

Practice Update

U.S. Supreme Court Holds Defense of Marriage Act Unconstitutional

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The U.S. Supreme Court decided *United States v. Windsor*, No. 12 -307 on June 26 2013, holding section 3 of the Federal Defense of Marriage Act (DOMA) unconstitutional as it applies to valid marriages between same sex couples recognized by state law and foreign jurisdictions, thus opening the door for married same sex couples to receive the benefits of numerous federal laws that are applicable to heterosexual married couples. The invalid provision stated as follows:

“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, **the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.**”

By way of background, DOMA was enacted in 1996 and it defines marriage for federal law purposes as a marriage between a man and a woman. Therefore, a legally married same sex couple cannot file a joint income return or take advantage of the marital deduction or otherwise be treated as married for federal tax purposes. There are more than 1,100

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federal benefits provided to married couples. Some of the more well-known include:

- Filing joint income tax returns (which may or may not reduce tax liability depending on the level of income earned by each spouse)
- The ability of spouses to receive tax free gifts and inheritances by virtue of the estate tax and gift tax marital deduction
- The ability of spouses to split gifts made by one spouse to enhance gift tax exclusions and exemptions
- Portability of estate tax exemptions
- Spousal rollover of retirement benefits
- Survivor and death benefits under social security
- State law benefits which are applicable to spouses

Windsor v. United States is a case brought by the estate of a deceased spouse of a legally married same sex couple. Edie Windsor married Thea Clara in 2007 in Canada. Thea died in 2009 leaving her estate to Edie and named Edie executor of the estate. Thea's estate filed an estate tax return claiming a marital deduction for the bequest to Edie. The IRS denied the deduction. Thea's estate paid the estate tax as if not entitled to a marital deduction and filed a claim for refund.

Normally, a claim for tax refund is defended by the Department of Justice (DOJ). If DOJ had defended the refund claim, it would have had to take the position that DOMA is a valid law, i.e. a same sex spouse is not a spouse for tax purposes. DOJ announced in 2010 that it would not defend the constitutionality of DOMA. Therefore, DOJ would not defend the refund claim. The U.S. House of Representatives has a Bipartisan Legal Advisor Group (BLAG), which is a committee of Congress that can participate in litigation of interest to Congress. BLAG decided to defend the IRS position and argue against the Windsor estate. BLAG was permitted by the Federal District Court to intervene

in the case and defend the refund claim. In essence, BLAG assumed DOJ's usual role.

Although there is much uncertainty regarding the application of the decision that has yet to be resolved by future guidance from federal agencies, including IRS and Social Security Administration, same sex couples who are married should be reviewing their tax planning and considering applying for refunds of past tax liabilities with their tax advisors.

State law benefits, which are applicable to spouses same sex married couples living in states like Florida and the 28 other states that do not recognize same sex marriages (non-recognition states), are less likely to benefit than those living in other states since the decision dealt only with those marriages otherwise legally recognized by the state of residence. However, at this time, the IRS has not issued guidance. The IRS may or may not recognize the marriage of same sex couples in the non-recognition states. For example, the IRS may or may not permit a Florida couple married in Iowa to file a joint federal income tax return. In addition, it is likely that groups will continue to push for expansion of the decision. Since a law deemed unconstitutional is deemed to be so from its inception, it would be important for married couples to be filing timely refunds for taxes previously paid if guidance or legal developments turn out to be favorable. This would protect against a running of any statute of limitations against returns for years that are still open. Although an argument might be made that claims for refunds made after the running of the statute of limitations on the theory that the unconstitutionality of a law "trumps" the statute of limitations, it is unlikely that such an argument will be withheld.

It will thus be important for same sex couples to be consulting their tax advisors on these issues.

State law property issues between same sex married couples in non-recognition states should not be

affected by the decision. Accordingly, marital rights to a person's estate on death or divorce, issues allowing property to be held as "tenancy by the entirety" or "homestead" laws affecting spouses would remain as they are until those states revise their laws or until those laws are determined to be unconstitutional.

We must await the Obama Administration to implement the Windsor decision. In the interim, if you have any questions, please contact your attorney at Akerman for advice.

This is the first in a series of updates on the Defense of Marriage Act. The next update in the series will address the employee benefits implications for employers.

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