

Implications of the Supreme Court's *Windsor* Decision on Estate Planning for Same-sex Couples

On June 26, 2013, the Supreme Court, in its decision in *United States v. Windsor*, overturned Section 3 of the Federal Defense of Marriage Act ("DOMA"). The Court ruled that the Federal government could not deny tax and other benefits to legally married same-sex couples. Those couples may now have access to benefits under Federal laws relating to gift and estate taxes, income taxes, retirement and other employee benefits, Social Security, family medical leave, immigration, and other areas. We have included in this alert some of the important estate planning considerations for such couples.

Estate plans should be reviewed. Same-sex spouses who reside in the state where they were legally married may now make transfers to each other at death in unlimited amounts without the imposition of Federal estate tax, as long as the surviving spouse is a U.S. citizen. Prior to the *Windsor* decision, Federal estate tax could have applied to these transfers at a rate of up to 40%. Bequests to a surviving non-citizen spouse or to a surviving spouse in trust must be made in a qualifying form in order to be non-taxable.

We recommend same-sex married couples contact us to review their estate plans and to discuss whether those plans are structured to take full advantage of the Federal estate tax benefits for married couples. Certain planning structures can help to maximize the property passing to the surviving spouse as well as to other family members and charitable organizations. Revisions to wills, revocable trusts, and retirement account and life insurance beneficiary designations may be necessary to avoid unintended outcomes and tax inefficiencies.

Lifetime transfers between spouses may no longer be taxable. Prior to the *Windsor* decision, lifetime transfers of property between same-sex spouses in excess of the annual exclusion amount (currently \$14,000 per year) would have required use of the donor spouse's lifetime gift tax exclusion amount or caused the imposition of gift tax at a rate of up to 40%. Same-sex married spouses who reside in the state where they were legally married may now generally make tax-free transfers of property between them during life, as long as the recipient spouse is a U.S. citizen. (Tax-free lifetime gifts to a non-citizen spouse are generally limited to a maximum annual amount, which is currently \$143,000 per year.) This is a significant change in the law that may influence how some same-sex married couples should hold title to property and generally organize their financial affairs.

Prior to the *Windsor* decision, gift taxes would have raised concerns for many same-sex couples who considered holding valuable property in joint form between them, when one spouse contributed the funds for such property in excess of his or her proportional ownership. Same-sex married couples may now wish to contact us to review the title of their financial and other assets to determine whether a form of joint ownership may be appropriate for their situation. For example, married couples may be afforded certain creditor protection by holding real estate in qualified forms.

In addition, lifetime planning for many same-sex couples prior to *Windsor* was directed toward making tax-efficient transfers of wealth from one spouse to the other in a manner that would minimize gift and estate taxes. Same-sex married couples who have engaged in such planning may wish to contact us to determine whether any steps should now be taken with respect to that prior planning.

Planning opportunities for transfers to other individuals may be enhanced. Currently, each individual may make nontaxable gifts of \$14,000 to any recipient. A married individual may transfer two times that amount (i.e., \$28,000) to a recipient if his or her spouse consents to "split" the gift. Each individual also has a lifetime Federal

gift tax exclusion of \$5,250,000, so that a married couple may effectively transfer up to \$10,500,000 to a recipient without the payment of gift tax. The availability of gift splitting and gifts between spouses may enhance the opportunities for same-sex spouses to make tax-efficient lifetime transfers to other family members (such as children, nieces and nephews).

Prior tax returns may need to be amended. The *Windsor* decision should apply retroactively in a manner that may affect prior tax reporting positions. For some same-sex married couples, it may be advisable to file amended income, estate, or gift tax returns, and tax refunds may be available. Certain deadlines may apply to filing amended returns. We recommend such couples contact us—or, where appropriate, their other tax advisors—as soon as possible to determine any steps that should now be taken with respect to prior tax positions.

State of residence may affect available benefits. The Supreme Court did not declare that state restrictions on same-sex marriage are unconstitutional. There is still much uncertainty about whether Federal tax benefits would apply to a couple that marries in a state that recognizes same-sex marriages, such as New York, and then moves to a state that does not grant or recognize such marriages, such as New Jersey or Florida. We understand the IRS is currently reviewing the *Windsor* decision with the Department of Treasury and the Department of Justice to provide guidance as to which marriages will be recognized for tax purposes. Non-tax issues may also influence proper estate planning for same-sex couples residing in states that do not recognize their marriages. It is important for same-sex married couples to understand what effects a change in residency may have on the validity of their marriage for tax and non-tax purposes.

Tax benefits not available for unmarried couples. Couples must be married at the state level for Federal tax benefits to apply, and the *Windsor* decision will generally not apply retroactively to provide benefits during any period prior to a couple's legal marriage. Couples in domestic partnerships and civil unions will generally not qualify for Federal tax benefits, even in states where same-sex marriage is not available. Same-sex couples who are not legally married may wish to consider the range of gift and estate tax benefits marriage may provide.

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Careful estate planning is important for same-sex couples to ensure that their goals are realized in a tax-efficient manner. If you have any questions about how the *Windsor* decision may impact your family or your estate plan, or what planning opportunities the new legal landscape may present for you, please feel free to contact us.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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