

PRACTICE TIPS FOR ADVISING SAME-SEX COUPLES ABOUT PRE-NUPTIALS

After the United States Supreme Court decision in Windsor one year ago, no one anticipated the rapid extension of marriage rights to same-sex couples now sweeping the country. Same-sex couples throughout the United States are asking themselves whether they should marry and, if so, how will marriage impact the existing rules that they established for their relationship.

Many of these couples will turn to lawyers to comprehend the implications of marriage and whether they need to sign a pre-nuptial agreement.

A lot of the issues in a pre-nuptial agreement for a same-sex couple will be similar to a pre-nuptial agreement for a different sex couple. But, there are other factors and specific issues to consider when advising same-sex couples.

The typical client seeking preparation of a pre-nuptial agreement is entering into a relationship with a new spouse. In contrast, a same-sex couple talking to an attorney about a pre-nuptial agreement has probably been living together for years, if not decades.

Since the institution of marriage and its related benefits and burdens were unavailable to them, same-sex couples fashioned their own financial agreements. Getting married requires that those arrangements be re-examined and redefined within the institution of marriage or by explicit avoidance of those rules through a pre-nuptial agreement.

To give proper advice, a lawyer needs to examine the past financial history of the couple, review how assets are titled, look at birth certificates and adoption orders for their children and any legal documents which concern a formalization of their relationship. For example, are both adults

the legal parents of the children? Should real estate previously titled in some other form be retitled as tenants by the entirety? What about retirement account and life insurance beneficiary designations?

During the evolution of state sanctioned relationship recognition for same-sex couples, individual states created a variety of relationships for these couples which are less than marriage. In addition to these state sanctioned forms of relationships, there are municipal and county registries and employer sponsored domestic partnership statements.

Given the uncertain legal status of these non-marital relationships, often when a same-sex couple broke up they did not think it necessary to fulfill any legal formalities to have these relationships terminated. As a result, a lawyer needs to question the clients whether they entered into a domestic partnership or civil union with the person they are about to marry or with someone else. Clearly, before getting married, it is imperative to terminate any prior legal relationships with former partners.

Also an attorney must investigate whether the couple now considering marriage ever signed an agreement between themselves memorializing their financial arrangements, particularly if done before entering into a domestic partnership or civil union. If so, the lawyer needs to ascertain whether that prior agreement remains valid or will be voided by a subsequent marriage.

Although the right for same-sex couples to marry is being extended state by state, there are still many states which do not recognize such marriages. Therefore, it is mandatory that any pre-nuptial agreement for a same-sex couple specify a choice of laws for which state's laws will be used to interpret and enforce the agreement. A pre-nuptial agreement should state that even if the couple moves to a state which refuses to recognize their marriage, the agreement shall still be valid and shall be subject to the laws of a particular jurisdiction which recognizes that marriage.

Despite living in a state which will not recognize their marriage, some same-sex couples still plan to get married in a state where those marriages are allowed and then return to their home state. In preparing a pre-nuptial agreement, should they consult lawyers in their home state or in the state where the marriage will be celebrated? The best answer is that they should consult attorneys in both states. The lawyers need to craft specific language which covers this situation with the understanding that at some point the home state of this couple may recognize their marriage.

As the laws about same-sex marriage continue to evolve, practitioners need to stay abreast of legal developments and be nimble and flexible to adjust to the changes. Even if there is marriage equality nationwide within the next year, same-sex couples considering marriage will still need to consider these same issues.