

MARRYING EXPECTATIONS WITH REALITY: 5 YEAR RETROSPECTIVE ON GAY MARRIAGE

Lisa Cukier and Nancy Van Tine discuss divorce issues that anyone considering marriage should know!



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LISA: Since the Goodridge case was decided, over 16,000 gay couples have married. What advice do you have for gay couples who are contemplating marriage?

NANCY: I am not ordinarily a proponent of prenuptial agreements for everyone but every same-sex couple considering marriage should first consider meeting with an attorney to discuss the implications that their marriage would have on children, finances and property, and how the law is different for gay married couples than for straight married couples. Most importantly, same-sex couples should consider entering into a prenuptial agreement. Although Massachusetts recognizes same-sex marriage, couples should know that most states and the federal government do not. As a result, same-sex couples are not able to take advantage of the benefits marriage usually offers to heterosexual couples in the areas of property transfers, taxes, retirement planning, and estate planning. A prenuptial agreement can make gay marriage portable from state to state.

LISA: The 'ick' factor keeps many couples, gay and straight, from entering into prenuptial agreements. Explain to Boston Spirit readers why a prenuptial agreement is especially important for gay couples.

NANCY: The federal government, under the Defense of Marriage Act ("DOMA") does not recognize same-sex marriage. This means that transfers of property between same-sex couples are taxable transfers and where ordinarily, in a traditional marriage, a spouse may retain the marital home upon death or divorce without paying a cent in tax, absent a prenuptial agreement, the same transfer could be taxable for same-sex couples. Similarly, alimony payments that are tax deductible for the payor in a traditional marriage will be taxable for same-sex couples. A prenuptial agreement can contemplate these additional tax burdens on a payor and help couples plan accordingly. A prenuptial agreement is also extremely important because the federal government will not recognize a same-sex partner as the recipient of retirement and pension benefits under ERISA and other federal laws governing benefits. A prenuptial agreement is the best instrument to plan for the property, tax and benefit issues

arising out of the federal government's decision to deny same-sex marriages.

LISA: Goodridge lulled some people into believing that marriage would automatically protect children and would confer parental rights on the non-adoptive, non-biological parent of the other's child. Let's dispel the myth. If you marry someone who already has a child, what parental rights will you have with respect to the child?

NANCY: Marriage does not create parental rights. If you marry someone who is already a parent, you will be a step-parent. This is one area where straight and gay couples are treated in the same way.

LISA: We have handled several same-sex divorces where the parties have children together, born during the marriage, and where custody is a major issue in the case. The non-adoptive, non-biological parent may be considered a 'legal stranger' to the child, despite the marriage, and could end up with no custody rights whatsoever. Please describe what can be done to prevent this in the first place.

NANCY: In Massachusetts, a child who is born during marriage is presumed to be the child of the spouse of the woman who gave birth. This creates a presumption of legitimacy and tends to support the notion that both spouses are the child's parents, regardless of the fact that one parent has no biological connection to the child, as is often the case for children conceived through assisted reproductive technology. However, this presumption is not, in and of itself, equivalent to legal parentage, and it most certainly cannot be relied on out of state. If the couple later divorces and no adoption has taken place, the non-biological parent may have very limited rights or even no rights at all with respect to the child, regardless of how involved in the child's life the non-biological parent may have been.

Massachusetts allows for adoption of children by same-sex couples. A non-biological parent can obtain parental rights to the child through adoption. Through adoption, both spouses to the same-sex marriage will obtain full parental legal rights that are valid and enforceable in most jurisdictions even where their marriage is not recognized under those laws.

LISA: When same-sex spouses are outside of Massachusetts borders, they are not guaranteed the right to visit a spouse who is hospitalized. In fact, if an emergency medical need arises in one of the majority of states that does not recognize same-sex marriage, then a gay spouse can be denied the power to make treatment decisions for, or even obtain information about, an incapacitated spouse. What precautions do you advise to avoid such a situation?

NANCY: I advise my clients to ensure that their partner or spouse is the health care agent in a Health Care Proxy. A Health Care Proxy can be drafted to ensure that

a gay spouse can visit the ill spouse in the hospital and receive medical information despite any objections by family members or the hospital. Similarly, executing a Durable Power of Attorney allows same-sex spouses to designate the other as the person legally authorized to make important financial decisions should one spouse become temporarily or permanently incapacitated. Durable Powers of Attorney and Health Care Proxies are enforceable in all states, regardless of whether a state recognizes same-sex marriage.

LISA: Our clients are surprised to learn that they may not be able to get divorced if they move to another state. Please speak to this incredible issue.

NANCY: A provision of DOMA provides that states are not required to recognize same-sex marriages granted by another state. Most states do not recognize same-sex marriage, and they therefore will not grant same-sex couples a divorce. Currently, Massachusetts, Connecticut and Iowa allow same-sex marriage, with Vermont, New Hampshire and Maine soon to follow. Washington, D.C. and New York currently recognize same-sex marriages performed in other states.

In Massachusetts there is a one year residency requirement during which at least one of the spouses must be a resident of Massachusetts before a divorce can be obtained. Thus, couples who move out of Massachusetts after they marry may get stuck in their marriage, with no timely way to divorce.

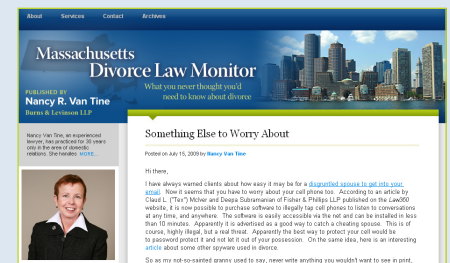
LISA: Many gay couples have been in relationships for decades but only recently married, having not had the option to do so before May 17, 2004. Please explain to Boston Spirit readers how the length of marriage factors into the court's division of marital assets.

NANCY: If a couple has been married for a short amount of time, a court may divide assets based on the principle that each spouse should leave the marriage with more or less than what they brought into it. For longer term marriages, one spouse may receive far more than what that spouse brought into the marriage because property rights accrue as the length of marriage increases. It is still unresolved in the divorce context how a court should divide assets for same-sex couples who have been in a long-term non-marital relationship and who would have married years earlier, were it an option. The argument can be made that the court should divide assets accumulated throughout their non-marital relationship, not just what the couple might have accumulated in the years after they were finally allowed to marry. Exactly how these arguments will play out in the courts remains to be seen.

This article by the attorneys of Burns & Levinson LLP provides general information and does not constitute legal advice. All views expressed here are those of the authors and do not necessarily represent the views of Boston Spirit Magazine.

To hear more from attorney Nancy Van Tine on Massachusetts Divorce Law, visit her blog at:

www.massachusettsdivorcelawmonitor.com



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