached among the states or how state actions would be affected by a proposed amendment to the U.S. Constitution banning any form of same-sex marriage.

The California Supreme Court, for instance, in March put a stop to gay marriages in San Francisco. But that action left open the question of whether the marriages that already were performed are valid, even as the state legislature has adopted laws expanding rights for persons in domestic partnerships.

A similar dilemma exists in Oregon, where a trial-level judge enjoined officials of Multnomah County, which encompasses Portland, from issuing marriage licenses to gay couples, but ordered Oregon officials to recognize some 3,000 same-sex marriages that were already performed in the state this year. Judge Frank L. Bearden said his ruling in *Li v. State*, No. 0403-03057 (April 20), gives the legislature and supreme court an opportunity to fashion a more definitive decision on the issue.

Confusion continues even in Massachusetts, which on May 17 became the first state to recognize same-sex marriages following the Massachusetts Supreme Court's ruling in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (2003), that interprets marriage under state law to be the "voluntary union of two persons as spouses." But even as gay marriages are being performed in Massachusetts, the state legislature has initiated a three-step process that will put a constitutional amendment banning gay marriages before the voters in 2006, while recognizing same-sex civil unions.

The growing uncertainty about the direction of the law on this issue is making it increasingly difficult for lawyers to advise clients in same-sex domestic partnerships on just what their rights are and what steps they should take to protect them.

"Counseling clients is very difficult," says Hertz. "Part of the problem is that they do not want to hear me saying that I do not know. I can explain with great elaboration and detail all the things that I do not know, but fundamentally what I am doing is telling them that I do not know."

Compounding these difficulties is the fact that many homosexual couples simply haven't given much thought to how legal issues might arise in the course of their relationships, according to Richard Wilson, a domestic relations lawyer in Chicago.

"Given the history and the social opprobrium they have had to deal with, same-sex couples often set up relationships with no legal protections," says Wilson. "So often—and this always surprises me—they do not consider what happens if things fall apart. They've bought real estate together and all other kinds of things without a thought about what they might be getting into. They have this assumption that they will have their day in court or some sort of legal recourse and are shocked to find out that they have none."

The current push for recognition of unions between same-sex couples has emphasized the disparity in how the law treats them in comparison to heterosexual married couples.

By some counts, marriage carries with it 1,049 distinct rights, benefits and responsibilities under federal law alone. Together, federal and state laws touch on nearly every aspect of a marital relationship by addressing such matters as Social Security survivor's benefits, preferential tax treatment, standing to sue for certain torts, access to health care insurance, support obligations for children, access to divorce courts, intestacy rights, decision-making authority for an incapacitated spouse and parental rights.

There is no legal recognition of same-sex couples under federal law, and only a few states extend coverage of their laws to same-sex couples. But there has been gradual acknowledgement of the contention that at least some of the legal rights enjoyed by married persons should be extended in effect, if not in name, to persons in committed same-sex partnerships.

STATE OF CHANGE

In 1999, the Vermont Supreme Court broke new ground by accepting the discrimination argument. In response to the court's decision in *Baker v. State*, 744 A.2d 864, the Vermont legislature adopted a statute permitting same-sex couples to enter into civil unions. The law accords same-sex couples all of the benefits, protections and responsibilities of spouses in a marriage under Vermont law.

Since then, a handful of other states have acted to provide broader protections to same-sex couples in committed relationships.

Under a newly enacted law that goes into effect in 2005, California will treat same-sex couples in much the same way as Vermont, says Tamara Kolz, a Boston lawyer who is a member of the ABA Working Group on Same-Sex Marriages and Non-Marital Unions. While a statute already in effect extends a limited number of rights to same-sex couples under California law, the new law will include such protections as access to divorce courts for dissolution of long-term relationships and for obligations relating to children, financial support during and after the relationship, community property rights, and consent for autopsies and the disposition of remains.

New Jersey's legislature this year enacted a domestic partnership statute granting a variety of rights to domestic partners that previously were reserved for married couples, including exemption from inheritance taxes on the same grounds as a spouse, state income tax exemptions for joint tax returns, and the right to make medical or legal decisions for an incapacitated spouse or partner. The statute also recognizes the validity of domestic partnerships, civil unions and similar relationships formed under the laws of other jurisdictions.

But the recognition in a few states of same-sex marriage or civil unions, along with the legal rights and obligations that go with them, is unlikely to address the legal needs of gay couples living in other jurisdictions for two reasons: First, states that permit same-sex marriages or civil unions also may impose a residency requirement; and second, the full-faith-and-credit principle does not require other states to recognize those unions.

Concerns have been raised from a number of quarters—ranging from gay rights advocates to proponents of retaining a strong element of federalism in the nation's legal structure—that the proposed amendment to the U.S. Constitution defining marriage as the union of a man and a woman also would prohibit states from passing legislation that confers any kind of legal status to same-sex couples.

In February, the ABA's policy-making House of Delegates adopted a recommendation opposing any federal measure that would pre-empt states from defining marriage.

That would be a more sweeping prohibition than exists under the Defense of Marriage Act adopted by Congress in 1996. Under that law, states are relieved of their obligation to give full faith and recognition to same-sex marriages that are lawful in other jurisdictions. At the same time, however, the law does not bar states from adopting their own laws recognizing same-sex marriages or other forms of unions.

Gay couples who are granted a marriage or civil union by a state in which they don't reside—or Canada, which recognizes gay marriages—may suffer dire consequences when they return home or travel elsewhere, says Middlebury attorney Beth Robinson, who argued for equal protection for gay couples before the Vermont Supreme Court in Baker.

"There are a whole bunch of people who think that they are uniting in families and find out that the federal government does not recognize them," says Robinson. "If one of them is the breadwinner and the other stays home with the kids and the breadwinner dies, then the other has no access to survivor benefits."

Sometimes gay couples may not experience those consequences until they try to separate. In Vermont, for instance, gay couples who have joined in civil unions also have access to the state's divorce courts—but only if they meet a six-month residency requirement under the same-sex union law. Canada imposes a one-year residency requirement.

"It's problematic because you just cannot pick up and move there for the required time period," says San Francisco lawyer Courtney G. Joslin, who co-chairs the Sexual Orientation and Gender Identity Committee in the ABA Section of Individual Rights and Responsibilities. She also serves on the association's same-sex marriage working group.

These kinds of issues typify why the developing patchwork of state laws on same-sex unions is so difficult for attorneys and their gay clients, says Joan M. Burda of Lakewood, Ohio. She is the author of Estate Planning for Same-Sex Couples, being published in July by the ABA's General Practice, Solo and Small Firm Section.

"It's a mess and it's not going to be resolved anytime soon," says Burda, a member of the section's council. "Lawyers need to sit down with their clients and figure out what they need in their home states to protect themselves and their property, and what happens to them and their children if they take a vacation or go to a state that is particularly antagonistic toward same-sex couples."

ALTERNATE ROUTES

Because the current state of the law does not provide for universal recognition and protections for gay couples, the challenge for lawyers is to find other means to try to re-create at least some of them.

For now, say experts, one of the most useful tools is the private contract that crafts a broad variety of agreements on such issues as property, parental rights and inheritance.

First, however, a lawyer must confirm whether such a contract would be recognized by the couple's home state.

Chicago's Richard Wilson notes that a handful of states, including Illinois and Ohio, still have case law that invalidates contracts in which the consideration is a person's sex. Lawyers have had success in enforcing these contracts, however, by arguing other forms of consideration, such as parenting duties, or by framing the contracts as business agreements.

Further, even if a state gives some measure of recognition to rights of same-sex couples, documenting the rela- tionship is useful, say lawyers, because people travel frequently and may be in a locale where the laws of their home state are not given full faith and credit.

"It is becoming more and more important to document the relationship and put as much as possible in writing," says Burda. "The need for written documentation establishing the relationship and what the parties have agreed to, and evidence of their commitment to each other, is the best that we can do at this point."

Joslin says this extra documentation is especially necessary if children are in the picture. She advises same-sex couples with children to do co-parent adoptions for the nonbiological parent even if the law has changed to officially recognize nonbiological second parents.

"When a married couple has a child, they both are presumed to be the parents, regardless of biology," says Joslin, an attorney at the National Center for Lesbian Rights. "Theoretically, after Jan. 1, 2005, a child born to a same-sex couple [in California] will be presumed to be the child of both members of the couple, regardless of biology. But it is our position that they should take some additional steps for protection. One option would be to go to court and get a judgment to declare them both parents. It's unfair because it's expensive and not required of heterosexual parents, but it is especially important if they go into another state where California law is not recognized."

Without taking that extra step, say lawyers, even the smallest things like picking up a child from school could become problematic for the nonbiological parent.

Burda urges clients to have a broad range of documentation to protect their rights. The most powerful is a form designating an agent, giving a partner such rights as hospital visitation, decision-making authority for health care, and even control over the disposition of remains.

Even with proper documentation, however, same-sex couples still can never be sure under current law in most states that their intentions will be honored. Burda cites a recent Maryland case in which a gay man became seriously ill and was transferred to a Baltimore hospital. The hospital barred his partner from accompanying him, visiting and participating in medical decisions even though the man had created all sorts of legal documentation to express and protect his and his partner's rights.

"Go figure," says Burda. "But that's what lawyers need to tell their clients: They may have all of these documents and it still may not work."

WELL-DRAFTED DOCUMENTS

When it comes to estate issues, gay couples will have a better chance of assuring that their wishes are carried out if the proper documentation is in place, says Ralph Brashier, a law professor at the University of Memphis and author of Inheritance Law and the Evolving Family, published in January by Temple University Press in Philadelphia. Tightly drafted wills, trusts and estate plans can ensure that a surviving partner takes assets and other property according to the decedent's wishes, notes Brashier.

But, he says, lawyers need to know what additional provisions to insert in these documents to make sure judges or juries do not deviate from the law, or that family members cannot successfully contest a decedent's wishes, an issue that frequently is raised when families do not want to recognize a son's or daughter's homosexuality.

"Even the everyday practitioner who occasionally does a will needs to think about how to develop simple estate plans that minimize the risk of attack from biological relatives of the decedent," says Brashier.

In preparing contracts, estate planning documents and other legal documents for gay couples, lawyers also need to look ahead and consider how they might be affected by changes in state law, including legislation to recognize same-sex unions, says Sandra Morgan Little, a lawyer in Albuquerque, N.M., who chairs the ABA Working Group on Same-Sex Marriage and Non-Marital Unions.

"Given how unclear it is, lawyers have to think about both directions," says Little. "If a client comes in today, the lawyer needs to think about what [these documents] mean today and what will happen next year if their union is recognized. Will their contracts go away? Will the law make them weaker? Stronger?"

Federal tax law is a crucial consideration that must be addressed in developing nearly any legal arrangement for a gay couple.

"All this goes to what the federal government is going to do with taxes," says Chicago lawyer James L. Schwartz, who serves with Burda on the council of the general practice section. "That is going to be the linchpin because under the tax code right now, you do not get the same kind of treatment [for same-sex partners] that you do for married couples."

Boston lawyer Kolz says tax planning can get extremely complicated for gay couples because they lack recognition under federal law. Lawyers must understand the deductions and exemptions available only at the state level in jurisdictions that recognize same-sex partnerships and plan accordingly, she says. They also can make good use of complicated estate- and tax-planning tools that allow gay couples to avoid certain federal gift and estate taxes.

Hertz says the Internal Revenue Code has forced him to be extremely creative in resolving tax dilemmas for gay clients. Often he finds himself crafting solutions that are different from what his clients originally planned to do.

For instance, Hertz recently represented a gay couple with a high net worth in a dissolution of their relationship. The couple had registered as domestic partners in California after entering into several agreements governing their relationship more than 20 years ago. The agreements provided that the partners would divide a stock account, but the division would have triggered immense tax liability for the partners—something that would not have happened in the case of a married couple. To avoid the tax consequences, Hertz devised a solution through the payment of child support at a high level because child support is not taxable.

"It's an example of knowing how all the legal rules come into play [that] may help you craft a better solution," says Hertz, who defines his practice as nonmarital law oriented toward California's community property laws. "Most family law attorneys in California do not know nonmarital law because it is not in family courts. It is contract law in the civil courts," he notes.

Hertz has been teaming with marital lawyers to work on dissolutions for couples who have been together for years before marrying or registering as domestic partners. With California's new domestic partnership law coming on line next year, he envisions working in this style much more when representing same-sex couples.

Experts say that lawyers representing same-sex couples need to know when formalizing the relationship may not be the best move. Immigration is one example. U.S. citizens may sponsor a noncitizen spouse for immigration purposes. But the same is not true for same-sex couples, even if their relationship has been recognized through a civil union, domestic partnership or marriage in another country.

And being part of a civil union or domestic partnership actually may inhibit the ability of aliens to stay in the United States, according to Victoria Neilson, legal director of Immigration Equality in New York City.

"Anytime they apply to renew their visa they have to overcome the presumption of intending to come to the United States permanently," says Neilson. "If a U.S. consulate abroad, or a customs or immigration officer at an airport, believes that they plan to be here permanently, entrance will be denied."

Some lawyers in the field say that, ultimately, the greatest obstacle to protecting the legal rights of partners in same-sex relationships may be their own reluctance to take advantage of protections the law may offer, even in the absence of statutes recognizing same-sex marriages or civil unions.

"We have the tools and we can help them," says Hertz, "but there has been this whole political shift where people are saying, 'Why do I have to pay you \$1,500 to do this? Why can't I just do what my parents did and get married?' "

Jill Schachner Chanen, a lawyer, is a legal affairs writer for the ABA Journal. Her e-mail address is chanenj@staff.abanet.org.

©2004 ABA Journal