Same-Sex Marriages—The Quagmire Continues after Windsor

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On June 26, 2013, the U.S. Supreme Court struck down as unconstitutional Section 3 of the federal Defense of Marriage Act. This decision extended for the first time a myriad of federal benefits, rights, and privileges to same-sex married couples. The breadth, applicability, and consequences of this decision, however, are uncertain. For same-sex married couples living in states that recognize same-sex marriages, the Supreme Court decision has immediate consequences, but its retroactive application is uncertain. For same-sex married couples that live in states that do not recognize such marriages, the Supreme Court decision apparently has immediate consequences in some—but not all—areas, depending on the particular federal agency. Several federal agencies have responded to this decision. For example, the Internal Revenue Service issued Revenue Ruling 2013-17 on August 29, 2013. At this time, same-sex couples should carefully analyze their particular situation to determine what steps should be taken to take advantage of this development.

INTRODUCTION

On June 26, 2013, the U.S. Supreme Court issued a historic decision that affected the application of federal law to same-sex married couples. This decision will have far reaching consequences as the breadth, applicability, and consequences of this decision are being understood.

Windsor

The decision in United States v. Windsor held that Section 3 of the 1996 Defense of Marriage Act (DOMA) was unconstitutional as a deprivation of liberty protected by due process and equal protection. Section 3 of DOMA stated that for purposes of federal law, the word “marriage” meant only a legal union between one man and one woman as husband and wife, and the word “spouse” referred only to a person of the opposite sex who is a husband or a wife. In effect, DOMA denied federal benefits, rights, and privileges to the partners/spouses of same-sex marriages.

Section 2 and Section 3 of DOMA are presented in Exhibit 1.

In Windsor, a same-sex couple residing in New York went to Canada to marry and then returned to New York. While living in New York, one of the spouses to the marriage died. The issue in the case was whether the decedent’s estate would be entitled to the same federal estate tax benefits that would be accorded to opposite-sex marriages of persons living in New York. At the time of the spouse’s death, New York recognized same-sex marriages. The Windsor court concluded that Section 3 of DOMA was unconstitutional and, therefore, the decedent’s estate was...
entitled to the same federal estate tax benefits that a heterosexual couple would have received.

Therefore, it is clear from the *Windsor* opinion that a same-sex married couple residing in a state that recognizes same-sex marriages will be entitled to all federal benefits, rights, and privileges accorded to opposite-sex married couples in that state.

The uncertainty is whether and how all federal benefits, rights, and privileges will be accorded to same-sex couples validly married in one state but thereafter residing in another state that does not recognize same-sex marriages at the time in question.

States that do not recognize same-sex marriages include Texas, Florida, Pennsylvania, and many others. *Windsor* is only the first step in unraveling the quagmire facing same-sex married couples.

The *Windsor* court did not address Section 2 of DOMA. Section 2 states that one state does not have to recognize a marriage performed under the laws of another state.

**PERRY**

On the same day as the issuance of the *Windsor* opinion, the Supreme Court also issued a decision in the case of *Hollingsworth v. Perry*. In the Perry decision, the Supreme Court held that neither the Supreme Court nor the lower Circuit Court had the authority to decide the question of whether California Proposition 8 was unconstitutional as held by the District Court.

California Proposition 8 stated that only a marriage between a man and woman is valid or recognized in California. The District Court concluded that Proposition 8 was unconstitutional. As a result of the Supreme Court’s decision, the District Court’s original opinion held and, therefore, Proposition 8 remained unconstitutional and same-sex marriages in California are permitted.

**STATES RECOGNIZING SAME-SEX MARRIAGES AS VALID**

At the present time, 13 states and the District of Columbia recognize same-sex marriages as valid. Those states are New York, California, Massachusetts, Connecticut, Iowa, Maine, Vermont, Maryland, Washington, New Hampshire, Minnesota, Rhode Island, and Delaware.

States that do not recognize same-sex marriages as valid will continue to contribute to the uncertainty facing same-sex married couples. For example, in 2011, the New Mexico Attorney General issued an advisory opinion that New Mexico can recognize same-sex marriages performed outside of New Mexico even though New Mexico itself does not recognize same-sex marriages. The effect of this advisory opinion is uncertain.

In Texas, a case is presently pending in the Texas Supreme Court where the issue is whether a Texas lower court had the power to grant a divorce to a same-sex couple who were married outside Texas and were living in Texas at the time of divorce. The Texas Supreme Court announced in August 2013, that oral arguments in this case will be heard in early November 2013.

**RECOGNIZED MARRIAGE REQUIRED**

The *Windsor* opinion requires a valid, recognized marriage. The status for federal purposes of civil unions and domestic partnerships after *Windsor* is uncertain. In the recent decision of *Cozen O’Connor, P.C. v. Tobits*, the District Court held, “where a state recognizes a party as a “Surviving Spouse,” the federal government must do the same with respect to ERISA benefits—at least pursuant to the express language of the ERISA—qualified Plan at issue here.”

In this case, the same-sex couple was married in Canada and residing in Illinois, a state that does not issue marriage licenses to same-sex couples but does have a civil union statute.

The *Tobits* court treated the surviving party to an Illinois civil union as a “spouse” for purposes of the ERISA plan in issue.

However, the Internal Revenue Service (the “Service”) ruled in 2010 that domestic partners in a registered domestic partnership in California who are treated as owning community property under California law would be required to report on the partner’s individual federal tax return one-half of the community income.

These rulings did not treat the couple as married for federal purposes or extend any tax benefits to them as married. These rulings only addressed the nature of the property interest each partner had in the property and income.

For purposes of federal law, marriage is determined by state law. As discussed below, the issue is which state’s law controls—the state of marriage or the state of residency?

**AFFECTED FEDERAL LAWS**

The General Accounting Office identified 1,138 federal statutory provisions involving marital status as of December 31, 2003, in 13 subject categories.
whose applicability depends on whether a couple is married.\textsuperscript{10}

Affected areas include, but are not limited to, income tax, gift tax, estate tax, immigration, social security, Medicare, Medicaid, family medical leave, veterans’ spousal benefits, health insurance benefits for employee’s spouse, spousal IRA rollovers, COBRA, employee benefit plans, defined contribution plans, qualified domestic relations orders, HIPAA, cafeteria plans, flexible spending accounts, and health savings accounts.

The General Accounting Office issued a report in 2004 that identified 198 separate Internal Revenue Code provisions tied to marital status.\textsuperscript{11}

\section*{Which State Law Controls}

The uncertainty arising out of the \textit{Windsor} opinion is further exacerbated by the fact that all federal agencies currently do not apply the same standard for determining whether a same-sex marriage will be recognized for federal purposes. The issue revolves around the question of whether the state in which the marriage ceremony is performed (“state of ceremony”) or the state in which the married couple reside at the time in question (“state of residency”) will be used to determine whether the marriage will be recognized for federal purposes.

For example, Frequently Asked Question (FAQ) A-2 issued by Homeland Security, regarding an immigration visa petition, stated that “[I]n evaluating the petition, as a general matter, USCIS looks to the law of the place where the marriage took place when determining whether it is valid for immigration law purposes.”\textsuperscript{12}

In addition, after the issuance of the \textit{Windsor} opinion on July 1, 2013, the Secretary of Homeland Security, Janet Napolitano, announced that effective immediately, the U.S. Citizenship and Immigration Services (USCIS) would immediately review immigration visa applications filed on behalf of a same-sex spouse in the same manner as applications filed for an opposite-sex spouse.

On June 28, 2013, the U.S. Office of Personnel Management (OPM) issued a memorandum stating that it will extend benefits to federal employees and annuitants who have legally married a spouse of the same sex. The benefits covered by this memorandum are as follows:

1. Health insurance
2. Life insurance
3. Dental and vision insurance
4. Long-term care insurance
5. Retirement benefits
6. Flexible spending accounts

The memorandum implied that more benefits would be offered. The memorandum did not mention which jurisdiction would be used to determine a legal marriage. Presumably, all that is required is the couple be legally married.

The Service did not specifically address this issue of which state law controls in Publication 501.\textsuperscript{13} However, in Revenue Ruling 58-66, 1958-1 C.B. 60, the Service concluded that a common-law marriage entered into in a state that recognizes such relationship would continue to be treated as a marriage for federal tax return filing purposes when that couple later moved to a state that requires marriage ceremonies. It was not clear how or if this ruling applied to same-sex marriages.

The Service recently announced in “Answers to Frequently Asked Questions for Same-Sex Couples” that they are “reviewing the important June 26 Supreme Court decision” on DOMA, and “will move swiftly to provide revised guidelines in the near future.”

On August 29, 2013, the Service issued Revenue Ruling 2013-17, announcing that all federal tax laws would be extended to same-sex married couples regardless of the state in which the couple resides. This ruling, which cited Revenue Ruling 58-66 as precedent, will have immediate and far-reaching consequences.
Since *Windsor*, the Department of Defense announced that military benefits will be extended to spouses of a valid same-sex marriage regardless of residence. However, the Social Security Administration announced a policy that seemingly applies a state of residence standard for benefits.

Until further federal legislation (such as the proposed Respect for Marriage Act pending in Congress) or case law or guidance from each federal agency is issued, uncertainty will continue to exist for those same-sex married couples that live in states that do not recognize same-sex marriages.

**Federal Tax Laws**

The *Windsor* opinion has significant federal income, gift, and estate tax consequences for those same-sex married couples that live in states that do recognize same-sex marriages ("recognition states") and for those same-sex married couples that live in states that do not recognize same-sex marriages ("nonrecognition states").

*Windsor* and its application only relate to federal law, as states currently are entitled to treat same-sex couples differently. Thus, a situation could arise wherein a same-sex couple is recognized as married for federal tax purposes, thus requiring a married federal tax return, and not recognized as married under the laws of the state of residency, thus requiring an unmarried state tax return.

**Revenue Ruling 2013-17**

On August 29, 2013, the Service issued Revenue Ruling 2013-17 (the "Ruling"). The Ruling stated that all federal income, gift, and estate tax laws will be extended to the parties to a valid same-sex marriage regardless of the state in which the parties reside.

The Ruling also concludes that federal tax law will not be extended to parties who have entered into a registered domestic partnership, civil union, or other similar form of relationship recognized under state law that is not denominated as a marriage under the laws of that state regardless of whether the parties to the marriage are same-sex or different sex.

The Ruling states that it is to be applied prospectively as of September 16, 2013. Thus, on and after that effective date, all federal tax laws will apply to the parties to a valid same-sex marriage as long as the marriage was performed in a place, whether in the United States or in a foreign country, that recognized the marriage as valid.

On the same date as the issuance of the Ruling, the Service also issued "Answers to Frequently Asked Questions for Registered Domestic Partners and Individuals in Civil Unions" and "Answers to Frequently Asked Questions for Individuals of the Same-Sex Who Are Married Under State Law" (collectively, "FAQs"). Those FAQs attempt to clarify the Ruling and address additional issues arising out of the Ruling.

The Ruling and the FAQs also provide that a same-sex married couple may file a claim for refund for a prior year for which the statute of limitations is still open if the couple was married during that prior year. The Ruling also provides that for federal tax returns to be originally filed on or after September 16, 2013, the original return must be filed on the basis of the parties being married, even though, for example, the income tax return may relate to a prior year.

The Ruling and the FAQs provide that if an original or amended return (claim for refund) claiming marital status is filed for a prior year, then all of the items reported on that return should be filed consistent with marital status.

The Ruling provides that the Ruling may be relied on retroactively regarding employee benefit plans or arrangements for purposes of filing original, amended, or adjusted returns or claims for refund concerning employment tax and income tax with respect to employer-provided health coverage benefits or fringe benefits.

The Ruling states that the Service may provide additional guidance on the subject matter of the Ruling and the application of *Windsor* with respect to federal tax administration.

**Income Tax—Recognition States**

Same-sex couples that reside in recognition states will now be required to file their federal tax returns as either married filing joint returns or married filing separate returns. Clearly, this filing status will apply for the tax return for the taxable year 2013 and subsequent years.

A question exists as to whether the *Windsor* opinion applies to a taxable year prior to 2013. For example, should a same-sex married couple that lived in a Recognition State during the year 2012 and has not yet filed their 2012 federal tax return, file the federal tax return for 2012 as married or as single?

One argument may be that since the *Windsor* opinion was not issued until 2013, the couple during the tax accounting year of 2012 was not considered as married for federal purposes. Therefore, this couple would have been considered as not married as of the close of 2012 and would have filed tax returns as separate single individuals.
The contrary argument is that the Windsor court held Section 3 of DOMA to be unconstitutional, which has the effect of rendering Section 3 of DOMA void ab initio as though the statute never existed. The latter argument would logically result in the conclusion that the same-sex married couple during the tax accounting period of 2012 were, for federal purposes, married and, therefore, should file as a married couple for federal income tax purposes.

Under the Ruling, if both of the married spouses file their tax return on or after September 16, 2013, they will be required to file federal returns as married. It is not clear under the Ruling how one spouse should file his/her federal tax return for 2012, whether as single or married filing separate, after September 16, 2013, if the other spouse filed his/her federal tax return for 2012 before September 16, 2013, as single.

The same analysis applies to years prior to 2012. A taxpayer generally does not have an obligation to file an amended return for a prior year. Nevertheless, an issue arises whether an amended federal tax return (Form 1040X; claims for refund are made on an amended return) should be filed for a prior year with the status of a married couple if there is a benefit in doing so. Obviously, such a question would arise only if filing as a married couple for federal income purposes would result in an overall income tax savings greater than the amount previously paid by each spouse to the same-sex marriage having previously filed separate single federal tax returns.

Furthermore, the issue arises as to how many prior years an amended return can be filed. The normal federal income tax statute of limitations on refund claims is three years from the date the return was filed or two years from the date the tax was paid, whichever is later.

However, according to Revenue Ruling 83-183, the last date to file a joint return for a prior year for which a single return was filed may be three years from the due date (without extensions) of the prior year.

In that Revenue Ruling, however, the taxpayer could have filed a married, joint return for the prior year at the time the single return was filed. In the case of a same-sex married couple, that couple could not have filed a joint return for the prior year since federal law at that time precluded such a return. This distinction is important and makes this Revenue Ruling distinguishable from the situation confronting same-sex married couples seeking to file a married, joint return for a pre-Windsor year.

If the normal statute of limitations on refund claims is applicable in this situation, then as of September 1, 2013, the earliest prior year for which a claim for refund could be filed would be either the tax year 2009 if the tax return was filed on October 15, 2010, or the tax year 2010 if the 2009 tax return was filed prior to September 1, 2010.

Under the Ruling, claims for refund for a prior year can be filed only if the statute of limitations is still open at the time the claim is filed. Prudence would dictate that claims for refund be filed as soon as possible for all years that would still be open under the applicable statute of limitations, provided there would be a net tax savings (refund) resulting from filing married as opposed to single.

Under the Ruling, all items and transactions for the prior year for which an amended return is filed must be treated consistent with the married filing status.

However, all transactions occurring during a prior year for which a claim for refund is being considered should be analyzed to determine if the federal tax treatment originally reported would change if the same-sex couple was now considered married in the year for which the amended return is filed. For example, if the spouses to a same-sex marriage each owned stock in a corporation and one spouse’s stock was partially redeemed by the corporation during the prior year for which a claim for refund is being considered, the gain to the redeeming spouse in the original transaction may have been capital gain but now might be ordinary income because of the related-party rules (the shareholders are now deemed married in the prior year).

Another issue relates to same-sex married couples that are divorced. Clearly, for same-sex couples divorced in a recognition state, such couples will be afforded the tax benefits of Section 1041 (tax-free property settlement), alimony under Section 71 (income to payee) and under Section 215 (deductible to payor), and child support under Section 71 (exclusion from income).

However, for a couple that was granted a divorce in a year prior to September 16, 2013, such couple should determine whether the property settlement and payments are entitled to a more favorable federal tax treatment than originally reported or if the divorce should be re-opened and restructured to take into account the tax benefits under the Internal Revenue Code.

Another potential issue is whether a same-sex married couple in a recognition state has a duty to treat an item for federal tax purposes in the current or later year consistent with the manner in which the item was treated in a pre-Windsor year for which an amended return is not being filed.

For example, let’s assume a same-sex married couple is divorced in a recognition state in a pre-Windsor year, one spouse issued an installment note...
to the other spouse as part of the property settlement, and the note payments extended into a post-Windsor year. In this scenario, can the parties claim the tax-free benefits of Section 1041 in the post-Windsor year even though payments in the year of divorce were not reported under Section 1041?

Conversely, as in the prior corporate redemption example, if the redeeming shareholder received an installment note from the corporation with payments extending into a post-Windsor year, will the character of the gain on the redemption be (1) taxed as capital gain in the post-Windsor year (which is consistent with the treatment in the original pre-Windsor redemption year) or (2) taxed as ordinary income in the post-Windsor-year, since the redeeming spouse is now considered married to the remaining shareholder/spouse in the prior year? The shareholder/spouse is a related party under Section 318 for purposes of Section 302(b)(3).

The duty of consistency requires a taxpayer to be consistent in the treatment of tax items under certain conditions. How this duty applies in the situations described above is not clear since the potential inconsistency results not from the taxpayer's error or omission but from a change in a law that seemingly is retroactive.

The consistency position in the Ruling may indicate that the transaction be reported in a later year consistent with the original treatment unless an amended return for the prior year is filed. Perhaps the earlier transaction should be grandfathered. The Ruling does not address this type of issue.

In addition, it is not clear whether, in a Service audit of one spouse to a same-sex marriage for a pre-Windsor year, the Service can treat the taxpayer/spouse as married for federal tax purposes for the audit year even though the spouse filed as a single person. The better position would be that the Service should not be able to change the marital status for the prior year.

**Income Tax—Nonrecognition States**

Under the Ruling, same-sex married couples that live in a nonrecognition state will be subject to the same rules as described above. That is, they are required to file as married persons for federal income tax purposes. However, since many nonrecognition states also have a personal income tax (presently, 41 states have a broad-based personal income tax), the same-sex married couple will not be able to file state returns as married. They will need to file state returns as single, which will require more work on an allocation of tax items, such as income and deductions, between them. This allocation becomes more complex in community property states that are nonrecognition states.

In addition, the same considerations as above should be given to whether a claim for refund should be filed for all open years if a refund in tax would result from filing as married.

However, before a same-sex married couple living in a nonrecognition state makes a final determination to file a claim for refund if such action is otherwise warranted, such couple should consider potential disadvantages from an income tax point of view from filing as married. Such disadvantages could arise in a number of areas, such as previously discussed.

A same-sex married couple that lives in a nonrecognition state and is seeking a divorce has a fundamental problem since such couple may not be able to obtain a divorce either in the nonrecognition state or in any other state in which the couple are not residents, including the state of ceremony. However, under Section 1041, a property settlement between the spouses upon a split-up should be a nontaxable event since the couple would still be married for federal purposes. In addition, if properly structured, cash payments can qualify for alimony or child support under the Section 71.

Another difference arises with respect to the proper parties to a Subchapter S election. In a community property recognition state, both spouses to a same-sex marriage would sign the election if the stock is community property. In a community property nonrecognition state, the community property laws do not apply. Therefore, only the same-sex spouse in whose name the stock is registered would sign the election, absent a joint ownership arrangement between the spouses.

**Gift Tax—Recognition States**

For a same-sex married couple living in a recognition state, the Windsor opinion affords this couple many gift tax advantages. The Ruling does not specifically address the gift tax issues now applicable to same-sex married couples. Nevertheless, the Ruling will apply to gifts made on or after September 16, 2013, as well as original gift tax returns and amended returns filed on or after that date but for a prior period for which the statute of limitations is still open at the time of filing (i.e., the 3 year/2 year rule described above).

Transfers of property between the spouses will be gift-tax free. This is because the married couple will qualify for the unlimited marital deduction and a gift tax return will not be required.

In addition, gifts of property to a third party will qualify for gift splitting, wherein the current $14,000
annual exclusion per donee will be available from both the donor spouse and the nondonor spouse, thus qualifying the gift for a $28,000 annual gift tax exclusion per couple.²⁵ The same rationale applies to a spouse’s lifetime exemption amount, which is currently $5,250,000.²⁶

If a transfer of property was made between spouses in a prior year for which a gift tax was paid, an amended gift tax return should be filed that claims the marital deduction and a refund of any gift taxes paid for which the applicable statute of limitations is still open. Amended gift tax returns are filed on a new IRS Form 709.

If no gift taxes were paid with regard to a prior year’s transfer of property for which a gift tax return was filed but the amount of the gift exceeded the annual exclusion and, therefore, utilized any portion of the donor’s lifetime exemption amount, an amended gift tax return should be filed that claims the marital deduction and thus reverses the use of the lifetime exclusion.

While this course of action is available under the Ruling for all years for which the statute of limitations is still open, a question exists for all other prior years in which the couple was married and filed gift tax returns using part of the lifetime exclusion. If Section 3 of DOMA is unconstitutional, then it would seem that the use of the lifetime exclusion was improper and the portion claimed previously should still be available regardless of the statute of limitations. This issue is not addressed by the Ruling.

Gift Tax—Nonrecognition States
For a same-sex married couple that lives in a non-recognition state, the same rules and issues would apply as discussed above for recognition state residents. However, gifts of property by one spouse in a community property nonrecognition state will require additional analysis to determine the nature of the ownership of the property gifted.

Estate Tax—Recognition States
Same-sex married couples that reside in recognition states will be entitled to all the federal estate tax benefits accorded to opposite-sex married couples. These benefits include the unlimited marital deduction,²⁷ which allows an estate tax deduction for the value of assets passing from the deceased spouse to the surviving spouse. The Ruling does not specifically address estate tax issues for persons dying prior to September 16, 2013.

Nevertheless, the Ruling will apply to persons dying on or after September 16, 2013, as well as original estate tax returns filed after that date but for a prior period and amended estate tax returns filed after that date for which the statute of limitations is still open at the time of filing.

In addition, the recent addition to the Internal Revenue Code of “portability,” which is an election made in the estate of the first deceased spouse, allows for the unused estate tax exemption of the first deceased spouse to be available to the same-sex surviving spouse.²⁸

An issue relates to the portability election for the estate of the first deceased spouse.²⁹ Internal Revenue Service Notice 2011-82, 2011-42 IRB 516, requires the portability election for estates of deceased dying after 2010 be made on a timely filed federal estate tax return.³⁰

The due date of the estate return is nine months after date of death plus a possible additional extension of six months.³¹ Obviously, by September 16, 2013, the time for making a portability election has expired for some previously filed (or unfiled) estate tax returns. Whether the Service will grant additional time for the estate of a deceased spouse of a same-sex married couple to make the election remains to be seen. The Ruling does not address this type of issue.

In the case of an estate tax return previously filed for a deceased same-sex spouse in a recognition state, consideration should be given to filing an amended estate tax return to utilize the unlimited marital deduction to the extent otherwise applicable (meaning estate assets pass to the surviving same-sex spouse) and to preserve for the surviving same-sex spouse the deceased same-sex spouse’s unused estate tax exemption, if any, if the statute of limitations is still open.

Estate Tax—Nonrecognition States
For a deceased same-sex spouse in a nonrecognition state, the unlimited marital deduction will be available. An amended estate tax return should be considered for the same reasons as discussed above, including (1) the unlimited marital deduction and (2) the benefits of portability for any unused estate tax exemption in the estate of the first deceased same-sex spouse.

One significant disadvantage of residing in a community property nonrecognition state is there will be no step-up in basis on the death of the first spouse under Section 1014 for all of the property that would otherwise be community property of a opposite-sex married couple in that state. For the same-sex married couple, the step-up in basis will apply only to the decedent’s interest in the property owned by the decedent under that state’s law.
Estate Planning

The dichotomy between recognition states and non-recognition states will be the continual subject of future developments.

For now, planning and advice to same-sex couples requires diligence. Diligence includes both planning to obtain future benefits and advice as to claiming current federal benefits. Plans for same-sex couples should be reviewed and revised for the above-mentioned income, gift, and estate tax benefits.

Recognition States

In recognition states, estate plans for same-sex couples should be immediately changed to take full advantage of marital deduction planning and split-gift planning.

In addition, plans should also be reviewed for same-sex couples as a result of this newly recognized marital status. For example, grantor retained income trusts (or “GRITs”) have been a popular tool utilized for same-sex couples. This technique was available because as long as a same-sex partner was not considered to be a spouse, Chapter 14 was not applicable. GRITs are no longer available for same-sex married couples. It is unclear whether GRITs created in a year prior to September 16, 2013, while the parties were validly married, and continuing after that date will continue to be treated for tax purposes in the same manner as originally intended.

The Ruling does not address these types of issues but the Ruling’s position on consistency would seemingly answer this question in the affirmative. There are many such examples of planning matters that are altered due to the newly recognized marital status of same-sex married couples.

Another example is the status of existing trusts where a same-sex spouse is serving as trustee. It is now possible that such a trust has been converted to a grantor trust under Subchapter J of the Code due to the grantor being deemed to have the powers of his or her newly recognized spouse. The Code specifically addresses a change in marital status. The Code clarifies that one is deemed to hold the powers of a new spouse, but only for periods following the establishment of the marital relationship. Again, the Ruling does not address this issue, but the consistency position in the Ruling may provide an answer.

An additional question relating to the above type of trust involves the retroactive application of Windsor. Due to the Windsor opinion, could this trust be treated as a grantor trust since inception? Under the Ruling, the answer should be no if an amended return is not filed for the prior year.

Nonrecognition States

Estate planning for same-sex couples in nonrecognition states should focus on the same issues as discussed above, as well as state-specific issues since the parties are not considered married for state law purposes. Such issues include the absence of marital and property rights afforded to opposite-sex spouses.

State Law Issues

While not a direct result of the Windsor or Perry decisions, or, for that matter, DOMA, the continual and evolutionary acceptance of same-sex couples creates some significant state law implications for planning attorneys and other professionals.

Specifically, any number of planning documents that address the concept of a “spouse” should, if not already, account for whether the term includes same-sex spouses. If these documents contain a general reference to “spouse,” then what law is intended to apply in determining whether one is a spouse for purposes of the document?

Further, references to “child” or “descendant” in a document should address what is meant by those terms and what law is to apply. A will or trust could itself define the beneficiaries of the estate or trust or define the class of appointees of a power of appointment.

In determining whether an individual is a beneficiary of a will or trust, a drafter could (1) attempt to carefully define the term in the document, (2) rely on modifying terms such as “legitimate,” “blood,” or “adopted,” or (3) make reference to definition under applicable state law.

New estate documents should carefully consider how children of same-sex couples will be treated for purposes of the agreement. For example, assume a child is born with one parent in a same-sex couple being the biological parent. The document should address the question of whether the child is “legitimate” or whether the child is born in or out of wedlock if those terms are used in the document.

The document should also answer the question of whether such child is a descendant of the nonbiological parent. Care should be exercised in designating which state’s laws are applied if any reliance is placed on state law for these determinations.

It is expected that Windsor and the Ruling, as well as the applicability of other federal benefits, will result in a dramatic increase in the number of same-sex married couples due to the availability of federal economic benefits and, therefore, states will increasingly need to deal with the differing status applied to such couples and their descendents.
CONCLUSION

While the Supreme Court in *Windsor* clarified the applicability of federal law to same-sex married couple in recognition states, the Court did not address how those same couples are to be treated in nonrecognition states. As a result, federal agencies, including the Service, are issuing guidance in this area. This agency guidance is necessary and it will take time to identify and address all issues arising out of the *Windsor* opinion.

Unfortunately, all federal agencies have not issued guidance as of the time of the writing of this article or have not all agreed as to which state law is to be used for determining marriage. In addition, conflict exists between federal law and nonrecognition state law as applied to same-sex married couples. Thus, the quagmire continues.

IMPORTANT TAX DISCLAIMERS

This discussion is intended for general information purposes. It should not be construed as legal advice or a legal opinion on any specific facts or circumstances and does not create an attorney-client relationship.

Because sound legal advice necessarily takes into account all relevant facts and developments in the law, the information in this discussion is not intended to constitute legal advice or a legal opinion as to any particular matter. Each person should consult with a qualified professional for appropriate legal advice.

Notes:

2. 1 USC §7; 28 USC §1738C.
6. Id, at 4.
8. CCA 2010 21050; PLR 2010 21048.
9. See, Windsor 133 S. Ct. at 2689.
11. This report can be found at www.gao.gov/new.items/d04353r.pdf.
13. IRS Publication 501.
16. See, Regulations 1.451-1(a) and 1.461-1(a); Broadhead v. Commissioner, TCM 1955-3283. Treasury Department Circular No. 230 requires a practitioner to advise a client promptly of an error or omission and the consequences thereof but does not require the practitioner to advise the client to file an amended return.
17. Section 6511(a).
20. The requirements for a claim for refund can be found at Regulations 301.6402-2 and .3. The appropriateness and consequences of a protective claim for refund can be found at CCA 2011 36021 (9-9-11), GCM 38786 (S-13-81) and Martin v. U.S., 833 F.2d 655 (7th Cir. 1987). A claim for refund that is determined to be for an excessive amount could trigger a penalty. Section 6676.
22. See, Sections 302 and 318. All Section references are to the Internal Revenue Code of 1986, as amended.
24. Section 2523.
25. Section 2503(b).
26. Sections 2505 and 2010(c).
27. Section 2056.
28. Section 2010(c)(4).
29. Section 2010(c)(5).
30. See also, Regulations 20.2010-2T(a)(3).
31. Sections 6075(a) and 6081(a).
32. Section 672(e).

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