

Estate Planning for Same-Sex Couples After *Obergefell*
Madison Estate Council – October 19, 2015
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Agenda:

- I. Federal and Wisconsin Timelines (and why they matter)
 - II. High-Level Effect on Planning for Same-Sex Couples
(including discussion of domestic partnerships)
 - III. Unique Wisconsin-Specific Issues For Planning for Couples after *Obergefell*
 - A. Marital Property Law
 - B. Wisconsin Statutes addressing Wills and Powers of Attorney
 - IV. Other Issues
 - A. Amending 2013, 2014 Tax Returns
 - B. Specific State Marriage Statutes
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- I. How Did We Get Here?
 - A. Nationallyⁱ:
 - 1. September 21, 1996 - Defense of Marriage Act (“DOMA”) signed into law
 - 2. 1998 – 2006 – More than half of the states in the U.S. formally ban same-sex marriage, either by constitutional amendment or other legislation.
 - 3. May 17, 2004 – Massachusetts legislature passes marriage equality law
 - 4. May 15, 2008 – California Supreme Court holds for marriage equality
 - 5. November 4, 2008 – Proposition 8 Legislates over California Supreme Court
 - 6. 2008 – early 2015 – Thirty-seven states permit same-sex marriage, either by legislation or judicial decision
 - 7. June 26, 2013 – U.S. Supreme Court strikes down Proposition 8 (*Hollingsworth v. Perry*) and Section 3 of DOMA, which denied legally-married same-sex couples certain benefits of marriage (*U.S. v. Windsor*).
 - 8. June 26, 2015 – U.S. Supreme Court recognizes same-sex couples right to marry in *Obergefell v. Hodges*.
 - B. Wisconsinⁱⁱ:
 - 1. November 2006 – Wisconsin residents pass Referendum 1 by a 59% vote to limit marriage to one man and one woman. Also prohibits legal

recognition or validity for any legal status “identical” or “substantially similar” to marriage for unmarried persons.

2. June 29, 2009 – budget bill signed into law that includes domestic partnership provisions for same-sex couples. Wis. Stat. 770 comes into law establishing the process and criteria for creating a domestic partnership.
3. June 6, 2014 – Judge Barbara Crabb overturns Wisconsin’s constitutional amendment prohibiting same-sex marriage in *Wolf v. Walker*.

NOTE: despite several stays being issued and subsequently lifted as *Wolf* wound through the courts, the state has declared it will recognize all marriages for which a license was validly issued, including those between June 6 and June 13, 2014.

4. September 4, 2014 – Seventh Circuit Court of Appeals upholds Judge Crabb’s ruling in *Wolf v. Walker*.
5. October 6, 2014 – U.S. Supreme Court denies review of *Wolf v. Walker*.

II. What this Means for Planning for Same-Sex Couples (Big Picture)

- A. In terms of application of Wisconsin law, federal law (including the Internal Revenue Code) and other applicable regulations, same-sex couples should be approached the same as opposite-sex couples:
 1. Estate Tax and Planning
 - (a) Unlimited marital deduction available to married same-sex couples
 - (b) Portability available to married same-sex couples
 - (c) Ability to file joint federal income taxes
 2. Wisconsin Law
 - (a) Applicability of Wisconsin Marital Property Laws
 - (b) May jointly file state income taxes
 - (i) Same-sex couples married in 2014 who filed joint federal returns previously needed to file Schedule S with their Wisconsin returns. After *Wolf*, this is no longer necessary.ⁱⁱⁱ
 3. NOTE: Wisconsin domestic partnerships, while still available and in force for unmarried same-sex couples are expressly distinguished from marriage by statute, and therefore DO NOT entitle domestic partners to treatment as spouses under the law.

- B. Of course there, are some sensitivities to be aware of that are somewhat unique to the same-sex marriage context:
1. Family members of same-sex couples may not approve of the union and therefore there may be unique interplay with estate plans of parents, grandparents, etc. Keep an eye out for powers of appointment, distribution clauses that may be against public policy and other issues.
 2. Also bear in mind that heirs-at-law may not be appropriate default provision in estate plan.
 3. Marital property issues – spouses may each be established in their respective professions prior to marriage.
- C. Primer on Domestic Partnerships
1. Still an option for couples, though future is uncertain with same-sex marriages now recognized in Wisconsin and nationally.
 - (a) Constitutional challenge to legality of domestic partnerships had been winding through courts simultaneously to same-sex marriage litigation
 - (b) Court in *Appling v. Walker* found that domestic partnerships were not “identical or substantially similar to marriage” as was prohibited under the amendment to Wisconsin’s state constitution then in effect.
 2. Rights of Domestic Partners Include:
 - (a) Intestate inheritance rights
 - (b) Presumption of joint tenancy on jointly titled real estate
 - (c) Waiver of real estate transfer fees
 - (d) Family/sick leave and workers compensation benefits
 - (e) Immunity from testifying against partner
 3. Domestic Partnerships May Be Terminated in Two Ways:
 - (a) Filing signed notice of termination (Wis. Stat. 770.12(1))
 - (b) Domestic partnership automatically terminates if either partner enters into a marriage recognized in Wisconsin. (Wis. Stat. 770.12(4)(b))

III. Application of Wisconsin’s Marital Property Law – Wis. Stat. 766

- A. In the coming years, many same-sex couples that have been in committed relationships for long periods of time will be marrying, having earlier marriages recognized in Wisconsin and revisiting their estate plans. Amending plans for these couples will require a thorough discussion with clients explaining the application of Wisconsin's marital property law.
- B. A vast majority of these clients will likely require some sort of marital property agreement in order to plan effectively.
 - 1. Threshold question when considering marital property issues: What is a couple's determination date?
 - (a) Wis. Stat. 766.01(4) - "Determination date" means the last to occur of the following:
 - (i) Marriage.
 - (ii) 12:01 a.m. on the date that both spouses are domiciled in this state.
 - (iii) 12:01 a.m. on January 1, 1986."
 - (b) Department of Revenue Publication 113
 - (i) "As a same-sex couple that is considered lawfully married for federal income tax purposes is considered married for Wisconsin income tax purposes, the "Wisconsin Treatment" information in this publication applies to a lawfully married same-sex couple."
 - (ii) What does this mean for a couple married:
 - (A) Out-of-state before Judge Crabb's decision in *Wolf*?
 - (B) After *Wolf* decision, before stay was instituted?
 - 2. For some, a standard Opt-In Agreement will be appropriate
 - (a) Already consider everything joint
 - (b) Have shared estate planning goals and beneficiaries
 - (i) Few "family" assets, heirlooms, etc.
 - (ii) May have children together, or, if children from previous relationships, considered both spouse's children
 - (c) Benefits include basis step up, "Washington Will."

3. For many, however, either a full or limited Opt-Out will be necessary
 - (a) Full Opt-Out
 - (b) Limited Opt-Out: “All marital property except...”
 - (i) “Keep in the family” assets
 - (ii) Closely-held business interests
 - (iii) Fruits of labor assets
 - (iv) Assets to benefit certain family members, friends, etc.
 - (A) Classifying certain assets as individual property may simplify estate planning/administration
 - (B) E.g. credit shelter trust with death order provisions “all individual property to Family Trust, all marital property to Survivor’s Trust.”

IV. Planning Techniques Most Applicable

A. Fiduciary Appointments, Rights of Spouse

1. Trusts
 - (a) Joint living trusts now often most appropriate primary planning vehicle for same-sex couples. (Previously, separate trusts were ordinarily recommended.)
 - (b) Keep in mind language in trust relating to separate accounts for marital property and individual property based on clients’ situation.
 - (c) Family Trust often appropriate at first spouse’s death, particularly where death order provisions are necessary to ensure certain beneficiaries receive assets at first spouse’s death.
 - (d) Pay particular attention to treatment of IRAs, particularly in trusts that were drafted before availability of spousal rollover for same-sex spouses. (Spousal rollover not available for domestic partners.)
2. Will
 - (a) Wis. Stat. 854.15 revokes provisions of a Will executed in favor of a domestic partner if domestic partnership has been terminated between execution of Will and testator’s date of death, including:

- (i) Disposition of property in favor of former domestic partner or domestic partner's family members
 - (ii) Power of appointment created in favor of former domestic partner
 - (iii) Nomination of former domestic partner as Personal Representative or other fiduciary capacity
- (b) BUT, provision does not apply if "The decedent and the former spouse have remarried or entered into a new domestic partnership before the death of the decedent" – Wis. Stat. 854.15(5).
 - (i) Should apply to ensure that domestic partners who later marry need not update their Wills to ensure continued provisions in favor of spouse
 - (ii) But highlights danger of clients not formally terminating domestic partnerships upon dissolution of relationship
- (c) Premarital Will Statute – Wis. Stat. 853.12
 - (i) If decedent dies with Will executed prior to marriage to surviving spouse (or entering into domestic partnership with surviving partner), surviving spouse or partner is entitled to what he or she would have received if decedent died intestate, less certain devises to issue.
 - (ii) Same-sex couples need to take care to update their Wills and related documents to reflect their relationship status, to prevent not only challenges from family members or other contingent beneficiaries, but also to ensure they document their understanding of their share under their spouse or domestic partner's documents.
- (d) Availability of Claim to Elective Share
 - (i) Some couples may have created an estate plan prior to marriage, with provisions for their family members, friends or charities. If they wish to maintain that plan after subsequent marriage, they will need to execute marital property agreement waiving any rights to the elective share under Wis. Stat. 861.
 - (ii) "The surviving spouse has the right to elect an amount equal to no more than 50% of the augmented deferred marital property estate as determined under sub. (2)."

- (iii) Depending on classification of marital property vs. individual property, failure to waive elective share may prevent sufficient assets from reaching beneficiaries designated in estate plan of first spouse to die.

3. Agents Under Power of Attorney for Finances and Property

- (a) Wis. Stat. 244.10(2)(e) – “An agent's authority terminates when any of the following occurs...The domestic partnership of the principal and agent under ch. 770 is terminated unless the power of attorney otherwise provides.”
- (b) What is the effect for same-sex spouses who were formerly domestic partners, but whose domestic partnership is terminated due to their subsequent (or subsequently recognized) marriage?
 - (i) Illogical to read that power of attorney is terminated if naming former domestic partner (now spouse) but that seems to be strict reading.
 - (ii) No similar provision to Wis. Stat. 854. 15(5) in favor of domestic partners who later marry.
 - (iii) Probably best to re-execute power of attorney subsequent to marriage to name spouse, to ensure no complications arise.

4. Agents Under Power of Attorney for Health Care

- (a) Wis. Stat. 155.40(2) – “If the health care agent is the principal's spouse or domestic partner under ch. 770 and, subsequent to the execution of a power of attorney for health care instrument, the marriage is annulled or divorce from the spouse is obtained or the domestic partnership under ch. 770 is terminated, the power of attorney for health care is revoked and the power of attorney for health care instrument is invalid.”
- (b) Same issues arise as with regard to power of attorney for finances. Best practice may be to re-execute power of attorney naming spouse after the marriage.

B. Amend Certain Income or Gift Tax Returns?

1. Federal Income Tax Returns

- (a) Rev. Rul. 2013-17 permits married same-sex couples to amend prior returns within limitations period to reflect marital status as of date return was filed.

- (b) For purposes of amending federal returns, a couple is deemed married so long as they were married in a state recognizing their marriage, regardless of where they were domiciled at time return was filed (state of celebration vs. state of domicile standard).
- (c) Clients married earlier than the current tax year should consider whether to amend prior returns to reflect marital status.^{iv}
 - (i) Imputed Income for Health Insurance – If client was married in other state and lived in Wisconsin, client recognized imputed taxable income if spouse was included in employee-funded insurance plan.^v
 - (ii) Deductible Health Insurance Account Contributions – If client was married and contributed above deductible limit for single person but below threshold for married couple, return may be amended to refund tax paid on the difference.
 - (iii) Deductible IRA Contributions – Note that the IRS does not permit amended returns with respect to qualified retirement plans, and has not provided guidance regarding application of *Windsor* to periods before September 16, 2013.
- (d) If amending earlier returns for other reasons, no guidance has been issued as to whether taxpayer must also amend to pay tax as married couple. Should be considered if amendment to reflect marital status would cause taxpayer to incur “marriage penalty.”

2. State Income Tax Returns^{vi}

- (a) 2013 Returns filed before October 16, 2014 and other Returns within limitation period – couples married at the time such return was originally due may amend those returns to reflect married filing jointly or married filing separately status within limitation period by filing Form 1X.
- (b) 2013 Returns filed after October 16, 2014 Beyond – Married couples must file individual Wisconsin income tax returns as married filing jointly, married filing separately, or if applicable, head of household
- (c) Wisconsin returns may be amended for the same reasons as federal returns (including income recognized through employer-provision of health insurance, overfunded HSAs, etc.)

3. Estate and Gift Tax Returns

- (a) Prior to *Windsor*, unlimited marital deduction was not available to same-sex couples, meaning that all transfers to partner were subject to gift tax and resulting reduction in available exemption
- (b) Same rules apply to amending previously-filed estate and gift tax returns as federal income tax returns.
- (c) Estate Tax Returns
 - (i) If bulk of taxable estate was left to same-sex spouse, but estate tax return was filed without utilizing marital deduction, return should be amended to recover all estate taxes paid owing to lack of marital deduction or to elect portability.
 - (ii) This was primarily the issue in *Windsor*.
- (d) Gift Tax Returns
 - (i) Any gift tax returns filed for gifts to same-sex spouses should be amended to reflect that no taxable gift was made, and preserve the donor's available exemption.
 - (ii) No relief for gifts given to spouses for which the time to amend the return has passed.

V. Miscellaneous Issues to Consider

A. State Laws Restricting Marriage Not Expressly Targeted toward Same-Sex Couples

1. Massachusetts' "1913 Law"^{vii}

- (a) Massachusetts was one of first states to recognize same-sex marriages in 2004.
- (b) But Massachusetts statute in force until July 31, 2008 required couples marrying in Massachusetts to indicate intent to reside in Massachusetts and to do so after the marriage.
- (c) A number of same-sex couples were married in Massachusetts during this four-year period, but did not reside in the state for any length of time.
- (d) This "technical defect" renders such marriages "voidable" and could permit a spouse to argue, at dissolution (or a disgruntled family member to argue at one spouse's death) that the marriage was void.

- (e) Marriage may be “perfected” by “remarriage”
 - (i) Couple must file “Notice of Intention to Remarry” in same Massachusetts city or town where original Notice of Intention to Marry was filed.
 - (ii) No waiting period, BUT couple must personally appear.
 - (iii) Unaware of court annulling any marriage or holding marriage to be void on these grounds to date, but remarriage may nonetheless be prudent based on family dynamics or property interests (practitioners should at least be careful to alert clients to “voidability” concerns).

2. Wisconsin’s Marriage Evasion Statute

- (a) Wis. Stat. 765.30(1)
- (b) “The following may be fined not more than \$10,000 or imprisoned for not more than 9 months or both:
 - (a) Penalty for marriage outside the state to circumvent the laws. Any person residing and intending to continue to reside in this state who goes outside the state and there contracts a marriage prohibited or declared void under the laws of this state.”
 - (i) Could this cause issues for couples married in other states, but residing in Wisconsin prior to *Wolf*? Would such a case be moot after *Wolf*?
 - (ii) Likely no corrective steps to be taken, but may want to alert clients to issue, reaffirm marital status in Marital Property Agreement, Wills, Trusts and Powers of Attorney.

ⁱ <http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage>

ⁱⁱ <http://archive.postcrescent.com/article/20140609/APC0101/306090255/Gay-marriage-Wisconsin-timeline>

ⁱⁱⁱ <https://www.revenue.wi.gov/taxpro/news/2014/141013.html>

^{iv} See also <https://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples>

^v See also https://www.irs.gov/irb/2014-2_IRB/ar13.html

^{vi} <https://www.revenue.wi.gov/taxpro/news/2014/141013.html>

^{vii} *Legal Issues for Non-Massachusetts Same-Sex Couples Who Married In Massachusetts Prior to July 31, 2008*, Gay & Lesbian Advocates & Defenders, 2014.