

What Happens Now: The Aftermath of DOMA (Defense of Marriage Act)

by James F. McDonough, Jr. on August 1, 2013

The United States Supreme Court recently struck down the Defense of Marriage Act (DOMA) as unconstitutional. Despite this ruling, there are a number of issues that will result from this decision where the laws of the states will differ.

Consider a gay couple, A and B, with a valid marriage under the law of the state where they reside (the “Home State”). Assume that this couple owns property in a state (“non-resident state”) that does not recognize gay marriage. What are the implications? I pose a number of questions that are sure to arise.

Assume the property in the Non-resident State is income producing property. May this couple file a non-resident income tax return as married or must they file separate returns?

What income tax rate or table may this couple use? May they use married or must they file separately and under what status?

Assume there is a judgment rendered in the non-resident state against A. Is B, a non-debtor, able to protect his or her property interest from the levy of A’s creditor? May the entire property interest, that of A and B, be protected in the same manner as in the case of ownership by husband and wife as tenants by the entirety?

Assume A has a qualified retirement plan account (401K) but does not name anyone as beneficiary. Do the default rules operate to pass the retirement account to B, the survivor?

Assume the non-resident state does not recognize gay marriage and has an inheritance tax that imposes a tax based upon the relationship of the recipient, B, to the decedent, A. What is the tax classification of the B? If New Jersey did not recognize B as the spouse of A, inheritance tax would be imposed at 15%.

Is a state law Qualified Domestic Relations Order (QDRO) drawn on the Home State effective against a custodian in the non-resident state that does not recognize gay marriage?

Assume an estate tax return must be filed in the Non-resident State. How do you compute the marital deduction for state law purposes if B is not considered a spouse in the non-resident state?

These are some of the issues that will arise in the coming years. The Supreme Court’s decision resolves only the question before it. The decision does not address the collateral

consequences. Although planning could address these issues, I am certain that case law, confusion and controversy are ahead.