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ESTATE PLANNING OPPORTUNITIES FOR SAME-SEX MARRIED COUPLES AFTER OBERGEFELL

The U.S. Supreme Court's ruling on June 26, 2015, in *Obergefell* prevents a state from denying a marriage license to a same-sex couple (same-sex marriage is legal in all 50 states and Washington DC). However, the Supreme Court ruling limited the scope of its decision to "lawful marriages," and not so-called "marriage equivalents" (civil unions and domestic partnerships).

1. **Unlimited Marital Deduction and Portability**.

Federal recognition of same-sex marriages makes the "unlimited marital deduction" from federal estate tax and gift tax for transfers available to same-sex spouses. They are no longer required to rely on an individual's applicable exclusion amount from federal estate tax and federal gift tax (currently $5.43 million, adjusted annually for inflation).

The "portability" provisions available under federal gift and estate tax laws will also be available to the surviving spouse of a same-sex marriage. This allows the surviving spouse to use any portion of the deceased spouse's unused Applicable Federal Estate Tax Exemption and to make additional tax-free gifts and reduce the amount of estate taxes owed upon the surviving spouse's death.

2. **Review Current Estate Planning Documents to Ensure that the Amount and Structure of any Spousal Bequests Remain Appropriate.**

Existing estate planning documents should be revisited in light of the fact that any gift or bequest to the spouse of a same-sex married couple will be subject to the unlimited marital exemption (no limitation on gifts between spouse's) and not the individual's Applicable Federal and State Exclusion Amount(s). This can shelter a significant amount of assets that will not be subject to federal estate tax (currently at a rate of 40 percent).

Estate planning documents should also be reviewed to include, if appropriate, a separate marital trust. This trust can be designed to permit a surviving spouse to use any of the deceased spouse's unused Federal GST Exemption.

3. Review Retirement Account Beneficiary Designations and Joint and Survivor Annuity Elections to Ensure that they Remain Appropriate.

A surviving spouse may roll over a deceased spouse's retirement account into their retirement account without being required to take minimum distributions or lump sum distributions, until

such time as the surviving spouse ordinarily would be required to take minimum distributions (usually upon attaining age 70½). To take advantage of this opportunity married same-sex couples should name each other as the beneficiary of his or her retirement accounts in order to defer income tax recognition as long as possible.

If a spouse's retirement plan is covered by the Employee Retirement Income Security Act of 1974 (ERISA), a participants spouse may automatically be a beneficiary of the retirement plan as a result of their marriage. As a result, if a participant desires to designate someone other than their spouse as the plan beneficiary they will need to obtain the consent of the non-participant spouse to make such a designation. In addition, state employment benefits are now available to same-sex spouses.

4. **Replacing Individual Life Insurance Policies with Survivor Policies**.

Prior to the Supreme Court ruling many same-sex couples purchased individual life insurance policies which named their partner as the beneficiary (either directly via beneficiary designation or indirectly through a life insurance trust). These policies were utilized to provide the surviving partner with sufficient liquid assets that could be used to pay federal estate taxes due upon the death of the first to die. However, with the unlimited marital deduction now available to married same-sex couples, these policies should be examined and, if appropriate, replaced with a "second-to-die" policy (pays benefits only upon the death of the surviving spouse). These type of policies can provide liquidity to beneficiaries of the married same-sex couple, and are generally less expensive with the same death benefits.

5. Gift Splitting Between Spouses.

Until the Supreme Court rulings, a same-sex married spouse could only make annual gifts up to his or her annual federal gift tax exclusion amount (currently $14,000). Any gift in excess of the exclusion amount was deducted from his or her federal estate tax exclusion amount.

Each spouse may now make gifts from his or her own assets and, with the other spouse's consent, have such gifts deemed to have been made one-half by each spouse for purposes of federal gift tax laws. As a result, both spouses acting together may now give up to $28,000 to any individual without using any portion of either spouse's federal gift tax exclusion amount.

6. Amend Previously Filed Federal Estate, Gift and Income Tax Returns and State Income Tax Returns.

Subsequent to the Supreme Court ruling in *Windsor*, on August 29, 2013, the Treasury and the IRS issued Revenue Ruling 2013-17 with directions for administering all federal tax laws including those pertaining to income, gift and estate taxes, married same-sex couples who were lawfully married in any jurisdiction (domestic or international) and providing they will be treated as married regardless of whether the jurisdictions in which such couples are resident or domiciled recognize the marriage. As a result same-sex married couples, who were married in prior years may, but are not required to, file original or amended tax returns within the statutory limitations period (ordinarily three years from the date the tax return was originally due or filed or two years from the date the tax was paid, whichever is later).

Both spouses may also amend prior year income tax returns to change their filing status from single to married filing jointly and obtain a refund if the amount of tax owed based on their married filing status is less than that owed based on their prior single status, again subject to the limitations period described above. Additionally, married couples living in states that did not previously recognize same-sex marriages may be able to amend more recently filed state income tax returns for the years 2012-2014, depending on the laws in such states.

7. Non-citizen spouses should consider seeking permanent residency and/or becoming citizens.

Non-citizen spouses are now eligible for citizenship or permanent residency on the basis of their marriage to a spouse of the same sex who is a US citizen. Before applying for this status, there are numerous tax and non-tax consequences that should be carefully considered.