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Estate Planning and Tax Issues after DOMA is Ruled Unconstitutional

In its recent decision of *United States v. Windsor*, the Supreme Court recently struck down the Defense of Marriage Act (DOMA), which required same-sex spouses to be treated as unmarried for purposes of federal law. This case has many tax implications. Same-sex marriages are recognized in the District of Columbia and the following states: California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington. These states represent about one-third of the U.S. population. Additionally, individuals living outside of these states, including Ohio, but marrying in them, may be considered as married spouses for federal tax purposes.

Estate planning. *Windsor* was an estate tax case and the decision saved the taxpayer hundreds of thousands of dollars. There are many favorable estate and gift tax provisions available to married couples. Married same-sex couples should consider revisiting their estate plans, as the following estate and gift tax benefits are now available to them for the first time:

- Availability of the unlimited marital deduction for the transfer of assets during life and/or at death to the other spouse, free of gift and estate tax (e.g., making a spouse co-owner of a home);
- Transfer of the deceased spouse's unused estate tax exclusion amount to the surviving spouse (currently \$5.25 million); and
- In addition to using their own gift tax annual exclusion (currently \$14,000 for each donee), a married individual can also use their spouse's annual exclusion by "gift splitting" (i.e., gifts to others treated as if made one-half by each).

Other tax benefits. Also available to legally married same-sex couples are the following:

- The right to file a joint return, which can produce a lower combined tax than the total tax paid by same-sex spouses filing as single persons (but this can also produce a higher tax, especially if both spouses are relatively high earners);
- The opportunity to get tax-free employer health coverage for the same-sex spouse (including the ability for reimbursement from flexible spending accounts for a same-sex spouse's medical costs);
- The opportunity for a surviving spouse to stretch out distributions from a qualified retirement plan or IRA after the death of the first spouse under more favorable rules than apply for non-spousal beneficiaries; and

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- Many other tax provisions, such as the deductibility of alimony paid to a former spouse and the availability of innocent spouse relief.

Married same-sex couples who filed separate federal returns should consider filing amended returns or refund claims. This may be beneficial if they paid higher taxes as a result of not being able to file jointly, if one spouse had capital gains in a year that would have been effectively cancelled by the other spouse's capital losses, or if they were previously taxed on health benefits provided to a spouse. The general statute of limitations for refunds is three years from filing or two years from payment, whichever date is later.

Employers may also want to file refund claims where they paid FICA taxes on imputed income for health benefits provided to a same-sex spouse. The overruling of DOMA will also impact employers sponsoring employee benefits plans. Under DOMA, same-sex spouses were treated as unmarried for employee benefits purposes. Now same-sex spouses will be treated as married under federal employment statutes such as ERISA and the Family and Medical Leave Act. Employers should review their policies and the definitions each employee benefit plan utilizes.

The extent to which the Supreme Court's DOMA decision will be applied retroactively is not clear. It is also unclear as to how this decision will be applied for married same-sex couples that reside in states that do not recognize same sex marriage. As such, this is a developing area of the law.

Marriage Recognition in Ohio. Ohio law continues to prohibit the recognition of same sex marriages, but this prohibition is also under increasing scrutiny. Recently, a federal judge in Cincinnati issued a decision stating that Ohio must recognize a same sex marriage solemnized in a state that has legalized such marriages, at least as Ohio law is applied to the issuance of a death certificate. The case, *Obergefell v. Kasich*, involved a same sex couple, with one spouse under hospice care suffering from ALS. The couple were married in Maryland and returned to Cincinnati, asking the court to issue an order assuring that the ill spouse's death certificate would identify him as married. Ohio's Constitution prohibits Ohio from recognizing same sex marriages but, the court ruled that the death certificate should list the ill man as married.

The *Obergefell* court's ruling was directed only to the couple bringing the action, and did not strike down the Ohio Constitution's ban on same sex marriage. Therefore, Ohio's constitutional ban remains in place, and Ohio state tax law would not yet recognize a same sex marriage from another state. However, this decision will likely set off future challenges to Ohio's prohibition on same sex marriage.

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