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California's treatment of out-of-state same-sex marriages

By Fred Silberberg

While the battle over same-sex marriages in California moves through the federal courts at a snail's pace, starting this Sunday, the state of New York will permit same-sex couples to marry. While historically, New York has been the state to lag behind on family law issues (until this year, New York did not have "no-fault" divorce, which we have had in California since 1971), this change in law puts New York ahead of most of the country, and the effect is expected to trickle down through other states as well.

Many Californians have ties to New York and it is expected that the state will become a popular location for destination same-sex weddings. In fact, the economic impact of such weddings was one of the factors considered by the New York Legislature in deciding to change the law last month. With these weddings commencing as of this weekend, some California residents are already questioning whether they should go to New York and get married since they cannot legally wed in our state. This, of course, gives rise to the question of what the legal effect of such marriages is here in California and whether people availing themselves of the change in New York's laws will have the same rights as a married couple in California, including the right to get divorced. The state of the law in California reminds one of the age-old adage: "If it looks like a duck, walks like a duck, and quacks like a duck...then it must be a duck"

The latest ruling on the prohibition against same-sex marriage in California came from the District Court in San Francisco, which found Proposition 8 unconstitutional. Notwithstanding that fact, same-sex marriages continue to be prohibited in California as the result of a stay entered by the federal appellate court. The matter remains in limbo for the time being, as the state Supreme Court has been asked to determine if the plaintiffs who seek to uphold the constitutional ban on same-sex marriage have standing to do so. The state of California has chosen not to defend Proposition 8 and at this juncture, a group of private citizens are maintaining litigation over the dispute. Therefore, despite the fact that our own government is not attempting to defend the prohibition against gay marriage, the courts have, at least temporarily, upheld the prohibition pending further proceedings both in the state Supreme Court, as well as the federal court. All of this may make those married in New York question whether their marriages will be recognized when they return to California.

The battle over the legality of same-sex marriages actually began prior to the passage of Proposition 8. As you may recall, with the passage of Proposition 22 back in 2000, Section 308.5 of the Family Code was enacted, which defined marriage as between a man and a woman. Our Supreme Court found this statute unconstitutional, giving rise to a period during which same-sex partners could get married in California. That period came to an abrupt end with the passage of Proposition 8 in 2008, which amended the California Constitution to mirror the language of Section 308.5, thereby reviving the statute.

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That, however, did not put an end to the issue of whether out of state same-sex marriages could be recognized in California. In a rather interesting manner, our Legislature saw fit to give recognition to such marriages while getting around the specific wording of Proposition 8.

The Legislature did this by enacting Family Code Section 308, which is our "full-faith and credit" statute when it comes to addressing the validity of



Supporters of same-sex marriage celebrate after Senate members approved same-sex marriage in Albany, N.Y., on June 24.

Associated Press

out-of-state marriages. That code section, in addition to giving recognition to marriages valid in other states, now includes specific sub-sections that address the issues of marriages performed out of state involving same-sex couples.

In regard to these marriages, the Legislature has provided that a same-sex marriage contracted outside of California prior to Nov. 5, 2008 (the date of passage of Proposition 8) is valid in California. As to those marriages, there is no issue as to their validity, just as there is no issue concerning the marriages contracted in California during the brief window that existed between the time the Supreme Court overturned Proposition 22, and the enactment of Proposition 8.

The sticking points, however, relate to out-of-state same-sex marriages contracted after Proposition 8's date of passage. Under Family Code Section 308, they incur the exact same rights, duties, and obligations imposed upon spouses as any other married couple with one peculiar exception. While the marriages may be called marriages in other states, in California they cannot legally be referred to by use of the term "marriage."

Therefore, those deciding to get married in New York or any of the other states that allow same-sex marriage, have the same rights and obligations as heterosexual couples as far as state law is concerned when they return to California. This includes the right to share in community property, to will that property to the other spouse, and to have the property divided by a divorce court if the situation arises. These same couples will also have obligations to one another in terms of child support for children resulting from the relationship, as well as obligations of spousal support. The only thing

that these couples cannot do, which heterosexual couples can do, is refer to the relationship in a legal sense as a "marriage," so if you can live with being married in a "non-marriage" there is no reason to forego getting married in New York.

That having been said, the same considerations should apply to those contemplating marriage — namely, whether or not to execute a premarital agreement. However, until Proposition 8 is either overturned by a final decree in the courts or through another referendum, lawyers will have to find another term for these agreements for same-sex couples so as to avoid violating the language of Family Code Section 308. After all, if it looks like a duck...



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