Impact of the Supreme Court's Ruling on Same Sex Marriages on Estate Planning and Estate Administration

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On June 26, 2015 the Supreme Court of the United States, in ***Obergefell v. Hodges, Director, Ohio Department of Health***, in a five to four opinion ruled to allow same sex marriages in every state. The Court held that the 14th Amendment requires a state to license a marriage between two people of the same sex and to recognize the marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state. The Court said the 14th Amendment concepts of due process and equal protection require states to treat same sex couples the same as opposite sex couples with regard to the fundamental right of marriage. The ruling does not apply to civil unions or other arrangements where the couple is not lawfully married.

Rights of Same-Sex Couples

Same-sex married couples may now avail themselves of benefits and rights to which they were formerly denied access. A partial list of benefits includes income and estate tax benefits, the right to inherit property, the right to receive property through intestate succession, hospital access (including preference and decision making when a spouse is incapacitated), pension and retirement benefits, workers compensation benefits, spousal privileges in court cases, adoption rights and benefits offered to spouses at work, such as health insurance, and child custody. The couples also may have certain burdens and obligations that go along with marriage, such as a spouse's right to elect against an estate, an obligation to pay alimony to a divorced spouse, homestead rights and the prohibition on devise of homestead when married.

Effect on Homestead Provisions

In Florida, new estate planning and estate administration considerations will center on Florida's homestead provisions in Article X, Section 4 of the Florida Constitution and elective share statutes. Additionally, property rights will need to be re-examined to see if a now recognized marriage has changed the character of the property rights.

The Florida Constitution prohibits the devise of homestead property if a decedent was married at the time of his or her death or had minor children. If a marriage was not previously recognized in Florida, but has now become recognized, the ownership of homestead needs to be examined. The moment the marriage became recognized, the burdens and privileges of the Florida homestead laws attached to the homestead property. Although only one spouse may own the property, that spouse is not free to dispose of the property at his or her death if married. A second homestead scenario could arise if only one spouse had minor children and the other spouse had been barred from adoption. That other spouse, now married, may wish to adopt the other spouse's children. If the adopting spouse was the owner of the homestead property, the

Florida prohibition on the disposition and right to devise of homestead applies and the default rule that the surviving spouse receives a life estate and all of the decedent's children receive a remainder interest in the property is applicable. In the first instance, when the homestead owner is married, but there are no minor children, the disposition may be allowed if the other spouse signs a homestead waiver or post-nuptial agreement. In the latter case, children are involved and the creation of a complex trust may be necessary to address the homestead issues.

Other Property Rights

Couples whose marriages were not recognized but are now recognized should revisit how other property is owned. Prior to the marriage being considered valid, couples may have acquired property in different forms such as tenants in common or joint tenants with right of survivorship. Both forms of ownership are forms of joint tenancies. When property is titled as tenants in common, each party owns one-half of the property; and that one-half interest can be gifted, sold or devised as that owner chooses. When property is titled as joint tenancy with right of survivorship, the same rules apply, except, at death, each spouse's one-half interest in the property will pass to the surviving spouse. A third type of joint tenancy known as a tenancy by the entireties is only available to married couples. Not all states recognize tenancy by the entireties, but Florida does. The tenancy by the entireties form of ownership is similar to a joint tenancy with right of survivorship. However, the tenancy cannot be broken by the unilateral action of one spouse. Generally, it may only be broken by the consent of both spouses, or through divorce. Most creditors of only one spouse cannot force the division of the property or the sale of the property to pay creditors. Limited creditor protection is offered by tenancy by the entireties property. Additionally, by statute, homestead property owned as a tenancy by the entireties, is excluded from the definition of homestead for purposes of devise and descent and the property will pass to the surviving spouse at the death of the first to die. Couples should make a thorough view of the ownership of the property and determine if any action is to be taken to change how title is held and to check if title has automatically changed to a form that they do not desire.

Impact on Disinheriting Spouses and the Elective Shares Statute

Florida has a strong public policy against disinheriting spouses. The Florida legislature has enacted statutes known as elective share statutes. If a spouse is disinherited, that spouse has a right to elect against the deceased spouse's estate. This is a complex area of law, beyond the scope of this article. However, as a very general rule, the electing surviving spouse may be entitled to 30% of a decedent's "elective estate." The elective estate may be significantly more than just probate assets. A couple married in a state outside of Florida, who at one point did not have their marriage recognized in Florida, may now be surprised to find the elective shares statute applying to their estate at death. A spouse concerned about this should consult with their attorney to discuss whether a post-nuptial agreement would be appropriate.

Spouses are also entitled to inherit property in ways other than by direct bequest or elective share. A spouse who became a spouse after the other spouse's will or other estate planning documents were executed and who is not mentioned in the estate planning documents is known as a pretermitted spouse. A pretermitted spouse is entitled to his or her intestate share of the other spouse's estate at death. If a predeceased spouse does not have a will or other estate planning device, an intestacy will arise and the surviving spouse is entitled to his or her intestate share. The intestate share of a spouse will vary depending on whether the predeceased spouse

had children and whether those children are children of the marriage of the predeceased spouse and the surviving spouse.

Retroactive Benefits

Same sex married couples need to check beneficiary designations on life insurance, IRA accounts, 401K accounts, pension plans and other retirement accounts. Additionally, if a spouse died prior to the Supreme Court ruling, the surviving spouse should check with their attorney and financial planner to see if rights previously denied have been denied incorrectly. For example, if the marriage was not recognized, but is now recognized retroactively, the surviving spouse may be entitled to a spousal rollover as opposed to an inherited IRA or 401K. Depending upon the spouse's age, the tax deferral and savings could be significant. Similarly, death benefits denied because the marriage was not recognized and the surviving spouse was not recognized as a spouse at the time of the predeceased spouse's death should now be allowed. The past denial of the benefits may rationally be challenged because the non-recognition of a valid marriage was unconstitutional.

What same sex couples are now entitled to and what they will be entitled to in the future is relatively simple. All legally married couples are entitled to the same benefits regardless of gender. The difficult question is, what rights and benefits same sex couples, or the surviving spouse of the same sex couple, entitled to retroactively. This may be unclear for years to come, but if a same sex couple fears that they have lost rights or benefits they should act now to preserve their right to act, rather than wait for the law to more clearly develop.

About the Author: Eric Gurgold serves as Chair of Henderson Franklin's Estate Planning and Administration division and is Board Certified in Wills, Trusts & Estates by The Florida Bar. For over twenty-five years, Eric has concentrated his law practice in the areas of estate planning and administration, elder law, probate litigation, title insurance claims related to probate issues, business law and taxation. He assists clients in the preparation of wills, trusts, family limited partnerships, inventories, inheritance and estate tax returns, as well as providing counsel to minimize income and estate taxes.

Eric has been recognized by Florida Super Lawyers® magazine for his work in estate and probate law (2013-2015). He is also AV rated by Martindale Hubbell.

Eric is very active in the community and currently serves as a member of the Grant Advisory Committee and Scholarship Review Committee of the Southwest Florida Community Foundation, the Professional Advisors Network of the Harry Chapin Food Bank of Southwest Florida, and the Planned Giving Committee for Habitat for Humanity Lee and Hendry Counties.