

New York Law Journal

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Creative Parenting Agreements Still Needed With Same-Sex Marriage

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New York Law Journal

08-29-2011

Many New Yorkers—and people all around the world—celebrated our generation's civil rights breakthrough victory, the Marriage Equality Act, passed June 24, 2011. Still others have noted—correctly—that while this is a meaningful step toward the ultimate goal of genuine marriage equality, that goal is still elusive and will only be achieved with the repeal of the Defense of Marriage Act (DOMA). Larry Kramer, playwright and gay rights advocate, planted himself squarely in the latter camp, declaring in *The New York Times* on July 24, 2011, "These marriages, in whichever state, are what I call feel-good marriages. Compared to the benefits heterosexual marriages convey, gay marriages are an embarrassment." Days later, on July 27, 2011, he clarified in the *Advocate.com*, saying that he would happily marry his partner, "but only when that marriage is equal to what heterosexual marriages convey by law, the law of the United States, and not just New York State."

Mr. Kramer is accurately reflecting the fact that true marriage equality is not the law of the land as long as DOMA¹ remains in effect. Nonetheless, it is important to note the path that led to this victory—including Governor Andrew Cuomo's determination, the courage of state legislators crossing party lines, Tom Duane's unrelenting initiative, the repeal of Don't Ask Don't Tell—all a mere seven years since President Bush stirred a national debate when calling for a constitutional amendment banning gay marriage, during his re-election bid in 2004.

DOMA and State Laws

Put broadly, DOMA provides that states do not have an obligation to recognize a valid gay marriage nor the rights or claims from such marriage. Marriage is strictly defined as a legal union between one man and one woman. As Tobias Barrington Wolff, professor of law at the University of Pennsylvania, explains in "DOMA Repeal and the Truth About Full Faith and Credit,"² a key issue to analyze when states pass their own marriage equality statute is how such marriages will be regarded by other jurisdictions.

So for newly married LGBT New Yorkers, there are 49 states that fall into three distinct categories. The easy cases are the other five states and the District of Columbia where same-sex couples can marry. In about 40 states, there are "mini-DOMA" laws that effectively ban the recognition of a validly performed same-sex marriage from another state. Finally, the remaining states vary in their recognition and enforcement of same-sex out-of-state marriages. For example, Maryland (and New York, prior to the passage of marriage equality) recognizes legal marriages from other states.

Mr. Wolff points out that there is a long history of states' refusal, among themselves, to recognize valid marriages under the laws of other states. Areas of dispute historically have included interracial marriage and marriage among family members. The Full Faith and Credit clause is implicated, rather, when parties seek to enforce court decisions in a foreign state. Thus, court orders, as opposed to the marriage and/or the relationship status, trigger Full Faith and Credit. For example, if a gay couple divorces in New York, neither party would successfully enforce any provision of the divorce judgment (e.g., collect alimony) in Virginia, a state with

a "mini-DOMA."

Implications for Mediation

For mediators in New York, the contradictions presented by New York State's marriage equality and DOMA, raise practical challenges distinct from those faced by heterosexuals negotiating a divorce or a prenuptial agreement. Any mediation of a gay pre-nuptial or divorce agreement would, by definition, entail parallel tracks—that is, what is required under the federal law and what is permitted under state law. And, consider the implications of how the settlement will be viewed under the laws of the various states. With that in mind, it is essential that mediators engage neutral financial experts in these cases.

As mediators, we often encounter the need and/or benefit of various experts assisting the couple during their negotiations. In these cases, the financial neutral is an invaluable resource in "running the numbers" and explaining the limits to various financial benefits that are available to heterosexual, but not same-sex couples. For example, a woman receiving health insurance through her wife's employer is obligated under federal tax law to pay income tax on the benefit. Similarly, while Qualified Domestic Relations Orders are routine in divorce practice, a gay married couple wishing to divide a pension pursuant to divorce, would be subject to federal gift tax on the proceeds of the transfer. Additionally, under DOMA there is no right to receive Social Security benefits or survivor benefits. Both the Department of Homeland Security and the Immigration and Naturalization Service do not recognize valid same-sex marriages, which is of particular concern to immigrants married to U.S. citizens. For the first time, New York married LGBT couples will file parallel tax return forms—one set for the federal returns in which they file as Single and another for state and local in which they file as Married.

For mediators, helping divorcing couples negotiate the minefield of a financial settlement—whether it is expanding the financial pie by trading deductions and tax benefits; choosing to separate rather than file for a full divorce in order to remain on a spouse's health insurance plan; or assessing the tax deductibility of alimony payments, among others—the implications of a gay divorce are decidedly more complex and present fewer options. From this vantage point, Larry Kramer's complaint resonates.

Parenting Decisions

If the financial settlement is fairly complex and rigid, the parenting decisions are similarly fraught, though tend to entail more flexible options. For gay couples in mediation negotiating parenting agreements, the legal analysis tends to be splintered into two prongs. First, where there is an unknown donor, the non-biological parent must proceed with a second-parent adoption. Until the second-parent adoption is finalized, the non-biological parent has no parental rights. Some mediators approach this waiting period by helping the new parents negotiate an unenforceable interim agreement in which the non-biological parent is named as the guardian of the child and is appointed a "person in parental relation to the child."

An interesting legal question is now raised: If a child is born of a valid legal marriage, with an unknown donor, will courts ultimately rule that, as with heterosexual marriages, there is a presumption of legitimacy and therefore no need for a second-parent adoption?³ Even if New York State determines this to be the case, there is a great risk to parties who move to a "mini-DOMA" state. Teresa Calabrese, a collaborative lawyer and mediator in New York City, cautions practitioners that there is inherent danger in tying the parental relationship to the marriage. "Until our marriages have full recognition in the United States, I will always urge my clients to file second-parent adoptions. I think that is the only way to ensure that this legal relationship will be fully recognized and the only way to protect your family," says Ms. Calabrese.

Because the mediation process encourages parties to contemplate individualized solutions to their conflict that may vary from a legal result, unenforceable statements of intent are a feature of many mediators' practices. The idea behind these negotiated clauses: The written agreement is an extension of the open and flexible negotiations themselves that take into account each party's individual values and concerns for the future. In matrimonial mediations it is not uncommon for couples to discuss, and regard as serious binding goals, the role of grandparents in their children's lives or, for example, agreeing to maintain a flexible schedule for the benefit of the children.

The second situation facing gay couples negotiating parenting agreements is where there is a known donor and he or she either surrenders parental rights in a negotiated donor agreement or all three parties (the gay couple and the donor) create an agreement that encompasses each party's parenting role and financial responsibilities to the child. These mediated agreements are common where known donors will maintain a role in the child's life. Nonetheless, these are not enforceable. Under New York law, there can be only two legal parents.⁴ Therefore, if there is a judicial surrender and a second-parent adoption, the donor has no legal rights to the child in spite of any financial contributions he may make—but a mediated agreement can create a "non-legal" role for him in the child's life. Or, if the donor retains his legal status as a parent and the non-biological partner therefore cannot adopt the child, then that non-biological spouse in the gay marriage has no parental rights under the law, in spite of a day-to-day role as a parent.

Mediation has opened the door to a lot of creative agreements among gay families. Parties negotiating these parenting agreements should talk as much as possible before the child is born, or even conceived. In fact, Ms. Calabrese says, a year of discussion is not uncommon. The goal is to come to an agreement about how they will work together. This may entail flexibility, and a discussion of parenting philosophies as well as the practical terms of apportioning financial responsibilities and time spent with the child. Simply put, the law does not encompass these arrangements that, in some permutations, feature three parents. Ms.

Calabrese also points out that because the law has been traditionally unfriendly to LGBT people, they are less likely to go to court to resolve their conflict. Rather, a community custom has evolved whereby questions of parenting rights and roles, and what is best for the child, are negotiated out of court.

As culture and communities evolve regarding LGBT rights in society, practitioners must remain particularly aware of our obligation to understand the nuances of how the law applies to such families. Further, mediators must stay abreast of the law and remain open to flexible and individualized solutions in order to both facilitate informed decision-making and assist couples in achieving their best results, financially and as parents, in this ever-changing landscape.

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Endnotes:

1. [28 U.S.C. 1738C](#) (1996).
2. http://www.huffingtonpost.com/tobias-barrington-wolff/doma-repeal-and-the-truth_b_905484.html; also see Tobias Barrington Wolff, Interest Analysis in Interjurisdictional Marriage Disputes, 153 U. Pa. L. Rev. 2215 (2005).
3. See [Debra H. v. Janice R.](#), 14 N.Y. 3d 576 (2010).
4. *Id.* at 590-591.



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