The Effect of Obergefell v. Hodges for Same-Sex Couples

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The U.S. Supreme Court decision in *Obergefell v. Hodges* is a landmark decision which will affect same-sex marriages throughout the nation. The decision was issued on the second-to-last decision day of the term, and provides that same-sex couples have had a constitutional right to marry since at least the passage of the Fourteenth Amendment. This ruling may come as a surprise to same-sex couples who were unable to marry in many states as late as 9:59 a.m. the morning of the *Obergefell* decision. Given this ruling, however, the legality of same-sex marriage is now the law of the land, and same-sex couples can now receive the benefits (and, yes, burdens) of marriage that were largely exclusive to heterosexual couples. Provisions and protections of several legal areas will apply to same-sex couples going forward, so it is imperative to understand some of the avenues now available.

Among the most fundamental changes from *Obergefell* are in the area of family law. Many states recognized the existence of domestic partnerships as a kind of work-around to allow same-sex couples to receive some of the same benefits as married couples. Kentucky did not recognize these types of arrangements in an official sense, but couples could create domestic partnership agreements as a form of contract to assist in dissolving the relationship and disposing of assets as necessary. Now that marriage is available to those couples, however, individuals who entered these agreements should consider invalidating those agreements and forming either a pre-nuptial agreement (for same-sex couples who did not legally marry before *Obergefell*) or a post-nuptial agreement (for same-sex couples who are already legally married). Couples should keep in mind that merely applying the term "post-nuptial agreement" to an existing domestic partnership agreement will not transform the latter into the former. There are specific requirements for a valid post-nuptial agreement that must be followed, so these agreements should be drafted as an original document, even if a valid domestic partnership agreement was previously in place.

Adoption in Kentucky will likely see some changes as well. Single LGBT individuals could adopt in Kentucky before *Obergefell*, and same-sex married couples will now be able to as well. The most major change from an administrative standpoint is that forms will require an update from "mother" and "father" to a more generic "parent," but the law in the area is relatively black and white: married couples may adopt in Kentucky, and same-sex marriages are now legal. Prior to the ruling, same-sex couples faced a myriad of difficulties and a largely gray legal area in adopting. The end of the prohibition on same-sex marriage will do away with the necessity for any of the various methods same-sex couples previously had to use for both partners to adopt.
There are several other advantages available to married same-sex couples in Kentucky now. For instance, Kentucky couples may now file their state tax returns as "married filing jointly," and should consider doing so if financially advantageous. Couples who had legal marriages in other states prior to this year may also amend their state tax returns up to two years from the date of overpayment of state taxes to request refunds that would have been available to them had their marriages been recognized.

Property laws also convey certain rights and options to same-sex married couples. While married couples can and do choose different forms of real property title, they are exclusively eligible for a designation known as "Tenancy by the Entireties." Under Tenancy by the Entireties, each spouse owns a 100% interest in the real property. When one spouse dies, the other spouse immediately receives title to the full property without the need for probate or intestate succession.

Intestacy laws, which govern the descent of property when a person dies without a will, typically favors a spouse, and same-sex spouses can now take advantage of these laws. For instance, a surviving spouse is entitled to a full half interest in an intestate estate. Even if a Will exists, a surviving spouse may legally renounce the Will and receive his or her share as if the testator died without a Will.

Finally, same-sex couples can take advantage of marital benefits of estate planning. For instance, portability allows the unused estate tax exclusion amount (currently $5.43 million) to be used by the surviving spouse in addition to his or her own exclusion amount. Additionally, the Kentucky inheritance tax does not apply to the portion of the estate received by Class A beneficiaries, which includes spouses.

There are many other benefits (and possibly burdens) for same-sex couples whose marriages are now legally recognized by the state. The best way to understand and maximize those potential benefits is to consult with an attorney to plan for your family and your estate.

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