Marriage Equality

Turning a Dream into a Reality for Same-Sex Couples

Over the past two decades, the United States has experienced a tremendous sea change on the stance of same-sex marriage. On June 26, 2013, the Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA), which had previously defined "marriage" to mean a "legal union between one man and one woman as husband and wife, and the word "spouse" to mean "only a person of the opposite sex who is a husband or a wife." While the 2013 ruling is viewed as a landmark court case, it did not create marriage equality.

Unfortunately the 2013 Supreme Court decision did not address Section 2 of DOMA, which allowed states, through the sovereign authority, to refuse to perform same sex-marriages and/or recognize same-sex marriages performed in other states. As of May 31, 2015, there were 13 states (AR, GA, KY, LA, MI, MS, MO, NE, ND, OH, SD, TN and TX) that did not perform and/or recognize same-sex marriages.

Over the past two years, same-sex marriage advocates have fought tirelessly to maintain the momentum created by the 2013 Supreme Court decision. Finally, on June 26, 2015, the Supreme Court, in the case of Obergefell vs. Hodges, ruled on Section 2 of DOMA.

Supreme Court's Decision on Section 2 of DOMA

The Supreme Court ruled, by a 5-4 decision, that Section 2 of DOMA is essentially unconstitutional. This decision is considered the 21st century equivalent of Loving vs. Virginia (1967), which ruled that states were required to perform and recognize inter-racial marriages.

The Supreme Court, in citing the Fourteenth Amendment, has ruled that the 'due process clause' and 'equal protection clause' requires all states to perform and recognize same-sex marriages. Same-sex married couples are no longer "consigned to an instability many opposite-sex couples would deem intolerable in their own lives" (Justice Anthony Kennedy). This decision provides security and stability to same-sex married couples irrespective of state of residency or state of travel. In addition, same-sex married couples can no longer be "denied the constellation of benefits that the states have linked to marriage" (Justice Anthony Kennedy).

Same-sex married couples must now navigate through the financial and estate planning opportunities created by the Supreme Court decision. For those same-sex married couples living in the 36 states that already recognized same-sex marriages, there may be little to no financial and estate planning changes necessary. However, for the 13 states that did not recognize same-sex marriages and Florida (recognized same-sex marriage starting in January 2015 as a result of Brenner vs. Scott), there are a myriad of financial and estate planning issues that must be re-evaluated to ensure tax efficiency and wealth transfer continuity.

Financial Planning

For same-sex married couples in the 13 states that did not recognize same-sex marriages and Florida, there will be a tremendous amount of income tax planning that must be analyzed. Tax planning opportunities include:

- Analyze prior year federal and state income tax returns to determine if there is a positive tax arbitrage worth the time and costs associated with amending prior year returns. Consider the impact of the change in the adjusted gross income limitations, which may prevent a same-sex married couple from making Roth IRA contributions or receiving tax deductions and/or credits during this period of time.
- Analyze current year federal and state income tax planning opportunities to ensure that there is enough tax withholding done to mitigate tax withholding penalties. This may require updating 2015 Form W-4 with the employer to decrease the number of personal allowances (line 5) and/or withhold an additional amount from each paycheck (line 6).
- Analyze Roth conversion strategies, financial aid assistance for children going to college, HSA contributions and employee benefit programs to determine the most tax efficient strategy to achieve the stated goal/objective.
- Analyze worker compensation benefits, child support payments and spousal support payments.

Estate Planning

For same-sex married couples in the 13 states that did not recognize same-sex marriages and Florida, there will be estate tax planning opportunities that must be considered. These opportunities include:

- Spousal elective share, which provides a surviving spouse with the right to receive a fraction of the deceased spouse's probate estate in 'separate' property states (e.g. Florida).
- Prior year wealth transfer to a surviving spouse in states that have an estate tax or inheritance tax (e.g. Kentucky, Nebraska and Tennessee) may result in a refund. Current and future wealth transfer to a surviving spouse in these states will not be subject to inheritance taxes.
- Asset titling and beneficiary designation coordination within the updated estate plan that is reflective of current law will be paramount.
- Same-sex married couples will now have child custody rights, hospital visitation rights, adoption rights, and access to a spouse's birth certificate and death certificate.

While financial and estate planning will become easier to oversee over time, there is a current influx of planning opportunities that must be considered today by financial advisors to ensure that same-sex married couples they work with maximize their tax efficiency, and align their assets with their estate and wealth transfer objectives.