

P E N N S Y L V A N I A
LAW WEEKLY

Monday, January 15, 2007

SEPARATE, BUT STILL NOT EQUAL

Legislation is a big step forward for same-sex couples, but there is still a long way to go

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Special to the Law Weekly

On Nov. 20, 2006, I devoted my column (headlined "Separate, but Not Equal," 29 PLW 1310) to the New Jersey Supreme Court opinion *Lewis v. Harris*, 908 A.2d 196 (2006) directing that, within 180 days, the state legislature had to either amend the marriage statutes or enact an appropriate statutory structure so that committed same-sex couples were provided the full rights and benefits enjoyed by heterosexual married couples.

The high court's directive to the legislature came down on Oct. 25, 2006, and on Dec. 6, 2006, legislation was introduced to the Assembly, went through a number of amendments and revisions and on Dec. 14, 2006, both houses approved and passed the legislation. On December 21, 2006, New Jersey Gov. Jon S. Corzine signed into law legislation that permits civil unions between same-sex couples. The new legislation provides that same-sex couples apply for a civil union license and participate in a civil union ceremony will enjoy the same rights and benefits as heterosexual couples who choose to marry.

It is clear that the New Jersey legislature stopped short of granting the right to marry to same-sex couples. In *Lewis v. Harris*, the court determined that there was no fundamental right to same-sex marriage either under the federal or New Jersey constitution. The legislature therefore chose the nomenclature of "civil union" declining to call the relationship "marriage". However, the legislature in its wisdom decided to enact the civil union laws by *amending* the existing marriage statutes of New Jersey.

What procedures does this new legislation, which will take effect 60 days after Corzine's signature, or on Feb. 19, 2007 provide in order to secure a civil union? An analysis of the "Civil Union Bill" sets forth the following information: • When one applies for a civil union license, the couple is obligated to wait a period of 72 hours before receiving the license. This provision is identical to the one concerning marriage licenses and the waiting period before receiving the license.

• New Jersey same-sex residents will seek a civil union license in the Municipality or City or Township or Borough where at least one of them resides.

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- Out of State couples may also secure civil unions in New Jersey by seeking the civil union license in the Municipality, Township or City where they intend for the ceremony to take place.
- A license for a civil union is good 30 calendar days.
- Presently, the fee for the license is \$28.00, the same amount as a heterosexual couple would pay for a marriage license.
- At the actual ceremony, there must be a witness age 18 or over who is not the partner.
- The civil union may be conducted by clergy or by a Federal, State, or Municipal Judge whose jurisdiction includes New Jersey or by a County Surrogate Clerk, Mayor, Deputy Mayor, or the Head of a Municipal Council.
- After the ceremony, there are five calendar days to send the Civil Union License and the Certificate to the local registrar or the Clerk of the County Board of Health.

No Residency Requirement

Clearly, same-sex couples from Pennsylvania and other states will avail themselves of the new Civil Union Act of New Jersey in that it has no residency requirement and is clear that residents of other states may avail themselves of its benefits.

The legislation provides that the procedures and grounds for terminating a civil union are identical to those for heterosexuals to secure a divorce. Those portions of the marriage statutes dealing with annulment, legal separation, and divorce have been amended to provide for the same procedures for a same-sex couple in a civil union. Those provisions normally seen for annulment of a heterosexual marriage, such as being under-age; not having the mental capacity to enter into such a union; being under the influence of drugs or alcohol where there is a lack of mutual assent; duress; fraud; or having a wife, husband, or partner living at the time that the civil union was established, also apply to civil unions. Instead of the word "annulment", the new legislation uses "nullity" of a civil union. Instead of the word "divorce", the legislation uses the language "judgment for dissolution of a civil union." A review of this recent legislation indicates that by amending the marriage statutes to include the language concerning civil unions, the legislature came as close as possible to accomplish having the public at large view civil unions in the same light as marriages between heterosexual couples.

What rights now accrue to same-sex couples who enter into civil unions in the state of New Jersey? The answer is that of the enumerated state rights, they are identical to those of heterosexual married couples. Those rights, *inter alia*, are as follows:

- Ownership of property and transfer of property both during life and death and the right to devise and distribute property upon death in the same way as married heterosexual couples. A couple who have engaged in a civil union have all the causes of actions which are available to dependent or spousal status including wrongful death, loss of consortium, and other torts.

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- Probate law and procedures will pertain to civil union couples.
- Adoption laws and procedures.
- Laws regarding health insurance and pension benefits.
- Domestic violence protection pursuant to the "Prevention of Domestic Violence Act of 1991."
- Victim's Compensation Benefits.
- Worker's Compensation Benefits, including Survivor's benefits and payment of back wages.
- All laws relating to medical care and treatment, hospital care and nursing home care, including the ability to make a healthcare power of attorney.
- The ability to have Family Leave.
- Public Assistance benefits, including Medicaid, Pharmaceutical Assistance and Utility Benefits.
- Laws relating to State or Municipal Taxes.
- The right of a spouse to a surname change.
- State pay for military service.

No Federal Recognition

A review of the benefits available to civil union couples in New Jersey indicates that a civil union does *not* gain the same federal recognition as marriage. Therefore, a civil union couple can file a joint state tax return, but may not file a joint federal tax return. Civil union couples cannot get Medicare and are not entitled to any federal benefits. Therefore, the lack of recognition by the federal government is certainly a significant difference between the benefits enjoyed by heterosexual married couples and those recognized to be available to civil union couples.

There are now three states that recognize civil unions. They are Vermont, Connecticut and New Jersey. Only one state, Massachusetts, recognizes same-sex marriage. Even in Massachusetts, however, federal benefits are not available to same-sex marital partners.

While New Jersey has taken huge steps to afford same-sex couples the same rights and benefits enjoyed by married couples, no state can change the law regarding federal benefits. There are countries such as Canada, Spain, South Africa, Belgium, and the Netherlands that have recognized same-sex marriages. If a same-sex couple got married in any of those countries, would that marriage be recognized in the state of New Jersey? We do not know the answer yet to that question. Consider the situation where an American citizen enters into a civil union with a same-sex partner from France or Italy or Greece. Will that partner be able to come live in the

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United States, get a green card, or become a citizen due to the "civil union relationship?" Right now, the answer is clearly no because immigration laws of this country are governed by federal law, which does not recognize same-sex unions. Can a civil union couple file a joint state tax return and each file their own federal tax return? We do not know the answer to that question. Will certain deductions normally available to heterosexual married couples be available to couples who secure a civil union? Presently, the answer is that with regard to federal tax returns, no.

The amendment of the marriage statutes by the New Jersey legislature to include civil unions, but not refer to those civil unions as "marriage" gives same-sex partners who engage in civil unions in New Jersey, whether residents or non-residents, the same state benefits as married couples. Clearly, the passing of this legislation is a huge step forward for same-sex couples. However, same-sex couples still have a long way to go. Therefore, although the distance between separate, but equal has been narrowed significantly, same-sex unions are still separate, but not equal. •