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RECENT DEVELOPMENTS
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By Ron L. Meyers

LGBT ESTATE PLANNING: CONFIDENCE AND OVER-CONFIDENCE

The law is creeping in the direction of LGBT equality. But not so fast.

Two milestones on the path to LGBT equality were reached in February 2011. In New York, an appellate decision in the *Ranftle* case confirmed that a legally married same-sex spouse has exactly the same rights as an oppose-sex spouse for inheritance and estate proceedings. Meanwhile, at the federal level, the Obama administration announced that the Department of Justice would no longer defend the "Defense of Marriage" Act (DOMA) in court. Each of these developments chips away meaningfully at the barriers that separate same-sex couples from equal treatment under the law. But it is very important to understand their precise effect, and not to read too much into them.

The *Ranftle* Case. New York law regarding same-sex marriage recognition is a complicated patchwork of affirmations and denials. The state legislature has refused to recognize same-sex marriages, but the executive branch has given affirmative recognition. One strange result of this no-but-yes regime is that a same-sex couple cannot marry in New York, but New York will recognize their marriage from Connecticut, Canada or elsewhere. Another strange result is that such marriages are recognized for some purposes (e.g., employee benefits) but are not recognized for tax purposes. Taxation is administered by an executive department, but the governing legislation requires state taxes to be filed in the same manner as federal taxes. And as long as the federal DOMA is on the books, that means no recognition.

Since inheritance and estate matters are supervised by the courts, they have fallen into the no-man's land between the legislative "no" and the executive "yes". In a traditional marriage, the surviving spouse has exclusive rights to receive and administer a deceased spouse's estate. But until the *Ranftle* case, it was not clear whether this rule applied to a same-sex spouse. The courts in each county had to work it out on their own, and they reached different conclusions. The *Ranftle* decision (from the appellate court for Manhattan and the Bronx) has ironed this out, clarifying the rule that a spouse is a spouse is a spouse. This is now the law for the entire state, and it is not subject to further appeal (unless an appellate court in another part of the state makes a contrary ruling, which is not foreseen at this time). This development will eliminate many ugly battles within families, and will allow the estates of same-sex partners to be concluded in a swifter, more certain and more orderly manner. It's a very significant advance.

The Justice Department DOMA decision. The decision by the federal Department of Justice to stop defending DOMA against court challenges is a much smaller step. It is a striking statement by the Obama administration of its view that DOMA is indefensible and probably unconstitutional. But the decision not to defend the law is not the same as a decision not to enforce the law, much less a decision to repeal the law. DOMA remains on the books and in full effect – with the result that same-sex

marriages are still not recognized for immigration, Social Security, federal taxation, New York State taxation and a host of other functions.

There are exactly two ways in which DOMA could be repealed. Congress could act to repeal it – not an impossibility, perhaps, given the last Congress's repeal of Don't-Ask-Don't-Tell. But this Congress is more conservative and more divided, so let's not hold our breath.

The other way is for the Supreme Court to rule it unconstitutional. The administration's decision not to defend the law has paved the way for a Supreme Court ruling, allowing the cases challenging its constitutionality to proceed. These cases will almost certainly yield conflicting results, requiring a resolution from the Court.

When the issue reaches the Court, however, it's not at all clear that the law will fall. The Court is very conservative now, with majority of justices appointed by Reagan or one of the Bushes. Moreover, it could even be a stretch for the more liberal justices to strike down DOMA. They would have to determine that sexual orientation is an unconstitutional ground for discrimination, like race. Even gender discrimination has not been treated strictly in this manner, and the Court has historically been hesitant to extend these strong protections to other types of discrimination. Also, while a repeal by Congress would only affect federal law, a ruling by the Supreme Court would undo all the similar laws at the state level as well. Upending state laws can create a powerful cultural backlash – recall that many of these state-level DOMA laws were enacted in the backlash against the San Francisco mayor's decision to marry same-sex couples at City Hall during the election year of 2004.

The Upshot. The *Ranftle* decision in New York can give us really solid confidence that same-sex marriages will be fully honored for estate purposes in New York. The federal Justice Department's decision to stop defending DOMA looks like a step in the right direction, but it has no practical effect at present. The further steps to full repeal might occur in a second Obama term, if there is one, or in the next Democrat-majority Congress. Until then, though, it's important not to be over-confident of our progress in that direction.

Ron L. Meyers is an attorney who helps his clients optimize their plans and assets to benefit the people they love. His attention to developments in the law, especially those affecting the LGBT community, helps his clients to achieve the best results, and the greatest confidence, in a fast-changing legal landscape.