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**MARRIAGE EQUALITY IN NEW YORK:
WHAT IT CAN, AND CANNOT,
DO FOR YOU.**

by Ron L. Meyers

Since July 24, 2011, it has been possible for same-sex couples to marry in the State of New York. This is the biggest expansion of civil rights of our times, and the greatest LGBT victory ever in New York. I am finding, though, that my LGBT clients are not rushing to City Hall. Rather, they are doing what they have always done – taking stock of how the law works for them and against them, and carefully considering whether marriage makes sense for them. Here are some answers to the questions that you might find yourself thinking about.

WHAT CAN MARRIAGE DO FOR YOU? The laws of New York State include over a thousand provisions that relate in some way to marriage or marital status, and federal laws include over a thousand more.¹ These laws range the full gamut of personal, business, tax and family matters, spanning the alphabet from Agriculture to Worker’s Compensation. Many of them will never apply to you personally, and many relate to issues in the deep background of your life, so that you would not feel the effects of marriage from day to day. That said, you never know when some issue might arise in your life. For example, only a spouse can bring a lawsuit and collect damages for wrongful death if someone is killed in an accident – an unmarried partner is simply, absolutely shut out of this right.

Certain rights do have a clear effect on your life, and if they don’t right now, they will at some point. For example, marriage creates privileged status when someone dies, in several ways. It puts the surviving spouse first in line to inherit property and to serve as executor. It also prevents other parties from bringing will contests, ensuring that no one will inherit your property except the people you’ve specified. Marriage also brings an unlimited exemption from estate taxes, ensuring that your property will also not be inherited by the government. It creates privileged status for hospital visitation and medical decisions.

The long and the short of it is this: when you are unmarried, your immediate family members are legally the central people in your life; your partner is legally a stranger, whose position as a beneficiary, agent or decision-maker can only be granted by your family, and even then, not in all circumstances. When you are married, your partner is legally the central person in your life.

Another benefit of marriage, strange to say, is the application of **divorce** laws if the relationship comes apart. If you break up from a non-spouse, you are on your own to decide who will take what property and to get your former partner to honor your rights – imagine, for example, if you have made mortgage and maintenance payments on your house for twenty years, while it was legally in your partner’s name the whole time. As messy as a divorce can be, it provides an orderly framework that can be relied on to

¹ For a detailed report on marriage rights in New York, see: http://www.nycbar.org/pdf/report/marriage_v7d21.pdf; for a similar report on Federal marriage rights, see: <http://www.marriageequality.org/1-138-federal-rights>.

bring all legal issues to a conclusive resolution. When you're not married, breaking up is really hard to do, and it often leaves at least one party really out of luck.

WHAT CAN MARRIAGE NOT DO FOR YOU? Same-sex marriage is currently recognized only at the state level, so the thousand-plus rights granted by federal law are currently not available even if you do marry. This will change when the federal "Defense of Marriage" Act is repealed by Congress or overturned by the Supreme Court, which could happen in the coming year, or which might not happen for a generation. Federal marriage rights include: benefits and exemptions from federal-level taxes, immigration rights, social security benefits, and military benefits, to name a few.

In addition, it's important to note that marriage does not confer certain rights, even at the state level, that you might expect. Marriage does not create **joint ownership of property**. Marriage does not give one spouse the right to handle the other's **personal business** affairs, even if incapacitated. And if your partner has borne or adopted a child, your subsequent marriage does not give you **parental rights**, even if you've been together since before the child was born. These things must all be done proactively with appropriate legal documents and court procedures.

When it comes to divorce, marriage can do certain things, but careful legal documentation may be necessary to finish the job. The laws of divorce address the division of property that is acquired during your marriage. But if your relationship and shared property predate your marriage, then everything from before the marriage is outside the reach of the law. These issues can be addressed in a carefully crafted prenuptial agreement.

And let's not lose sight of the obvious: **marriage confers benefits only if you actually marry!** We've all felt the victory of Marriage Equality. But we don't all share in its benefits, unless and until we legally tie the knot.

CAN THE BENEFITS OF MARRIAGE BE ACHIEVED BY OTHER MEANS? Many of the benefits of marriage can be replicated through prudent legal action – but not all of them. If you take this approach, it's important to make sure that your documents are prepared thoughtfully and with the required legal formalities, and it's important to take stock carefully of what your documents can and cannot achieve.

A good example is **writing a will**. If you're not married, then your partner has no automatic rights to inherit or to administer your estate – in fact, your partner has no such rights at all. If you do have a will, then the law will recognize your partner, or anyone else you name, as a beneficiary or executor. What the will cannot do, that marriage can, is to prevent a will contest. In the absence of marriage, the law still recognizes the potential inheritance rights of your immediate relatives, and gives them a chance to overturn the will. If they succeed, then your partner would be locked out as if you had no will, and if they don't succeed, they can still create delay, misery and financial hardship for your partner through litigation. If all is peaceful and no one contests the will, a spouse is still the only person who can avoid estate tax, meaning that the legacy you leave to your partner could be slashed by tens or hundreds of thousands of dollars.

On the other hand, there are some things that good documents can do that marriage can't. If you are hospitalized in a state that does not recognize your marriage (e.g., skiing accident in Utah, special treatment at the Mayo Clinic), then a good health care proxy can establish your partner as the decision maker for your medical care. Similarly, if you leave New York and live in a state that doesn't recognize

marriage, you can still rely on your will to enact your wishes (though the same caveats noted above would apply).

You might also think that **Domestic Partnerships** from a state like Oregon, or **Civil Unions** from New Jersey or the U.K., confer marriage rights in New York. They do not. No matter how similar the legal rights may be, and no matter how much the laws of those places state that their version of almost-marriage is intended to be equivalent to marriage, the laws of New York do not recognize them. The law is made of words, and the laws of New York only contain the word “marriage”. This means that marriages from Iowa or Canada or South Africa will all be recognized, but anything that’s not called “marriage” will not be.

Finally, it’s important to watch out for the **federal gift tax**. Transfers of property from one person to another can be taxable events with complex consequences for your estate and inheritance plans. These transfers include many shifts of property that may seem natural, ordinary and obvious, like changing ownership of a home from single to joint when you come together, or the other way around if you come apart. Only marriage – recognized by federal law – gets you a free pass for these transfers. In the absence of federal marriage recognition, your ordinary affairs may require very careful planning.

CAN MARRIAGE CAUSE ANY PROBLEMS? There are some down-sides to marriage, especially if you have some means. When you are married in New York, you have a right to inherit at least a third of your spouse’s estate at death, even if you have not been provided for in a will (this is known as the **elective share**). If your estate plans are focused on people other than your spouse, you might want to keep this in mind and get your partner to waive this right. Similarly, even though marriage does not create joint property rights, it does create a right to **equitable distribution** of property in divorce. This means that any property acquired during the marriage – including capital appreciation of separately-owned property – is part of the pie that a court divides up. This typically burdens the wealthier partner and benefits the less-wealthy partner. The outcome of equitable distribution can be altered, though, with a **prenuptial agreement**, or even a post-nuptial agreement, made in advance. Prenups and post-nups can be difficult to negotiate, since they involve planning for the worst at the very time that you’re enjoying, and planning, and hoping for, the best. But it’s better to work these things out when you’re on good terms, than later on when you might not be.

You may have heard of the “marriage penalty” for **income taxes**. This is a quirk of the tax system – the formulas used to calculate taxes, which were intended to benefit “traditional” couples, where one earns substantially more than the other, tend to come out less well for couples where both partners have substantial incomes. It’s hard to generalize about this, since tax calculations involve so many variables, and it’s not necessarily appropriate to opt out of marriage just for this reason, but it is worth the effort to run the numbers or to ask your accountant.

And there is at least one area in which marriage is a positive danger: **immigration**. When a U.S. citizen marries a non-citizen of the opposite sex, it makes the non-citizen spouse instantly eligible for a green card. When a U.S. citizen marries a non-citizen of the same sex, it is regarded as evidence of the non-citizen’s intention to settle permanently in the U.S. and thus makes the non-citizen eligible for nothing but deportation. Until marriage is recognized at the federal level, this is one consideration that may trump all the others.

IF YOU CHOOSE TO MARRY. Whatever the pros and cons may be, marriage is still the way that the law embraces you as a couple with all the benefits it has to give. For now, though, “all” the benefits only

means all the state-level benefits, and that's only in the half-dozen states that recognize your marriage. So, it's wise to build-out your legal situation by writing a will, a health care proxy and a power of attorney. And because you live simultaneously in two different jurisdictions – state and federal – where your marriage has such different implications, it's important to talk it all through with a smart lawyer who knows about these things, to see what other steps you might need to take.

IF YOU CHOOSE NOT TO MARRY. A savvy couple may evaluate the options and come to a very sensible decision not to marry. The savvy couple, though, knows that the lack of marriage may create legal results that don't align with their intentions and wishes. Again, you need to be smart and think it through.

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There are plenty of lawyers, accountants and financial advisors out there who are **gay-friendly** – it's good for business and happily, it's now viewed as the right way to be. But it's something else to be **gay-knowledgeable**. These laws are complex, and every change in the law makes them complex in new ways. Now that you have the freedom to choose, it's smart to find a team of advisors who can help you to choose wisely.

Ron L. Meyers is an estate-planning attorney who uses legal planning, tax reduction structures, and charitable and strategic gifts to help clients make the most of their assets for themselves and their loved ones, during their lives and beyond. This article is presented for educational purposes only; it is not intended as, and should not be construed as, tax advice.

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