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Who Should Get Married After DOMA Repeal – or, Why You Should Walk (Not Run) to City Hall

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As the entire country waits in anticipation of the U.S. Supreme Court's decision in United States v. Windsor, the case that could finally repeal the federal "Defense of Marriage Act" (DOMA) from 1996, this seemed like a good time to take a step back and reflect on what marriage could mean on legal and tax levels.

Along with many of you, I have been waiting for the repeal of DOMA ever since it passed. And yet, I am also an attorney whose job is to be risk-adverse on behalf of my clients. As such, I feel compelled to emphasize the obvious. Having the right to marriage does not create an obligation to marry. We should not all be running to City Hall for the marriage license just because we can. We need to think about whether it makes sense, not only for legal and tax reasons, but also for social, cultural, and family reasons.

The following are some possible advantages of marriage from a tax and legal perspective:

(1) Immigration rights: U.S. citizen spouses have long been allowed to petition for permanent residency for their non-U.S. citizen spouses to stay in the country. Until DOMA is repealed, same-sex couples will not be allowed this right.

(2) Social security benefits: Federally-recognized spouses have the right to receive one half of his or her spouses' retirement benefit if greater than what the surviving spouse would receive based on his or her own earning record, even after divorce and even while the higher-earned spouse is still alive, so

long as the marriage lasted ten years or more. When a federal-recognized spouse dies, the surviving spouse is also entitled to a small one-time death payment.

(3) Double step-up in basis: When someone inherits a capital asset, such as a house or stock account, federal and state tax laws allow the recipient to receive a "stepped up basis" for purposes of calculating the capital gains tax upon sale. The original owner's capital gains basis ("basis") is determined by the original purchase price, plus amounts spent on improvements. The capital gains tax upon sale is determined by subtracting the basis from the sale price. But in the case of inherited property, the basis on the property is "stepped-up" to date-of-death value, which means virtually no capital gains tax if the property is sold right after death. Generally, this result reduces taxes for the beneficiary, unless the property value has depreciated.

The advantage for federally-recognized married people in community property states is the "double step-up in basis." Ordinarily, property co-owned by two people only receives a stepped-up basis on the deceased person's share. However, community property owned by a federally married coupled receives a step-up on both halves – the inherited half and the non-inherited half. Note: The double step-up in basis has been permitted since 2007 on California state taxes for community property owned by state-registered domestic partners, a benefit that was extended to same-sex married couples since 2008. (Please see http://becklawgroup.com/resources/ca-state-domestic-partnership-and-same-sex-marriage/ for the full article discussing the double step-up
in basis.)

(4) Confidential marriages: California law permits confidential marriage licenses, protecting personal information from public view. This benefit is only available to the parties to the marriage; anyone else seeking information about the marriage would require a court order. This privilege is not allowed for California state domestic partners.

(5) The "unlimited marital deduction" from federal gift/estate taxes: When Edie Windsor's wife passed away, she left an estate large enough to trigger a federal estate tax of over $300,000 from her estate. Had their marriage been federally recognized, the entire inheritance to Edie would have been completely deductible from federal estate tax. While this issue has been a major issue for same sex couples in previous years, the exemption from federal estate and gift taxes was raised in 2013 to $5.25 million, which affects less than 1% of people in the U.S.
Possible disadvantages of federal marriage:

(1) The "marriage penalty" for federal income taxes: Many, but not all, federally-recognized married people in two-income households pay higher income taxes than two single people. The best way to analyze this issue is to properly run the numbers with a licensed tax preparer.

(2) Medicaid: A person with less than $2,000 in "assets" (not including a primary residence and first vehicle) can qualify for Medicaid, known as Medi-Cal in California, which can pay for nursing home and other medical care. When the person needing care is in a federally-recognized marriage, the program counts the income and assets of both people in the marriage, and in the case of California, also the state-registered domestic partnership (SRDP). Although couples who are already married or SRDPs are now permitted to retain enough income and assets to continue living at home, the spouse or SRDP is not permitted to have additional assets. If, however, a couple is not married or not SRDPs, the partner's income and assets would typically not be counted toward Medicaid eligibility. If this situation might apply to you, please consult with an attorney specializing in Medicaid benefits, as the rules are very particular and can have dire consequences if misunderstood.

Ultimately, the analysis for each couple should be case-by-case, based on the specific facts of the situation. At the very least, before heading down to City Hall for your marriage license, consider consulting with your tax preparer (about the income tax issues), financial advisor (about social security death benefits and long-term care planning), estate planning attorney (about capital gains, estate, gift tax, and inheritance issues) and/or Medicaid attorney. Then weigh the decision with your partner, keeping in mind the other cultural and social issues relating to marriage. If you still decide to move forward, consider a prenuptial agreement or estate planning documents to keep separate property separate (for ownership or tax reasons). Then, when you are done with the lawyers and financial professionals, forget about all of us for a while, and have a blast at your wedding, if you so choose to have one.

Alma Soongi Beck, Esq., is an attorney based in San Francisco who specializes in estate planning, probate and trust administration, domestic partnership, and property co-ownership issues, particularly as they affect same-sex and unmarried couples. For more information, please visit www.becklawgroup.com.

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