Post-*Obergefell* – California Same-Sex Couples and the New Era of Federal and State Marriage Recognition

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Once again, June 26 has become a momentous day for the Supreme Court of the United States (SCOTUS) extending constitutional rights to same-sex couples. In 2003, *Lawrence v. Texas* (U.S. June 26, 2003) repealed so-called "sodomy" laws that prohibited same-sex intimate relationships, declaring these laws a violation of the constitutional right to privacy. In 2013, *United States v. Windsor* (U.S. June 26, 2013) repealed the so-called federal Defense of Marriage Act (DOMA) as a violation of the due process clause of the 5th Amendment, thus requiring federal recognition of same-sex marriages in states that recognize the marriages. And of course last week, on June 26, 2015, in a decision that literally brought rainbow lights to the White House, *Obergefell v. Hodges* declared marriage a fundamental right protected by the 14th Amendment of the U.S. Constitution in all 50 states throughout the country.

The most dramatic impact of the *Obergefell* decision will certainly be felt in the minority of states that had not previously permitted same-sex marriages. But even in the 37 states (including California) plus the District of Columbia where same-sex marriages were already recognized, the impact of *Obergefell* will still be felt in subtler but still important ways.

So what does the latest decision in *Obergefell* herald for same-sex married couples in California, if we already had federal recognition? Mostly, it affects cross-state rights, such as for couples who live in different states, are moving to and from different states, and owning property in different states. The following are some examples relating to property, taxes, and estate planning (trusts, wills, powers of attorney):

(1) Owning property in other states. Until the *Obergefell* decision, California same-sex married couples who owned property in states that did not recognize the marriage were left with some degree of limbo about the status of the property. In most states, property rights are governed by state law, and if a state is not recognizing a couple's marriage, it can negatively affect the couple's tax or property rights relating to that property. With a constitutional requirement to recognize marriages from other states, now all states will be required to recognize marital property rights of those couples.
POSSIBLE ACTION ITEMS: If you have property in a state that was not until last week recognizing same-sex marriages, it may be worth contacting your California estate planning attorney about whether anything can or should be changed in your estate planning documents relating to your

out-of-state property. Potential changes could involve new deeds, or for unmarried couples, a fresh look at whether it might make sense to consider marriage.

(2) Moving to other states. Until the recent decision, California same-sex couples who moved to states that did not recognize their marriage were left with some insecurity about their rights in relation to each other. Some of this insecurity could be tempered by having estate planning documents to assist with inheritance, financial management, and health care decision making. Other issues might require court action, such as relating to parental rights relating to minor children.

    POSSIBLE ACTION ITEMS: If you are parents of a minor child and considering moving to another state, make sure to talk to your family attorney about your parentage rights and presumptions <u>before</u> you leave California, in case it may still make sense to file some adoption paperwork for the non-birth parent. For your estate planning documents, have them reviewed by an attorney in that state <u>after</u> you leave California, ideally someone with a track record of working with same-sex couples and who has been keeping track of the evolution of the laws in that state.

(3) Moving to California from another state. As for anyone who moves from another state, same-sex married couples should have their estate planning documents reviewed by a California licensed attorney with a track record of working with same-sex couples. This review might also involve discussion of issues relating to California capital gains taxes, California property taxes, and California parentage rules.

(4) Couples living in different states. The recognition of marriage in all 50 states should greatly decrease the confusion that has arisen regarding certain federal and state rights where the two people in a couple live in different states. This is especially true where one state has not until last week recognized the marriage. If this scenario applies to you and you have not reviewed your estate planning documents in the last 2-3 years, you may want to review them again in light of the recent decision, to see if property needs to be re-characterized, marital provision altered, or new trusts set up.

As a reminder, <u>federal rights</u> for California same-sex married couples have been clear since the *Windsor* decision in 2013. On certain issues such as immigration and federal taxes, even married couples in states not recognizing the marriage were able to take advantage of these federal rights. On other issues, such as social security and Medicare, the states have been inconsistent in their willingness to recognize those federal rights.

Married couples in California should still be careful and not assume that their marital status alone will give all the protections needed. For instance, same-sex couples in California who have not had their estate planning documents reviewed since the *Windsor* decision in 2013 may be missing out on very valuable and important opportunities provided by marriage, such as:

(A) Federal capital gains protection at the death of the first spouse. In many cases, couples need to proactively transfer their property into community property by deed or by agreement or both. Failure to act could result in a loss of tens or hundreds of thousands of dollars for a surviving spouse.

(B) Review of estate planning documents to include marital trust provisions. If your trust has not been updated since 2013, it may not contain marital trust provisions that could save or eliminate the federal estate tax upon the death of the first spouse. Failure to act could be costly.

(C) Consideration of marriage by couples who are not yet married. If you have not at least considered getting married since the *Windsor* decision in 2013, you may be missing out on benefits that could save a lot of money for you and your spouse, either during life such as with social security spousal benefits, or at death from tax exemptions.

(D) Consideration of California state registered domestic partnership for couples who choose not to marry. We still have a state registered domestic partnership in California that offers marital benefits on the state level. If you choose not to marry, you may still want to consider domestic partnership registration to take advantage of state-level tax benefits relating to capital gains and property taxes.

The promise of the *Obergefell* decision is the leveling of the playing field for all married couples regardless of state of celebration, or state of residence, and regardless of where couples move between or own property across different states. In this new era of federal and state recognition, we will soon see a time where the planning issues will be virtually identical for same-sex and opposite-sex married couples. In the meantime, please check your documents and have them reviewed, especially if you have cross-state issues or have not reviewed your documents since 2013. A little bit of time now could save a ton of time, money, and headache in the future for you and your beloved.

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