

CONSUMER BANKRUPTCY

Bankruptcy Issues Facing Same-Sex Couples

Gay and lesbian debtors currently have fewer rights

By Craig D. Robins

Same-sex couples have many more issues to contend with than heterosexual married couples - especially when it comes to filing bankruptcy in New York. Everything about the federal bankruptcy law is geared towards the conventional family.

Nowhere in the bankruptcy statutes is there sufficient guidance for dealing with non-conventional family units, let alone same-sex couples who were married in other states.

That does not mean that gay or lesbian consumers in committed relationships can't file for bankruptcy; it just means that they have to approach the bankruptcy petition and means test more carefully.

The following issues routinely come up in providing bankruptcy advice to gay and lesbian individuals and couples. Unfortunately, some of the answers are not necessarily so clear.

Can a same-sex unmarried couple file a joint bankruptcy?

There is no difference between gay or straight non-married couples. Only married couples can file a joint bankruptcy petition.

Can a same-sex couple that is legally married in another state file a joint bankruptcy petition in a New York Bankruptcy Court?

Recently, a handful of states adopted legislation recognizing same-sex marriage. They include Massachusetts, Connecticut, Iowa, Vermont, Maine, and for a short time, California. Consequently, many New York residents in same-sex committed relationships eagerly went to these states to tie the knot.

What if one of these gay or lesbian married couples now wants to file a joint bankruptcy petition in a New York bankruptcy court, can they?

Here we have a conundrum. According to the Defense against Marriage Act (a federal law dating back to 1996), a state is not required to recognize a same-sex marriage



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in their state even if the couple was legitimately married in another state. However, Governor Paterson did not feel that this produced a fair result and issued a directive in May 2009 requiring all state agencies to recognize same-sex marriages performed out-of-state.

Bankruptcy is a federal procedure based on federal laws. When these laws fail to address certain issues, such as the legitimacy of marriage, then state law can be used to amplify the federal law. Since New York does not currently have any law that explicitly recognizes such marriages (Governor Paterson's directive only applies to state agencies), then it appears that the New York bankruptcy court would not be able to recognize an out-of-state same-sex marriage.

I have not yet had the opportunity to file a joint case involving a same-sex married couple, but given that opportunity, I certainly would give it a try. The Office of the United States Trustee would then have the difficult decision on whether they should seek to dismiss the case.

Even if they raised such objections, a sympathetic judge could nevertheless rule in favor of the debtors and come up with some legal justification for permitting the joint bankruptcy filing. It is just a question of time before we see such a filing in a New York bankruptcy court.

How do you calculate the size of the household for means test purposes when you have a same-sex couple with domestic partnerships?

The real issue here is essentially no different for any two partners or roommates living together, whether they may be straight or gay. Simply calculate all of the people who occupy the household, whether they are related or unrelated.

Do you include a same-sex partner's income on the means test?

The means test only requires a debtor to include the income of the spouse. If you are representing an individual debtor who

(Continued on page 29)

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(Continued from page 15)

is in a same-sex unmarried relationship in which the parties share their finances, the best approach is to come up with a specific monthly contribution amount from the non-filing partner.

If the individual debtor is in a same-sex marriage, the debtor can conceivably argue that the spouse's income and finances should be included in the means test, or, alternatively, argue that the spouse is merely a roommate, considering that New York has yet to make the arrangement legal, and that the income does not need to be included.

Does the United States Trustee look any differently at bankruptcy petitions filed by debtors who have same-sex partners?

My experience has been that the United States Trustee's office does not treat debtors in same-sex relationships any differently than debtors in straight relationships. However, I do get the feeling that they may want to avoid any politically-charged controversy involving gay rights issues.

What's down the road?

Eventually, Congress may recognize the existence of same-sex marriages and domestic civil unions in bankruptcy proceedings and provide statutory authority for dealing with such issues. Until that happens, we can only look towards the time when New York legalizes same-sex marriage.

In October, Governor Patterson called same-sex marriage a civil right and announced that he wanted the legislature to take quick action and adopt such legislation.

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