


# Trusts & Estates Update: July 2013

**By RIW on July 11, 2013**


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## HISTORIC CHANGE IN PLANNING FOR SAME SEX COUPLES

On June 26, 2013, the Supreme Court issued a landmark decision in United States v. Windsor, striking down Section 3 of the Defense of Marriage Act ("DOMA"), which defined marriage as that between one man and one woman for all federal purposes. The Court stated that Section 3 violated the Due Process Clause and the equal protection guarantee of the U.S. Constitution. At the very heart of the Windsor case lies a fundamental principal of the federal estate tax law: a surviving spouse's ability to defer estate tax payments until his or her death. This principal is embodied in the federal marital deduction, which allows the first spouse to die to leave an unlimited amount of assets to his or her surviving spouse, free of any current estate tax liability. Ms. Windsor and her spouse, Thea Spyer, lived in New York, a state that not only recognizes same sex marriage, but also honors same sex marriages that take place outside of New York. When Ms. Spyer passed away in 2009, the IRS denied her estate the benefit of the federal marital deduction because the marriage was not recognized under DOMA. The IRS assessed a large federal estate tax which Ms. Windsor paid as executrix of Thea's estate. She brought suit under the Due Process Clause of the U. S. Constitution seeking a refund of the estate taxes paid. The lawsuit went all the way to the Supreme Court, where by a vote of 5-4, the Court agreed that the definition of marriage under DOMA violated the Fifth Amendment of the U.S. Constitution. However, this decision extends far beyond granting legally married same sex couples the ability to utilize the estate tax marital deduction. The decision impacts over 1,000 federal statutes that effect married couples. Below is a sampling of some of the federal laws that will now apply to legally married same sex couples:

- File married filing joint or married filing separate income tax returns
- Consent to gift split
- Unlimited lifetime gifting to spouse
- Unlimited marital deduction for estate tax purposes
- Portability of spouse's unused estate tax exemption
- Spousal rollover of IRAs at death

- Social Security survivor benefits
- $500,000 personal residence capital gain exclusion upon sale of personal residence
- Access to Medicare, Medicaid and Veterans Benefits

The decision does not clearly state how and when the repeal will be implemented. Most notably, there is no clear directive as to what the effective date will be, whether the decision will be retroactive, and if retroactive, to what date. IRS guidance as to how and when same sex couples may begin to take advantage of these benefits should be forthcoming. If the law is retroactive, then same sex couples legally married years ago may be able to file for income tax refunds for any years in which the statute of limitations has not expired, or may be able to recover federal benefits they never received. However, not all applications of the law are a benefit. Now the income tax "marriage penalty" may apply to same sex married couples if both spouses are high income earners.

Another area of uncertainty is whether benefits under the new law will be afforded to all legally married same sex couples, or only to those who are legally married and reside in one of the 14 states or jurisdictions that recognizes same sex marriage. The Windsor case notably did not rule on Section 2 of DOMA which provides that no state is required to recognize a same sex marriage performed in another state. Until there is further clarification, same sex married couples who wish to take advantage of this change in the federal law should be very cautious about moving to a state or jurisdiction that does not recognize same sex marriage, even if they were legally married in a state or jurisdiction that does recognize their marriage.

For those same sex couples that are already legally married, there are many changes and opportunities to be addressed with their tax advisors, estate planners and even their employers. Those same sex couples that are considering marriage must weigh all of their options and determine whether the benefits now afforded under federal and state laws outweigh the potential burdens of such laws (such as the marriage penalty) before walking down the aisle. For most, this historic decision, once fully implemented, will help simplify estate and tax planning for same sex married couples. It is worth having estate and income tax plans reviewed to determine if changes ought to be made.

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## ARE THOSE ESTATE TAX LAWS REALLY PERMANENT? A LOOK AT PRESIDENT OBAMA'S 2014 BUDGET PROPOSAL

In our January newsletter we shared with you a synopsis of the American Taxpayer Relief Act (ATRA) which became law on January 2, 2013. ATRA put an end to the uncertainty that plagued us for more than a decade when it provided permanent federal estate tax provisions. We cautioned you in that same newsletter that the law is only permanent until Congress decides to act again and that some of our favorite planning techniques could soon come under fire. Just four short months after ATRA was signed by President Obama, he issued his proposed 2014 budget which threatens to change our permanent federal estate tax law and do away with some of our most favored methods of estate tax minimization planning. In addition, in response to the President's proposed budget several other bills have been introduced which also call in to question the future of many advanced estate planning techniques. Below we have listed just a few of the estate, gift and generation-skipping transfer ("GST") tax planning items which appeared in the President's 2014 Budget Proposal and other recently proposed legislation:

- Reduction of the estate tax exemption back to $3.5M with an increased 45% maximum tax rate
- Reduction of the gift and GST tax exemption back to $1M
- Limit the duration of GST Exempt trusts to ninety years

- Required minimum ten year term for Grantor Retained Annuity Trusts (GRATs)
- Inclusion of certain grantor trust assets in the estate of the grantor
- Limitations on the use of valuation discounts.

Many of these proposals have appeared in the past, and have gone nowhere. However, the federal government is trying to reduce the deficit, raise revenue, and is seriously considering major tax reform. Therefore the future of our "permanent" federal estate tax laws remains uncertain and many estate planning techniques continue to be reviewed with an increasing level of scrutiny. In light of this uncertainty, we encourage you to take advantage of the estate planning opportunities that our current laws allow. Please call any member of RIW's Trusts and Estates Group with your questions.

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## MEMBER SPOTLIGHT

Katie Sheehan is an associate in the Trusts and Estates Group. Katie focuses her practice in the areas of estate and tax planning, estate and trust administration, charitable planning, long term care and special needs planning and elder law. In addition to her work at Ruberto, Israel & Weiner, P.C., Katie is a member of the Women's Initiative Committee of the Boston Estate Planning Council and volunteers her time to the Elder Law Project sponsored by the Women's Bar Foundation and the Elder Law Education Program sponsored by the Massachusetts Bar Association. Katie has given numerous presentations on a variety of estate and long term care planning topics and has served as a Co-Chair for MCLE programming.

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For a full description of our Trusts & Estates Group and a list of all of our practice areas, visit www.riw.com or contact any member of the T&E Group listed below.

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