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ESTATE PLANNING LEGAL ALERT

Estate Planning After Obergefell

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On June 26, 2015, the United States Supreme Court decided in a five-to-four decision that states must recognize and allow marriage between same-sex couples. In short, the decision found that who a person loves, develops a relationship with, and then marries is a fundamental liberty to which all Americans are entitled. The *Obergefell* case consisted of several cases on appeal from Michigan, Ohio, Tennessee and Kentucky.

The plaintiffs sought to answer two questions. First, does the Fourteenth Amendment require a state to license a marriage between two people of the same-sex? Second, does the Fourteenth Amendment require a state to recognize a marriage between two people of the same-sex when their marriage was lawfully licensed and performed out-of-state?

The answer from the majority was "yes" to both questions.

With this landmark decision comes a certain sense of relief and comfort for the many same-sex couples who have been left to wonder if they would ever be able to commit to their loved ones in a way that could adequately express their devotion, and whether family, friends, and governments would recognize that commitment and the many rights that come with it. It is now clear that the government must recognize same-sex marriage.

With this decision come significant changes in which assets will pass to surviving spouses in same-sex marriages. Same-sex spouses will now have the same priorities as opposite-sex spouses for legal questions, such as:

- who should be appointed guardian or conservator of a spouse;
- who is entitled to custody or guardianship of a minor child after the death of a spouse;
- who should be entitled to possession of ashes or deciding where and how to dispose of the remains of a deceased spouse; and
- inheritance of assets after death.

Accordingly, now is the time to understand how the default laws will affect same-sex married couples. If the default rules result in something other than your desire, you will need an estate plan crafted to fit your circumstances, concerns and objectives.

For example, many people, regardless of sexual orientation, may not realize that in Michigan your surviving spouse does not typically get everything you own after your death if you leave no will. Many people want their spouse to receive everything and assume that will happen with or without a will or trust, yet the default rules provide otherwise. Additionally, the fact that you are a spouse does not mean healthcare providers will share protected information or take direction from you regarding your spouse without a patient advocate designation and HIPAA release that has been properly prepared and executed.

For same-sex couples in Michigan, prenuptial and postnuptial agreements, joint trusts, and estate and income tax planning will now resemble the traditional planning that has been prepared for opposite-sex married couples

for years. Powers of attorney and patient advocate designations are required if you want your spouse to conduct business or make medical decisions for you without court involvement. Preparation and coordination of wills, trusts, beneficiary designations and titles to assets are required to alter the default intestacy rules for passing assets to your loved ones after death, avoid probate and minimize the impact of taxes.

Many questions and issues remain, such as the impact this decision will have on spousal rights in employee benefit plans, and many other questions will undoubtedly surface. Nevertheless, the ability for same-sex spouses to marry has also enabled them to plan with more certainty to ensure that they, their families and their loved ones are well cared for.

If you have any questions or would like more information, please contact attorney Michael D. Shelton at 616-458-0268 or mshelton@shrr.com.

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