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Joanna Grossman

Maurice A. Deane School of Law at Hofstra University

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Should a Surviving "Spouse" in a Same-Sex Couple Be Permitted to Sue for Wrongful Death?

A New York Court Will Have a Chance to Decide

By JOANNA GROSSMAN
lawilg@hofstra.edu

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Neal Spicehandler was allegedly the victim first of a driver's hit-and-run spree, and then of medical malpractice. When he arrived at St. Vincent's Hospital in New York, he had only a broken leg. A few days later, however, he died from a blood clot.

Spicehandler's partner, John Langan, has filed a wrongful death suit against St. Vincent's in New York Court. Langan claims that Spicehandler's death was the result of St. Vincent's medical malpractice. But before he begins to try to prove his case, Langan will have to establish that he has the right to sue in the first place.

Spicehandler and Langan were joined together in a November 2000 civil union in Vermont. Under Vermont law, such a union is equivalent in all respects to a marriage. (For more on Vermont civil unions, see [my prior column](#).)

But under New York's wrongful death statute, does the civil union mean Langan was Spicehandler's "spouse," and thus is entitled to sue? That is the question a New York court may soon decide

What a Wrongful Death Suit Is, And Who Can Be A Plaintiff

Who can be the plaintiff in a wrongful death suit? In New York, the right to sue belongs to the deceased person's "distributees." In turn, a "distributee" is defined as a person who would inherit under the state's system of intestacy - that is, its system setting forth the laws of descent and distribution for those who die intestate (without a will).

One possible distributee is the deceased person's surviving spouse. That leads to a key question for Langan's wrongful death suit: Is a partner in a same-sex civil union a "spouse" under the provision of New York's Estates, Powers, and Trusts Law governing wrongful death suits?

Vermont Would Allow Langan to Sue For Wrongful Death

To support his argument, Langan argues that the very reason he and Spicehandler entered into a Vermont Civil Union was to ensure that each would have rights in the event that the other died. And, indeed, that was one of Vermont's purposes in creating the civil union status.

Vermont's civil union is meant to be a marriage equivalent. Pursuant to the statute, every right and benefit accruing to opposite-sex spouses accrues to same-sex civil union partners. Among the many laws amended by the Civil Union law was the wrongful death statute. Thus, had Spicehandler died in Vermont, Langan would clearly have the right to sue.

Langan also notes that, in addition to entering into the Vermont civil union, each member of the couple also executed a will, and bought life insurance, naming the other as the beneficiary. In addition, each executed a health care proxy giving the other the power to make medical decisions for him.

In sum, Langan and Spicehandler are the ideal test case, for they did everything possible within their power to become, in effect, spouses. If a same-sex couple ever can be spouses, they were that couple.

The hospital has argued, however, that in New York, Langan does not qualify as a Spicehandler's surviving spouse.

In support of its argument, the hospital notes that New York, unlike Vermont, has no civil union law.

Is a New York court likely to accept this argument? It's unclear - in part because most relevant New York precedents predate the Vermont Civil Union statute and the new issues it raises.

Prior to the advent of civil unions, unmarried same-sex partners had tried to persuade New York courts to consider them to be spouses. Once, they succeeded: A New York court interpreted the New York City rent control law to include a same-sex partner in the definition of "family" entitled to assume an apartment after a tenant's death. But mostly, they lost.

In the 1993 case of *In re Cooper*, an intermediate New York appellate court refused to allow a same-sex partner to renounce his partner's will, which had given him less than he would have been statutorily entitled to as a legal spouse. The plaintiff argued that the statute's term "surviving spouse" was broad enough to include an intimate partner in a marriage-like relationship. He had also argued that the statute, if it excluded same-sex partners, violated the Constitution's Equal Protection Clause in that it unlawfully discriminated on the basis of sexual orientation. The court rejected both arguments.

Later, in the 1998 case of *Raum v. Restaurant Associates*, a different appellate court in New York refused to allow a homosexual partner to bring a wrongful death suit for his partner's death, on the ground that he was not a surviving "spouse." The statute is the same one Langan is trying to invoke. The partners in *Raum*, however, had not entered into a civil union (and could not have, since the Vermont statute had yet to be enacted).

These precedents may seem to spell defeat for Langan, but in fact, the passage of the Vermont Civil Union statute, preceded by the enactment of the federal Defense of Marriage Act (DOMA), may have changed the legal territory quite significantly.

The Relevance of the Full Faith and Credit Clause, and of DOMA

The U.S. Constitution's Full Faith and Credit Clause (located in [Article IV, section 1](#)) says that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

Langan argues, as a result, that New York must give "full faith and credit" to the Vermont judgment deeming Langan and Spicehandler to be partners in a civil union, with all the consequences that entails.

The question of whether he is right is complicated. [Article IV](#) of the Constitution also states that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Congress has enacted the Full Faith and Credit Act, which declares that states must give the same effect to judgments as the state in which they originated would. Arguably, a public policy exception to this mandate has developed, which permits states to refuse to recognize judgments that are against their own public policy.

This rule has always been understood to protect states from having to recognize marriages that are polygamous, for example, even if one state amended its laws to make them permissible.

Another relevant source of law is the Defense of Marriage Act (DOMA), which amends the Full Faith and Credit Act. DOMA was meant to target Hawaii (which never did legalize same-sex marriage, in the end), not Vermont. But it still may hurt Langan's ability to base his New York case on his and Spicehandler's Vermont civil union.

In addition to making clear that, for federal law purposes, a "marriage" is a union between "one man and one woman" and a "spouse" is married to someone of the opposite sex, DOMA also provides that one state need not honor another state's recognition of a "relationship between persons of the same sex treated as a marriage."

Langan argues that DOMA does not apply to him because it speaks only about relationships treated "as a marriage," and a civil union was purposefully given a name other than "marriage."

But even if DOMA applies, does it permit New York to refuse to accord full faith and credit to Vermont's act of recognizing Langan's and Spicehandler's union? Not necessarily.

Whether the Full Faith and Credit Clause permits Congress to decide how much credit to give the judgments of a sister state, as opposed to creating a mechanism for sharing them, is unclear. One interpretation of the Constitution is that it permits Congress to increase the amount of credit due sister state judgments, but not to decrease it. Under that interpretation, DOMA may be unconstitutional.

Surely Article IV did not intend to give Congress the power to eliminate the guarantee of Full Faith and Credit entirely. More likely, the "effect" language was to allow Congress to standardize how states accorded effect to out-of-state judgments - not to allow Congress to assure states they didn't have to accord out-of-state judgments any effect at all. The latter state of affairs, after all, would have threatened the Union the Framers worked so hard to create.

The Relevance of New York's Lack of A "Mini-DOMA"

Consistent with the prevailing interpretation of the Full Faith and Credit Clause, and DOMA, courts can cite public policy reasons to refuse to accord full faith and credit to marriages celebrated in other states.

Consider, for instance, that New York's law governing marriage itself is gender neutral: It does not say same-sex unions are permitted, but neither does it say they are barred. At least one court in New York has held that a clerk has no authority to issue a marriage license to a same-sex couple. But that is not necessarily the correct legal answer, and New York's highest court has yet to rule on this issue.

The Bar of the City of New York is currently deciding whether to make a formal recommendation that New York recognize same-sex couples, at least to the extent of providing them the rights associated with marital unions. And New York City passed a local law last summer providing that parties to a civil union are automatically entitled to the benefits of being in a registered domestic partnership in the city without re-registering their relationship.

Subsequent to the passage of the federal DOMA, more than thirty-five states passed legislation - so-called "mini-DOMAs" - declaring that they, indeed, would not recognize same-sex marriages entered into in other states.

However, New York was not one of those states - and that fact may be very helpful to Langan. Without a New York mini-DOMA, arguably the federal DOMA is irrelevant to New York.

On this view, DOMA made an offer to allow states not to credit out-of-state same-sex marriages; thirty-five states accepted that offer; but it was an offer that other states - such as New York - could, and did, refuse. (This interpretation is especially compelling when one notes that those who voted for DOMA were generally also big believers in states' rights.)

Evidence that New York did not take the feds up on the offer they extended in DOMA can also be drawn from other sources. For instance, unlike many other states, New York also lacks any legislation or attorney general's opinion expressly stating that it is against the state's public policy to recognize a same-sex union from another state.

It also recently enacted SONDA (the Sexual Orientation Non-Discrimination Act), which amends all existing human rights and education laws to prohibit discrimination on the basis of sexual orientation, in addition to those characteristics already protected. It is not inconceivable that a state may have a public policy against sexual orientation discrimination for employment and education purposes and yet permit such discrimination in the marriage context. Yet SONDA, standing alone, suggests perhaps the state's public policy is broadly opposed to sexual orientation discrimination.

In light of the state's silence on the specific issue of same-sex marriage, while a New York court could still hold that a same-sex marriage is against New York's public policy, it would have an uphill battle in citing evidence for its view.

At best, New York seems ambivalent about same-sex marriages - hardly a basis for a public policy invalidation of Langan's and Spicehandler's Vermont civil union. If the Full Faith and Credit Clause means anything, it ought to mean that a state ought to have excellent reasons for rejecting another state's judgment. When it comes to Vermont civil unions, New York does not.

Joanna Grossman, a FindLaw columnist, is an associate professor of law at Hofstra University.

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