



VISHNICK MCGOVERN MILIZIO LLP
ATTORNEYS AT LAW

3000 Marcus Avenue, Suite 1E9, Lake Success, NY 11042
T: 516-437-4385, F: 516-437-4395
www.vmmlegal.com

LGBT EQUALITY - A GLOBAL WARNING

By: Joseph Trotti, Esq. and Joseph G. Milizio, Esq.

The LGBT community has recently witnessed both historic successes as well as disturbing defeats in its strive for equality. Although we appear to be headed in the right direction, we are not there yet...not nearly. The mixed results are especially troubling since our Country has enthusiastically embraced change in other areas and has recently ushered in a new era for political and social reform. Yet, the LGBT community has still not attained the rights and privileges that the heterosexual community has historically enjoyed. The struggle for equality may be the new civil rights frontier in this Country. This article, therefore, is written not to laud the victories but more to alert the community that the final result is far from settled.

On a positive note, in 2008, our office successfully filed and obtained what may be the first signed judgment of divorce between two gay men in New York. The outcome and ultimately the judgment in this case conform to the recent trend and direction courts are taking in this field. Our office had previously closely monitored the status and results in several New York cases. In 2006, the Court of Appeals held in the *Hernandez v. Robles*

case that the State of New York did not violate the New York constitution as it refused to allow same-sex marriage within the State. Despite the decision, there appeared to remain the distinct possibility that an out-of-state marriage might be granted recognition in New York. It is interesting to note that it took nearly 20 years for any important decisions in this area since the Braschi Court held that a homosexual couple was a family for the purposes of succession rights to a rent controlled apartment.

Early in 2008, in *Martinez v. The County of Monroe*, the court held that an employer's refusal to extend healthcare benefits to an employee's same sex spouse rendered the employer guilty of violating a law which prohibits discrimination in the workplace based on sexual orientation. Finally, in *Beth R. v Donna M.*, a New York County matrimonial judge held that a same sex marriage that was legally entered into in Canada, is legally binding in New York. Therefore, if it is to be dissolved, it should be dissolved through a conventional divorce proceeding. So although New York has not yet granted gay or lesbian marriages within the State, the LGBT community now appears to have certain rights protected under the Domestic Relations Law that benefit other couples. As proof, our office did obtain, in New York County, a judgment of divorce.

The year 2008 brought with it early victories and important gains. In May, New York Governor David Patterson ordered state agencies to recognize legal marriages between same sex couples conducted out of state as equal to New York marriage. In fact, Governor Patterson has instructed all state agencies to revise their policies to recognize marriages of same sex couples formed in other countries and in other states. That decision has recently been upheld by the courts in the case of *Lewis v. The New York State Department of Civil Service*. During the same month, the California State Supreme

Court issued a decision finding that same sex couples in California should be given access to civil marriage.

Unfortunately, however, 2008 was not all about victory and achievements. This article is written as a reminder and warning to a possibly war weary LGBT community that victory is not yet a certainty. The spirit of the spring successes seemed to lose momentum as the summer faded. In autumn the LGBT community braced itself for the chilling prospect that various battles across different state lines for equality could be lost. In fact, November represented a true fall from the prior victories. On Election Day, voters in California, Arizona, Florida and Arkansas all had important issues on the ballots. While the Country chose a historic new leader, and a reminder that prior civil rights issues could be attained, the LGBT community suffered disappointing losses with the passage of Proposition 102 - the Arizona Marriage Ban. In Florida, Amendment 2 was passed. Arkansas banned all unmarried couples, including gay and lesbian couples, from fostering or adopting children. And finally, Proposition 8 - the initiative to eliminate the right to marry for same sex couples in California, was voted into law. These were painful reminders that prejudice persists.

The fight for equality is not a fight in name only. There are many income and tax advantages that are now unavailable to the LGBT community. Heterosexuals take for granted the benefits, rights and privileges which remain outside the grasp of the LGBT community. Only opposite-sex spouses can collect Social Security benefits based on each other's earnings. The federal law also allows opposite-sex spouses to make unlimited gifts to each other without incurring any gift tax. There is also no estate tax for any assets passing to a surviving opposite-sex spouse.

In New York, an opposite-sex spouse has an automatic right to inherit at least one third of the other's assets irrespective of whatever a will may provide. Only opposite-sex married couples enjoy the benefits of the Unlimited Marital Deduction that enables spouses to make unlimited transfers to each other during their lifetime and at death without transfer tax consequences. Unmarried couples and same-sex spouses are limited to giving no more than \$13,000.00 per year to each other without paying gift taxes. Unlike a surviving opposite-sex spouse, a surviving same-sex partner is not entitled to receive any portion of the deceased partner's retirement account unless specifically designated as the beneficiary. In addition, alimony is tax deductible for heterosexual couples, but not for same sex couples. Only opposite-sex married couples can file jointly. There are no survivor Social Security benefits or wrongful death proceeds for the LGBT community. The reason for all of the above: the IRS does not recognize same-sex marriages. The New York State Department of Taxation follows suit.

It is true that these rights and privileges carry certain obligations and legal precedents that may not always be advantageous. Nevertheless, the community must remain vigilant and forge ahead to attain equality while maintaining and protecting previously gained ground. Our office has begun a series of seminars and lectures to warn and educate the community of not only the dangers of remaining status quo, but also the pitfalls and obligations that certain rights carry with them. We can only hope that the energy and vision of a new administration will bring with it renewed successes for the community. In fact, our office is confident that the community will succeed.

Changes in the law are taking place in rapid succession. In September, 2008, the Queens County Surrogate's Court ruled that the parents of a deceased same-sex spouse

had to be included in a proceeding to probate the decedent's will, despite the fact that New York law provides that only spouses need be included in such a proceeding. By February, 2009, the New York County Surrogate's Court ruled the exact opposite, holding that a man married to the decedent in a valid same-sex marriage (in Canada) is the decedent's surviving spouse and that no other persons were entitled to participate in the probate proceedings.

It is our responsibility to create awareness for change. This is not a time for complacency, but rather comradery and community spirit. It is not a time to reflect on achievement, but what continues to be denied. A global warning that victory and equality is not a certainty.

Joseph Trotti is a partner in the law firm of Vishnick McGovern Milizio LLP. He practices in the area of traditional family law, as well as in the firm's LGBT practice. Joseph G. Milizio is also a partner in Vishnick McGovern Milizio. He practices in the areas of business representation and real estate, as well as in all aspects of the firm's LGBT practice. The LGBT practice area includes marriage and partnership matters, estate and trust planning and administration, adoptions, discrimination and all other matters where LGBT individuals require an understanding attorney. Both Joe T. and Joe M. can be reached at 516-437-4385.