

Estate Planning For Same-Sex Couples After Obergefell v. Hodges



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On June 26, 2015 the United States Supreme Court issued its opinion in *Obergefell v. Hodges*, the name assigned to a series of consolidated cases on same-sex marriage rights. The Court ruled 5-4 in favor of the petitioners, holding that same-sex married couples are entitled to equal protection under the laws, and that their marriages must be recognized nationwide.

CASE BACKGROUND

Jim Obergefell & his longtime partner, John Arthur, sought to enter into a legal marriage. They were residents of Ohio and Mr. Arthur was terminally ill with ALS. They wanted to solemnize their relationship before Mr. Arthur's death. They chartered a plane to Maryland, where same-sex marriage is legal, and they were married on the tarmac at a Baltimore airport. They then returned to Ohio as a married couple.

Soon after, Mr. Arthur died. The State of Ohio issued a death certificate that did not identify Obergefell as surviving spouse. Mr. Obergefell sued the state (naming Hodges, director of the Ohio Department of Health) to have himself named as Mr. Arthur's surviving spouse, arguing that Ohio's state constitutional ban on same-sex marriage – including *nonrecognition of marriages solemnized in other states* – violates the equal protection clause of the 14th Amendment¹. Obergefell's case was consolidated with a series of other related same-sex marriage cases to resolve two specific issues under the 14th Amendment.

ISSUES RESOLVED BY OBERGEFELL OPINION

1. The 14th Amendment requires states to issue marriage licenses to individuals of the same gender.
2. The 14th Amendment requires states to formally recognize same-sex marriages of that state's residents, when those residents entered into a same-sex marriage in another state where the marriage was legally valid.

IMPACT OF OBERGEFELL FOR SAME-SEX MARRIED COUPLES

State laws banning same-sex marriage are effectively invalidated. Same-sex spouses will now enjoy all state tax benefits and other spousal benefits that other couples enjoy. (Including marriage, divorce, adoption & child custody, separation agreements & QDROs, marital property, survivorship spousal death benefits, inheritance through intestacy, priority rights in guardianship proceedings, contract rights, etc., as referenced above.)

¹ The 14th Amendment applies the 5th Amendment equal protection clause to the states. (Note: Same-sex couples already receive equal treatment under federal law after *U.S. v. Windsor*. For all federal tax purposes and other benefits under federal law (ERISA, etc.), same-sex couples are treated the same as any other married couple.)

After *Obergefell*, same-sex couples are afforded the same spousal rights that other couples enjoy. Some of these occur independent of proactive planning, like:

- Adoption or child custody proceedings, even in states that previously did not recognize two persons of the same gender as a child's parents (at issue in some of the cases that were consolidated with *Obergefell*);
- Divorce proceedings, if necessary, now that states must recognize the validity of the marriage wherever solemnized;
- Spousal priority in matters concerning an incapacitated spouse's care, or recognition in the event guardianship or conservatorship proceedings are necessary;
- Spousal survivorship rights under state pension or other retirement benefits, even in states that previously did not recognize same-sex marriage;
- Spousal inheritance through intestacy (when a spouse dies without a valid will or trust);
- Spousal *identity or priority* in the event will or trust proceedings are contested after death;
- The ability to file taxes jointly as a married couple;
- Spousal privilege in criminal proceedings where a spouse is a defendant;
- Any other spousal contract right where the contract is construed under the laws of a state that did not recognize the marriage.

Couples absolutely should still proactively plan. Just because states recognize marriage doesn't mean couples should not take control of their will and trust planning, and clearly set forth their wishes in enforceable legal documents. All the good reasons to plan apply just as much to same-sex married couples as well as opposite-sex couples:

- Proactively expressing their wishes concerning their medical care during periods of incapacity (through durable powers of attorney);
- Structuring the distribution of their property – ideally in protective trusts – for the benefit of their surviving spouse and children after death;
- Establishing trusts to preserve privacy, and to avoid the delay and expense of guardianship or probate proceedings during incapacity and after death;
- Providing mechanisms that allow flexibility in administering those trusts to account for changes in the law, or changes in beneficiary circumstances after death (through carefully-tailored choice of law, decanting, or trust protector provisions);
- Providing clarity and discretion to a trustee to make strategic tax decisions through trust administration after death (through various investment powers, and accounting and tax provisions);
- Providing for family members other than a spouse or child through their estate plans;
- Making gifts to religious or other charitable organizations through their estates;
- Allowing orderly operation and transition of businesses or professional practices through incapacity or death

Obergefell likely represents the last word on same-sex marriage, elevating these relationships to equal stature with other marriages. While same-sex married couples are now entitled to equal protection under the laws of every state, the efficacy of those laws in ensuring dignity in disability and death, and orderly and structured distribution of property after death is very limited for all couples. Families should always take control of their planning and leave as little to state law interpretation as possible. That is best done through careful planning with experienced professionals who can intelligently guide the family through the process.

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