Navigating the Same-Sex Marriage Landscape: A Primer for the New York Private Client Attorney

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Since the turn of the millennium, and especially over the past year, same-sex marriage has become the issue of our times. Most significantly, in May 2004 Massachusetts became the first state to solemnize (i.e., sanction the creation of) same-sex marriages. While at this writing Massachusetts presently remains the only state in which a same-sex couple can marry, several other states have opened quasi-marital institutions to same-sex couples, chief among these being Vermont's civil union. So, too, has the movement for same-sex marriage advanced abroad, with Belgium, the Netherlands and several Canadian provinces already granting equal marriage rights to same-sex couples.

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In recent months, New York has emerged as one of the next battleground states. Between October 2004 and February 2005, five separate New York trial courts ruled on whether New York's Constitution or Domestic Relations Law require the state to solemnize same-sex marriages. While four trial courts found no such requirement, the New York Supreme Court for New York County disagreed, holding that the state constitution requires New York to grant equal marriage rights to same-sex couples. Because these decisions conflict, it is almost certain that the New York Court of Appeals will ultimately resolve the issue. An unambiguous extension of equal marriage rights would surely prompt a rush to the wedding altar in New York, home to the second most same-sex couples of any state.[1]

Still, it likely will be a year or longer before the Court of Appeals acts to resolve the conflict among the lower court decisions. In the meantime, authority suggests that New York will respect any same-sex marriage that is valid where created. As such, marrying in Canada or (if possible) Massachusetts,[2] or entering a civil union in Vermont or (beginning in October) Connecticut, might offer same-sex couples a more expeditious route to accessing benefits that New York law extends to married couples, including the unlimited marital deduction from the New York estate tax.

But irrespective of whether New York sanctions the creation of same-sex marriages or accords recognition to same-sex marriages created in other jurisdictions, the Defense of Marriage Act ("DOMA"), enacted by Congress in 1996, prohibits *any* Federal-level recognition of same-sex marriages. Nor are same-sex marriages "portable" to any of the 40 states that have enacted their own such bans. A proposed amendment to the U.S. Constitution would sweepingly prohibit any state from choosing to recognize same-sex marriages.

This complex and rapidly shifting landscape presents a challenge for New York same-sex couples. In considering the question of marriage, these couples must ask not only the familiar (and personal) "if," but also the legal questions of "when" and "in what jurisdiction." Moreover, because their marriages will not be recognized universally, same-sex couples must plan carefully for marriage. In particular, they must be aware of difficulties in obtaining a future divorce and that accessing certain state-level spousal benefits could result in adverse Federal tax consequences.

To help attorneys advise clients on these issues, this article maps the current state of the law and highlights planning considerations. Part I sets the stage by reviewing out-of-state developments. Part II reviews case law concerning the ability of same-sex couples to marry in New York. Part III examines the extent to which New York will recognize same-sex marriages and civil unions that are validly created in other jurisdictions. Part IV discusses Federal non-recognition under DOMA. Finally, Part V evaluates the options for same-sex couples who wish to marry and considers tax and estate planning implications of same-sex marriage.

At the outset, a caveat is necessary: The legal status of same-sex marriage is evolving rapidly, with new case law being issued and statutes being enacted on what seems like a daily basis. Until addressed by the Court of Appeals or legislature, the rights of same-sex couples under New York law will be clouded by uncertainty.

I. Out-of State Developments

New York attorneys need to be familiar with out-of-state developments for several reasons. First, many New York same-sex couples have traveled, or will travel, to other jurisdictions for the purpose of marrying or becoming civilly united. Second, same-sex couples may become domiciled in New York after having married elsewhere. Third, for the New York same-sex couple who owns property in another jurisdiction, marrying, becoming civilly united or creating a "quasi" marriage might enable the couple to access transfer tax benefits from the other jurisdiction. Finally, these out-of-state developments inform the spectrum of paths that New York's courts or legislature might choose to take.

A. Vermont Civil Unions

In the first breakthrough with enduring implications,[3] the Vermont Supreme Court ruled in 1999 that denying same-sex couples the benefits of marriage violates the Vermont Constitution's Common Benefits Clause.[4] The court directed the legislature to modify Vermont's marriage statute, either by opening marriage to same-sex couples or by crafting "some equivalent statutory alternative." The legislature chose the latter and created the "civil union."[5]

Because civil unions were intended to be "separate but equal," the civil union statute defines "marriage" as "the legally recognized union of one man and one woman," while also providing that the parties to a civil union shall be known as "spouses" and shall "have all the same benefits, protections and responsibilities under [Vermont] law . . . as are granted to spouses in a marriage."[6] Thus, under Vermont law, the sole distinction between a civil union and a marriage is the nomenclature. Yet when civil unions first became available in July 2000, Vermont's estate tax was still a "sponge" tax—that is, for resident decedents who died with taxable estates, Vermont assessed a tax equal in amount to the state death tax credit that had been allowed against the Federal estate tax under I.R.C. § 2011. Because civil unions are disregarded for Federal estate tax purposes,[7] "a reduction in the Vermont estate tax liability for parties to a civil union based upon the Federal marital deduction would not [have] reduce[d] the total estate tax liability."[8] Accordingly, the civil union statute expressly provided that civil unions shall have no effect for Vermont estate tax purposes. But in 2002, Vermont decoupled its estate tax from Federal law;[9] shortly thereafter, the legislature extended to civilly united spouses the unlimited marital deduction from Vermont estate tax.[10] The extension took effect upon the January 1, 2005 completion of the Federal state death tax credit phase out.[11]

Vermont imposes no residency requirements for entering a civil union. Consequently, thousands of non-Vermont couples, the greatest number of them from New York, have traveled to Vermont to become civilly united.[12] But that Vermont is presently the only state to solemnize civil unions has clouded "portability"—that is, the extent to which civil unions will be recognized in other jurisdictions. Because of strict residency requirements imposed on couples who wish to file for civil union dissolution in Vermont court,[13] this question has been brought to bear in the dissolution context. While trial courts in Iowa and West Virginia have each recognized a Vermont civil union in order to dissolve it,[14] appellate courts in Connecticut and Georgia have refused to do so.[15] As discussed below, the New York Supreme Court for Nassau County is the only non-Vermont court that has extended affirmative rights to civilly united spouses.[16]

B. Massachusetts Marriage

Nearly four years after the Vermont Supreme Court's historic decision, the Massachusetts Supreme Judicial Court took the further step, ruling in *Goodrich v. Department of Public Health* that "[l]imiting the protections, benefits and obligations of civil marriage to opposite-sex couples violates the basic premise of individual liberty and equality under law protected by the Massachusetts Constitution."[17] When *Goodrich* took effect on May 17, 2004, Massachusetts town clerks became required to issue marriage licenses to same-sex couples.

Same-sex couples who marry are entitled to *all* benefits that Massachusetts extends to married couples, including the ability to file joint state income tax returns and the unlimited marital deduction from Massachusetts estate tax. As a practical matter, because Massachusetts income tax calculations are tied to Federal calculations, the state requires same-sex married couples to complete a *pro forma* Federal income tax return as married, and to submit that return with their Massachusetts return. A similar procedure is required for the Massachusetts estate tax return of a decedent who is survived by a same-sex spouse.[18]

Although *Goodridge* is undoubtedly the most significant development to date, two caveats warrant mention. First, same-sex couples are presently unable to marry in Massachusetts unless both spouses reside, or manifest an intention to reside, in Massachusetts. The limitation stems from an obscure 1913 statute, which provides that "no marriage shall be contracted in [Massachusetts] by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted

in such other jurisdiction, and every marriage contracted in [Massachusetts] in violation hereof shall be null and void."[19] Based on the statute, Massachusetts town clerks have been ordered to "cease and desist" from granting marriage licenses to out-of-state same-sex couples.[20] The statute is now itself the subject of litigation[21] and a legislative repeal effort.[22]

Second, *Goodrich* prompted a movement to amend the Massachusetts Constitution. The proposed amendment simultaneously would prohibit same-sex marriage and create civil unions. To take effect, the amendment must be approved by two consecutive joint meetings of the legislature (known as constitutional conventions) and then by voter referendum. In March 2004, a first constitutional convention approved the proposed amendment. The amendment's prospects in the current legislature are far from certain;[23] it is also unclear if voters would ratify the amendment.[24] The earliest this process could be completed is November 2006.

C. Connecticut Civil Unions

In April 2005, Connecticut became the first state to enact civil unions without court mandate.[25] The law, which takes effect on October 1, extends to civil union "partners" "all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage." Among these benefits are the exemptions for transfers between civil union partners from the Connecticut succession tax[26] and from the Connecticut gift tax.[27] Unlike its Vermont analog, the Connecticut statute does *not* define the parties to a civil union as "spouses."

D. Quasi-Marital Institutions

Additionally, several state legislatures have created quasi-marital institutions that make available to same-sex couples certain rights that had previously been reserved for married spouses. At a minimum, these institutions grant registrants hospital visitation and health care decision-making rights. A brief consideration of these institutions illustrates the range of privileges accorded at the state level and the degree to which legislatures in some states have been willing to extend rights to same-sex couples.

Since January 1, California's statewide domestic partnership registry has resembled Vermont's civil union, minus the state tax benefits. The registry extends to domestic partners all non-tax rights available under California law to married spouses, including the intestate inheritance preference.[28] Notably, all property acquired during a partnership will be treated as community property for property law purposes, unless the partners enter a transmutation agreement.[29] The registry is open to non-California couples.[30] Yet because classification as community or separate property is generally based on owner domicile (rather than property situs), community property treatment is probably available only to registrants domiciled in California.[31]

New Jersey's domestic partnership law, which took effect in 2004, extends certain rights as next of kin. But the law extends no intestate inheritance or elective share rights,[32] nor are domestic partners treated as spouses for income and estate tax purposes.[33] The law does, however, exempt transfers to a surviving domestic partner from New Jersey inheritance tax.[34] Given the high marginal rates of this tax, this provision could result in significant state death tax savings for a decedent who dies owning New Jersey property. For instance, if a decedent dying in 2005 bequeaths a $1,000,000 New Jersey house to her same-sex partner, the bequest ordinarily would generate a $153,000 inheritance tax liability on the decedent's estate.[35] But if the decedent and her partner had registered as domestic partners, the same bequest would pass free of any New Jersey inheritance tax.[36]

Couples who register as domestic partners in Maine or as "reciprocal beneficiaries" in Hawaii are entitled under those states' laws to the intestate inheritance preference and right of election.[37] Hawaii also extends funeral and family leave and limited transfer-tax benefits.[38] Maine confers next-of-kin status, victim's compensation rights, and rights of guardianship and conservatorship.[39]

In additional states, legislative efforts are underway to extend various levels of relationship recognition to same-sex couples. Alongside this activity, a number of lawsuits pending in state courts challenge the inability of same-sex couples to marry. As this article goes to press, trial courts in California and Washington have each held that the respective state constitution requires equal marriage rights for same-sex couples.[40] Both of the decisions are on appeal. Similar lawsuits are also pending before Connecticut, Florida, Maryland, New Jersey and Oregon state courts and, as discussed below, the New York Appellate Division (First and Third Departments).[41]

Finally, dozens of U.S. municipalities, including 11 in New York State, offer domestic partnership registries.[42] The statutory rights associated with these municipal registries generally are few. Still, registration could carry significant benefits. For instance, some employers, particularly local governments, make registration a prerequisite to accessing employment-related domestic-partner benefits. Moreover, entering a municipal registry could enable couples to access rights under the statewide registries of other states, such as New Jersey.[43] Registration of a domestic partnership could also provide *prima facie* evi-

dence of a couple's relationship, which could prove essential in a variety of legal contexts.

E. Developments Abroad

In 2001, the Netherlands became the world's first jurisdiction to grant full marriage equality to same-sex couples. Belgium followed in 2003. The same year, Ontario's Supreme Court ruled that the Canadian Charter (Canada's equivalent to the Bill of Rights) grants same-sex couples the right to marry. The decision mandated the Province of Ontario to grant same-sex couples marriage licenses and the Canadian Parliament to codify a sex-neutral right to marry.[44] While Canada's Parliament is considering legislation that would satisfy the court's mandate, the highest courts of each of British Columbia, Manitoba, Nova Scotia, Quebec, Saskatchewan and the Yukon Territory have opened marriage in those provinces to same-sex couples. Canada, unlike Belgium and the Netherlands, imposes no nationality or residency requirement to marry. Many United States couples have already traveled to Canada to marry.[45] Meanwhile, Spain is on the brink of extending marriage rights to same-sex couples.[46]

II. New York Marriage Law

New York's marriage law is codified in the Domestic Relations Law (DRL), which facially imposes only two substantive requirements to create a marriage: a minimum age requirement[47] and the "consent of parties capable in law of making a contract."[48] Although neither requirement is phrased in gender-specific terms, New York courts consistently have held that as a matter of statutory interpretation, the DRL does not authorize the creation of same-sex marriage.[49] At the same time, however, there has never been a New York statute or constitutional provision that expressly *prohibits* the state from sanctioning the creation of same-sex marriages or from recognizing such marriages created in other jurisdictions. Based on this absence, Attorney General Eliot Spitzer concluded in an advisory opinion that although the DRL probably does not authorize the creation of same-sex marriages, the exclusion of same-sex couples from marriage "presents serious constitutional concerns" under the New York Constitution.[50]

Following the Attorney General's pronouncement, five separate lawsuits that challenge the exclusion were filed in New York courts. Each lawsuit asserts that denying same-sex couples the right to marry violates the New York Constitution, which, as the Court of Appeals has acknowledged in another context, "affords the individual greater rights than those provided by its Federal counterpart."[51] In particular, the plaintiffs argue that New York's Due Process Clause grants a fundamental right to marry a person of one's choice, and that under New York's Equal Protection Clause, restricting marriage to opposite-sex couples cannot survive the heightened scrutiny that applies to deprivations of fundamental rights and to classifications based on sex and (possibly) sexual orientation.[52] Two of the lawsuits also raise a statutory argument, claiming that the DRL's facial gender neutrality confers upon same-sex couples a right to marry.

The Supreme Courts for Albany, Rockland and Tompkins Counties all have rejected such challenges (two separate Albany County judges reached this conclusion). As to the due process claim, these courts have declined to find a fundamental right to enter into a *same-sex* marriage. As to the equal protection claims, these courts have denied that the ban on same-sex marriage is tantamount to a sex-based (i.e., suspect) classification. The courts also have rejected the claim that heightened scrutiny applies to classifications that implicate sexual orientation. Having dispensed with these arguments, the courts held that the state has a rational basis for limiting marriage to opposite-sex couples.[53]

In February, the Supreme Court for New York County reached the opposite conclusion, holding that the New York Constitution requires the state to permit same-sex couples to marry. Without determining if heightened scrutiny is applicable, the court applied the rational basis test, concluding that the defendant, City of New York, "has not presented even a legitimate State purpose that is rationally served by barring same-sex marriage."[54] On these grounds, the court held that the DRL must be interpreted to permit same-sex marriage. The court's decision has been stayed, pending an appeal by the City of New York.[55]

Because the New York Court of Appeals has declined to entertain a direct appeal to these decisions, the First and Third Appellate Departments must first rule on the appeals. It is unlikely that the Court of Appeals will resolve the issue before the end of 2006.

III. Recognition by New York of Out-of-State Same-Sex Marriages

A. The "Place-of-Celebration" Rule and *Langan v. St. Vincent's Hospital*

As the issue of whether same-sex couples can *create* a marriage in New York moves through state courts, an independent issue is whether New York will *recognize* a same-sex marriage that is created in another jurisdiction. The authority suggests that marrying in Canada or (if possible) in Massachusetts, or entering a civil union in Vermont or Connecticut,

might offer a shortcut to spousal recognition under New York law, and thus to all benefits that New York extends to married couples.

To determine if an out-of-state marriage is legally recognizable, most states, including New York, apply the "place-of-celebration" rule: The marriage will be recognized as long as the marriage (i) is valid in the jurisdiction where it was created and (ii) does not violate an important public policy of the forum state.[56] Historically, New York courts have given this rule a broad application. The mere fact that New York law would not permit the creation of a marriage has never been equated with a public policy against the marriage.[57] Rather, marriages have been found to contravene New York public policy only if New York statute expressly prohibits recognition or if recognition would be so "offensive to the public sense of morality to a degree regarded generally with abhorrence."[58] As to the former, no New York statute expressly prohibits the recognition of same-sex marriage. As to the latter, only "polygamy or incest in a degree regarded generally as within the prohibition of natural law" have risen to such a level.[59] Thus, even though New York law prohibits the creation of a common-law marriage,[60] a common law marriage that is lawfully created in Pennsylvania will be recognized in New York.[61] Similarly, while an uncle and niece cannot marry in New York,[62] such a marriage lawfully created in Italy will be recognized in New York.[63]

In 2003, the Supreme Court for Nassau County became the first New York court to apply the place-of-celebration rule in the context of a same-sex spousal relationship. In *Langan v. St. Vincent's Hospital*, the court concluded that the place-of-celebration rule requires New York to recognize the parties to a Vermont civil union as spouses.[64]

Langan arose in the context of the Wrongful Death Act,[65] codified in the Estates, Powers & Trusts Law ("EPTL"). The Act extends standing in a wrongful death action to a decedent's distributees,[66] a class defined elsewhere in the EPTL to include, among others, a decedent's "spouse."[67] The question presented was whether the decedent's civil union partner qualified as his spouse, and thus as a "distributee" with standing under the Act. As to the first prong, the court noted that Vermont law calls the parties to a civil union "spouses," and concluded that "[a] civil union under Vermont law is distinguishable from marriage only in title." As to the public policy exception, the court found that recognizing same-sex unions would actually be *consistent* with the public policy of New York, a state that already has extended a panoply of legal protections to same-sex couples.[68] On these bases, the court concluded that the survivor of a civil union is a distributee of the decedent and, as such, has standing under the Act.

B. Extending *Langan*

A logical extension of *Langan*—though not expressly drawn by the court—is that a same-sex couple who lawfully creates a spousal relationship in another jurisdiction (whether by marrying or by entering a civil union) will be entitled to *all* rights that New York law extends to spouses. Attorney General Spitzer's March 2004 advisory opinion gave *Langan* such an interpretation, stating "New York law presumptively requires that parties to [same-sex unions created in other jurisdictions] must be treated as spouses for purposes of New York law."[69] Following the Attorney General's lead, New York Comptroller Alan Hevesi announced that the New York State and Local Retirement System, over which his office has jurisdiction, will "recognize a same-sex Canadian marriage in the same manner as an opposite-sex New York marriage, based on the principle of comity."[70] The City of New York, as well as the municipal governments of Brighton, Buffalo, East Hampton, Ithaca, Nyack, and Rochester, have also announced that they will recognize any validly created same-sex marriage for all municipal purposes. Several private employers and insurance providers have also indicated that they will recognize New York same-sex couples' marriages that are valid where created.[71]

Still, until a higher court affirms *Langan*, not all state agencies will necessarily respect same-sex spousal relationships that are created outside of New York. Governor Pataki opposes same-sex marriage,[72] making it unclear whether executive-branch agencies will recognize out-of-state same-sex marriages. A spokesman for the New York Department of Taxation and Finance has stated that because New York taxpayers generally are required to use the same filing status on their New York income tax returns as on their Federal tax returns,[73] same-sex couples who have married elsewhere are not to file New York income tax returns as married.[74] Presumably, the Department would take the same position with respect to the New York estate tax. However, such a position is vulnerable to challenge. If, as *Langan* and the Attorney General's Advisory Opinion suggest, New York law requires recognition of same-sex marriages that are valid where created, such recognition would be required for all New York purposes. In fact, as a statutory matter, the New York Tax Law requires the Department to depart from Federal definitions of terms used in the income tax context if "a different meaning is clearly required" under New York law.[75]

IV. Federal Non-Recognition of Same-Sex Marriage

Notwithstanding these state-level developments, DOMA, signed into law by President Clinton in 1996, has frozen Federal law.

Historically, the Federal government has recognized any marriage that is valid under the laws of any state. But DOMA renders this principle inapplicable to same-sex couples. DOMA defined, for all Federal purposes, "marriage" as "a legal union between one man and one woman as husband and wife" and "spouse" to "refer[] only to a person of the opposite sex who is a husband or wife."[76] As such, same-sex couples—even if recognized as married by one of the fifty states—are denied access to all 1,138 Federal benefits, rights and privileges that are contingent upon marital status,[77] including 179 provisions of Federal tax law (among them the unlimited martial deductions from estate and gift tax).[78]

Besides denying Federal-level recognition of same-sex marriage, DOMA purports to authorize—but not require—each state to refuse to "give effect to any public act, record or judicial proceeding concerning a relationship that is treated as a marriage . . . or a right or claim arising from such relationship."[79] For additional measure, 40 states have enacted their own "mini-DOMAs"—constitutional or statutory provisions that prohibit the creation or recognition of same-sex marriages.[80] Thus, the portability of a same-sex couple's spousal relationship is severely limited as the couple travels across the country, and especially outside the Northeast.

Many scholars have questioned DOMA's constitutionality.[81] But gay rights organizations, believing that a constitutional challenge would fuel efforts to amend the U.S. Constitution, have been discouraging any challenge to the statute. The proposed constitutional amendment would define "marriage" to mean the union of one man and one woman for all Federal, state and local purposes.[82]

V. Planning for Marriage

The result of these developments is a patchwork of legal rights for New York same-sex couples: They are already able to marry in Canada or to become civilly united in Vermont; New York may itself soon solemnize same-sex marriages; New York law appears to require the state to recognize same-sex spousal relationships that are validly created in other jurisdictions; and the Federal government unambiguously (though perhaps unconstitutionally) denies any recognition of same-sex spousal relationships.

A. Where and When to Marry

For the New York same-sex couple who have decided to marry, the threshold question becomes *where* to marry.

Canada probably is the best option. New York same-sex couples have an unambiguous right to marry in those Canadian provinces that have already begun to sanction same-sex marriages; it appears highly unlikely that this right will be reversed. New York precedent also suggests that the place-of-celebration rule applies equally to marriages created in other countries as to marriages created in other U.S. states. The case for choosing Canada is not unassailable, however, because of Canada's one-year residency requirement for divorce. Thus, if for some reason New York courts were to deny recognition to a same-sex marriage created in Canada, to obtain a divorce might require one of the spouses to establish residency in Canada.

In contrast to Canada, marrying in Massachusetts is not presently a viable option for most New York resident couples. Massachusetts' marriage application form requires applicants to affirm that both applicants reside or intend to reside in Massachusetts.[83] Couples who marry in violation of the statute will be committing perjury and their marriages will be void *ab initio*.[84] Moreover, because New York's recognition of an out-of-state marriage will hinge on the marriage having been lawfully created, same-sex couples who marry in violation of the statute will have dubious legal status in New York. Furthermore, there is a possibility that Massachusetts will amend its constitution to eliminate same-sex marriage; the proposed amendment would probably "convert" same-sex marriages created in Massachusetts into civil unions.

As between a Canadian marriage and a Vermont or Connecticut civil union, Canadian marriage is probably preferable. *Langan* suggests that civilly united spouses will be able to access all spousal rights under New York law. But if DOMA were to be overturned or repealed, marriage would surely have Federal effect, while civil unions might not. Moreover, other states that might be willing to recognize a same-sex marriage might disagree with *Langan's* conclusion that the "civil union" title is inconsequential. It also warrants mention that Connecticut's civil union statute does not deem the parties "spouses." It is unclear if the fact that Vermont's statute does extend this label was dispositive to *Langan*'s conclusion that the Vermont civil union differs from marriage only in title.

A second question is *when* to marry. Marrying today will immediately enable New York same-sex couples to access benefits from those public and private institutions that have already announced that they will recognize all lawfully created same-sex marriages. These benefits could be significant for some couples, for instance, if one spouse is a participant in the New York State and Local Retirement System. Even without such benefits, couples still might choose to marry today, for doing so would put them in a strong position to access spousal rights if *Langan* were affirmed or if New York marriage were opened to same-sex couples. Other couples may choose to wait for New York law to become clearer. There are, of course, significant non-legal reasons that many couples would decide against marrying in another state or country. In the meantime, these couples may wish to consider registering as domestic partners, in order to ensure a minimum baseline of government recognition of their relationship.

B. Planning for Marriage

Same-sex couples must plan carefully for marriage, especially because it is not clear that a same-sex marriage can be dissolved as easily as an opposite-sex marriage and because accessing state-level benefits could have Federal tax consequences.

Prenuptial agreements. Same-sex couples must be aware of the state-level obligations associated with marriage, such as the support obligation[85] and the spousal elective share.[86] As is true for opposite-sex couples, prenuptial agreements are advisable, both to limit the applicability of such obligations and to establish a baseline for asset distribution if the marriage should end.

For same-sex couples, prenuptial agreements take on added importance because of the difficulty the couple might encounter in obtaining a divorce. Whereas opposite-sex married couples generally can divorce in their state of residence (regardless of whether the marriage was created in that state), such access is not clear for same-sex couples. As of yet, no New York court has ruled as to whether it has authority to dissolve a same-sex marriage or civil union created in another jurisdiction. Moreover, if the married couple were to move to another state, it is not clear the other state would dissolve the relationship. For these couples, returning to the jurisdiction that solemnized the relationship might become the only means of obtaining a divorce. But Canada, Massachusetts and Vermont each require one spouse to satisfy a one-year residency requirement before the spouses can avail themselves of the courts to divorce.

A prenuptial agreement can address such hurdles. The agreement could stipulate that if the spouses decide to dissolve their relationship, one or both spouses will become resident of a jurisdiction that will sanction dissolution. Alternatively, the agreement can provide that if dissolution cannot be obtained in New York, the prenuptial agreement should be construed as a contractual domestic partnership agreement, upon which an arbitrator shall rely to allocate the spouses' assets. Still, if a marriage or civil union cannot be dissolved, the parties probably would not be able to marry or become civilly united again.

For same-sex couples, prenuptial agreements also take on added importance because transfers incident to divorce could trigger Federal transfer and income taxes. The Internal Revenue Code provides for no gain or loss recognition to the recipient of a transfer incident to divorce.[87] But DOMA renders this provision inapplicable to same-sex couples. Thus, a transfer pursuant to dissolution of a same-sex marriage or civil union might be treated as a gift for Federal tax purposes, resulting in gift-tax liability (or an erosion of the $1,000,000 lifetime exclusion) to the extent the transfer exceeds the annual gift-tax exclusion amount (currently $11,000). A prenuptial agreement might anticipate this consequence by stipulating that upon divorce, any asset held prior to the marriage will be returned to the spouse who owned it and that assets acquired during marriage would be divided between the spouses in accordance with consideration furnished.

Wills, health care proxies and powers of attorney. In certain states, but not New York,[88] if a testator executes a will prior to marrying, his subsequent marriage will serve to revoke or modify the will, unless the will was executed "in contemplation" of marriage.[89] At a minimum, therefore, parties to a same-sex marriage should evaluate and perhaps revise or republish their wills. In addition, each party to a same-sex marriage will need to confirm that a spousal claim to the elective share will not defeat the party's desired scheme for distribution of probate and non-probate assets.

Individuals who will have taxable estates might also consider revising their wills in anticipation of state-level opportunities for tax deferral or savings. The New York estate tax generally tracks Federal estate tax determinations of a decedent's marital status.[90] But if New York law were to require recognition of same-sex marriages or civil unions, the New York Tax Law would have to be read in a manner that extends equal rights to same-sex spouses. As such, the marital deduction from New York estate tax

would be available for transfer at death to a surviving same-sex spouse if the transfer is made outright or, presumably, in QTIP-able form.[91] Similar benefits would be available for the New York decedent who dies owning real or tangible property in a jurisdiction that both imposes death taxes on non-resident estates and recognizes validly-created same-sex marriages or civil unions.[92] But in planning for these potential opportunities at the state level, the estate plan should also take account of a surviving spouse's immediate cash needs, as such needs could be impacted by the Federal estate tax.

Even if these state-level benefits are not currently available, it may be advisable for practitioners to draft wills that anticipate such possibilities, so that the will achieves optimal results if the law later changes and the will is not updated. If both spouses of a same-sex married couple are moderately wealthy, a standard estate plan might provide as follows: The first spouse to die bequeaths (a) the New York credit shelter amount in a credit shelter trust; (b) the difference between the Federal and New York credit shelter amounts to the surviving spouse in a trust that would qualify for the Federal QTIP election (in anticipation of the possibility that New York would treat such trust as if a Federal QTIP election had been made); and (c) the residue to the surviving spouse outright or in QTIP-able form. Such an estate plan would put the estate of the first spouse to die in a strong position to avoid all New York estate taxes, even though the estate would be liable for Federal estate tax on the residue.

Additionally, because same-sex couples who marry will face uncertainty as to whether their marriages will be recognized if something were to happen to them as they travel outside of New York state, the couples should maintain powers of attorney and health care proxies.

C. Federal Tax Traps

Same-sex couples should be aware that accessing state-level benefits could trigger adverse Federal tax consequences. For instance, numerous states, including New York, permit married couples to take title to property as a tenancy by the entirety, a form that historically has offered greater creditor protection than other forms of joint tenancies.[93] Upon creation, a tenancy by the entirety vests equal property rights in both spouses, regardless of the manner in which consideration was furnished.[94] As a tax matter, however, if both spouses do not furnish equal consideration, the creation of a tenancy by the entirety will be considered a gift for Federal purposes.[95] For opposite-sex couples, the gift would qualify for the Federal gift tax marital deduction; but for same-sex couples, on account of DOMA, the gift would be deductible only to the extent valued at an amount not greater than the annual gift-tax exclusion amount.

Same-sex couples must also be sensitive to generation-skipping transfer tax considerations. Same-sex couples will not benefit from the Federal law presumption that spouses are of the same generation[96] or that a spouse's child is a "skip person" with respect to the transferor for GST purposes.[97] To address the latter treatment, a same-sex spouse might consider legally adopting his partner's children, an option known as "second parent adoption," which is available under New York law.[98]

DOMA's flip side, of course, is that same-sex couples, including those who marry, are not subject to any of the Federal rules governing intrafamily wealth transfer. To take a few familiar planning strategies, a taxpayer who marries her same-sex spouse can continue to shift wealth to her spouse using grantor retained income trusts; the taxpayer can still create a qualified personal residence trust for the benefit of her spouse and then purchase the residence back from the trust prior to the completion of the trust term; the taxpayer will not be subject to the restrictions of Section 2704 for family limited partnerships she creates with her spouse; and the taxpayer's spouse will not necessarily be considered a "related and subordinate party" under Section 672(c).[99] Nor will the taxpayer's spouse necessarily be considered a "disqualified person" for the Chapter 42 private foundation excise taxes.

Nevertheless, it may be advisable for same-sex married couples to avoid taking advantage of such "opportunities." Gay and Lesbian Advocates and Defenders, the organization that represented the *Goodrich* plaintiffs, advises married same-sex couples to disclose their marital status consistently, in order to "prevent others from using the designation of 'single' [for tax purposes] to argue or prove that a person is not really married when that issue arises in other legal contexts."[100] For this reason, the organization advises including on a personal income tax return a statement that the taxpayer was legally married in Canada or Massachusetts but that the taxpayer is filing singly because of DOMA and that the designation of single is only for Federal tax purposes.[101] The same considerations suggest that same-sex married couples act as though they are bound by Code provisions limiting intrafamily wealth transfers. Opting into such requirements would also avoid the need for "emergency planning" if DOMA were to be overturned or repealed and same-sex marriages were to become recognized for Federal tax purposes.

VI. Conclusion

Five years after civil unions became available in Vermont and one year after Massachusetts began solemnizing same-sex marriages, considerable uncertainty remains. Among the states, New York appears most likely to recognize out-of-state relationships; New York is also a probable contender to become the next state to authorize the creation of same-sex marriages. Even in this climate of uncertainty, there are many reasons why a same-sex couple should evaluate their options. When called upon to advise clients on these issues, estate planning practitioners should draw on two techniques with which they have familiarity from other contexts: planning for contingencies and planning in an environment of decoupled Federal and state tax.

Endnotes

1. *See* Tavia Simmons and Martin O'Connell, *Married-Couple and Unmarried-Partner Households*, Census 2000 Special Reports, CENSR-5, U.S. Department of Commerce, U.S. Census Bureau, Feb. 2003, at 4 (reporting 46,490 same-sex couples in New York, or 1.3% of all New York couples), *but see generally* Lee Badgett and Marc Rodgers, *Left Out of the Count: Missing Same-Sex Couples in the 2000 Census*, Institute for Gay and Lesbian Strategic Studies (2003) (positing that the Census vastly undercounted same-sex couples).
2. Same-sex couples are currently able to marry in Massachusetts only if both spouses reside or intend to reside in Massachusetts. *See infra* Section I.B.
3. The prospect of same-sex marriage first came on the national radar in 1993, when the Hawaii Supreme Court ruled that the denial of marriage rights to same-sex couples might violate the Hawaii Constitution's equal rights provision. *Baehr v. Lewin*, 74 Haw. 645, 852 P.2d 44 (1993). Following the *Baehr* decision, the Hawaii Constitution was amended to allow the state legislature to "reserve marriage to opposite-sex couples" (Haw. Const. art. 1, § 23), which the legislature soon chose to do. Hawaii Stat. § 572-1, 572-3 (2005).
4. *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999).
5. *An Act Relating to Civil Unions*, 2000 Vt. Acts & Resolves 91, *enacted at* 15 Vt. Stat. Ann. §§ 1201–1207 (2005).
6. 15 Vt. Stat. Ann. §§ 1201–1207 (2005).
7. *See infra* Section IV.
8. *See* 2000 Vermont Laws P.A. 91 (H.847), § 22(a), *enacted at* 32 Vt. Stat. § 7401(a) (2000).
9. 32 Vt. Stat. §§ 7402(8), 7442a, 7475, as amended June 21, 2002 (imposing a tax based on Federal death tax credit rates in effect on January 1, 2001).
10. *See* 2002 Vermont Laws P.A. 140 (H. 753), *enacted at* 32 Vt. Stat. § 7401(a) (2005) (providing that "[b]eginning with estates of decedents with a date of death on or after January 1, 2005, [provisions of the Vermont estate tax] shall apply to parties to a civil union and surviving parties to a civil union as if federal estate tax law recognized a civil union in the same manner as Vermont law.").
11. I.R.C. § 2011(f) (2005).
12. *See* Report of the Vermont Civil Union Review Commission, January 2002.
13. To file in Vermont court for civil union dissolution, one spouse must have been a resident of Vermont for the preceding six months; to obtain the dissolution, one spouse must have been a resident for one year preceding the final hearing. 15 Vt. Stat. Ann. § 1206 (2005).
14. *In re Kimberly Brown and Jennifer Perez* (Iowa Dist. Ct., Woodbury Co., Nov. 14, 2003); *In re the Marriage of Misty Gorman and Sherry Gump*, No. 02-D-292 (W.Va. Fam. Ct., Marion Co., Jan. 3, 2003).
15. *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct.), cert. granted in part but dismissing case as moot upon death of the party, 806 A.2d 1066 (Conn. 2002); *Burns v. Burns*, 560 S.E.2d 47 (Ga. App. 2002).
16. *See infra* Section III.A.
17. 798 N.E.2d 941 (Mass. 2003). In a subsequent advisory opinion, the court clarified that only marriage, and not civil unions, will satisfy constitutional muster. *In re Opinions of the Justices to the Senate*, 803 N.E.2d 565, 567–68 (Mass. 2004).
18. *See* Commonwealth of Massachusetts Department of Revenue, Technical Information Release 04-17: Massachusetts Tax Issues Associated with Same-Sex Marriages (*available at*: http://www.massdor.com/rul_reg/tir/tir_04_17.htm).
19. Mass. Gen. Law c. 207 §§ 10–13, 50 (2005).
20. *See Johnstone v. Reilly*, Brief of the Plaintiffs/Appellants Clerks, Supreme Judicial Court of Massachusetts, SJC No. 09436.
21. The lawsuit alleges that the 1913 statute violates the Massachusetts Constitution or, alternatively, that the statute applies only to residents of those states that would not recognize a Massachusetts same-sex marriage. Relief on either claim would have significant implications for New York same-sex couples since, as explained in Section III., a marriage legally created in another jurisdiction is generally entitled to recognition under New York law, even if such a marriage could not be created under New York law. In August 2004, a Massachusetts trial court denied the plaintiffs' motion for summary judgment. *Cote-Whitacre v. Department of Public Health*, 2004 Mass. Super. LEXIS 341 (Suffolk Co., Aug. 18, 2004). The Massachusetts Supreme Judicial Court has granted a direct appeal.
22. Although a repeal measure handily passed the Massachusetts Senate in 2004, it has yet to be put to a vote in the Massachusetts House. *See* Raphael Lewis & Yvonne Abraham, *Senate Votes to End 1913 Law*, Boston Globe, May 20, 2004.
23. *See* Raphael Lewis, *Same-Sex Marriage Ban Loses Ground*, Boston Globe, Nov. 5, 2004; Frank Phillips, *Bid Seen Weakening to Ban Gay Marriage: Amendment Foes May Get Majority*, Boston Globe, Jan. 18, 2005.
24. *See* Frank Phillips, *Poll Finds Split Over Marriage Amendment*, Boston Globe, Apr. 6, 2004 at B1 ("Massachusetts residents were evenly divided over the Legislature's compromise proposal that bans gay marriage but also provides civil unions for same sex couples, according to a University of Massachusetts poll conducted over the past week.").
25. Civil Union Law, Conn. Public Act 05-10 (enacted Apr. 20, 2005).
26. In 2005, estates of decedents passing to Class C beneficiaries (i.e., any person who does not have a legal marital or familial relationship with the decedent), are taxed at 12% of amounts over $400,000; 13% of amounts above $400,000 and below $600,000; and 14% of amounts over $1 million. *See generally* Conn. Gen. Stat. § 12-344 (2005); State of Connecticut Department of Revenue Services, *Q&A on Succession, Estate, and Generation-Skipping Transfer Taxes*, IP2004(25). Pre-

sumably, Connecticut will implement an administrative rule to reconcile the fact that Connecticut law generally requires a resident taxpayer's Connecticut tax filing status to track the taxpayer's Federal filing status. *See generally* Gay and Lesbian Advocates and Defenders, *Some Questions and Answers About the New Connecticut Civil Unions Law* (Apr. 27, 2005).

27. The gift tax applies only to donors whose taxable gifts for Connecticut gift tax purposes exceed $1 million during a calendar year; the tax in 2005 equals $45,000 plus 6% of the excess over $950,000. Conn. Gen. Stat. § 12-643 (2005).

28. California law provides that "[r]egistered domestic partners shall have all the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses." A.B. 205, 2003-04 Sess. (Cal. 2003) (enacted); *see* Cal. Fam. Code § 297.5(a)-(c) (2005). The law expressly excludes domestic partners from filing joint state tax returns. *See Id.* § 297.5(g).

29. But because Federal law will probably not recognize the domestic partnership, it is unlikely that a surviving domestic partner would be able to claim the double step-up in Federal income tax basis that I.R.C. § 1014(b)(6) generally extends to community property interests. *See infra* Section IV. If Federal law were to respect California's community property treatment, it is possible that the creation of the community property interest could be considered a gift for Federal tax purposes. *See generally* Sodra J. Allphin, *New Domestic Partnership Legislation and Its Impact on Estate Planning and Administration*, Calif. Trusts & Estates Q., Spring 2004, at 4.

30. Similarly, California does not impose a residency requirement for dissolving a domestic partnership. If both partners desire to terminate a California domestic partnership that has lasted less than five years, they need only to file a Notice of Termination of Domestic Partnership with the California Secretary of State, followed by mailing of the Notice to the domestic partner. Otherwise, the domestic partnership can be dissolved in accordance with the procedures required to dissolve a marriage, although the residency requirement is waived for domestic partners. *See* Calif. Fam. Code § 299 (2005).

31. *See generally* W.S. McClanahan, Community Property Law in the United States § 13.2 (1982).

32. 2003 N.J. Sess. Law Serv. 246 (June 5, 2003), codified in pertinent part at N.J.S.A. § 26:8A-1 - :12 (2005).

33. A taxpayer can, however, claim an additional personal exemption from New Jersey income tax if the taxpayer's domestic partner does not file a separate income tax return. N.J. Stat. § 54A:1-2(e) (2005).

34. Under the law, domestic partners are classified among "Class A" beneficiaries, for which transfers at death do not result in inheritance tax, rather than as "Class D" beneficiaries, for which only transfers at death valued at less than $500 are exempt from inheritance tax. N.J. Stat. § 54:34-2 (2005).

35. N.J. Stat. § 54:34-2(d) (2005).

36. *Id.* § 54:34-2(a). While the registry is open only to New Jersey residents and non-residents who are members of a state-administered retirement system (N.J. Stat. 26:8A-3 (2005)), the law expressly provides that New Jersey will recognize any "domestic partnership, civil union or reciprocal beneficiary relationship entered into outside of this State, which is valid under the laws of the jurisdiction under which the partnership was created. . . ." N.J. Stat. § 26:8A-6(c) (2005). However, parties to a same-sex marriage will *not* be treated as domestic partners under New Jersey law. *See generally Hennefeld v. Township of Montclair*, 2005 WL 646650 (N.J. Tax Court, Mar. 15, 2005) (declining to recognize a same-sex marriage entered in Canada).

37. Haw. Stat. § 572C (2005); Maine R.S.A. tit. 24-A, §§ 2832-A, 2741-A (2005).

38. Haw. Stat. § 247-3(4) (2005) (exempting transfers between reciprocal beneficiaries from conveyance tax). Because it did not decouple its estate tax from Federal law, Hawaii effectively no longer imposes an estate tax.

39. Maine Rev. Stat. Ann. Tit. 18-A, § 1-201 (10-A); Tit. 24-A §§ 2832-A, 2741-A (2005).

40. *See Woo v. Lockyer*, Judicial Council Coordination Proceeding No. 4365 (Calif. Sup. Ct., San Francisco Co., Mar. 14, 2005); *Andersen v. Sims*, No. 04-2-04964-4 SEA (Wash. Sup. Ct., King Co., Aug. 4, 2004).

41. For a summary of the pending lawsuits, see National Center for Lesbian Rights, *Marriage Equality Factsheet*, *available at* http://www.nclrights.org/publications/pubs/marriage_equality0305.pdf.

42. *See* New York State Bar Association, *Report and Recommendations of the Special Committee to Study Issues Affecting Same-Sex Couples*, Oct. 2004, at 238. The jurisdictions are the Cities of Albany, New York and Rochester; the Towns of Brighton, Eastchester and Greenburgh; and the Counties of Albany, Tompkins and Westchester. *Id.*

43. N.J. Stat. § 26:8A-6(c) (2005).

44. *Halpern v. Canada* (Attorney General), 215 D.L.R. (4th) 223 (Ontario 2004). For a summary of the procedure for marrying in Canada, see Gay and Lesbian Advocates and Defenders, *What Do I Need to Know to Get Married in Canada?*, October 2004 (*available at* http://www.glad.org/marriage/canadianmarriage_faq.shtml).

45. *See, e.g.*, Rona Marech, *Same-sex couples flock to gay-friendly Canada*, S.F. Chron., Mar. 9, 2004, at A1.

46. *See* Renwick McLean, *Spanish Parliament Gives Approval to Bill to Legalize Same-Sex Marriages*, N.Y. Times, Apr. 22, 2005, at A12.

47. N.Y. Dom. Rel. Law § 15-a (McKinney's 2004).

48. *Id.* § 10.

49. *Hernandez v. Robles*, 2005 WL 363778, 2005 N.Y. Slip Op. 25057 (Sup. Ct., N.Y. Co. Feb. 4, 2005).

50. Op. Att'y Gen. No. 2004-1, March 3, 2004, at 6. Advisory Opinions are not binding, but indicate how the Attorney General's office evaluates a particular issue.

51. *Esler v. Walters*, 56 N.Y.2d 306, 313-14 (1982).

52. The Appellate Division, First Department, has ruled that under the Equal Protection Clause of the New York Constitution, sexual orientation is suspect classification, and that classifications based on sexual orientation are entitled to heightened judicial scrutiny. The Court of Appeals reserved judgment on the issue. *See Under 21 v. City of New York*, 488 N.Y.S. 669 (1st Dep't 1985), *rev'd on other grounds*, 65 N.Y.2d 344, *aff'd*, 482 N.E.2d 1 (N.Y. 1985).

53. *See Kane v. Marsolais*, N.Y. Sup. Ct., Albany Co. (*available at* http://www.nycourts.gov/press/KAN4SAME%SEX%20DECISION.pdf) (on appeal to the Appellate Division, Third Department); *Samuels v. New York State Department of Health*, Index No. 1967-04 (Sup. Ct., Albany Co., Dec. 7, 2004) (on appeal to the Appellate Division, Third Department); *Seymour v. Holcomb*, 2005 WL440509, 2005 N.Y. Slip Op. 25070 (Sup. Ct., Tompkins Co., Feb. 23, 2005) (on appeal to the Appellate Division, Third Department); *Shields v. Madigan*, 783 N.Y.S.2d 270 (Sup. Ct., Rockland Co. 2004) (on appeal to the Appellate Division, Third Department).

54. *Hernandez v. Robles*, 2005 WL 363778, 2005 N.Y. Slip Op. 25057 (Sup. Ct., N.Y. Co. Feb. 4, 2005).

55. Additionally, the Justice Court of New York for the Town of New Paltz held that the Mayor of New Paltz could not be prosecuted for marrying same-sex couples because the inability of same-sex couples to marry is unconstitutional. *People v. Greenleaf*, 780 N.Y.S. 2d 899 (N.Y. Just. Ct. June 10, 2004).

56. *In re Estate of May*, 305 N.Y. 485, 490 (1953) ("In the absence of a statute expressly regulating within the domiciliary State marriages created abroad, the legality of a marriage between persons *sui juris* is to be determined by the law of the place where it is celebrated."). *See generally* Restatement (Second) Conflict of Laws § 283 (2) (1971) ("a marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the *strong public policy* of another state which had the most significant relationship to the spouses at the time of the marriage.") (emphasis added).

57. *See, e.g., Van Voorhis v. Brintnall*, 86 N.Y. 18 (1881) (upholding the validity of a Connecticut marriage under New York law, even though the marriage could not have been entered in New York and the parties, New York domiciliaries, traveled to Connecticut solely to marry).

58. *In re May's Estate*, 305 N.Y. at 490.

59. *Id.* at 491.

60. N.Y. Dom. Rel. Law §§ 5(3), 11.

61 *Carpenter v. Carpenter*, 208 A.D.2d 882 (2d Dep't 1994); *accord Black v. Moody*, 276 A.D.2d 303 (1st Dep't 2000).

62. N.Y. Dom. Rel. Law § 5(3) (McKinney's 2005).

63. *Campione v. Campione*, 201 Misc. 590 (Sup. Ct., Queens Co. 1951); *accord Estate of May*, 305 N.Y. 486 (1953) (Rhode Island uncle-niece marriage recognized).

64. *Langan*, 196 Misc. 2d 440 (Sup. Ct., Nassau Co. 2003).

65. N.Y. Estates, Powers & Trusts Law § 4-1.1 (McKinney's 2005).

66. *Id*. § 5-4.1.

67. *Id.* §§ 1-2.5, 4-1.1.

68. For instance, New York has recognized the right of second-parent adoption (enabling an individual to adopt the children of her same-sex partner) and allows the survivor of a same-sex relationship to succeed to the lease of a deceased partner's rent-controlled apartment.

69. Op. Att'y Gen. No. 2004-1, March 3, 2004, at 6.

70. George S. King, Counsel to the New York State and Local Retirement System, to Mark E. Daigneault, Oct. 8, 2004.

71. *See, e.g., Top Three Car Insurance Companies in New York Will Respect Gay Couples' Marriages*, *available at* http://www.lambdalegal.org/cgibin/iowa/news/press.html?record=1515.

72. *See* Erin Duggan, *Opinion Mixed on Gay Unions*, Albany Times Union, Mar. 14, 2004.

73. N.Y. Tax Law § 607(b) (McKinney's 2005). However, some exceptions are statutorily required, such as if one spouse is a New York resident and the other is not. *Id.* § 651.

74. *See* Andy Humm, *Gays Denied Married Tax Status; Attorney Gen. Eliot Spitzer Won't Intervene in State Finance Decision*, Gay City News, Jan. 31, 2005.

75. N.Y. Tax Law § 607(a) (McKinney's 2005). *See, e.g., Graham v. Commission,* 48 A.D.2d 444, 445 (App. Div. 3rd Dept. 1975), *aff'd* 389 N.Y.S.2d 362 (1976) (rejecting "strict conformity" with Federal law if Federal law conflicts with overriding principles of New York law).

76. 1 U.S.C. § 7 (2005). Congress expressly provided that these definitions be used "in determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States." Public Law 104-199 (1996). Accordingly, these definition are codified in Title 1 of the United States Code. 1 U.S.C. § 7.

77. *See* General Accounting Office, Tables of Laws in the United States Code Involving Marriage Status, by Category, January 31, 1997; Dayna K. Shah, Associate General Counsel, Government Accounting Office, to The Honorable Bill Frist, United States Senate, Jan. 23, 2004., *available at* http://www.gao.gov/archive/1997/og97016.pdf. In a 2003 Private Letter Ruling, the Internal Revenue Service confirmed that on account of DOMA, Rev. Rul. 58-66, which provides that the Service will track state-law determinations of marriage, is inapplicable to same-sex marriages. Priv. Ltr. Rul. 200339001 (June 13, 2003).

78. I.R.C. §§ 2056, 2523. The Code privileges transfers by married persons in numerous additional ways. For instance, only married couples can maximize their § 2503(b) annual gift tax exclusion by splitting gifts. I.R.C. § 2513. Only married couples can take advantage of the tax deferral strategies associated with the QTIP election. *Id.* § 2601. Spouses are presumed to be of the same generation for generation-skipping tax purposes. *Id.* § 2651(c)(1). For purposes of estate inclusion, the Code presumes that each spouse furnished one-half of the consideration for all jointly held assets, while creating a rebuttable presumption for non-married persons that the first joint owner to die furnished all consideration for a jointly held asset. *Id.* § 1022(d)(1)(B)(i).

79 P.L. 104-199 (1996), codified at 29 U.S.C. § 1738C.

80. In addition to New York, the states that have not enacted statutory or constitutional prohibitions on same-sex marriage are Connecticut, Maryland, Massachusetts, New Jersey, New Mexico, Rhode Island, Vermont, Wisconsin and Wyoming. Nor has the District of Columbia done so.

81. Commentators argue that by distinguishing same-sex marriage from opposite-sex marriage, DOMA violates the Equal Protection clause of the Fourteenth Amendment, by nationalizing a definition of marriage, it usurps a power that is constitutionally reserved to the states, and by excusing states from recognizing a sister state's marriage, it violates the Constitutional requirement that states give "full faith and credit" to the "public acts, records, and judicial proceedings" of every other state. *See generally* Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 Iowa L. Rev. 1 (1997); Scott Ruskay-Kidd, Note, The Defense of Marriage Act and the Overextension of Constitutional Authority, 97 Colum. L. Rev. 1435 (1997). A Federal District Court in Florida recently upheld the statute's constitutionality; the petitioners have not appealed the decision. *See Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005).

82. *See* H.J. Res. 56; S.J. Res. 30.

83. It is not entirely clear how such intent is demonstrated. The Governor's Office has instructed Massachusetts Town Clerks that "intends to continue to reside" means "that the individual has the present intention either to remain where he currently lives, or to establish a new home or residence in another state in the near future, even if a specific address or town has not been selected. A vague intent to someday have a residence in a state is sufficient." The Governor's office has also suggested that a person can be a Massachusetts resident if the person "owns homes in three different states, and divides his time between those homes throughout the year." This notion is consistent with the concept that an individual has only one domicile but can have numerous residences. *See Presentation of Governor's Legal Counsel Daniel Winslow to Municipal Clerks*, May 4, 2004 (*available at* http://www.provincetowngov.org/marriage/GovpowerpointQA.pdf).

84. Mass. Gen. Law ch. 207, § 52 (2005).

85. N.Y. Fam. Ct. Act § 412 (McKinney's 2005) ("A married person is chargeable with the support of his or her spouse and, if possessed of sufficient means or able to earn such means, may be required to pay for his or her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties).

86. N.Y. Estates, Powers & Trusts Law § 5-1.1 (McKinney's 2005).

87. I.R.C. § 1041(a)(2).

88. New York instead gives the spouse a right of election under either EPTL 5-1.1.

89. *See, e.g.,* Ore. Stat. § 112.305 (2005); *see also* Unif. Probate Code § 2-102.

90. *See* N.Y. Tax Law § 961 (McKinney's 2005).

91. Presently, there is no independent QTIP election for New York estate tax purposes. But the experience in Massachusetts suggests that if New York were to accord recognition to same-sex spousal relationships, the executor of the estate of a decedent who died married to a same-sex spouse would file a *pro forma* Federal return, on which the executor would make a QTIP election that would be respected for New York purposes.

92. These opportunities will be available for transfers to a surviving same-sex spouse of Massachusetts or Vermont property. The same result appears likely for transfers of Rhode Island property. *See* Department of the Attorney General, State of Rhode Island, *Attorney General Lynch's Statement Concerning Same-Sex Marriage* (May 17, 2004) ("This Office's review of Rhode Island law suggests that Rhode Island would recognize any marriage validly performed in another state unless doing so would run contrary to the strong public policy of this State. Public policy can be determined by statute, legal precedent, and common law."). If the couple has registered as domestic partners, the result also appears likely for transfers of New Jersey property. *See supra* note 43.

93. 11 U.S.C. § 522(b)(2)(B) (2005) (under the Bankruptcy Code, a debtor's estate may exclude property that the debtor owns as a tenant by the entirety to the extent that the property is exempt from process under state law); *see* EPTL 6-2.1(4) (recognizing tenancies by the entirety for real property and, after January 1, 1996, for cooperative apartments).

94. *See, e.g., In re Estate of Violi*, 65 N.Y.2d 392 (1985).

95. Treas. Regs. *25*.2512-2.

96. I.R.C. § 2651.

97. I.R.C. § 2651(c)(1).

98. Because adoption is not contingent on spousal status, such second-parent adoptions will be respected for GST purposes. *See* I.R.C. § 2651(b)(3)(A) (a legal adoption is treated as a relationship by blood).

99. *See generally* 813-2nd T.M., Estate Planning for the Unmarried Adult (BNA) (2005).

100. Gay and Lesbian Advocates and Defenders, *Navigating Income Taxes for Married Same-Sex Couples*, *available at* http://www.glad.org/rights/taxes_for_married_couples.html."

101. *Id*.

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