

Planning In Light of Minnesota's New Civil Marriage Law

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Key Provisions of New Law

- **Civil Marriage Definition:**
"... a civil contract between two persons, to which the consent of the parties, capable in law of contracting. . ."
- **Requirements for Valid Civil Marriage:**
 - Valid marriage license
 - Two witnesses
 - Someone authorized to solemnize or whom one or both of the parties in good faith believe to be authorized to do so
 - Neither party may already be married
 - No prohibited relationship (siblings, ancestors, descendants, aunts, uncles, nieces, nephews or first cousins)
- **Religious Exemption:**
Religious organizations may refuse to perform civil marriage ceremonies in violation of their beliefs.

Key Provisions of New Law

- New civil marriage law is effective August 1, 2013.
- Previously unrecognized same-sex marriages validly solemnized in other states and countries will be recognized in Minnesota as of the effective date.
- Federal recognition of same-sex marriages is automatic under U.S. v. Windsor decision.

Income Tax Considerations

- **Income Taxes Generally:**
 - Tax paid may be affected; depending on your circumstances, there may be either a marriage penalty or a marriage bonus
- **Income Tax Brackets:**
 - Combining incomes can result in pushing one person's income into higher income tax brackets, increasing taxes.
- **Filing Status:**
 - Four principal options for filing status: single, head of household, married filing jointly, married filing separately
 - Married filing separately is not the same as both filing as single and generally results in the highest taxes being paid.
 - Head-of-household is not possible for married couples, thereby eliminating wider income tax brackets accompanying head-of-household filing status.
 - Filing status determination is made as of the last day of the year and is governed by state law as to who is married.

Income Tax Considerations

- **Alternative Minimum Tax ("AMT")**
 - If one person is subject to AMT and the other is not, marriage may pull the non-AMT spouse into AMT or push the AMT spouse out of AMT.
 - AMT imposes a minimum 28% income tax rate if it is higher than the regular income tax.
 - No deductions such as foreign, state, local or property taxes
 - No personal exemptions or standard deductions
 - Higher minimum income requirements for medical deductions (10% v. 7.5%)
 - No deduction for most miscellaneous itemized deductions
 - Loss of some interest deductions (generally not home mortgage)
- **Credit, Deduction and Contribution Phase Outs**
 - Adoption Tax Credit (\$194,580 to \$234,580)

Income Tax Considerations

- **Credit, Deduction and Contribution Phase Outs (continued)**
 - **Earned income tax credit**
 - No qualifying children: single income limit is \$14,340; married filing jointly income limit is \$19,680
 - One qualifying child: single income limit is \$37,870; married filing jointly income limit is \$43,210
 - Two qualifying children: single income limit is \$43,038; married filing jointly income limit is \$48,378
 - Three or more qualifying children: single income limit is \$46,227; married filing jointly income limit is \$51,567
 - No credit available to married taxpayers filing separately

Income Tax Considerations

- Credit, Deduction and Contribution Phase Outs (continued)
 - Student loan interest
 - Single: deduction phase-out begins at \$60,000 and is completely eliminated at \$75,000
 - Married filing jointly: deduction phase-out begins at \$125,000 and is completely eliminated at \$155,000
 - Married filing separately—no deduction
 - Roth IRA contribution
 - Single: contribution limited begins reducing at \$112,000 and is completely eliminated at \$127,000
 - Married filing jointly: contribution limited begins reducing at \$178,000 and is completely eliminated at \$188,000
 - Married filing separately—contribution limited begins reducing at \$0 and is completely eliminated at \$10,000

Income Tax Considerations

- Credit, Deduction and Contribution Phase Outs (continued)
 - Traditional IRA contribution (for those covered by a retirement plan at work)
 - Single: contribution limitation begins reducing at \$59,000 and is completely eliminated at \$69,000
 - Married filing jointly: contribution limitation begins reducing at \$95,000 and is completely eliminated at \$115,000
 - Married filing separately—contribution limitation begins reducing at \$0 and is completely eliminated at \$10,000
 - Wash Sales Prohibited
 - Unmarried partners could sell items to each other for the purpose of creating an income tax loss; married couples cannot.

Estate Planning Simplified

- Estate Planning Generally
 - Statutory laws of intestacy apply
 - The surviving spouse receives entire estate if predeceased spouse does not have any descendants or all of predeceased spouse's descendants are also the descendants of the surviving spouse.
 - The surviving spouse is entitled to the first \$150,000 plus one-half of any balance of the intestate estate if either spouse has descendants that are not the descendants of the other.
 - The intestate share does not include assets that pass by beneficiary designation, joint tenancy or operation of law.
 - Elective share available to surviving spouse
 - The surviving spouse is entitled to take an elective share if the predeceased spouse does not provide for the surviving spouse by will in an amount equal to or exceeding the elective share.
 - The elective share is a percentage of the augmented estate (loosely the combined assets of both spouses) with the percentage determined based on the length of the marriage.

Estate Planning Simplified

- Estate Planning Generally (Continued)
 - Premarital Will
 - The surviving spouse is entitled to receive the intestate share if the predeceased spouse's last will was executed before the marriage unless there is a antenuptial agreement, the will states that omission of the surviving spouse was intended, or the surviving spouse is provided for in the will.
 - Exempt Property
 - The surviving spouse is entitled to the predeceased spouse's homestead outright if there are no descendants of the predeceased spouse, and to a life estate in the homestead if there are descendants.
 - The surviving spouse is entitled to \$10,000 (net value) of household furniture, furnishings, appliances, and personal effects.
 - One automobile regardless of value

Estate Planning Simplified

- Estate Planning Generally (Continued)
 - Family allowance
 - The surviving spouse is entitled to a monthly stipend of \$1,500 per month from the estate.
 - The family allowance is payable for 18 months for solvent estates and 12 months for insolvent estates.
 - Priority to serve as personal representative, conservator and guardian
 - The surviving spouse is entitled to serve as personal representative of the predeceased spouse's estate unless the predeceased spouse provides otherwise by will.
 - The spouse is entitled to serve as conservator of an incapacitated spouse's estate unless there is a conservator already serving or the incapacitated spouse has nominated or appointed a different attorney-in-fact.
 - The spouse is entitled to serve as guardian of an incapacitated spouse unless there is a guardian already serving or the incapacitated spouse has designated another guardian in a health care directive.

Estate Planning Simplified

- Estate Tax Planning
 - Transfers to spouses qualify for the unlimited gift and estate tax marital deductions.
 - Surviving spouse is entitled to use a predeceased spouse's unused exemption from estate taxes before the death of the surviving spouse's next spouse.
 - Generation-skipping transfer ("GST") tax issues go away for May-December relationships (which for GST tax purposes means a gap of more than 37.5 years) and descendants of the younger spouse.
 - Spouses become related parties for the purposes of the grantor trust rules and techniques such as grantor retained income trusts.

Premarital Planning/Cohabitation Agreements

- Same-sex couples may enter into premarital agreements similar to opposite-sex couples.
- The new civil marriage law does not address the cohabitation statute which limits cohabitation agreements to opposite-sex couples.

Social Security

- United States v. Windsor extends social security benefits to married same-sex couples.
- SSA will approve benefits for same-sex married couples whose marriage is recognized in their state of domicile.
- Applications by spouses whose marriage is not recognized in their state of domicile are being held pending further interpretation of *Windsor*.
- Apply now, even if under current guidance a claim would be held pending further *Windsor* interpretation.

Employee Benefits, Pension Benefits and Qualified Retirement Plans

- Marital property rights to retirement assets
- Survivor benefits under non-ERISA pension plans likely not available to same-sex spouses in a non-recognition state
- FSA, HRA, and HSA plans can reimburse for spouse's expenses
- 401(k) and IRA spousal rollovers

Health Insurance

- Same-sex couples who marry will no longer have to pay income tax on domestic partner health benefits.
- Some employers may eliminate domestic partner health benefits as a result of marriage.
 - This seems more likely for employers who only provide it to same-sex couples.
 - This seems less likely for multi-state employers who operate in the states where same-sex marriage is still unavailable.
- FMLA leave currently available to married couples whose marriage is recognized in their state of domicile.

Immigration

- A same-sex spouse of a U.S. citizen or permanent resident will be able to apply for permanent residency and eventually citizenship based on marriage.
- USCIS applies a state of celebration standard for determining marriage status for immigration purposes.
- An individual seeking permanent residency should re-apply as a spouse (3-yr vs. 5-yr track to citizenship).
- An individual who is already a permanent resident must assess whether they could apply for citizenship more quickly on their current track, or by relinquishing permanent residency to re-apply as a spouse.

Emigration to Another State

- Complication of state income tax reporting for mid-year move
- Complication of income tax filing in more than one state
- Contingency estate planning for possible moves to non-recognition state from recognition state or vice versa

Outlook for § 2 of DOMA

- Basis for Decision
 - The Supreme Court held § 3 of the Defense of Marriage Act (“DOMA”) was “unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”
 - Using a rational basis test, the majority opinion found that “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.”
- Marriage Traditionally Regulated by States
 - States have traditionally regulated marriage, although federal law can pre-empt state law (e.g., ERISA rights) in discrete statutes designed to ensure efficiency of federal programs and pursuit of larger federal goals.

Outlook for § 2 of DOMA

- State Laws Must Respect Constitutional Rights
 - *Loving v. Virginia*—held antiscegenation laws unconstitutional in 1967
- Congressional Action Unlikely
- Practicality of Movement From State to State

The Impact of Minnesota’s New Gender Neutral Marriage Law: Family and Juvenile Court Proceedings

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Background



1. Same-sex couples have long experienced significant legal challenges in family formation and family breakdown
2. Many challenges arose from the inability of same-sex couples to marry
3. Lawyers have had to be creative in adapting legal procedures to provide alternative solutions
4. The new statute in Minnesota allowing same-sex marriage is a short and narrowly focused law; it does not significantly address family formation or family breakdown

22

Background



5. The impact of this new law is unknown
6. Types of court proceedings potentially affected:
 - a. Adoption
 - b. ART
 - c. Parentage
 - d. Custody and Parenting Time
 - e. Divorce

23

Adoption



1. Adoption is a creature of statute
2. Chapter 259 contains the Adoption code
3. Kinds of adoptions:
 - International
 - Direct Placement
 - Agency
 - State Ward
 - Relative
 - Stepparent
 - Same-sex Adoptions

24

Adoption



4. The adoption code provides that only single persons or married couples can adopt; the gender-neutral marriage statute does not change that
5. Legal requirements:
 - Residency
 - Written, witnessed, and notarized consents
 - Adoption petition
 - Unless waived, a home study and post-placement report
 - Birth certificate of child
 - Marriage certificate, if applicable
 - MFAR report
 - Forms for amended birth certificate
 - Proposed adoption decree
 - Compliance with ICWA, if applicable

25

Adoption



6. Additional requirements for second-parent adoptions sometimes require a motion and various supporting affidavits
7. Impact of an adoption of new marriage provisions in Chapter 517: should make same-sex adoptions easier
8. Interstate issues involving relocation and Full Faith and Credit concerns will remain
9. Relevant case law:
 - In re Custody of L.M.K.O., 607 N.W.2d 151 (Minn. App. 2000)
 - In re the Adoption of T.A.M. and E.J.M., 791 N.W.2d 573 (Minn. App. 2010)

26

Assisted Reproduction



1. A method of building families heavily used by same-sex couples
2. Establishing parentage involves contracts and possibly a legal proceeding
3. Complex medical proceedings and terminology
4. Possible parents: legal, biological, genetic

27

Assisted Reproduction



5. Legal complexity and necessary contracts are determined by the type of proceeding
6. Same-sex female couple ...
7. Same-sex male couple ...
8. Relevant case law:
 - In re Custody of L.M.K.O., 607 N.W.2d 151 (Minn. App. 2000)
 - In re the Paternity and Custody of Baby Boy A, No. A0-452, 2007 WL 4304448 (Minn. App. Dec. 11, 2007)
 - A.L.S. by guardian ad litem J.P. v. E.A.G. v. R.W.S., No. A-10-443, 2010 WL 4181449 (Minn. App. Oct. 26, 2010)

Parentage



1. How is parentage established?
 - Birth certificate
 - Parentage Act
 - Adoption decree
2. Minnesota's Parentage Act is found in Chapter 257...
3. Parentage is determined on a variety of presumptions:
 - Genetic testing
 - Marital status
 - Financial support
 - Holding the child out as one's own
 - Recognition of Parentage (ROP)
 - Registering with MFAR

Parentage



4. Proof of parentage: birth certificate vs. court order
5. Competing presumptions are generally resolved through a multi-factored analysis
 - Best interests of the child
 - Genetic testing
6. The new gender neutral marriage law specifically references the parentage presumptions of Chapter 257: Minn. Stat. § 517.201, subd. 2
 - Obtaining a parentage order or adoption decree may remain prudent

Custody and Parenting Time Outside of Marriage



1. Unfortunately, custody and parenting time litigation has commonly been used to address access to children by same-sex partners when the relationship between the partners terminates
2. Chapter 257C
3. Legal/biological parents have constitutionally protected rights to the custody of their children
 - Pierce v. Society of Sisters, 268 U.S. 510 (1925)
 - Troxel v. Granville, 530 U.S. 57 (2000)

31

Custody and Parenting Time Outside of Marriage



4. Situations giving rise to litigation:
 - Co-parenting the other partner's child without an adoption decree and/or the parties were never married
 - Planning to have a child born to one of the parties during their relationship without a written co-parentage plan, a parentage determination or a second parent adoption
5. Custody and parenting time disputes under the new law
 - Chapter 518
 - Chapter 257C

32

Custody and Parenting Time Outside of Marriage



6. What about the non-biological, non-legal parent?
 - The Parentage Act of Chapter 257 or Chapter 257C?
7. A prudent course of action for same-sex couples includes:
 - Premarital agreement
 - Marriage
 - Parentage order or adoption decree
8. Relevant case law
 - Lewis-Miller v. Ross, 710 N.W.2d 565 (Minn. 2006)
 - SooHoo v. Johnson, 731 N.W.2d 815 (Minn. 2007)

33

Divorce/Legal Separation

1. Married same-sex couples could not divorce in Minnesota until recent enactment of the gender-neutral marriage statute
 - See Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971)
2. Prior to new legislation, same sex couples married in other jurisdictions would need to go to a state or country that would grant such divorces and establish residency
3. The use of cohabitation agreements, parentage actions or adoptions, and partition actions in district court—cumbersome and challenging

34

Divorce/Legal Separation

4. All divorce statutes, case law, and procedures should now apply to married same-sex couples, including provisions as to custody, parenting time, child support, spousal maintenance, division of property and apportionment of debts
5. Jurisdiction issues (see Minn. Stat. § 518.07, subd.2)
6. Prenuptial and postnuptial agreements vs. cohabitation agreements—impact if signed before the new legislation

35



Questions

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36
