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Planning for the LGBTQ family

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Ever since the United States Supreme Court ruled in favor of same-sex marriage in *Obergefell v. Hodges,* many same-sex couples have headed towards the altar.[1] In fact, the Williams Institute estimates that, in the five years after the ruling, the number of same-sex couples who marry has nearly doubled.[2] Despite the rapid rise of same-sex marriage in recent years, not every same-sex couple is rushing down the aisle; indeed, only a little more than half of the approximately 1.2 million LGBTQ[3] couples cohabitating in the United States are married, compared to nearly 90% of their heterosexual counterparts.[4] What's more, of those cohabitating LGBTQ couples in the US, about a fifth of them are raising children,[5] many of whom were adopted or conceived using assisted reproductive technology (ART), such as in-vitro fertilization.

As discussed in the first section below, although marriage does provide some benefits for these couples, there are some drawbacks as well. For those couples who choose to remain unmarried, navigating the legal and economic landscape will be a necessary part of any such couple's family planning to ensure that each partner's wishes with respect to their healthcare decisions and estate plan, among other things, are respected. And for those LGBTQ couples who have or want to have children, the landscape becomes even more complex. The potential issues that arise from being unmarried or from having children are each discussed below, as well.

Some benefits and drawbacks of marriage

While many LGBTQ couples may marry for cultural, religious, or other personal reasons, many find financial, tax, and other legal or economic justifications for marriage.[6] The many legal and economic benefits to marriage, all of which are now afforded to same-sex couples, include, among other things:

- **Social security survivor benefits.** The social security benefits of a deceased spouse may be paid to the surviving spouse.
- **Retirement account contributions and beneficiary options.** Married individuals may be eligible to take advantage of the spousal individual retirement account (IRA) contribution rules. If only one spouse has earned income, the non-working spouse can also make an IRA contribution based on the earned income of the working spouse. In addition, surviving spouses may treat a deceased spouse's traditional IRA as their own, potentially creating some tax efficiency by prolonging the time period for required withdrawals over the surviving spouse's life expectancy. Surviving spouses may also treat a deceased spouse's Roth IRA as their own, potentially realizing additional years of tax deferred growth and potentially tax-free distributions to the surviving spouse and the surviving spouse's beneficiaries.
- **Gain from the sale of a home.** If certain conditions are met, up to $250,000 of gain from the sale of an individual's primary residence is excluded from taxable income; the exclusion doubles to $500,000 for married couples.
- **Gift and estate taxes.** Transfers of assets between spouses, either during life or at death, can qualify for a 100% gift or estate tax marital deduction (i.e. the transfers are not taxable), while transfers between non-spouses may be subject to a 40% gift or estate tax on transfers in excess of the gift and estate tax exemption amount ($12.92 million in 2023).[7] Married couples may combine both their annual exclusion gifts (up to $34,000 in 2023) and their lifetime exemption amounts (up to $25.84 million in 2023), as well as inherit the unused gift and estate tax exemption amount of a deceased spouse.

[1] *Obergefell v. Hodges,* 576 U.S. 644 (2015).

[2] Williams Institute, "The Economic Impact of Marriage Equality Five Years After Obergefell v. Hodges," *https://williamsinstitute.law.ucla.edu/publications/econ-impact-obergefell-5-years/.*

[3] LGBTQ is an abbreviation for lesbian, gay, bisexual, transgender, and queer or questioning.

[4] Zachary Scherer, "Key Demographic and Economic Characteristics of Same-Sex and Opposite-Sex Couples Differed," United States Census Bureau, November 22, 2022, *https://www.census.gov/library/stories/2022/11/same-sex-couple-households-exceeded-one-million.html.* Williams. Institute, "How Many Same-Sex Couples in the U.S. are Raising Children?" *https://williamsinstitute.law.ucla.edu/publications/same-sex-parents-us/.*

[5] Id.

[6] There are many other non-economic legal benefits of marriage, as well; for example, spouses are allowed hospital visitation and access to health information, as well as the ability to make healthcare decisions on behalf of their spouse during incapacity.

[7] This assumes that each spouse is a US citizen. For a US person, the gift and estate tax exemption is indexed annually for inflation and currently includes a temporary increase. This increase expires after 2025, at which time the gift and estate tax exemption will be cut roughly in half.

While there are numerous personal and economic benefits to marriage, there are a number of potential drawbacks, as well, including:

- **Income tax marriage penalty.** In 2023, single individuals reach the highest marginal rate of federal income tax on income earned over $578,125, while married couples filing jointly hit the highest rate on income earned over $693,750, well below double the income of a single individual.[8] Two married high earners would therefore have to pay more federal income tax than they might have had they remained unmarried. This is referred to as the marriage penalty, since there is a financial penalty associated with married couples who are both high earners.[9] Couples may not avoid this penalty by filing separately, either.
- **Debts.** State laws differ, but marriage often entails subjecting one spouse to the debts and credit history of the other spouse.
- **Tax status of certain trusts.** Prior to the legalization of same-sex marriage, many LGBTQ couples engaged in gift and estate tax planning by setting up trusts for their unmarried partners or named their unmarried partner as a trustee of a trust. Getting married after such transactions may create unwanted consequences. For example, trusts that were not previously considered grantor trusts, where the grantor is responsible for the payment of the trust's income taxes, may become grantor trusts as a result of the marriage. In addition, the Internal Revenue Code disallows certain intra-family transactions or valuation discounts for transfers of family-controlled entities which would otherwise be allowable for unmarried individuals.

Estate planning for LGBTQ couples post-*Obergefell*

For any family, the essential estate planning questions still apply: To whom—or to what—do I want my wealth to go? How much of it? In what form should an inheritance be given—outright or in trust? Who will speak for us if we become incapacitated and can't communicate our wishes?

Even post-*Obergefell,* however, some unique estate planning challenges remain for many LGBTQ couples. Despite the Supreme Court's ruling, many of those couples have continued their partnership unmarried, or obtained a civil union or domestic partnership, neither of which is treated as a legal marriage under federal law.[10] Thus, those couples that continued in a domestic partnership or civil union and did not obtain a marriage license are essentially treated as unmarried partners for purposes of federal tax law. This can sometimes lead to disastrous federal tax consequences. For example, consider an unmarried couple where only one partner earns income for the whole family. If the earning partner purchases a home for the family and titles the home in the joint name of the couple, the earning partner may have made a taxable gift to the non-earning partner, requiring the filing of a gift tax return, using the earning partner's lifetime exemption amount and possibly paying a gift tax. Registered domestic partners and those who entered a civil union will face the same potential calamity, while married spouses will not. Therefore, unlike married couples, unmarried couples must closely monitor the titling of their assets and the payment of the couple's joint expenses in order to avoid any potential tax pitfalls.

The extra onerousness for unmarried couples does not end with death, either. While estate planning should be a necessity for all couples, it is particularly critical for unmarried couples. Most state laws provide for a default inheritance to a spouse in the absence of any estate planning documents, but an unmarried partner would have no such rights to inherit under the law, and assets might pass to the deceased partner's other family members. An estate plan is essential to ensure that each partner is provided for if that is the couple's intent.

Outside of transfer tax or inheritance issues, many unmarried couples may find themselves in difficult circumstances if one partner becomes incapacitated, and they do not have the proper legal documents in place. Unmarried couples cannot assume that a doctor would follow the healthcare wishes expressed by one partner for another incapacitated one. Absent a health care directive, a physician might take direction from a legally recognized family member rather than an unmarried partner, because an unmarried partner is generally not

[8] For these purposes, a single individual is an individual who is unmarried and doesn't qualify as a surviving spouse or a head of household.

[9] On the flip side, if one spouse is a high earner and the other makes little or no income, then there could be a marriage bonus, meaning that the couple pays less federal income tax as a married couple than they would have had they been unmarried.

[10] For example, registered domestic partners are not considered married for federal tax purposes and cannot file federal tax returns as married filing jointly.

afforded visitation rights, access to medical records, or other important healthcare rights that married couples have. A properly executed health care directive can designate each partner as the person the other partner wants making health care decisions for them in the event one becomes incapacitated.

Similarly, having a power of attorney—a separate legal document that allows an individual to appoint an agent to act in that individual's stead in financial matters—may allow one partner to continue to execute financial documents, make rental or mortgage payments, and open and close accounts in the event one partner becomes unable to. Finally, most states have legal documents that allow one individual to appoint another to control the disposition of the remains of a deceased individual. An unmarried partner would normally have no right to control the remains of a deceased partner, so executing such documentation would allow the surviving partner to make funeral, burial, or cremation arrangements.

Family planning

LGBTQ individuals and same sex couples may choose to start a family in a number of different ways, including via adoption or ART. Adoption decrees are indisputable evidence of the parentage of a child. Post-*Obergefell,* married same-sex couples may petition to adopt jointly, so that both individuals can be recognized as the child's parent. However, in some states, unmarried couples (both same-sex and opposite-sex) are not permitted to adopt jointly. Thus, in these states, only one of the individuals will be legally recognized as the child's parent. This could create a slew of problems for the non-legal parent, from enrolling a child in school to making medical decisions on behalf of a child. A few states allow for second-parent adoptions, wherein a child may be adopted by an additional parent who is not married to the parent of the child.

An unmarried couple may face similar hurdles in establishing parentage of a child if they use ART to conceive. Most states' parentage laws presume that a woman who gives birth to a child will be regarded as the child's mother, and the mother's husband will be presumed to be the other legal parent. For obvious reasons, these presumptions do not work for same-sex couples. Nonetheless, the United States Supreme Court has ruled that same-sex married couples have "the same constellation of benefits that the States have linked to marriage,"[11] which includes a birth mother's same sex spouse being listed on a child's birth certificate. While this ruling was a victory for married LGBTQ couples, there is no similar rule for unmarried couples. In many states, the non-birthing individual will not be recognized as a legal parent, which could lead to future custody battles in the event the couple terminates their relationship.

Moreover, if the parent-child relationship isn't legally respected, that child may be inadvertently left out of the family's estate plan, which usually transfers property to heirs at law or descendants. Therefore, when having estate planning documents drafted for LGBTQ individuals, particular attention should be paid to the definition of "children" or "descendants." If the intent is to have adopted children or children conceived via ART to qualify as beneficiaries, then the estate planning documents should make this intention clear.

Finally, issues may arise in estate planning documents when naming specific beneficiaries or using gendered pronouns. Because a number of individuals who identify as LGBTQ may consider themselves gender non-conforming, the use of gender-neutral pronouns may be more respectful. In addition, individuals who transition genders may use a different name than the one given at birth, so naming beneficiaries in the estate planning documents should be done with care and with the flexibility to change the given name to the preferred name.

Respect for Marriage Act

In December 2022, Congress passed and President Biden signed into law the Respect for Marriage Act (RMA). The new law enacts rules requiring federal and state recognition of same-sex marriage in anticipation of any potential reversal by the Supreme Court of its prior rulings in *United States v. Windsor*[12] and *Obergefell,* the pair of landmark decisions that mandated federal recognition of same-sex marriage and made same-sex marriage the law of the land, respectively.

[11] *Pavan v. Smith,* 582 U. S. ____ (2017).
[12] *United States v. Windsor,* 570 US 744 (2013).

Because states have the primary authority to define marriage and delineate its benefits, Congress cannot simply enact a federal law requiring states to perform same-sex marriages. If *Obergefell* is overturned, a constitutional amendment would be necessary to force states to perform and accept same-sex marriages. An amendment, however, would be no small feat since a constitutional amendment—the last one of which was ratified 30 years ago—ultimately requires ratification by three-fourths of the states. Faced with this practical and political hurdle, Congress chose instead to enact laws that buttress the results of *Windsor* and *Obergefell.*

So while the RMA does not (and cannot) require states to perform same-sex or interracial marriages, the new law does three things to shore up state and federal recognition of those marriages. First, it repeals the Defense of Marriage Act (DOMA), the 1996 law that not only allowed states to deny recognition of same-sex marriages validly performed in other states, but also denied same-sex couples the benefits of marriage under federal law[13]. Those provisions of DOMA have been overturned already by the Supreme Court (in *Windsor*), but the RMA statutorily repeals DOMA in case those precedents are subsequently overturned. Second, the RMA requires states to recognize the public acts, records, and judicial proceedings of any other state pertaining to a marriage between two individuals and makes clear that states cannot deny such recognition on the basis of the sex, race, ethnicity, or national origin of those two individuals[14]. Third, the RMA establishes a "place of celebration" standard for recognition of marriages for federal benefits; that is, where marital status is a factor in any federal law, rule, or regulation, the RMA requires federal recognition of the marriage so long as it was valid in the state where the marriage was entered into[15].

Finally, in order to garner bipartisan support, as well as the necessary 60 votes to overcome any threat of filibuster, the RMA provides protection for a diverse set of beliefs around the issue of marriage equality by not only acknowledging directly in the statute that those beliefs can be both reasonable and sincerely held by others based on religious or philosophical premises, but also by allowing nonprofit religious organizations, including churches, religious educational institutions, and other religious nonprofit entities the right to refuse to provide services, accommodations, and other goods or privileges for the solemnization or celebration of a marriage[16]. Any such refusal, the law now makes clear, shall not create any civil claim or cause of action[17]. These religious liberty protections are perhaps the only novel and immediately effective piece of this new legislation, since those protections begin now; whereas, for as long as the *Obergefell* ruling remains intact, states do not have the authority to refuse to perform or recognize same-sex marriages. Only if the case is overturned by the Supreme Court do the new RMA rules around recognition have any meaningful effect. While the RMA cannot go as far as the *Obergefell* decision in its scope, it will provide valuable protections should any reversal of that decision occur, allowing same-sex couples to continue their marriages with dignity and respect throughout the United States.

[13] Pub. Law 117-228, § 3.
[14] Pub. Law 117-228, § 4.
[15] Pub. Law 117-228, § 5.
[16] Pub. Law 117-228, § 6.
[17] Pub. Law 117-228, § 6(b).

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