INSIDE: Repeal DOMA • Estate Planning Under Delaware's New Statute • And More

Delaware Lawyer

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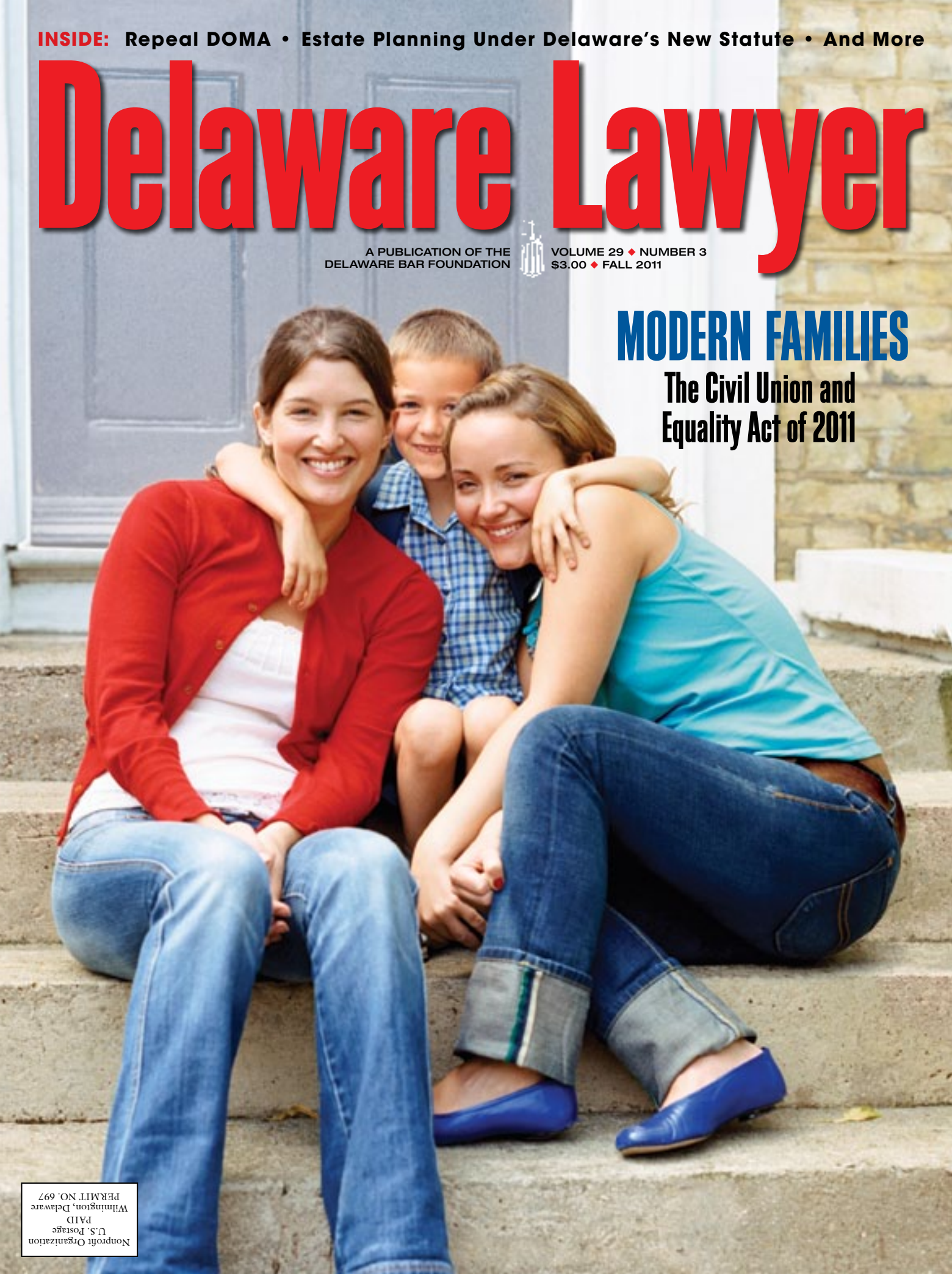
MODERN FAMILIES

The Civil Union and Equality Act of 2011



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Representative Melanie George, Esquire (standing), during the April 14, 2011 debate and vote on S.B. 30.

Brad Glazier Photography

Witnesses testify on the first panel at the Senate Judiciary Committee hearing to assess the impact of DOMA on American families, July 21, 2011.

Senate photograph

Senator Chris Coons chairs Judiciary Committee hearing on the impact of DOMA, July 21, 2011.

Senate photograph

B. Proud Photography

EDITOR'S NOTE

Susan F. Paikin

After more than five years, time had come for *Delaware Lawyer* to focus again on family law. When planning for this issue started more than a year ago, the expectation was for a potpourri of topics ranging from the impact of aging out of foster care to international custody disputes.

Then the *Civil Union and Equality Act of 2011* was quickly enacted in May. This legislation ushers in the most significant change in Delaware family law anyone on the Board of Editors remembers. While Delaware has enacted or modified many laws impacting families in recent decades – think *UIFSA*, or the *UPA*, or limitations on alimony – none has been as significant as Delaware's recognition of the legal rights of same-sex couples to each other and to their children.

Like the adoption of no-fault divorce more than 30 years ago, this legal redefinition of family has been controversial and contested. Despite any discomfort some individuals still may have over the construct of Delaware's "Modern Families," it was indisputable that *Delaware Lawyer* was in a unique position. We were working on a family law issue, set to be released right before the civil union law comes into force – January 1, 2012. Damping down near panic, this issue was totally refocused.

I am deeply indebted to Lisa Goodman for coming to my rescue. Not only did she author the opening article, explaining the new law – and the many years it took to have an "instant" success – but she consulted with, contacted and cajoled many of the other authors to write for this issue within an incredibly tight timeframe. I am grateful to them all.

The result is an issue with thoughtful guidance for many Delaware lawyers. Experienced practitioners know that, whatever their legal specialization, they are inevitably tapped by a friend, family member or client for advice on some matter involving family law. Richard Popper offers a comprehensive discussion on the impact of civil unions on estate planning. Changes to state law cannot remove all the roadblocks faced by lesbian and gay couples. The federal *Defense of Marriage Act* (*DOMA*) remains a barrier to recognition of the families' legal status by other states and the federal government. Mark Purpura and Melanie George, leaders in the struggle to draft and pass the civil union bill, explore the remaining impact of *DOMA* on Delawareans. Senator Chris Coons argues that it is time to repeal *DOMA* and describes his federal bill that would do just that – the *Respect for Marriage Act*. Greg Inskip suggests that elimination of *DOMA* is premature.

Maryland law professor Bill Reynolds and I explore how the new law changes the legal landscape for determining parentage. Of Counsel spotlights retired Judge Battle Robinson (profiled by her daughter). Judge Robinson's work writing uniform laws on child support and paternity is an apt fit for this issue.

I thank our authors for being so generous with their time and expertise – and photograpers Barbara Proud and Brad Glazier for sharing the tension and celebration occasioned by passage of the Civil Union bill through their donated photographs.

Susan F. Paikin

CONTRIBUTORS

Chris Coons
was sworn in as Delaware's junior U.S. Senator in November, 2010. Since then, he has developed a reputation as a staunch supporter of equal rights for all Americans. Chris co-sponsored the repeal of "Don't Ask, Don't Tell" and legislation to end discrimination in the workplace and in schools. In March, he co-sponsored the *Respect for Marriage Act*, which would extend federal recognition to same-sex marriages in states where they are legal. Chris serves on the Foreign Relations, Judiciary, Energy, and Budget committees — at the nexus of global human rights, justice and economic development. Previously, Chris was in-house counsel for Delaware-based W.L. Gore & Associates and served as New Castle County Executive for six years. He holds degrees from Amherst College, Yale Law School, and Yale Divinity School.

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Lisa B. Goodman
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Lisa B. Goodman
President, Equality Delaware Inc.

Extending Family Law to Gay and Lesbian Families

B. Proud Photography

Governor Jack Markell holds aloft S.B. 30 after signing it into law on May 11, 2011.

Delaware's *Civil Union and Equality Act* provides the rights that only flow from governmental recognition of a spousal relationship.

On May 11, 2011, at a ceremony attended by more than 600 people, Governor Markell signed Senate Bill 30, the *Civil Union and Equality Act of 2011* ("the Act"), into law. When the Act becomes effective on January 1, 2012, same-sex couples in Delaware will be able to enter into the legally recognized relationship of civil union. This article will discuss the basic provisions of the Act.

Importance of the Act

It is difficult to overstate the importance of this legislation for gay and lesbian families. Despite attempts to create legal protection for our partners and children by means of powers of attorney, adoption, estate planning, and health care directives, there are many rights and protections that flow only from governmental recognition of a spousal relationship.

These include, but are certainly not limited to, presumptions and rights concerning parentage and adoption, the ability to hold property as tenants by the entireties, and recognition as legal spouses for purposes of health care decisions, visitation, inheritance, disposition of remains, wrongful death claims, pension benefits, workplace health insurance, access to Family Court for fair and orderly property distribution, and basic estate planning tools such as exemptions from property transfer tax for transfers between spouses.

By entering into a civil union, same-sex couples will have "all the same rights, protection and benefits, and shall be subject to the same responsibilities, obligations and duties under the laws of this State…as are granted to, enjoyed by or imposed upon married spouses."[1]

Although Delaware cannot grant federal recognition, the Act provides same-sex couples who enter into a civil union with all the protections and obligations available under Delaware law.

Mechanics of the Act

The Act is modeled in large part on Chapter 1 of Title 13 of the Delaware Code, which sets forth who is eligible for marriage, requirements for obtaining a marriage license, and how marriages may be solemnized. Mark Purpura of Richards Layton & Finger, the Act's primary drafter, recognized that reinventing the wheel regarding licensing and solemnization made little sense. The Act thus closely follows Chapter 1 of Title 13.

To enter into a civil union, one must be at least 18 years old, not within a prohibited degree of consanguinity, not married or in a civil union or similar legal relationship with a different person, and of the same gender.[2]

To obtain a license, a same-sex couple will follow the same steps as an opposite-sex couple. The couple will go to a Clerk of the Peace's office in any of the three counties, prove their eligibility and pay the required fee. The couple may choose to have the Clerk of the Peace or a Clerk's deputy solemnize the civil union, or may have a consenting clergyperson, judge, former judge or mayor perform the solemnization.

As with marriages, only the Clerk of the Peace or his or her deputy is required to perform a solemnization if requested.

How Rights Are Granted Under the Act

The Act does not attempt to enumerate all of the rights, benefits and obligations that flow from entering into a civil union. Instead, it includes parties to a civil union under the protection of the laws of Delaware by deeming them included wherever terms denoting a spousal relationship or a person in a spousal relationship are used.

Terms specifically referenced as examples in § 214(a) of the Act include: "dependent," "family," "husband and wife," "immediate family," "next of kin," "spouse," "stepparent," and "tenants by the entireties."

The Act is clear that such inclusion applies for terms used "throughout the Code, administrative rules or regulations, court rules, governmental policies, common law, court decisions, or any other provisions or sources of laws of this State, including in equity."[3]

Former parties to a civil union and surviving parties are also identified as being subject to the same rights and responsibilities as former married spouses and widows or widowers.[4]

Recognition of Non-Delaware Legal Unions

Currently, six states, plus the District of Columbia, permit same-sex couples to marry.[5] Maryland does not permit same-sex marriages but recognizes those performed in other jurisdictions. Nine states have either civil union or domestic partnership laws that provide the equivalent of full spousal recognition under state law.[6]

The Act provides that "a legal union between two individuals of the same sex" which meets the eligibility requirements of § 202 of the Act (as to age, marital status, consanguinity, etc.) and which provides "substantially similar rights" will be recognized as a civil union for purposes of Delaware law.[7]

Thus, same-sex couples who either are validly married or have a valid civil union or domestic partnership that provides for substantially similar rights and obligations will be recognized by operation of law as having a civil union should they be in Delaware as residents or visitors.

Dissolution of a Civil Union

Parties to a civil union will have access to Family Court for purposes of divorce. The Act also recognizes and provides for a difficulty that has arisen in other states because of the lack of full reciprocity among the states concerning legal relationships entered into by same-sex couples.

This difficulty arises where a couple is married or enters into a civil union in a state which permits it, and then one or both of them move to a state which does not. Should that couple wish to dissolve their union, there are a significant number of states which will not permit them to do so. In other words, there are states, such as Texas, which will not recognize the union even for the sole purpose of dissolving it.

The Act addresses this problem by providing that, for civil unions solemnized in Delaware, Family Court shall have jurisdiction over proceedings for divorce or annulment, even if one or both of the parties are not Delaware residents, if the state of domicile of either party will not affirmatively permit dissolution or annulment in that jurisdiction.[8]

Parentage – Issues Prior to the Act

One of the most important protections the government provides to married couples is recognition of parentage for children born within a marriage. Legal status as parents creates myriad rights and obligations for parents, and provides many protections for children, including rights of support.

Gay and lesbian parents have primarily had to rely on adoption to achieve full parental recognition for both parents. Beginning in 2001, with Chief Judge Poppiti's decision in *In the Interest of Hart*,[9] "second parent" adoption was recognized in Delaware. Second parent adoption permitted adoption by the partner of the legal parent of a child whom both were raising — permitting a child to have two legal parents, both of whom could be the same gender. *Hart* was based on a finding that the non-legal parent was a de facto stepparent, a status which created standing to adopt.

However, in 2009, in *Smith v. Gordon*,[10] the Delaware Supreme Court held that the *Uniform Parentage Act of Delaware* ("DUPA")[11] did not include the concept of de facto parentage. Because the legal basis for second parent adoption in Delaware had been based on a finding of de facto stepparent status, the decision in *Smith v. Gordon* effectively prevented the Family Court from proceeding with second parent adoptions.

In his decision in *Smith v. Gordon*, Justice Holland, writing for a unanimous en banc Court, clearly indicated that the inclusion of the de facto parent

Brad Glazier Photography

Advocates for S.B. 30 during the House debate. From left to right, attorneys Drewry N. Fennell, Deborah I. Gottschalk, Laura A. Dietrich, Shahulunta L. Bhaya, Sarah Worrbelow, Lisa B. Goodman, Mark V. Purpura.

The Road to Equality

"I worked for 20 years to become an overnight success."— Eddie Cantor

The *Civil Union and Equality Act of 2011* was introduced on March 22, 2011. It was passed by the Senate on April 7, and by the House on April 14.

With just 24 days from introduction to passage by both houses, many people expressed surprise at its swift journey through the General Assembly. However, passage of the Act was made possible by almost two decades of effort and relationship-building by a group of Delaware advocates, many of whom are Delaware lawyers.

Following the beating of a gay man on the boardwalk in Rehoboth Beach in 1992, a core group of advocates began working for equal protection under the law for gays and lesbians in Delaware. Their first success came in 1997 with the addition of "sexual orientation" to Delaware's hate crimes law. (Del. S.B. 53, ___ Gen. Assem. (5 Del. C. § 1304))

However, it was still legal in Delaware to discriminate on the basis of sexual orientation. An employee could be fired because he was gay. Individuals or couples could be refused service in a restaurant or a room in a hotel based on sexual orientation. Gay families could be denied the right to rent or purchase a home, or denied the ability to buy insurance.

In 1998, the first bill banning discrimination based on sexual orientation was introduced in the General Assembly. Although legislation banning discrimination was introduced in every subsequent General Assembly, and lobbied for vigorously, it did not pass until 2009 — 11 years after its original introduction. (Del. S.B. 121, 145th Gen. Assem.) Governor Markell signed it into law on July 2, 2009.

Advocates spent those years playing defense as well as offense. In the 142nd (S.B. 246), 143rd (S.B. 15), 144th (S.B. 156) and 145th (S.B. 27) sessions of the General Assembly, constitutional anti-same-sex-marriage amendments were introduced and defeated. The debates on each of these bills, while long and contentious, did serve as platforms for initial discussions with legislators regarding relationship recognition for same-sex couples.

The years spent lobbying for the non-discrimination bill and against the anti-same-sex-marriage amendments forged deep friendships between gay and lesbian advocates and numerous members of the General Assembly. Advocates working on those bills learned the ways and rules of Legislative Hall. Leadership changes in 2009 placed legislators much friendlier to gay and lesbian equality issues in leadership positions in both the Senate and the House.

Thus, by the time Equality Delaware was formed and had decided on a civil union bill as its first initiative, a huge amount of groundwork had been laid. Although Equality Delaware and many supporters worked tremendously hard to draft and pass the Act, it was the work of elected officials that made the Act become law.

Governor Markell supported civil union legislation as a candidate and spoke eloquently in favor of the Act at the press conference held to announce its filing. Legislators such as House Majority Leader Pete Schwartzkopf, Senate Majority Leader Patricia Blevins, and the Act's primary sponsors, Representative Melanie George and Senator David Sokola, were fearless and fierce in their determination to see civil unions become part of Delaware law.

When the *Civil Union and Equality Act of 2011* becomes effective at 10 a.m. on January 1, 2012, it will represent years of community and legislative work by many people. As with many undertakings, it was years of struggle that led to seemingly swift success.

— Advocate and attorney Lisa B. Goodman

concept in Delaware law was a matter to be decided by the General Assembly. Less than five months later, the General Assembly revised DUPA to explicitly include "de facto parent" within the statutory definition of "parent."[12]

Despite the best efforts of the General Assembly to restore the law to what it was prior to the decision in *Smith v. Gordon*, the Family Court has not, as far as can be determined, uniformly resumed its prior practice of granting second parent adoptions to same-sex couples who meet the statutory standard. This has left too many children in the perilous position of having only one legal parent, when a second, loving, would-be parent is seeking legal recognition.

Parentage Treatment by the Act

Section 204 of the Act provides that parties to a civil union have the same rights with respect to children of whom one of the parties becomes a parent during a civil union, as do married couples, including presumptions of parentage. This means that a child born to one parent is presumed to be the child of the other parent.

Section 204 of the Act explicitly states that this includes the right to have the non-biological parent's name entered on the original birth certificate. Despite the ability to be listed on the original birth certificate, it will remain prudent for gay and lesbian parents to formally adopt each other's biological or adopted children. Adoption is recognized by all 50 states; a birth certificate listing two women or two men may not be granted recognition in all U.S. jurisdictions.

Adoption by a second parent should be more straightforward for parties to a civil union. Because parties to a civil union are to be included within any terms denoting a spousal or family relationship per § 214 of the Act, children of one party born prior to their parent entering into a civil union become legal stepchildren of the other party.

Because stepparents have standing to seek adoption under Delaware law under Section 903 of Title 13, same-sex couples in a civil union should be treated no differently than a married couple seeking a stepparent adoption.

Simultaneous adoption is currently not available in Delaware to gay or lesbian couples. This has created tragic circumstances where, because of death or the ending of a relationship before the second parent adopts, a child can lose all contact with one parent, who may be his or her only surviving parent.

After the Act becomes effective, simultaneous adoption by a couple who are parties to a civil union will be permitted under Delaware law. Section 903 of Title 13 permits adoption by "husband and wife jointly," and is the statutory basis for allowing simultaneous adoption by married couples. Since parties to a civil union will be deemed included wherever such spousal terms are used, simultaneous adoption will also be available to civil unioned couples.

Where Does the Law Go From Here?

The Act will provide equal treatment for civil unioned couples under Delaware law. However, as discussed at greater length by Mark Purpura and Melanie George in this issue, such protections will exist only within the boundaries of Delaware and within the 14 other U.S. jurisdictions (13 states and the District of Columbia) that permit similar legal relationships.

Should a civil unioned couple move to (or have an accident while passing through) a state that does not recognize their union, they will be legal strangers. Regardless of their state of residence, they will remain legal strangers in the eyes of the federal government and thus have no access under the 1138 [13] statutory provisions that use marital status as a determining factor for the receipt of a benefit, right or privilege.

This patchwork of recognition creates obvious legal complications. These complications will not be lessened unless there is federal recognition of same sex legal relationships, and unless some consistency is adopted or imposed between the various states.

January 1, 2012

Many Delaware same-sex couples have gone to other states or countries to enter into civil unions or same-sex marriages. At 10 a.m. on January 1, 2012, Delaware will recognize these legal relationships as civil unions under Delaware law. Delaware couples who chose to wait to be recognized by their own state will be able to be joined in civil union in Delaware. Under Delaware law, they will be treated no differently than opposite-sex married couples. Their children will have the legal protections that flow from having two parents whose relationship is recognized by their state.

For gay and lesbian couples in Delaware, it will be a new day as well as a new year. ◆

My thanks to my partner, Drew Fennell, for her years of hard work leading advocates on lesbian, gay, bisexual and transgender equality issues as Executive Director of the ACLU of Delaware, and for her encyclopedic memory of the legislative record.

FOOTNOTES

1. Section 212(a) of the Act.
2. Section 202 of the Act.
3. Section 214(a) of the Act.
4. Section 212(b) and (c) of the Act.
5. Massachusetts (as of 2004), Connecticut (2008), Iowa (2009), Vermont (2009), New Hampshire (2010), New York (2011), and the District of Columbia (2010).
6. California (1999, expanded 2005), Washington (2007), Oregon (2008), New Jersey (2009), Nevada (2009), Rhode Island (2011) Hawaii (effective January 1, 2012), and Delaware (effective January 1, 2012).
7. Section 213 of the Act.
8. Section 216 of the Act.
9. 806 A.2d 1179 (Del. Fam. Ct. 2001).
10. 968 A.2d 1(Del. 2009).
11. Chapter 8 of Title 13 of the *Delaware Code*.
12. Del. S.B. 84, 145th Gen. Assem. (2009) (amending 13 Del. C. §§ 8-201, 2302(13)). The General Assembly's swift action on this matter was led by Senator Patricia Blevins and by Drew Fennell, then the Executive Director of the ACLU of Delaware. Ironically, the critical revisions to DUPA passed the General Assembly on the same day as the State's sexual orientation non-discrimination bill, which (unlike the DUPA revisions) had taken years of work.
13. Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Sen. Bill Frist (Jan. 23, 2004) (in GAO-04-353R, Defense of Marriage Act (2004)). This letter transmitted an update through December 31, 2003, of the General Accounting Office's 1997 report on the *Defense of Marriage Act* (GAO/OGC-97-16, Defense of Marriage Act (1997).

Mark V. Purpura and
Melanie L. George

The Effects of Federal Law on Delaware Civil Unions

Senate photograph

July 21, 2011 hearing before the U.S. Senate Judiciary Committee to consider the Respect for Marriage Act.

While many states are progressing toward full equality for committed same-sex couples, federal law remains discriminatory.

When the *Civil Union and Equality Act of 2011* ("the Act")[1] becomes effective on January 1, 2012, same-sex couples who enter into civil unions in Delaware, or whose relationship from another jurisdiction is recognized as a civil union for purposes of Delaware law, will be entitled to all the same rights, benefits and protections, and will be subject to the same responsibilities and obligations, as married spouses under Delaware law.

While equality will be achieved to the extent possible under Delaware law, these civil unions generally will not be recognized for purposes of federal law. As Delaware and certain other states are progressing toward full equality for committed same-sex couples, federal law remains discriminatory, treating committed same-sex couples and opposite-sex married couples differently for many purposes.

The United States General Accounting Office, in a report first issued in 1997 and updated in 2004 (the "GAO Report"), identified 1,138 provisions of the Federal Code existing as of December 31, 2003, under which marital status is a factor in granting federal benefits, rights or privileges.[2] Because of the federal *Defense of Marriage Act* (DOMA),[3] even legally married same-sex couples are not afforded treatment equal to opposite-sex married couples for purposes of federal law.

Further, even if DOMA is repealed or held to be unconstitutional, additional legislation or clarification likely would be required to provide equal treatment under federal law for same-sex couples joined in a Delaware civil union, which is a type of relationship that currently is not recognized for purposes of federal law.

The Federal *Defense of Marriage* Act

To understand how committed same-sex couples are treated differently than opposite-sex married couples under federal law, one must understand DOMA and its effect on state-law-recognized same-sex relationships. Historically, provisions of federal law turning on marital status were interpreted by deferring to state law determinations of such status. If a person was validly married under applicable state law, then such person was considered married for purposes of federal law.[4]

In 1996, however, in anticipation of the legalization of same-sex marriage in Hawaii, Congress passed, and President Clinton signed into law, DOMA. DOMA contains two provisions. First, Section 2 provides that a state is not required to give effect to any public act, record or judicial proceeding of any other state respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state, or a right or claim arising from such a relationship.[5]

Second, Section 3 of DOMA establishes a rule of construction for interpreting all aspects of federal law: The word "marriage" means only a legal union between a man and a woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.[6]

As a result, under DOMA, civil unions recognized under Delaware law generally will not be recognized for purposes of determining marital or spousal status under federal law or with respect to federal programs.

What Provisions of Federal Law Implicate Marital or Spousal Status?

In analyzing how DOMA operates to discriminate against committed same-sex couples, it is also important to understand what provisions of federal law are implicated by DOMA. The GAO Report identified 13 categories of provisions within the Federal Code in which marital status is a factor.

Brad Glazier Photography

Delaware attorney and State Representative Melanie George prepares to respond during the House debate on S.B.30.

It is worth exploring some of these categories in more detail, as so many important governmental benefits, rights and privileges for spouses and families that most people take for granted are denied to committed same-sex couples, with many arising in times of spousal death, illness or disability, when a family is most vulnerable.

Social Security and Related Programs

The various federal social entitlement programs (such as Social Security retirement and disability, food stamps, welfare, Medicare and Medicaid) treat same-sex couples differently than married opposite-sex couples in relation to provisions that depend on marital status as a determining factor.

The provisions of the Social Security program are pervasively based on one's marital status in terms of eligibility and as a basis for the level of benefits.[7] For example, in many circumstances, an opposite-sex spouse may receive his or her spouse's higher social security benefit in the event of such spouse's death. An opposite-sex spouse, in many circumstances, may also qualify for a higher social security benefit by virtue of the social security payment record of his or her higher-earning spouse.

An opposite-sex spouse also may qualify for up to half of a disabled spouse's benefit and may be entitled to a one-time death benefit. An opposite-sex spouse may also qualify for Medicare based on his or her spouse's tax payment record.

Same-sex spouses receive no such spousal benefits. This denial of status for committed same-sex couples can be particularly costly to families with one spouse who either is not a wage earner or is a limited wage earner because such spouse has primary responsibility for care of the couple's children.

However, there are also means-tested federal (or partially federally funded) benefits for which a same-sex spouse may qualify more easily than an opposite-sex married spouse by virtue of non-recognition of the spousal relationship.

For example, eligibility for Supplemental Security Income, Medicaid and portions of Medicare are assessed based in part on spousal income and assets. Thus, normally a same-sex spouse's income and assets will not be included for these purposes, and it may be easier for such a person to qualify for these social programs.

This is, in large part, why the Congressional Budget Office estimated in 2004 that if same-sex marriage were to be recognized in all jurisdictions within the United States and under federal law, the net effect on federal government revenue and spending would be revenue positive each year through 2014.[8]

For means-tested welfare programs that are funded by both the federal government and states and are administered by the states, such as Medicaid, state law (including the Act) may in some cases require attribution of same-sex spousal income and assets for eligibility determinations.[9]

Federal Civilian and Military Service Benefits

The federal government provides comprehensive medical and retirement benefits for both its civilian and military service employees. Such benefits apply to spouses of current and retired federal employees, military service members,

elected officials and judges, and include standard spousal benefits for health, leave, retirement, survivor and insurance purposes. Certain federal employees receive unpaid leave to care for an ill spouse. Federal employees whose marriages are recognized receive more compensation for work-related disabilities.

Military spouses receive many additional benefits, including employment assistance, commissary privileges and a non-taxable cash death benefit in the event of the death of the service member spouse who is on active duty or in certain other situations.

Same-sex spouses of federal civilian and military service employees receive only some of these benefits.[10] In Delaware, this will mean that while both married and civil union spouses of state employees will be entitled to full spousal health and other employer-provided benefits, their neighbors who may be civil union spouses of federal employees or military service members may not be entitled to similar health and other employer-provided benefits from the federal government.

Veterans Benefits

The federal government provides many critical benefits to surviving spouses of veterans, including the right to receive monthly dependency and indemnity compensation payments when the veteran's death was service-connected, and to receive a monthly pension when the veteran's death was not service-connected.

Furthermore, a veteran with a disability of 30 percent or more is entitled to additional benefits if the veteran has a spouse. Spouses of veterans may be entitled to medical care, educational assistance, job counseling, training and placement services, and employment preferences within the federal government, and may be eligible for interment in national cemeteries with the deceased veteran.

Same-sex spouses are not entitled to any of these rights, benefits or privileges, despite the fact that beginning September 20, 2011, following the effectiveness of the repeal of the "Don't Ask, Don't Tell" policy, gay and lesbian military service members will be able to serve openly.

Taxation

Taxation is one of the most significant aspects of federal law in which substantive rights depend on marital status. One basic right under federal tax law is the ability of married spouses to file joint or separate income tax returns and to combine deductions, a right that is denied to same-sex couples.

Although this may be a benefit or a detriment for federal income tax purposes, depending on the financial situation of the same-sex couple, the laws of many states that recognize same-sex legal relationships, including Delaware, may require same-sex spouses to create a "dummy" federal income tax return in order to file joint tax returns at the state level.[11]

Same-sex couples are also not entitled to the significant benefits afforded to married spouses under the federal gift and estate tax laws. Under federal law, an opposite-sex spouse may, at death, pass an unlimited amount of assets to the surviving spouse without the imposition of federal estate taxes. An opposite-sex spouse may also gift an unlimited amount of assets to his or her spouse during his or her lifetime. However, a marital deduction or marital gift exemption is not available to same-sex couples as a means of transferring wealth.

Further, federal income tax laws have the effect, in many cases, of imposing additional income tax burdens on same-sex couples in relation to employee benefits. Under the Internal Revenue Code, the value of employee benefits provided to a same-sex spouse is considered imputed income to the employee, unless the non-employee spouse can qualify as a dependent for such purpose.

The Williams Institute estimated in 2007 that this income tax inequality costs same-sex partners on average $1,069 in additional income taxes per year compared to opposite-sex married couples.[12] Employers are also penalized by such treatment, since employers are required to pay payroll tax on such imputed income. Federal legislation has been introduced to eliminate these tax disparities.[13]

Immigration, Naturalization and Aliens

Our federal laws regulating immigration grant benefits to married spouses of immigrants and non-citizens in many ways. Unfortunately, they also have the effect, in some cases, of tearing apart same-sex families. Opposite-sex spouses of non-citizens who have been granted asylum may be granted the same legal status, and an opposite-sex spouse who is a United States citizen may sponsor his or her non-citizen spouse for a green card for permanent residency.

Additionally, a United States citizen may seek a visa for a non-citizen opposite-sex spouse. Further, a United States citizen's opposite-sex spouse, if such spouse is a lawful permanent resident, may become a United States citizen in certain circumstances.

These spousal privileges of immigration that serve to keep binational couples and their families together are not available to committed same-sex couples and their families.

In an effort to remedy this disparity, the *Uniting American Families Act of 2011*[14] (UAFA) was introduced in the United States House of Representatives and the United States Senate on April 14, 2011. UAFA would amend the *Immigration and Nationality Act* by eliminating discrimination in the federal immigration laws. The bill accomplishes this result in part by allowing "permanent partners" of United States citizens and lawful permanent residents to be awarded permanent resident status on the same basis that opposite-sex married spouses are afforded such status.

A "permanent partner" is an individual 18 or older who: (1) is in a committed, intimate relationship with another individual 18 or older in which both

individuals intend a lifelong commitment; (2) is financially interdependent with the other individual; (3) is not married to, or in a permanent partnership with, anyone other than the individual; (4) is unable to contract with the other individual a marriage cognizable under [federal immigration law]; and (5) is not a first-, second- or third-degree blood relation of the other individual.[15]

Employment Benefits and Related Laws

Many employees rely on employer-sponsored benefits for health and retirement benefits. In the private employment context, the *Employee Retirement Income Security Act of 1974* ("ERISA") applies to almost all employee health, pension and other benefit plans of private employers. Of particular relevance to the disparity of treatment of same-sex couples for purposes of employee benefits is Section 514 of ERISA, which provides that state laws that "relate to" employee benefit plans are generally preempted, with certain exceptions, including state laws that regulate insurance.

Thus, states such as Delaware, through its insurance laws, can regulate insured health care plans by regulating the terms of such insurance contracts and the conduct of the insurers, including by dictating that the terms of contracts and insurers may not discriminate based on the sexual orientation of the plan beneficiaries.[16] In such a way, the state may ensure that such insurance plans provide co-extensive benefits for opposite-sex married couples and same-sex civil union couples.

However, under Section 514 of ERISA, states cannot regulate the terms of self-funded employee benefit plans, which are employee benefit plans that are not provided through insurance contracts regulated by the state. Thus, many private employers operating self-funded employee benefit plans cannot be required by state law to provide benefits to same-sex spouses under such plans.

Further, although under the *Consolidated Omnibus Budget Reconciliation Act of 1986* ("COBRA") employees and their opposite-sex spouses and dependent children must be permitted to continue their participation in employer-sponsored health coverage at their expense after certain qualifying events, COBRA does not require that such continuation coverage be made available to the same-sex spouse of an employee or the children of that spouse.

Many employers (including many Delaware employers) with self-funded benefit plans voluntarily choose to cover same-sex spouses on the same basis as opposite-sex married spouses, including granting COBRA-type rights to same-sex spouses. Federal legislation has been introduced that, if enacted, would require employers to offer the same COBRA benefits to same-sex partners and spouses as they do for opposite-sex spouses.[17]

With respect to defined benefit plans (such as pensions), while ERISA and the Internal Revenue Code mandate that survivor annuity payment options be made available to opposite-sex spouses of employee participants unless waived by such spouse, no such protections are required for same-sex spouses.

Same-sex couples are also denied legal protections afforded under the *Family and Medical Leave Act of 1993* ("FMLA") to opposite-sex married couples to care for a seriously ill spouse. Under FMLA, an opposite-sex spouse may take up to 12 weeks of unpaid leave to care for his or her seriously ill spouse. The *Family and Medical Leave Inclusion Act*[18] would extend these benefits to same-sex spouses.

Efforts to Limit and Repeal DOMA

The Constitutionality of DOMA

In a letter to Speaker of the United States House of Representatives John A. Boehner, dated February 23, 2011, Attorney General Eric H. Holder, Jr., announced that the Obama administration has determined that Section 3 of DOMA violates the Equal Protection Clause of the United States Constitution as applied to legally married, same-sex couples.[19]

Attorney General Holder noted that the Department of Justice had previously defended DOMA against legal challenges by same-sex married couples. The defense of those cases involved lawsuits in which the applicable United States circuit courts had already held that classifications based on sexual orientation are reviewed under the deferential "rational basis" standard of review. He further noted that two new lawsuits challenging DOMA have been filed in jurisdictions in which there is no precedent involving the applicable level of scrutiny.[20]

President Obama and Attorney General Holder concluded that classifications based on sexual orientation warrant strict scrutiny, and, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.

Notwithstanding this refusal of the Department of Justice to defend DOMA in the *Windsor* and *Pedersen* cases, the United States House of Representatives designated Paul Clement to intervene in such cases for the limited purpose of defending Section 3 of DOMA. The President has also instructed that the Executive Branch will continue to enforce DOMA, and will continue to comply with DOMA, until such time as Congress repeals it or the courts definitively determine it to be unconstitutional.[21]

The *Respect for Marriage Act*

The *Respect for Marriage Act*[22] was introduced in the United States House of Representatives and the United States Senate on March 16, 2011. United States Senator Chris Coons is a co-sponsor.

The *Respect for Marriage Act* would repeal Section 2 of DOMA and revise the federal statutory provision codified by Section 3 of DOMA to provide: "For the purposes of any Federal law in which marital status is a factor, an individual shall be considered married if that individual's marriage is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is valid in the place where entered into and the marriage could have been entered into in a State."[23]

Despite its repeal of Section 2 of DOMA, the *Respect for Marriage Act* would not affirmatively require individual states to either issue same-sex marriage licenses or to recognize same-sex marriages from other states. Importantly, even if enacted, the *Respect for Marriage Act* may not directly affect or grant any federal rights, benefits or privileges to parties in civil unions that are recognized under Delaware law, since civil unions are a type of legal relationship distinct from marriage. The *Respect for Marriage Act* does not address the validity of civil unions for purposes of federal laws.

Conclusion

Despite the tremendous gains in equality for same-sex couples and their families achieved in Delaware through the passage of the Act, many federal laws and programs remain discriminatory with respect to the treatment of committed same-sex couples. Such couples are provided very few of the benefits, rights and privileges under federal law that are afforded to opposite-sex married couples, and in some cases may receive rights, benefits and privileges under means-tested welfare programs on a preferential basis as compared to opposite-sex married couples.

Given the pervasive manner in which marital and spousal status affects federal laws, either legislative or judicial intercession at the federal level will be necessary to achieve equal rights for all married or civil unioned couples. ◆

FOOTNOTES

1. Del. S.B. 30, 146th Gen. Assem. (2011) (to be codified at 13 Del. C. § 201, *et seq.*).
2. U.S. General Accounting Office, *Defense of Marriage Act*, GAO/OGC-97-16 (Washington, D.C.; January 31, 1997); U.S. General Accounting Office, *Defense of Marriage Act: Update to Prior Report*, GAO-04-353R (Washington, D.C. January 23, 2004).
3. 110 Stat. 2419 (1996); Public Law 104-199.
4. H.R. Report No. 104-664, at 30 (1996).
5. 28 U.S.C. § 1738C. DOMA does not specifically address civil union relationships, which are different than marriage. As a result, it is unclear if Section 2 of DOMA, which provides that states need not give full faith and credit to same-sex marriages performed in other states, or rights relating thereto, applies to civil unions.
6. 1 U.S.C. § 7.
7. 42 U.S.C. § 402.
8. Congress. Budget Office, Report to the Hon. Steve Chabot, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (June 21, 2011) (available at http://www.cbo.gov/doc.cfm?index=5559&type=0).
9. 13 Del. C. § 212(d).
10. Federal employees may elect to receive reduced retirement benefits to provide a survivor annuity to any person who has an insurable interest in his or her life, and domestic partners may be proved by affidavit evidence to have an insurable interest in an employee's life. The Office of Personnel Management is proposing to amend its regulations to add a presumption that a same-sex domestic partner has an insurable interest in the life of his or her federal employee partner. *Presumption of Insurable Interest for Same-Sex Domestic Partners*, 76 Fed. Reg. 11684 (proposed March 3, 2011) (to be codified at 5 C.F.R. §§ 831.613(e) and 842.605(e)). Additionally, President Obama, in a memorandum dated June 2, 2010, directed certain federal agencies to extend various benefits to their employees' same-sex domestic partners, to the extent permitted by law. Agencies not governed by Title 5 of the United States Code were directed to provide additional benefits, including insurance benefits, where legally permissible. Office of the Press Secretary, *Presidential Memorandum for the Heads of Executive Departments and Agencies: Extension of Benefits to Same-Sex Domestic Partners of Federal Employees* (June 2, 2010).
11. 13 Del. C. § 212(d).
12. M. V. Lee Badgett, *Unequal Taxes on Equal Benefits: the Taxation of Domestic Partner Benefits* (Williams Inst. Dec. 2007).
13. The Tax Parity for Health Plan Beneficiaries Act of 2011, H.R. 2088, 112th Cong. (2011) ; S. 1171, 112th Cong. (2011).
14. H.R. 1537, 112th Cong. (2011); S. 821, 112th Cong. (2011).
15. Bill Summary & Status 112th Congress, H.R. 1537, CRS Summary (http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR01537:@@@D&summ2=m&).
16. *See, e.g.*, 18 Del. C. § 2304.
17. *Equal Access to COBRA Act of 2011*, H.R. 2310, 112th Cong. (2011); S. 563, 112th Cong. (2011).
18. H.R. 2364, 112th Cong. (2011); S.1283, 112th Cong. (2011).
19. Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (February 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-ag-223.html (hereinafter the "Holder Letter").
20. *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y.); *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn.).
21. Holder Letter, *supra*, EN 19.
22. H.R. 1116, 112th Cong. (2011) ; S. 598, 112th Cong. (2011).
23. H.R. 1116 Sec. 3, 112th Cong. (2011).

United States Senator
Chris Coons

Repeal the Defense of Marriage Act

Senate photograph

Senator Chris Coons chairs Judiciary Committee hearing on the Respect for Marriage Act.

As more jurisdictions approve LGBT unions, Washington increasingly lacks a compelling reason to overrule states' traditional right to regulate marriage.

Fifteen years ago, when President Bill Clinton signed the *Defense of Marriage Act* ("DOMA") into law, ours was a very different nation. Misinformation and fear led many Americans to react negatively to the rising voices of a new generation of gay, lesbian, bisexual and transgendered Americans determined to live openly with dignity and in pursuit of equal rights.

While efforts to gain acceptance and increase protections against discrimination in the workplace gained traction, in other areas, legal walls went up that we are finally beginning to tear down.

Opponents of LGBT equality scored two major victories in that era — "Don't Ask, Don't Tell," which would deny LGBT Americans the right to serve openly in our military through statutory codification, and DOMA, which enshrined in law that the federal definition of marriage would be limited to heterosexual unions only, regardless of individual states' decisions on the matter.

One of the best moments in my early days as a Senator came last December when I joined a majority of my colleagues in voting to end "Don't Ask, Don't Tell." Finally, since September, LGBT service members have been allowed to serve their country with an open heart.

I believe, wholeheartedly, that DOMA will meet the same fate as "Don't Ask, Don't Tell," precisely because history has proven that laws that exist to advance inequality will ultimately come undone. From the Alien and Sedition Acts to Jim Crow, from restrictive voting rights to laws that banned women from work and military service, we as a nation have always come to see the wrong in unjust laws and set them right. So too will be the case with DOMA.

That is why I joined a number of my colleagues at the beginning of this Congress in introducing the *Respect for Marriage Act* (S. 598), which would undo DOMA's limit on the federal definition of marriage.

Our bill is not about legalizing same-sex marriage throughout the country. It doesn't make any new requirements or instruct individual states to allow same-sex marriage.

Instead of building up another wall separating Americans from the rights they deserve, the *Respect for Marriage Act* tears a wall down.

Equal treatment under the law is the mandate of the *Respect for Marriage Act*. It is about whether we as a nation think it is acceptable to deny some American citizens the same rights and privileges afforded others.

When DOMA was enacted in 1996, not a single LGBT couple in America could produce a marriage certificate because it wasn't yet legal in any state. Today, more than 80,000 LGBT couples are legally married in six states and the District of Columbia, but not one of those marriages is recognized by the federal government.

Equality for all is supposed to mean equality for all, and when some states have empowered same-sex partners to marry, it becomes very difficult to see a compelling interest on the part of the federal government to overrule those states' regulation of marriage — a right they have traditionally held.

We have bigger problems in this country than going out of our way to continue to discriminate against and deny rights to Americans — in particular, getting our economy back on track and helping businesses create jobs here in our country. While those who support DOMA argue that our nation's larger challenges offer proof of the need to delay the *Respect for Marriage Act*, I could not disagree more. We should not wait to end discrimination — now or ever.

Moving our nation's economy forward does not have to prevent us from moving our nation forward.

Ours is a republic of laws, and our laws must reflect our values. Those who promoted DOMA 15 years ago did so by saying it would safeguard our values of marriage, but our societal values have evolved and now a majority of Americans support same-sex marriage. Even many conservatives recognize the injustice in denying the protections of marriage to loving LGBT couples and the children they are raising.

The *Respect for Marriage Act* is an opportunity for America to right a wrong and to ensure that our laws reflect our nation's values, not its fears. I look forward to working with my colleagues to ensuring it becomes law. ◆

Gregory A. Inskip

In Defense of DOMA

DOMA upholds the principles of federalism — citizens of one state can decide this issue but not impose their will on other jurisdictions.

In the *Civil Union and Equality Act of 2011* the citizens of Delaware, by their elected representatives, have extended the right to form civil unions to couples of the same sex. Not everyone agrees with the law, but opponents had the opportunity to participate in the legislative process and to shape its outcome. All citizens of all 50 states are entitled to the same prerogative, which is protected by the federal *Defense of Marriage Act* ("DOMA").

Enacted by Congress and signed by President Clinton in 1996, DOMA includes the following provision at 28 U.S.C. § 1738C:

> **Certain acts, records, and proceedings and the effect thereof**
>
> "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."

The statute is intended to nullify the "Full Faith and Credit" which one state arguably might be bound to give same-sex marriages established under the law of another state under Article IV, Section 1 of the United States Constitution:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The *Respect for Marriage Act* (S.598), co-sponsored by Delaware Senator Chris Coons, does not expressly legalize same-sex marriage throughout the country. Conceivably, however, the proposed legislation might have that effect because it would repeal 28 U.S.C. § 1738C, opening the doors to an argument that same-sex marriages allowed under the laws of one state are entitled to Full Faith and Credit by all the others.

If such an argument were successful it would put federal courts in the position of overruling states which do not recognize marriage between people of the same sex.

Although gay and lesbian people increasingly enjoy social acceptance and legal protections, there are opposing views which cannot fairly be characterized as simple bigotry. Many opponents of same-sex marriage proceed from deeply held religious, moral, and practical beliefs that can inform public debate.

Even citizens who don't begin their analysis with Genesis may wonder about child-rearing in families which, by definition, separate children from one biological parent and from the presence and guidance of a parent of one gender (mother or father as the case may be). The experiment is too new to justify dismissing the concerns of opponents as close-minded or ignorant.

For the states to act as "laboratories of democracy" in our federal system, the innovations of one state cannot be forced on other states in the guise of Full Faith and Credit or otherwise. DOMA serves traditional principles of federalism, allowing citizens of New York to decide the issues for themselves, but not for the citizens of Texas or Tennessee.

Here in Delaware, the citizens and their elected representatives have addressed the issue. Best wishes to all who are affected by the new law. ◆

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Richard J. A. Popper

Estate Planning Under the Civil Union and Equality Act of 2011

B. Proud Photography

Delaware's legislation means new rights, responsibilities and possibilities in the arena of estate planning for same-sex couples.

The enactment of the *Civil Union and Equality Act of 2011* ("the Act") provides historic new opportunities for same-sex couples in estate planning. Some of the estate planning concepts suggested in this article are not new, but are bolstered by enactment of the Act, while others were not previously available for same-sex couples.[1]

For estate planning, the critical part of the Act is § 212.[2] Subsection (a) provides that parties to a civil union shall generally have the same rights, protections and benefits, and shall be subject to the same responsibilities, obligations and duties as are granted to or imposed upon married spouses. Subsection (b) provides similarly with respect to former parties to a civil union, and subsection (c) provides similarly for surviving parties to a civil union.

In addition, 13 Del. C. § 213 provides that Delaware will recognize as civil unions, civil unions or marriages validly formed in another jurisdiction. Thus, on January 1, 2012, these couples' rights and responsibilities will blossom without further action on their part.

Prenuptial Planning

Before entering into a civil union, couples should consider entering into a prenuptial agreement. Such agreements are permitted in Delaware pursuant to 13 Del. C § 321 *et seq.*

Of course, even before the enactment of the Act, the parties to a same-sex relationship intending to live together were well advised to enter into agreements governing the titling of property, payment of expenses, rights upon death of either party, and property division upon dissolution of the relationship. The Act will now protect the validity of such contracts against attempts to invalidate them to the extent that such agreements properly follow the provisions of Title 13.

Civil union parties who move to another state which does not recognize same-sex marriages or civil unions may still have concerns with the enforceability of such contracts because of the Federal *Defense of Marriage Act* ("DOMA")[3], since under DOMA, the courts of other states cannot be compelled to recognize marriage unless it is between two persons of the opposite sex.

Considerations Under Federal Law

Because DOMA prohibits federal recognition of same-sex unions as marriages, the advantageous provisions of sections 2523 and 2056 of the Internal Revenue Code are not available to same-sex couples. These sections provide a marital deduction for federal gift and estate taxes, for outright gifts, and certain types of trusts for the benefit of a spouse.

Once the Act become effective, Delaware will recognize tenancy by the entireties as a method by which the parties to a civil union may hold real property. Under state law, the ability to hold property as tenants by the entities provides excellent estate protections, since the creditor of one spouse cannot compel the partition of the property.

However, for federal estate and gift tax purposes, a tenancy by the entirety will be treated as joint tenancy with right of survivorship between parties other than husband and wife. As a result, there may be adverse federal gift tax consequences for the surviving party.

When one party to a civil union dies, holding property either as tenants by the entireties or as joint tenants with right of survivorship, it is presumed for federal estate tax purposes that the deceased joint tenant contributed 100 percent of the value of the property.[4] This presumption can be rebutted by evidence to the contrary presented with the federal estate tax return. Civil union parties should keep very good records of the original and continuing cost of such joint property, so that the needed evidence will be available.

For purposes of the Delaware estate tax, however, the property will be treated as though the parties were married, meaning that so long as both parties are U.S. citizens, each will be conclusively presumed to have owned one-half of the real property.

This disparate treatment will result in a different tax basis of the property for federal and state income tax purposes. In a rising real estate market, federal non-recognition of same-sex marriage may actually work to the benefit of the surviving party if the estate is not large enough to require the filing of a federal estate tax return. This is because the surviving party will receive a basis step-up to fair market value on the date of death of the deceased party, to the extent of the deceased party's percentage of contribution to the value of the property.

Under Delaware law, which will treat a civil unioned couple the same as a married couple, the basis step-up will apply only to one-half of the value of the property. However, if the deceased party's estate for federal estate tax purposes is in excess of the estate exemption amount (currently $5,000,000, but scheduled to go down to $1,000,000 in 2013 absent further Congressional action), the surviving party will be disadvantaged by federal law. The portion contributed by the first party will be includible in the survivor's estate for federal estate tax purposes, with no marital deduction available.

Estate Planning: State Law Considerations

The estate plan for a couple which has entered into a civil union will depend upon the couple's wishes. So long as federal law does not recognize same-sex marriage, the effect of the Act on the drafting of wills and trusts will be relatively minimal.

Nonetheless, the Act has several important consequences which must be considered in preparing an estate plan or administering the estate of a deceased party in a civil union.

In the event of an intestacy, the surviving party to a civil union will be treated as a surviving spouse. As a result, he will be entitled to the surviving spouse's allowance of $7,500,[5] and to an intestate share of the estate.[6]

If there are no children or surviving parents of the decedent, the intestate share would be 100 percent. Otherwise, the amount passing to the surviving party will be less, depending upon which other persons are surviving and the nature and extent of the deceased party's assets.

The surviving party will also be entitled to an elective share equal to one-third of the estate of the first party to die if the first party provides less than one-third in his or her will.[7] In addition, if the parties already have wills which predate their union, the civil union will be considered a marriage, which calls into play the provisions of 12 Del. C. § 321 *et. seq.*

These provisions state that if a will does not provide for a surviving spouse, the surviving spouse will be entitled to his or her intestate share of the estate. A will which already provides for the surviving spouse is not revoked by subsequent marriage.

Civil union couples will need to be mindful of the existence of the elective share in preparing their estate plans, if they do not want to provide at least the elective share amount to the surviving party. Such couples may avail themselves of the same planning techniques which traditional married couples can use to try to defeat elective share rights.

Property passing to a surviving party will qualify for the marital deduction for Delaware estate tax purposes, even though it does not for federal estate tax purposes. Since the Delaware estate tax applies only to estates in excess of $5,000,000 and is scheduled to disappear for decedents dying after June 30, 2013, this is unlikely to be a long-term consideration in tax planning.

Nonetheless, as both parties to a civil union may die before that date, consideration should be given to minimizing the overall Delaware estate tax due even though such planning will not necessarily help at the federal level.

The first party to die in a very wealthy same-sex couple might leave the equivalent of a qualified terminable interest property ("QTIP") trust for the benefit of the surviving party, so as to get a Delaware estate tax marital deduction at the first party's death, although, presumably, at the cost of inclusion of such trust in the surviving party's taxable estate for Delaware estate tax purposes.

A QTIP trust is one which provides that all income is distributable currently to a surviving spouse, but limits the ability of the surviving spouse to receive principal of the trust and to determine how the trust principal passes following the surviving spouse's death.

Couples who have entered into civil unions or marriages recognized by other jurisdictions who now reside in Delaware need to be mindful of the problems which could be created by wills executed before January 1, 2012, even if the wills post-date their marriage or union in another jurisdiction.

Such couples should execute new wills early in 2012, even if they simply reconfirm the estate plan embodied in their current documents, to avoid this legal uncertainty.

Other Considerations

As in any estate plan, parties to a civil union should be mindful of how their beneficiary designations are prepared. For federal income tax purposes, only a surviving spouse may both roll over benefits from an IRA and start distributions based on her own life expectancy.

Technically, Delaware law should allow this same treatment for Delaware income taxation of IRAs. From a practical point of view, however, the failure to follow the federal rules in this area would result in such significant penalties that it is unlikely any surviving party in a civil union will attempt to treat benefits from an IRA in this way.

The Register of Wills offices will need to modify their forms and procedures so as to recognize the rights of surviving parties under the Act. Similarly, the Division of Revenue will have to update its Delaware estate tax form to provide a marital deduction for assets passing to surviving parties, even though such deduction will not be recognized for federal purposes.

Although Delaware income tax is beyond the intended scope of this article, the option to file a joint income tax return for Delaware purposes starting in 2012, which will not be available for federal purposes, will no doubt also generate work for the Division of Revenue in updating its forms and filing procedures.

Unlike the estate tax, this will affect a substantial number of taxpayers. This may require relatively immediate attention from the Division of Revenue, since although the Act will not affect the filing season of early 2012, it will certainly have a potential impact on state income tax withholding for some persons.

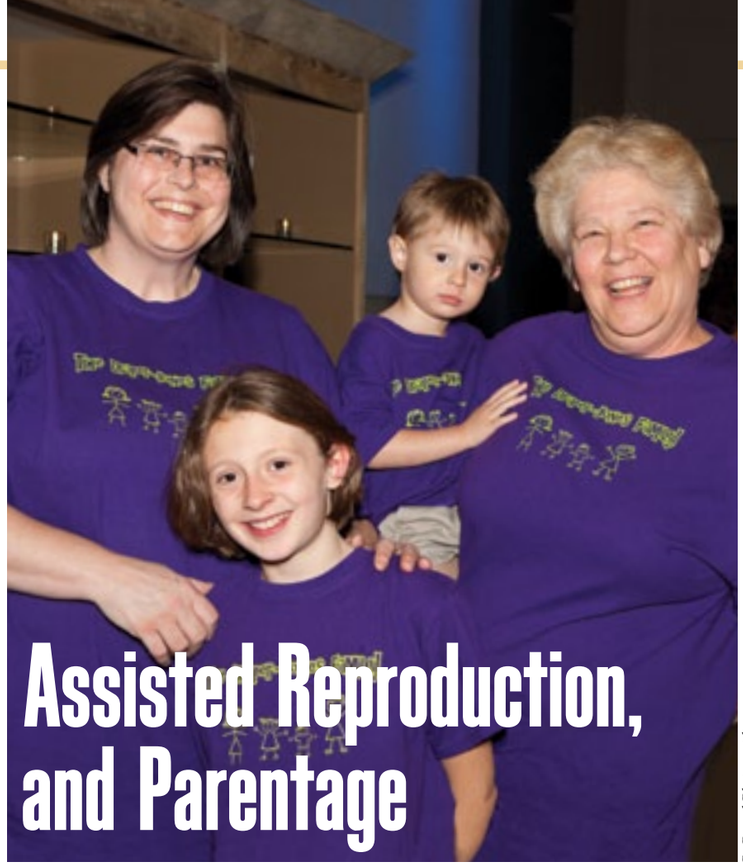
In addition, the first estimated tax payments for calendar year 2012 will be due on April 30, 2012, and by then the Division of Revenue's estimated tax coupon form will need to recognize the ability of civil union couples to file a joint coupon.

Same-sex couples who wish to take advantage of the civil union statute will take joy in their civil unions. However, these happy couples should consult their estate planning attorneys to make sure that the legal estate planning consequences of their unions are properly considered. ◆

FOOTNOTES

1. The author received an advance copy of an article by Mark V. Purpura, Esq., F. Peter Conaty, Jr., Esq., and Ginger L. Ward entitled "Delaware Adds to its Jurisdictional Advantages for Asset Protection and Estate Planning Opportunities for Same-Sex Couples" scheduled to appear in an upcoming issue of *Delaware Banker*. This article covers some of the same ground, and the author gratefully acknowledges insights borrowed from or inspired by the *Delaware Banker* article.
2. 13 Del. C. § 212.
3. 1 USC § 7 and 28 USC § 1738C.
4. Section 2040(a) of the Internal Revenue Code.
5. 12 Del. C. § 2308.
6. 12 Del. C. § 502.
7. 12 Del. C. § 901 *et seq.*

Susan F. Paikin and
William L. Reynolds



B. Proud Photography

Civil Unions Assisted Reproduction, and Parentage

As advances in reproductive technology meet expanded rights for same-sex couples, new laws tackle the question, "Who is the parent?"

Five years ago in the pages of this magazine, we explored parentage and child support as these issues impacted same-sex families in interstate litigation:

"The formation, recognition, and rights of [same-sex] families have been a constant source of not-so-polite public discourse and political wrangling. Adoption by gay individuals or partners led the way, though not without legal challenges. Medical interventions and scientific advances now offer a smorgasbord of assisted reproductive technologies, where a child may be biologically related to one, both, or neither member of the couple — and a child could have as many as six parents. Layered on top is the hot-button topic of the legal status a same-sex couple may obtain in some states or countries — domestic partnerships or gay marriage — and the *Defense of Marriage Act* ("DOMA")."[1]

Delaware's *Civil Union and Equality Act of 2011* ("the Act") changes the legal landscape for determining a child's legal parents in Delaware, and medical science has revolutionized the process of conceiving a child. Although the Act does not delineate an answer in each fact situation, it lays out straightforward principles that go a long way toward answering the question, "Who is the parent?"

Section 204[2] of the Act provides that the parties should be treated as married spouses "with respect to a child of whom either party becomes the parent during the term of the civil union." Specifically, the marital presumption applies to the civil union parent, and he or she has the right to be named as parent on the child's original birth certificate.

While this provision, especially when coupled with the requirement to construe the Act broadly "to accomplish its stated purposes"[3] is a significant positive change, it likely will not eliminate parentage litigation — either within Delaware or in interstate cases.

This article raises some of the potential legal arguments. It is important to remember, particularly when considering family law case law, that litigation stems from failed relationships and arrangements — and they frequently disintegrate with animus.

Lesbian Couples in a Civil Union

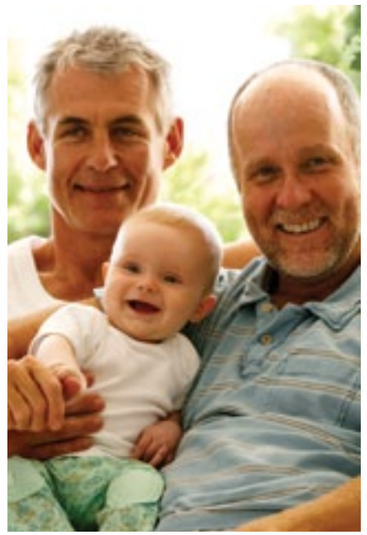
Where a child is born to one woman (using her egg), under the Act her civil union partner is presumed to be the legal parent of the child, entitled to the same standing as a husband with respect to a child born to his wife. The primary rule for a child born to a married woman is the marital presumption of legitimacy — her husband is the father of the child. The common law permitted rebuttal of the presumption only by proof that a husband was "beyond the four seas" — and thus could not possibly have fathered the child.

However, that era has long since passed. Today, the marital presumption is codified into state law. And, with the advent of and advances in genetic testing, the presumption is frequently rebuttable.[4]

Delaware's *Uniform Parentage Act* ("UPA") establishes a mother's husband as the presumed father by operation of law "…until that status is rebutted or confirmed in a judicial proceeding."[5] An action to rebut the presumption may be brought within two years of the child's birth by mother, husband or an individual claiming parental rights. This statutory period is not limited where the court finds certain facts present in the case.[6]

As the civil union partner stands in the shoes of the husband, it appears that the man providing the required sperm may have standing to assert his parental rights under § 8-607. However, UPA specifies that a donor is not a parent of a child conceived by means of assisted reproduction — unless intended to be the parent.

UPA does not distinguish between an anonymous sperm donor through an ART medical facility and donation by a known man — but



other states have drawn that distinction, and donation of sperm by a friend who remains involved with the child may raise questions as to whether the biological father is a third legal parent.[7]

It will be interesting to see whether the courts will be as reluctant to rebut the marital presumption, where the challenge to parentage is raised timely by either the mother or her presumed parent partner.

Modern reproductive technologies make it possible for a woman to give birth to a child with whom she has no genetic connection. As an alternative to straightforward artificial insemination, a lesbian couple may chose for the ova of one partner to be fertilized by a sperm donor and carried by her partner.

Sorting out parentage in such a situation is mind bending. On the one hand, under UPA, the mother-child relationship is established by a woman giving birth.[8] Thus, the non-biological birth mother is a parent and, under the Act, her civil union partner — the child's biological parent — is a presumed parent. On the other hand, in this case, the mother's partner is the egg donor. As noted earlier, under the UPA a donor is not a parent — unless the donor establishes her intent to be the child's parent under § 8-703 by a consent signed by both partners.[9]

So, in this fact situation, does the presumption contradict the need for written consent? Perhaps not, though if the union falls apart, the lack of consent may be raised to rebut the marital presumption.

Gay Couples in a Civil Union

Despite all the advanced human reproductive technologies, it is still true that only a woman can give birth to a child. For a gay couple, a gestational mother is required, whether or not one of the partners donates sperm so the child will carry his genes or they use a sperm donor. A gestational mother can also be the child's genetic parent if she provides the egg in addition to carrying the child. Obviously, the complications in these cases are myriad.[10]

The most recent version of UPA contains Article 8 covering gestational agreements; however, after considerable debate, the Uniform Law Commission ("ULC") elected to mark this article as optional, so as not to sink the entire UPA.[11] Delaware did not enact Article 8 when it passed UPA in 2004;[12] however, neither does Delaware explicitly prohibit gestational agreements (also known as surrogacy agreements).

The Delaware Family Court, in *Hawkins v. Frye (1988)*,[13] held a contractual agreement to terminate parental rights contrary to public policy and, therefore, unenforceable in Delaware. The decision analogized the case to Baby M,[14] New Jersey's infamous surrogacy case. The holding found "receipt of money in connection with adoption is barred by Delaware law."

Today gestational agreements are reportedly in wide use in Delaware. Twenty-three years after *Hawkins v. Frye*, it is reasonable to wonder whether the decision would be precedential were the gestational mother in such an agreement to assert her parental rights contrary to its terms.

Where one of the partners is the biological father and no valid gestational agreement exists, Delaware's statutory

scheme appears fraught with complications. Giving birth establishes the mother-child relationship with the gestational mother (whether or not she is also a biological mother).[15] The biological father may establish his parentage by executing and filing a voluntary acknowledgment of paternity under 13 Del. C. § 8-302.

Unless the acknowledgment is rescinded within 60 days or timely challenged within two years "a valid acknowledgment of paternity filed with the Office of Vital Statistics is equivalent to an adjudication of paternity of a child and confers upon the acknowledged father all of the rights and duties of a parent."[16]

Federal law requires that every state give Full Faith and Credit to the valid acknowledgments signed in other states under its procedures.[17] Where a man is established as the legal parent of a child during a civil union, would his legal partner automatically become a presumed parent of that child under the Act? Would the existence of two legal parents rebut the statutory presumption of the partner in a civil union? Or does Delaware's civil union statute envision a child having three legal parents? What is in a child's best interest?

It will be interesting to see how these issues are sorted out when — as is inevitable — relationships and agreements break down.

Enforcement of Parental Rights and Obligations

As we noted in our earlier article, "[b]ecause the establishment of duty [for child support] against a same-sex ex-partner has been recognized by the Family Court, Delaware would unlikely have a basis for precluding enforcement of a comparable order from another state, even though Delaware has enacted its own DOMA provision."[18]

The Act makes this assumption a reality. It gives the Family Court "the non-exclusive jurisdiction … for all proceedings for divorce and annulment of such civil unions, even if one or both parties no longer reside in [Delaware]."[19] The grant of jurisdiction where all parties have left the state is available "…if the jurisdiction of domicile or residence of the petitioner and/or respondent does not by law affirmatively permit such a proceeding to be brought in the courts of that jurisdiction."[20]

Offering continuing jurisdiction to dissolve a civil union created under Delaware law is reasonable and appropriate; however in interstate cases, the legal framework related to where disputes on issues of custody, parentage or child support are litigated may not line up with jurisdictions where a marriage or civil union may or may not be dissolved.

For example, a reading of DOMA and the underlying policies of relevant statues related to children strongly suggest that a sister state will enforce a valid Delaware custody or child support order even if it will not recognize the validity of the Delaware civil union.

What remains a concern is whether a DOMA state will accept jurisdiction on a petition to establish or challenge parentage, custody or child support under the *Uniform Interstate Family Support Act* ("*UIFSA*") or the *Uniform Child Custody Jurisdiction Enforcement Act* ("UCCJEA") and what substantive rules will they apply.

For example, under UIFSA, a responding jurisdiction may not consider nonparentage as a defense where parentage has been previously determined.[21] Is parentage "a right or claim arising from [the civil union]" and therefore falling within DOMA? Will other states accept the presumptive parentage established under Delaware's civil union law as a "previously determined" parentage?

Passage of the *Respect for Marriage Act* (S.598) will ensure that the rights and obligations of civil union parents will be enforced everywhere. Besides repeal of DOMA, it can be hoped that same-sex families are more stable than opposite-sex marriages have been in recent decades. We also hope a respectful approach to the needs and best interests of children remain in the forefront when the adult relationship breaks down. ◆

FOOTNOTES

1. "Parentage and Child Support: Interstate Litigation and Same-Sex Parents," *Delaware Lawyer*, Vol. 24, No. 1 (Spring 2006) at p. 26 (footnotes omitted).

2. 13 Del. C. § 204.

3. 13 Del. C. § 217(a).

4. *See, e.g.* "Paternity Disestablishment — Just the Facts, Please!" *Delaware Lawyer*, Vol. 24, No. 1 (Spring 2006) at p.24.

5. 13 Del. C. § 8-204.

6. The Court must find: "(1)(a) The presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception; and (b) The presumed father never openly held out the child as his own; or (2) The presumed father did not commence an action within the limitation period in reliance on the mother's failure to disclose the possibility of any other alleged fathers." 13 Del. C. § 8-607.

7. *See, e.g., Laura G. v. Peter G.*, 830 N.Y.S.2d 496(N.Y. Supr. 2007); *Ferguson v. McKirenan*, 940 A.2d 1236 (Pa. 2007).

8. 13 Del. C. § 8-201(a)(1).

9. A gender-neutral application of the UPA — as required — is sometimes challenging. As to sperm donors, the Delaware Supreme Court held that a man whose sperm was used by the mother to impregnate herself through ART without his consent was the not the child's legal father as he had not signed the consent required by the UPA. *Adams-Hall v. Adams*, 3 A.3d 1096 (Del. 2010).

10. For a recent example, albeit involving a heterosexual couple, see, *T.V. v. New York State Department of Health*, 2011 N.Y. App. Div. LEXIS 6120 (N.Y. App. 2nd Dept Aug. 9, 2011).

11. See the Article 8 Gestational Agreement Prefatory Note in "*Uniform Parentage Act* (2000) (with Unofficial Annotations by John J. Sampson, Reporter)" *Family Law Quarterly*, Vol. 35, No. 1 (Spring 2001) at p. 166.

12. Only Texas and Utah have enacted Article 8.

13. *Hawkins v. Frye*, 1988 Del. Fam. Ct. LEXIS 31 (Del. Fam. Ct 1988).

14. *Matter of Baby M*, 537 A.2d 1227 (N.J. 1998).

15. As to whether the law allows a father to rebut the maternity of the gestational mother, *see, e.g.*, *In re Roberto d.B.*, 923 A.2d 115 (Md. 2007) (relying on Maryland's equal rights amendment to hold that courts must interpret the state's paternity statute, which allows men to rebut paternity based on evidence of the lack of a genetic relationship, to apply equally to women).

16. 13 Del. C. § 8-305(a).

17. 42 U.S.C. § 666(a)(5)(C) (iv).

18. EN1, *supra*, at p.30

19. 13 Del. C. § 216.

20. *Id.*

21. 13 Del C. § 6-315.

OF COUNSEL: Battle Rankin Robinson

When Sussex County Family Court Judge Battle Robinson retired in 2000, she promised herself she would devote herself to three things: exercise for an hour a day, study the Bible daily, and clean out her attic.

She's the first to admit the past 12 years haven't gone exactly as planned.

"I haven't made much progress on the things I set out to do," she says with a smile. "'But one thing I would like to say to people who may be thinking about retirement is, 'Don't be afraid of it.' Because there are many, many opportunities out there — you just never know what you will get involved in."

That outlook certainly holds true for Battle, age 73. When she left the bench after being an associate judge for 14 years, it wasn't because she was tired or frustrated with the work. Rather, it was that her mother and brother — who were living in her hometown of Durham, N.C. — needed her.

"My mother was elderly and not well, and she had been caring for my brother who is disabled with multiple sclerosis," she remembers. "She needed help, so it seemed best for me to retire and devote my attention to them, which I did for the first few years of my retirement."

After many drives back and forth to Durham, and after her mother passed away, her brother resettled into a nursing home, and the family home was cleared out and sold, Robinson was ready to return to the working world.

Luckily, she received a phone call from then Speaker of the House, Terry Spence, inviting her to help draft legislation for the Republican side of the House of Representatives. "He asked if I had any interest coming back to work. And I did."

The part-time job was full-circle for Battle; she began her Delaware career at the same job when she first moved to Sussex County from Washington, D.C., in 1970 when she married Robert Robinson. The legislative job, although brief, was a good respite for Battle who says she enjoyed getting "upstate" from her home in Georgetown to "see people from all over the state again and keep abreast of Delaware politics." (She ran for lieutenant governor in 1984.)

But perhaps her most interesting work in retirement has been with the Uniform Law Commission (ULC), a national organization of lawyers, judges and law professors which drafts uniform legislation for the states.

While still on the bench, Battle served on a ULC committee charged with revising laws dealing with the enforcement of child support obligations across state lines, resulting in the nationally adopted Uniform Interstate Family Support Act ("UIFSA"). She also had been appointed to the United States Commission on Interstate Child Support.

Her work on child support continued after retirement and in 2007 she accepted the Community Service award from the National Child Support Enforcement Association for her efforts.

Recently Battle has branched out to work on international children's issues. She has twice attended sessions at The Hague which developed an international treaty designed to improve support collection among countries — the Hague Maintenance Convention.[1] She then chaired the committee of the ULC which drafted state legislation to implement that Convention through amendments to UIFSA.

This effort has drawn considerable attention as a new approach to the implementation of private international agreements through state, rather than federal, law. She is now chairing another drafting committee concerned with similar state implementation of the Hague Convention on Protection of Children, which deals with the enforcement of custody and visitation orders in the international arena.

She cites these activities as a great example of how in retirement one can take up new and unfamiliar challenges. "Who would have thought a lawyer from a small town in Delaware would end up involved in an international enterprise? It's amazing. Now I make presentations at the State Department and Harold Koh (the legal advisor to the State Department) calls me by my first name," she says, laughing.

In addition to all her work on behalf of children and families, Battle has being called up (twice!) to be the hearing officer for two health insurance affiliations.

Despite all of these post-career accomplishments, as any grandparent would know, her main priority is being grandmother (or "Batmama" as she is known) to grandsons Clemens, 6, and Graham, 3.

Lest you think retirement is just trips to The Hague, play dates with grandchildren and calls from Harold Koh, there can be some downfalls.

"When I retired, my husband claimed I would miss everybody standing up when I came in the room," she says. "But what I really miss is my secretary — there is so much new technology out there that it's been hard to keep on top of it all!"

Her son Rob, a public defender in Georgetown, and her daughter Dorothy, a writer in Brooklyn, continue to push her to get an iPad or at least a faster internet connection. But so far Robinson has resisted. Besides, it seems like she's doing just fine just the way things are. ◆

FOOTNOTE

1. On November 23, 2007, at the International Peace Palace in The Hague, the United States signed the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Maintenance Convention). By this signing, the U.S. committed to seek ratification of the treaty. On an expedited basis, the ULC approved amendments to UIFSA in July 2008. The ABA House of Delegates approved UIFSA (2008) in February 2009. President Bush submitted the Maintenance Convention to the Senate for advice and consent in September 2008. On September 29, 2010, the United States Senate approved the Resolution of Advice and Consent. Updating the UIFSA mandate in federal law to the 2008 version of the Act is included in proposed implementing legislation but has not been enacted as of this writing.

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