SAME-SEX MARRIED COUPLES,
THEIR ESTATE PLANNING, AND THE LAW

Michael J. Tucker
Certified Specialist in Estate and Trust Law
MICHAEL J. TUCKER, P.C.
365 East Coronado Road, Suite 100
Phoenix, Arizona 85004

I. WINDSOR, OBERGEFELL, AND RECOGNITION: NOW WHAT?

Legal and tax planning for pioneering same-sex married couples in America, after a time of uncertainty and many unanswered questions, now enjoys relative clarity and simplicity, in particular since 2013. These remarks will summarize the developments in marriage law along the tightrope walk toward legal and tax certainty for same-sex married couples. I will then dwell briefly among some of the lofty and interesting legal questions posed by the status of such couples, who are now legally married for most purposes and may remain legal strangers for a few others. Finally, I include observations of practitioners as to the relationship of same-sex married couples with the legal framework that is developing to govern their circumstances.

State and federal judicial and legislative changes in the law (amid, perhaps as importantly, unrelenting media attention) redefined who can marry, as well as transforming the law governing civil unions and registered domestic partnerships, and effectively resolving the recognition or non-recognition by one American jurisdiction of marriages solemnized in another jurisdiction. As of this writing, same-sex couples may marry in all fifty states and the District of Columbia. Meanwhile, in the aftermath of the U.S. Supreme Court's decision in *United States v. Windsor*[1] declaring unconstitutional Section 3 of the federal Defense of Marriage Act ("DOMA"),[2] federal agencies (and, to some extent, private employers, educational institutions, health care providers, lenders, asset custodians, and others) are formulating policies to implement the updated meaning of "marriage" under federal law and to identify the marital status of those whose lives they touch. Taking a step further, the landmark case of *Obergefell v. Hodges*[3] held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Prior to *Obergefell*, a flurry of federal court decisions and other changes in the law had catapulted marriage equality toward nationwide uniformity. In view of the recent federal court decisions at all levels declaring state-level same-sex marriage bans unconstitutional, it will no longer be useful to regard the marriages of same-sex couples in American jurisdictions as "gay marriage"—rather, under the law, same-sex marriages and opposite marriages alike will more helpfully be regarded as "marriage," without qualification based on the gender of the spouses.

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1 570 U.S. 12, 133 S.Ct. 2675; 2013 U.S. LEXIS 4935 (2013).

2 28 U.S.C.A. § 1738C.

3 576 U.S. ___, 135 S. Ct. 2071, 191 L. Ed. 2d 953 (2015)

The term "unmarried" is now conclusively no longer useful in describing groups of couples with similar estate planning concerns. Indeed, same-sex couples who marry, particularly those who marry earlier in life, are now positioned in a way that is nearly identical to their opposite-sex married counterparts. After *Windsor* and prior to *Obergefell*, the complex legal circumstances of couples who had married in "recognition states" and then resided in or relocated to what were then "non-recognition states" became far more complex, both for the married couples themselves and for their employers, health care providers, lenders, and others. Such circumstances were dramatically simplified for most couples, particularly those without minor children, after *Obergefell*. These materials highlight the federal constitutional and regulatory framework now applicable to same-sex married couples, as well as focusing particularly on tax and estate planning concerns.

While same-sex couples can now marry in all American jurisdictions, households made up of unmarried and unrelated adults have not disappeared. Far from it. Over the last thirty or forty years, naturally enough, the increase in American households made up of unmarried and unrelated adults has led to increased demand for estate planning arrangements that meet their unique needs. It is useful to survey the available estate planning techniques for unmarried and unrelated adults and to contrast them with familiar techniques for married couples. Same-sex marriage recognition has not eliminated the need for sensitive planning for couples who choose not marry.

In today's legal environment regarding same-sex marriage recognition, lawyers must confront complexities created by clients' changes in circumstances, despite the resolution after *Obergefell* of state and federal marriage recognition laws. Opposite-sex married couples have long enjoyed relative uniformity of the laws of different jurisdictions as to their marital status and its effects (with the notable exception of community property law). Prior to *Obergefell*, the effect of a same-sex couple's marriage can differ across time, across state or national borders, and across areas of law. Nationwide same-sex marriage recognition now largely standardizes the legal effect of the marriage of a same-sex couple. The effect of a married same-sex couple's relocation to a new state of residence in now minimized.

Some of the challenges facing married same-sex couples are familiar to advisers working with opposite-sex couples who marry. For example, advisers of same-sex couples, particularly those who marry later in life, are now called upon to consider the effect of prenuptial agreements and the impact of state community property laws. Some legal concerns that were unique to same-sex couples, for example, how advisers would structure prenuptial agreements for couples whose marriages are recognized by the states in which they were solemnized, as well as by the federal government for some purposes, but not by the state in which the couples resides, have happily been relegated to the dustbin of history.

Legal issues as to the community property rights of same-sex spouses in Arizona and the timing of when those rights arose will likely be resolved in divorce court rather than in probate court. Advisers can anticipate that some disputes will arise as to the relative rights and responsibilities of couples who legally married after years, perhaps decades, of unwedded bliss. Divorce judges in community property states can look forward to arguments between same-sex couples who married pre-recognition, and who are now treated as married for all state and federal purposes, as to when the community property laws of their jurisdictions of residence became applicable to their marriages.

One area of complexity that has not entirely disappeared is the patchwork of state laws (not including Arizona) establishing same-sex domestic partner registry or civil unions. Some such

statuses created by state law were subsumed into marriage when same-sex marriage became legal in those jurisdictions, while others are preserved in the status they enjoyed prior to same-sex marriage recognition. Some of the pre-*Windsor* debate as to whether the federal government would recognize same-sex marriages legal under state law has now shifted, in a less broadly applicable arena, to whether federal law will recognize civil unions and domestic partnerships as if they were marriages.

Prior to *Obergefell*, the remarkably complex array of law as to where and how same-sex married couples can divorce was a labyrinth. This quagmire has thankfully been resolved in all American jurisdictions. Also, largely, same-sex marriage recognition has been accompanied by the applicability to same-sex married couples of state laws permitting married couples to adopt children. Matrimonial lawyers are relieved that the law applying to divorces of same-sex couples has become relatively simpler and clearer, namely, the same law that already governed divorces of opposite-sex couples.

However, in most states, adoption, child custody, child support, and related family matters involving same-sex couples (married or otherwise), still raise complicated questions. Such issues are beyond the scope of this article.

II. SAME-SEX MARRIAGE: POST-WINDSOR CASES, STATUTES, REGULATIONS.

A. **Windsor.** Until the decision of the Supreme Court in *Windsor* found it unconstitutional, Section 3 of DOMA prohibited the recognition of same-sex marriages for purposes of federal law, including federal tax law. Specifically, Section 3 of DOMA provided that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[4]

The majority opinion in *Windsor* mixed due process, equal protection, and federalism principles to find Section 3 of DOMA unconstitutional. The states' primacy in defining and regulating marriage is given pride of place in the *Windsor* opinion, which scrutinizes Section 3 all the more carefully because it posed a direct conflict with New York's legislative decision to treat same-sex marriages on a par with opposite-sex marriages, a decision that the *Windsor* majority praised for its "evolving understanding of the meaning of equality."[5] Section 3 of DOMA, however, was found "to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages . . . for purposes of federal law" and the Court could identify no legitimate purpose that could overcome the discriminatory purpose and effect of Section 3 of DOMA.[6]

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4 1 U.S.C. § 7.

5 *Windsor*, 133 S. Ct. at 2693.

6 *Id*. at 2692-93.

B. **Between *Windsor* and *Obergefell***. Both the casual observer and the dissenting justices were left to wonder whether the *Windsor* decision's foundations in federalism and due process/equal protection were inextricably linked or, alternatively, whether the due process interests, standing alone, could muster the same constitutional result absent federalism concerns.[7] By late 2014, however, the full scope of *Windsor* was crystallizing in other federal court decisions. After *Windsor*, federal appeals courts in the First, Second, Fourth, Seventh, Ninth, and Tenth Circuits, citing *Windsor*, overturned state constitutional and statutory bans of same-sex marriage.[8] Conversely, the Sixth Circuit upheld a state-level same-sex marriage ban, thereby creating a long-anticipated split in the circuits that led to the U.S. Supreme Court review of the issue in the *Obergefell* case. State officials and state courts also paid heed; even before their states became recognition states, state officials in Virginia, Pennsylvania, New Jersey, and Nevada cited *Windsor* as a decisive factor in their decisions to abandon their defense of state same-sex marriage bans, and New Mexico and New Jersey courts have relied on the decision to find that civil unions, which currently do not form the basis for conferral of federal benefits triggered by marriage, cannot substitute for state recognition of same-sex marriage.[9] Notably, *Windsor* also factored into courts' analyses of other sexual orientation discrimination claims, importantly resulting in greater protections in the areas of jury selection, employment and retirement benefits, and parental rights.[10]

C. **Regulatory Guidance**.

1. **IRS**. Effective September 16, 2013, the IRS considered all same-sex married couples as married for federal tax purposes if the marriage was legally recognized at the place of celebration, regardless of the couple's place of domicile.[11] This policy change was a direct result of *Windsor*, even prior to *Obergefell*. The impact of this "place of celebration rule" extends to

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[7] *Id*. at 2697, 2709-11, 2720.

[8] *De Leon et al. v. Perry*, No. SA-13-CA-00982-OLG, 2014 U.S. Dist. LEXIS 26236 (W.D. Tex. Feb. 26, 2014) (stayed pending appeal); *Bostic et al. v. Rainey*, No. 2:13cv395, 2014 U.S. Dist. LEXIS 19110 (E.D. Va. Feb. 13, 2014) (stayed pending appeal); *Bishop v. U.S. ex rel Holder*, No. 04-CV-848-TCK-TLW, 2014 U.S. Dist. LEXIS 4374 (N.D. Okla. Jan. 14, 2014) (stayed pending appeal); *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 U.S. Dist. LEXIS 179331 (D. Utah Dec. 20, 2013), stay granted, *Herbert v. Kitchen*, 134 S. Ct. 893, 82 U.S.L.W. 3382, (U.S. Jan. 06, 2014).

[9] David S. Cohen and Dahlia Lithwick, *It's Over: Gay Marriage Can't Lose in the Courts*, Slate (Feb. 14, 2014), http://tinyurl.com/lxb9mpk; *Garden State Equality v. Dow*, 434 N.J. Super. 163, 82 A.3d 336 (N.J. Super. L., Sept. 27, 2013); *Griego v. Oliver*, 316 P.3d 865 (N.M. S.Ct., Dec. 19, 2013).

[10] *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014) (jurors cannot be stricken on the basis of sexual orientation); *Cozen O'Connor, P.C. v. Tobits*, No. 11-0045, 2013 U.S. Dist. LEXIS 105507 (E.D. Pa. July 29, 2013) (ERISA definition of "spouse" must include same-sex spouses recognized by the state of Illinois), discussed in these materials in text accompanying footnote 38 below; *In re Fonberg*, 736 F.3d 901 (9th Cir. Nov. 25, 2013) (for federal employee, OPM distinction between same-sex marriages and civil unions constituted sexual orientation discrimination inconsistent with the District of Oregon's Employment Dispute Resolution plan); *D.M.T. v. T.M.H.*, 129 So.3d 320 (Fla. S. Ct. Nov. 7, 2013) (same-sex couples must be afforded the equivalent chance as a heterosexual couple to establish their parental intentions in using assisted reproductive technology to conceive a child).

[11] Rev. Rul. 2013-17, dated August 29, 2013.

federal income, gift and estate taxes, personal and dependency income tax exemptions where marriage is a factor, the earned income tax credit, the child tax credit, and retirement accounts. All same-sex married couples in the 2013 tax year and thereafter are required by Rev. Rul. 2013-17 to file their income tax returns as married (married filing jointly, or married filing separately). Each couple's total income tax liability could be higher or lower in any given tax year than if each of the spouses were to file their respective federal income tax returns as single. In practice, many same-sex married couples have failed to realize (or have ignored) the fact that married filing status applies to them for federal income tax compliance purposes. The author is unaware of IRS enforcement activity in this regard.

Same-sex married couples were permitted, but not required, to amend their filings for open tax years, as set forth in the Instructions for Form 1040X (Rev. December 2013) at www.irs.gov, with regard to same-sex married couples: "You may amend a return filed before September 16, 2013, to change your filing status to married filing separately or married filing jointly. But you are not required to change your filing status on a prior return, even if you amend that return for another reason. In either case, your amended return must be consistent with the filing status you choose. You must file the amended return before the expiration of the period of limitations."

To the extent any such tax years remained open, each same-sex couple married in a tax year prior to 2013 could have sought professional review of their past federal income tax return filings for the period after they were married, to determine whether or not it would be advantageous to amend any prior year tax return to file as "married," in order to claim a refund for higher income taxes paid for one or more years prior to 2013 due to the fact that they had not been allowed to file as married.

Note that a same-sex married couple's refund claim could include a claim for refund of taxes paid by an employee for the value of health insurance coverage provided by the employer for the employee's spouse, and included as part of the employee's gross income in one or more prior tax years. Such refund claims could extend to claims for taxes paid by an employee on premiums that an employee paid with after-tax dollars for health insurance coverage for his/her spouse (*e.g.*, in a cafeteria plan). The refund claim also could include Social Security and Medicare taxes paid by the employee on employer-provided health insurance benefits for his/her same-sex spouse.[12]

The Treasury Department and the Internal Revenue Service offered April 2014 guidance on how and when qualified employer-sponsored retirement plans have to apply the Supreme Court's decision in *Windsor*.[13] Notice 2014-19 clarifies that a retirement plan won't lose its qualified status under Section 401(a) merely because it did not recognize the same-sex spouse of a participant as a spouse before June 26, 2013, the date of the Supreme Court decision. Notice 2014-19 also clarifies that a retirement plan won't lose its qualified status due to an amendment to

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[12] See Q & A 10-12 in Answers to FAQs for Individuals of the Same Sex Who are Married, issued by IRS in conjunction with Rev. Rul. 2013-17.

[13] Notice 2014-19, released April 4, 2014. www.dol.gov/ebsa provides additional details about retirement plans governed by ERISA. The IRS later announced guidance in Notice 2014-19 on the retroactive application of the *Windsor* decision for retirement plans, and the Department of Labor plans to issue guidance on the definition of "spouse" in Title 1 of ERISA.

reflect the outcome of *Windsor* for some or all purposes as of a date prior to June 26, 2013, if the amendment complies with applicable qualification requirements. Retirement plans also didn't fail to meet qualification requirements if, prior to September 16, 2013, they recognized the same-sex spouse of a participant only if the participant was domiciled in a state that recognized same-sex marriages.[14] The effect of these rules is largely rendered obsolete by the U.S. Supreme Court's recognition of same-sex couples' constitutional right to marry under *Obergefell*.

Interestingly, and conversely, the applicable 2013 rules ensured that a retirement plan will not lose its qualified status due to an amendment to reflect the outcome of *Windsor* for some or all purposes as of a date prior to June 26, 2013, if the amendment complied with applicable qualification requirements. In other words, an employer/plan sponsor could have chosen to amend a retirement plan to define same-sex spouses of the plan participants as spouses for qualified plan purposes, even prior to the date of the *Windsor* opinion.[15] Whether or not an employer/plan sponsor was required to formally amend a retirement plan document to update the definition of marriage to conform to *Windsor* depended on whether the plan document as written included a definition of "spouse" or "marriage" that was inconsistent with post-*Windsor* federal law.[16] Qualified plans subject to plan documents that define marriage by reference to local law may not have to amend in order to update this definition post-*Obergefell*.

One might think that the *Windsor* decision, involving an estate tax case, might eliminate all further question about the applicability of the federal estate tax marital deduction to same-sex married couples. At least one commentator suggested that for a same-sex married couple living in a non-recognition state that also imposes a state-level inheritance or estate tax, the surviving spouse could be subjected not only to inheritance or estate tax at the state level, but also at the federal level, to the extent that assets otherwise qualifying for a federal estate tax marital deduction are used to pay state-level inheritance or estate tax.[17] Such fact scenarios would not be possible under post-*Obergefell* marriage equality laws.

2. **Department of Labor**. Pursuant to Department of Labor Technical Release 2013-04, dated September 18, 2013, all retirement plans subject to ERISA must provide the same benefits to an employee married to a person of the same sex as provided to employees married to opposite-sex spouses. Importantly, prior to *Obergefell*, this rule applied even if the employee lived in a non-recognition state.

If a married employee under a plan governed by ERISA wants to name anyone other than his/her same-sex spouse as the beneficiary of his/her retirement benefits under a defined benefit plan, his/her spouse must sign a consent to such an election. This is also the case for most defined contribution plans. Now that Section 3 of DOMA is removed from federal law, such rights of a spouse of plan participant under the Retirement Equity Act of 1984, previously limited to

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[14] Notice 2014-19, Q&A-2.

[15] Notice 2014-19, Q&A-3.

[16] Notice 2014-19, Q&A-5 through Q&A-7.

[17] Herzig, *Same-Sex Marriage and Estate Taxes: Why Windsor Is Still at Issue,* Tax Analysts 79, October 7, 2013.

opposite-sex spouses, are now extended to same-sex spouses of plan participants. This development in the law, coming on the heels of rapid social change, has resulted in some plan participants effectively "waking up married" for ERISA-qualified retirement plan purposes, perhaps years after they married their same-sex spouses under the law of, say, Canada or Massachusetts (where same-sex couples could legally marry beginning in 2004), at a time when federal recognition of their marriages was merely a dream of marriage-equality proponents.

3. **Military and Veterans**. After *Windsor*, the Department of Defense considered all married same-sex couples, both uniformed service members and DOD civilian employees, to be married for all DOD benefits purposes, including those living in non-recognition states. Same-sex military spouses were granted access to all military facilities that were available to military spouses. Prior to *Obergefell*, the DOD also extended "non-chargeable leave" to a service member who had arranged to marry someone of the same gender serving at a duty station that was more than 100 miles from a state that granted same-sex marriages, so that the service member and his or her partner could travel to a jurisdiction where they could legally marry.[18]

4. **Other Federal Employees**. After *Windsor*, the Office of Personnel Management extended federal benefits coverage to same-sex spouses, whether or not their state of residence recognized their marriage. A federal employee married to a person of the same sex is entitled to nearly all the same benefits to which federal employees married to an opposite sex couple are entitled, including survivor benefits for his spouse. Prior to *Obergefell*, the effect of this policy extended to married same-sex federal employees living in non-recognition states as well as those living in recognition states. Further, after *Windsor*, the children of same-sex married couples became entitled to family coverage under the federal employee's benefits, even if the federal employee had not legally adopted the children.[19]

In response to *Windsor*, the Office of Personnel Management opened an enrollment period for federal employees in same-sex marriages to allow those employees to update their benefit elections as to same-sex spouses, regardless of the employee's marriage date. OPM has treated all same-sex marriages as "new marriages" effective of the date of the *Windsor* opinion, allowing employees to add their spouses to their federal benefits. The open enrollment period closed August 26, 2013, but federal employees can elect to provide for their same-sex spouses in subsequent open enrollment periods.

5. **Family Medical Leave**. Importantly, after *Windsor* and before *Obergefell*, the definition of "spouse" under the Family and Medical Leave Act (FMLA) was based on the place of domicile of the employee. On August 9, 2013, Department of Labor Secretary Thomas Perez circulated an internal memorandum, advising his agency of the impact of *Windsor* and the resulting invalidation of Section 3 of DOMA, particularly as it applied to FMLA. The Department

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[18] Department of Defense Memorandum for Secretaries of the Military Departments dated August 13, 2013;http://www.defense.gov/home/features/2013/docs/Further-Guidance-on-Extending-Benefits-to-Same-Sex-Spouses-of-Military-M.pdf and DOD News Release 581-13 dated August 14, 2013.

[19] "Frequently Asked Questions--Same Sex Domestic Partner Benefits," which also includes information about benefits for federal employees in same-sex marriages, appears on OPM's website (www.OPM.gov), along with the OPM fact sheets listed in that FAQ.

of Labor then defined "spouse" as "…husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including 'common law' marriage and same-sex marriage." It may be apparent that the effect of this definition was subsequently eclipsed by *Obergefell*. Prior to *Obergefell*, however, the FMLA did not require that a non-federal employee married to a same-sex spouse and living in a non-recognition state be given unpaid leave to care for her ill spouse. However, an employee living in a non-recognition state who acts *in loco parentis* with regard to her spouse's (or unmarried partner's) child could be entitled to FMLA leave.[20]

In addition, same-sex domestic partners of federal employees, the children of a federal employee's same-sex domestic partner, and some other relatives of the federal employee's same-sex domestic partner have been identified by the Office of Personnel Management (OPM) as "family members" for the purposes of sick leave, funeral leave, the Voluntary Leave Transfer (VLTP) Program, the Voluntary Leave Bank (VLBP) Program, and the Emergency Leave Transfer (ELT) Program. Such policies presumably are continuing to benefit unmarried domestic partners of federal employees even after *Obergefell*.

6. **Immigration**. An American married to a same-sex spouse should be able, in many cases, to sponsor the spouse for a green card or a visa. Of course, under federal immigration law, the couple must, like opposite-sex couples, prove the *bona fide* nature of their relationship through evidence that they married one another to solemnize their personal relationship rather than simply to provide the foreign national spouse a green card. On July 1, 2013, just a few days after the *Windsor* decision, then-Secretary of Homeland Security Janet Napolitano issued a statement that directed U.S. Citizenship and Immigration Services "to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse." Same-sex married couples who applied for immigration benefits before issuance of the *Windsor* decision and who were denied because of DOMA may have sought to reopen their cases provided they meet certain criteria. An American married to a same-sex spouse who is also a non-citizen, or considering marriage to a same-sex spouse who is also a non-citizen, would do well to consult an attorney specializing in immigration law to determine whether or not to file an application to sponsor a spouse for a green card or visa.

Because *Windsor* required that same-sex marriages, wherever celebrated, be recognized under federal law, including immigration law, all same-sex married couples could apply for immigration benefits after *Windsor* in any state of the union. Same-sex couples, therefore, received equal protection of the law in the realm of immigration after *Windsor* and prior to *Obergefell*. This rule applied (and continues to apply) in cases involving collateral family members, such as a parent petitioning for an adult child and that child's same-sex spouse, a sibling petitioning for a sibling and that sibling's same-sex spouse, or an adult child petitioning for a parent and that parent's same-sex spouse. The key issue is proving the qualifying relationship that is a precursor to the specific immigration status in question. After *Windsor*, it no longer mattered under federal immigration law whether the relationship is between members of a same-sex couple or an opposite-sex couple.

[20] DOL Fact Sheet #28, August 2013.

Similar policies now apply to business immigration matters. As long as the same-sex couple is legally married, immigration benefits accrue to that foreign national spouse, just as they have for opposite-sex spouses over the years. For example, under a temporary worker visa in the immigration arena, a worker's spouse and children may come along to the United States as derivatives. No longer is there a different policy as between same-sex couples and opposite-sex couples.

Non-citizens in same-sex marriages with American spouses who successfully obtaining refugee or asylee status may give the same status to their spouses and children, provided those same-sex couples are legally married.

Relief from deportation is possible for some who have key family relationships with a permanent resident or U.S. citizen. Similar relief would now accrue to same-sex married couples. As with opposite-sex married couples, one must prove eligibility for that relief, known as cancellation of removal, by showing among other things that the person in question is a person of good moral character, as well as showing a high degree of hardship to the permanent resident or U.S. citizen spouse.

7. **Social Security**. Prior to *Obergefell*, if one was receiving Social Security disability or retirement benefits, his same-sex spouse might be entitled to spousal benefits of up to 50% of the benefit that he was receiving, while the retired or disabled spouse recipient continues receiving 100% of his/her own benefit. If a deceased spouse was receiving Social Security benefits prior to death, the surviving spouse might be entitled to 100% of the benefits that the deceased spouse was receiving at time of death. If the surviving spouse is already receiving her own benefits, she can decide whether it is more advantageous to continue to receive her own benefits or to receive the deceased's spouse's benefits. If there are children, they also might be eligibility for child benefits.

Prior to *Obergefell*, under the Social Security statute, Social Security looked to whether the marriage, civil union, or domestic partnership was recognized in the place of domicile of the wage earner (*i.e.*, the spouse upon whose earnings a claim for benefits is made) at the time of application for benefits. If the marital relationship was not recognized in the state of residence of the wage earner, then spousal benefits were not paid.

In February 2016, Social Security issued final regulations for same-sex married couples seeking benefits. The applicants' legal relationship status categories (other than marriage) are now referred to as "NMLRs," i.e., non-marital legal relationships. Social Security revised GN 00210.100 (Same-Sex Relationships – Spouse's Benefits) to add instructions for divorced spouses and surviving spouses, as well as to clarify not to use the dates of the *Windsor* or *Obergefell* decisions in determining the duration of marriages, but rather to use the date the couple was married or entered into the NMLR. The regulations also clarify when an internal legal opinion is necessary to determine the duration of a marriage or an NMLR.

Importantly, with respect to stepchild benefits, Social Security regulations clarified the procedure for stepchildren's benefits if there is no formal adoption and whether a stepchild can qualify for Social Security benefits on the earnings record of a step-parent, whether married or in a NLMR. The NMLR/marriage duration is a minimum of nine months, and there is a dependency

requirement (one-half of the stepchild's support). Dying or seriously ill step-parents may want to take steps to meet these requirements during their lifetime.

One of three new transmittals from Social Security in February 2016 relates solely to recognition of foreign marriages and NMLRs for spousal benefits and simplifies this process, no longer requiring automatic referrals to Social Security regional counsel offices for opinions. The biggest problem will be applicants in NMLRs that are not recognized in their state of residence, e.g., Arizona couples who are not married but are registered domestic partners in California. These claims will be denied. Clients in registered domestic partnerships and civil unions living in states that do not recognize that status will have their Social Security spousal benefit claims denied. Clients are effectively waiving Social Security spousal and survivor benefits by not choosing to marry if they have NMLR status and do not live in the state where that NMLR status is recognized. Legal opinion procedures must be followed with Social Security if the marriage took place in a foreign country and/or was non-ceremonial. The opinion must address if the non-ceremonial marriage, deemed marriage, or NMLR was permitted in the foreign jurisdiction and recognized by the state of domicile (or the District of Columbia if domicile is in a foreign jurisdiction) to convey spousal inheritance rights. If it wasn't so permitted or recognized, the relationship is not recognized as a valid marital relationship for Title II and Medicare purposes.

One of several little-known Social Security benefits is a check not just for a surviving minor child, but for a surviving parent of a disabled child (minor or adult). This separate benefit is paid for a parent on the deceased number holder's account for so long as the child is under age 16 or a disabled adult child (DAC). This benefit is important in special needs planning for an LGBT community parent with a disabled child. Many LGBT families do not undergo costly family formation strategies such as surrogacy, but often choose to adopt a foster child through the state. A disproportionate number of foster children are disabled before the age of 22, and Social Security provides a benefit both for that disabled child and for the caregiver parent, based on a deceased parent's earnings record, for life. The Social Security benefits eligibility for the disabled adult child effectively qualified the child for Medicare, typically resulting in improved health coverage, rendering the child's Medicaid coverage a supplemental role. The Social Security guidelines released in February 2016 describes the marriage and NLMR requirements. In particular, the new regulation describes when the nine-month duration of marriage is NOT required. The claimant must meet the following four requirements: (1) The claimant is the NH's surviving spouse or they were in an NMLR. (2) Determine if the claimant's marriage or NMLR with the NH meets the duration requirement, i.e., (a) the marriage or NMLR meets the 9-month duration requirement; (b) the claimant and the NH were married when they jointly adopted a child under 18 years old, or either of them adopted the other's child; or (c) the claimant is entitled or potentially entitled to, or has applied for, any of these benefits or payments: widow(er)'s, spouse's, parent's, disabled child's benefits (CDB), or annuity payments under the Railroad Retirement Act for widow(er)s, parents, or children age 18 or older; or the claimant was entitled to surviving spouse's benefits for the month before the NH died. A legal opinion may yet establish the requisite marriage or NMLR if none of these requirements are met. (3) The claimant must not have remarried, with certain limited exceptions. (4) The disabled child in care is the child of the claimant.

How do Arizona same-sex couples meet marriage duration requirements for Social Security spousal and survivor benefits? They can't rely on "stacking" duration of prior NMLRs

on top of the periods during which they were married at the time of applying for benefits, because Arizona law doesn't recognize the NMLRs. The "stacking" is widely applicable for same-sex couples who never married or whose NMLRs are recognized for Social Security purposes. Under the new guidance, Social Security regional counsel opinions are needed if the NMLR and marriage were not in the same state. Specifically, a claimant for spouse's benefits must meet a one-year duration-of-marriage requirement. A claimant for surviving spouse's benefits must meet a nine-month duration-of-marriage requirement.

The parent and stepparent of a child filing for stepchild benefits must meet the nine-month duration of marriage requirement if the NH is deceased, or the one-year duration requirement if the NH is living. If the nine-month duration requirement is not met for surviving stepchild benefits, an alternative or exception to the duration requirement may exist.

If the NMLR, by itself, does not meet the duration requirement or any of the exceptions to the duration requirement, but the claimant and the NH entered into more than one NMLR or also entered into a marriage, a Social Security regional counsel opinion may be needed. A combination of NMLRs, or combination of NMLRs and marriages with the number holder, may in total, meet the duration of marriage requirement without obtaining a Social Security regional counsel legal opinion if (1) the relationships all occurred in the same state and (2) the relationships were consecutive without any gap in time between the relationships.

A claimant is entitled to Title II and Medicare benefits as the number holder's same-sex spouse including aged spouses (including divorced spouse and independently entitled divorced spouse); spouses with child-in-care; and surviving spouses (including surviving divorced spouses and disabled surviving spouses). For currently married spouses, the relationship must meet the one-year duration of marriage requirement or one of the alternatives to the one-year duration-of-marriage requirement. For divorced spouses and independently entitled divorced spouses, the relationship must meet the ten-year duration of marriage requirement. For surviving spouses and surviving divorced spouses, the relationship must meet the nine-month duration of marriage requirement or one of the alternatives to the nine-month duration of marriage requirement.

D. **Just Married, and Now Already Widowed: Estate Tax Portability for Same-Sex Couples**. In recent years, estate planning attorneys have assisted opposite-sex married couples in designing estate plans that contemplate that the survivor may wish to elect estate tax portability, an option that became permanent under the American Taxpayer Relief Act of 2012. Under portability, a deceased spouse's estate can elect to pass any unused federal gift and estate tax exemption (a maximum of $5,490,000 for decedents dying in 2017) to the surviving spouse without creating a more complex estate plan involving separate trusts for the assets qualifying for the estate tax marital deduction and the assets to which the decedent's federal gift and estate tax exemption is applied. Electing estate tax portability can be appealing for surviving spouses who wish to avoid the administrative expense and time involved in administering separate subtrusts. Some months after *Windsor* and Rev. Rul. 2013-17, the IRS issued additional guidance[21] that gives extensions of time for electing portability, particularly for same-sex married couples who, obviously, didn't know they would be regarded as married for federal tax purposes

[21] Rev. Rul. 2014-18.

until after *Windsor* and Rev. Rul. 2013-17. Portability was the most attractive estate-tax reduction option for some same-sex married couples, who would not have had the opportunity to undertake the sort of "traditional" estate tax reduction planning long practiced by high-net-worth opposite-sex married couples to maximize both the federal estate tax marital deduction and their lifetime applicable exclusions.

III. MARITAL DEDUCTION PLANNING FOR HIGH-NET-WORTH SAME-SEX MARRIED COUPLES

After *Windsor*, transfers at death to a same-sex spouse can qualify for the federal estate unlimited marital deduction. As this article will later explore, prior to *Windsor*, "traditional" planning for same-sex couples (who by definition were unmarried for federal tax purposes), as well as for opposite-sex couples who had chosen not to marry, was largely focused on maximizing the use of "marital deduction substitute" techniques. The rapid increases in recent years to the federal estate tax lifetime exclusion amount have, if anything, an even greater impact on such planning than the changes in the same sex-marriage laws. In this environment, planners can now turn their attention to qualifying the bequests between high-net-worth same-sex married couples for the federal estate tax unlimited marital deduction.

In nearly all respects, the estate planning techniques applicable to opposite-sex couples now apply to same-sex married couples. Such couples are treated as married for federal tax purposes as well as for purposes of their state of residence. Even without estate planning, surviving same-sex spouses now constitute heirs-at-law who are entitled to certain intestate shares in the estates of their deceased spouses. Under federal tax law, such transfers will generally qualify for the federal estate tax unlimited marital deduction.

High-net-worth same-sex married couples may wish to implement marital deduction trusts to maximize the use of their respective estate tax lifetime exemption amounts, for the benefit of their intended remainder beneficiaries whose interests will vest after the surviving spouse's death. Alternatively, surviving spouses of same-sex marriages may choose to rely on the estate tax portability election in order to defer and minimize the impact of federal estate tax liability on beneficiaries whose interests will vest after the surviving spouse's death.

In states that also observe community property law, same-sex married couples may wish to create a joint revocable trust as a primary estate planning vehicle, whether or not federal estate tax reduction planning is a goal. Many same-sex married couples residing in community property states who observe an "everything in one bucket" approach to household finance management are likely to find that a joint revocable trust best reflects their shared financial reality. Federal recognition of same-sex marriages has eliminated some of the prior legal and practical complications of the use of joint trusts by same-sex unmarried couples, notably, the difficulties with reporting the trust's federal income tax attributes under the unmarried couple's two different Social Security numbers. This particular challenge is eliminated now that federal law and Internal Revenue Service procedures contemplate that such same-sex married couples will now report their tax attributes on joint federal income tax returns under one Social Security number.

IV. SAME-SEX COUPLES WHO MARRY: OTHER ADJUSTMENTS

Planners have relied on estate tax reduction planning techniques, in what we will now identify as "traditional" planning for same-sex couples, who by definition were unmarried for federal tax purposes prior to *Windsor*, and other couples who had chosen not to marry. It is useful to consider how and when to terminate or unravel such planning techniques.

A. **Community Property**.

Spouses, now including same-sex spouses, further benefit from state laws regarding community property, [22] tenancy by the entirety, intestacy, spousal exempt property and allowances,[23] and the like. Such benefits now extend to same-sex couples who marry and, in a dwindling number of states, to same-sex and opposite-sex domestic partners as provided by law.

Advisers in community property states must anticipate, along with the advent of same-sex marriage recognition, an increased incidence in couples who marry, after having have lived together as domestic partners for many years, perhaps for decades. Such couples may or may not be accustomed to regarding their collective income and assets as combined or joint, or the functional equivalent of community property, during the period of their cohabitation. Those couples who are not in the habit of considering their respective assets, income, and debts as being common or joint may benefit greatly from advice regarding the effect of community property law with respect to the portion of their income and assets that accrues after the marriage. Some such couples in community property states may, in fact, choose not to marry because of the effect of community property law on their respective assets or, perhaps more dramatically, on their respective debts. Those same-sex couples who affirmatively choose to marry may wish to minimize their respective exposure to the debts that their new spouse incurred prior to and during the marriage, through the use of prenuptial agreements[24] or otherwise.

The author has observed occasional confusion among couples and among advisers in community property states as to the applicability of community property law to such marriages. The author has observed such occasional anomalies as same-sex unmarried couples purporting to take title to a residence located in that state as community property with right of survivorship. A related issue has arisen with regard to the income tax basis adjustment for both spouse's community property interest in property upon the death of one of the spouses.[25] Notwithstanding federal same-sex marriage recognition after *Windsor*, there is not yet any federal income tax basis adjustment at death for both halves of a community property asset owned by registered domestic partners, insofar as the tax law doesn't recognize the validity of the registered domestic partners, and therefore the community property law of the state does not apply to the ownership of the

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[22] *See, e.g.*, A.R.S. Section 25-211.

[23] *See, e.g.*, A.R.S. Sections 14-2402, 14-2403.

[24] Darting for a moment down the rabbit hole of prenuptial agreements for same-sex couples, additional issues arise from their typical circumstances, namely, that they are choosing to marry following many years, perhaps decades, of cohabiting without the benefit or hindrance of a legal framework tailored to their relationship. These realities typically impact the couple's notions of fairness in any agreement as to property settlement upon possible future dissolution of their marriage.

[25] 26 U.S.C.A. Section 1014(b)(6).

property. The federal tax rule recognizing a basis adjustment for both halves of a community property asset relies of the existence of a community right under state law and cannot recognize an income tax consequence where no such right exists.

B. **Federal Estate and Gift Tax**.

Estate planning advisers to same-sex married couples will now routinely identify planning techniques that were created by or for unmarried couples who later marry and whose marriages will be recognized for relevant purposes. Advisers will find themselves recommending that some of those planning devices have outlived their usefulness due to the marriage or (more often) due to the dramatic increase in the federal estate tax lifetime exclusion in recent years.

Estate planning for unmarried couples, whether for same-sex couples or opposite-sex couples (collectively referred to herein as "domestic partnerships"), often involves planning for substantial transfers to or for the benefit of the surviving domestic partner (referred to herein as "domestic partners"). While many estate planning issues and federal estate tax reduction strategies applicable to domestic partners are identical to those for married taxpayers, other issues arise only in planning for domestic partners. Further, some techniques can be used for domestic partners but not for married taxpayers, typically because they are prohibited by family attribution rules found in the tax law.

Prior to the U.S. Supreme Court's ruling in *Windsor*, DOMA's express nonrecognition of legally-solemnized same-sex marriages had created complications for couples whose marriages were recognized for state law purposes (for couples living in or owning real property in stats that were recognition states prior to *Windsor*) but not for federal law purposes.

The Internal Revenue Code[26] does not specifically address the tax consequences of domestic partnership, even though taxing authorities now observe a "place of celebration" rule with respect to married same-sex couples for all federal tax purposes. Unmarried domestic partners cannot take advantage of the federal estate and gift tax marital deduction provisions of the Code,[27] or the federal gift tax provisions regarding gift-splitting.[28] Both married couples and unmarried domestic partners can avail themselves of the federal gift tax annual exclusion[29] (currently $14,000 per donee per year) and the federal gift and estate tax applicable exclusion amount ($5,450,000 for gifts and $5,450,000 for decedents dying in 2016). However, many other estate tax reduction techniques are available only to married couples. Notably, the federal gift and

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[26] References in this paper to "the Internal Revenue Code" or "the Code" are to the Internal Revenue Code of 1986, as amended. All section references herein are to the Internal Revenue Code of 1986, as amended, unless otherwise indicated. Historically, interpretation of the Internal Revenue Code has relied on state law for a determination of whether a particular taxpayer is "married" for tax purposes. The U.S. Supreme Court ruling in *United States v. Windsor* specifically considered the application of the federal Defense of Marriage Act, 28 U.S.C.A. § 1738C, which had prevented the IRS from recognizing same-sex marriage for federal estate tax marital deduction purposes, and declared a portion of the statute unconstitutional.

[27] 26 U.S.C.A. Sections 2053 and 2523.

[28] 26 U.S.C.A. Section 2513.

[29] 26 U.S.C.A. Section 2503(b).

estate tax unlimited marital deduction affords married couples (but not domestic partners or anyone else) the ability to transfer unlimited amounts of property to one another during life or at death without federal transfer tax consequences. Also, spouses (but not domestic partners) can make gifts of income interests in property to each other through inter vivos or testamentary QTIP trusts or through inter vivos or testamentary charitable remainder unitrusts, all without federal gift or estate tax consequences.

As noted above, federal estate tax reduction planning under current law is now relevant only to those unmarried couples in which one or both taxpayers expect to leave a taxable estate in excess of $5,490,000, a much higher exemption than what had been available under prior federal estate tax law. Those relatively few high-net-worth same-sex unmarried couples who would be impacted by federal estate tax liability under current law would now do well to analyze whether, when, and where to marry, now that federal taxing authorities have determined that same-sex married couples will be treated as married based on a place of celebration rule, as opposed to the law of the state in which the couple resides.[30] Such high-net-worth married couples may have relatively few legal incentives to marry under current law, other than the specter of significant federal estate tax savings; their relative financial freedom may render them far less reliant than most Americans on such federal benefits as Social Security, Medicare, Veterans Administration benefits, and the like, that would be impacted by marriage.

[30] Rev. Rul. 2013-17. The term "spouse" is defined broadly in the ruling to include all same-sex marriages that were performed in a domestic or foreign jurisdiction having the legal authority to sanction marriages – the "place of celebration" principle – without regard to the state law where the spouse is domiciled. The decision is effective prospectively as of September 16, 2013 (with an optional retroactive effective date for payroll and tax refunds within the statute of limitations). The IRS later issued additional guidance regarding the impact on qualified plans and issues surrounding possible retroactivity, Notice 2014-19, and promises to offer guidance on cafeteria plans, and a streamlined payroll refund process for employers.