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## **June 26, 2013, in U.S. vs. Windsor, the U.S. Supreme Court struck down Section 3 of the Federal Defense of Marriage Act (DOMA)**

- Found it violated the equal protection clause of the Fifth Amendment
- As a result, the federal government will recognize same-sex marriages
- Couples considered married under state law now enjoy federal benefits previously only available to opposite-sex married couples

### **Tax-Related Benefits:**

- Income Tax
- Estate & Gift Tax
- Transfers Pursuant to Divorce

### **Other Benefits (over 1000 total):**

- Social Security Survivorship Benefits
- Family Medical Leave Act
- COBRA Laws
- Veteran's & Military Benefits
- Immigration Benefits (still "out of status" issue – need current visa)

### **BUT the Supreme Court:**

- Did not extend same-sex marriage nationwide
- Failed to say if there was a constitutional right to same-sex marriage that would override state law (Section 2 of DOMA was not challenged, and it allows states to refuse to recognize same-sex marriages valid in other states)
- Failed to address the status of "domestic partnerships" and "civil unions" under state law in connection with federal benefits
- Failed to address status of federal benefits for a same-sex couple married in one state, but now residing in a state which does not recognize same-sex marriages
- Failed to address the ability of married same-sex couples to divorce in a state that does not recognize same-sex marriage

### **INCOME TAXES**

#### **Filing status:**

- Single
- Head of Household
- Married Filing Jointly
- Married Filing Separately
- Status determined on the last day of the year

### **How does the IRS determine if you are married under state law?**

- Validity based on “State of Residence”
- Not based upon “State of Celebration”(i.e. validity in the state in which you were married)

*This implies that only people residing in states that recognize same-sex marriage can expect to be treated as married by the IRS.*

- “Recognition” versus “Non-Recognition” States
- Contrast with OPM, Immigration, Military that are State of Celebration, Social Security Survivorship benefits (decedent’s State of Residence) & VA Death benefits (State of Residence upon retirement)
- There is no IRS statute or regulations on this yet

### **Tax Impact: Will we owe more or less if we file jointly?**

- Every situation is different
- Generally joint filers with disparate incomes will pay less
- Generally joint filers with similar incomes will pay more (“Marriage Penalty”)

### **Action Items if You Are Married:**

- Should you change your filing status with your employer on a W-4?
- If you pay estimated taxes, do you need to change the amount you pay?
- If you’re on extension until October 2013 for your 2012 taxes, consult with your tax advisor on correct filing status
- Consider filing amended returns for tax refunds (generally 3 years), after considering any downside (income, gift & estate)
- Request revised W-2 if spouse’s health insurance coverage was imputed income
- Can no longer claim “spouse” as “dependent”
- Be aware that Roth contribution limits will include your spouse’s income

### **If Not Married but Considering It: Have Your Accountant Run the Numbers!**

#### **ESTATE TAXES**

#### **Every person can pass \$5.25 Million estate tax free to a US citizen**

- \$5.25 Million is the exemption/exclusion amount
- Indexed for inflation

#### **Assets over \$5.25 Million are taxed at 40%**

**Prior to Windsor there was an unlimited marital deduction available only to opposite-sex spouses**

- \* **Your estate may now take an “unlimited marital deduction” for any assets passing to your surviving same-sex surviving spouse (outright or in a qualifying trust)**
  - Basically, it defers the federal estate tax that otherwise would be paid upon the first spouse’s death
  - Previously, there was the possibility of a “double” estate tax
- \* **“Portability” is now available to a same-sex spouse**
  - Another way to avoid the estate tax on the first spouse’s death
  - It allows surviving spouse to use deceased spouse’s unused exemption amount
- \* **Disclaimer estate planning is now available**
- \* **Surviving spouse can defer income recognition when they inherit a deceased spouse’s IRA and/or qualified retirement plan**
- \* **Bequests to a same-sex spouse over 37.5 years younger than the gifting spouse no longer trigger the General-Skipping Transfer (GST) Tax**

\* = starred items are New due to Windsor

#### GIFT TAX

- \* **Now same-sex couples can transfer assets between themselves without gift tax consequences because the gift tax marital deduction now applies to them**
  - Wealthier spouse can support less wealthy spouse without concern of making taxable gifts (2013 annual gift tax exclusion is \$14,000)
  - Relevant when one spouse wants to add the other spouse to a Deed for a house owned by the first spouse

#### ESTATE PLANNING NOTES

**You can now plan for marriage in your documents**

**Even if you are in a non-recognition state, identify your spouse to address the rapidly evolving law**

**Make sure any assets going to your spouse qualify for the marital exemption**

- Basically, outright to them or in trust, with the ability to get income from the asset (a trust cannot benefit anyone other than spouse)
- A trust is often used when there are children from a first marriage

**Consider disclaimer trust planning**

**Consider whether there is a need to disinherit or exclude family members**

- If so, consider using a revocable trust

**Draft to provide flexibility**

**Using separate counsel versus the same counsel**

- Ethical considerations & conflict waiver

**Coordinate beneficiary designations**

- **If married, redo beneficiary designations to reflect “spouse”**

**MISCELLANEOUS ESTATE PLANNING ISSUES**

**Domestic Partnerships/Civil Union:**

- You may want to consider defining “spouse” to include a domestic partner or person with whom you have formed a civil union

**Non-biological Child Involved**

- Be careful with the language used (distribution to your “heirs” would not include a non-biological child unless you have adopted that child)
- In large estates, beware of the Generation Skipping Transfer (GST) Tax where you have a same-sex family where a child has no legal relationship with one of the parents, such as in a state that does not allow same-sex couples to adopt (e.g., the child is over 37.5 years younger than a non-biological parent)

**ESTATE PLANNING DOCUMENTS**

- Durable Power of Attorney for Financial Affairs
- Durable Power of Attorney for Health Care
- Health Care Declaration/Living Will
- HIPAA Authorization (separate document & incorporate into POAs)
- Disposition of Remains
- Last Will and Testament
- Revocable Trust (also known as a Living Trust)

**RESOURCES**

**Lambda Legal:** [www.LambdaLegal.org](http://www.LambdaLegal.org) (Good fact sheets)

**LGBT Bar:** [www.lgbtbar.org/tax-equity-project](http://www.lgbtbar.org/tax-equity-project)

**Human Rights Campaign:** [www.hrc.org](http://www.hrc.org)

**National Center for Lesbian Rights:** [www.nclrights.org](http://www.nclrights.org)

**ACLU:** [www.aclu.org/lgbt-rights](http://www.aclu.org/lgbt-rights)

**Freedom to Marry:** [www.freedomtomarry.org](http://www.freedomtomarry.org)

**Family Equality Council:** [www.familyequality.org](http://www.familyequality.org)