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**PROTECTING SAME-SEX CLIENTS AND THEIR
FAMILIES**

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**Practitioners must craft documents to mirror - to the extent possible and
permissible - the rights, privileges and obligations of marriage.**

AS THE FINAL HOURS of the 20th Century ticked away and the new millennium slowly approached over the horizon, the winds of change, many believed, began to blow from the north, as the Vermont Supreme Court broke new ground by delivering to the citizens of its state, much like Moses from the mountain, its decision in Blake v. State, [FN1] holding that Vermont had a constitutional obligation to provide same-sex couples the same benefits, protections and security that Vermont law provided to married couples of opposite sexes.

Thereafter, Vermont's Civil Union Law (Act 91) was enacted on July 1, 2000, permitting same-sex couples to enter into civil unions, and thereby also affording to those couples the security of the previously enacted custody and visitation statutes protecting the rights of all married persons with children.

Three years later, in Goodridge v. Department of Public Health, [FN2] the Massachusetts Supreme Judicial Court determined that restricting marriage to couples of the opposite sex contravenes doctrines "of individual liberty and equality under law protected by the Massachusetts Constitution."

In quick succession, on Jan. 12, 2004, [FN3] and Jan. 1, 2005, [FN4] New Jersey and California, respectively, jumped on the bandwagon and enacted domestic partnership statutes expanding the rights and protections afforded couples in same-sex relationships.

Under California's domestic partnership laws, registered same-sex domestic partners will be treated similarly to those in Vermont, and be afforded such protections as access to divorce courts for dissolution of long-term relationships, financial support during and after the relationship, community property determinations and distributions, and adjudication of rights and obligations concerning child

custody, visitation and child support. [FN5]

To many, the progress made divined a bright and benevolent future for the promise of equality in law and the implementation of protections for adults of same-sex unions and their children -- providing to them the security that parents and children born of married relationships are afforded.

The promise of what was to be has yet to come to fruition, with New York one of the notorious laggards. Only five states currently -- Vermont, California, Massachusetts, Hawaii [FN6] and New Jersey -- have made positive inroads into affording couples in same-sex relationships and their families broad statutory protections.

Massachusetts recognizes same sex marriage, Vermont and New Jersey have created the doctrine of civil unions, and Hawaii and California have implemented reciprocal beneficiary registration -- each of which confers rights and benefits only to the state's own citizens and only as concerns state law.

And, despite Justice Doris Ling-Cohan's resourceful 62-page decision in Hernandez v. Robles, [FN7] New York is no closer to affording same-sex couples and their families the same privileges and protections as married couples.

This has a wide-ranging effect, as these statistics show:

- In 2004 the Government Accounting Office conducted a computerized search of the United States Code to ascertain the number of federal rights and responsibilities conferred upon married couples and denied to couples involuntarily unmarried at law. [FN8] The number was a staggering 1,138. [FN9]
- According to the Human Rights Campaign's (HRC) analysis of the 2000 Census statistics there had been, during the course of the 10 years preceding the Census, a 238 percent increase in the number of households of same-sex partners in New York. Nationwide 33 percent of female same-sex couple households and 22 percent of male same-sex couple households reported at least one child under the age of 18 living in the home. Astonishing as that number may seem, it is on the low side, for the HRC estimates that the Census 2000 figures in all likelihood undercounted gay and lesbian families by as much as 62 percent. [FN10]

This all means that, sooner rather than later, more and more matrimonial practitioners in New York will be involved in documenting or resolving issues concerning same-sex couples and their children where there is no statutory system in the background primed as a default. [FN11]

Since New York law, as it currently exists, does not provide sufficient protections for same-sex couples, [FN12] the challenge and the goal is to craft documents to mirror -- to the extent possible and permissible -- the rights, privileges and obligations inherent in the traditional marriage contract.

Duplicating the Rights

As Prof. Alan Scheinkman noted in his Practice Commentary for Domestic Relations Law '236, [FN13] "marriage is an economic partnership ... [which] cannot exist until marriage has occurred," and

"[I]f non-marital cohabitants wish to form an economic partnership, they may do so; but the partnership can be created only by agreement, not by operation of law.' [FN14]

The Court of Appeals in Morone v. Morone, 50 N.Y.2d 481, 429 N.Y.S.2d 592 (1980), held that an express agreement between unmarried cohabitants is as enforceable as though they were not living together, [FN15] so long as illicit sexual conduct was not part of the consideration of the contract. The theory is that while cohabitation absent marriage does not provide the property and financial rights attendant to the marital relationship, it does not disable the parties from making an agreement within the traditional parameters of the law of contracts. [FN16]

Concomitantly, inasmuch as domestic partners may enter into written agreements to memorialize their mutual undertakings, those who are dissolving their relationship may enter into termination or "separation" agreements. [FN17]

In order to duplicate as closely as possible the rights of the marital economic partnership for the unmarried couple, begin with the premise of the number 10 -- the 10 most important rights that married couples accrue, to wit:

- (i) the right to receive financial support from one's spouse for oneself and any children; [FN18]
- (ii) the right to use separate and commonly owned property, and the right to an equitable distribution of jointly acquired property;
- (iii) the right to guardianship of children born of the relationship; [FN19]
- (iv) the panoply of rights and benefits allotted to those who could file joint tax returns (including head of household and child tax credits);
- (v) the right to receive distributions from estates free of estate tax;
- (vi) the right to receive retirement and survivor's benefits from retirement plans and Social Security;
- (vii) the right to COBRA continuation coverage;
- (viii) the right to obtain "family" health insurance, dental insurance, and other employment benefits;
- (ix) the right to determine medical treatment in the case of medical emergencies and to have access to the patient in the hospital, and further, in the event of death, to sue for wrongful death; and
- (x) the right to automatically share in the partner's estate in the event of intestacy.

With this knowledge, then proceed to the following 10 documents that should be prepared by same-sex couples to protect their families. At a minimum, this well serves to begin the process of protecting the gay or lesbian client:

- a partnership/cohabitation agreement;
- directives addressed to a child's school and health care providers;
- a durable power of attorney for property;
- a durable power of attorney for health care and/or health care proxy;
- healthcare powers of attorney for a child;

- a thoroughly well-crafted last will and testament or revocable living trust;
- a special needs trust;
- a living will;
- an affidavit of cremation (if applicable); and
- guardianship documents/standby guardianship.

The Documents

The partnership/cohabitation agreement should establish, to the extent not already established by the form/manner in which title is taken, [FN20] each partner's rights and obligations as owners of joint real property, financial instruments, bank accounts, securities, retirement funds and investments.

Same-sex couples that have or expect to have a child should include in the agreement their goals and hopes concerning the families they are creating, including, but not limited to their agreement to:

- (i) jointly parent;
- (ii) contribute financially in specific proportions to the child's and the family's needs;
- (iii) acknowledge the parent-child relationship to the extent there is no second-parent adoption;
- (iv) be governed by the "best interest of the child standards," therein detailing what the parties consider to be in their child's best interest concerning residence, education, health care and religion;
- (v) execute any additional documents necessary to carry out the import and intent of the agreement; and
- (vi) an alternative dispute resolution procedure and process.

This type of agreement will ultimately serve two important purposes. First, the processes of accomplishing the arrangement will in all likelihood reveal, and promote resolution of, areas of misunderstanding between the parties or areas where there is clear discord. The goal is to pinpoint and settle as many prospective differences of opinion as possible -- paying special attention to the prospect that the family may dissolve.

Second -- by accomplishing the partnership/cohabitation agreement the parties may create some greater protection for the non-biological/non-adoptive partner's relationship with the child than currently exists at law. [FN21]

Directives addressed to a child's school and health care providers, as well as health care powers of attorney for any child should specifically provide names, contact information, and the extent to which the parent, absent adoption, may partake in, contribute to, and direct school and health care needs of a child -- including, the mundane concern of who has the right to collect the child at the end of the school day and in the event the child takes ill while at school.

A durable power of attorney for property/financial affairs allows the client to name his or her partner as agent with respect to property and to make decisions with respect thereto, including the ability

to make annual exclusion gifts if properly drafted. If the principal becomes ill or incapacitated, a durable power of attorney will survive such illness or incapacity and will ensure the appointed partner continued access to property that is subject to such power of attorney.

A durable power of attorney for health care allows the client to stipulate that his or her partner can make decisions regarding termination of life and/or health care, and make burial/funeral arrangements in the event of death. Without this document, a same-sex partner may not be admitted to the hospital, could be excluded from the funeral, and will not have the right to make any essential decisions in the event the partner is ill or incapacitated.

A health care proxy provides the mechanism by which to appoint both a health care agent and a substitute agent to make health care decisions and determine the course of medical treatment, consult with medical caregivers and, most importantly, make decisions concerning artificial nutrition and hydration. Note, however, that the principal must provide in the proxy specific instructions or a specific authorization that the partner can act on issues regarding artificial hydration and nutrition. Absent such specificity the agent may not make such decisions.

A last will and testament allows the client to specifically identify and leave property at death to the partner, appoint the partner as executor and/or trustee of any trusts created thereunder and establish the partner as the legal guardian of any minor children. Absent this document, the laws of intestacy will govern the distribution of property, with, in all likelihood the biological family being granted the property and being allowed to make essential decisions regarding the children despite the partner's objections.

The so-called will substitute, the revocable living trust, is another manner in which property can pass to a same-sex partner after the death of the other partner. This trust can include the same dispositive scheme as a traditional last will and testament. However, a client may wish to consider this vehicle to pass assets at death if real property is owned in more than one state and if the client wants to "avoid" or minimize the amount of assets that will be subject to probate in the domiciliary state.

Furthermore, such a trust is more private than a will, may in many cases allow for a quicker property conveyance, and may provide less opportunity for any biological family members to litigate the decedent's testamentary objectives.

A living will -- a document that appoints a surrogate to make end-of-life decisions -- has recently received much public press in Florida and elsewhere due to the Terry Schiavo case. It still has a unique place in providing protection to same-sex couples -- namely, the guilt factor. If the ill, infirm or deceased same-sex partner's biological family is homophobic, litigious, or simply differs in its view about end-of-life decisions, this document can supply a concise account of the client's wishes.

A special needs trust is a specific type of a trust that preserves government benefit eligibility (for such programs as Supplemental Security Income and Medicaid) and leaves assets that will meet the supplemental needs of a same-sex partner with a disability.

Supplemental needs are those that go beyond food, shelter, clothing and the medical and long-term supports and services of Medicaid. An SNT (a Supplemental Needs Trust) can fund those

additional needs. In fact, the SNT must be designed specifically to supplement, not supplant, government benefits. Money from the trust cannot be distributed directly to the person with a disability. Instead, it must be distributed to third parties to pay for goods and services to be used by the person with a disability.

Standby guardianships permit a parent with a life-threatening illness to make a number of choices about the permanent plans for a child, concerning guardianship, without presently abdicating parental rights. If the parent is alive when the guardianship becomes effective, both the parent and guardian have concurrent authority. Absent second-parent adoption, plans for a child of the partnership may be enacted.

Last, but not least, is the affidavit of cremation. It goes without saying what this is and why it is needed, for often family members do not adhere to a decedent's spoken desire to be cremated. Therefore, to make certain that the decedent's wishes are followed, the additional step of creating the notarized affidavit is appropriate.

Conclusion

Clearly, for many of the rights, benefits and obligations that devolve upon married couples, there is no contractual replacement. These include Social Security benefits and deductions and/or credits granted under income, estate and gift tax law -- much of which is based in federal law. However, until New York and federal law afford the rights, benefits and obligations of marriage to same-sex couples, practitioners of family law must cobble together what they can to provide their clients necessary protections.

Endnotes:

FN1. 744 A.2d 864 (Vt. 1999).

FN2. 798 N.E.2d 941 (2003).

FN3. New Jersey Domestic Partnership Act, 2003 N.J. Sess. Law Serv. 246 (June 5, 2003).

FN4. A.B. 205, 2003-04 Sess. (Cal. 2003).

FN5. Jill Schachner Chanen, "The Changing Face of Gay Legal Issues," ABA Journal, July 2004.

FN6. Reciprocal Beneficiaries Law (Act 383), enacted July 8, 1997; Haw. Rev. Stat. ' 572C (2001). Rights to support, divorce, and child custody resolution not afforded to reciprocal beneficiary couples.

FN7. 7 Misc.3d 459, 2005 N.Y.Slip Op. 25057 (Sup Ct. N.Y. Cty. 2005).

FN8. Report No. 04-353R (Jan. 4, 2004); A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships, ABA Section of Family Law, Family Law Quarterly, Vo, 38, No. 2, Summer 2004.

FN9. Id.

FN10. Human Rights Campaign Web site, www.hrc.org.

FN11. Minieri v. Knittel, 188 Misc.2d 298, 727 N.Y.S.2d 872 (Sup. Ct. N.Y. Cty., 2001) - in resolving disputes arising upon the dissolution of a same-sex union the court noted that "' ... they must use contractual, statutory, common law, and equitable vehicles to protect their interests in property" - especially when the couple has failed to provide for "their respective rights to the properties at issue in the event of a dissolution of the relationship ... [leaving] them in the position of needing to have a Court determine their rights at law and in equity" (id.p.300); see also, Protecting Families: Standards for Child Custody in Same-Sex Relationships, by Gay & Lesbian Advocates & Defenders, Boston, in collaboration with Lambda Legal Defense and Education Fund, National Center for Lesbian Rights, Family Pride Coalition, and the ACLU Lesbian and Gay Rights Project. First printing April 1999.

FN12. Of late New York has enacted a number of laws addressing the civil rights of gays and lesbians, including the Sexual Orientation Non-Discrimination Act of 2002, and afforded same-sex couples a blend of rights and obligations in housing, employment and medical care, as well as judicial recognition of second parent adoptions.

FN13. Book 14, McKinney's Consolidated Laws of New York.

FN14. Morone v. Morone, 50 N.Y.2d 481, 429 NYS2d 592 (1980); Trombley v. Sorrelle, NYLJ, Jan. 3, 2005, p. 21, col. 3 (Jefferson County City Court 2005).

FN15. However, contracts will not be implied from the conduct of the parties.

FN16. Morone v. Morone, 50 N.Y.2d at 486, 429 NYS2d at 595.

FN17. Silver v. Starrett, 176 Misc.2d 511, 674 N.Y.S.2d 915 (Sup. Ct. N.Y. Cty. 1998).

FN18. F.C.A. '412; G.O.L. '5-311; D.R.L. '236(B).

FN19. In the event a second-parent adoption has not been undertaken and fully accomplished.

FN20. For example, as for real property - joint tenants with rights of survivorship, tenants in common; as for bank/brokerage accounts - joint tenancy with right of survivorship, or payable on death/in trust for - Totten trusts.

FN21. Andrew Schepard, "Revisiting 'Alison D.': Child Visitation Rights for Domestic Partners," NYLJ, Volume 227, No. 123, June 27, 2002.

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