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Will Sister States Recognize Them? An Early Status Report

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On July 1, 2000, Vermont's law creating the civil union - a legally recognized marriage-like status available to same-sex couples - became effective.

Almost three years later, the validity and meaning of a civil union outside of Vermont is entirely uncertain, despite the fact that eighty-five percent of the civil unions granted have been to out-of-staters.

Only a handful states have weighed in thus far on the validity of a civil union relationship outside of Vermont, and in those states, the results for the most part have been discouraging for parties to civil unions (even those who want to dissolve them). In the remaining states, couples have little or no information on the legal status of their relationship.

This legal limbo means that parties to a civil union--intact or not--live with a degree of risk and uncertainty to which other couples are simply not subjected.

New York, however, has bucked the trend of states' refusing to recognize Vermont civil unions. Recently, a New York court held that the surviving partner to a Vermont civil union is a "spouse" for purposes of applying New York's wrongful death statute.

The Relevance of Out-of-State Recognition of Vermont Civil Unions

Why does the "recognition" of civil unions outside of Vermont matter? For numerous reasons, it turns out.

A married person has: the ability to get divorced in her state of residence, regardless of where the marriage was celebrated, and the right to seek property distribution under that state's laws; the right to inherit even if their spouse dies intestate (without a will) or tries to disinherit them (in which case they still get the "spousal share"); and the right to sue for wrongful death if their spouses dies as a result of medical malpractice or other negligence. A civil union partner is guaranteed none of these rights unless he or she is recognized as a "spouse" under the relevant state's law.

Meanwhile, in family law generally, myriad legal rights and responsibilities turn on the determination of whether a person is married or has a spouse. For instance, is a marriage subsequent to a civil union bigamy?

Or, suppose a divorce agreement conditions visitation rights on a prohibition of overnight visits from anyone other than a "spouse" or relative. If a civil union partner visits overnight, has the agreement been violated? One Georgia court said yes last year, in the case of *Burns v. Burns*.

Civil Unions and Divorce: An Unsuccessful Record

As I wrote in an earlier column, out-of-state parties to a Vermont civil union have found it more difficult to split up, than to get married in the first place.

One need not become a Vermont resident to marry or enter a civil union there. However, to get divorced in Vermont - the only way either a marriage or a civil union can be terminated - a person must have been a resident for at least six months at the time of filing, and for at least a year before the divorce can be granted.

To end a civil union, then, out-of-staters must either move to Vermont temporarily (an impractical option in most

cases), or convince a court in their home state to recognize their union--at least long enough to dissolve it.

The result has been that Vermont courts have dissolved only a handful of civil unions to date. Meanwhile, there are clearly couples in other states who would dissolve theirs if they could do so elsewhere.

Of course, Vermont could fix the problem most easily by eliminating the residency requirement for civil union divorce. But other states have an obligation to grapple with the couples who come before them, stuck in legal limbo with nowhere to turn.

To date, however, two courts have issued decisions refusing to allow civil union partners to divorce outside of Vermont.

In *Rosengarten v. Downes*, a Connecticut appellate court held that a Vermont civil union was not a "marriage" under either state's law and thus could not be dissolved in Connecticut. It found persuasive the fact that, in 2002, the Connecticut legislature had considered, but failed to act upon, two bills that would have authorized same-sex marriage or same-sex civil unions, respectively. This, the court felt, was indicative of Connecticut's clear public policy against recognizing a same-sex marriage-like relationship.

Recently, a court in Texas reached a similar result, when a judge who had initially granted a divorce to partners in a civil union reconsidered his decision. The state's attorney general intervened in the case and persuaded the judge that Texas could not grant a divorce where no valid marriage had existed.

Meanwhile, according to *The New York Times*, a judge in West Virginia quietly dissolved the civil union of a lesbian couple, writing only that they had "irreconcilable differences" and were "in need of a judicial remedy to dissolve a legal relationship created by the laws of another state."

There may of course be other divorce/dissolution cases like this one that have gone through the courts without fanfare. However, the published, precedent-setting cases have all gone the other way.

Civil Unions and Wrongful Death Claims: Some Signs of Success

In the case of *Langan v. St. Vincent's Hospital*, a trial court in New York recently gave a civil union partner the green light to sue as a "spouse" under New York's wrongful death statute.

There, as I described in an earlier column, a civil union partner, John Langan, sued a hospital alleging that medical malpractice caused the death of his partner, Neal Spicehandler. The case may yet be appealed, but for now, the trial court's decision is a very positive sign for New York civil union partners. (Similar decisions have also been rendered in both California and the District of Columbia.)

If any same-sex partner were to qualify as a "spouse," under the wrongful death law, it would have had to be Langan. Not only had Langan and Spicehandler entered into a civil union, but they also had created reciprocal estate plans. Several family members and friends filed affidavits in the case swearing to their committed, spouse-like relationship. "John has been Neal's partner in all aspects of life," Spicehandler's mother explained.

The New York trial court began by applying the "place of celebration rule" - a common family law principle that says a court in one state will recognize the marriages validly celebrated in another unless "contrary to natural laws or statutes." It noted also that New York precedent had recognized a common law marriage - and done so under the wrongful death statute - despite New York's own statutory abolition of such marriage.

The exception to the place of celebration rule was thus reserved, the court reasoned, for marriages that are incestuous, polygamous, or similarly offensive to public policy. And unlike with incest and polygamy, New York, the court held, has no public policy against same-sex marriages or marriage-like relationships.

For instance, unlike many states New York has never enacted a "mini-DOMA" - a state law mirrored after the federal Defense of Marriage Act, to ensure that same-sex marriages cannot be recognized. To the contrary, both the state and the City of New York recognize same-sex domestic partnerships for employment benefits. Similarly, by judicial interpretation, the rent control laws permit a same-sex partner to succeed in right to a rent-controlled apartment, a right reserved for family members. New York also allows lesbian and gay co-parent adoptions. In addition, it prohibits discrimination in employment, education, and housing on the basis of sexual orientation.

Finally, the court noted that the purpose of a particular statute should be taken into account, and that "spouse" need not mean the same thing in all contexts. The wrongful death law, the court explained, is designed to punish tortfeasors and to compensate those members of the decedent's family most likely to have suffered pecuniary losses from his death.

Who are those persons? Basically, those who are still in intact relationship with the deceased at the time of his death. And partners to intact civil unions fit within that definition.

What the Future Holds for Out-of-State Recognition of Civil Unions

The status of civil unions outside of Vermont is very much an open question. In addition, the issue may well be decided differently in the family law context, versus the trusts and estates context. Sadly, courts may feel less threatened by civil unions that have already been terminated by death - with only assets left to be distributed - than by an ongoing, thriving same-sex marriage-like relationship that raises issues of custody and other familial relationships.

As noted above, one solution to the quandary of out-of-state civil union partners would be Vermont's elimination of the residency requirement for divorce. But another would be wider adoption of civil union laws; several other states have considered it, but none has yet passed such a law. Yet greater recognition of same-sex relationships by state legislatures would resolve many of the problems currently faced by courts wondering whether to recognize Vermont civil unions, despite the fact that their statutes do not themselves provide for them.

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