PLANNING FOR SAME-SEX COUPLES

# *Windsor*—The Practitioner's Viewpoint

*As noted in the accompanying article (see page 123), the Supreme Court's decision in* Windsor *has raised more questions than it answers. For a practitioner's perspective on this decision, we contacted Joshua S. Rubenstein, national head of the Trusts and Estates practice at Katten Muchin Rosenman LLP in New York City. Mr. Rubenstein has counseled clients in trust and estates matters for more than 30 years, and is a former adjunct professor at Brooklyn Law School as well as a frequent lecturer and author.*

**CCH:** One question that comes to mind immediately concerns the retroactive application of the decision. Although the opinion says nothing specifically, what are your thoughts on the subject?

**Mr. Rubenstein:** At the very least, tax returns applicable to those years for which the statute of limitations has not run should be fair game for amendment. In other words, returns for the three open years of 2010, 2011, and 2012. Perhaps more interesting though is the possible argument that, because the existing law [Section 3 of DOMA] was found to be unconstitutional, all relevant years should be open and there should be an equitable tolling. Now, the answer to that could be different, depending on the situation. For example, let's say a same-sex couple has been validly married for several years under the laws of their particular jurisdiction, but never filed jointly because they didn't think they could. My feeling would be that such a situation may not be open. Just because you are married does not mean you have to file jointly. In fact, many couples choose not to file jointly.

On the other hand, let us assume that someone made a gift to a partner six years ago that was subject to gift tax, which would not have been the case if the couple's marriage had been recognized as valid by the federal government. That situation to me is fair game for being open even though it has been more than three years. So, I think you really need to look at these situations on a case-by-case basis.

**CCH:** Since the Supreme Court's decision in *Windsor*, there has been some discussion of how liberally the IRS and other elements of the federal government are going to interpret the holding. Even the President made a comment that he hoped couples who were married in a jurisdiction that recognized same sex marriage and who then moved to another jurisdiction would still be treated as if they were validly married for federal law purposes. Do you anticipate the IRS or other agencies taking an expansive view of the opinion, particularly with respect to the issue of looking at "place of celebration" versus "place of residence" when making such a determination?

**Mr. Rubenstein:** I would be pleased but surprised if the upcoming guidance says that all same sex couples whose marriages took place in a state that permits it are entitled to the same tax benefits regardless of where they now live. This might be a great thing for many clients, but I don't anticipate this being the case. You have to look at when benefits accrued and for what purpose. If you are looking at death-time benefits, such as spousal entitlements in one's estate, those benefits are ordinarily dependent upon the laws of the state of one's domicile at the time of one's death.

However, there are several federal benefits that have nothing to do with state benefits. In dealing with those types of benefits, I would be more inclined to think the guidance will look to place of celebration of the marriage to see whether the marriage was valid. So, for instance, with respect to immigration benefits, those have nothing to do with looking to the law of a state of domicile to see whether you are married. If someone married a person of the

same sex in New York, for immigration purposes, that person should still be a spouse regardless of the state the couple may have moved to.

In some respects, this is like going back to law school and wrestling with conflict of law questions. If this is a case where the question being asked is, "are you married?" rather than whether the state recognizes the marriage, the choice of law would seem to look to the place of celebration. On the other hand, if we are talking about an estate right or a divorce right, that would normally be regulated by the state of domicile of the couple at the time of the dissolution of the marriage, either by death or divorce. A state may, in its own conflict of laws, say that we look to the place of celebration, but that is up to the state. Remember, *Windsor* specifically left Section 2 of DOMA alone. That section allows states not to be bound by another state's definition of marriages.

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**CCH:** Besides those states that actually recognize same-sex marriages, there are a number of states—like Illinois—that recognize civil unions or domestic partnerships. Although Illinois does not currently recognize same sex marriage, for state estate tax purposes at least, the statehas taken the position that parties to a civil union should be afforded the same protections and benefits as any spouse in a marriage recognized for federal estate tax purposes. Do you expect the federal guidance to look beyond simply the word "marriage" to examine the state's specific treatment of same sex partners?

**Mr. Rubenstein:** As much as I would like this to be the case, I would tend to doubt that result. You have to remember that, in the second-to-last line of the majority opinion, the court stated "This opinion and its holding are confined to those lawful marriages" [*Windsor*, at p. 26], presumably referring to same-sex marriages that a state has already recognized. But, assuming for the moment, that a state has taken the position that it will treat a domestic partnership or other marriage equivalent exactly the same as a full-fledged marriage, then it seems the argument could be made that the federal government should do so as well.

**CCH:** Do you expect that the guidance we will be receiving from the government in response to *Windsor* will be coordinated and issued at basically the same time or do you think we may see pronouncements filtering out from different parts of the federal bureaucracy for months to come?

**Mr. Rubenstein:** Although there are approximately 1,000 federal benefits that could be impacted by the Court's ruling, one would hope that they are quantifiable and that the guidance on all would be released at relatively the same time. But, I have been making tax predictions since 2001 and my batting average is no better than at predicting the weather, so I hesitate to make a prediction with respect to this issue. That being said, I would not be surprised if they issue guidance in the tax area first since there are stringent deadlines built into the law.

**CCH:** What steps should clients who are potentially impacted by *Windsor* be taking in the immediate time frame?

**Mr. Rubenstein:** If the parties are same sex and married, they should definitely have their estate planning documents reviewed to assure that they were drafted on the assumption that the couple was married and that the marriage will be recognized. And, for those persons who are not currently living in one of the states that recognize same-sex marriage, they should consider the possibility of moving to one of these jurisdictions.

Another immediate area of concern would be life insurance. If you didn't think you were going

to be entitled to a marital deduction, survivorship life insurance was not going to be of much use. Consequently, many same-sex couples bought individual life insurance separately. Now, assuming you don't need the money until the second death, it might be feasible to swap those policies out for survivorship insurance and get greater coverage for the same money.

As I mentioned earlier, amending tax returns must be considered, but this may not necessarily be advantageous in all cases. For income tax purposes a high-earner couple could easily find themselves worse off filing jointly than as single filers. Why would anyone want to put themselves into the marriage penalty?

**CCH:** What other situations might we have overlooked?

**Mr. Rubenstein:** One would be property ownership. A same-sex couple married in a jurisdiction that recognizes their marriage should be able to own property as tenants by the entireties, which comes with a certain degree of creditor protection.

The ability to make marital gifts would be another possibility. And, for those people who made large year-end gifts to a same-sex partner in 2012 in order to make use of the $5 million plus lifetime applicable exclusion amount in anticipation of it possibly going away after 2012, it would be advisable to amend the gift tax return to take advantage of the marital deduction and get the lifetime exclusion amount back.

Divorce will also present many considerations with respect to alimony, qualified domestic relations orders (QDROs), and the insulation from gift taxes provided under Code Sec. 2516 for certain property settlements incident to a divorce, etc.

**CCH:** And, on the other side of the coin, what are some of the things people covered by the Court's holding will no longer be able to do?

**Mr. Rubenstein:** While it was possible to create a grantor retained interest trust (GRIT) for a same-sex partner because that person would have been considered a non-family member under the Code Sec. 2702 rules, this will no longer be the case if your same-sex partner is now recognized as your spouse. Nor will you be able to have that person buy back a residence from a qualified personal residence trust (QPRT). Certain income shifting arrangements that might previously have worked will also not be allowed. For example, setting up a trust for a partner and letting the partner pay tax at his or her rate. Now, if the trust is for your spouse, it is a grantor trust and you can't income shift.

Some other things to consider would be attribution rules, related party sales, and the definition of disqualified persons for purposes of the private foundation rules.

**CCH:** Finally, what longer-term suggestions can you give our subscribers?

**Mr. Rubenstein:** In the longer term, I believe this decision puts same-sex couples on the same footing as opposite sex couples in terms of assessing whether or not it is in their best interests to be married. The point being that there are some benefits to not being married. Just because you can be married and have your marriage recognized for federal purposes does not mean that marriage necessarily provides the best overall result. Think of all the octogenarians whose former spouses have died and they are now living together, but have not married because they don't want to forfeit their deceased spouse's Social Security benefits. Presumably, this kind of choice will now have to be faced by same-sex couples as well.