

# PUBLICATION

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## Tax Issues for Same-Sex and Non-Traditional Couples

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Tax issues are among the many legal challenges same-sex and non-traditional couples face. Currently the Defense of Marriage Act of 1996 (DOMA) requires that under federal law marriage is between a man and a woman. Our federal tax system extends a variety of tax benefits to married couples that are not available to same-sex couples as a consequence of DOMA.

### Tax and Related Issues

If you and your partner are unmarried, or if your same-sex marriage is only recognized under state law, here are just some tax issues for you to consider as you prepare your tax returns this year:

- Filing status -- As a result of DOMA, even if your home state recognizes your marriage, you and your partner must file separate tax returns as either "single" or "head of household" if you have at least one dependent.
- Claiming Dependents -- Because you must file separate returns, if you and your same-sex partner have a child or children in your custody, only one of you can claim each child as a dependent on your return.
- Second-Parent Adoption -- Some states have begun to recognize second-parent adoption, a mechanism by which a child can be adopted without terminating the parental rights of a biological parent. If you have paid expenses associated with a second-parent adoption, you may be eligible to take a federal income tax deduction for those expenses.
- Benefits Taxed as Imputed Income -- Your same-sex partner may be eligible to be included on your employer-provided health insurance. However, under DOMA, such benefits are not treated as spousal benefits but may instead be treated as imputed income, and thus be subject to federal income tax.
- Gift Tax Implications -- Heterosexual spouses are eligible to transfer money to each other tax free thanks to the unlimited marital deduction. However, same-sex couples risk incurring gift tax on such transfers. Be mindful that taxable transfers can occur even in cases where one partner pays for property that is titled in both partners' names, such as a car or a house. Currently, federal law allows you to make gifts of \$14,000 or less per person per year without paying taxes or filing a gift tax return. Federal law also currently allows each taxpayer a lifetime exclusion of \$5 million indexed for inflation; however, if any gift is more than the \$14,000 annual exclusion, a gift tax return must be filed.

### A Potentially Changing Tax Landscape for Same-Sex Couples

The inability of same-sex couples whose marriages are recognized under state but not federal law to benefit from the unlimited marital deduction is at the heart of *United States v. Windsor*, the first challenge to DOMA to reach the United States Supreme Court. The case was filed by Edith Windsor, who was married to Thea Spyer in Canada in 2007. The couple's marriage was recognized in their home state of New York. When Spyer died in 2009, she left Windsor certain properties which resulted in a federal estate tax assessment of over \$350,000. Windsor challenged the assessment based in part on DOMA being unconstitutional. The U.S. District Court for the Southern District of New York determined that assessment to be invalid. On October 18, 2012 the U.S. Court of Appeals for the Second Circuit upheld the lower court.

The Second Circuit Court of Appeals held that government discrimination against lesbians and gay men is now assumed to be unconstitutional and that DOMA's defenders could not offer any good reason for treating married same-sex couples differently from all other married couples. This is the first federal appeals court decision to decide that government discrimination against gay people gets a more exacting level of judicial review, called "heightened scrutiny."

The Supreme Court is scheduled to hear oral arguments in *United States v. Windsor* on March 27 of this year. The outcome of that case has the potential to greatly change the way that same-sex couples are treated for federal tax purposes.

## **Conclusion**

The tax issues faced by same-sex and non-traditional couples are complex. If you have questions about these or any other tax issues, do not hesitate to contact any one of the following attorneys in the Firm's Tax Department: