

SAME-SEX MARRIAGE RECOGNIZED IN NEW JERSEY

In 2003 the Legislature enacted the Domestic Partnership Act, *N.J.S. 26:8A-1 et seq.*, which permitted same-sex couples to form **domestic partnerships**. As a result of the New Jersey Supreme Court's decision in *Lewis v. Harris*, 188 *N.J.* 415 (2006), the Legislature adopted the Civil Union Act in 2006, which amended various sections of *N.J.S. Title 37* to permit same-sex couples to form **civil unions**. Nevertheless, proponents of same-sex marriage have argued that the Civil Union Act affords inadequate protections to same-sex couples.

Congress had previously enacted the Defense of Marriage Act ["DOMA"], 1 U.S.C. §7, which refused to recognize same-sex unions under federal law. Last year, the United States Supreme Court found DOMA to be unconstitutional to the extent it denied federal benefits to same-sex couples who are validly married under state law. *U.S. v. Windsor*, 570 *U.S.* ___, 133 *S. Ct.* 2675 (2013). This decision led to litigation in the courts of New Jersey. In *Garden State Equality v. Dow*, 434 *N.J. Super.* 168 (Law Div. 2013), the Superior Court determined that, in light of the holding in the *Windsor* case, the state law prohibiting same-sex couples from entering into marriages (as opposed to civil unions) was unconstitutional.

The Attorney General requested a stay of the decision pending an appeal to the New Jersey Supreme Court, but its application was denied. 433 *N.J. Super.* 347 (Law Div. 2013). The denial was affirmed by the Supreme Court. 216 *N.J.* 314 (2013). Accordingly, in October, 2013, in accordance with guidance from the Attorney General, local registrars were formally advised that it is permissible to issue marriage licenses for same-sex couples.¹ A bill has been introduced in the Legislature to permit same-sex marriages, but it has not yet been enacted (S-788, the "Marriage Equality Act"). Thus, same-sex marriage is currently permitted in New Jersey by judicial decisions and by administrative actions, but there is no statute governing the same.² If a couple has entered into a valid same-sex marriage or civil union in another jurisdiction, the same should be entitled to legal recognition in New Jersey.³

In view of the foregoing, title insurers may be asked to insure transactions involving same-sex couples who are married (rather than partners in a civil union). Since the intent of the Civil Union Act is to place civil union couples (as nearly as possible) in the same position as married couples, the underwriting guidelines governing civil unions may be applied (in general) to same-sex marriages.

Thus (for example), when same-sex marriage or civil union partners acquire title to realty, they should be deemed to have acquired title as **tenants-by-the-entireties** (unless the deed or will provides otherwise). A surviving same-sex marriage or civil union partner should be able to convey realty (held in a tenancy-by-the-entireties or joint tenancy) free of the interest of the deceased partner's heirs or devisees. If title to the principal residence is vested in only one partner, the non-title-holding partner presumably enjoys a **joint possessory right**. But if the land to be conveyed or mortgaged is **not** the principal residence, no such right should exist. Consistent with the foregoing, title insurance underwriters have suggested that the customary requirement found in the title commitment – with respect to the deed or other

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instrument to be insured –read as follows:

Execution, delivery and recording of a [deed] [mortgage] [lease] from _____ and spouse (or same-sex marriage or civil union partner), if any, to the proposed insured.

A deed from or to same-sex marriage or civil union partners should therefore reflect “A and B, married to each other” (or “same-sex marriage partners” or “a married couple”), or “A and B, civil union partners”, as the grantors or grantees (as the case may be). If the conveyance is made by only one partner, the deed should so indicate, just as in the case of different-sex married persons. The text of the seller’s or mortgagor’s **affidavit of title** should be modified as well, so that the affiant’s marital and civil union status and history (if any) is set forth. Title insurers will generally rely, for underwriting purposes, upon a representation in an affidavit of title which states that the couple had entered into a valid same-sex marriage or civil union in another jurisdiction.

With regard to inheritance, a surviving same-sex marriage or civil union partner should stand in the same position as a surviving spouse. Thus, with respect to **transfer inheritance tax**, a surviving partner should be considered to be a Class A beneficiary. As a result of the *Windsor* decision (discussed above), the IRS now recognizes same-sex marriages; but it may not recognize civil unions. Thus, a surviving civil union partner may not stand in the same position as a surviving spouse for **federal estate tax** purposes.

NOTES

1. The Department of Health [“DOH”] website contains a section on “Same-Sex Marriage FAQs”. See <http://www.state.nj.us/health/vital/faq>. The website indicates that out-of-state same-sex marriages are recognized as valid in New Jersey.
2. Note that the Civil Union Act remains in effect, as does the Domestic Partnership Act (as to domestic partnerships which pre-date the Civil Union Act).
3. See *N.J.S.A. 37:1-34* (out-of-state civil unions recognized in New Jersey); *Atty-Gen ’l’s F.O. No. 3-2007* (Feb. 16, 2007) (out-of-state same-sex unions recognized as civil unions in New Jersey); *DOH Same-Sex Marriage FAQs* (Oct. 2013) (out-of-state same-sex marriages recognized as such in New Jersey).



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