

- 1) Same-Sex Marriage – federal benefits
 - a) DOMA - Opinion in *Windsor* released June 26th.
 - i) the core of DOMA was taken down
 - ii) statewide bans remain in place
 - b) “place of residence” or “place of celebration”
 - i) Determining whether the 1,138 federal marriage rights will apply to same-sex couples depends on the regulations of each agency, and how they determine if a couple is legally “married.” It varies based on whether the agency looks at: (1) where the marriage was performed, or (2) where the couple lives.
 - c) Income Taxes
 - i) We have to file jointly
 - (1) the marriage penalty will be an issue for many DINKs.
 - (a) similar income to spouse, the more likely that there will be a marriage penalty
 - (b) would be able to file separately, but this might make them ineligible for a number of tax benefits, such as the ability to take certain deductions and credits.
 - (c) no definition of spouse in law and in regulation - it was de facto
 - ii) Lose ability to file as head of household
 - iii) Amending returns?
 - (1) If already married for a while, check with tax preparer whether it makes sense to seek refund
 - (2) if you paid tax on spouse’s health care benefits, or if your income or capital gains or estate taxes were paid which might be more favorable if filed as a married person.
 - (3) If dp or c.u. partner is on your health insurance at work, you will still have to pay the tax on the imputed income because you are not married.
 - (4) If married, no longer have to keep onerous records of who contributed what to avoid taxation at death
 - ii) Lose ability to file as head of household
 - iii) Amending returns?
 - (1) If already married for a while, check with tax preparer whether it makes sense to seek refund
 - (2) if you paid tax on spouse’s health care benefits, or if your income or capital gains or estate taxes were paid which might be more favorable if filed as a married person.
 - (3) If dp or c.u. partner is on your health insurance at work, you will still have to pay the tax on the imputed income because you are not married.
 - (4) If married, no longer have to keep onerous records of who contributed what to avoid taxation at death
 - d) Estate and gift taxes –
 - i) YES marital deduction - Anything left to federally recognized spouse will be exempt from U.S. estate tax
 - ii) Unlimited gifting between spouses, giving your spouse an interest in the house; previously had to deal with annual gift tax issues and gift tax returns; now, if married, unlimited gifting
 - iii) Same-sex couples will need to rethink wealth management and estate plans; need to revisit beneficiary designations

- iv) Gift splitting
 - v) Portability of unused estate tax credits – now available to surviving spouse of s-s couples – could potentially leave estates of \$10+ million untaxed
 - e) Social Security benefits or pensions on to each other in old age ONLY if we die in a recognition state (statute vs de facto rule)
 - i) Depending on each person’s work history, you would maybe be entitled to benefits based on your spouse’s record.
 - ii) Survivor benefits available in a variety of contexts – over 60, over 50 and disabled or caring for decedent’s child under 16.
 - iii) One time death benefit of \$255 to surviving spouse
 - f) Bankruptcy
 - i) Can file as a married couple, save filing fees and attorney fees, more convenient
 - ii) Debts not dischargeable if owed as a result of a marriage (alimony)
 - g) Retirement benefits
 - i) Surviving spouse can rollover IRA into her/his own name. ability to extend start date of required minimum distributions and to stretch payments.
 - ii) Hardship distributions – expenses for same-sex spouse will qualify for same-sex spouse on same grounds as for employee
 - iii) a QDRO is a federal benefit we can now get so that disposition of a retirement plan is an option on divorce
 - h) FMLA- also state of domicile
 - i) Miscellany
 - i) Affects esoteric things like federal integrity rules, reporting of political contributions to Federal Election Commission, federal security law classifications, ethics and integrity rules, public company disclosures
 - ii) Lots of great changes on in exec branch on admin level which are too numerous to go over but know that the Obama administration has been incredible in making changes so as many SSM couples have as many rights as possible (OPM, Dept. of Labor, Veterans Affairs)
- 2) Statewide –
- a) Windsor left the statewide bans in place, though not for long if you agree with Scalia's dissent.
 - b) We're working collaboratively on strategies to take down our ban. No going rogue.

- c) Even when we get marriage rights, we still experience homophobia.
 - d) Estate planning remains especially necessary. You still should be sure your clients and friends do their estate planning documents – a will, durable power of attorney, and a health care advanced directive.
 - i) the current default of the federal law is not to protect the same-sex partner and it is the default in many states like FL.
 - ii) planning for s-s couples requires a little more creative and personalized
 - iii) Portability
 - (1) imagine if your marriage disappeared as you moved across state lines. That's what we're contending with.
 - (2) And even in recognition states, understand that many of the rights will vanish when your clients and friends travel, even on vacation.
 - (3) Also clients may have assets in multiple jurisdictions so proper planning still essential.
 - iv) Some tools in the estate planner's toolbox beyond the simple will
 - (1) Health care advance directives are critical
 - (2) Be sure to do Docubank and have them on you.
 - (3) Put on the bottom of the docs "A copy of this document is as valid as the original"
 - (4) HIPAA authorization language is key as sometimes it's a pretext for homophobia
 - (5) DPOAs are still the most serious thing signed and are not the default for married couples
 - (6) Trusts
 - (a) Revocable trusts
 - (i) don't help with estate tax avoidance
 - (ii) help with incapacity planning
 - (iii) harder in an adversarial proceeding to prove undue influence
 - (b) Now can do same bypass, AB trusts, credit shelter trusts you do for your hetero married clients.
 - (c) With the portability of the exemption passed in 2011 that means we'll only have to worry about that for couples with over \$10.5 million
- 3) To Marry or Not to Marry? - possible reasons not to marry
- a) obligations upon death or divorce

- b) higher income tax brackets for married couples filing jointly Getting spousal support from prior spouse (but “supportive relationship” can disqualify)
- c) Household income inclusion for Medicaid and SSI
- d) FAFSA
- e) Tax stuff
 - i) Adoption tax credit is substantial but you don’t get it if you’re married to your partner because then it is a stepparent adoption. Some are adopting this year and marrying next year to maximize the tax benefits.
 - ii) A taxpayer's spouse cannot be a dependent of the taxpayer and for some couples that's a better benefit than filing jointly-you have to run the numbers both ways.
 - iii) A married taxpayer can't itemize if his spouse takes the standardized deduction
 - iv) Wanting to use a tool like a GRIT (Grantor Retained Interest Trust) – No longer allowed for opposite –sex couples after 1990 because you can't be a “family member”
 - v) Divorce can't be granted if you live in many other states so people who get married elsewhere are “wedlocked.” A few jurisdictions have no residency requirement for marriage OR for divorce – CA, DC, DE, MN, VT (if no kids) and Canada
 - vi) Don't believe in the institution
 - (1) See Paula Ettlbrick (z'l) “Since When is Marriage a Path to Liberation”
- 4) Other issues you'll need to know about in representing LGBT couples
 - a) Prenuptial agreements
 - i) essential for many couples to consider and when so doing, date of “marriage” can be addressed. Imagine you're together 20 years and then marry in 2013 and divorce in 2014
 - ii) be sure that you have separate representation on this unlike ep
 - b) second parent adoption is critical for clients with kids.
 - i) A birth certificate is not sufficient protection: presumptive vs. conclusive evidence of parentage.
 - ii) portability concern. It is crucial for a nonbiological/de facto parent to be protected and without a second parent adoption that's a lot harder.
 - iii) Ethical issue to flag about joint rep: get a written acknowledgement from the clients that this is a joint representation and that you won't keep secrets from one another

- 5) Lest we think that marriage will fix the gay community's woes, even when we get marriage, the fight isn't over.
 - a) It's legal federally to fire someone because he's gay or perceived to be
 - b) It's legal statewide to fire someone because he's gay or perceived to be
- 6) suggestions for being professional and culturally competent with your lgbt client
 - a) in consultations
 - i) Ask open ended questions. Be curious.
 - ii) Let them define their own families
 - iii) Don't try to prove your cred: "my florist is gay"
 - b) words not to use
 - i) homosexual- that puts it in purely sexual terms
 - ii) lifestyle-there's no straight lifestyle any more than there's a gay lifestyle
 - iii) Sexual preference- it's not a choice
 - iv) Don't say someone "admitted" he was gay. That sounds like there's something shameful about it.
 - c) Change your forms- married/divorced/partner, parent/parent
 - d) Have Resources