GPSOLO
SOLO, SMALL FIRM & GENERAL PRACTICE DIVISION A PUBLICATION OF THE AMERICAN BAR ASSOCIATION

Advising Same-Sex Couples after *Obergefell* and *Windsor*

Vol. 32 No. 4

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Arlene Zarembka is a solo lawyer in St. Louis, Missouri, whose practice concentrations are estate planning, elder law, probate, and co-parent adoptions. A large percentage of her clientele is from the LGBT community. The author and her spouse were one of the ten plaintiff couples that successfully challenged Missouri's ban on recognition of same-sex marriages in *Barrier, et al. v. Vasterling, et al.*, #1416-cv03892 (Circuit Court, Jackson County, Mo., Oct. 3, 2014), which was filed by the American Civil Liberties Union of Missouri.

Two years ago, the U.S. Supreme Court, in a 5–4 decision written by Justice Anthony M. Kennedy and joined by Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor, and Elena Kagan, held that Section 3 of the federal so-called Defense of Marriage Act (DOMA) violated the Equal Protection and Due Process Clauses of the Constitution. *United States v. Windsor,* 133 S. Ct. 2675 (2013). Section 3 prohibited any federal recognition of same-sex marriages at any level of the federal government and limited the definition of "spouse" to a "person of the opposite-sex who is a husband or wife." The *Windsor* Court did not decide, however, whether a state must recognize same-sex marriages lawfully performed outside the state or grant marriage licenses to same-sex couples within the state.

A flood of litigation filed by same-sex couples ensued in states across the country—some seeking recognition of marriages performed in other jurisdictions, and others seeking the right to marry in their states. Most courts ruled in favor of the same-sex plaintiffs.

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GPSolo magazine is published six times a year (January/February, March/April, May/June, July/August, September/October, and November/December) by the ABA Solo, Small Firm, and General Practice Division.

GPSolo is devoted to themes of critical

But in November 2014 a panel of the Sixth Circuit Court of Appeals broke the trend of same-sex marriage victories. By a 2–1 vote, it upheld same-sex marriage bans and bans on recognition of out-of-state marriages in cases from Kentucky, Michigan, Ohio, and Tennessee. *DeBoer v. Snyder*, ___ F.3d ___ (Nov. 12, 2014). The Supreme Court granted petitions for a writ of *certiorari* involving all four states *sub nom Obergefell v. Hodges*.

Exactly two years after the *Windsor* decision, the Supreme Court ruled in *Obergefell v. Hodges,* ___ S. Ct. ___ (June 26, 2015) that states must: (1) issue marriage licenses to same-sex couples on the same basis that they issue licenses to different-sex couples and (2) recognize any lawful same-sex marriage performed in another state or country. The Court's decision also applies to territories, but not to Native American tribes (which are sovereign nations). Again, it was a 5–4 decision written by Justice Kennedy and joined by the same four justices as in *Windsor*.

The Court held that the right to marry is a fundamental right inherent in liberty, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples cannot be "deprived of that right and that liberty." The Court emphasized that religions that oppose same-sex marriage may continue to teach their principles regarding marriage, as can individuals who oppose same-sex marriage for other reasons. "The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." The Court concluded:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. . . . It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

Essentials of Representing LGBT Clients

If you want, or have, any LGBT (lesbian, gay, bisexual, transgender) clientele, it's crucial that you understand the issues

and concerns of the LGBT community. You cannot do so without knowing the very long—and continuing—history of prejudice and discrimination against LGBT persons. You also must be 100 percent comfortable with LGBT persons; most LGBT clients will sense any discomfort. And you need to keep abreast of the rapidly changing legal landscape affecting the LGBT community.

Don't assume that all same-sex partners, even long-term partners, plan to marry. Many gay and lesbian partners, particularly older couples, have lived for years without the option to marry. Although marriage is now possible for all same-sex couples, many couples are weighing the pros and cons of marriage before running to get a marriage license. And many of those who do marry still do not have the full recognition of their marriage that different-sex spouses take for granted.

Advising Same-Sex Couples about Marriage

When advising a same-sex couple about marriage, it's important to have a complete picture of the couple's income and assets. Ask which assets are owned jointly and which separately. Ask about any medical conditions that might result in nursing home placement in the future.

State statutes have numerous provisions that differ depending on whether a person is "married" or "single." If an applicant for public assistance benefits (such as Medicaid) is considered "single," only her or his own income or assets are considered in determining eligibility. Before the applicant can be eligible for Medicaid, his or her "countable" assets must be spent down to the minimum amount allowed by the state's Medicaid rules. If the applicant is married, however, then the income and assets of both spouses are considered in determining the applicant's eligibility. Moreover, some states consider the income and assets of both partners who are *not* married in determining the eligibility of one of the partners. Assets cannot be transferred or given away to qualify for Medicaid because Medicaid "looks back" five years from the application date for any transfers of assets. It will impose a penalty period for gifts made during that five-year period, including donations. Thus, in some cases, remaining as unmarried partners will be preferable to marrying, at least from a public benefits eligibility perspective.

Most long-term same-sex couples contemplating marriage are unlikely to want a prenuptial agreement. But if they do, they each need separate legal counsel. You should not represent either of them in negotiating or drafting the agreement, as this would be a conflict of interest and open you up to a potential claim by a disgruntled client if the couple later divorces.

Consequences of Marriage

Policies issued by federal departments since *Windsor* require that legally married same-sex spouses be treated the same as different-sex spouses in programs under the jurisdiction of that

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department. For example, all same-sex married couples must file as married for all federal tax purposes.

Many couples focus on the immediate financial impact of marriage. But there are other consequences of which a couple may be unaware that could have a major impact later. These include the marital privilege in court and standing for a surviving spouse to pursue a wrongful death claim if his or her spouse is killed owing to another's negligence or wrongful act. Moreover, marriage could adversely affect such government benefits as insurance subsidies under the Affordable Care Act or eligibility for public assistance programs.

A married person cannot designate anyone other than his or her spouse on most retirement plans and accounts, unless the spouse gives written consent. If a client has named someone other than the partner as beneficiary of all or part of a retirement plan prior to marriage, it is important that the partner (now spouse) consent to such beneficiary designation after marriage; or, if the spouse does not consent, then the client must revise the beneficiary designation to name the spouse as the 100 percent primary beneficiary.

If a client may be entitled to benefits from Social Security based on his or her living or deceased spouse's benefits, the attorney should find out if the client is aware of such benefits. If not, then the attorney should advise the client to meet with a representative at the Social Security office as soon as possible to determine the potential benefits available so that he or she can decide whether to apply for them. Moreover, the biological, adopted, or dependent stepchild of a deceased wage earner also might be eligible for survivor benefits.

Same-sex married federal employees have the same spousal rights as different-sex married employees. The Office of Personnel Management (OPM) also has an expansive definition of "family members" for purposes of sick leave, funeral leave, and several other leave programs (including an employee's same-sex domestic partner, the children of the partner, and some other relatives of the partner).

A U.S. citizen or lawful permanent resident can sponsor his or her same-sex spouse or fiancé for family-based immigration. The U.S. Citizenship and Immigration Services also is reopening all previous immigration petitions that were denied solely because of Section 3 of DOMA.

Wills and Other Estate Planning

If you are preparing estate planning documents for a same-sex couple, married or not, ask: (1) how they want to refer to each other in their documents—do not assume they want to use "wife," "husband," "spouse," or "partner"; (2) whether there are relatives who might challenge the distribution of assets upon death or who might seek to remove the person designated to serve as attorney-

in-fact for health care and financial decision making upon incapacity; and (3) whether they wish to include no-contest clauses in their wills and/or trusts to exclude from receiving any portion of their estates anyone who contests the distribution of their assets after death and/or files suit seeking removal of their designated attorneys-in-fact in their powers of attorney for health care and/or financial affairs.

Determine what, if any, state law exists regarding the "right of sepulcher" (disposition of the body upon death) for married and unmarried decedents. Understand that many in the LGBT community consider one or more persons who are not "next-of-kin" (legally speaking) to be part for their chosen "family." Careful drafting of the "right of sepulcher" document is essential to ensure that the client's chosen person will have this right.

If a couple does marry, one of the important protections married couples can have in most (perhaps all) states is tenancy by the entireties protections from creditors. Therefore, draft the documents to re-title any property that is jointly owned by the couple before marriage into tenancy by the entireties ownership after marriage. I suggest including the date and place of marriage in the deed.

Be aware that some statutes might refer to "husband and wife" rather than "spouse." In light of the *Obergefell* decision, such statutes should be interpreted as applicable to same-sex spouses as well as different-sex spouses. However, in conservative states, some judges might conclude that these statutes are not applicable to same-sex spouses. To avoid such a ruling, such statutes need to be revised to refer to "spouse" and not to "husband and wife." It is important that attorneys draft revisions to such statutes and advocate both with their bar associations and in the state legislatures for such revisions.

Many married clients (and, unfortunately, some attorneys) believe that a married person does not need a health care power of attorney, thinking that the spouse will be able to make health care decisions upon incapacity. In some states, however, a spouse does not automatically have the right to make health care decisions for an incapacitated spouse. Although many doctors will turn to the spouse for consent to treatment or termination of life support, failure to have a health care power of attorney can be very unfortunate if a dispute erupts among family members regarding treatment or end-of-life decisions. This is especially true if some relatives are not supportive of the same-sex relationship. Moreover, relatives' apparent "acceptance" of an LGBT family member's partner or spouse can change drastically when serious illness, injury, or death occurs. Lack of a health care power of attorney can mean that a court will need to appoint someone to make the decisions if the incapacitated person's spouse is deceased or incapacitated or in the case of a family dispute.

Regulations issued by the Obama administration require any hospital that receives Medicare or Medicaid funds—which are virtually all hospitals—to allow a partner to visit an ill partner in the hospital. Nevertheless, it's important for same-sex couples to carry a copy of their spouse's or partner's health care power of attorney (and any marriage license and/or domestic partner/civil union registration) in their car and also in their carry-on luggage when traveling. Health care facilities might not accept the assertion of a same-sex spouse or partner that he or she is the spouse or partner of the injured patient, so documentation is essential to ensure visitation and health care decision making by the partner.

Adoption

When same-sex couples, whether partnered or married, are raising children together and only one partner or spouse is recognized legally as the parent, major problems can arise. The children's lack of a legally recognized relationship with the other partner or spouse can result in tremendous psychological and financial harm to the children. For example, if the legally recognized parent dies, a relative of the deceased parent, rather than the co-parent, might be appointed as the children's guardian or conservator. If the couple separates, the legally recognized parent might attempt to cut the children off from contact with the co-parent. If the co-parent dies, the child might not receive survivor benefits otherwise available if the co-parent were a legally recognized parent.

In many states the couple can obtain a co-parent adoption (sometimes called a second-parent or stepparent adoption) so that both partners or spouses become legally recognized as parents of the children. In co-parent adoptions, be sure that the *guardian ad litem* appointed to represent the children's interests supports co-parent adoptions by same-sex couples. Some judges will grant co-parent adoptions whether or not the couple is married. Other judges will only grant such adoptions if the couple is married; if there are reasons the couple does not want to marry (see above), attempt to persuade the judge that the children's best interest is in having two legally recognized parents, regardless of whether the parents are married. If there are no judges who will grant such adoptions to a same-sex couple under any circumstances, then it's important to consult with legal organizations such as the National Center for Lesbian Rights, the American Civil Liberties Union, or Lambda Legal regarding possible litigation challenging the court's refusal to consider co-parent adoption petitions by same-sex couples on the same basis as adoption petitions by different-sex couples.

An adoption tax credit is available to a partner who adopts the other partner's child. The adoption tax credit is not available, however, to a person who adopts his or her spouse's child. Therefore, if a couple is considering both marriage and a co-parent adoption, it may be financially advantageous to complete the

adoption prior to the marriage. However, be aware that Internal Revenue Service policies could change as to the availability of an adoption tax credit for same-sex partners who are not married.

Even if the couple was married at the time a child was born to or adopted by one of them, a co-parent adoption is important to protect the child's relationship with the non-biological or non-adoptive parent. There may be jurisdictions within the United States or elsewhere that will refuse to recognize the co-parent as a legal parent unless there is a formal adoption decree that names the co-parent as a parent of the child.

A Final Caution

Even though the Supreme Court has struck down all bans on same-sex marriage and marriage recognition, this is not the end of the struggle for full equality for the LGBT community. Some opposed to equal rights for LGBT persons are claiming that the *Obergefell* decision violates religious freedom, even though the decision makes it clear that no religious denomination is required to marry anyone. On June 28, two days after the *Obergefell* decision, the attorney general of Texas authorized county clerks in the state to deny marriage licenses to same-sex couples based on a clerk's religious objections.

Moreover, there is no federal law that prohibits discrimination by private companies based on sexual orientation or gender identity in employment, public accommodations, or housing, and many states still lack such anti-discrimination protections. Discrimination against LGBT persons in housing, employment, and public accommodations also has been justified under "religious freedom"—or simply out of prejudice against LGBT persons. In states without anti-discrimination protections, a gay or lesbian employee can marry his or her partner but be fired if the employer learns of the marriage or of the employee's sexual orientation or gender identity. Thus, the struggle for full equality for the LGBT community is far from over.