



GIDEON ROTHSCHILD TEP, DANIEL RUBIN AND ARLENE DUBIN ARE PARTNERS OF MOSES & SINGER LLP, NEW YORK. THE AUTHORS GRATEFULLY ACKNOWLEDGE THE ASSISTANCE OF ELI AKHAVAN, AN ASSOCIATE AT MOSES & SINGER LLP, FOR HIS ASSISTANCE

O

On 26 June 2013, in *Windsor v US*, the US Supreme Court ruled that s3 of the *Defense of Marriage Act* (DOMA) was unconstitutional. DOMA is a federal law that was enacted in 1996, and s3 provided that only individuals of opposite sex were to be recognised as 'spouses' or as 'married' for purposes of federal law.

Currently, 13 states¹ and the District of Columbia recognise same-sex marriage.

The *Windsor* decision substantially influences tax and estate planning for same-sex married couples, who, as a result, should have their estate plans reviewed. In addition, with more than 1,100 federal laws affected, couples should review employee benefit plans, income tax filings and retirement plan designations.

Estate tax

Married same-sex couples can now take advantage of the unlimited marital deduction by making estate-tax-free testamentary transfers to each other, effectively eliminating or deferring the estate tax at the death of the first spouse.

Additionally, married same-sex couples can now use portability to transfer a deceased spouse's unused tax exemption to a surviving spouse. The current federal estate tax exemption amount for an individual is USD5.25 million, indexed for inflation. For example, assume neither spouse has used any portion of their transfer tax exemption amount. Upon the death of the first spouse, the executor can elect to transfer the remaining USD5.25 million of unused exemption to the survivor, preserving, for the surviving spouse, a federal exemption of USD10.5 million (plus inflation adjustments on the survivor's own exempt amount).

Gift tax

Under DOMA, gratuitous transfers between married same-sex couples did not qualify for the unlimited marital deduction and also reduced the donor spouse's

MARRIAGE COUNSEL

Gideon Rothschild, Daniel Rubin and Arlene Dubin provide a planning update for same-sex married couples in the US

“ Since s3 of DOMA was unconstitutional, it is, by law, null and void from its inception. Accordingly, same-sex married couples should be treated the same as opposite-sex married couples from the time of their marriage ”

lifetime transfer tax exemption amount. Married same-sex couples can now make unlimited lifetime transfers to each other free of gift tax and without reducing the donor's lifetime exemption amount. In addition, married same-sex couples can now 'split' gifts to others. This means that if one spouse makes a gift to someone other than their spouse, the gift can be treated as having been made one-half by each spouse. This allows a gift to a third party by one spouse to qualify for two annual exclusions of USD14,000 each, or up to USD28,000 total (as indexed for inflation).

Income tax

Federal recognition of marital status for same-sex married couples can also confer income tax advantages. Same-sex married couples can now file joint tax returns entitling them to such benefits as lower income taxes, combined exemptions, combined income exclusions (e.g. gain from sale of a personal residence) and non-recognition of gain or loss on transfers between them. Same-sex married couples should be mindful, however, that federal recognition of their marital status may also result in adverse income tax consequences.

such as potentially higher income tax rates as a result of the so-called marriage penalty.

With respect to retirement benefits, the surviving spouse of a same-sex married couple who has been named as the beneficiary under a qualified retirement account can now roll over the account into an account in their own name. This can potentially extend the ultimate payout of the account. But same-sex married couples should be aware that federal recognition of their marital status will now require a written waiver from the participant's spouse if the participant wishes to name a non-spouse beneficiary to a qualified plan.

Asset protection

Marital status is often critical in asset-protection planning. As an example, only married couples can own their residence – and, in certain states, intangible assets as well – as 'tenants by the entirety'. This form of joint ownership protects the assets from creditor claims brought against one spouse, but not the other.

Retroactive application

Since the Supreme Court held that s3 of DOMA was unconstitutional, s3 of DOMA is, by law, null and void from its inception. Accordingly, same-sex married couples should be treated the same as opposite-sex married couples from the time of marriage.

This has many potential implications for federal tax. For example, married same-sex couples who would have incurred lower federal tax liabilities had they been permitted to file joint federal income tax returns, or who could have claimed the marital deduction on the death of a spouse, should consider filing amended tax returns or protective claims for refunds (assuming the statute of limitations has not yet expired). In addition, transfers from prior years may have to be revisited to determine how the possible retroactive application of this decision may affect the tax results.

Following the Supreme Court's decision the IRS issued Notice IR-2013-72, which provides guidance on the filing of tax returns. The notice specifically provides that 'same-sex couples will be treated as married for all federal tax purposes, including income and gift and estate taxes'. Furthermore, while legally married same-sex couples must file their 2013 income tax returns using either the married filing jointly or married filing separately status, they may, but are not required to, file amended returns for prior years still open under the statute of limitations.

Marital agreements

Marital agreements for same-sex couples may need to be updated as they may not reflect the intention of the parties regarding their rights and obligations. For example, waivers of automatic spousal death benefits in retirement plans may not



1 The states that issue licences for same-sex marriages are California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont and Washington

have been addressed as, pre-*Windsor*, these benefits were not applicable. Also, the use of tax-beneficial qualified domestic relations orders to divide retirement plans in the event of divorce may not have been anticipated. Further, the parties may have provided, in their agreements, for a specified level of spousal support, without factoring in the post-*Windsor* consequences that the payment of support could be structured as deductible to the payor and taxable to the recipient on the federal level and that social security would be available.

Under *Windsor*, if same-sex couples marry and live in New York (or another state that recognises same-sex marriage), they are entitled to the same federal and state benefits that are available to opposite-sex married couples. An issue arises, however, if the same-sex couples move to a non-recognition state and want a divorce. In this instance, they may not be eligible for a divorce in the original state because New York and most states require residency in the state for a certain time before initiating a divorce; and the current state may not grant the divorce because it does not recognise same-sex marriage. The resolution of this issue awaits, and *Windsor* provides some basis for challenges to state law. In the meantime, it is helpful to provide choice-of-law provisions in premarital agreements stating that New York law will govern and that the New York courts will be used to the fullest extent possible.

Same-sex couples and different jurisdictions

While it is clear that same-sex married couples living in jurisdictions that recognise same-sex marriage will be eligible for federal tax benefits, it was not clear, until the IRS issued Revenue Ruling 2013-17, how federal law would apply in jurisdictions that do not recognise same-sex marriage or recognise only domestic partnerships and civil unions, or how federal law would apply to a same-sex couple that got married in a jurisdiction that recognises same-sex marriages, but currently resides in a jurisdiction that does not recognise same-sex marriages. The ruling provides that if federal recognition of same-sex marriage applies for federal purposes, it applies regardless of whether the state where the couple resides recognises the marriage.

Conclusion

Same-sex married couples should consult their estate planner to determine the impact of the Supreme Court's ruling on their income taxes and estate planning, and to preserve any rights to file protective claims. ■