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**CAUGHT IN THE TRANSITION:
A CAUTIONARY TALE FOR SAME-SEX
COUPLES**

by

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Matina Mouyos**

I. INTRODUCTION

After the Supreme Court's decision legalizing same-sex marriage in *Obergefell v. Hodges*¹, one would believe that the disparity in the treatment of same-sex versus opposite-sex couples under the law would cease. Yet a series of decisions by New York state courts examining the rights of same-sex couples after the end of their relationships have had unforeseen consequences. These decisions have impacted the areas of estate planning, equitable distribution of property, and parental rights relating to the custody and visitation of the couple's children.

The purpose of this article is to analyze these court rulings and provide guidance to avoid both unexpected and unintended outcomes.

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II. BEQUESTS TO FORMER SPOUSES

New York Estates, Powers and Trusts Law (EPTL) §5-1.4 states that, unless the will expressly states otherwise, a divorce, judicial separation, or annulment of a marriage revokes all dispositions or appointments made by a decedent to a former spouse. The former spouse is treated as having predeceased the testator. This means any bequests to the former spouse, the nomination of the former spouse as executor or trustee, and any appointments of property in the former spouse's favor under a power of appointment are revoked. The revocation is valid even if the will was executed before the marriage.² In addition, the former spouse's rights to "in-trust-for" bank accounts (Totten Trusts), life insurance policies, lifetime revocable trusts, and joint tenancies with right of survivorship are also revoked.³

*Matter of Leyton*⁴ involves a petition by the decedent's mother and sister to revoke letters testamentary issued to the decedent's former same-sex partner naming him as executor, and to disqualify him as a beneficiary under the will. The decedent and his former partner had entered into a commitment ceremony in New York in 2002, but later separated in 2008. The will was executed on January 11, 2001, prior to the commitment ceremony.⁵ If the decedent and his partner had married and then divorced, EPTL §5-1.4 would have barred his former partner from serving as executor and from inheriting under the will. When the Bennett Commission first reviewed this issue in the 1960s, it found it counterintuitive that any testator would provide a gift to a former spouse, and the Legislature agreed.⁶ In their petition, the decedent's mother

and sister contended that the former partner was the equivalent of a former spouse, and therefore should be disqualified under the statute.

The petitioners argued that the State of New York “wrongfully and unconstitutionally deprived decedent and his partner the right to marry and subsequently divorce.” Therefore, the Surrogate’s Court, “as a matter of right and equity” should apply the statutory provisions of EPTL §5-1.4.⁷ Conversely, the former partner argued that at the time of the commitment ceremony, the union was not considered a formal marriage in New York State, and the subsequent break-up was not a “separation,” “abandonment” or “divorce” as defined by the statute.⁸

The Surrogate noted that the petitioners were asking the Court to retroactively apply New York’s Marriage Equity Act, which did not legalize same-sex marriage until 2011. The Court further stated that it is up to the Legislature to decide questions such as this, concluding, “this Court cannot deem the commitment ceremony to have sanctified a marriage,” thereby allowing the decedent and his former partner to be deemed divorced.”⁹ Even after 2011 the decedent and his former partner took no steps to obtain a judicial decree declaring an end to their union. The petition was denied.

While the Court’s decision appears to deny the presumed intent of the decedent, this may not be true. The decedent died in December 2013 of a heart attack at the age of 52. This was more than five years after the decedent and his former partner had ended their relationship. The couple had been together approximately 10 years prior to their commitment ceremony, and separated six years after the

ceremony, resulting in a 16-year relationship. They stayed on good terms after their separation; they continued to co-own property, bank accounts and credit cards up until the decedent's death. Early in 2013, the decedent attended his former partner's wedding when he married another man, and the decedent acted as the wedding's sole official witness.¹⁰

The decedent had ample time and opportunity to execute a new will after the romantic relationship between the parties ended, but did not. While the Court's ruling appears to support the decedent's wishes in this case, the opposite may be true in future cases. It is imperative that same-sex couples who never legally marry, then later separate, review and update their estate plans. They cannot rely on the language of EPTL §5-1.4 to revoke all bequests to a former loved one. Only by revising their documents can they be certain that their true wishes will be carried out.

III. EQUITABLE DISTRIBUTION OF PROPERTY

Equitable distribution is the means by which New York allocates marital property between the spouses when a marriage ends. New York's Domestic Relations Law provides that equitable distribution of marital property shall be made in a court action where all or part of the relief granted is a divorce, or upon the dissolution, annulment or declaration of the nullity of a void marriage.¹¹ This provision authorizes the court to equitably distribute marital property only when the marital relationship is terminated. Absent such a change in marital status, the court is powerless to distribute marital property.

The term "marital property" is defined as all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a divorce action, regardless of the form in which title is held.¹² Excluded from marital property is separate property, which includes property acquired before the marriage or property acquired by bequest, devise, descent or gift from a third party to one of the spouses.¹³

*O'Reilly-Morshead v. O'Reilly-Morshead*¹⁴ involves a same-sex couple who began their relationship in 2001. In 2002 the couple moved to New York, but before relocating the defendant sold a house that she owned in her own name in Indiana. In June, 2003, the couple entered into a civil union in Vermont. Under the Vermont civil union statute the parties acquired rights, under Vermont law, in property they acquired thereafter.¹⁵ In 2004 the plaintiff purchased a home in New York, which she purchased with her separate property; the defendant was not listed on the deed to the property. In 2006 the couple was married in Canada, and five years later the plaintiff commenced a divorce action in New York seeking equitable distribution of the marital property. The defendant then filed an action for divorce and a counterclaim for dissolution of the civil union, asking the New York court to distribute any "civil union property" under Vermont law.¹⁶

At controversy is whether either or both of the parties attained legal rights to property acquired by the other party in her own name after the date of the civil union, but before the date of the marriage. At the time of the parties' civil union, Vermont's civil union statute granted couples entering a civil union the same property rights as those extended to couples entering a marriage.¹⁷ Nevertheless at the time these parties

entered into their civil union, Vermont did not recognize their union as a legal marriage. In 2009 Vermont passed a Marriage Equality Act which afforded legal status to same-sex marriages.¹⁸ This Act defines marriage, stating that it includes all "legally recognized unions of two people." Therefore marriages and civil unions, after the Marriage Equality Act, are equivalent unions that can be dissolved by the Vermont courts. To further clarify property rights, the Vermont Supreme Court has intoned that even if joined in a civil union, the property acquired by the parties during the civil union is subject to court distribution, and is referred to as the "marital estate"¹⁹

While it is clear that Vermont courts have the authority to dissolve the couples' civil union and subsequent marriage, as well as distribute all property acquired by them after the date of their civil union, do New York courts have jurisdiction to do the same? Appeals courts in New York state have held that trial courts can dissolve civil unions under a trial court's general equity jurisdiction.²⁰ Nevertheless, while authorizing New York courts to dissolve civil unions, no guidance was provided regarding the distribution of property acquired during the course of the civil union.²¹ The court in *O'Reilly-Morshead* had to decide whether it could distribute "civil union property" that is outside the scope of "marital property" as defined in the Domestic Relations Law. The mere fact that the court has the power to dissolve the civil union does not dictate that it must apply New York's statutory rules to relief under the dissolution.²² In that respect, it is important to note that other New York courts have concluded that a civil union is not the equivalent of a marriage in New York.²³ Furthermore the Third Department declined to apply comity and extend New York's system of benefits to a civil union partner stating,

While parties to a civil union may be spouses, and even legal spouses, in Vermont, New York is not required to extend to such parties all of the benefits extended to marital spouses. The extension of benefits entails a consideration of social and fiscal policy more appropriately left to the Legislature.²⁴

The court in *O'Reilly-Morshead* ruled that there was no indication from the legislature or the Court of Appeals that the definition of marital property, which is subject to distribution in New York divorce actions, could be so easily relinquished to other states. This would cause the situs of the marriage, rather than that of divorce, to carry more weight, and the court refused to adopt Vermont's definition of marital property or the marital estate.²⁵

A second argument made by the defendant is that a civil union is an "express contract" similar to the marriage contract. As a matter of contract law, the union is subject to termination by a court of general equity, and the court must decide whether to utilize New York or Vermont law as the basis for developing a remedy after termination of the agreement. While the court acknowledged the persuasiveness of this argument, it declined to accept it, stating,

The failure of the legislature to recognize "civil unions" and the strict definition of "marital property" as the starting point for considering equitable distribution of property prohibit this court from venturing to that conclusion. There is no general

common law of equity that is equivalent to the statutory creation of an equitable distribution power in the Domestic Relations Law. Equitable distribution of property from a titled party to a non-titled party is only permitted in New York if the parties are married, either under the laws of New York, or other states or nations. The Court of Appeals has repeatedly noted that a "marriage"—of whatever type or from whatever jurisdiction—is the only touchstone for equitable distribution of property in New York.²⁶

The Court's decision in this case appears to be an anomaly; it dissolves a preexisting civil union, but only allows equitable property distribution based upon the date of the couple's legal marriage. Some states recognize civil unions as the equivalent of a legal marriage, providing the parties with the same legal rights and responsibilities of a married couple. However, this case serves as a caution to same-sex couples: The jurisdiction in which they entered a civil union may not serve as the controlling law when they wish to terminate their relationship. When seeking court-ordered distribution of civil union property, it is the law of the state granting the dissolution that controls. These couples, while on good terms, may wish to sign an express contract addressing the distribution of civil union property in the event their relationship terminates in the future.

IV. PARENTAL RIGHTS

In New York state, it has long been presumed that a child born of a married woman is the child of the husband. The

presumption is recognized at common law²⁷ and codified in New York statutes.²⁸ Both New York's Domestic Relations Law and Family Court Act establish that a child born before or after the marriage shall be deemed to be the legitimate child of the married couple. This is true whether or not the marriage was valid.

*Kelly S. v. Farah M.*²⁹ involves a same-sex couple that began their relationship in March 2000. They entered into a registered domestic partnership in California in January 2004, and shortly thereafter decided to start a family. Anthony S., a close friend of both of the parties, agreed to donate his sperm, and Kelly S. became pregnant through artificial insemination. In January 2005, Kelly S. gave birth to I.S., who was legally adopted by Farah M. and is not a subject of this case.

The parties decided to have another child, and Anthony S. again agreed to donate his sperm. This time Farah M. became pregnant by artificial insemination and gave birth to Z.S. on March 24, 2007. The parties were legally married in August 2008 when California first allowed same-sex marriages. That same year they decided to have a third child, and Farah M. became pregnant once more through artificial insemination, with Anthony S. again donating the sperm. Farah M. gave birth to E.S. on April 27, 2009. Both Z.S. and E.S. were given Kelly S.'s surname, and Kelly S. was listed as a parent on the children's birth certificates. In conceiving Z.S. and E.S. the artificial insemination procedure was performed at home by Farah M., rather than by a physician, and the parties did not draft or sign a written consent agreement. Kelly S. did not legally adopt Z.S. or E.S.³⁰

In 2012 the parties relocated with the children to New York. Subsequently the parties separated, and Kelly S. moved to Arizona in the summer of 2013, while Farah M. remained in

New York with the three children. In May 2014 Kelly S. filed a visitation petition in the Family Court in Suffolk County, New York, seeking visitation with Z.S. and E.S. The petition alleged that Kelly S. was the mother of the subject children and stated the facts set forth above. The petition further alleged that Kelly S. helped raise the children until the parties separated.³¹ In determining parentage the first issue that the court had to decide was whether to use New York or California law. After discussing the doctrine of comity,³² the court determined that the parties' decade long history and residence in California warranted the application of California law to this matter.

Turning to the facts of this case, the court noted that the parties did not comply with the artificial insemination laws of either California or New York. Therefore, those statutes did not provide a basis for treating Kelly S. as a parent. Nevertheless, after analyzing the presumption of parentage arising under California law for children born of a marriage,³³ as well as the California law for registered domestic partnerships,³⁴ the court determined that when Z.S. was born in 2007, while the parties were living together in a registered domestic partnership, California law afforded them the same rights and obligations with respect to Z.S. as if they were married spouses. The court concluded that Kelly S. was presumed to be the parent of both Z.S. and E.S. under California law.³⁵

At first glance this case appears to create new law in New York, doing away with New York's previous holding in *Matter of Paczkowski v. Paczkowski*,³⁶ which concluded a non-biological mother does not have standing to seek custody or visitation. In *Paczkowski* the court held that the presumption of parentage does not arise for the non-gestational spouse in a same-sex marriage because there is no possibility that she is the child's biological parent. While it may be an indication of intent to be a parent, as would a non-biological parent's name

on a birth certificate, it does not create a legal parent-child relationship.

While it is true that many states have a “marital presumption of parentage,” it is applied differently by the states. In New York, the marital presumption of parentage does not apply to same-sex couples. Therefore, had Kelly S. and Farah M. lived in New York, and conceived and given birth to their children in New York, the outcome of this case would have been vastly different. Kelly S. would have been denied visitation to the children she had helped to raise since their birth. Same-sex families be cautioned: Adoption is the only way to create a legal parent-child relationship that must be recognized in every state.

V. CONCLUSION

Marriage is a vital package of legal rights and responsibilities. Prior to our nation legalizing same-sex marriage, many states permitted same-sex couples to take part in commitment ceremonies or enter civil unions or registered domestic partnerships. These “marriage substitutes” do not afford the parties the same rights and responsibilities of a legal marriage, and may result in unforeseen consequences when a couple seeks to dissolve their relationship. It is time for states to pass legislation to mitigate these unexpected and unintended outcomes.

ENDNOTES

¹ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

² *Matter of Knopske*, 165 Misc. 2d 45, 626 N.Y.S.2d 701 (Surr. Ct. Erie Co. 1995).

³ N.Y. EST. POWERS & TRUSTS LAW §5-1.4 (McKinney 2016).

⁴ *Matter of Leyton*, 135 A.D.3d 418, 22 N.Y.S.3d 422 (1st Dept. 2016).

⁵ *Id.*

⁶ N.Y.L.J., July 13, 2015, at 1 col 2.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ www.artleonardobservations.com/tag/matter-of-mauricio-leyton.

¹¹ N.Y. DOM. REL. LAW §236B (McKinney 2016).

¹² *Id.*

¹³ *Id.*

¹⁴ *O'Reilly-Morshead v. O'Reilly-Morshead*, 50 Misc.3d 402, 19 N.Y.S.3d 689 (Sup Ct., Monroe Co. 2015).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ VT. STAT. ANN. tit 15, §1204[d] (2000).

¹⁸ VT. STAT. ANN. tit 115 (2009).

¹⁹ *DeLeonardis v Page*, 188 Vt. 94, 101 n 1, 998, (Vt. 2010).

²⁰ *Dickerson v Thompson*, 88 A.D.3d 121 (3d Dept. 2011).

²¹ *Id.* at 124 n 2.

²² *O'Reilly-Morshead v. O'Reilly-Morshead*, 50 Misc. 3d 402, 19 N.Y.S.3d 689 (Sup Ct., Monroe Co. 2015).

²³ In *Matter of Langan v. State Farm Fire & Cas*, 48 A.D.3d 76 (3d Dept. 2007) and *Langan v. St. Vincent's Hosp. of N.Y.*, 25 A.D.3d 90 (2d Dept. 2005), the Second and Third Departments noted that the parties had not married and, therefore, the surviving partner was not a "surviving spouse" for purposes of the application of New York's workers' compensation laws.

²⁴ *Matter of Langan v. State Farm Fire & Cas*, 48 A.D.3d 76, at 79 (3d Dept. 2007).

²⁵ *O'Reilly-Morshead v. O'Reilly-Morshead*, 50 Misc. 3d 402, 19 N.Y.S.3d 689 (Sup Ct., Monroe Co. 2015).

²⁶ *Id.*

²⁷ *Matter of Findlay*, 253 N.Y. 1 (1930).

²⁸ N.Y. DOM. REL. LAW § 24 and N.Y. FAM. CT. ACT § 417 (McKinney 2016).

²⁹ *Kelly S. v. Farah M.*, 139 A.D.3d 90, 28 N.Y.S.3d 714 (2d Dept. 2016).

³⁰ *Id.*

³¹ *Id.*

³² In *Kelly S. v. Farah M.*, 139 A.D.3d 90, 28 N.Y.S.3d 714 (2d Dept. 2016), the court noted that comity is one State's voluntary decision to defer to the policy of another. Such a decision may be perceived as promoting uniformity of decision, as encouraging harmony among participants in a system of co-operative federalism, or as merely an expression of hope for reciprocal advantage in some future case in which the interests of the forum are more critical.

³³ CAL. FAM. CODE § 7611.

³⁴ CAL. FAM. CODE § 297.5 [d].

³⁵ *Kelly S. v. Farah M.*, 139 A.D.3d 90, 28 N.Y.S.3d 714 (2d Dept. 2016).

³⁶ *Matter of Paczkowski v. Paczkowski*, 128 A.D.3d 968, 10 N.Y.S.3d 270 (2d Dept. 2015).