

# LGBT SideBar

A Newsletter From

VISHNICK MCGOVERN MILIZIO LLP

Specifically for the Lesbian-Gay-Bisexual-Transgender  
Community

## Relocating in Retirement May Cost You

*By Joseph G. Milizio, Esq.*

Despite receiving federal recognition, same-sex couples are not guaranteed to receive certain retirement benefits under federal law. If your plans for retirement include relocation to another state, it pays to investigate your entitlement to these benefits.

Subsequent to the U.S. Supreme Court's decision in *United States v. Windsor*, the Social Security Administration announced it would recognize same-sex married couples for purposes of receiving Social Security benefits. However, the rules for recognizing marriage are not consistent across all federal agencies. Although most agencies will grant benefits to same-sex couples based on a "place of celebration," or where the marriage took place, the Social Security Administration is currently granting benefits using the "place of domicile" rule, only granting benefits to same-sex spouses who reside in a jurisdiction that recognizes same-sex marriage.

Married couples who reside in New York, who have not yet applied for Social Security spousal benefits, should thoroughly assess the timing of a move to a jurisdiction which does not recognize the marriage. If you are near retirement age, you should determine if Social Security spousal retirement benefits would exceed your own benefit. If so, you may want to wait before you relocate. If same-sex spouses move to a state that doesn't recognize their marriage, they won't lose their eligibility for spousal benefits, as long as they applied for benefits when they still lived in a state that recognizes their marriage.

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*Joseph G. Milizio, Esq.*

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# Hobby Lobby May Threaten Others' Rights

By Andrew A. Kimler, Esq.

The U.S. Supreme Court's decision in the so-called Hobby Lobby case may prove troubling to the LGBT community.

The owners of Hobby Lobby Stores, Inc., a corporation with thousands of employees in close to 600 locations across the country, are deeply religious. As such, they opposed the contraception coverage mandate of the Affordable Care Act (ACA). The mandate requires that employers provide health insurance coverage for contraceptives.

In its suit, Hobby Lobby Stores asserted that it should not be required to comply with the ACA mandate because it is protected by the Religious Freedom Restoration Act (RFRA), which provides that the government "shall not substantially burden" the exercise of religion without satisfying a very demanding legal test.

The Supreme Court's June 30 decision held that pursuant to the RFRA, the ACA's contraception coverage mandate cannot be applied to closely held, for-profit corporations that object on religious grounds. Although the majority opinion, written by Justice Alito, states that the Court's ruling was very limited to the issues before the Court, Justice Ginsburg noted in her dissent that the Court's decision could, in effect, open up a Pandora's Box if "its logic extends to corporations of any size, public or private."

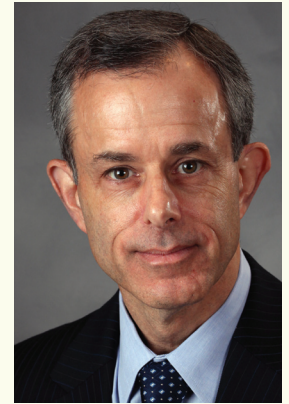
This decision stands against prior state court decisions that rejected the argument that an individual's religious beliefs may allow discrimination in the commercial sphere. For example, one state court decision held that a small company could not withhold services from gay clients based upon a so-called "free exercise religious exemption." Likewise, in another state court case, a wedding photographer unsuccessfully attempted to withhold services from a lesbian couple on the

basis of his religious beliefs.

While there is obviously cause for concern, we should bear in mind that Justice Alito specifically noted, among other things, "the government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal. . . ." Indeed, Justice Alito responded to Justice Ginsburg's concerns by noting that while her dissent "raises the possibility that discrimination in hiring, for example, on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield."

Thus, while the Court's decision raises legitimate concerns for the LGBT community, it cannot be said that the Court is actually prepared to allow discrimination against LGBT individuals based upon an individual's religious beliefs. Nonetheless, we will have to observe how the courts apply Hobby Lobby to determine whether the decision constitutes a step backward in the recognition of LGBT rights. **M**

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*Andrew A. Kimler, Esq.*

## Retirement... (Cont'd from Page 1)

Like all married couples, same-sex couples need to wait until their full retirement age to get the maximum possible spousal retirement benefit, which is 50% of the higher earner's Social Security benefit. Married individuals are also eligible for survivor's Social Security payments, which are equal to the higher earning spouse's monthly payment. The same rule currently applies – a beneficiary must apply for the benefit before moving to a state that doesn't recognize the marriage.

With limited exceptions, the above rules also apply to Veteran's Administration benefits.

The Employee Retirement Income Security Act, known as ERISA, is a federal law which governs many retirement plans. ERISA requires employer-provided pensions to follow certain rules that protect surviving spouses. Unless a surviving spouse specifically opts out, married retirees must take their pensions as annuities that provide payments to a surviving spouse. Of course, this could be beneficial to a surviving spouse who does not have the resources to maintain his or her accustomed standard of living. However, if the

spouse has his or her own resources and does not need the spousal benefit, it may be more advantageous to waive the spousal right and allow the retired spouse to receive more during his or her lifetime.

There are many unresolved scenarios regarding spousal rights to pension plans, including whether an individual is entitled to his late spouse's pension benefits and whether he can collect those benefits retroactively. Moreover, there are pension recipients who were not recognized as married when they started collecting their pensions, but who now want to add a spouse as a beneficiary. These people would have been paid a lower amount had they been allowed to choose a payment stream based upon two lives instead of one. It remains unclear whether they will have to pay back the excess benefits. Situations also may arise wherein a surviving spouse could claim that she was entitled to a late spouse's 401(k) or life insurance benefit if there was no beneficiary named and it went to another family member, such as a parent. The impact of these cases is yet to be seen. **M**

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# Will Creation Requires Professional Help

**By Morris Sabbagh, Esq.**

The proliferation of online options for drafting Wills has tempted some to create their own Wills and others to hold themselves out as experts in Will writing. But the risks of doing so without the help of an attorney far outweigh the perceived cost savings.

By failing to follow the exacting rules of Will creation, you may be exposing your family to legal battles after your death and your assets may wind up being distributed in a way you never intended. Fortunately, the courts make a “presumption of regularity,” presuming Wills that were created with an attorney’s involvement were executed properly.

Some of the risks of not involving an attorney in creating a Will are the failure to properly follow the very strict formalities of executing a Will. This could create issues relating to the mental capacity of the person making the Will and whether the Will was executed without duress, undue influence or fraud. There is a “presumption of regularity” in law which allows courts to presume that a Will was properly executed if an attorney was involved in the process. Without this presumption of regularity, the courts will impose a greater burden on the Will’s proponents to prove that the Will was properly executed.

A recent decision highlights another risk – that the Will might be difficult to understand. Courts use rules of construction to decipher language in a Will, and the deciphering process may have unintended consequences.

In a recent unpublished Surrogate’s Court decision in the Estate of Ronald D. Myers, New York County Surrogate Nora Anderson struggled to make sense of the Last Will & Testament written by a gay man without the assistance of an attorney. The Will, drafted in 1981, left “all monies” to the man’s mother, and provided that “all Stocks of I.B.M. . . And also all personnel [sic] property” would be left to his life partner, who at the time of the man’s death had been living with him for more than 25 years. Upon his death, the decedent left cash accounts of approximately \$40,000 and stock holdings worth approximately \$617,000, including the value of IBM and non-IBM stock. A dispute arose over whether the non-IBM stock should have been distributed to the decedent’s mother or to his life partner. Ultimately, the court decided the case in favor of the mother.

The main goal in a Will construction proceeding is to determine

the true intent of the person making it. In deciding the case, the Surrogate considered various rules of construction in an attempt to understand the decedent’s true intent. For example, she considered that while the term “personal property” is sometimes construed by courts to mean all personal property, including non-tangible property such as stock, in other cases the term is construed to mean only tangible items of personal property, such as furniture, clothing and jewelry. Likewise, while the term “money” is sometimes narrowly construed, in other situations, the term may include stocks and securities. The Surrogate also considered the use of the term “monies” in the plural to suggest something more than just cash.

Attorneys arguing the mother’s right to the stock put forward the theory of “inclusio unius est exclusio alterius” – the inclusion of one thing implies the exclusion of others. In other words, because the decedent mentioned the IBM stock specifically, he must have intended to exclude other stock from distribution to the decedent’s life partner. As is often necessary in the law, the court had to split hairs in order to make sense of a poorly drafted document.

Notably, in concluding in the mother’s favor, the court relied in part on a legal presumption in favor of a testator’s relatives over non-relatives, giving little weight to the decedent’s 25-year relationship with his life partner.

It is commonly said that hard cases make bad law. As can be seen from this case, a poorly drafted Will can result in unexpected results. When drafting a Will, a seasoned Trusts and Estates attorney will consider the legal rules of construction, and will artfully draft the Will to ensure clarity of intent. Attempting to go at it alone without a full understanding of legal rules of construction puts too much at risk. **M**

*Morris Sabbagh is a Partner in the Trusts & Estates and Elder Law Practice Groups. He can be reached at 516-437-4385 x 120 or [MSabbagh@vmmlegal.com](mailto:MSabbagh@vmmlegal.com).*



*Morris Sabbagh, Esq.*

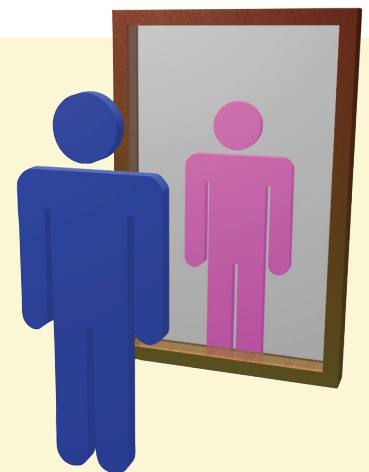
## Gender Markers

**By Joseph G. Milizio, Esq.**

The New York State Department of Health has revised its extremely stringent policy for changing gender markers on birth certificates. Previously, the exhaustive list of requirements included gender reassignment surgery.

The new policy allows for a change of gender upon submission of a certification from a licensed medical provider stating that the applicant is undergoing appropriate clinical treatment.

In a similar move, the American Medical Association announced that it has amended its policy to declare that transgender individuals should not be required to undergo genital surgery in order to update legal identification documents. **M**



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## **‘Before I Do’: Considerations for Same-Sex Couples Contemplating Marriage**

***Select one of two available dates and locations***

Now that same-sex couples' marriages are recognized by federal law and many states, there are numerous issues to consider before tying the knot.

Vishnick McGovern Milizio attorneys Joe Milizio, Morris Sabbagh and Joe Trotti, along with a noted CPA well-versed in LGBT representation, will present the estate planning, family law and tax consequences of becoming lawfully wedded spouses. Light refreshments will be served.

**DATE:** OCTOBER 2, 2014

**TIME:** 6-8 PM

**LOCATION:** 830 THIRD AVE., 5TH FLOOR  
CONFERENCE ROOM, NEW YORK, NY 10022

**DATE:** OCTOBER 30, 2014

**TIME:** 6-8 PM

**LOCATION:** 3000 MARCUS AVE., SUITE 1E9,  
LAKE SUCCESS, NY 11042

To reserve your spot, email Mindy Wolfle at  
MWolfle@vmmlegal.com with your preferred date/location.



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The content of this newsletter is for informational purposes only. Please contact us if you would like legal counsel.



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