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## Estate planning implications after DOMA decision from high court

In a landmark ruling on June 26, the U.S. Supreme Court struck down the 1996 Defense of Marriage Act (DOMA) provision that defined marriage as between one man and one woman and left same-sex couples unable to receive federal marriage benefits. Now, in the 14 jurisdictions that recognize same-sex marriage, the ruling opens the door for couples to have access to the same federal benefits that heterosexual couples already receive.

The decision entitles same-sex couples to more than 1,000 different federal benefits, including Social Security and pension benefits, retirement plans and marital tax deductions.

#### Estate-planning benefits:

- Claim the marital deduction for gift and estate tax purposes
- Elect portability of the deceased spouse's unused applicable exclusion amount
- Split inter vivos gifts
- Name spouse as beneficiary under a qualified retirement account and allow the surviving spouse to roll over the account to his/her personal account
- Income tax planning benefits:
  - Grant certain Social Security, Medicare and Medicaid benefits
  - File joint income tax returns as a married couple and consider amending past returns
  - Simplify the basis and contribution rules for jointly owned property
  - In a divorce, eliminate adverse tax consequences for the transfer of property

The court's decision transforms the way that gay and lesbian married couples can plan ahead for their futures, but only as long as they live in a state which recognize same-sex marriages. Same-sex couples living in states that do not permit marriages or in states that only allow civil unions, like Illinois, are still left vulnerable.

Many clients look to elope to a state which recognizes same sex marriages. However, state law rights, such as divorce, create significant complications for same-sex spouses should they move to states that do not recognize the marriages and, thus, would not grant

divorces. Couples may be forced to move back to their states of marriage for certain time periods before divorces would be granted.

Furthermore, estate planning concerns arise for the extended families and descendants of same-sex couples as well. If a trust is governed under the laws of a state that does not recognize same-sex marriage, the documents may have different meanings in different states. Specific definitions for "spouse" and "descendant" in estate planning documents could help avoid potential nonrecognition issues.

The Illinois Religious Freedom Protection and Civil Union Act was signed into law in January 2011 and allowed same-sex and heterosexual couples to enter into civil unions. The act provided persons entering into civil unions the same protections and benefits afforded by Illinois law to spouses. Like the DOMA ruling, the act removed the inequalities between same-sex and heterosexual couples.

The act allows Illinois partners in a civil union the right to inherit from one another in the absence of a will. Namely, if a partner in a civil union was to die in Illinois intestate (without a will), 100 percent of the decedent's estate would automatically pass to the surviving partner or 50 percent if the decedent also had descendants.

Furthermore, in Illinois, married couples have been afforded tremendous asset protection with respect to their primary residence through ownership as tenants by the entirety (TBE). Pursuant to the act, partners in a civil union may also take title to their primary residence as TBE. Under TBE, one's home is deemed to be owned by a married couple (and now under the act a couple in a civil union) as a fused unit. Therefore, an individual creditor of either partner would be unable to reach the primary residence. Only a joint creditor of both partners would be able to reach the asset.

The DOMA ruling leaves questions regarding the extent to which the federal government recognizes civil unions. Thus, part-

### THE BUZZ



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ners in a civil union will not receive federal benefits. For married couples, upon the first spouse's death, the surviving spouse could make a marital election at the federal level and postpone having to pay estate tax until the surviving spouse's death.

Under the act in Illinois, a partner in a civil union can create a similar type of trust, which would qualify for the "marital deduction" at the state level, but would not be recognized at the federal level. Additionally, while married persons are allowed to gift unlimited amounts to one another, because civil unions are not recognized at the federal level, partners in a civil union are not afforded an unlimited gift exclusion.

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The Supreme Court's ruling has further impacted Illinois same-sex couples by helping to reconcile inconsistencies between federal law and Illinois law regarding hospital visitations and medical decisions. The Illinois act ensures that a partner in a civil union would be afforded hospital visitation rights and the right to make medical decisions for one another. And as now with federal law, a partner in a civil union will be entitled to survivor pension benefits on both the state and federal level.

Although substantial changes are being implemented to ensure equal rights for same-sex couples, partners entering into civil unions or marriages should be cautious. Most states continue to deny such recognition and it remains unclear whether other states would respect an Illinois civil union. Likewise, the Supreme Court did not address how the federal government should treat civil unions between same-sex couples.

However, Illinois same-sex couples who legally wed in other states will now be able to file joint taxes, receive Social Security survivor benefits and take advantage of other federal benefits afforded to traditional married couples. While the DOMA ruling and the act are significant steps toward establishing marriage equality, estate planning documents are still critical to ensure that one's wishes are respected.

At the very least, couples should have wills, powers of attorney for property and powers of attorney for health care. In addition, couples are encouraged to also execute revocable living trusts to help avoid probate and provide asset protection for beneficiaries.

*On Aug. 13 from 7 to 9 p.m., Lindsey Paige Markus will be a panel presenter on "Alternative Endings: Collaborative Options for Building Strong LGBT Families for Better or Worse," presented by the Center on Halsted and the Gay and Lesbian Chamber of Commerce. A special thanks to Chuhak & Tecson P.C. law clerk Lorien Schoenstedt for her contribution to this month's column.*