

UNTIL DEATH DO YOU PART

Same-sex marriage and estate planning

BY SUSAN B. SLATER-JANSEN

Many same-sex couples are embarking on a married life together in New York now that the Marriage Equality Act became state law this summer.

Like all married couples that expect to grow old together, newly wed same-sex couples should consider what would happen to the surviving spouse if the other spouse dies. Although same-sex partners are now legally entitled to specific shares of their partners' estates in New York, Federal law still does not recognize same-sex marriages. Therefore, gay spouses are subject to Federal estate taxes when their partners' estates pass to them. For that reason, estate planning for same-sex married couples is extremely important.

New York estate law covers all gay married partners, whether they were wed in New York or in another jurisdiction where same-sex marriages are recognized. However, estate law applies only if a gay spouse dies on or after July 24, 2011, the day that New York's Marriage Equality Act was signed into law.

Here's what your new rights are under the law:

- If a spouse dies without a will and does not have any children, the surviving spouse gets the entire estate. Prior to the Marriage Equality Act, the late spouse's parents or siblings could claim a share of the estate, but that's no longer true.

- If a spouse dies without a will and has one child or more, then the surviving spouse is entitled to receive \$50,000 off the top of the estate. The remainder of the estate is split 50/50 with the children.

- If the deceased spouse has a will, only the surviving spouse or the deceased spouse's children have the right to challenge the will. Parents and siblings are not accorded that right.

- If the deceased spouse leaves a will, but the will does not bequeath anything to the surviving spouse, the survivor is still entitled to a "Right of Election," which means the spouse can elect to receive a share of the estate equal to the greater of \$50,000 or 1/3 of the net estate. The term "net estate" encompasses a wide variety of property and assets. (Defining "net estate" could be the subject of an article on its own.) But for our purposes now, you can think of a net estate including assets in the deceased spouse's name alone or held jointly with another (including the surviving spouse), business

interests, accounts held in trust for another party, or an IRA, less debts, funeral expenses and expenses of administering the estate.

In addition, in New York there are family rights that are legally set aside for a surviving spouse: household furnishings and furniture, appliances, clothing, jewelry not disposed of in a will, photo equipment and electronic devices not exceeding \$20,000 in value; a car not exceeding \$25,000 in value; books, bibles, CDs and DVDs not exceeding \$2,500 in value; and for couples tilling farms in Westchester, domestic and farm animals with their food for 60 days, one tractor and one lawn-tractor, not exceeding \$20,000 in value.

Surviving spouses have an unlimited marital deduction in New York, so they are exempt from paying New York State estate tax on their inheritance. But because of the Federal "Defense of Marriage Act," the Federal government does not recognize same-sex marriages. Therefore, the surviving spouse in a gay marriage is not entitled to an unlimited marital deduction from Federal estate taxes. Fortunately, the Federal estate tax exemption is \$5,000,000 this year and next, and that's a large enough exemption to cover many estates. For every dollar inherited above \$5,000,000, a surviving gay spouse has to pay Federal estate tax at a rate of up to 35 percent. No one can predict what will happen to Federal estate taxes after 2012. If you and your spouse have a sizeable estate, you should seek legal counsel now.

The Defense of Marriage Act also has ramifications on whether the surviving spouse in a same-sex marriage has rights to profit-sharing and other qualified retirement plans held by the spouse who dies. These plans are governed by Federal laws, which do not recognize same-sex marriages. There are sure to be numerous judicial proceedings which will decide these issues.

The Marriage Equality Act is definitely a boon to same-sex couples. Unfortunately, until Federal law goes along, there will be numerous uncertainties as well.

Susan B. Slater-Jansen is a partner in the trusts and estates department at Kurzman Eisenberg Corbin & Lever, L.L.P. in White Plains. Reach her at 993-6044 or sslater-jansen@kelaw.com.

