Wills, Probate and Estate Planning
(and Thoughts on Marriage)
for Same-Sex Couples
In Light of *Windsor* and *Obergefell*

February 16, 2016

Michael L. Kaufman
Jackson Walker L.L.P.
2323 Ross Avenue, Suite 600
Dallas, Texas 75201

mkaufman@jw.com

(214) 953-5734

I. A SEA CHANGE. For same-sex couples and gay and lesbian persons generally, the years of the 2000's have brought major changes that many thought would come only well into the future. As with so many significant changes, progress is not smooth, or universal. But in the estate planning area, the legal challenges to laws treating same-sex couples differently from opposite-sex couples and the court rulings on those challenges have brought generally positive changes and opportunities to the community.

II. WHERE WERE WE BEFORE? Until very recently, same-sex couples were strangers under the law absent affirmative planning to the contrary, and persons engaging in this kind of sexual behavior were criminalized in Texas as well as in many other states.

III. WHAT HAPPENED? The law and much of society changed in its view of same-sex relations. Harking back to a line of cases that leads at least to *Loving v. Virginia* (388 U.S. 1, 1967), laws treating gays and lesbians differently than other persons have been found to be unconstitutional denials of equal protection under the law. The four main Supreme Court cases impacting these developments, all of which date after the year 2000, are described below. You should note the three substantive majority opinions in these cases have been written by Justice Anthony Kennedy, and all were issued on June 26 of the year of decision. June 26 is the date in 1969 when gay community protests of treatment at the hands of law enforcement began at the Stonewall Inn in New York, beginning the civil rights fight that continues today, and of which these cases are a part.

A. *Lawrence v. Texas*, 539 U.S. 558 (2003). In 1998, the police were called to Lawrence's Houston home in response to a claim of a weapons disturbance, and there saw him engaged in a sexual act with Mr. Garner. Both men were arrested and charged with "deviate sexual intercourse" in violation of a Texas statute prohibiting certain intimate sexual conduct. After lower courts upheld the conviction, the US Supreme Court found that the Texas statute that criminalized private consensual behavior violated the 14th Amendment to the US Constitution and was an unconstitutional denial of equal protection under the law. The opinion was based on "liberty" being fundamental to law in this country.

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.
> *Lawrence*, 539 U.S. at 562.

B. *U.S. v. Windsor*, 133 S. Ct. 2675 (2013). Edie Windsor and Thea Spyer had been together for many years when Thea got sick. In 2007, the two women married in Ontario, Canada, where their marriage was legally sanctioned. By 2009 when Thea died leaving a will that left all of her property to Edie, New York also recognized the legality of their marriage. Edie filed an estate tax return to claim the marital deduction for property passing to her from Thea, but the return was not accepted since the Federal Defense of Marriage Act ("*DOMA*") invalidated the couple's Canadian legal marriage for US law purposes. Edie had to pay $363,053 in estate tax and brought this suit to challenge DOMA and be able to properly claim the marital deduction. There were numerous procedural twists and turns in this case, not the least of which was the decision of the Justice Department not to challenge the lower court ruling invalidating DOMA, leaving it to the "Bipartisan Legal Advisory Group" of the US House of Representatives to pursue the case. In upholding the lower court rulings that DOMA was "unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment" to the US Constitution, Justice Kennedy wrote the following for the Court:

> The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.
> *Windsor*, 133 S. Ct. at 2695-96.

C. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). The opinion in this companion case to *Windsor* was not overly significant in itself, since in essence the Supreme Court said that the matter in this case was not properly before them. But this case was the foundation for the 2015 case that provided for the availability of same-sex marriage in the 50 states. Respondents in this case were two same-sex couples who had sued the State of California challenging Proposition 8, the controversial referendum-initiated law that limited California marriage to

opposite-sex couples after the state had initially approved same-sex marriage. The respondents had sued the state officials responsible for enforcing the law, but the state did not defend this challenge. Petitioners in this case were those who had promoted Proposition 8 initially and who intervened in the federal suit to defend the law. The federal district court found Proposition 8 unconstitutional and enjoined state officials from enforcing the law. The State did not appeal, but the intervenors did, and they brought it to the Supreme Court after losing in each court along the way. The Supreme Court held that after the district court rendered judgment, and the state elected not to appeal, the respondents had no further injury on which to base their suit, and the intervenors had never had a cognizable injury on which to substantiate their attempt to pursue the suit. The Court then held as follows:

> We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here. Because petitioners have not satisfied their burden to demonstrate standing to appeal the judgment of the District Court, the Ninth Circuit was without jurisdiction to consider the appeal. The judgment of the Ninth Circuit is vacated, and the case is remanded with instructions to dismiss the appeal for lack of jurisdiction.
> *Hollingsworth*, 133 S. Ct. at 2668.

The basic impact of this holding was to put a final answer to the availability of same-sex marriage in California (it was available), but to leave in place all of the other various state restrictions on same-sex marriage that existed at the time. At this point, following *Windsor*, federal law recognized the availability of same-sex marriage across the country, but some states did and others did not. This set the stage, as Justice Scalia noted in his dissent in *Windsor* (133 S. Ct. at 2710), for the next case: "[T]hat Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the "personhood and dignity" which state legislatures conferred upon them [by recognizing same-sex marriage in some states], will of a certitude be similarly appalled by state legislatures' irrational and hateful failure to acknowledge that "personhood and dignity" in the first place [through prohibitions on same-sex marriage]. As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe."

D. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). This was an appeal from the Sixth Circuit Court of Appeals by fourteen same-sex couples who had sued for marriage in the states of Michigan, Ohio, Kentucky and Tennessee. Each couple had prevailed at the district court level, but the Sixth Circuit consolidated the cases and reversed them all. James Obergefell, the named petitioner, was the surviving spouse of John Arthur. Obergefell and Arthur had lived in Ohio and had a relationship of over twenty years. In 2011 Arthur was diagnosed with ALS, and the couple resolved to marry before he died of the disease. They did so in Maryland, where their marriage was legal. But when Arthur did die several months later, Ohio disregarded the marriage (in accordance with its laws) and refused to list Obergefell as the surviving spouse on Arthur's death certificate. This had practical implications regarding disposition of assets and benefits, but as John Obergefell said, the state imposed requirement that the couple remain legal strangers in death was "hurtful for the rest of time." *Obergefell*, 135 S. Ct. 2594-95. The

majority opinion found that all states in the US must recognize all legal marriages from other jurisdictions, same-sex or opposite-sex, and also that each state must allow for same-sex marriage under its own laws. Justice Kennedy concluded the opinion as follows:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.
> *Obergefell*, 135 S. Ct. at 2608.

IV. WHAT ABOUT TEXAS? Texas of course had its own constitutional amendment prohibiting same-sex marriage, as well as statutes designed to bolster that prohibition. Challenges to these were working through the federal courts at the same time as *Windsor* and *Obergefell*, but had not been resolved when *Obergefell* came down.

A. *De Leon v. Abbott*, 791 F.3d 619 (5th Cir., 2015), is the Fifth Circuit case out of Texas that concluded the challenge to the Texas constitution's prohibition on same-sex marriage that had been brought by two Texas same-sex couples in the Federal District Court in San Antonio. This lower court had found the Texas prohibition unconstitutional, and issued a preliminary injunction barring enforcement of the Texas prohibition on recognition of out-of-state, or in-state performance of, legal same-sex marriages. The injunction had been stayed pending the state's appeal of the decision to the Fifth Circuit. Once *Obergefell* was decided on June 26, the District Court issued an order immediately lifting the stay of its injunction, stating that it:

> "hereby LIFTS the stay of injunction … and enjoins Defendants from enforcing Article I, Section 32 of the Texas Constitution, any related provision of the Texas Family Code, and any other laws or regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage."
> *De Leon*, 791 F.3d at 625

The Fifth Circuit then sought letter advisories from the parties to the appeal as to their positions on proper disposition of the pending case in light of *Obergefell*. All parties agreed that as *Obergefell* was the law of the land, the injunction from the District Court was correct. The Fifth Circuit affirmed the injunction and remanded the case for entry of an order in favor of the same-sex couples no later than July 17, 2015. The order was issued on July 7, 2015.

B. The First Test: *Stone-Hoskins*. (DeLeon v. Abbott, No. 5:13-cv-00982 (W.D. Tex. Oct. 28, 2013)). The scope of the *De Leon* injunction and how it would function in Texas was quickly put to the test.

1. James Stone and John Hoskins lived together for ten years, along with James' mother, and legally married in New Mexico on their tenth anniversary in August 2014. James died in January, 2015.

2. John, with the cooperation of James' mother, then began working to get James' death certificate issued listing him as surviving spouse, but the state refused and issued a certificate listing James as single and his mother as next-of-kin. Once *Obergefell* was issued, John again contacted the Texas Department of State Health Services seeking to have the death certificate amended to list him as surviving spouse. The department refused again, this time stating, with approval of Texas AG Paxton, that *Obergefell* did not apply retroactively.

3. In the interim, John received a diagnosis of terminal cancer, and with his limited time in mind, sought an emergency order for relief from the same federal District Court that had decided *De Leon*. He received the order the following day. In that Order, Judge Garcia indicated that it was proper to list John as James' surviving spouse on the death certificate, and ordered the Texas AG and the Commissioner of the Texas Department of State Health Services to appear and answer possible contempt charges for having refused to change the certificate after the order in *De Leon*.

4. Before that hearing, the Texas Department of State Health Services issued a memorandum approved by the Commissioner, dated August 12, 2015, listing changes to be made in the handling of vital records in light of *Obergefell* and *De Leon*. In that document, the state listed the following:

a. Birth certificates would be issued or amended to list the same-sex parents of a child if (i) one member of the couple is the birth mother and (ii) the parents were legally and formally married in Texas or another state at the time of the birth.

b. Death certificates would be issued or amended to include a same-sex surviving spouse (i) for a person who died in Texas after June, 26, 2015 if the couple was legally and formally married in Texas or another state at the time of the death; and (ii) for deaths prior to June 26, 2015, if the couple was legally and formally married prior to death under the laws of another state.

As a result of the issuance of this memo and its approval by the Commissioner, the contempt hearing was canceled.

5. John received James' amended death certificate on August 6, 2015. He died from his cancer in October, 2015.

C. <u>But What if the Marriage is not Legal and Formal</u>? After the *Obergefell* decision, the question of a same –sex informal marriage (*see* Article V, below) came up in Travis County probate court. In *Estate of Stella Marie Powell,* No. C-1-PB-14-001695 (Travis County Probate Court No. 1 – September 18, 2014), Sonemaly Phrasavath petitioned the probate court for a determination that she was her partner Stella Powell's legal heir and surviving spouse.

1. Sonemaly and Stella had not legally married, but got engaged in 2007 and participated in a (symbolic) wedding ceremony in Texas in 2008. After the wedding they executed domestic partner declarations and otherwise lived together as spouses until Stella's death from cancer in 2014.

2. Sonemaly sought a declaration that she was Stella's surviving spouse in an informal marriage. In a motion filed in August, 2015 after the *Obergefell* decision had come down, Sonemaly claimed that in light of *Obergefell*, there was no remaining question of law and she was entitled to be declared Stella's surviving spouse in a summary judgment.

3. Stella's siblings opposed the suit, along with Texas Attorney General Ken Paxton, who also in August filed a motion stating that Sonemaly was requesting the court to "reach back in time and declare a relationship that at all points of existence could not have been a valid marriage under Texas law is now – over a year after the death of one spouse – a valid informal marriage under Texas law."

4. Sonemaly argued that *Obergefell* should be applied retroactively, particularly in light of the facts of the *Obergefell* case in which Jim Obergefell had sued in order be listed as surviving spouse on his husband's death certificate, and the Stone-Hoskins order described above. Under Sonemaly's argument, the "legal and formal" requirements of the Texas Department of State Health Services memo described above were claimed to be disallowed under *Obergefell*, since opposite-sex couples could claim status as being informally married under the law.

5. Sonemaly and Stella's siblings settled the case, and in that settlement, among other things, Sonemaly and Stella's relationship was recognized as being a legal informal marriage under the law.

6. The Texas AG then filed an objection in the case, claiming among other things that as the parties had reached a financial settlement, the question of the marriage became moot and was outside of the court's jurisdiction. Sonemaly, however, argued that the determination of the marriage was central to the settlement and was essential to the case.

7. The probate court turned aside the AG objections and approved the settlement with the affirmative ratification of the marriage intact. An order finding that Sonemaly met the legal requirements to be considered Stella's informally married surviving spouse was signed on October 5, 2015.

V. SO WHAT HAS CHANGED?

A. Marriage. For many years planners have been working with same-sex couples as though they were strangers under the law. At least since 2004, when Massachusetts became the first state to allow same-sex marriage, Texas planners have been working with some couples who were legally married somewhere in the county or the world, but were still legal strangers in Texas due to the constitutional and statutory prohibitions on same-sex marriage in this state. Now, couples who have not taken advantage of legal marriage will have to continue with that

kind of planning, but those who have married will generally have the opportunities afforded to any married couple available to them.

B. What is Legal Marriage?.

1. Legal and Formal. In Texas, "ceremonial marriage" requires a marriage license (*Tex. Fam. Code Ann.* § 2.001 (West 2015)) and a ceremony conducted by a proper person (*Tex. Fam. Code Ann.* § 2.202) within 90 days of, but later than 72 hours after, issuance of the license (*Tex. Fam. Code Ann.* §§ 2.201 and 2.204). If the marriage is conducted after the license expired, there is a penalty for the officiant (*Tex. Fam. Code Ann.* § 2.207). If the officiant is not a proper person under the law, the marriage is still valid so long as at least one party participated in the ceremony in good faith and treats the marriage as valid, and the officiant had a reasonable appearance of authority (*Tex. Fam. Code Ann.* § 2.302).

All of these statutes are written in terms of the marriage being a union of a man and a woman, but in light of *Obergefell* and the express reference to the prohibition on enforcement of Family Code provisions related to the limitation of marriage to opposite-sex couples in the *DeLeon* injunction, those limits appear to have been functionally expunged from the law. Or at least the over 2,500 licensed same-sex marriages conducted in Texas since June 26, 2015 would have you think so (estimate from Texas Department of State Health Services in September, 2015).

2. Federal. There is a patchwork of laws even under federal rules that define what marriage actually is, but for most purposes, marriage is deemed as legal and sufficient if it was legal in the place of *celebration*. However, other parts of federal law (most notably Social Security and the VA) recognize marriage if it is legal in the place of a couple's *residence*. Thus, from *Windsor* in 2013 until *Obergefell* in 2015, couples could be married for many federal purposes no matter where they lived if their marriage was legal where it was performed, but for other federal purposes, their marriage would be recognized only if they lived in a state that recognized it, and not recognized if they lived elsewhere. If a couple moved from one jurisdiction to another, it became even more confusing. State recognition of marriage was entirely dependent on where a couple lived. With the advent of *Obergefell*, all marriages that are legal where performed are also recognized in all 50 states, so the distinction has become less important.

3. Informal Marriage. Texas is one of the few states that recognizes informal or "common law" marriage. For Texas statutory purposes, an adult man and woman can be married without benefit of ceremony or license if (i) they are not otherwise married, (ii) they agreed to be married, (iii) after making that agreement they lived together as husband and wife and (iv) there represented to others that they were married. *Tex. Fam. Code Ann.* § 2.401(a)(2), (c) and (d). Since *Obergefell*, the *De Leon* injunction related to Family Code provisions limiting same-sex marriage, and the order entered in the *Powell Estate* case described above, there is authority that the gender limitations included in the statute are no longer of effect, and same-sex couples who desire to claim this status should have a credible basis on which to do so.

4. Divorce. Even though Texas did not recognize same-sex marriage prior to *Obergefell*, the Texas Supreme Court had approved the granting of a same-sex divorce on June

19, 2015, one week before *Obergefell* was handed down. See *Texas v. Naylor*, 466 S.W.3d 783 (Tex. 2015) In this case, Naylor and Daly married in Massachusetts in 2004 and moved to Texas. In 2010 Naylor sought a divorce in district court. Daly argued the court could not divorce them since their marriage was not valid in Texas, but over the course of the trial the parties settled their differences, and in entering a judgment in the matter, the court indicated that the judgment "is intended to be a substitute for … a valid and subsisting divorce." *Naylor*, 466 S.W.3d at 787. The Supreme Court noted that representatives of the Attorney General's office had been present throughout the hearing and at the time of the announcement of the court's judgment, but it was only the following day when the State of Texas sought to intervene in the matter, to limit the right to divorce to only opposite-sex couples. Both parties objected to the AG's intervention, and on hearing the trial court refused to consider the intervention, holding it was filed too late. Both the court of appeals and the Texas Supreme Court agreed and allowed the divorce to stand. With the advent of *Obergefell*, same-sex divorce in Texas is available under the same rules as opposite-sex divorce.

VI. UPSIDES AND DOWNSIDES

A. What are some of the benefits of marriage same-sex couples may now receive?

(this list is far from exhaustive but is representative of how marriage is a preferred status under the law in many ways)

Social Security	Spousal benefits – planning for distributions based on both spouses' accounts and benefits Spousal benefit for surviving spouse Benefit for surviving spouse supporting deceased spouse's minor child
Taxes	Transfers between spouses are generally income tax-free Qualifying transfers between spouses are eligible for the estate and gift marital deduction Spouses may file jointly (or married filing separately) Spouses may split gifts for reporting purposes
Immigration	Family members are considered for long term permanent residency Fiancé visas allow fiancés to enter, and in some cases remain in, the US Families traveling together complete joint customs / immigration forms
Retirement and Work Related Benefits	Spouse is a mandatory beneficiary of a 401(k) plan absent consent Spouse is a mandatory pension beneficiary in most cases Spouse may be insured under employee health plans tax-free Spouse's children may also have health plan coverage tax-free Spouse is allowed family medical and bereavement leave Spouse has rollover options other beneficiaries do not Minimum required distributions may be favorably determined referencing

	a spouse's life, but no other person's
Other Benefits	*Marital status is recognized across state and country borders* Spouse is allowed hospital visitation and emergency medical and end-of-life decisions in the absence of documents providing for same Spouses are given preferred treatment in application for public housing Spouses may claim property and auto insurance jointly Spouses may not be compelled to testify against each other, and can participate in available crime victim and protection programs Spouses are considered one joint applicant in mortgage financing
Death	Spouse is considered an heir in the absence of a will Survivor may file wrongful death claims on death of a spouse Survivor has homestead rights at death of spousal owner of residence Spouse may claim elective share, family allowance and other rights Children of spouses have clearer relations to and status regarding both parents
Divorce	Spouses have a recognized court-supervised means to dissolve a relationship that has ended and protect children and the spouse with less property (but see discussion in the following section on the possible downside in this context)
Parenting	Spouses have rights to joint custody, joint adoption, joint foster care, visitation for non-biological parents (See *Stankevich v. Milliron,* in following section).
Community Estate	Income generated during marriage is presumed to be community belonging half to each spouse, absent agreement otherwise Community property receives a basis step up for 100% of the asset at the death of a spouse

B. What are some of the downsides of claiming status as married?

1. The income tax marriage penalty for high earning couples. The income tax rate schedules are designed for a world where you have either low income earners or one high earner and a stay at home spouse. Once both spouses start earning significant income, the schedules have a real penalty for married couples filing jointly.

For 2016, here are the rate schedules allowed to individual filers, and married couples filing jointly:

Individual rates and brackets		**Married filing jointly rates and brackets**	
0 - 9,275	10%	0 - $18,550	10%
9,276 - 37,650	927.50 + 15% over 9,275	18,551 - 75,300	1,855 + 15% over 18,550
37,651 - 91,150	5,183.75 + 25% over 37,650	75,301 - 151,900	10,367.50 + 25% over 75,300
91,151 - 190,150	18,558.75 + 28% over 91,150	151,901 - 231,450	29,517.50 + 28% over 151,900
190,151 - 413,350	46,278.75 + 33% over 190,150	231,451 – 413,350	51,791.50 + 33% over 231,450
413,351 - 415,050	119,934.75 + 35% over 413,350	413,351 – 466,950	111,818.50 + 35% over 413,350
415,051 or more	120,529.75 + 39.6% over 415,050	466,951 or more	130,578.50 + 39.6% over 466,950

ASSUME: Terry is a barista who earns $40,000. Chris is a teacher who earns $50,000. Just based on these rate schedules, filing individually or filing jointly they will pay the same amount of combined tax, $14,042.50.

Terry got certified as a plumber and now earns $450,000. Chris gave up teaching to stay at home with the kids. Terry and Chris can save over $10,000 by filing jointly - $134,369.95 Terry single v. $124,646 filing jointly.

Terry is still plumber who earns $450,000. Chris found the time being at home to develop teaching apps that are taking off, and now earns $150,000. Each filing as single they would pay a combined tax of $169,406.70. Filing jointly they will pay tax of $183,266.30, or almost $14,000 more. The real loser is Chris, who would pay $35,036.75 filing as single, but on top of Terry's income, $150,000 generates tax of $58,620.30. Ouch.

TAKE AWAY: High-income dual-earner couples ought to run a pro forma to see what the income tax consequence of getting married will be. As any married couple can tell them, it will be worth it, but still…

2. Community Property. This is a benefit or a detriment depending on the viewpoint of the individuals in the couple. But for same-sex couples, community property may present a real quandary.

ASSUME: Couple has been together since 1985.
Couple has always and continues to reside in Texas.

Couple married in Canada in 2004.
Obergefell decided in 2015; suddenly couple is legally married in Texas.

Certainly from June 26, 2015 the couple's income is now community property absent agreement to the contrary. This is despite the fact they have been together for 30 years and never had it before. However, consider the Texas cases cited above that allow for recognition of marriage prior to *Obergefell*.

When did the community property regime begin to apply to this couple? With *Windsor* in 2013? With the 2004 legal marriage? From 1985 when the couple began living together as spouses and representing themselves as functionally married? This will be of little import so long as the parties remain together and no other family members are involved during life or at death. But in the event of death or incapacity, the question of what is community and who will control it could be very important and possibly contentious.

3. Transactions between unrelated persons no longer available. When the members of a couple are viewed as strangers under the law, certain transactions that cannot be undertaken by family members can be done by them. Sales of property to recognize loss, common law GRITS, employment arrangements to have income taxed at lower rates all are available to unrelated persons in proper circumstances, and unavailable to persons deemed related under the law.

4. Debts. Persons who are unrelated under the law have no liability for each other's debts. Same-sex couples can discover, as have many opposite sex couples, that along with a spouse, liability on the spouse's debts comes with the marriage in certain cases.

5. Custody of Children. This is another one where it depends on where you are coming from, but consider the facts of *Stankevich v. Milliron*, 2015 Mich. App. LEXIS 2191 (Mich. Ct. App. Nov. 19, 2015. Many same-sex couples have children, and prior to *Obergefell*, if the parties separated, in many cases the children went with the biological or named adopting parent. The partner was a stranger to the child under the law. In the referenced case, Milliron was artificially inseminated, and then while pregnant married Stankevich in Canada. Their child was born after the marriage, but Milliron was the sole biological parent. Two years later they separated. Stankevich sued for custody and parental rights. Milliron said Michigan law did not recognize their marriage and thus Stankevich had no standing. The lower courts agreed with Milliron, but on appeal to the Michigan Supreme Court, the matter was put on hold pending the outcome of *Obergefell* (Michigan was one of the states involved in *Obergefell*). Once that case was decided, the Michigan Supreme Court remanded the case to the Court of Appeals for a disposition consistent with *Obergefell*. The appeals court recognized the rights of Stankevich to be an equitable parent of their child. This is arguably a good outcome, but not the one the biological parent wanted.

6. Separation. As legal strangers, a member of an unmarried same-sex couple would have no cognizable claim to a partner's property on separation in the absence of an enforceable written, oral or implied agreement to share property. But that "palimony" agreement might be better for the less propertied spouse then a marriage for a short period if the couple had

been together for a long time. If the couple marries after decades together, and makes no affirmative agreement regarding separate property brought to that marriage, a court may very well credit the spouses with community property only during the period of the actual marriage, ignoring the period beforehand and potentially skewing the expectations regarding the property rights of the couple.

VI. WHAT HAS NOT CHANGED

A. There are still issues. Even though the "law of the land" is that all 50 states now recognize same-sex marriages performed in-state or out-of-state, there are public officials and communities that are not fully on board. All same-sex couples should ensure that their planning is in good shape so as to be as able as possible to withstand challenge or problems that may still arise.

B. Unmarried Couples. That being said, married couples do have certainty under federal law (at least in 2016), and protections to claim under state law related to their status as married spouses. Unmarried couples have no such protections, and so proper documents (including titling assets properly) remain essential to achieve the results they desire.