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## Family-Planning Questions for Same-Sex Married Couples

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Prior to the decision from the U.S. District Court for the Middle District of Pennsylvania in *Whitewood v. Wolf*, there were more questions than answers when it came to family planning for same-sex couples. Now that marriage equality has been achieved in Pennsylvania, some answers have finally come to light, but they may not necessarily be the answers that same-sex couples have been hoping for.

Before the decision in *Whitewood*, certain citizens of Pennsylvania were not guaranteed the right to marry the person they love. This created a great deal of confusion and hardship on those same-sex couples wanting to marry and those that chose to marry in another state wherein same-sex marriage was recognized. On May 20, this all changed. Judge John E. Jones III stated, we “have concluded that all couples deserve equal dignity in the realm of civil marriage.” Jones held that the marriage laws of Pennsylvania (23 Pa.C.S. Sections 1102 and 1704) violate both the due process clause and equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

What this decision will mean for same-sex couples living in



Pennsylvania in a practical sense will vary greatly from couple to couple. For those couples previously married in a jurisdiction wherein same-sex marriage was legal, it means that as of May 20, their marriage became legal in Pennsylvania. The couple does not need to file for a license, fill out a form or affirm their marriage in any way. They are just married, as they have been, but now Pennsylvania will recognize their marriage as well.

The couple should now automatically receive the benefits of being married, but along with the benefits comes the obligations as well. The parties must file a joint state tax return; they can title their house as joint tenants by the entirety and take

advantage of the health insurance benefits of their spouse without having to pay tax on those benefits. It also means that property acquired during the marriage may now be subject to equitable distribution and there may be an obligation for one party to pay alimony to the other if the couple ever divorces. The same-sex married couple is just like any other couple that chose to travel elsewhere to get married but wanted to return to their home in Pennsylvania. As Jones aptly stated in his decision, “In future generations the label same-sex marriage will be abandoned, to be replaced simply by marriage.”

For those couples planning their marriage, they can finally do so in

their home state of Pennsylvania. Of course, there are lots of decisions to be made when getting married, and it is not all about the wedding cake, choice of DJ and venue for the reception. For those couples who have been together for a long time, they may want to think about consulting with a family law attorney to discuss what the benefits and the consequences may be in making this decision to marry. A prenuptial agreement is something to think about for many same-sex couples, especially those who have acquired property, businesses and income separately up to the point of getting married.

Of course, the biggest question that has arisen since the Whitewood decision involves second-parent adoption. As most same-sex couples know, second-parent adoption has been legal in Pennsylvania since 2002, when the Pennsylvania Supreme Court decided *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195. As a result of Whitewood, however, many couples have asked whether or not they need to still go through the second-parent adoption process if they are now able to marry. If a child is born to a couple during an intact marriage, Pennsylvania presumes then that both parties are the legal parents to the child. In Pennsylvania it is called the presumption of paternity. This is a common-law doctrine in the state, the main purpose of which is to prevent intact families from being disrupted by outsiders claiming to be the actual biological parents of children born to marriages.

Many same-sex couples have asked whether this presumption will apply to them and they can then avoid the adoption process. The adoption process is long, technical and expensive, and most couples would rather avoid having to go through it. While the presumption of paternity should apply to same-sex married couples as it does to heterosexual married couples, it is still yet to be seen, so couples should

be somewhat wary. One major benefit that should come to fruition immediately is that as a result of the presumption, at the time of the birth of a child to a same-sex married couple, both parties' names should be immediately placed on the birth certificate rather than having to wait until the end of the adoption process. The Pennsylvania Department of Health should automatically issue this birth certificate, whereas before the birth certificate would not be issued with both names of the same-sex couple until a decree of adoption was presented. Whether or not this will happen automatically without a challenge or some direction to the Department of Health is yet to be seen.

The issuance of a birth certificate does not necessarily mean the couple can avoid second-parent adoption. It is unfortunate, but until such time as there is marriage equality in all 50 states, the couple should still go through the adoption process. Many couples do not understand this, but if they travel to a state that does not recognize their marriage and if something happens to the child, then only one party may be considered the legal parent in that "non-recognition" state. A state without marriage equality does not have to honor an administrative document, such as a birth certificate, and it will not consider the same-sex couple married, and therefore the state does not have to recognize the presumption of paternity. A birth certificate is not a court order and therefore can be ignored. A court order for an adoption, however, must be granted full faith and credit and must be honored by the state, even if the state does not recognize the marriage. Therefore, the same-sex married couple should still go through the adoption process until such time as there is marriage equality in every state.

That being said, the second-parent adoption process and procedure

should change as a result of the Whitewood decision. If a married same-sex couple files an application for an adoption, then the process should be streamlined, similar to a step-parent adoption. The procedure then will not be as onerous and expensive and it may not take as long. It is not much consolation to these same-sex couples who still must endure the process, but the hope is it will make things a little easier. There is no doubt, however, that it will take the courts some time to catch up with the marriage equality decision, and practitioners will need to be proactive in pointing out to the court the difference in these applications now that the parties are legally married.

There is still a lot to consider for same-sex couples in deciding whether or not to wed, but it is nice that that they now have the choice and their considerations are no different than any other heterosexual couple going through the same thing. Jones said "we are better people than what these laws represent," meaning the marriage laws, and he was absolutely correct. Same-sex couples may now share in the same trials and tribulations as any other married couple. And as all married couples, they should do so cautiously.

*Helen Casale is a shareholder in the family law practice group of Hangley Aronchick Segal Pudlin & Schiller, where she is known for her work with same-sex couples. She was also part of the legal team in the Whitewood v. Wolf lawsuit that struck down Pennsylvania's ban on marriage for same-sex couples.*