

Same Sex Marriage

We have substantial experience representing same sex couples with both prenuptial agreements, divorce actions, termination of a civil unions and/or domestic partnership. We are fortunate enough to live in a country that now accepts same-sex marriage in every state. However, for years same-sex couples were limited to getting a civil union or a domestic partnership. Even though same-sex marriage is now legal, it does not mean that all civil unions and domestic partnerships are automatically converted into a marriage. Indeed, there are several differences in the rights of those who are divorcing a marriage as opposed to those that are dissolving a civil union or domestic partnership. Our Family Law Department at Wilentz, Goldman & Spitzer understands the differences and the implications they may have for you.

Another issue that often arises in the context of same-sex relationships is parentage – that is, the recognition of each partner to the relationship as the parent of a child that was born during the relationship. Under New Jersey’s current law, husbands are presumed to be the biological father of children born to their wives during marriage. The same does not hold true for same-sex partners who are not a biological parent of a child born during a same-sex relationship because the statutory framework is gender specific. That being said, there are several avenues of relief that a non-biological parent may pursue to assert his or her right to establish a legal parent-child relationship. This may include a “Second Parent Adoption” or other proceeding. These processes can be confusing and often difficult to navigate, but we have the experiences and resources to best protect your interests.

New Jersey Civil Unions

In a 2013 landmark decision, our United States Supreme Court struck down the Defense of Marriage Act (“DOMA”) *United States v. Windsor*, 570 U.S., 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013). DOMA, Federal Law enacted in 1996, explicitly defined marriage as a union between a man and a woman. DOMA was heavily scrutinized in recent years for prohibiting same sex couples from enjoying many Federal Benefits. Subsequent to *United States v. Windsor*, the IRS in Rev. Rul. 2013-17 clarified that that the terms “husband and wife,” “husband,” and “wife” should be interpreted to include same-sex spouses.

Domestic Partnership Act

On July 10th, 2004, New Jersey passed its Domestic Partnership Act. On February 19th, 2007, New Jersey enacted its Civil Union Law. On June 26th, 2013, the United States Supreme Court issued a decision, *United States v. Windsor*, holding that the federal government could not deny benefits to same-sex couples legally married in a state that recognized same-sex marriages. This did not affect the right of states to decide independently to offer same-sex marriage, and it had not yet become legal in New Jersey.

However, same-sex marriage became legal in New Jersey before the right to same-sex marriage was recognized on a national level. In the case of *Garden State Equality v. Dow*, a gay-rights advocacy group and several same-sex couples brought an action against New Jersey state officials for unconstitutionally depriving them the right to marry. They won this argument before a New Jersey trial court, and the Court ordered state officials in New Jersey to begin issuing same-sex marriage licenses. The State immediately sought to postpone the effective date of the trial Court’s decision, but that request was denied. On October 18th, 2013, in its unanimous opinion denying the state’s request to postpone the effective date of the trial Court’s ruling, the New Jersey Supreme Court declared that state officials would be permitted to process same-sex marriages in New Jersey. That same day, Governor Chris Christie withdrew the state’s plans to appeal, which sealed the

right to same-sex marriage in New Jersey. The state began issuing same-sex marriage licenses the following Monday, October 21st, 2013.

Obergefell v. Hodges

On June 26th, 2015, same-sex marriage became legal in every state when the United States Supreme Court decided *Obergefell v. Hodges*. In *Obergefell*, the Court held that the right to marry is a fundamental right guaranteed to every American under the due process and equal protection clauses of the Fourteenth Amendment. Although same-sex marriage is now available in every state, some same-sex couples have chosen to remain in civil unions. Those who seek to dissolve their civil union must be aware of the differences in their rights versus those who are seeking to divorce a marriage.

New Jersey Parentage Act

The legal recognition of same-sex families is an evolving issue. Under the New Jersey Parentage Act, husbands are presumed to be the biological father of children born to their wives during marriage. Now that same-sex marriage is legal in New Jersey, many have argued that this presumed parenthood should extend to same-sex partners over children of whom their same-sex spouse is the biological parent. However, the law remains in flux, as the statute appears on its face to be gender specific.

Dissolving a Civil Union

There are several impediments to dissolving a civil union that do not exist for divorcing spouses in a marriage. First, if a couple that entered into a civil union moves to another state where civil unions are not recognized, they cannot dissolve their union in that state. This poses a particular inconvenience for partners who wish to marry or enter into a union with a new partner, since the existence of a civil union is an impediment to entering into a new civil union or marriage.

In addition to the geographical impracticalities of dissolving a civil union, under current law, partners in a civil union are deprived of significant federal benefits offered to married partners because the federal government does not recognize civil unions. These benefits denied to civil union partners include:

- Family and medical leave
- Medicare
- Immigration matters
- Military and veteran's affairs
- Filing a joint federal tax return
- Participation in a Survivor Benefit Plan

Unlike divorced spouses, former partners of a dissolved civil union are not eligible to receive their former partner's Social Security benefits. In addition, while a divorced spouse who is ordered to pay alimony may deduct his or her alimony payments from his or her federal income tax return, a former partner to a now-dissolved civil union cannot claim that same deduction. Unless the civil union is dissolved and the partners subsequently enter into a marriage, dissolving partners to a civil union will continue to be deprived of these benefits.

Marriage Equality and Presumed Parenthood

A legal parent is a person who is legally recognized as such and has the legal authority to participate in the major decisions affecting a child's overall welfare. A legal parent could be a biological parent, whereby parenthood was established by conception, or an adoptive parent, whereby parenthood was established by a legal permission of a Court. Under New Jersey's Parentage Act, a man is presumed to be the biological father of a child born to the woman he is married to. In at least one New Jersey trial Court case, *In re Parentage of Child of Robinson*, a same-sex partner was entitled to the statutory presumption of parenthood afforded to

husbands under the language of the New Jersey Parentage Act. However, until it is specified by the legislature that the New Jersey Parentage Act is gender neutral, the non-biological parent in a same-sex marriage should petition the Courts for a Second Parent Adoption. This adoption process is usually pretty brief because at least one biological parent (the same-sex spouse who is also the biological parent of the child born during marriage) is usually consenting to the adoption.

Second Parent Adoption

A second-parent adoption is another term used for “stepparent adoption.” It is the legal act that allows a non-biological parent to adopt his or her partner’s biological child without terminating the biological parent’s legal status as a parent. Many same-sex partners use this process because, as a matter of biology, they cannot both be the biological parent of a child.

A stepparent adoption is initiated by filing a complaint. After the complaint is filed, and the Court finds that it has jurisdiction over the matter, it will order an investigation and agency report. The investigation and report are aimed at evaluating whether the stepparent has the capacity to meet the child’s physical and emotional needs, and whether it is overall in the child’s best interests for the adoption to be processed. The Court will also schedule a preliminary hearing 2-3 months from the date of the complaint, and will order that a search of the stepparent’s criminal and domestic violence history take place within 30 days of the preliminary hearing. Within 9 months of the preliminary hearing, the Court will schedule a final hearing to put through the adoption, provided no issues arise in the process leading up to that point.

Garden State Equality v. Dow

Same-sex marriage is now recognized in New Jersey as a result of *Garden State Equality v. Dow*, 2013 N.J. Super. LEXIS 169 (Law Div. Sep. 27, 2013), stay denied, 433 N.J. Super. 347 (Law Div. 2013), stay denied, 216 N.J. 314 (2013). *Garden State Equality*, citing *United States v. Windsor*, held that same sex couples must be afforded the full rights and equal benefits enjoyed by heterosexual married couples.

With equal rights, it is important that same sex couples understand the rights and obligations including, but not limited to, alimony, equitable distribution of assets/liabilities, custody/parenting time, child support, health/life insurance and counsel fees.

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