

# Wealth Planning Alert

## “Same-sex marriage” now just “marriage”

On June 26, 2015 the Supreme Court in *Obergefell vs. Hodges* held that same-sex couples have a fundamental right to marry and to have their marriages recognized in every state. *Obergefell* reversed an earlier ruling by the US Court of Appeals for the Sixth Circuit, invalidating marriage bans in Kentucky, Michigan, Ohio, Tennessee, and similar laws in another 10 states. Justice Anthony Kennedy delivered the majority opinion, which Justices Ginsburg, Breyer, Sotomayor, and Kagan joined.

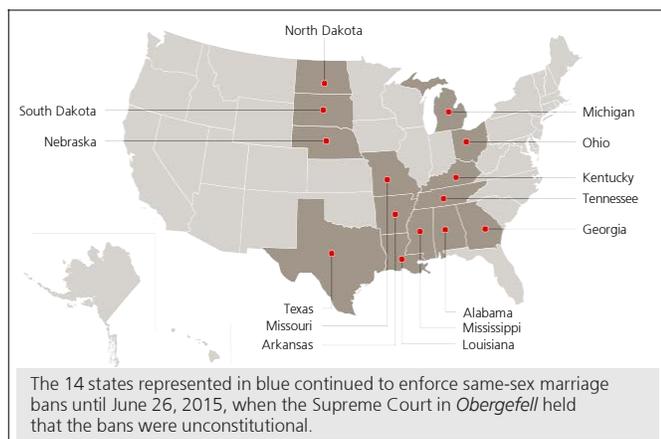
Kennedy, since retired and who was widely considered to be the Court’s swing vote on social issues at that time, also authored the opinion in *US vs. Windsor* just two years prior. There, the Court held that the federal government must recognize same-sex marriages, but only to the extent they are valid under state law. It did not determine whether states must license same-sex marriages or recognize those marriages that had been licensed in other jurisdictions. Therefore, inconsistencies among states’ recognition laws continued to undermine the legitimacy of marriages and threaten the attendant rights of individual spouses. *Obergefell* resolved state law conflicts in favor of equality. It reinforces existing marriage bonds, and clears a path down the aisle for others to walk in the future. This article discusses a few of the ways in which *Obergefell* changes the legal landscape by expanding couples’ state-level rights and eligibility for certain federal benefits.

### Income tax

Since *Windsor*, and prior to *Obergefell*, same-sex spouses had been required to select either “married filing jointly” or “married filing separately” as their federal income tax filing status. Those who were also subject to tax in non-recognition states were forced to file their state returns as though they were unmarried. Often, each spouse needed to prepared a “dummy” federal return with a “single” filing status in order to accurately calculate his/her adjusted gross income for state income tax purposes. In short, couples prepared a greater number of returns than they actually filed. *Obergefell* eliminated that burden. Every state must now permit same-sex spouses to make the same tax and filing elections it permits similarly situated opposite-sex spouses to make. Clients should speak with their tax and legal advisors to determine whether they can amend their state returns from the prior years to properly reflect their marital status, bearing in mind that state refunds must be reported as income on their current year’s federal income tax returns.

### Estate tax

*Windsor* declared that same-sex marriages must be given equal treatment under the federal estate and gift tax regime, but it did not compel the states to reinterpret their own death tax laws. Kentucky, Nebraska, and Tennessee impose inheritance taxes based on the value and character of property passing at death, and/or the relationship of a beneficiary to the decedent; bequests to a surviving spouse are always exempt from the tax. However, each of those states defined “spouse” in a way that excluded parties to a same-sex marriage, and so bequests to a surviving same-sex spouse could never be exempt as such. *Obergefell* requires each state to treat all marriages alike under its transfer tax laws. The surviving spouse of any decedent whose estate owed death taxes because of a state’s refusal to recognize his/her marriage should consult his/her legal advisors to consider filing an amended return and claim for refund.



### Retirement accounts

Since *Windsor*, same-sex spouses generally have the same preferential tax treatment, enhanced protections, and flexibility that all similarly-situated opposite-sex spouses have with respect to their IRAs and ERISA governed plan accounts (such as 401(k)'s). For example, a surviving spouse can roll over the deceased spouse's IRA to his/her own IRA and, in doing so (depending on their relative ages), defer required minimum distributions. Also, the surviving spouse of a 401(k) plan participant is automatically entitled to the participant's account assets upon his/her death, unless the spouse has affirmatively waived his/her right to the assets in writing. Same-sex couples who married after retirement or whose marriage was not recognized until after retirement may consider reviewing their retirement plan benefits to determine whether their spouse is entitled to preferential treatment and, if he or she is not, may consider speaking with the plan administrator to see if benefits can be extended retroactively or whether the plan can be amended.

Significantly, certain governmental and church plans are not subject to ERISA. Additionally, federal protections against gender-based discrimination and most state protections against sexual orientation-based discrimination do not apply to religious organizations. So, if a church plan provides that pension payments should continue after a participant's death for the benefit of his/her surviving spouse and the plan's definition of "surviving spouse" excludes parties to a same-sex marriage, a participant's surviving same-sex spouse will not be entitled to the benefit. Same-sex married participants of employer-sponsored retirement plans should consult their legal advisors and plan administrators to determine the impact of *Obergefell* on their particular circumstances.

### Domestic Partner benefits

The majority of employers, particularly larger entities, extend benefits to their unmarried employees' domestic partners or spousal equivalents. Employers' financial contributions to insure its employee's domestic partner result in imputed income to the employee. This may increase the employer's overall payroll tax liability. Additional administrative requirements, such as creating and maintaining separate payroll withholding systems, can also add to an employer's costs. For many employers, the value of these benefits as a way to attract and retain diverse talent outweighed the additional tax and administrative burdens.

Some companies are considering whether to discontinue domestic partner benefits now that same-sex couples can marry in every state. Even now, however, some LGBTQ couples are justifiably hesitant to rush down the aisle for a wide variety of reasons--including fear that doing so will jeopardize their job and/or housing security. Not all states currently prohibit workplace and housing discrimination based on a person's sexual orientation, nor do all of those offer protections based on gender identity.

There has been movement over the past month toward eliminating these consequences. On July 14, 2015 the Equal Employment Opportunity Commission (EEOC) ruled that Title VII of The Civil Rights Act prohibits sexual orientation- based discrimination in the workplace. The panel was divided 3 to 2, with the majority declaring it to be impermissible as a form of gender discrimination. The Commission's ruling is not binding on courts, but could be persuasive in future litigation.

### State intestacy and health surrogate laws

Each state imposes its own distribution plan for the probate property of individuals who die without a valid Will. Although most statutes allocate a significant portion of an estate to the surviving spouse, until *Obergefell*, same-sex spouses were considered strangers to one another under non-recognition states' laws. Unless the deceased spouse explicitly provided for the surviving spouse under his/her Will or Trust in those states, the surviving spouse would be disinherited by application of state law (as to the decedent's probate property). Now same sex spouses will have the same intestacy protection in all states.

Most states also have a statutory pecking order in place to identify a health care decision-maker for a patient who lacks capacity and who has not already nominated an agent to act under a health care power of attorney. The surrogate may have broad discretion to authorize or refuse life-sustaining treatment on the patient's behalf. Generally, these statutes name the patient's spouse first (or second to a court-appointed guardian) among a list of potential surrogates, followed by other relatives like an adult child, parent, or sibling. Medical providers in non-recognition states likely considered a patient's same-sex spouse to be the surrogate of last resort, relegated by statute to a class commonly described broadly as "close friend" or some such.

The Court in *Windsor* did not reconcile the above-described inequities because they did not arise out of federal law. *Obergefell* now demands that each state reevaluate its laws and interpret them in such a way that all married couples are treated alike.

### **Federal benefits**

*Windsor* required the federal government to recognize same-sex marriages to the extent they were valid under state law. Often, an individual agency had discretion to choose which state's law should drive the analysis. Some (like the Treasury Department) applied an inclusive "place of celebration" standard, recognizing any marriage that was legal in the state where and when it was celebrated, regardless of where the couple resided. Others (like the Social Security Administration) applied a more restrictive "place of domicile" standard, recognizing a marriage only if it was legal in the state where the couple resided either at the time the marriage was celebrated, or when the right to the particular federal benefit accrued. As a result

of these inconsistencies, a same-sex couple could have the peculiar experience of qualifying for certain federal benefits and not for others. In requiring all states to recognize same-sex marriage, *Obergefell* ensures that the application of either standard will always yield the same result. Same-sex spouses who were denied benefits based on any agency's determination that they were not lawfully married should consider with their legal advisors whether to reapply for the benefits and to determine if they may be eligible for retroactive benefits.

### **Conclusion**

*Obergefell* is the latest in a line of three significant Supreme Court cases over the past several years, placing the rights of LGBTQ individuals on equal footing with those of everyone else. It will likely be years until the full extent of *Obergefell's* reach can be known, and so those clients who are affected by the issues addressed above should consult regularly with their advisors.

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