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Family Law Update

My, How Times Have Changed

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Society has changed dramatically in the last 28 years since our Pennsylvania divorce code was radically amended to bring us in line with the modern world.

In 1980, “no fault” divorce, alimony and like concepts were new to us, and our courts spent the ensuing years engaged in the task of interpreting and enforcing these ideas. Viewing the 1980 Pennsylvania divorce code today, through the haze of more than one quarter-century, is like watching a 1950’s movie. What passed for groundbreaking back then seems quaint and commonplace to us now.

We are currently facing sweeping social and cultural changes that are outpacing our “modern” divorce code. For instance, thousands of gay and lesbian couples married in Massachusetts following that state’s legalization of same-sex marriage. Now, apparently, some of those unions are proceeding to divorce. But the laws have not kept up with new and expanding definitions of family, nor has federal law adapted to state law changes, which reminds us once

again to be careful what we wish for. (Note that one New York State Appeals Court recently ruled that same sex marriages validly performed in another jurisdiction (in this case Canada), are entitled to recognition in New York, unless the Legislature specifically prohibits such recognition. *Martinez v. County of Monroe, et al*, CA 06-02591 (Appellate 4th Division, NY))

Consider the case where two partners in a same-sex marriage divorce, and one is ordered to pay the other support. This support may be in the form of alimony *pendente lite* (temporary support) while the proceeding works its way through the system, or alimony once the marital estate has been distributed and a divorce decree entered. Historically, the payor would deduct these support payments and the recipient would claim them as income for federal income tax purposes provided each filed a separate federal income tax return. Same-sex partners must, in fact, file their own returns because they are not permitted to file a joint return. But, unlike the heterosexual divorcing payor, the same-sex payor is not able to deduct support payments to the payee.

Federal income tax is just one area where the treatment is different for same-sex couples going through divorce.

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Other areas include health insurance coverage, transfer of retirement assets and life insurance coverage. The legalities of home ownership are also different for same-sex couples. A heterosexual married couple in Pennsylvania owning a jointly titled home may hold title as “tenants by the entirety.” This special title protects the home from creditors of one spouse by shielding the home from actions which would divest the other’s ownership. Lawyers often delay the entry of a divorce decree until after the home is transferred into the name of the other spouse to avoid attachment by the creditor. The same-sex couple cannot take advantage of such protection because this form of home ownership is not available to them.

Now consider the situation where each married partner in a lesbian relationship decides to be artificially inseminated in order to give birth.

If the couple proceeds to divorce, how would a judge determine custody when each child is the biological child of one specific parent yet, due to the marriage each is also a sibling of the other? Does the advantage of being a biological parent apply? What about the preference not to split-up siblings?

These are tough issues, and ones that lawyers in Pennsylvania have not had to face since same-sex marriage is not recognized here. Yet as the definition and composition of “family” continues to expand and blur, more and more such topics will arise in our courts. How we will handle these difficult themes is anyone’s guess, but I am sure there will be some feelings of nostalgia for the “good old days” circa 1980.

The information contained in Family Law Update is not meant to provide opinions or advice on specific legal matters. If you would like to consult with me on a specific issue, please call.

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