

Same-Sex Marriage: Now Legal In All Fifty States

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On June 26, 2015, the US Supreme Court issued its opinion in *Obergefell v. Hodges*, the name assigned to a series of consolidated cases on same-sex marriage rights. The Court ruled 5-4 in favor of the petitioners, ruling same-sex married couples are entitled to equal protection under the laws and that their marriages must be recognized nationwide.

Case background

Jim Obergefell & his longtime partner, John Arthur, sought to enter into a legal marriage. Both residents of Ohio, Mr. Arthur was terminally ill with ALS and they wanted to solemnize their relationship before his death. They chartered a plane to Maryland, where same-sex marriage is legal and were married on the tarmac at a Baltimore airport. They then returned to Ohio as a married couple.

Soon after, Mr. Arthur died. The State of Ohio issued a death certificate that did not identify Obergefell as a surviving spouse. Mr. Obergefell sued the state (naming Hodges, the director of the Ohio Department of Health) to have himself named as Mr. Arthur's surviving spouse, arguing that Ohio's state constitutional ban on same-sex marriage – including nonrecognition of marriages solemnized in other states – violates the equal protection clause of the 5th and 14th Amendments. Obergefell's case was consolidated with a series of other related same-sex marriage cases to resolve two specific issues under the 14th Amendment.

Issues resolved by *Obergefell* Opinion

1. The 14th Amendment requires states to issue marriage licenses to individuals of the same gender.
2. The 14th Amendment requires states to formally recognize same-sex marriages of that state's residents, when those residents entered into a same-sex marriage in another state where the marriage was legally valid.

The law in Colorado

The Obergefell decision will have no impact on same-sex couples in Colorado. On October 6, 2014, the U.S. Supreme Court decided to let the appellate court decisions stand, permitting same-sex marriage, in seven appeals from five states. Two of those states were Utah and Oklahoma, states that are in the 10th Circuit Court of Appeals. Decisions of the 10th Circuit Court of Appeals determine the applicable law for all six states in the 10th Circuit, Oklahoma, Kansas, New Mexico, Colorado, Wyoming and Utah.

As a consequence of that decision, Colorado Attorney General John Stuthers issued a statement that the Colorado County Clerks were legally required to issue marriage licenses to same-sex couples who request them. The Obergefell decision has now extended the right of same-sex couples to marry to all 50 states.

Impact of *Obergefell* for same-sex married couples

State laws banning same-sex marriage are effectively invalidated. Same-sex spouses will now enjoy all state tax benefits and other spousal benefits that other couples enjoy. Some of these occur independent of proactive planning:

- Adoption or child custody proceedings, even in states that previously did not recognize two persons of the same gender as a child's parents (at issue in some of the cases that were consolidated with *Obergefell*);
- Divorce proceedings, if necessary, now that states must recognize the validity of the marriage wherever solemnized;

- Spousal priority in matters concerning an incapacitated spouse's care, or recognition in the event guardianship or conservatorship proceedings are necessary;
- Spousal survivorship rights under state pension or other retirement benefits, even in states that previously did not recognize same-sex marriage;
- Spousal inheritance through *intestacy* (when a spouse dies without a valid will or trust);
- Spousal *identity or priority* in the event will or trust proceedings are contested after death;
- The ability to file taxes jointly as a married couple;
- Spousal privilege in criminal proceedings where a spouse is a defendant;
- Any other spousal contract right where the contract is construed under the laws of a state that did not recognize the marriage.

Proactive planning still advised

Just because all states must now recognize marriage between same-sex couples doesn't mean couples should not take control of their will and trust planning, and clearly set forth their wishes in enforceable legal documents. All the good reasons to plan apply just as much to same-sex married couples as to opposite-sex married couples:

- Proactively expressing their wishes concerning their medical care during periods of incapacity (through durable powers of attorney and living trust provisions);
- Structuring the distribution of their property – ideally in protective trusts – for the benefit of their surviving spouse and children after death;
- Providing mechanisms that allow flexibility in administering those trusts to account for changes in the law, or changes in beneficiary circumstances after death (through carefully-tailored choice of law, decanting, or trust protector provisions);
- Providing clarity and discretion to a trustee to make strategic tax decisions through trust administration after death (through various accounting, tax and investment provisions);
- Providing for family members other than a spouse or child through their estate plans;
- Making gifts to religious or other charitable organizations through their estates;
- Allowing orderly operation and transition of businesses or professional practices through incapacity or death.

Obergefell likely represents the last word on same-sex marriage, elevating these relationships to equal stature with other marriages. While same-sex married couples are now entitled to equal protection under the laws of every state, the efficacy of those laws in ensuring dignity in disability and death, and orderly and structured distribution of property after death is very limited for all couples. Families should always take control of their planning and leave as little to state law interpretation as possible. That is best done through careful planning with experienced professionals who can intelligently guide the family through the process.