

SAME GENDER MARRIAGE AND PROBATE LAW

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New Hampshire's same gender marriage law took effect on January 1, 2010. In its most basic form, this law eliminates the previous exclusion of same gender couples from marriage in the Granite State. Although New Hampshire has recognized "civil unions" since January 2008, with the new marriage law, now is an appropriate time to look at how this legislation may affect rights in the probate law arena.

The expressed purpose of the same gender marriage law is to "affirm the right of two individuals desiring to marry . . . Any person who otherwise meets the eligibility requirements . . . may marry any other eligible person regardless of gender. Each party to a marriage shall be designated 'bride,' 'groom,' or 'spouse.'" It may take some time before we have a clear understanding of the full and complete application of this new law. In the probate law arena, there are several statutes that may now be affected.

Intestate Distribution

Existing New Hampshire law provides for a method of distribution for estate assets in circumstances where a decedent dies without a will ("intestate"). For example, RSA 561:1 provides: If the deceased is survived by a spouse, the spouse shall receive the entire estate if there are no surviving issue or parent of the decedent and smaller amounts depending on whether the decedent has surviving children and/or surviving parents. With the enactment of the same gender marriage law, which specifically refers to individuals in a marriage as bride, groom, or "spouse," New Hampshire laws of intestate distribution certainly should apply to the surviving spouse of a same gender married couple just as it should apply to a heterosexual couple.

Disinherited Spouse

New Hampshire law also protects the "disinherited" spouse. RSA 560:10, sometimes referred to as the spousal elective share statute, protects a spouse from complete disinheritance. If one spouse prepares a will but disinherits the other, RSA 560:10 provides that "disinherited spouse" with some rights. Generally, if the decedent spouse completely disinherits the other, or provides only a minor gift in a will, while leaving the rest of the estate to others, the surviving spouse has the option to "elect" a statutory "spousal share" of the estate, despite what the provisions in the will might provide. Although the statute

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uses the term “spouse” and “surviving spouse,” the statute specifically refers to the application of this elective share “upon the death of either husband or wife.” This, perhaps, raises the issue of whether this elective share will actually apply to a same gender married couple, and if so how.

Related to the elective share issue is the New Hampshire statute regarding the effect of one spouse’s abandonment of the other. Currently, RSA 560:18 precludes a surviving spouse from “electing” under the spousal share statute: “If a husband has willingly abandoned his wife and has absented himself from her or has willfully neglected to support her, or has not been heard from in consequence of his own neglect, for the term of three years next preceding her death, he shall not be entitled to any interest or portion in her estate, real or personal, except such as she may have given to him in her will.” The wording of this statute of course raises the issue of whether a wife may “abandon” her husband. But it now raises the issue of whether one spouse in a same gender marriage may abandon his or her partner and whether that constitutes “abandonment” under this statutory scheme.

Common Law Marriage

Another issue is whether the “common law” marriage statute will apply to same gender couples. Under New Hampshire law, there is no such thing as “common law marriage,” until death that is. Under our statute, New Hampshire only recognizes “common law marriages” for purposes of probate - - that is, they are effective only at death and only under limited circumstances. Under the statute, a couple may be deemed to have been legally married if they (1) live together for more than three years preceding the death, (2) acknowledge each other “as husband and wife,” and (3) were generally understood in the community to be husband and wife. If these elements are satisfied, the couple will be deemed to have been legally married such that the surviving spouse may take under intestate distribution or may elect the spousal share if disinherited by will. As the statute specifically refers to “husband and wife,” this at least raises the question of whether the legislature intended that a surviving spouse of a same gender couple might also take advantage of this common law marriage provision. Also, because marriage of same gender couples has not been recognized until now in New Hampshire, what if a same gender partner were to die now? Will the “common law” marriage provision statute apply, even though the couple could not have been married for three years prior-- and as such could not have held themselves out as a married couple?

With the implementation of New Hampshire’s new same gender marriage law, there is certain to be much discussion, and perhaps litigation, over the intent of the statute and its application to the probate arena. As with any new legislation, the full impact and full extent may not be completely realized for a number of years.

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