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Estate Strategies

U.S. Supreme Court Legalizes Same-Sex Marriage

A Look at the Ruling's Impact on Michigan's Trust & Estate Laws

By: Marlaine C. Teahan

The White House responded to the U.S. Supreme Court's ruling in Obergefell v Hodges by projecting a rainbow flag, on the evening of June 26, 2015.

In a landmark decision, the U.S. Supreme Court ruled last month that the Constitution guarantees a right to same-sex marriage. Before this 5-4 decision in *Obergefell v. Hodges*, the state of Michigan was one of 13 states that did not recognize these unions. Now, Michigan must not only legally allow and recognize same-sex marriages, it must guarantee other benefits for same-sex spouses.

Beyond the decision's social and political implications, there will be a great impact on a wide variety of legal matters. The effect on estate planning and the administration of trusts and estates in Michigan is staggering, though it will be a long process to change all of our state laws to conform with the ruling. Each law must now be carefully reviewed, new bills drafted, and legislation enacted. However, while it will be easier to exercise your rights once the laws have been amended, you do not need to wait for legislative action.

Estate Planning and Tax Issues

With proper planning before the *Obergefell* decision, same-sex couples could provide for each other and designate each other as a fiduciary, just as heterosexual married couples. Even so, married same-sex couples did not have the same federal estate and gift tax advantages as heterosexual married couples until after the *United States v. Windsor* case in 2013.

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Michigan Court of Appeals Decisions: Estate Recovery

By: Melisa M.W. Mysliwiec

If you know anyone who receives long-term care services covered by Medicaid, it is highly likely that their estate will be subject to estate recovery unless specific actions are taken to prevent estate recovery. Estate recovery is the program through which the State of Michigan is paid back for Medicaid benefits provided to certain recipients upon the recipient's death by allowing the state to recover property from the recipient's probate estate. If the Medicaid recipient is still living, there are steps that can be taken to ensure their assets pass outside of a probate estate, allowing their heirs to entirely escape estate recovery.

In an ideal world, estate recovery wouldn't be an issue for anyone because they would have taken the appropriate steps prior to death to ensure they wouldn't have a probate estate. But in reality, many individuals die as long-term care Medicaid recipients and, for any number of reasons, own a homestead that must pass through probate. If you are the heir of an estate of someone who received long-term care Medicaid benefits prior to death, it will be helpful to know the following information.

The Michigan Court of Appeals recently held that all individuals who sign a Medicaid Application, DHS Form 4574, bearing a date on the bottom of the application of 10-11 (representing October 2011) or later, have sufficient notice that their estate may be subject to estate recovery upon death. In a separate case, the Michigan Court of Appeals also recently held that in order to receive a hardship waiver exempting you from estate recovery, one must file a Hardship Waiver Application within 60 days of the date on the "Notice of Intent to File a Claim and Request for Information" that is mailed to the family of the deceased Medicaid recipient by the Department of Health and Human Services. Often this Notice of Intent is mailed to the last known contact person (often the attorney or agent who filed the Medicaid Applications on behalf of the deceased). One of the most common hardship exemptions sought is commonly referred to as the "home of modest value hardship exemption," which refers to the situation where the value of the Medicaid recipient's homestead is equal to or less than 50% of the average price of a home in the county in which the homestead is located. Besides these two Michigan Court of Appeals cases, there are currently several other cases on estate recovery pending before the Michigan Court of Appeals, several of which were recently consolidated. Until the dust settles, this area of the law is subject to both change and controversy.

Take Away 1: Living long-term care Medicaid recipients or their agents should take appropriate steps to ensure the Medicaid recipient's assets pass outside of probate upon death.

Take Away 2: If you are the heir of a recently deceased long-term care Medicaid recipient, do not delay in determining whether you are eligible for a hardship waiver from estate recovery, and be certain to file a Hardship Waiver Application within the timeframe specified on the Notice of Intent to File a Claim and Request for Information sent by the Department of Health and Human Services to preserve the waiver.

For more information, contact attorney Melisa M. W. Mysliwiec at 616.301.0800 or email her at mmysliwiec@fraserlawfirm.com.

Join us for the Walk to End Alzheimer's in Lansing!

September 13, 2015 | State Capitol | 11:30 a.m.

Email us at msutterer@fraserlawfirm.com or register online: http://act.alz.org/goto/Team-Fraser

Ten Year Anniversary Provides Reminder to Us All

Ten years have passed since the controversial death of Terri Schiavo. The tragic story that spurred national debate serves as a lesson to us all about the importance preparing the proper legal documents to guide our families and Courts in situations like hers.

At age 26, Terri suffered massive brain damage after a heart attack, causing her to enter a persistent vegetative state, relying on a feeding tube to survive. She lacked legal documents that would have explained her wishes regarding life-prolonging measures. Her husband was appointed guardian and found himself in a prolonged legal battle with Terri's parents over whether to discontinue Terri's life support. The story set off a fiery national debate over many issues, including the role of the Courts in making the ultimate decision – to live or die – for those unable to make the decision themselves.

At approximately the same time as Terri Shiavo's experience, a Michigan man and his wife were in a similar position. Michael Martin was catastrophically injured in an automobile accident, and like Terri, he remained alive because of life supportive measures administered 24-hours a day. Although medical testimony in the case showed that Michael was conscious, the level of that consciousness was unclear, as Michael was unable to communicate in any significant way.

Michael's wife made the heart-wrenching decision to petition the Court on Michael's behalf for the removal of the life supporting care. She explained to the Court that Michael had repeatedly expressed that he "would rather die than be dependent on people and machines".

Ultimately, the Michigan Supreme Court determined that there was not clear and convincing proof that "Michael made a firm and deliberative decision, while competent, to decline medical treatment in these circumstances". In other words, Michael's wife, even though appointed by the Court to act as his Guardian, did not have the legal authority to take Michael off life support.

The solution in Michigan is a document naming a patient advocate or agent to act on your behalf when you are unable to participate in medical treatment decisions like these. The document is called a "patient advocate designation", or a "medical durable power of attorney" or a "durable power of attorney for health care". The patient advocate designation should include a statement of your desires for your care and custody, and whether you want particular medical or mental health treatment, or both.

With some exceptions, your patient advocate can do whatever you could do with regard to your own health care; however, a patient advocate may only make end-of-life decisions to withdraw or withhold life support if your patient advocate designation indicates in a "clear and convincing manner" that your patient advocate has this authority, and that you understand that withdrawing or withholding life support could or would allow your death.

Without such language in your designating document, your patient advocate would not be able to take you off of life support – even if you had previously verbalized these wishes, like Michael Martin's wife said her husband had done.

There are specific signing formalities that are unique to patient advocate designations. It is important to sit down with an attorney who specializes in this area to ensure that your preferences will be honored and enforced by the Court.

For a detailed conversation about patient advocate designations, contact one of our Trusts & Estates attorneys at 517.482.5800.

U.S. Supreme Court Same-Sex Marriage Ruling:

The *Obergefell* case now gives married same-sex couples in every state equal tax treatment. For example, same-sex married couples will no longer have to file separate state and federal income tax returns. Same-sex married couples should discuss with their tax preparer if it would be worthwhile seeking refunds for prior years. In states other than Michigan, that have inheritance and state estate taxes, same-sex married couples will now be able to inherit from each other without having to pay these taxes.

Probate

Same-sex married couples will now have priority in probate court to serve as a personal representative, conservator, guardian, and, under Michigan Court Rules, will be identified as an interested person (heir or spouse) and have the right to receive notice of a variety of probate proceedings. In addition, all surviving spouses have the right to inherit under the intestacy laws, to elect against their spouse's will, receive statutory spousal allowances, and petition for proceeds from wrongful death actions.

Medical Issues

Michigan has next-of-kin laws that allow spouses, in certain circumstances, to make medical decisions, anatomical gifts, and determine funeral and burial rights of their spouse. Before *Obergefell*, same-sex married couples did not qualify as their spouse's next-of-kin because Michigan did not recognize the marriage of the couple. These rights will now be recognized for all married couples in Michigan.

Family Law

Same-sex married couples may now marry in Michigan and same-sex marriages solemnized in other states must now be recognized by Michigan. All married couples in Michigan will be able to get a divorce and adopt their spouse's child or adopt children together. Visitation, child support and custody decisions will also be impacted by *Obergefell*. Family law issues were specifically addressed by the *Obergefell* Court; having children and raising a family is a protected constitutional right of same-sex spouses.

Governmental Benefits and Creditor Issues

Following the *Obergefell* ruling, Attorney General Loretta Lynch announced that the federal government is now making governmental marriage benefits available to same-sex couples in every state, including Social Security, Veterans benefits, and Workers' Compensation. The Social Security Administration has said that same-sex married couples should apply for benefits right away. The Department of Veterans Affairs is also now working to implement the ruling.

Creditor protection will be greater for married same-sex couples as they will be able to benefit from owning real property as tenants by the entireties and will be able to own certain other financial assets as tenants by the entireties, including membership interests in an LLC. Insurance on the life of a spouse, that names a spouse as a beneficiary, enjoys certain creditor protection that should be available to all married couples.

Real Property

There are numerous real property issues that will be affected by *Obergefell*; however, only a few are discussed here.

Impact on Michigan Trust & Estate Laws, continued

Obergefell may well be the end of the archaic law of dower in Michigan. Tenancy by the entireties protection was previously enjoyed by only a "husband and wife." Going forward, such protection will be enjoyed by any married couple. The uncapping of real property taxes will also be impacted as conveyances to spouses are generally exempt from uncapping laws.

General Laws

There are numerous Michigan laws that will have to be updated given the *Obergefell v. Hodges* case. A cursory check on the uses of both "husband" and "wife" in all of Michigan's Compiled Laws reveals over 300 statutes that use these terms. Perhaps each instance of "husband" or "wife" will be changed to "spouse" but, in any event, it will be a long process as all such laws will have to be carefully reviewed, bills drafted, and legislation enacted.

It may be difficult for a same-sex couple to assert the rights discussed above prior to the updating of Michigan law. This is simply because many of the laws specifically use the words "husband" and "wife" instead of "spouse." A key passage in *Obergefell* addresses this issue and provides a path of action until our laws are changed [Slip Op., at 24]:

> "The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act."

It will be many years before Michigan's statutes fully align with the recent Supreme Court ruling in *Obergefell*. This process is already underway by the Michigan Law Revision Commission. We have posted a link to more information on this project on our blog page: fraserlawfirm.com/blog.

This article serves as a general overview and does not constitute legal advice. To meet with a Fraser Trebilcock attorney to discuss this topic or other estate planning needs, contact attorney Marlaine C. Teahan at 517.377.0869 or email her at mteahan@fraserlawfirm.com.

Visit our blog to learn about other legal matters impacted by Obergefell v Hodges: fraserlawfirm.com/blog

Business & Tax

Real Estate

Employee Benefits

New Age of the Joint Trust

By: Mark E. Kellogg

When Congress passed the American Taxpayer Relief Act of 2012 (ATRA), it had a drastic effect on both the estate and gift tax laws and planning opportunities for clients. ATRA increased the estate and gift tax exemption to $5,000,000 per person (indexed for inflation) and increased the estate tax rate from 35 percent to 40 percent. For 2015, the estate and gift tax exemption amount has increased to $5,430,000 per person or $10,860,000 for a married couple. ATRA also introduced the concept of portability, which, in simple terms, has the effect of providing a married couple a joint exemption of $10,860,000. Essentially, if upon the death of the first spouse, he or she did not utilize his or her full exemption, the remaining exemption amount can be preserved and used by the surviving spouse on his or her subsequent death.

As a result of the changes brought about by ATRA, 99.8 percent of estates will owe no estate tax at all. Only the estates of the wealthiest 0.2 percent of Americans – roughly 2 out of every 1,000 people who die – will owe any estate tax. Accordingly, the focus of estate planning for most people has shifted from concern for estate taxes to realizing income tax advantages.

For years, the federal estate tax was the primary concern for many estate planning clients. The A-B (marital trust/credit shelter trust) trust structure was the fundamental estate planning tool to ensure that each spouse maximized his or her individual separate exemptions, which was as low as $675,000 per person in 2000, $1,000,000 in 2002, $1,500,000 in 2005, and $2,000,000 in 2008.

With the greatly increased federal estate tax exemption (or estate tax exclusion amount) more married couples will not require estate tax-oriented estate planning, separate trusts, or division of their joint assets. This will give rise to an increase in the use of the joint trust as a viable estate planning tool. Although the use of joint trusts will be more prevalent, they are not the answer for all planning situations. The use of a joint trust for a married couple is more appropriate when the following circumstances exist: (1) no federal estate tax concerns; (2) with regard to the gross estate of the spouses and the impact of the federal estate tax, it is anticipated that the value of the gross estate is expected to be stable or likely diminish; (3) the only children of the spouses are of the current marriage; (4) with or without children, the spouses agree completely on the allocation of assets when both have died, regardless of the order of death; (5) all or most of the assets of the spouses are viewed by them as joint marital assets; and (6) there are no creditor problems or high risk occupations, which could expose the combined assets in the joint trust to the liability of one spouse.

The joint trust is a single trust to which two persons, most commonly a married couple transfer their assets as creators of the trust. The assets generally are combined. Both spouses will act as co-trustees during their lives and the survivor will continue to act as sole trustee after the death of the first spouse. Each spouse is given control over a stated portion of the trust. In the typical case, each may revoke and acquire one-half of the trust assets. Thus, each spouse is treated as owning half of everything, a familiar and comfortable position for those in long-term marriages. Under the terms of the joint trust, if one spouse withdraws assets from the trust, the trustee is directed to distribute the same value to the other spouse. Through this mechanism, each spouse's share remains at one-half even though segregated shares are not maintained. Specific terms in the joint trust providing certain rights and powers to each spouse over the assets of the trust have the effect of providing an adjustment in the basis of one-half the assets (step-up in basis), for income tax purposes, at the death of the first spouse under Section 1014 of the Internal Revenue Code.

Creditor protection concerns can be a significant disadvantage to a joint trust as compared to separate trusts or other types of joint ownership. Assets in a joint trust are available to some extent to creditors of one spouse during his or her life. Under Michigan law, certain types of assets may be held by a husband and wife, in the form of tenancy by entirety. Assets held in a tenancy by entirety will not be subject to liabilities of only one spouse. Currently, the transfer of such assets to a joint trust will terminate the creditor protection afforded to assets held in a tenancy by the entirety arrangement. The Council for the Probate and Estate Planning Section of the State Bar of Michigan is presently working on proposed legislation that would provide "tenancy by entirety" protection to assets that are transferred to certain trusts, including joint trusts. Adoption of this proposed legislation would be welcome relief to this impediment to the use of a joint trust.

The recent significant revisions to the federal estate tax laws, including the increased estate tax exclusion amount and portability of the exemption between spouses will result in the increased use of the joint trust in Michigan. The use of the joint trust is not a panacea for all estate plans, and various issues, such as income tax planning, creditor protection and family dynamics will still need to be considered. Regardless, the addition of the joint trust as a viable estate planning tool should be welcomed.

For more information, contact attorney Mark E. Kellogg at 517.377.0890 or email him at mkellogg@fraserlawfirm.com.

Get to Know Our Attorneys

We work to bring you updates on legal changes that may affect you. From monthly articles to frequent seminars, we aim to keep you informed on important matters. We also share opportunities and news important in our communities.

Marlaine C. Teahan leads the Trusts and Estates practice at Fraser Trebilcock. With nearly 30 years of experience as an attorney, Marlaine works closely with individuals and families to create estate plans to fit each client's unique situation. Marlaine is a Fellow of the American College of Trust and Estate Counsel, and is an officer of the Probate and Estate Planning Section of the State Bar of Michigan. Her legal work continues to be recognized by peers and leading publications.

Melisa M. W. Mysliwiec has been re-elected as Chair of the St. John Vianney Catholic School Board for the 2015-2016 school year. She also recently addressed the Greater Lansing Association of REALTORS® regarding new exemptions from uncapping of taxable value of residential real property at their annual meeting. She will also speak at the Institute of Continuing Legal Education's Annual Elder Law Institute on "Government Benefits A to Z" in September.

Mark E. Kellogg, an attorney and CPA, leads Fraser Trebilcock's Business & Tax practice. He has devoted 30 years of practice to the needs of family and closely-held businesses and enterprises, business succession, and estate planning. Mark holds several leadership positions for legal organizations, currently serves on the Board of Attorneys for Family-held Enterprises (AFHE) and is also the President of the DeWitt Public Schools Board of Education.

Michael P. James is a JD/MBA who leverages his diverse experiences and perspectives as an entrepreneur, judicial officer, mediator, and litigator to achieve dynamic solutions to complex legal and business problems. Mike works with individuals, businesses and health care providers on a wide variety of matters including health care, business, employment, estate planning and real estate law. He is licensed to practice law in the states of Michigan and Florida.

Paula J. Manderfield spent 20 years as a Circuit and District Court Judge and ten years in private practice before joining Fraser Trebilcock. Paula's judicial experience gives her clients a distinct advantage, particularly those needing mediation, or dealing with civil or criminal litigation. Paula has been a registered nurse for more than 40 years, and serves on the Board of Blue Care Network, the Board of Visitors for Michigan State University's College of Nursing.

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