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TAX AND WEALTH ADVISOR ALERT: ESTATE PLANNING AFTER WINDSOR

The federal tax code (the "Code") offers several benefits (and a few burdens) to married couples. In 1996, the United States Congress passed a statute known as the Defense of Marriage Act ("DOMA"). Under DOMA, with respect to any federal statute, a married couple meant a husband and wife; a man married to a woman. Because the Code is a collection of federal statutes, same-sex couples legally married under the laws of a state that provided for same-sex marriage received none of the benefits provided to married couples under the Code.

One of these benefits the Code provides is the unlimited marital estate tax deduction: Under the Code, one spouse can leave an unlimited amount of property to the other spouse without the imposition of estate tax. Edith Windsor and Thea Spyer were a lesbian couple married in Ontario, Canada in 2007. In 2009, Spyer died and left her entire estate to Windsor. At the time of Spyer's death, both Windsor and Spyer were residents of New York, a state that, at that time, had legalized same-sex marriage and legally recognized same-sex marriages entered into in other states and countries. So, at the time of Spyer's death, under New York law, Spyer left her entire estate to her spouse. But under DOMA, Spyer did not leave everything to her spouse; Windsor could not qualify under the Code as Spyer's spouse as they were both women. Windsor filed her tax return, paid the estate tax and then sued for a refund, arguing that DOMA was unconstitutional. The District Court and the Second Circuit Court of Appeals agreed with Windsor.

The case was then argued in front of the United States Supreme Court. In a landmark decision, the Supreme Court determined that DOMA violated Windsor's and Spyer's constitutionally protected right to equal protection. In essence, the majority opinion held that historically, the definition of marriage is a matter left to the states. In passing DOMA, Congress violated that tradition of state-defined marriage. That departure was due to Congressional bias, and that bias violated the equal protection clause of the US Constitution.

The majority opinion answered this question: If a same sex couple is married in a state that defines same sex marriage as marriage, how is that couple treated for federal purposes (including the tax code)? The answer is clear: The same as any other married couple. But the decision leaves at least two other critical planning questions unanswered: (1) If a couple gets married in a state that allows same sex marriage, but moves to a state that does not,

how are they treated for federal purposes, married (consistent with the laws of the state where the marriage took place, or what sometimes is called the state of “celebration”) or unmarried (consistent with the laws of the state of domicile which does not allow same sex marriage?) (2) Can a state disallow same sex marriage if, in fact, that disallowance is a violation of equal protection? Hopefully, these questions are resolved in the future.

So after Windsor, estate planners should handle planning for a same-sex married couple in exactly the same fashion they handle planning for a heterosexual married couple. The planner should help the couple build a plan that takes care of the people they care about. The plan will accomplish that goal by getting the right property to the right people at the right time. The plan will ensure that the right people are making the right decisions. And the plan will be allowed to take advantage of the tools provided under the Code to married couples including (but not limited to) the unlimited marital deduction, income tax free transfers, and the ability of an inheriting spouse to treat the transferring spouse’s IRA as his or her own.