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United States v. Windsor Creates New Estate Planning Opportunities For Married Same-Sex Couples

By Lauren Liebes on August 6, 2013

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The recent United States Supreme Court ruling in *United States v. Windsor* invalidated Section 3 of the Defense of Marriage Act, which had defined marriage as a union between a man and a woman. The ruling greatly expands the estate planning techniques available for married same-sex couples who live in a state like California that recognizes same-sex marriage. These include:

- **Marital Deduction Planning.** Married couples may make unlimited transfers to each other, either during life or at death, without being subject to federal gift or estate tax.
- **Portability.** Subject to certain elections and restrictions, a surviving spouse's estate tax exemption is now the combination of the surviving spouse's own estate tax exemption plus the deceased spouse's unused estate tax exemption. Upon the surviving spouse's later death, his or her estate will be subject to the 40% estate tax only to the extent the estate exceeds that combined exemption.
- **Gift Splitting.** A spouse with significant separate property can take advantage of his or her spouse's annual exclusion from gift tax, allowing the wealthier spouse to make gift-tax free transfers to any third party up to \$28,000. A gift tax return must be filed to elect the "gift splitting," but no gift tax will be payable.
- **Company Retirement Plans And IRAs.** For "qualified" plans, spouses have a special right to be the sole beneficiary of these plans. A surviving spouse also may take advantage of the spousal rollover rules, which may permit delayed withdrawals of retirement funds.
- **Potential Tax Refunds.** Married same-sex couples should consult with their tax advisor regarding whether to file amended or protective income, gift and estate tax returns.

Other items to consider:

- **Life Insurance Planning.** As an alternative to single life policies, "second-to-die" policies may be more appropriate to help ease the burden of estate tax on the second death.
- **Community Property Benefits.** Couples who live in California or another community property state may wish to retitle assets to community property to receive a full step-up in income tax basis of the entire asset after the death of the first spouse.

Even if the *Windsor* decision does not apply to you, it is important that you review your estate plan in light of the “permanent” transfer tax relief passed by Congress earlier this year.

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