

Estate Planning for Same-Sex Couples



Law Office of JANE FRANKEL SIMS LLC
Estates & Trusts

Same-Sex Marriage in Maryland

- n 1973: 1st state to ban same-sex marriage
- n 2006: Court of Appeals upholds ban on same-sex marriage
- n 2010: Att' y Gen: MD can recognize foreign same-sex marriages
- n 2012: Ct of Apps: MD must recognize foreign same-sex marriages
- n 2013: Same-sex marriage adopted after referendum

Same-Sex Marriage in DC and Virginia

- n DC -- same-sex marriages performed since 2009
 - domestic partnerships carry almost all the same benefits as marriage.
- n Virginia -- constitution bars same-sex marriage;
 - no domestic partnership law.

United States v. Windsor

June 26, 2013: Supreme Court struck down Section 3 of the Defense of Marriage Act (“DOMA”).

Same-sex marriages recognized for federal purposes

Affects federal taxes, Social Security and thousands of individual federal laws.



Tax benefits of marriage- Federal

Important Federal Benefits

- § Gifts - Unlimited gifts to spouse; ability to split gifts
- § Estate Tax – No tax on transfers to surviving spouse
- § Portability – Unused estate tax exemption passes to spouse
- § Joint Filing - Can file income tax returns jointly
- § Health Care Premium Tax - No income tax on health care premiums paid out of your paycheck for your spouse

Tax benefits of marriage - Maryland

Important Maryland Benefits

- § Estate Tax – No estate tax on transfers to surviving spouse.
- § Inheritance Tax - No 10% Inheritance Tax on bequests to same-sex spouses
- § Joint Filing – Can file income tax returns jointly
- § Health Care Premium Tax – No income tax on health care premiums paid out of your paycheck for your spouse

Tax *detriments* of marriage – Federal and Maryland

Marriage penalty – Two-income couples face higher income taxes if married than if unmarried.

Related party transactions – Some transactions are less advantageous when the parties are related (including married). Same-sex married couples could enjoy the benefits of these transactions before *Windsor*, but not after.

Must ALL States Allow Same-Sex Marriages?

Windsor did not require states to allow same-sex marriages to be performed.

But the *Windsor* reasoning has led federal courts to strike down bans on same-sex marriage in Michigan, Oklahoma, Texas, Virginia and Utah (all pending appeal).



What if we move to another state? Will our Maryland same-sex marriage be respected?

Under § 2 of DOMA (not challenged in *Windsor*) states can refuse to recognize same-sex marriages performed elsewhere

But the *Windsor* reasoning has led federal courts to require such marriages to be recognized in Illinois, Kentucky, Ohio, Tennessee, Texas, Utah and Virginia (all pending appeal or applicable only to specific plaintiffs).



Same-sex married couples moving to other states after *Windsor*

- § Non-Recognition States – If your new state does not allow same-sex marriages, that state probably will not recognize your marriage for tax (or any other) purpose.
- § Federal “State of Celebration” Rule Applies - If you got married in a state that recognizes same-sex marriage, the federal government will recognize that marriage, no matter where you live.
- § Result – In non-recognition states, you can to file your federal tax returns as a married couple, but not your state returns.

Always consider the impact of a move to a state that does not recognize same-sex marriages.

What if my partner and I do not wish to marry?

Answer: It's a pre-*Windsor* world

- § No joint filing at federal or state level
- § Employees may be taxed on partner benefits.
- § No unlimited gifting between you and your partner.
- § Estate tax applies to a bequest to your partner.
- § Maryland inheritance tax applies (except for a jointly-owned home with a domestic partnership affidavit).

Domestic partnership is not legally equivalent to marriage.

What strategies should all married couples be using in their estate plans?

It depends upon the value of assets includable in your estate.

What is includable in your estate?



The following assets are subject to estate tax:

Equity in your home

Life insurance proceeds

IRA/401k accounts

Bank/brokerage accounts

Closely held businesses

Tangible personal property



Federal Estate Tax Exemptions and Rates

<u>Year</u>	<u>Lifetime Exemption (includes certain gifts)</u>	<u>Tax Rate</u>
2014	\$5,340,000	40%

Maryland: An Additional Layer of Estate Tax

<u>Year</u>	<u>Federal Exemption</u>	<u>Maryland Exemption</u>	<u>Federal Tax Rate</u>	<u>Maryland Tax Rate</u>
2014	\$5,340,000	\$1,000,000	40%	16%

Maryland: An Additional Layer of Estate Tax

<u>Year</u>	<u>Federal Exemption</u>	<u>Maryland Exemption</u>	<u>Federal Tax Rate</u>	<u>Maryland Tax Rate</u>
2015	\$5,450,000?	\$1,500,000	40%	16%
2016	\$5,560,000?	\$2,000,000	40%	16%
2017	\$5,670,000?	\$2,500,000	40%	16%
2018	\$5,780,000?	\$3,000,000	40%	16%
2019	\$5,890,000?	\$5,890,000?	40%	16%

D.C.: An Additional Layer of Estate Tax

<u>Year</u>	<u>Federal Exemption</u>	<u>D.C. Exemption</u>	<u>Federal Tax Rate</u>	<u>D.C. Tax Rate</u>
2015	\$5,450,000?	\$1,000,000	40%	16%
2016	\$5,560,000?	\$1,000,000	40%	16%
2017	\$5,670,000?	\$1,000,000	40%	16%
2018	\$5,780,000?	\$1,000,000	40%	16%
2019	\$5,890,000?	\$1,000,000	40%	16%

Okay I know what is included, what benefits do
married couples receive?

The ability to defer the payment of estate tax until
the death of the surviving spouse using Bypass and
Disclaimer Trusts and Wills

§ Don't just leave it all to your spouse

§ Permit Segregation of Portion of Estate for Next
Generation in order to Minimize Estate Tax

§ Automatic Creation of Credit Shelter Trust or
Discretionary Creation of Disclaimer Trust

Important Documents for the Same-Sex Couple

1. Last Will and Testament
2. Beneficiary Designations
3. Revocable Trusts
4. Affidavit of Domestic Partnership (if unmarried)
5. Advance Directive
6. Durable Power of Attorney
7. Maryland Statutory Power of Attorney
8. Life Insurance Trusts



Last Will and Testament

Your Will controls distribution of your property at death.

But your legal heirs can challenge a Will.

If a family member may be hostile to your relationship, try:

Clear statement of intentions

In terrorem clauses

Pour-over Will with Revocable Trust

Restate beneficiary designations in Will to confirm

Refer to any domestic partnership status in Will

Beneficiary Designations

Beneficiary designations are used to transfer bank accounts, life insurance proceeds and retirement accounts directly to the beneficiary upon the account owner's death without the publicity of probate or the expense of a revocable trust.

These transfers are subject to estate tax, but are not subject to probate.



Revocable Trusts

Revocable Trusts avoid probate, which is lengthy and costly.

Revocable Trusts protect the privacy of your estate plan.

If the Revocable Trust is funded during lifetime, it is much harder for anyone to challenge its validity.

The grantor retains complete control during his/her lifetime.



Affidavit of Domestic Partnership

In Maryland, filing an Affidavit of Domestic Partnership avoids inheritance tax on a jointly-held personal residence that passes from one partner to the other upon death.

Can be filed by any couple (not necessary if married).

Requires 2 pieces of proof that the couple are sharing assets.

Jointly-held means joint tenants with right of survivorship.

Advance Directive

Allows you to designate a decision maker for your health care issues.

Can specifically grant visitation rights to a partner and the power to control other visitors.

Gives you a place to express your wishes with regard to life-sustaining measures.



Durable Financial Power of Attorney

A durable power of attorney allows your agent to manage your finances if you become incapacitated.

This document can allow your agent to do estate planning on your behalf:

- § Gifting
- § Creation of Trusts
- § Exercise of Powers of Appointment



Maryland Statutory Personal Financial Power of Attorney

- § Form was approved by Maryland Legislature.
- § Limited in scope.
- § If a financial institution refuses to accept the statutory form, the agent can sue the institution, which will have to pay the legal fees.
- § More likely to be honored in Maryland.

Life Insurance Trusts

- § Insurance provides liquidity for survivor's expenses and to pay estate taxes.
- § Policies held in an Irrevocable Life Insurance Trust are shielded from federal and state estate tax.
- § Inheritance tax does not apply to most insurance.

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