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Estate Planning and Related Issues for Same-Sex Couples in 2017: *Obergefell v. Hodges* Did Not Eliminate the Need for Extra-Careful Planning When It Created National Recognition for Same-Sex Marriages

In June 2015, the U.S. Supreme Court held, in the case of *Obergefell v. Hodges,* that marriage is a fundamental right that extends to same-sex couples. This decision was hailed by many as an important advancement, and was believed to have settled many of the issues that same-sex couples used to face in doing their estate planning and dealing with various other legal issues. However, more than two years later, these couples are still facing a number of specific issues that they must address in their estate planning, many of which are not faced by opposite-sex married couples. In large part, this is due to the need for a large number of state and federal laws to be appropriately interpreted in light of the *Obergefell* ruling. It is also due in part to some of the positions being taken by President Trump's administration, and to how those positions differ from the ones taken by former President Obama's administration.

The state of Georgia began officially recognizing same-sex marriages on June 26, 2015. However, in order for Georgia to recognize a marriage entered prior to that date, the marriage had to have been valid at the time of the actual ceremony, under the laws that applied where the ceremony took place. Before *Obergefell*, state laws regarding same-sex relationships, and the extent to which they would be recognized under state law, were wildly inconsistent. A couple may have had marriage ceremonies in more than one state, perhaps in an attempt to ensure that they were still recognized as married after moving from one state to another. A couple could have married in one state and then had a registered domestic partnership in another state. In many cases, a same-sex couple who got married in one state but ended up living in a state that did not recognize their marriage may not have been able to get legally divorced when they decided to break up. Some of the members of these couples may then have entered new relationships and attempted to marry a new spouse, without having legally divorced the prior spouse. For these reasons, a same-sex couple who married before June 26, 2015 should review the facts and circumstances surrounding their marriage with their attorney in order to determine whether the marriage was valid at the time of the ceremony. If the marriage's validity is questionable or non-existent, then the couple may need to have a Georgia marriage performed in order to ensure that they are recognized as married under state and federal law. They may also need to take other steps, such as getting a formal divorce from a prior spouse.

Couples where one or both members are transgender can also face difficulties in ensuring that their marriages are recognized. Even if the couple is opposite-sex, the fact that one or both members may have previously been or may still be legally considered to be a different gender can create significant difficulties. In addition to discussing the facts and circumstances surrounding the couple's marriage with their attorney, they should also clarify the exact status of the transgender spouse's transition at the time of the marriage. In many states, if the couple's marriage was valid at the time it was entered, it would remain valid even if one spouse

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subsequently transitioned to a different gender. However, in many other states, the transition, if recognized under state law for identity purposes, could also negatively affect the status of the couple's marriage if the state would not have recognized the marriage based on the genders of the couple under pre-*Obergefell* law.

Same-sex couples, even married ones, may also face issues created by other familial dynamics, in addition to marriage. Some of these issues arise when one or both members of the couple have children from a prior relationship. It may be difficult or impossible to ensure that the stepparent member of the couple is able to maintain a continued relationship with the stepchildren if the legal parent dies or the couple divorces. If such a continued relationship is desired, the couple will need to plan as carefully as possible to ensure that their wishes are spelled out. Even more importantly, if the couple wants to have or adopt children together, they must plan very carefully to ensure that each party's parental rights and interests will be respected if they divorce, or if one of them dies. If the child is not legally adopted by both spouses (or by the non-birth spouse, if one spouse carries and gives birth to the child), if the child was conceived through artificial insemination before the couple was married, or if the child was conceived without the written consent of both spouses before the insemination and pregnancy, the couple may find that only one of them actually has legally recognized parental rights under Georgia law.

Under O.C.G.A. Section 19-7-20, children who are born during a marriage, or during the usual period of gestation after a marriage ends, are presumed to be the legal child of both spouses. Under Section 19-7-21, a child who was born during a marriage or during the usual period of gestation after the marriage ends and who was conceived through artificial insemination is considered the legal child of both spouses if both spouses consented in writing to the use and administration of the artificial insemination. However, if a couple was not legally married (or legally recognized as married) when the child was born or adopted, they need to note that simply having both members' names on the child's birth certificate does not necessarily mean that both persons will be legally recognized as the child's parents. Instead, a biological connection, a parentage order, or an adoption order may be required. In addition, there has been a trend in some areas to resist the application of laws similar to O.C.G.A. Section 19-7-20 to a child where the spouses are of the same sex, and to refuse to acknowledge both spouses as the legal parents of a child born to them during their marriage. If a couple has children who were born or adopted outside of Georgia, the attorney must remember to ask where the couple's parental rights were acquired. This is because there have been a number of states (such as, Arkansas, Mississippi, and New Jersey) where a person listed on a child's birth certificate as a parent has still been denied parental rights. A legal adoption order from another state would normally be entitled to recognition in Georgia, but simply having a person listed as a parent on a birth certificate issued by another state does not entitle the person so listed to recognition as a parent in Georgia unless they would also qualify for recognition in the state that issued the birth certificate. If it appears, after consideration, that one spouse may have less-than-solid legal standing as a parent, then options for changing that status may be available and can be considered. Solutions may be possible, such as having that spouse complete a legal adoption as a stepparent or second parent

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of the child. However, if a potential parental standing problem is not discovered in a timely manner during the planning process, it may be difficult or even impossible to address it when that spouse's rights are being challenged.

If a member of a couple is not legally recognized as the parent of a child, this can affect the child's rights with regard to that member of the couple in addition to affecting the rights of that member with regard to the child. If the couples divorces while the purported parent is still alive, the purported parent also may not be held responsible for child support. If the purported parent dies, the purported child will not normally have any rights with regard to the deceased purported parent's estate, except to the extent, if any, that the deceased purported parent named the purported child as a beneficiary under his or her estate planning. The purported child would not be recognized as an heir, either for intestacy purposes or for year's support purposes. The purported child would also have no right to make a claim for damages resulting from the wrongful death of the purported parent.

For those same-sex couples who are not married, and who do not wish to marry, there are also a number of special estate planning issues to be considered. However, most of these issues are actually the same issues that apply to unmarried opposite-sex couples. One major issue for unmarried couples who wish to stay that way is determining who will be each member's likely heirs in the event of a member's death. If the couple wishes to benefit each other, or others, instead of, or in addition to, their respective heirs, then they will need to be extra careful in designing and implementing their estate plans. Disappointed heirs may decide to contest a deceased person's Will or other estate planning documents. In addition, unmarried couples need to be aware that they are legally considered strangers to each other for many purposes other than heir status. For example, neither could make a claim for wrongful death damages if the other member died; neither will be considered next of kin for purposes of making medical decisions or even being allowed visitation in a hospital, nursing home, or similar facility; and neither will be a default beneficiary under a life insurance policy, tax-deferred retirement savings account, or qualified plan.

If you are a same-sex couple who is concerned about your existing estate planning, or if you haven't done any estate planning, we at Morgan & DiSalvo are here to help. Please contact our office administrator at (678) 720-0750 or info@morgandisalvo.com in order to schedule your estate planning consultation.