

WHAT IS DOMA AND HOW IT AFFECTS PENNSYLVANIA RESIDENTS

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The Defense of Marriage Act (“DOMA”) is a federal law, enacted in 1996, that has defined “marriage” as a legal union between opposite sex couples and has defined a “spouse” as a person of the opposite sex who is a husband or wife. Prior to 2013, marriages among individuals of the same sex have not been recognized by the federal government for purposes of eligibility for federal laws, benefits and programs. Such programs and benefits have included: insurance benefits for government employees, social security survivors' benefits, immigration, bankruptcy, and the filing of joint tax returns, among others.

However, in June 2013, the Supreme Court of the United States decided in the case of *U.S. v. Windsor*, that Section 3 of DOMA was unconstitutional under the Fifth Amendment of the U.S. Constitution. Section 3 defines marriage and delineates who is a spouse. With the decision in the *Windsor* case, there is a movement to treat same sex unions as “marriages” and afford all same sex couples, who are legally united, the same as heterosexual married couples.

The U.S. Department of Treasury and the IRS, following the Supreme Court decision in *Windsor*, announced in Rev. Ruling 2013-17, that same-sex couples, legally married in jurisdictions that recognize marriages of same sex couples, will be treated as married for all federal tax purposes. This includes filing status, exemptions and deductions, employee benefits, and IRA contributions. The ruling did distinguish between recognized same-sex marriages and civil unions, registered domestic partnerships and similar arrangements. To help answer questions regarding these different types of unions, the IRS has provided answers to frequently asked questions at <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Registered-Domestic-Partners-and-Individuals-in-Civil-Unions>. Under federal law, the U.S. government cannot discriminate against a same-sex couple in determining or applying federal benefits and programs. However, since the *Windsor* case did not strike down DOMA in its entirety, each state continues to be permitted to make its own determination of whether it will recognize same sex unions equally as heterosexual unions.

Pennsylvania law continues to identify marriage as a legal union between one man and one woman and accordingly does not recognize same sex marriages or unions among its residents, regardless of the jurisdiction where the couple may have been legally united. This affects the legal authority of a same sex couple to act on the other’s behalf to make health care decisions, inherit property, serve as a personal representative and many other aspects.

For example, Joanne and Mary are Pennsylvania residents. They obtained a marriage certificate in the Commonwealth of Massachusetts and legally were united in that jurisdiction where marriages between same sex individuals are recognized. Joanne and Mary return to Pennsylvania to reside. Since

Pennsylvania does not recognize Joanne and Mary as married individuals, regardless of the recognition of their marriage in Massachusetts, Joanne and Mary do not qualify for any state benefits and programs for “married” individuals. If one of them were sick or dying, without a health care power of attorney or living will, they could not make health care decisions as their health care representative, because Pennsylvania gives priority to children, parents, siblings and grandchildren if there is no legally recognized spouse. Pennsylvania’s failure to recognize same sex couples as married also has significant effects on Joanne’s and Mary’s right to inherit under Pennsylvania law. Without a will (or properly structured property ownership or beneficiary designations) Pennsylvania’s intestate laws would direct Joanne’s or Mary’s property, when they die, to their child, parent, sibling or more remote relative, rather than to their surviving spouse. Since Pennsylvania considers Joanne and Mary to be unmarried and unrelated, it is imperative that they have a will. Even with a will, Pennsylvania will tax their inheritance at 15%, rather than the zero tax rate for married individuals.

Taxation of gifts and estates between married same sex couples now differs under federal law. A same sex couple is now able to take advantage of the marital deduction. The marital deduction enables a spouse to transfer all or a portion of their property to the surviving spouse free of any federal estate tax. In addition, the federal law would permit a same sex married couple to elect portability. Portability, which has only been available since 2011, allows a married couple to combine their federal lifetime exemptions to transfer assets free of federal estate and gift tax up to a possible \$10.5 million dollars (this is the amount for 2013, and is indexed every year for inflation).

Pennsylvania Attorney General, Kathleen Kane, recently voiced her opposition to the state laws which treat married heterosexual couples differently than same-sex couples. She has indicated she will not defend against any actions on behalf of the Commonwealth that challenge the constitutionality of the definition of marriage. More interestingly, Bruce Hanes, the Montgomery County Register of Wills, further agrees that it is discriminatory to refuse to grant a marriage license to a same-sex couple who seeks to be legally united under the laws of the Commonwealth of Pennsylvania and, until recently, had been issuing marriage licenses to any couple, regardless of gender, who presented themselves to the Register’s office and met all other requirements. The issuance of marriage licenses to same sex couples in Montgomery County is currently curtailed pending actions in court, but it signals the progression of equality to same sex couples in Pennsylvania.

Until the Pennsylvania legislature re-defines marriage to include same sex couples or until the Federal legislature repeals DOMA, or the Pennsylvania Courts determine that it unconstitutional to discriminate between same sex and heterosexual couples, Pennsylvania residents are forced to comply with the current laws. Therefore, same sex couples can obtain marriages/civil unions in states which recognize same sex unions and they can hold themselves out as married in all respects, but if they reside in Pennsylvania they need to be aware that their estate and financial planning must take into consideration that their significant other is not their spouse under Pennsylvania law.

These differences between Pennsylvania and federal law complicate estate planning for same sex couples. More than ever, it is important to set out in written documents a couple’s intentions, and their understanding and expectation as to financial responsibility, division of finances and assets, and distribution of property upon death. Wills and powers of attorney are a necessity, but pre-nuptial agreements and trusts may also be recommended.

We would be happy to answer your questions and provide the necessary guidance to ensure that your interests are protected while the legal issues continue to be worked out.

	FEDERAL LAW	PENNSYLVANIA LAW
Individual Tax Returns and tax rates	married filing joint/ married filing separate/head of household	Individual
Death Tax/Marital Elections	<ul style="list-style-type: none"> • 0% rate on transfers to spouse • Portability election available • Qualified Terminable Property Election (QTIP) available 	<ul style="list-style-type: none"> • 15% rate on transfers • No QTIP election • No election to defer tax under 20 Pa.C.S.A 9113 for trust for spouse • No family exemption • No elective share available • No right to direct disposition of decedent's remains
Intestate (no will) succession	N/A	<ul style="list-style-type: none"> • No protection to same sex spouse to inherit property • No right to serve as administrator/administratrix
Beneficiary Designations	<ul style="list-style-type: none"> • ERISA covered plans – must name spouse or obtain waiver • IRAs- can name anyone 	<ul style="list-style-type: none"> • IRAs – can name anyone
Divorce	N/A	<ul style="list-style-type: none"> • No divorce available or protection for couples joined/married in another jurisdiction • No alimony
Social Security	Can receive spouse's benefits	N/A