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Premarital Agreements

Same-Sex Marriage

Same-Sex But Not Same Old, Same Old: Special Considerations for Drafting Same-Sex Prenuptial Agreements

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Introduction

It has been a roller-coaster ride of judicial opinions recently, as courts across the country have been striking down (or, less frequently, upholding[1]) bans on same-sex marriage. The number of states allowing same-sex marriage (or in which bans have been struck down) increased from 19 to 35 in October and November 2014 alone.[2] As the laws on same-sex marriage rapidly change, the way same-sex couples approach marriage must also change—and the way lawyers craft prenuptial agreements will have to change along with it. Laws regarding same-sex marriage (and divorce) vary from state to state, and not all states' jurisprudence has kept up. Lawyers and couples alike will have to be prepared to navigate this evolving system. This article will

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[1] On November 6, 2014, the U.S. Court of Appeals for the Sixth Circuit upheld bans on same-sex marriages in Kentucky, Michigan, Ohio and Tennessee. CNN Library, *Same Sex Marriage Fast Facts*, CNN (Nov. 24, 2014, 3:40 PM), http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/.

[2] Same-sex marriage is also legal in the District of Columbia. *Id.*

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highlight areas of the law that will be of particular importance to same-sex married couples, including differing state residency requirements for obtaining a divorce, obsolete definitions in divorce law that only apply to heterosexual activity, availability of federal employment benefits in states that do not recognize same-sex marriage, and child custody and parental rights issues in states that do not recognize *de facto* parent status.

Residency Requirements

As states increasingly began to legalize same-sex marriages, same-sex couples who lived in non-legalizing states traveled across state borders to get married in states that would let them do so. Just as in the past heterosexual couples traveled, for example, to Las Vegas to marry, many same-sex couples made the trip to states that had legalized same-sex marriage. Although a couple may spend as little as a few hours in a state to get married, the procedure to get divorced is much more protracted in most states.[3] State residency requirements to file for divorce range from six weeks to more than a year, except in Alaska, Iowa and Louisiana, which have no minimum residency requirement.[4]

The range of state residency requirements for divorce is important for same-sex couples to consider, because if they currently or later reside in a state that does not recognize same-sex marriage, then they cannot obtain a divorce in that state. This means that the couple (or at least one of the spouses) would have to travel to another state that recognizes same-sex marriage and meet the residency requirements of that state before one could file for a divorce there. Additionally, that state would maintain jurisdiction over the suit while it was pending, necessitating traveling to that state every time there was a hearing, trial, deposition, or some other kind of court proceeding. This could become very expensive, stressful and inconvenient for a couple in this situation. Thus, a prenup may need to include provisions delineating who will pay for transportation, lodging, and/or moving costs to a state that can grant a divorce in the event the couple lives in a state that does not recognize same-sex marriage.

However, there are a few states that have recognized this emerging dilemma and enacted legislation to address it. These states allow same-sex couples who married in their jurisdiction but live in a non-recognition state to obtain a divorce in the state they were wed, even if they do not meet the state's residency requirements. These states include California, Delaware, Hawaii, Illinois, Minnesota, and Vermont.[5] The District of Columbia also has one of these statutes, which specifically reads:

(b)(1) An action for divorce by persons of the same gender, even if neither party to the marriage is a *bona fide* resident of the District of Columbia at the time the action is commenced, shall be maintainable if the following apply:

(A) The marriage was performed in the District of Columbia; and

(B) Neither party to the marriage resides in a jurisdiction that will maintain an action for divorce.

(2) It shall be a rebuttable presumption that a jurisdiction will not maintain an action for divorce if the jurisdiction does not recognize the marriage.

(3) Any action for divorce as provided by this subsection shall be adjudicated in accordance with the laws of the District of Columbia.

D.C. Code § 16-902(b)(1)-(3).

While same-sex couples may not know where they will end up living, a couple considering same-sex marriage should investigate the various laws and procedural rules in their potential state(s) of residence before tying the knot, as this section has shown that trying to untie it across state lines may be more complicated than expected.

Obsolete Definitions

Assuming a same-sex couple has been able to successfully file for divorce, a spouse's actions that serve as grounds for the divorce may also need to fit within a narrow set of definitions which have not changed as fast as same-sex marriage laws. For example, adultery, a ground for divorce in states which grant fault-based divorces, is defined as voluntary sexual intercourse between a married person and a person other than the married person's spouse. However, '' '[s]exual intercourse,' judicially defined, 'means actual contact of the sexual organs of a man and woman and an actual penetration into the body of the latter.' ''[6] Thus, depending on the jurisdiction, same-sex sexual relations technically may not fall within the definition of adultery because penile-vaginal penetration is not present. While some courts have recognized that same-sex sexual relations constitute adultery,[7] others, such as the Supreme Court of New Hampshire in 2003, have expressly ruled that ''adultery, as a statutory ground for divorce, does not include homosexual relationships'' because of the absence of ''intercourse'' or, as some define it, penile-vaginal penetration.[8]

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[3] *See Chart 4: Grounds for Divorce and Residency Requirements, A Review of the Year in Family Law*, Family Law Quarterly 530-33, Vol. 46, No. 4 (Winter 2013), American Bar Association, available at http://www.americanbar.org/content/dam/aba/publications/family_law_quarterly/vol46/4win13_chart4_divorce.authcheckdam.pdf.

[4] *Id.*

[5] *Divorce for Same-Sex Couples Who Live in Non-Recognition States: A Guide For Attorneys*, National Center for Lesbian Rights (Dec. 2013), http://www.nclrights.org/wpcontent/uploads/2013/07/Divorce_in_DOMA_States_Attorney_Guide.pdf.

[6] *Robert v. State*, 220 Md. 159, 164, 151 A.2d 737, 739 (1959).

[7] *See, e.g., Owens v. Owens*, 274 S.E.2d 484, 485-486 (Ga. 1981) (holding ''[a] person commits adultery when he or she has sexual intercourse with a person other than his or her spouse'' and that ''extramarital homosexual, as well as heterosexual, relations constitute adultery''); *S.B. v. S.J.B.*, 609 A.2d 124, 127 (N.J. 1992) (holding that ''adultery exists when one spouse rejects the other by entering into a personal intimate sexual relationship with any other person, irrespective of the specific sexual acts performed''); *RGM v. DEM*, 410 S.E.2d 564, 567 (S.C. 1991) (holding adultery constitutes ''explicit extra-marital sexual activity . . . regardless of whether it is of a homosexual or heterosexual character.'').

[8] *In re Blanchflower*, 834 A.2d 1010 (N.H. 2003) (holding that ''adultery, as statutory ground for divorce, does not include homosexual relationships,'' where husband brought divorce proceedings against wife and wife's alleged female paramour, claiming adultery as a ground for divorce); *Glaze v.*

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Same-sex couples should pay special attention to the often ambiguous and antiquated definitions of terms such as ''adultery'' and ''sexual intercourse'' because prenups often foreclose the payment of spousal support, formerly known as alimony, if a spouse commits adultery, re-marries, or engages in co-habitation with another partner. ''Cohabitation'' is another term that is interpreted differently among different courts, as some courts define cohabitation as between only an unmarried man or woman,[9] while other courts use a more expansive definition that applies to unmarried persons of the same gender as well.[10] Still, a number of nationally used legal resources, such as the third edition of American Jurisprudence Proof of Facts, refers to cohabitation as only being between ''two persons of the opposite sex''.[11]

As one 2004 Pennsylvania case, *Kripp v. Kripp*, 849 A.2d 1159 (Pa. 2004), highlights, it would be in a same-sex couple's best interest to agree upon their own operational definitions for terms like ''adultery,'' ''sexual intercourse,'' and ''cohabitation'' and include those definitions in their prenuptial agreement. In so doing, a judge adjudicating the divorce or spousal support matter would have an operational definition clearly governing these terms of art. In *Kripp*, the property settlement agreement stated that alimony payments to the wife would end if the wife were to ''cohabitate.'' As the court in *Kripp* said:

> [The term ''cohabitate'' in the settlement agreement was] ambiguous as to whether it referred to or included the wife living with a person of the same sex, and thus, parol evidence was admissible; ''cohabitate'' was not defined in the agreement nor was there an incorporation of a definition from an outside source such as the Divorce Code, ''cohabitate'' was not followed with any language that clarified the specific person or persons with whom wife could or could not cohabit for purposes of continuing to receive alimony payments, and in common usage, as various dictionaries reflected, ''cohabit'' had several definitions and was not necessarily limited to that which occurred between a man and a woman.[12]

So, same-sex couples (and really, any couple) and their attorneys should educate themselves on the prevailing definition of terms like these in their state or possible state of residence, and include clarification of these terms in the prenup agreement if necessary.

Availability of Employment Benefits

In addition to conditions regarding spousal support, prenuptial agreements often include provisions addressing the amount or percentage of employment benefits, such as retirement and pension accounts, that a spouse may be entitled to upon dissolution of the marriage. Before June 2013, same-sex spouses were often not recognized as spousal beneficiaries for a variety of benefits, including health insurance, life insurance, and Social Security. Then, the U.S. Supreme Court held in its landmark decision, *United States v. Windsor*, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013),[13] that same-sex couples, married in states where same-sex marriage is legal, must receive the same federal benefits that heterosexual married couples receive.[14] However, *Windsor* included the qualifier that the decision only applied to states that legalized same-sex marriage.[15] This meant that spouses in same-sex marriages residing in states that did not recognize same-sex marriages may not qualify as a spousal beneficiary for federal benefits.[16]

To address this issue, several federal agencies that manage benefits programs, including the Internal Revenue Service (''IRS''), the U.S. Department of the Treasury (''Treasury''), and the Employee Benefits Security Administration (''EBSA''), which is a division of the U.S. Department of Labor (''DOL''), have released regulatory guidance to help employers and plan administrators comply with *Windsor*. Guidance released by the IRS and Treasury Department in August 2013 explicitly states that these agencies will recognize *all* lawfully married same-sex couples for federal tax purposes, whether the married couple resides in a state that rec-

Glaze, No. HJ-1323-4, 1998 WL 972306, at *1 (Va. Cir. Ct. Aug. 31, 1998) (holding wife could not engage in adultery with another woman, reasoning ''[p]ersons of the same sex can engage in sexual relations. Fellatio, cunnilingus, anal intercourse are examples. Sexual intercourse, however, can only take place between persons of the opposite sex.'').

[9] *See, e.g.*, *Bergeris v. Bergeris*, 217 Md. App. 71, 77-78, 90 A.3d 553, 557 (2014) (citing *Gordon v. Gordon,* 342 Md. 294, 308, 675 A.2d 540 (1996)) (defining cohabitation as ''a relationship of living together 'as man and wife', and connotes the mutual assumption of the duties and obligations associated with marriage''); *J.L.M. v. S.A.K.*, 18 So. 3d 384 (Ala. Civ. App. 2008), *cert. denied*, (Mar. 6, 2009) (holding ''[s]tatute, which required the termination of an alimony obligation upon proof that the former spouse was cohabitating with a member of the opposite sex, did not apply to warrant termination of former husband's alimony obligation, where former wife was cohabitating with a member of the same sex''); *In re Marriage of Edwards,* 73 Or.App. 272, 698 P.2d 542, 547 (1985) (''[C]ohabitation' . . . refers to a domestic arrangement between a man and woman who are not married to each other, but who live as husband and wife. . . .'').

[10] *See, e.g.*, *In re Marriage of Weisbruch*, 304 Ill. App. 3d 99, 710 N.E.2d 439 (1999) (holding ''paying spouse's maintenance obligation under divorce judgment may be terminated because receiving spouse is engaged in an ongoing relationship with a member of the same sex'').

[11] ''Generally, it can be said that courts consider cohabitation to mean a relationship between two persons of the opposite sex who reside together in the manner of husband and wife, mutually assuming those rights and duties usually attendant upon the marriage relationship.'' 765 Am. Jur. 3d Proof of Facts § 2 (last updated Dec. 2014). Under the ''cohabitation'' entry in Black's Law Dictionary (9th ed. 2009), ''illicit cohabitation'' is defined as ''1. The offense committed by an unmarried man and woman who live together as husband and wife and engage in sexual intercourse'' and ''2. The condition of a man and a woman who are not married to one another and live together in circumstances that make the arrangement questionable on grounds of social propriety, though not necessarily illegal.''

[12] *Id.*

[13] See the full decision here: http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf.

[14] Robert Barnes, *Supreme Court strikes down key part of Defense of Marriage Act*, The Washington Post, (June 26, 2013), http://www.washingtonpost.com/politics/supreme-court/2013/06/26/f0039814-d9ab-11e2-a016-92547bf094cc_story.html.

[15] ''This opinion and its holding are confined'' to couples ''joined in same-sex marriages made lawful by the State.'' *United States v. Windsor*, 133 S. Ct. 2675, 2696, 2695, 186 L. Ed. 2d 808 (2013).

[16] *See id.*

ognizes same-sex marriage or not.[17] The EBSA followed suit in September 2013, issuing guidance on the Employee Retirement Income Security Act of 1974 (''ERISA'') stating that ''in general, the terms 'spouse' and 'marriage' in Title I of ERISA and in related department regulations should be read to include same-sex couples legally married in any state or foreign jurisdiction that recognizes such marriages, regardless of where they currently live.''[18]

This is great news for same-sex couples, as agency guidance like these has increased the number of same-sex married couples that can now receive federal benefits after *Windsor*. However, not every type of benefit is administered under this ''place of celebration'' approach rather than by state residency.[19] Although DOL's EBSA, which administers ERISA benefits, follows this place of celebration approach, the DOL has not yet extended this definition to the Family and Medical Leave Act (''FMLA''). In June 2014, the DOL announced proposed rulemaking to amend the definition of ''spouse'' in FMLA to include legally married same-sex couples wherever they reside.[20] The commenting period ended in August 2014, but a final amendment or effective date for a new definition of ''spouse'' has yet to be made. Thus, the state residency rule still applies for some employment benefits, such as FMLA. Consequently, if a same-sex couple married in a state that recognized same-sex marriage but thereafter moved to a state that did not, it would be wise to have anticipated that issue in the prenup.

Parental Rights and Child Custody

Prenuptial agreements usually address the distribution of monetary assets and property, and generally do not mention child custody. Still, it is important for same-sex couples to consider how they might address the issue should they become parents during the marriage. *De facto* parent status is not recognized in some states, including Maryland,[21] New York, Vermont, Tennessee and Utah.[22] This means that, in such states, although a spouse may have taken care of a child since birth or adoption, that spouse would not be recognized as a legal parent unless there were a blood relationship or he or she had legally adopted the child. This being the case, it is not enough for only one spouse to birth or adopt a child; both spouses need to adopt the child in order to be recognized as a custodial parent with all the attendant rights in the case of divorce, such as child custody or visitation rights.

However, this may be easier said than done if a same-sex couple lives in Mississippi, the only state that expressly forbids adoption by same-sex couples in its statute regulating the adoption of minors.[23] But, as same-sex marriage rapidly becomes legal in more states, the ability for same-sex couples to adopt should likewise become easier.

Conclusion

As of today, drafting a prenuptial agreement for a same-sex couple includes these special considerations that attorneys for heterosexual couples do not have to think about. The laws and legal definitions governing same-sex marriage and related areas are changing every day— faster than many legislatures and judiciaries can keep up with—but a couple (and the family law attorney) with an eye toward the future can craft a same-sex prenup that can be enforced in court as ''same old, same old'' business as usual even in the speedily changing times ahead.

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[17] *Treasury and IRS Announce That All Legal Same-Sex Marriages Will Be Recognized For Federal Tax Purposes; Ruling Provides Certainty, Benefits and Protections Under Federal Tax Law for Same-Sex Married Couples*, Internal Revenue Service (Aug. 29, 2013), http://www.irs.gov/uac/Newsroom/Treasury-and-IRS-Announce-That-All-Legal-Same-Sex-Marriages-Will-Be-Recognized-For-Federal-Tax-Purposes%3B-Ruling-Provides-Certainty,-Benefits-and-Protections-Under-Federal-Tax-Law-for-Same-Sex-Married-Couples.

[18] *New guidance issued by US Labor Department on same-sex marriages and employee benefit plans*, United States Department of Labor (Sept. 18, 2013), http://www.dol.gov/opa/media/press/ebsa/EBSA20131720.htm.

[19] ''Place of celebration'' refers to a rule based on where the marriage was entered into rather than where the couple lives. *See Family and Medical Leave Act Notice of Proposed Rulemaking to Revise the Definition of ''Spouse'' Under the FMLA*, United States Department of Labor (June 27, 2014), http://www.dol.gov/whd/fmla/nprm-spouse/.

[20] *Fact Sheet: Proposed Rulemaking to Amend the Definition of Spouse in the Family and Medical Leave Act Regulations*, United States Department of Labor (June 2014), http://www.dol.gov/whd/fmla/nprm-spouse/factsheet.htm.

[21] *Janice M. v. Margaret K.*, 404 Md. 661, 685, 948 A.2d 73, 87 (2008) (''We will not recognize *de facto* parent status . . . as a legal status in Maryland'').

[22] *De Facto Parent Recognition*, Family Equality Council (Dec. 3, 2014), http://www.familyequality.org/get_informed/equality_maps/de_facto_parenting_statutes/.

[23] ''Adoption by couples of the same gender is prohibited.'' Miss. Code. Ann. § 93-17-3(5).

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