

FICPA Gulf Coast Chapter Meeting Outline
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Estate Planning For Same-Sex Married Couples: A Florida Perspective

Douglas J. Elmore, Esq.
delmore@williamsparker.com

- I. Law Prior to *U.S. v. Windsor*
- II. *U.S. v. Windsor* (“Windsor”), decided June 26, 2013
 - a. Factual Background
 - b. Issue
 - c. Holding = Section 3 of the Defense of Marriage Act (“DOMA”), defining marriage as a legal union between one man and one woman as husband and wife (and which applied to any act of Congress or an agency thereof), is unconstitutional.
 - d. Rationale = Section 3 of DOMA violates the Fifth Amendment (the Equal Protection Clause).
- III. Issues Remaining in the Wake of Windsor
 - a. State of Ceremony vs. State of Domicile = Does federal recognition apply to all same-sex married couples, regardless of domicile, or is it limited to same-sex couples domiciled in recognition states?
 - i. Florida is a non-recognition state.
 1. Florida Statute Section 741.212(1).
 2. Section 27 of the FL Constitution.
 - ii. Federal Recognition Should be Expanded to Non-Recognition States:
 1. The federal government must recognize that a valid marriage in the state of ceremony exists notwithstanding the state of domicile, or else such interpretation would amount to a federal restriction on the definition of marriage.
 2. A non-recognition state’s definition of marriage should not override that of a recognition state, as it would result in marriage being a “springing” concept under federal law.
 - iii. Argument limiting federal recognition to same-sex couples domiciled in recognition states:
 1. Marriage is not a federal constitutional right and should therefore be determined by the several states. Each state should determine the validity of a marriage for all purposes within its jurisdiction (similar to real property law).
 2. A recognition state’s definition of marriage should not override that of a non-recognition state. Since the definition of “marriage” is the domain of the separate states, a federal interpretation of marriage that is inconsistent with that of a

same-sex married couple's state of residence is also a prohibited restriction on the definition of marriage.

3. Forum shopping would occur if federal recognition depends upon a taxpayer's state of domicile, as those domiciled in non-recognition states could get married in recognition states and move to non-recognition states.

- b. Amended Returns = Does the unconstitutionality of Section 3 of DOMA require same-sex couples to file amended returns?
- c. Retroactive Refunds = Do same-sex married couples qualify for retroactive refunds, and if so, does a closed statute of limitations period impair a potential refund claim?

IV. Revenue Ruling 2013-17, issued August 29, 2013

- a. State of Ceremony vs. State of Domicile = Does the Service consider a same-sex marriage valid even if the married couple is domiciled in a state that does not recognize same-sex marriage (such as Florida)? Yes.
 - i. Exceptions = The Service does not interpret "marriage" to include registered domestic partnerships, civil unions, or other formal relationships that don't rise to the level of actual marriage.
 - ii. Rationale
 1. The Service perceives its position as being consistent with that of Rev. Rul. 58-66, in which common law marriages are recognized regardless of the taxpayer's state of domicile.
 2. An interpretation of marriage based upon the taxpayer's state of domicile is not administratively viable and would undermine the policy for uniform federal tax rules.
 - a. Marriage would otherwise be a "springing" concept.
 - b. If recognition depends upon the taxpayer's state of domicile, then the rules attributing one spouse's ownership interest in property to another would change when a same-sex, couple moves.
 - c. A rule based upon a states recognition or non-recognition would raise considerable issues for employers operating in more than one state (e.g., e'ee benefit plans).
- b. Interpretive Issue = Under the Code, should the Service interpret the terms "marriage," "spouse," etc. be read so as to include a same-sex spouse or couple? Yes.
 - i. Fifth Amendment issues are avoided if the terms "marriage" and "spouse" are read as gender neutral, and therefore these terms should include same-sex spouses and couples.
 - ii. A gender-neutral construction of a gender-specific term is permissible under Section 7701, and nothing in the IRC prevents a gender-neutral interpretation.
 - iii. Tax fairness mandates that same-sex couples be treated in the same manner as similarly situated, opposite-sex couples.

- c. Quasi-Marriages Issue = Should the term “marriage” include registered domestic partnerships, civil unions, or other similar formal relationships that are recognized under state law but are not equivalent to marriage?
No.
 - i. Congress has distinguished between marriage and other domestic arrangements and would have done so if it wanted the federal benefits connected with marriage to be extended.
 - ii. Different states attach different rights to various forms of quasi-marriages.
- d. Administration of Rev. Ruling 2013-17
 - i. Applies from 9/16 onwards.
 - ii. The ruling has retroactive effect, meaning that a taxpayer may file amended returns or refund claims so long as the applicable statute of limitations has not expired.
 - iii. Taxpayers may rely on it for purposes of reporting with regard to employee benefit plans, although additional guidance in this realm is forthcoming.
- e. Additional Guidance
 - i. The Service states that it may issue additional guidance for purposes of tax administration.
 - ii. Other agencies will need to provide their own guidance on programs they administer.
- V. Internal Revenue Bulletin 2013-72
 - a. Purpose = To provide guidance as to the filing of tax returns in light of Windsor
 - b. Scope of Application
 - i. Same-sex couples “will be treated as married for all federal tax purposes, including income and gift and estate taxes.”
 - ii. The Notice applies to “all federal tax provisions where marriage is a factor,” such as selecting filing status, claiming personal and dependency exemptions, taking the standard deduction, and contributing to an IRA.
 - c. Prior Years’ Returns
 - i. Amended Returns = Same-sex couples may, but are not required to, file original or amended returns selecting a married filing status, provided that such return years are still open for purposes of the statute of limitations. The notice makes it clear that the Service views DOMA as *void ab initio*.
 - ii. Income Tax = Many same-sex couples may owe additional tax if they are required to file under a married status.
 - iii. Estate and Gift Tax = Since a prior transfer either caused a taxpayer to use applicable exemption or pay gift tax, taxpayers should consider filing amended returns as to open years.
 - iv. The inference from I.R.B. 2013-72 is that the Service may not assess tax in prior years based upon marital status.

- d. Closed Years = The Service was silent in I.R.B. 2013-72.
 - i. Protective Claim for Refund = This remedy is likely considered to be an adequate remedy, and therefore the unconstitutionality of DOMA should be affect the closing of the statute of limitations.
 - ii. “Remoteness Test”
 - iii. Additional Arguments
- VI. Implications of Windsor, Rev. Rul. 2013-17, and I.R.B. 2013-72
 - a. Federal Income Tax
 - i. Filing Status
 1. Married filing jointly or married filing separately.
 2. Initial government estimates indicate that tax revenue will rise following the DOMA repeal, likely due to the “marriage-penalty.”
 - ii. Amended Returns
 1. Amended returns are not required to be filed, although doing so is permitted.
 2. A taxpayer may file for a refund on Form 843.
 3. Should a same-sex couple file an amended return?
 - a. A comparative financial analysis may indicate a difference in tax liability based upon filing status.
 - b. At present, the marriage penalty comes into play.
 - i. Some dual income, same-sex couples may not want to file amended returns.
 - ii. Some single income (or disproportionate income), same-sex couples may want to file amended returns.
 - iii. Amended returns may permit a same-sex couple to take advantage of personal exemptions, deductions, exclusions for the purchase of health insurance coverage, etc.
 - b. Federal Estate, Gift, and Generation Skipping Transfer Tax
 - i. Marital Deduction = Transfers by same-sex couples may now qualify for the marital deduction.
 1. Estate Tax
 - a. Shelter = The marital deduction is unlimited, and therefore testamentary transfers between spouses are no longer required to use the transferor’s applicable exemption or to trigger gift or estate tax payable.
 - b. Deferral = Even if the combined wealth of a same-sex couple exceeds the sum of both spouses’ applicable exemptions, the marital deduction may defer tax payable until death of the second spouse.
 2. Gift Tax

- a. Shelter = Lifetime transfers between spouses are sheltered from federal gift tax via the marital deduction.
- b. Reporting = Reporting issues are mitigated as to intra-spousal lifetime transfers.
 - i. Account titling/ownership.
 - ii. Documentation.
 - iii. Forms 709.
- ii. Portability
 - 1. Availability = Same-sex couples may now “claim” or “port” a deceased spouse’s unused exemption.
 - 2. More planning flexibility is available.
 - 3. The equalization of wealth is of diminished importance.
- iii. Gift Splitting
 - 1. Same-sex couples may now gift split.
 - 2. Gift-splitting can help mitigate the impact of future asset appreciation
- iv. Generation Skipping Transfer Tax
 - 1. A same-sex couple is now assigned to same generational level, rather than a level based on unrelated persons.
 - 2. A reverse QTIP Election is now permitted.
- v. Grantor Trusts = Same-sex couples may now fall within the spousal attribution rules found within IRC Sections 671-678, or within the definition of “related” or “subordinate” party.
- vi. Beneficiary Designations
 - 1. A “spousal rollover” is now permitted.
 - 2. Spousal consent is now required to assign benefits of certain qualified plans.
- vii. Impact on Above-Exemption Planning
 - 1. Family Attribution = Various family attribution rules now apply.
 - a. Context.
 - b. Effect.
 - 2. Family Limited Partnerships = Impact on valuation.
 - 3. Tax-Exempt Organizations = A same-sex spouse is now a disqualified person for TEO purposes.
 - 4. GRITS = Are no longer are no longer favored since the spouse is now an applicable family member who’s interest is valued at zero (can’t be used for wealth equalization).
 - 5. QPRT’s = Can no longer engage in a repurchase of the residence.
 - 6. Miscellaneous