Estate planning for same-sex couples

Edie Windsor and Thea Spyer entered into a committed relationship in 1963. In 1993 they registered as domestic partners in New York City, when that option became available. They married in 2007, in Canada, where gays and lesbians were permitted to marry.

Spyer died in February 2009. Although her estate passed to Windsor, the marital deduction was not available as a result of the Defense of Marriage Act (DOMA) enacted during the Clinton administration. A $363,053 estate tax was paid. Then Windsor sued for recovery of the estate taxes, arguing that her marriage must be respected for estate tax purposes. In addition, she challenged the definition of "marriage" under DOMA as unconstitutional, a violation of the equal protection clause.

The District Court agreed with Windsor, ordering the refund of taxes paid. The Court tested the "rational basis" of arguments behind DOMA's definition of marriage. These included proceeding with caution in protecting the traditional institution of marriage; the need for consistency and uniformity in federal benefits; and the unknown costs of expanding the definition of marriage beyond its traditional bounds. Each argument was rejected by the Court as insufficient to overcome the equal protection challenge.

The decision will be appealed and could end up in the U.S. Supreme Court. However, the possibility of a marital deduction could change the estate plans of same-sex married couples. Recent estates involving same-sex couples may be well advised to file for refunds.

The decision may be invoked in the income tax context as well. Same-sex married couples may be entitled to file jointly. Taken to its logical conclusion, these couples would be barred from filing as singles, but they could be required to choose between filing jointly or separately.

These tax rules will need to be added to the mix as Congress contemplates major tax reform in the coming years.

(August 2012)