SAME-SEX COUPLES AND SOME AREAS OF FAMILY LAW – A Snapshot – Updated 7/26/15
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How Did We Get Here?

1971 – Baker v. Nelson – MN Supreme Court upheld a MN law defining marriage as only between a man and woman. US Supreme Court declined to overturn citing lack of a substantial federal question. It was precedent.

Many cases in 70s, 80s and even 90s upholding excluding same-sex couples.

Baehr v. Lewin, 1993 - HI Supreme Court indicated that the exclusion was unconstitutional. It remanded, but then the HI legislature acted with a Defense of Marriage Act (DOMA) effectively killing the case by 1999 as it wound its way through HI courts. This case was the impetus for the Federal DOMA.

Baker v. Vermont – 1999 – VT Supreme Court indicated that had to offer same benefits as marriage – led to civil unions in 2000.


U.S. v. Windsor Case – 2013 - federal equality as the Federal DOMA falls – was over federal estate taxes.

Go Through Various Twists in FL case – Judge Hinkle’s decision – 7-2 ruling on upholding Florida’s stay. Led to marriages starting to be recognized on January 6, 2015. Finally Obergefell v. Hodges – 2015 – US Supreme Court finds state bans on same-sex marriage to be unconstitutional

General Issues
Nomenclature – are we just spouses, husband-husband, wife-wife? Ask.
4% of Mass marriages now are same-sex, so probably the future nationwide.

Issues in Probate
Legitimacy of Marriage – was there capacity to enter into the marriage.

Issues in Guardianship/Probate
Familial Relationships – who can contest, blood relatives? Step-relatives? Omitted children? Allows children to inherit from father even if an “attempted marriage” was void. F.S. 732.108

Issues in Real Estate Titling
JTROS or TBE – traditionally marriage alone is not enough to make TBE, have to explicitly state as well.

Issues in Adoptions
Stepparent Adoptions v. older more cumbersome Second Parent Adoptions

Issues in Surrogacy
Commissioning Couple – have to have a contract before implementation

Issues in Dissolutions (Marriage and/or Civil Unions)
1. Can you Dissolve a Civil Union in FL from another state? There is one Palm Beach decision, but it was not contested. There is a great Massachusetts case that says yes you can dissolve from another state, but many others have said no.

2. Legitimacy of Children – what about ratification statute? F.S.742.091 -If the mother of any child born out of wedlock and the reputed father shall at any time after its birth intermarry, the child shall in all respects be deemed and held to be the child of the husband and wife, as though born within wedlock, and upon the payment of all costs and attorney fees as determined by the court, the cause shall be dismissed and the bond provided for in s. 742.021 shall be void. The record of the proceedings in such cases shall be sealed against public inspection in the interests of the child.


4. What if one has biological connection to child and other does not? Is that a factor in custody?

5. Collaborative Law or Mediation more helpful because law is still not settled?

6. Pension/IRA plans requiring spouse approval before transfer – what if horse is already out of the barn?

7. Intraspousal gifts prior to marriage?

8. Alimony – Length of Marriage – 61.08(2)(j) – gives rise to equity – but 61.08(4) gives rise to presumptions.

9. Equitable Distribution – Duration of marriage and Other Factors to Do Justice? 61.075(c) and (j)

Issues for Transgendered
  Name Changes with Criminal Backgrounds – very few limits on changing a name other than misleading law authorities and creditors.
  Transitioning and Timing of Documents – usually name change with gender change, then change federal documents, then state documents.