# IF I *OBERGEFELL* IN LOVE WITH YOU:
# SAME-SEX MARRIAGE AND ITS IMPACT ON ESTATE PLANNING IN TEXAS

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- Author/Speaker: Who Is Your Spouse? The Demise of DOMA and Its Impact on Estate Planning in Texas, Attorneys in Tax and Probate (Houston), 2013

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## I. Introduction

On June 26, 2013, the United States Supreme Court ruled that Section 3 of the Defense of Marriage Act ("DOMA") is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment. *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013). Exactly two years later, on June 26, 2015, the U.S. Supreme Court ruled that the Fourteenth Amendment of the U.S. Constitution requires states to license marriages between two people of the same sex, and to recognize all marriages between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. *Obergefell v. Hodges*, 576 U.S. ___ (14-556), 135 S. Ct. 2584 (2015). As a result, all states must now permit same-sex couples to marry, and the marriage of a same-sex couple cannot be ignored by any state for purposes of applying their laws. What do these two landmark rulings mean for Texas same-sex couples who have been lawfully married, whether in Texas or in a jurisdiction other than Texas? Although perhaps there are still more questions than answers in this area, this outline seeks to raise issues that estate planners should consider as a result of the sea-change brought about by the Court's decisions in *Windsor* and *Obergefell*.

## II. Background

A. Marriage in Texas

Article I, Section 32 of the Texas Constitution provides:

> (a) Marriage in this state shall consist only of the union of one man and one woman.
>
> (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.

These constitutional provisions, adopted by popular vote in 2005, are codified in the Texas Family Code. In particular, Sec. 6.204 of the Texas Family Code provides:

> 6.204. RECOGNITION OF SAME-SEX MARRIAGE OR CIVIL UNION.
>
> (a) In this section, "civil union" means any relationship status other than marriage that:
>
> (1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and
>
> (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage.
>
> (b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.
>
> (c) The state or an agency or political subdivision of the state may not give effect to a:
>
> (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or

> (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.

B. DOMA and Marriage Under Federal Law

Historically, the federal government has deferred to each state for purposes of defining marriage for that state. *See Williams v. North Carolina*, 317 U.S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders"). In the words of another case, "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Haddock v. Haddock*, 201 U.S. 562, 575 (1906); *see also In re Burrus*, 136 U.S. 586, 593-594 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."). Against this backdrop, and prior to same-sex marriage being recognized as lawful in any state, Congress adopted DOMA.

For purposes of federal law, Section 3 of the Defense of Marriage Act ("DOMA") provided:

> In 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.

1 USC § 7.

C. *Windsor* and *Obergefell*

*United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013), was a tax case, and more specifically, an estate tax case. Briefly, Edith Windsor and Thea Spyer, a same-sex couple residing in New York, were lawfully married in Ontario, Canada in 2007. Ms. Spyer died in 2009, at a time when the State of New York did not permit same-sex marriages, but did recognize same-sex marriages performed elsewhere. Ms. Spyer left her entire estate to Ms. Windsor, who sought to claim the federal estate tax marital deduction for property passing to a surviving spouse pursuant to Section 2056 of the Internal Revenue Code (the "Code"). The IRS asserted that she was barred from doing so by Section 3 of DOMA. As a result, the IRS, finding that the unlimited marital deduction was not available to the estate of a deceased spouse in a same-sex marriage, denied Ms. Windsor's estate tax marital deduction and compelled her to pay $363,053 in estate taxes. Ms. Windsor paid the tax and sued for a refund, ultimately prevailing in the U.S. Supreme Court. The holding made it clear that same-sex couples who reside in a state that recognizes same-sex marriage would be considered as married for federal tax purposes.

In *Obergefell v. Hodges*, 576 U.S. ___ (14-556), 135 S. Ct. 2584 (2015), James Obergefell and John Arthur, a couple living in Ohio, flew to Maryland to get married on July 11, 2013, because Maryland had legalized same-sex marriage, which was still banned under Ohio law. Mr. Arthur died in October, 2013 while domiciled in Ohio. Even though the couple was legally married, the Ohio Department of Health refused to list Mr. Obergefell as the surviving spouse on the decedent's death certificate because Ohio did not recognize same-sex marriages. Mr. Obergefell filed suit, and the case made its way to the U.S. Supreme Court, where, along with several companion cases, two questions were presented: (1) whether the Fourteenth Amendment requires a state to license a marriage between two people of the same sex, and (2) whether the Fourteenth Amendment requires 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 Court ruled affirmatively on both questions. Justice Kennedy, who delivered the opinion for the 5-4 majority, wrote "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them."

On the date of the *Obergefell* decision, 37 states and Washington DC already recognized same-sex marriage, and 13 states, including Texas, had bans on same-sex marriage—all of which are now unconstitutional. Of the 13 states that had bans in place, 11 of the laws were on appeal, including the four states (Kentucky, Michigan, Ohio and Tennessee) that had their marriage bans being reviewed by the Supreme Court in *Obergefell*.

The Court's holding in *Windsor* was important, but relatively narrow. The *Windsor* Court held that if two persons were lawfully married in a jurisdiction that permitted such marriage, the Federal government was required to recognize that marriage. *Obergefell* went much further. The majority opinion in *Obergefell* makes it clear that every United States jurisdiction must allow same-sex couples to marry. Moreover, the Court held that that there is no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character.

The first holding in *Obergefell* means that Texas authorities are required to license and recognize same-sex marriages performed in Texas. The latter holding means that Texas must also recognize same-sex marriages performed in other jurisdictions, regardless of when that marriage was performed.

The *Obergefell* opinion specifically refers to marriages performed in another *state*: "It follows [from the holding that a state must license a marriage between two persons of the same sex] that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." (576 U.S. ___, 135 S.Ct. 2584, 2607). It is possible that a court in Texas might construe this language to mean that it need not recognize a valid same-sex marriage performed in another country. If the language of the holding referring to marriages performed in "another state" is not be taken too literally, some states will no doubt recognize same-sex marriages as valid no matter where celebrated.[1]

## III. National Recognition and the Date-of-Marriage Conundrum.[2]

A major question left unanswered by the Court in *Obergefell* is whether the holding has retroactive effect. The constitutional basis for the Court's holding might be read to mean that laws in states that purport to limit marriage to one man and one woman can never have had valid application. As a practical matter, the earliest marriage performed in a state other than Texas would have occurred on May 17, 2004, when the first same-sex marriages were celebrated in Massachusetts. If *Obergefell* applies retroactively, a same-sex couple who were lawfully married in Massachusetts in 2005, but who resided in Texas since that time, would have acquired interests in community property during the entire course of their marriage, even though Texas has purported not to recognize same-sex marriages. One might argue that if recognition of same-sex marriage is a Constitutional right, and

[1] The seminal New York case recognizing a same-sex marriage as valid, *Martinez v. County of Monroe*, 50 A.D.3d 189, 850 N.Y.S.2d 740 (4th Dep't 2008), involved a Canadian marriage. Whether every state must recognize such marriages, however, is a question that remains to be answered by the courts.

[2] For a more detailed discussion of these issues, *see* LaPiana, "Estate Planning for Same-Sex and Unmarried Couples after *Obergefell*: Detriment or Opportunity?" presented at the 50th Annual Heckerling Estate Planning Institute (2016).

if any state law the purports not to recognize such marriages is unconstitutional, then it must always have been so, and no court would be permitted to apply those laws in any setting. On the other hand, the U.S. Supreme Court has not always adopted this rationale. This question is not merely academic. As noted below, one's status as a spouse under local law confers a number of benefits (and burdens), and it is essential that estate planners and others understand that starting date for the availability of those benefits (or application of those burdens).

A. The Federal Agency Approach

Can we derive any guidance on the retroactive application of these cases from the way federal agencies treated the *Windsor* decision?

- On August 2, 2013, Secretary of State John Kerry announced that the United States would immediately begin applying a place-of celebration rule for processing visa applications for same-sex couples.
- Likewise, the Department of Defense announced that it will follow a place-of-celebration rule.
- On August 9, 2013, Labor Secretary Tom Perez announced in an email to Department of Labor employees that the spousal leave provisions of the Family and Medical Leave Act would be interpreted to apply to same-sex married persons. The Wage and Hour Division of the DOL has updated its FMLA Fact Sheet (#28F) to provide that "[s]pouse means a 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."
- The Social Security Administration issued a "Program Operations Manual System" update that applied a place-of-residence standard. It provides that all claims filed on or after June 26, 2013 (the date of the *Windsor* decision), or that were pending final determination at the time of the decision, are now subject to so-called "*Windsor* instructions," which allow for payment of claims when the applicant (i) was married in a state that permits same-sex marriage, and (ii) is domiciled, at the time of application or while the claim is pending a final determination, in a state that recognizes same-sex marriage.
- As discussed in more detail below, on August 29, 2013 the IRS issued Revenue Ruling 2013-17, 2013-38 IRB 201, holding that all same-sex married couples will be treated as married for all federal tax purposes, including income, estate, gift, and generation-skipping transfer tax purposes, regardless of the state of the couple's residence.
- In Notice 2014-19, 2014-47 I.R.B. 979, the Treasury announced that employers with qualified retirement plans would be permitted to amend their plans to recognize same-sex marriages during the period before the *Windsor* decision, but warned that there may unintended consequences flowing from such amendments. It also allowed amendments to selectively recognize same-sex marriages during the pre-*Windsor* period.

These rulings, of course, related to the impact of the Court overturning a federal statute. The agency positions could in general be described as pragmatic. For example, while the retroactive effect of the *Windsor* decision on income and transfer tax returns is limited by the period during which amended returns may be filed (usually three years), recognizing the marriage of beneficiary of a qualified plan is more difficult.

Regardless of how federal administrative agencies have dealt with the invalidation of Section 3 of DOMA by *Windsor*, however, the effect of *Obergefell* is a different issue. The *Obergefell* opinion

announces an extension of federal constitutional rights which may be completely different from invalidating a statute.

B. The Supreme Court and Retroactivity

The Supreme Court outlined its views on the retroactivity of its own decisions as to federal law in *Harper v. Virginia Dep't. of Taxation.* 509 U.S. 86 (1993). There the Court set out a general rule of retroactivity:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

*Id.* at 97.

*Harper* involved a Virginia statute that exempted from taxation retirement benefits paid by state and local governments but did not exempt retirement benefits paid by the federal government. The U.S. Supreme Court had held a similar Michigan statute to be unconstitutional in *Davis v. Michigan Dep't. of Treasury*, 489 U.S. 803 (1989). The Virginia Supreme Court refused to apply the *Davis* decision retroactively to persons who had paid Virginia tax on federal retirement benefits before *Davis* was decided. The U.S. Supreme Court ruled that Virginia was required to "provide relief consistent with federal due process principles," but held that in the context of an unconstitutional tax, due process could be met either by affording the taxpayer a "predeprivation hearing" allowing the taxpayer to challenge the tax before paying it, or by providing "backward-looking relief to rectify any unconstitutional deprivation." 509 U.S. at 100 (citation omitted).

In the end, the Virginia Supreme Court decided that although Virginia law did allow taxpayers to bring a declaratory judgment action to review the constitutionality of laws imposing taxes, no taxpayer would think that such an action provided the only remedy given Virginia's statute requiring refunds of illegally collected taxes. The declaratory judgment avenue was held not to be an adequate "predeprivation" remedy, and the taxes paid under the void statute had to be refunded. *Harper v. Virginia Dep't. of Taxation*, 250 Va. 184, 462 S.E.2d 892 (1995).

Under the *Harper* rationale, the *Obergefell* decision applies to all existing marriages making them valid from their beginning, whether a state recognized them at that time or not. This analysis then calls into question the legal consequences of the command that all valid marriages must be recognized by all states. Another way to put the question is, in what circumstances are remedies available for claims based on the retroactive application of *Obergefell*?

Some light on the meaning of *Harper* for retroactivity is shed by the Court in *Reynoldsville Casket Co. v. Hyde,* 514 U.S. 749 (1995). Hyde brought a personal injury suit after the running of the two-year Ohio statute of limitations, but the suit was still timely under Ohio law because of a state statute that provided for a tolling limitations while the defendant was out of the state. While Hyde's action was pending, the U.S. Supreme Court held that the Ohio tolling provision violated the Commerce Clause and was unconstitutional, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988). After the Ohio trial court and intermediate appellate court dismissed her case, Hyde appealed to the Ohio Supreme Court which reinstated it, holding that *Bendix* could not be applied retroactively to claims that had "accrued" before the announcement of the *Bendix* decision.

The U.S. Supreme Court reversed, holding that under *Harper*, the *Bendix* decision applied retroactively. The Court dismissed Hyde's argument that allowing her case to proceed was simply a matter of fashioning a remedy, an argument Hyde supported by citing the language in *Harper*

referring to a pre-deprivation remedy. Justice Breyer, writing for the Court, noted the "special circumstances" of tax cases in which remedies other than refunds of unconstitutionally collected taxes are possible. Justice Breyer also noted that retroactivity could be defeated by other constitutionally adequate remedies.

The majority noted that even with regard to Constitutional matters, retroactive application might not be required. In the words of the Court:

> [A]s courts apply "retroactively" a new rule of law to pending cases, they will find instances where that new rule, for well-established legal reasons, does not determine the outcome of the case. Thus, a court may find (1) an alternative way of curing the constitutional violation, or (2) a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief, or (3) . . . a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications, or (4) a principle of law, such as that of "finality" [involving collateral review of certain state criminal convictions that affect which cases are closed, for which retroactivity-related purposes, and under what circumstances].

514 U.S. at 759.

*Reynoldsville Casket*, thus outlines several possible arguments for limiting the retroactive effect of *Obergefell*. One example might be the sale of real property titled in the name of only one spouse of a couple whose marriage at the time of sale was not recognized by state law, but had the marriage been recognized the property would have been community property. The rights of a bona fide purchaser seem to be an example of a general rule of law reflecting "both reliance interests and other significant policy justifications" which trumps retroactive application of the new rule. That does not mean that the now-recognized spouse is without a remedy. Presumably, the proceeds of the sale would be characterized as community property and could be traced in the hands of the selling spouse. Likewise, a lien granted by the spouse listed as an owner, without the joinder of the person who, at that the time of loan, was not recognized as a spouse, could be found to be valid on the basis of reliance by the lender, and the benefit conferred on the married couple in the form of the loan proceeds.

C. An Historical Example—Retroactivity and Inheritance Rights of Illegitimate Children

*Reed v. Campbell*, 476 U.S. 852 (1986) provides an example of retroactivity in the context of an estate-planning- related issue involving newly recognized constitutional rights. In 1977 the U.S. Supreme Court held that state statutes excluding a nonmarital child from inheriting from the child's biological father were unconstitutional. *Trimble v. Gordon,* 430 U.S. 762 (1977). *Reed* was one of numerous post-*Trimble* cases involving claims by nonmarital children, in this case with regard to the Texas statute. The Supreme Court in *Reed* applied *Trimble* retroactively. The syllabus states:

> Appellant's father died intestate at a time when § 42 of the Texas Probate Code prohibited an illegitimate child from inheriting from its father unless its parents had subsequently married. *Trimble v. Gordon,* 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31, decided four months after the father's death, held that a total statutory disinheritance, from the paternal estate, of children born out of wedlock and not legitimated by the subsequent marriage of their parents, is unconstitutional. Thereafter, appellant filed a claim to a share in her father's estate, but it was denied by a Texas trial court. The Texas Court of Appeals affirmed, holding that *Trimble* does not apply retroactively.

> *Held:* The interest, protected by the Fourteenth Amendment, in avoiding unjustified discrimination against children born out of wedlock, requires that appellant's claim to a share in her father's estate be protected by the full applicability of *Trimble.* There is no justification for the State's rejection of the claim. At the time appellant filed her claim, *Trimble* had been decided, and her father's estate remained open. Neither the date of the father's death nor the date appellant's claim was filed should have prevented the applicability of *Trimble.* Those dates, either separately or in combination, had no impact on the State's interest in orderly administration of the estate.

*Reed* suggests a possible path for resolving at least some issues raised by the retroactive application of *Obergefell* to the estates of decedent's whose marriages were not recognized at the time of their deaths. One could apply the *Reed* rationale to fashion a rule that if the decedent died before June 26, 2015, but at the time of the surviving spouse's action the estate is still "open," the person now recognized as surviving spouse should be able to claim the status of heir to the decedent's estate. This of course begs the question of what one means by an estate being "open." In Texas, as in many states, most estates are never formally closed, in the sense that the personal representative accounts to the court, process is issued to those interested, and the court issues a decree approving the accounts and discharging the personal representative from further liability.

To achieve more certainty, states might address retroactivity by statute. For example, following *Trimble*, Mississippi amended its statute governing inheritance by nonmarital children to conform to *Trimble*. The amendment gave nonmarital children who claimed to be entitled to inherit from or through the child's birth father (and a birth father claiming to inherit from or through his nonmarital child) where the decedent died before July 1, 1981, three years from that date to bring the claim. In essence, the legislature enacted a statute of limitations giving those whose interests were affected by a change in the law a limited but reasonable amount of time to bring claims related to events that occurred before the change was announced.

The Mississippi Supreme Court upheld the statute in *Estate of Kimble*, 447 So.2d 1278 (Miss. 1984), holding that the statute affords nonmarital children equal protection of the laws "while at the same time accomplish the legitimate state interest of (1) avoiding the litigation of stale or fraudulent claims, (2) the fair and just disposal of an intestate decedent's property; and (3) the repose of titles to real property." In subsequent cases the Mississippi high court reversed dismissals of suits brought within the three-year period of the statute by persons claiming to be the nonmarital children of decedents who had died in 1958 (*Berry v. Berry*, 463 So.2d 1031 (Miss. 1984), 1969 (*Holloway v. Jones*, 492 So.2d 573 (Miss. 1986), and 1977 (*Estate of Smiley*, 530 So.2d 18 (Miss. 1988).

In *Collier v. Shell Oil Co.*, 534 So.2d 1015 (Miss. 1988), however, the court held the rights of nonmarital children in the estate of their father who died intestate in 1955 could not prevail over the rights of bona fide purchasers of mineral rights in land included in the intestate estate who acquired their interests before the date of the decision in *Trimble.* This result seems to comport with the limits on retroactivity set out less than a decade later in Justice Breyer's *Reynoldsville Casket* opinion: the bona fide purchaser principle is one of those principles which in this particular context provides finality and can also, and perhaps even more appropriately be described as "a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications . . .."

D. Retroactivity and *Obergefell*

The U.S. Supreme Court holding on retroactivity as outlined by *Reed* may serve as a useful template for applying retroactivity in the context of *Obergefell*.

First, the rights of a retroactively recognized spouse will likely not trump the rights of bona fide purchasers of property in which the spouse might have had an interest. The community property issue, at least to the extent real estate is involved and probably with regard to all property, is most likely resolved by leaving the bona fide purchaser in possession, and deciding that that the proceeds of sale are community property and must be traced in the hands of the spouse who disposed of the property.

A similar result should apply with regard to homestead rights. A bona fide purchaser of the homestead from the spouse who was the sole title holder should be protected. In most cases, a purchaser could not know that the seller had entered into a marriage perfectly valid where celebrated but not recognized in Texas. Of course, the circumstances of the sale will probably be closely examined in any litigation, and one can easily imagine that some sales, even for full consideration, might be questioned if, for instance, they occurred on the eve of the *Obergefell* decision.

The homestead issue is conceptually the same as the more general problem of intestate succession. Under every intestacy statute in United States jurisdictions, a surviving spouse is the primary if not the only heir. Based on the state cases following *Trimble*, property (including an interest in a Texas homestead), that passes by intestacy may be subject to claims of the now-recognized surviving spouse, at least if the estate is still "open," whatever that means. One would expect the same result in a cases where no formal administration was ever undertaken. This situation is one in which the enactment of a statute of limitations might make sense. Giving the surviving same-sex spouse a reasonable fixed period of time after the date of *Obergefell* would probably be fair to everyone involved, especially because the time period between the first valid same-sex marriages in the United States and the date of *Obergefell* is not long.

Will contests present, perhaps, a more complex set of issues, but a similar analysis should apply. Suppose the first spouse died before June 26, 2015, the date that *Obergefell* required that all states recognizes same-sex marriages. The decedent's will leaves the entire probate estate to his or her surviving spouse, whose marriage was not recognized in the state on the date of death. The decedent's supposed heirs successfully challenge the will on some grounds, and the estate passes by intestacy. But if the marriage had been recognized, the surviving spouse would be the sole heir. It is possible that retroactive application of *Obergefell* is impossible because the action was fully resolved, although that may not be an easy result to accept if the will was denied probate, because the persons contesting the Will should not have had standing to do so. Of course, if the time for appeal has not run, perhaps the case is not over. If the spouse settled with the contestants, it may be possible to revisit the settlement. An easier case is presented if the contest has not been resolved at the time the marriage was recognized in the jurisdiction. The action should end because the contestants to the will now have no standing. If the challenge is coming from persons who would be heirs even if the marriage were recognized, (for example, in Texas, children of a prior relationship), the case would presumably continue, but with the surviving spouse in a much better position, not only as heir, but also entitled to a share of community property and other rights of a surviving spouse (or in non-community property states, to some form of elective share).

Parentage issues may be even more complex. Assume that a woman living in Texas lawfully married a woman in another state. She gives birth to a child conceived through artificial insemination using anonymously donated sperm. If the existence of the marriage makes the child

the child of both spouses, has the child been the child of both spouses from birth or only from the date of *Obergefell*? Note that under the Uniform Parenting Act (adopted in Texas as Chapter 160 of the Texas Family Code), a woman not the birth mother of a child can become the child's mother only through adoption, while a man will be presumed to be the father of a child if the man is married to the child's mother, or if during the first two years of the child's life, the man continuously resided in the household in which the child resided and he represented to others that the child was his own. TEX. FAM. CODE § 160.204(a)(5). In the case of parentage, policy arguments for the retroactive application of *Obergefell* in many cases may not be difficult. The child will benefit from having two parents from birth and the classic best-interests-of-the-child standard may very well decide the case. However, what if the couple has separated before the date of *Obergefell* (or even divorced) and the spouse who did not give birth was held not to be a parent. Does that result now change? Answers will come through legislation, or more likely, through litigation.

E. "Retroactive" Marriage

There are already a few cases in which surviving partners of decedents have made claims based on the theory that the couple would have married if they could have and that the survivor should be treated as a surviving spouse. An interesting example is *Mueller v. Teppler*, 312 Conn. 631, 95 A.3d 1011 (2014). Plaintiff sued her partner's physicians for loss of consortium resulting from alleged medical malpractice that occurred in 2001 when the couple had been together 16 years but when marriage or a civil union was not available under Connecticut law. They entered into a civil union in 2005.

The trial court dismissed the action because the couple was not married in accordance with existing Connecticut law when the alleged tortious conduct occurred. The Connecticut Supreme Court reversed and expanded the common-law claim for loss of consortium "to couples who were not married when the tortious conduct occurred, but who would have been married if the marriage had not be barred by state law."

The Surrogate's Court of New York County has rejected a similar argument, this time made by the persons other than the surviving "spouse" who would benefit if the non-marital relationship were found to be a marriage. The decedent's will was executed in 2001 and named his same-sex partner as executor and made significant bequests to the partner. In 2002 the couple had a commitment ceremony in New York which at that time was without any legal effect. The couple later separated and the decedent died in 2013 without writing a new will. The decedent's relatives sought to disqualify the former partner as executor and to have the bequests to him revoked on the theory that the couple would have married had the law allowed them do so and that the former partner should be treated as a former spouse whose nomination as executor and gifts under the will are revoked by statute on "divorce" or legal separation. In her opinion in *Matter of Leyton*, N.Y.L.J. June 23, 2015, at 1 col. 3, Surrogate Anderson rejected that argument. Same-sex marriage did not exist in New York until the enactment of the Marriage Equality Act in 2011 and the court ruled that it would not treat the commitment ceremony as a marriage.

A similar issue can arise in states such as Texas that recognize non-ceremonial, or "common law" marriage.[3] In an unreported Pennsylvania case, the court found that a same-sex couple had fulfilled the requirements of Pennsylvania law and were in a common law marriage at the time of death of

[3] Twelve states recognize common law marriage: Alabama Colorado, Iowa, Kansas, Montana, New Hampshire (for inheritance purposes only), Oklahoma, Pennsylvania (on or before 1/1/2005), Rhode Island, South Carolina, Texas, Utah (with court approval). It is also recognized in the District of Columbia State law in this area is anything but uniform. The Social Security Administration has organized the relevant information in a table that can be found at http://policy.ssa.gov/poms.nsf/lnx/0200305075.

one spouse. The survivor was therefore entitled to all the benefits of a surviving spouse even though her spouse died before Pennsylvania law recognized same-sex marriage.[4]

## IV. Estate Planning Implications of *Windsor* and *Obergefell*

What are the estate planning implications of *Windsor* and *Obergefell* for same-sex couples? As noted above, *Windsor* required only that the federal government give effect to marriages of persons who lawfully marry in a jurisdiction that permits same-sex marriage, even if they reside in a state that does not recognize same-sex marriage. *Obergefell* goes much farther in holding that states must permit same-sex marriages to be performed in their jurisdiction, and must recognize same-sex marriages performed in other states. These holding have dramatic implications under federal and a state law.

### A. Federal Law Issues

By declaring Section 3 of DOMA unconstitutional, the Court in *Windsor* paved the way for applying state law rules for determination of the marital status of individuals when interpreting federal laws.

#### 1. Marriage for Federal Tax Purposes–Revenue Ruling 2013-17

*Windsor* makes clear that lawfully married same-sex couples who reside in a jurisdiction that recognizes such a marriage are to be considered married for federal tax purposes. On August 29, 2013 the IRS issued Revenue Ruling 2013-17, 2013-38 IRB 201, holding that all same-sex married couples will be treated as married for all federal tax purposes, including income, estate, gift, and generation-skipping transfer tax purposes, regardless of the state of the couple's residence. The Revenue Ruling expressly adopts a place-of-celebration rule for determining marital status, stating, "[I]ndividuals of the same sex will be considered to be lawfully married under the Code as long as they were married in a state whose laws authorize the marriage of two individuals of the same sex, even if they are domiciled in a state that does not recognize the validity of same-sex marriages." *See* Rev. Rul. 58-66, 1958-1 CB 60 (couple married under common law and filing income tax returns as married-filing-jointly will continue to be treated as married, even after moving to a jurisdiction that doesn't recognize common-law marriages). Revenue Ruling 2013-17 includes foreign jurisdictions in its use of the term "state," so out-of-country same-sex marriages will also be recognized.

The Ruling also makes it clear that the term "spouse" as well as any gender-specific terms such as "husband" and "wife" include same-sex married persons. The Ruling provides that the term "marriage" does not include registered domestic partnerships, civil unions, or other similar formal relationships recognized under state law that are not denominated as a marriage under that state's law. The ruling applies prospectively from September 16, 2013, but affected taxpayers may also generally rely on the ruling for the purpose of filing original returns, amended returns, adjusted returns, or claims for credit or refund for any overpayment of tax resulting from these holdings, provided the applicable limitations period for filing such a claim under Section 6511 of the Code has not expired. This prospective application with a permissive look-back gives same-sex married persons the option to apply the ruling to prior years if it is to their advantage to do so.

On October 23, 3015, the IRS issued proposed regulations amending the current regulations under Code Section 7701 to provide that, for federal tax purposes, the terms "spouse," "husband," and "wife" mean an individual lawfully married to another individual, and the term "husband and wife"

[4] *See* a newspaper report of the case, http://www.thelegalintelligencer.com/id=1202733414697/Common-Law-Marriage-Retroactively-Applied-to-SameSex-Couple?)

means two individuals lawfully married to each other, regardless of the gender of the married couple. In addition, the proposed regulations provide that a marriage of two individuals will be recognized for federal tax purposes if that marriage would be recognized by any state, possession, or territory of the United States. Under this rule, whether a marriage conducted in a foreign jurisdiction will be recognized for federal tax purposes depends on whether that marriage would be recognized in at least one state, possession, or territory of the United States. This comports with the general principles of comity where countries recognize actions taken in foreign jurisdictions, but only to the extent those actions do not violate their own laws. These regulations, when final, would cause Revenue Ruling 2013-17 to be treated as obsolete. IRB 2015-45.

2. Estate Planning Implications of Being Married under Federal Law

Prior to the decision in *Obergefell*, *Windsor* and Revenue Ruling 2013-17 caused many same-sex married couples to live in a weirdly bifurcated world where their property rights were fixed by state law denying their marital status, but the implications of those state-law property rights when interpreting federal law could be quite different. It is well established that, when applying federal tax rules, the property rights of the parties are a matter of state law. For example, although federal law determines which of the decedent's property interests are subject to estate tax, state law determines the nature and extent of those interests. *Morgan v. Comm'r*, 309 U.S. 78, 80, 23 AFTR 1046 (1940). In a federal tax controversy, the IRS (or a federal court) is not bound by a state court determination of property interests where the United States was not a party to the proceeding. *Estate of Bosch*, 387 U.S. 456 (1967). In applying state law to the facts of a particular case, the Court in *Bosch* held that (i) when a state law property right has been decided by the highest court of the state, the decision should be followed and respected as the best authority for that state's law; but (ii) when a state law property right has not been decided by the highest court of the state, federal authorities "must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." *Id.* at 465.

After *Obergefell*, couples who are lawfully married in any state must be treated as married for both federal and state law purposes. In interpreting the federal law, state property issues that arise from marital status presents unique estate planning considerations. For example, consider:

a. Unlimited gift tax marital deduction

An outright transfer to a surviving spouse who is a United States citizen qualifies for the unlimited gift tax marital deduction, so long as the interest is not a life estate or other terminable interest. IRC § 2523. The availability of this deduction may be critical in a situation where one same-sex spouse has substantial assets, and wants to provide for his or her spouse by making significant lifetime transfers. Absent recognition of the marital status for federal gift tax purposes, those transfers would constitute taxable gifts to the extent that they exceed the gift tax annual exclusion, or are made to providers of educational or medical services. IRC § 2503.

b. Unlimited estate tax marital deduction

An outright testamentary transfer to a surviving spouse who is a United States citizen qualifies for the unlimited estate tax marital deduction, so long as the interest is not a life estate or other terminable interest. IRC § 2056. In addition, transfers to various forms of testamentary trusts are eligible for the deduction. Thus, for example, an interest passing to a trust for the benefit of the surviving spouse that provides the spouse with the exclusive right to all income for life, and grants to the spouse a general power of appointment over the trust property at death (a so-called "life estate-power of appointment" or "LEPA" trust) qualifies for the estate tax marital deduction. IRC § 2056(b)(5). More commonly, a marital deduction is available for an interest passing to a trust

for the benefit of the surviving spouse that provides the spouse with the exclusive right to all income for life, and for which an election is made causing the property remaining in the trust to be taxed in the spouse's estate at the time of the spouse's later death (a so-called "qualified terminable interest property" or "QTIP" trust). IRC § 2056(b)(7).

c. Portability

The Tax Reform Act of 2010 added, and the American Tax Reform Act of 2012 made permanent, the notion of "portability" of a deceased spouse's unused exemption amount. In essence, portability provides that upon the death of one spouse, the surviving spouse may inherit any unused federal estate tax exemption of the deceased spouse. IRC § 2010(c)(2)(B). The unused exclusion amount is referred to in the statute as the "deceased spousal unused exclusion amount," otherwise known as the "DSUE amount." Once a spouse inherits the DSUE amount, the surviving spouse can use the DSUE amount either for gifts by the spouse or for estate tax purposes at the surviving spouse's subsequent death. An individual can only use the DSUE amount from his or her "last deceased spouse." IRC § 2010(c)(4)(B)(i). To understand how portability works, assume, for example, that X dies in 2016 with an estate of $3 million. He leaves $2 million to his surviving spouse Y, and the balance to his parents. As a result, his taxable estate is $1 million (his $3 estate, less the $2 million passing to his spouse). X's executor may elect to file an estate tax return using $1 million of X's $5.45 million estate tax exemption to shelter the gift to the parents, and "pass" the other $4.45 million of X's estate tax exemption to Y. Y would then have an estate and gift tax exemption of $9.9 million (Y's own $5.45 million exemption plus X's unused $4.45 million exemption).

d. Right to elect gift-splitting

Married persons, including same-sex married persons, may own substantial separate property. As a result of the Court's decision in *Obergefell*, all or part of the property acquired by same-sex married persons after the date of their marriage may be community property. Nevertheless, they will be eligible to elect to treat gifts of separate property made by one spouse as though they were made one-half by each spouse. IRC § 2513. This election would allow those gifts to utilize both spouses' annual exclusion, or for larger gifts, take advantage of both spouses' $5.45 million gift tax exemption.

e. Spousal Benefits under 401(k)s and Other ERISA Plans

Qualified plans must provide for the distribution of benefits in the form of annuities payable to the surviving spouse, either at retirement or when the employee dies prior to retirement, if there is not a valid participant election that incorporates spousal consent. IRC §§ 401(a)(11), 417. Therefore, a married retiree does not have the exclusive right to designate the beneficiaries of a retirement plan account governed by ERISA. The Retirement Equity Act of 1984 (REA) significantly affects benefit distributions under qualified and other employee benefit plans, particularly the requirements for providing qualified annuity benefits to the surviving spouse. Therefore, in planning for the treatment of potential plan distributions, consideration must be given to these requirements. In general, REA expanded the scope of the "Qualified Joint and Survivor Annuity" provisions and the preretirement survivor provisions as follows: (i) Surviving spouse annuity requirements are applicable to all qualified plans (with a limited exception for certain non-pension defined contribution plans), whether or not the plan has traditionally offered annuities. IRC § 401(a)(11)(B). (ii) Surviving spouse annuity requirements apply to the payment of benefits with respect to any participant who has vested accrued benefits under the plan. IRC § 401(a)(11)(A). (iii) A participant can elect out of the surviving spouse annuity coverage, but only with the written consent of the participant's spouse. Treas. Reg. § 1.401(a)-11(c)(1). In addition, the consent must

be acknowledged before a plan representative or a notary public. IRC § 417(a)(2)(A)(iii). As a result, same-sex married persons who have designated all or part of their retirement plans to pass to someone other than their spouse must revisit those beneficiary designations and obtain their spouses' consent in proper form for those designations to be effective. *See Cozen O'Connor, P.C. v. Tobits*.[5] (purported beneficiary change not signed by the participant's same-sex spouse held not valid under ERISA).

Revenue Ruling 2014–9, 2014–17 IRB 975, provides procedures a plan administrator may use in order to reasonably conclude that an amount is a valid rollover contribution. Notice 2014–19, 2014–17 IRB 979, provides guidance on the application (including the retroactive application) of the decision in *Windsor*, and the holdings of Rev. Rul. 2013–17, to retirement plans qualified under Code Section 401(a).

f. Spousal Rollovers under IRAs/401(k)s

When a person passes away owning an interest in an IRA or 401(k) that passes to a surviving spouse, the surviving spouse may roll over the account to a spousal IRA. IRC § 402(c)(9); Treas. Reg. § 1.402(c)-2, A-12. The election to roll the account into a spousal IRA rollover may be made *at any time* after the participant's death. Treas. Reg. § 1.408-8, Q&A 5(a). Non-spousal beneficiaries may roll funds into an inherited IRA under current law, but must begin distributions from the inherited IRA beginning the year following the plan participant's death. IRC § 409(c)(11). In contrast, with a spousal IRA, the spouse may treat the account as his or her own IRA, and may defer distributions until his or her required beginning date (typically, April 1 in the year after the surviving spouse attains the age of 70½). IRC § 409(c)(9). Note that a spousal rollover can be a two-edged sword. If the surviving spouse is younger than age 59½, distributions made to the surviving spouse from his or her own IRA prior to attaining age 59½ (including amounts rolled over from a deceased spouse) would be subject to the ten percent penalty for early withdrawals. For inherited retirement assets, if the surviving spouse may need access to the funds prior to attaining age 59½, a better strategy would be to leave those assets in the deceased spouse's IRA or in the qualified plan with the deceased spouse's employer, so that no ten percent penalty would apply to any distributions. After the surviving spouse attains the age of 59½, the remaining balance of the retirement funds could be rolled over to an IRA without subjecting future distributions to the ten percent penalty.

g. Deduction for/Taxability of Alimony Paid to Former Spouse

Payments to a former spouse which are characterized as alimony are deductible to the ex-spouse who is making the payment. IRC § 215. Likewise, amounts received as alimony are taxable as income to the ex-spouse receiving the alimony. IRC § 71. Although Texas law does not generally permit a court to make an award for alimony, spouses may agree that post-divorce support payments made by one spouse to the other will be treated as alimony. If the payments resemble alimony (as opposed to child support or a disguised property settlement), this "contractual alimony" will be treated as such for federal income tax purposes. *See, e.g., Taylor v. Campbell*, 335 F.2d 841 (5th Cir. 1964). Thus, same-sex couples who divorce will, like other married couples, what to consider the tax effect of any post-divorce payments made from one former spouse to the other.

[5] 2013 WL 3878688 (ED Penn., July 29, 2013) (slip opinion available at www.boomerisablog.com/files/2013/08/COZEN-OCONNOR-P-C-v-TOBITS-et-al.pdf.

h. Other Unexpected Tax Issues for Spouses

A number of other issues may arise by virtue of a person being treated as one's spouse. It is not uncommon for one partner in a same-sex relationship to name his or her partner as the trustee of a trust. But remember, if the *spouse* of a grantor is the *trustee* of a trust, the powers of the trustee are attributed to the grantor. IRC § 672(e). This rule may cause a trust that was formerly taxed as a simple or complex trust to now be treated as a grantor trust for federal income tax purposes. For purposes of the generation-skipping transfer ("GST") tax, transfers made to an unrelated individual who is more than 37½ years younger than the transferor are treated as generation-skipping transfers. IRC § 2651(d). If, however, the transferee is the lawful spouse of the transferor, the persons are treated as being in the same generation for purposes of the GST tax. IRC § 2651(c). The generational assignment of any transferee who is a descendant of the spouse's grandparents is similarly realigned. IRC § 2651(b)(2). Another common planning technique for same-sex couples is for one partner to make gifts as part of a split-interest transfer or of an interest in an entity, such as a limited partnership or limited liability company. Certain planning with split interest trusts or entities with multiple classes of ownership can achieve valuation discounts if the transferee is not a member of the transferor's family. Those discounts are largely ignored under Chapter 14 of the Code, however, if the transfer is to a family member, including a spouse. *See* IRC § 2701(e)(2)(A).

3. Planning Implications for Same-Sex Spouses

A number of estate planning issues arise because of the foregoing issues, and recognition of marriage may cause a fundamental shift in some of the effects of existing estate planning. In addition, estate planners should evaluate other matters in light of the fact that their same-sex married clients will be treated as married for federal tax purposes.

a. Consider Updating Estate Plans to Provide for the Federal Estate Tax Marital Deduction Planning

In testamentary planning, one spouse often chooses to create a trust for the surviving spouse to protect inherited assets from creditors or new spouses, to control the ultimate disposition of the property when the spouse dies, to provide management assistance for the surviving spouse, etc. For wealthy spouses, the availability of the estate tax marital deduction may give rise to a desire to defer estate tax until both spouses are deceased. As a result, same-sex married couples may wish to include QTIP, QDOT, or similar trust provisions in their estate plans.

b. Consider Amending Income Tax Returns for Open Years

Same-sex married couples should evaluate whether to amend income tax returns for all years for which the statute of limitations is open. Due to the progressive nature of income tax rates, and the thresholds for various deductions and exclusions, it may or may not be advantageous for persons to file jointly. Especially in the case of couples both of whom have substantial income, the so-called "marriage penalty" may cause overall taxes to increase. For returns filed before September 16, 2013, it appears that same-sex married couples may simply choose whichever reporting position works to their advantage and amend tax returns accordingly if not closed by the applicable statute of limitations. Rev. Rul. 2013-17, 2013-38 IRB 201. On or after that date, however, if a couple is married for tax purposes, they may not file as two single taxpayers, nor may either spouse file as "head of household."

c. Consider Amending Gift Tax Returns for Open Years

Same-sex married couples should evaluate whether to file amended gift tax returns for all years for which the statute of limitations is open. Taxpayers who reported transfers as taxable gifts to a

spouse on gift tax returns filed before September 16, 2013 may now modify those returns to take advantage of the gift tax marital deduction for any gift tax return not closed by the applicable statute of limitations. Rev. Rul. 2013-17, 2013-38 IRB 201. For gift tax returns filed after that date, the unlimited gift tax marital deduction should be applied. IRC § 2523.

d. Consider Filing "Supplemental" Estate Tax Returns if Statute Hasn't Run

For those couples with a same-sex spouse who is now deceased, consider whether an estate tax return should be filed or supplemented to claim an estate tax marital deduction or to elect portability. If the surviving spouse is not a U.S. citizen, a post-death "Qualified Domestic Trust" may be needed. *See* IRC § 2056A.

e. Consider Impact on State Death Taxes for "Decoupled" States that Base Tax on U.S. Return Principles

For those couples with a deceased same-sex spouse who owned assets in a state with a stand-alone estate or inheritance tax, consider whether an estate or inheritance tax should be filed or supplemented to claim a state-law marital deduction.

B. Texas Law Issues before *Obergefell*

1. Recognition of Out-of-State Marriages

As noted above, both the Texas Constitution and the Texas Family Code continue to define marriage as being solely between one man and one woman. Moreover, with regard to out-of-state marriages, Texas law purports to apply its rules to persons married elsewhere who are domiciled in this state. TEX. FAM. CODE § 1.103. The Texas Family Code goes on the provide that:

> [I]n order to provide stability for those entering into the marriage relationship in good faith and to provide for an orderly determination of parentage and security for the children of the relationship, *it is the policy of this state to preserve and uphold each marriage against claims of invalidity unless a strong reason exists for holding the marriage void or voidable*. Therefore, every marriage entered into in this state is presumed to be valid unless expressly made void by Chapter 6 or unless expressly made voidable by Chapter 6 and annulled as provided by that chapter.

TEX. FAM. CODE § 1.101 (emphasis added).

2. Void Marriages

Chapter 6 of the Texas Family Code declares that certain marriages are simply void. In particular, a marriage is void if one party to the marriage is related to the other as: (1) an ancestor or descendant, by blood or adoption; (2) a brother or sister, of the whole or half blood or by adoption; (3) a parent's brother or sister, of the whole or half blood or by adoption; or (4) a son or daughter of a brother or sister, of the whole or half blood or by adoption. TEX. FAM. CODE § 6.201. A marriage is void if entered into when either party has an existing marriage to another person that has not been dissolved by legal action or terminated by the death of the other spouse. TEX. FAM. CODE § 6.202. A marriage is void if either party to the marriage is younger than 16 years of age, unless a court order has been obtained under Section 2.103 of the Family Code. TEX. FAM. CODE § 6.205. A marriage is void if a party is a current or former stepchild or stepparent of the other party. TEX. FAM. CODE § 6.206. Although invalidated by *Obergefell*, the Texas Family Code still provides that a marriage between persons of the same sex or a civil union is "contrary to the public policy of this state" and is void in this state. TEX. FAM. CODE § 6.204(b).

3. Common-Law Marriage

Texas is among twelve states that recognize common-law or informal marriages. An issue as to whether a common-law or informal marriage exists between the decedent and another often arises during the estate settlement process. *See Crowson v. Wakeham*, 897 S.W.2d 779 (Tex. 1995); *Hinojosa v. Hinojosa*, 866 S.W.2d 67 (Tex. App.–El Paso 1993, no writ); *Estate of Giessel*, 734 S.W.2d 27 (Tex. App.–Houston [1st Dist.] 1987, writ ref'd n.r.e.); *Jordan v. Jordan*, 938 S.W.2d 177 (Tex. App.–Houston [1st Dist.] 1997, no writ). Once the existence of a common-law or informal marriage is established, the rights and duties of a common-law spouse are equal to those afforded a spouse of a ceremonial marriage. *See Weaver v. State*, 855 S.W.2d 116 (Tex. App.–Houston [14th Dist.] 1993, no writ). The legal status of a common-law spouse is equal to that of any other married person. *See Baker v. Mays & Mays*, 199 S.W.2d 279 (Tex. Civ. App.–Fort Worth 1946, writ dism'd). These rights include community property and other statutory rights and claims. *See, e.g., Garduno v. Garduno*, 760 S.W.2d 735 (Tex. App.–Corpus Christi 1988, no writ) (informally married spouses may acquire and own community property); *Barker v. Lee*, 337 S.W.2d 637 (Tex. Civ. App.–.Eastland 1960, no writ) (informally married spouses acquire homestead rights). As noted above, a couple that is treated as married under local law by virtue of a common-law marriage continues to be treated as married for federal income tax purposes, even if they move to a jurisdiction that doesn't recognize common-law marriages. Rev. Rul. 58-66, 1958-1 CB 60. In issuing its recent guidance, the IRS cited this ruling and its rationale in adopting the "place-of-celebration" rule for same-sex marriages. Rev. Rul. 2013-17, 2013-38 IRB 201.

C. Post-*Obergefell* Spousal Rights in Texas

There are many state-law rights that arise by virtue of one's marital status in Texas.[6] Now that the state of Texas recognizes same-sex marriages, these rights apply to all married persons in Texas, regardless of their gender. These rights include the following:

1. Community Property

One of the most fundamental spousal rights in Texas relates to the character of property owned by a married couple. Separate property consists of (i) property owned or claimed by the spouse before marriage; (ii) property acquired by the spouse during marriage by gift, devise, or descent; and (iii) recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage. TEX. FAM. CODE § 3.001. Community property is all property, other than separate property, acquired by either spouse during marriage. TEX. FAM. CODE § 3.002. A presumption exists that all property acquired by either of the spouses during marriage is community property. *See* TEX. FAM. CODE § 3.003.

If an asset is community property, then upon the death of one spouse, death works a partition, so that the asset will be owned in equal undivided interests between the surviving spouse and the beneficiaries of the estate of the deceased spouse, subject to the right of the executor of the deceased spouse's estate to administer that property. The personal representative is authorized to administer not only the separate property of the deceased spouse, but also the former community property which was the sole management community property of the deceased spouse during the marriage, and all of the joint management community property. TEX. ESTS. CODE § 453.007. The surviving spouse is entitled to retain possession and control of all of the former sole management community property which he or she managed during the marriage. *Id.* The surviving spouse may by written instrument filed with the clerk waive any right to exercise powers as the community

[6] This material is adapted in part from Davis and Pacheco, "Peace Treaties: Considerations when Negotiating, Drafting & Enforcing Settlement Agreements" presented to the Probate, Trusts and Estate Section of the Houston Bar Association, September, 2012.

survivor, in which case, the personal representative of the deceased spouse is authorized to administer the entire community estate. *Id.* The personal representative also has a duty to account to the surviving spouse for post-death income from any community property assets that are in the hands of the personal representative. *See* TEX. ESTS. CODE Chpt 310.

2. Claims for Contribution and Reimbursement

When one spouse's marital estate has benefited from expenditures made during the marriage to the exclusion of a marital estate in which the other spouse has an interest, claims for economic contribution and reimbursement arise. While originally based in equity, the Texas Legislature enacted a statutory reimbursement right governing certain claims in 1999. When first enacted, this statutory reimbursement right granted a spouse an "equitable interest" in property. It was amended in 2001 to establish claims for "economic contribution" based upon an algebraic formula. *See* former TEX. FAM CODE § 3.402-.403. Dissatisfied with both of these approaches, the 2009 Legislature again amended the statute to essentially codify the common law for reimbursement claims. The codification of these rules is intended to provide some measure of certainty regarding equitable claims for spousal reimbursement. An overview of these potential claims follows.

a. Claim for Economic Contribution

For persons dying between September 1, 1999 and August 31, 2009, a surviving spouse may have a statutory claim for economic contribution. *See* former TEX. FAM. CODE § 3.403. A claim for economic contribution is generally based on a reduction in the principal amount of debt on the other spouse's separate property or capital improvements to the other spouse's separate property. *See* former TEX. FAM. CODE § 3.402-.403.

b. Claim for Reimbursement

For persons dying on or after September 1, 2009, a surviving spouse may have a claim for reimbursement. TEX. FAM. CODE § 3.402. A claim for reimbursement may be based on (i) payment during the marriage by "one marital estate of the unsecured liabilities of another marital estate" (i.e., a community debt by one spouse's separate estate or vice versa); (ii) inadequate compensation for the time, toil, talent, and effort of one spouse by a business under the control and direction of that spouse; and (iii) certain debt reductions and capital improvement from one marital estate to another. TEX. FAM. CODE § 3.402. As compared to the statutory formula that applied to claims for economic contribution, a claim for reimbursement is decided by the court by "using equitable principles, including the principle that claims for reimbursement may be offset against each other if the court determines it to be appropriate." TEX. FAM. CODE § 3.402(b). Thus, the court may offset the monetary value of the spouse's use and enjoyment of property against a claim for reimbursement. TEX. FAM. CODE § 3.402(c). The court is authorized to impose a lien for payment of the claim upon death or dissolution of the marriage. TEX. FAM. CODE § 3.406. Certain payments, such as those for necessaries, are not reimbursable. TEX. FAM. CODE § 3.409.

3. Homestead

A homestead right, regardless of whether the property is separate or community, may be claimed when the decedent is survived by a spouse. *See* TEX. ESTS. CODE §§ 353.051, 102.002; *Givens v. Hudson*, 64 Tex. 471 (1885); *Zwerneznann v. Von Rosenburg*, 76 Tex. 522, 13 S.W. 485 (1890); *Childers v. Henderson*, 76 Tex. 664, 13 S.W. 481 (1890); *Jenkins v. Hutchens*, 287 S.W.2d 295 (Tex. Civ. App.–Eastland 1956, writ ref'd n.r.e.). A rural homestead consists of 200 acres of land for a married decedent or 100 acres for a single decedent, while an urban homestead consists of a lot or lots not exceeding ten acres. *See* TEX. CONST. ART. 16, § 51; TEX. PROP. CODE § 41.002.

Title to a homestead vests in the heirs of the decedent as other real property under the laws of descent and distribution if one dies with a surviving spouse. *See* TEX. ESTS. CODE §§ 101.001, 102.003. However, regardless of whether title to the homestead vests in others, it does so subject to the surviving spouse's right to use and occupy the homestead for his or her lifetime for as long as the surviving spouse chooses to occupy the property as a homestead. TEX. ESTS. CODE § 102.005. The homestead cannot be construed as an estate asset subject to the control of the representative or court, nor is any income derived therefrom subject to such control. *See Childers v. Henderson*, 76 Tex. 664, 13 S.W. 481 (1890); *Franklin v. Woods*, 598 S.W.2d 946 (Tex. Civ. App.–Corpus Christi 1980, no writ); *Thompson v. Thompson*, 149 Tex. 632, 236 S.W.2d 779 (1951). The homestead may not be partitioned until all superior rights of occupancy have been terminated. *See* TEX. CONST. ART. 16, § 52; TEX. ESTS. CODE §§ 102.005-.006; *Hudgins v. Sansom*, 72 Tex. 229, 10 S.W. 104 (1888).

The surviving spouse's occupancy right is in essence a legal life estate, created by operation of law. *Sargeant v. Sargeant*, 19 S.W.2d 382 (Tex. Civ. App. 1928, no writ). The spouse is liable for payment of all property taxes and interest on any mortgage, but the underlying title holder is responsible for paying casualty insurance premiums and the principal on any indebtedness. *Hill v. Hill*, 623 S.W.2d 779 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.).

4. Family Allowance

Immediately upon the approval of a filed probate inventory or upon the filing of an affidavit in lieu thereof, the court must fix a family allowance for support of the surviving spouse (as well as any minor or adult incapacitated children). The spouse and children may apply for the allowance even prior to the approval of the inventory and the court may fix it at that time. The allowance is to be in an amount sufficient for their maintenance for one year from the date of death. *See* TEX. ESTS. CODE Chpt. 353. No allowance can be made for surviving spouses who possess sufficient separate property of their own from which they are able to provide for their own maintenance. *See* TEX. ESTS. CODE § 353.101(d)(1); *Pace v. Eoff*, 48 S.W.2d 956 (Tex. Comm'n App. 1932, holding approved); *Kennedy v. Draper*, 575 S.W.2d 627 (Tex. Civ. App.–Waco 1978, no writ); *Noble v. Noble*, 636 S.W.2d 551 (Tex. Civ. App.–San Antonio 1982, writ ref'd n.r.e.). This allowance, when proper, is a matter of right and is not construed as an advancement. Thus, repayment at the end of the estate administration is not required. *See* TEX. ESTS. CODE § 353.104; *Chefflet v. Willis*, 74 Tex. 245, 11 S.W. 1105 (1889); *Stutts v. Stovall*, 544 S.W.2d 938 (Tex. Civ. App.–San Antonio 1976, writ ref'd n.r.e.). A family allowance can consist of money, property, or both, and the court may order a sale of assets to raise the allowance, including the sale of property specifically bequeathed when no other assets exist. *See* TEX. ESTS. CODE §§ 353.106-.107.

5. Exempt Personal Property

In addition to the homestead, surviving spouses are entitled to have certain exempt personal property set aside for their use during administration. *See* TEX. ESTS. CODE §§ 353.051-.052; TEX. CONST. ART. 16, § 49; TEX. PROP. CODE §§ 42.001 and 42.002.

a. Solvent Estates

In a solvent estate, exempt property may be used by persons entitled thereto during the administration. But, the right to use these assets (other than the homestead or allowance) terminates when the estate is closed. The personal property is then distributed to the heirs or devisees of the decedent. *See* TEX. ESTS. CODE § 353.152; *Kelley v. Shields*, 448 S.W.2d 135 (Tex. Civ. App.–San Antonio 1969, writ ref'd n.r.e.).

b. Insolvent Estates.

In an insolvent estate, title to the exempt personal property passes to the spouse and children free of all debts, except those debts secured by existing liens, or claims for funeral and last illness expenses. *See* TEX. ESTS. CODE §§ 353.151, 353.153-.155, 355.103(2); *American Bonding Co. of Baltimore v. Logan*, 106 Tex. 306, 166 S.W. 1132 (1914) (Certified Questions Answered).

c. Allowance in Lieu

When a decedent's estate does not contain a homestead or exempt personal property, the surviving spouse and children may apply to the court for an allowance in lieu thereof. An allowance is permitted of up to $45,000 for the homestead (increased from $15,000 on January 1, 2014) and $30,000 for other exempt property (increased from $5,000 on January 1, 2014). *See* TEX. ESTS. CODE §§ 353.053-.054; *In re: Mays' Estate*, 43 S.W.2d 306 (Tex. Civ. App.–Beaumont 1931, writ ref'd). The allowance may be satisfied in money, property, or both, and regardless of whether it was bequeathed to another. *See* TEX. ESTS. CODE § 353.055. Property of the estate may be sold by court order to obtain funds necessary for the payment of the allowance. *See* TEX. ESTS. CODE § 353.056.

## V. Conclusion

*United States v. Windsor* makes it clear that same-sex couples who reside in a state that recognizes same-sex marriage will be considered as married for federal tax purposes. Revenue Ruling 2013-17 amplifies *Windsor*, holding that all same-sex married couples will be treated as married for all federal tax purposes, including income, estate, gift, and generation-skipping transfer tax purposes, regardless of the state of the couple's residence. *Obergefell v. Hodges* greatly extends these rules, requiring states to license marriages between two people of the same sex, and to recognize all marriages between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. Estate planners representing same-sex married couples can now apply the rules that they have used for so long for opposite-sex married couples. Questions still remain, however, with regard to the effective date of the marriage of same-sex couples whose marital relationship pre-dates the U.S. Supreme Court's decision in *Obergefell*. Resolution of this issue, and its impact on marital property rights of same-sex married couples, will continue to present a challenge for those couples and their advisors.

## Summary of Estate Planning Issues:

1. Consider getting married to take advantage of the unlimited estate tax marital deduction and other tax provisions that favor married couples.

2. Consider staying single to avoid "marriage penalty" provisions, which cause additional taxes to be paid by married couples.

3. Consider making a "portability" election for a deceased spouse, or making a late "QTIP" election.

4. Consider amending previously filed federal estate, gift and income tax returns and state income tax returns that are not barred by applicable statutes of limitations.

5. Consider a spousal rollover for inherited IRAs or qualified plans.

6. Review current estate planning documents to ensure that the amount and structure of any spousal bequests remain appropriate.

7. Review retirement account beneficiary designations and joint and survivor annuity elections to ensure that they remain appropriate and valid.

8. Consider a marital property agreement to avoid confusion regarding the marital property characterization of assets acquired during marriage.

9. Consider converting separate property to community property, or in appropriate cases, vice versa.

10. Consider replacing individual life insurance policies with survivor policies.

11. Consider splitting gifts between spouses.

12. Non-citizen spouses should consider seeking permanent residency and/or becoming citizens.

13. Evaluate transfers or encumbrances of property that arose subsequent to marriage to consider whether joinder by the spouse was required and consider ratification.

14. Evaluate post-marriage litigation or settlements to determine the potential impact of marital status on the outcome of the dispute.