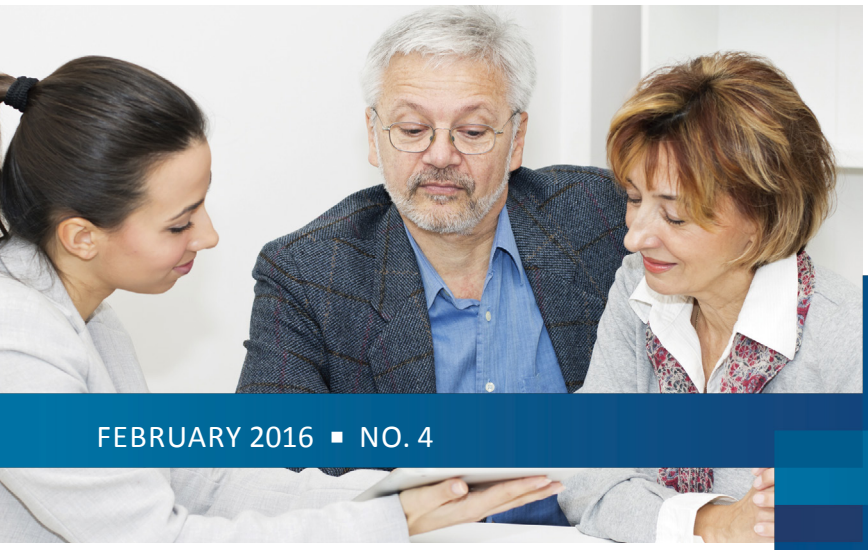

BLANK ROME LLP
COUNSELORS AT LAW

FEBRUARY 2016 ■ NO. 4

Private Client

Annual Estate Planning Newsletter: Part Four

Action Item: This is the fourth installment of our Annual Estate Planning Newsletter, and focuses on matters of interest to married couples. We urge you to review this installment to ensure that your 2016 estate and tax planning is in order.

1. **Same-sex Marriages.** On June 27, 2013, in *United States v. Windsor,* the United States Supreme Court held that Section 3 of the Defense of Marriage Act ("DOMA") is unconstitutional. The case arose in connection with a New York statute that recognized same-sex marriages. The IRS denied the deceased Ms. Windsor's estate the right to claim a marital deduction on the basis that under DOMA, the surviving Ms. Windsor did not qualify as a surviving spouse. Section 3 of DOMA provides that for purposes of determining the meaning of any act of Congress, "marriage" means only a legal union between one man and one woman as husband and wife, and "spouse" refers only to a person of the opposite sex who is a husband or a wife. The import of this provision was that even if a state permitted same-sex marriage, the federal government nevertheless would not recognize it for purposes of any of its laws. The U.S. Supreme Court held that the definition of marriage in Section 3 of DOMA violated the Due Process Clause of the Fifth Amendment to the United States Constitution as a deprivation of an essential part of the liberty protected under that amendment.

On June 26, 2015, in *Obergefell v. Hodges,* the United States Supreme Court held that the right to marry is guaranteed to same-sex couples by both the "Due Process" and "Equal Protection" clauses of the United States Constitution.

These two cases may significantly impact an estate plan and may have important income tax (as well as marital dissolution and property settlement) consequences. Below is a list of some of the consequences of these cases, many of which may be retroactive (same-sex married couples may amend previously filed income tax returns for tax years for which the statute of limitations has not run).

- The availability of the marital deduction for both gift and estate taxes, including the ability to transmute separate property of one spouse to community property (or vice versa) without negative gift tax consequences.
- The treatment of retirement benefits and the availability of the spousal rollover IRA.
- The opportunity to file one joint income tax return or two separate returns as married filing separately.

- Both spouses may use the gift, estate, and GST tax exemptions, tax advantages of "split gifts" for gift tax purposes, and the ability to use portability.
- Increased health care access and rights.
- Increased opportunities for international estate planning and citizenship.

2. **Community Property v. Joint Tenancy or Tenancy by the Entirety.** For income tax purposes, both "halves" of appreciated community property receive a "step-up" in basis upon the death of either spouse. Because only one-half of the basis of property held in joint tenancy or tenancy by the entirety receives a basis "step-up" at the death of the first spouse, spouses may wish to consider holding legal title to *appreciated assets owned jointly and not held in a revocable living trust as "community property" rather than as "joint tenants" or "tenants by the entirety."* California now recognizes "community property with right of survivorship" as a form of legal title for real estate.

3. **Marital Deduction; Noncitizen Spouse.** The vast majority of married couples combine the estate tax "exemption" granted to each person with the unlimited marital deduction to assure that no estate taxes are payable until the death of the surviving spouse. The unlimited marital deduction generally is available for gifts and bequests to spouses; those gifts and bequests can be outright transfers or can be made via trusts (although not all types of trusts will qualify for the marital deduction). Severe restrictions, however, are imposed on the ability to defer estate taxes if the surviving spouse is not a U.S. citizen (the surviving spouse's residence is not a factor). Under these rules, property passing to a noncitizen surviving spouse must be held in a special type of trust (a "qualified domestic trust") in order to qualify for the marital deduction. In addition, although gift taxes on gifts to noncitizen spouses generally cannot be deferred via the marital deduction, in 2016 you may make "annual exclusion" gifts of a maximum of $148,000 (rather than $14,000) to your noncitizen spouse (subject to annual inflation adjustments). Portability is not available if either spouse is a nonresident alien. You should review your estate plan now if either spouse is not a U.S. citizen.

4. **Regulatory Notice.** We are providing this letter and the enclosure as a commentary on current legal issues as a service to our clients and friends; neither should be considered legal advice, which depends on the unique facts of each situation. Receipt of this letter and the enclosure does not establish an attorney-client relationship.

* * *

The attorneys in Blank Rome's Private Client group have extensive experience in implementing cutting-edge estate planning techniques to take advantage of these unique opportunities and challenges. Please contact us to assist you in reviewing and updating your estate plan.

For additional information, please contact a member of Blank Rome's private client group:

William Finestone
424.239.3868 | WFinestone@BlankRome.com

Lawrence S. Chane
215.569.5721 | Chane@BlankRome.com

Andrew J. Haas
215.569.5479 | Haas-A@BlankRome.com

John S. Kiely
212.885.5240 | JKiely@BlankRome.com

Jonathan H. Lander
215.569.5563 | JLander@BlankRome.com

Michael I. Sanders
202.772.5808 | Sanders@BlankRome.com

Peter C. Valente
212.885.5320 | PValente@BlankRome.com

David M. Warren
212.885.5235 | DWarren@BlankRome.com

Susan Peckett Witkin
212.885.5190 | SWitkin@BlankRome.com