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Estate planning for same-sex couples in light of *Obergefell*

On June 26, the U.S. Supreme Court announced its decision in *Obergefell v. Hodges*, granting same-sex couples throughout the country the right to marry. Specifically, the court held that the right to marriage is a fundamental right and that under the due process and equal protection clauses of the 14th Amendment, same-sex couples may not be deprived of that right. The ruling requires that states recognize same-sex marriages, essentially equalizing same-sex marriage.

In June 2013, the U.S. Supreme Court overturned a portion of the 1996 Defense of Marriage Act, which limited federal benefits to heterosexual married couples. The ruling extended federal health, survivor, retirement and many other benefits to same-sex married couples.

It also extended those benefits to children of same-sex married couples who meet standard eligibility requirements. However, it remained unclear how states that only recognized civil unions, rather than same-sex marriage, would distribute federal benefits.

In Illinois, same-sex marriage has been recognized since June 2014 and civil unions have been recognized since January 2013. Previously, under federal and Illinois law, same-sex couples married in Illinois — or another state that recognized same-sex marriage — received the same federal and state benefits as heterosexual married couples. The Supreme Court's landmark decision in *Obergefell* extends those benefits to same-sex couples in every state.

Although Illinois couples already enjoy many of those rights, *Obergefell* expands civil rights for same-sex couples across the nation. In addition to this civil rights reform, Illinois couples should celebrate because they will now receive equal treatment in all 50 states, no longer needing to worry about how their rights and estate plans will

be affected by states which previously did not recognize same-sex marriage.

Although changes to legal rights are more profound in states that did not recognize same-sex marriage, Illinois couples continue to enjoy the expanded rights.

Estate planning benefits:

- Claim the marital deduction for gift and estate tax purposes and ensure no estate tax is owed until the surviving spouse's death;
- Elect portability of the deceased spouse's unused applicable exclusion amount;
- Split inter vivos gifts — allow a married couple to make an annual exclusion gift of \$28,000 from one spouse;
- Name spouse as beneficiary under a qualified retirement account and allow the surviving spouse to roll over the account to his/her personal account ensuring asset protection and maximum income tax planning;
- Make medical decisions even if a power of attorney for health care has not been executed;
- Receive spousal identity or priority in will contests;
- Receive recognition in intestacy and enforce bequests to same-sex partners.

Marital deduction, portability

The Supreme Court decision grants same-sex couples the same estate planning benefits enjoyed by opposite-sex couples. Married

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Additionally, upon the first spouse's death, an unlimited amount may pass to the surviving spouse without paying estate taxes until the surviving spouse's sub-

THE BUZZ



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sequent death.

The federal estate exclusion for 2015 is \$5.43 million per person, adjusted for inflation.

With a properly structured estate plan, each spouse should be able to pass the exemption amount tax-free, allowing them to pass \$10.86 million tax-free to the next generation. Further, portability now allows same-sex couples to leverage their respective exemptions.

For example, if Portia died this year with \$1 million and an estate tax return was timely filed, we would be able to capture the \$4.43 million of unused exemption and port it onto Ellen's (her surviving spouse) exemption. Ellen would then be able to pass an additional \$4.43 million estate tax free upon her death. Similarly, same-sex couples can now make gifts in excess of the \$14,000 federal limit by splitting the gift among spouses.

With more than 1,000 tangible benefits, protections, rights and responsibilities that a marriage provides to couples and their children, taxes are often at the forefront of same-sex marriage discussions.

Income tax benefits include:

- Grant certain Social Security,

Medicare and Medicaid benefits;

- When beneficial, file joint income tax returns as a married couple and consider amending past returns. Generally, where one partner's income is higher, filing jointly as a married couple can translate into tax savings. Conversely, partners in similar earnings brackets may find themselves in a steeper tax rate when they combine their returns;
- Simplify the basis and contribution rules for jointly owned property;
- In a divorce, eliminate adverse tax consequences for the transfer of property;
- Receive state benefits such as pensions and federal benefits that are distributed by the state;
- Surviving spouse rollover opportunity (as discussed above).

Illinois same-sex couples continue to enjoy the rights granted by the Religious Freedom and Marriage Fairness Act. After *Obergefell*, same-sex couples have increased security in how their rights and estate plans will be interpreted in different states. This makes it easier for couples to sleep at night rather than worry about whether their wishes will be respected.

However, same-sex couples still face the same concerns as all newlyweds, such as state laws governing families, adoption, divorce and family and estate planning. Although each state may have different laws, same-sex couples can adopt, divorce and easily create estate plans in every state. Couples are advised to plan for the future by executing key estate planning documents.

At the very least, couples should execute wills, powers of attorney for health care and powers of attorney for property. In addition, couples are encouraged to execute revocable living trusts to help avoid probate, provide asset protection for beneficiaries and minimize estate tax and income tax consequences.

A special thanks to Chuhak & Teeson P.C. law clerk Eric Pagnamenta for his contribution to this month's column.