POLUNSKY BEITEL GREEN

ATTORNEYS AT LAW

June 29, 2015

To Clients and Friends:

RE: United States Supreme Court Opinion in *Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al.*

On Friday June 26, 2015 at 9:00 AM, the United States Supreme Court rendered its decision in the *Obergefell* case.

The case was a consolidation of cases appealed from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. See, *e.g.*, Mich. Const., Art. I, §25; Ky. Const. §233A; Ohio Rev. Code Ann.§3101.01 (Lexis 2008); Tenn. Const., Art. XI, §18. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violated the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition in the state in which they resided.

The court held that, under the Bill of Rights and the Fourteenth Amendment, the right to marry is protected by the Constitution and the right to marry is fundamental under the Due Process Clause and that right applied with equal force to same sex couples as it does for heterosexual couples.

The court stated that:

> "These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry." And further stated "The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex."

The court held that:

> "The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character."

Because of that decision, a same sex marriage performed in Texas on and after June 26, 2015 at 9:00 AM is legally valid in Texas and further a same sex marriage properly performed before June 26, 2015 at 9:00 AM, in a state that recognized a same sex marriage is now valid in Texas. Accordingly, same sex married couples may be shown as married on all mortgage documents where marital status is reflected, including the 1003.

This decision will impact mortgage lenders in a number of ways. First, as a result of the *Obergefell* decision, all Texas statutes and Texas Constitutional provisions, which previously dealt with opposite sex marriages, should apply with equal force to same sex marriages. Accordingly, statutes and cases addressing a "husband and wife" should be read as a married couple and spouses to encompass this ruling.

This broader reading would apply to the conveyance and encumbrance of a Texas homestead, as well as homestead rights under Texas Constitution Article XVI, Section 50 and 51 and Section 5.001, et seq. of the Texas Family Code. Under Texas law, a married couple may have but one homestead at any given time and this rule will now apply to married same sex couples as well.

Also under Texas law, all property acquired by a married couple during their marriage is deemed to be community property, unless it can be shown that it was acquired prior to the marriage or by gift, inheritance, or as damages awarded for damages to one's body or unless there is a pre-marital or post-marital agreement that such property will be separate property of one spouse. The community property rules will now presumably apply to married same sex couples.

Common law marriages will likely also apply to same sex marriages, although the court's opinion in *Obergefell* dealt more with state statutes pertaining to or limiting the right to marry. But to be safe in dealing with homesteads, lenders should treat a same sex common law marriage the same as an opposite sex common law marriage. In addition to case law, Texas does have a state statute dealing with common law marriages, which statute refers to it as an informal marriage.

Further, the laws dealings with intestate succession should apply equally to persons who have either an opposite sex marriage or a same sex marriage.

In handling refinances on the homestead, as well as home equity loans under the Article XVI, Section 50(a)(6) of the Texas Constitution and a Reverse Mortgage under the Texas

Constitution, Article XVI, Section 50(a)(7), a lender must make proper inquiry as to whether the borrower(s) are married or not. Spousal joinder requirements will apply with equal force.

Because of the potential of common law marriages, whenever two persons (regardless of sex) are residing in homestead property, a lender may wish to require both to join in a refinance loan or a Texas "home equity loan" or a "reverse mortgage loan" unless they are related by means other than a marriage, i.e. brothers and sisters, or parent and child, etc. or unless there is clear and convincing evidence that they are not married.

In the vesting under a deed of trust, same sex married persons should probably be referred to as a married couple or as spouses. It is possible that for sake of convenience, vesting for all married persons may be referred to in that manner. It would be unnecessary to distinguish husband and wife, since sex is irrelevant. Rather, the relevant issue is whether two persons are married or not.

As the implementation of the United States Supreme Court decision continues in Texas and beyond, there may be additional questions or concerns that become evident. Accordingly, we will provide additional information as it becomes available.