

# ADVANCED PLANNING BULLETIN

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## Planning for Same-Sex Marriage After Obergefell v. Hodges

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### Summary

The US Supreme Court has ruled that the Fourteenth Amendment requires states to recognize and license same-sex marriages. This article outlines planning implications for same-sex couples.

### Related Information

[Same-Sex Marriage And the Law: A Little Clarity A Whole Lotta Confusion; Defense of Marriage Act \(DOMA\) Overturned by US Supreme Court ; Same Sex Marriage: The Door Opens a Little Wider – IRS Allows Recalculation of Tax Treatment on Prior Gifts or Bequests.](#)

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In Obergefell v. Hodges,<sup>1</sup> the US Supreme Court ruled that prohibitions against (i) the performance of same-sex marriage and (ii) the recognition of a same-sex marriage performed in another state violate the Due Process and Equal Protection Clauses of the 14<sup>th</sup> Amendment. In so ruling, the Court ended conflicts between jurisdictions on same-sex marriage. This ruling has many planning implications for same-sex couples.

### **If you're married, you're married . . . and if you're not, you're not**

Same-sex couples who are not married should consider the many rights, protections and benefits of getting married, including the following:

1. Estate tax marital deduction and portability. Marriage enables the use of the unlimited estate tax marital deduction for property passing to a surviving spouse who is a U.S. citizen.<sup>2</sup> Marriage also enables a surviving spouse to use the deceased spouse's unused estate tax exemption amount (portability).<sup>3</sup>
2. Intestacy and spousal election rights. The intestacy laws in nearly every state favor a surviving spouse. Most states also grant a surviving spouse a right to elect against a will. Additionally, planning strategies such as QTIP trusts, QDOT trusts and marital deduction trusts are available for spouses. In the past significant planning was necessary to ensure that assets pass to a same-sex partner, but now the law provides different options and default rules for married same-sex couples. Financial planners need to make certain that same-sex spouses understand the "default" rules if they fail to plan.

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<sup>1</sup> 576 U.S. \_\_\_\_ (2015).

<sup>2</sup> I.R.C. § 2056.

<sup>3</sup> I.R.C. § 2010.

3. Conservatorship/guardianship. Most courts give priority to a spouse in a conservatorship and/or guardianship proceeding. Hospitals are also much more receptive to allowing a spouse to be in the room and participate in discussions and make medical decisions.
4. Gift tax marital deduction and gift splitting. Married couples are able to make unlimited tax free gifts to each other provided they are U.S. citizens.<sup>4</sup> Additionally, spouses can “split gifts”, treating all gifts made by one spouse to third parties during a calendar year as made one-half by each.<sup>5</sup>
5. Income tax planning. Married couples are allowed to file joint income tax returns with the I.R.S. and state taxing authorities. However, some couples, in order to avoid the “marriage penalty”, may choose not to marry to avoid the implications of being in a higher income tax bracket. The alternative minimum tax rules also need to be considered with high earning same-sex individuals contemplating marriage.
6. Spousal and survivor benefits for Social Security. There are a number of Social Security benefits, such as spousal benefits and survivor benefits, that are available to a married couple. However, if two individuals are contemplating marriage, they should consider whether they may be forfeiting other benefits. For example, if two single individuals who have been married previously are collecting benefits from their former spouses, they will lose those benefits if they get married.
7. Veterans and military benefits for spouses. The Veterans Benefits Administration offers a variety of benefits and services to spouses of service members and veterans who are deceased or totally and permanently disabled by a service-connected disability. These include education and medical care.
8. ERISA rules surrounding spousal protections under pension plans. Under ERISA, a surviving spouse is usually the automatic beneficiary of a retirement plan. The spouse must consent in writing if the employee wishes to name someone else as the beneficiary.<sup>6</sup>
9. IRA contributions and rollovers. A non-working spouse can qualify to make IRA contributions based on income earned by a working spouse. Additionally, a surviving spouse has the option to roll over the deceased spouse’s IRA into his or her own IRA and postpone distributions until age 70½.<sup>7</sup> In contrast, non-married partners who inherit an IRA cannot postpone IRA distributions.<sup>8</sup>
10. Spousal rights under employer sponsored health care plans. Most employers offer health insurance benefits for spouses of employees, which is especially advantageous if a spouse is self-employed (or unemployed). Additionally, health care insurance for a married couple is generally less expensive than two individual plans. Finally, there are protections under COBRA that are available to a covered employee’s spouse.<sup>9</sup>

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<sup>4</sup> I.R.C. § 2503.

<sup>5</sup> I.R.C. § 2512.

<sup>6</sup> 29 U.S.C. § 1055.

<sup>7</sup> I.R.C. § 408.

<sup>8</sup> Id.

<sup>9</sup> 29 U.S.C. § 1161.

Medicaid eligibility rules apply for married couples. When one member of a married couple applies for Medicaid, the countable assets of both the community (healthy) spouse and the ill spouse are totaled as of the “snapshot” date – the date on which the ill spouse enters either the hospital or a long-term care facility. As a general rule, the community spouse may keep one-half of the couple’s total countable assets up to a maximum amount (\$119,220 in 2015, with indexing thereafter). These rules do not apply to two unmarried individuals, so non-married partners are able to keep all of their assets.

### **But questions still remain**

1. There are still lingering issues that will likely be the subject of future litigation, particularly where children are involved. For example, it is not settled whether all states allow second parent adoption by same-sex couples, or whether same-sex couples can be foster parents.
2. No guidance was provided in the Obergefell decision on the retroactivity of the decision under various aspects of property and probate law, and if it is retroactive, how the effects can be minimized. For example, assume that one member of a same-sex couple died prior to Obergefell, and the surviving same-sex partner did not inherit certain property because their same-sex marriage was not recognized. An unanswered question is whether Obergefell should be applied retroactively to allow the surviving same-sex partner to inherit the property. In addition, should same-sex couples amend previously filed state income tax returns to change their filing status to married? Fortunately, one of these issues were addressed in IRS Notice 2017-15. In that Notice, the IRS confirmed that taxpayers will be allowed retroactive relief in recalculating the transfer tax treatment of prior gifts made by those individuals in same-sex marriages prior to 2013. But, the Notice also states that no credit or refund will be issued if any gift or estate tax was paid.
3. There has been some speculation that domestic partner benefits provided by certain employers will disappear as a consequence of Obergefell. Plan sponsors may decide to no longer recognize domestic partners now that all domestic partners can choose to get married. This could have strong impact on both homosexual and heterosexual couples who have chosen not to marry but seek the advantages of employee benefits from the other partner.

### **Conclusion**

As a consequence of the Obergefell decision, all states are now required to issue marriage licenses to same-sex couples and to recognize same-sex marriages validly performed in other jurisdictions. But with the marriage question answered, new questions arise which emphasize the continued need for careful planning.

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