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Same Sex Marriage, Creditor Protection and Estate Planning in Missouri

Legally permitted same sex marriage became the Law of the land in the United States with the United States Supreme Court ruling in Obergefell vs. Hodges decided on June 26, 2015. The Court in its majority opinion ruled that the denial by a State of the right of same sex couples to marry violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The Majority Opinion authored by Associate Justice Kennedy cited four principles and traditions which demonstrate why marriage is a fundamental right under the Constitution which apply equally to same sex marriages and to traditional opposite sex marriages. These four principles are: 1) the right to personal choice regarding marriage is inherent in the concept of individual autonomy; 2) the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals; 3) it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education; and 4) that marriage is a keystone of our Nation's social order and it would be demeaning to lock same sex couples out of such a central institution. In describing the fourth principle, the Court stated:

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules...The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. 576 U. S. ____ (2015)

As the Court noted, married couples have enjoyed special rights under state law just by virtue of their marriage. In Missouri and in many other common law states, married individuals can own property, both real and personal as a Tenancy by the Entirety. Typically the Tenancy by the Entirety is created when a couple take title to property as "husband and wife". Tenancy by the Entirety is unique to married couples and differs from Tenants in Common,

where each owns an undivided interest which may be bequeathed or Joint Tenants with right of survivorship where where each owns an undivided interest with the survivor receiving the whole in that a creditor of either spouse alone cannot, with some exceptions, attach property owned as Tenancy by the Entirety. This is not the case with property owned either as Tenants in Common or Joint Tenants with right of survivorship where a judgment creditor of either tenant can attach the property. Thus, married couples enjoy a degree of creditor protection just by virtue of their marriage if their property is owned as Tenancy by the Entirety. Of course this does not apply where both spouses are, for example, jointly responsible for a tort or Co-Makers of a promissory note.

Prior to the Court's ruling in Obergefell vs. Hodges, same sex couples could only own property together in Missouri as Tenant in Common or Joint Tenants with right of survivorship. Now, so long as the same sex couple is married they should enjoy the same protection as married opposite sex couples with respect to Tenancy by the Entirety property. For any same sex couples that owned property together before their marriage, they should create the Tenancy by the Entirety by having a deed prepared transferring such property to them as "Spouse and Spouse", "Husband and Husband" or "Wife and Wife". That is not to say that at some point a creditor of one of a same sex married couple may not try and attach property owned together by the same sex married couple. However, the ruling in Obergefell vs. Hodges makes it pretty clear that if an opposite sex married couple can raise the Tenancy by the Entirety bar to a creditor of one spouse than a same sex married couple should also be able raise the Tenancy by the Entirety bar.

Same sex married couples in Missouri should also now be able to take advantage of Missouri's Qualified Spousal Trust ("QST"). By using a QST for their estate planning needs, married couples (traditional or same sex) in Missouri now can take advantage of the probate avoidance and privacy aspects of a living trust while also maintaining the creditor protection aspect of owning property as Tenancy by the Entirety. In general, in order to qualify as a QST the trust must meet the following general requirements:

- 1) The Settlers (creators) must be husband and wife (presumably spouse and spouse) at the time the trust is created;
- 2) The terms of the trust must provide that during the lifetimes of both Settlers the property transferred to the trust is held by the Trustee either:
 - a. As one trust revocable by either Settlor or both together with each having the right to receive income or principal from the entire trust while both are alive and for the lifetime of the survivor, or
 - b. As two separate shares of one trust revocable by each Settlor with respect to his or her share without consent or participation from the other spouse with each spouse having the right to receive income or principal from his or her share during his or her lifetime.

This QST enabling statute then goes on to provide that property interests held by a husband and wife (presumably spouse and spouse) as Tenancy by the Entirety which are then transferred into the QST will retain their protection as assets held as Tenancy by the Entirety. Prior to this statute, assets that were held as Tenancy by the Entirety that were transferred into a trust lost this protection.

This is intended to be a general discussion of the subjects covered herein and is not intended as legal advice. Should you have any questions please feel free to contact me.

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