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# REPORT BY THE COMMITTEE ON ESTATE AND GIFT TAXATION

# MEMORANDUM IN SUPPORT OF MARRIAGE EQUALITY

The Estate and Gift Taxation Committee supports the efforts of the New York City Bar Association (the "Association")[1] and the more than 20 other bar association groups across the state[2] that have advocated for the basic civil right of same-sex couples to marry in New York. Although the issue of the constitutionality of the denial to same-sex couples of the right to marry in New York is not directly within the purview of the Estate and Gift Taxation Committee, this committee is uniquely positioned to comment on the discriminatory effects of current law on same-sex couples in the area of transfer taxation (i.e., estate, gift, and generation-skipping transfer taxes). While the lack of marriage equality under current New York law impacts approximately 1,324 legal rights and responsibilities of same-sex couples,[3] in this memorandum we focus on two basic aspects of New York transfer taxation.

## NEW YORK ESTATE TAX MARITAL DEDUCTION

New York estate tax law grants a married individual the ability to shelter from immediate estate taxation transfers of assets to a surviving U.S.-citizen spouse by providing an unlimited marital deduction, which effectively defers estate tax liability on assets passing to the surviving spouse until his or her subsequent death.[4] Although New York state employees and residents of certain counties and cities (including New York City) may register as domestic partners,[5] no marital

[1] The Association's support for recognition of civil marriage for same-sex couples has been consistent over the past decade. See *Report of the New York City Bar Association: Why Should New York Support Marriage Equality for Same-Sex Couples?* (May 2011), authored by the Association's Committees on Lesbian, Gay, Bisexual & Transgender Rights and Sex & Law and cosigned by 17 other committees of the Association, *available at* http://www2.nycbar.org/pdf/report/uploads/MarriageEqualityupdatedreportFINAL4.28.11.pdf (last visited May 24, 2011).

[2] *See* New York City Bar, *44th Street Notes*, May, 23, 2011, City Bar in the News, quoting Reuters, May 17, 2011, *New York Bar Groups Endorse Same-Sex Marriage Bill.*

[3] *See* Empire State Pride Agenda Found. & the Association, *1,324 Reasons for Marriage Equality in New York State* (June 12, 2007), *available at* http://www.nycbar.org/pdf/report/marriage_v7d21.pdf (last visited May 24, 2011).

[4] *See* N.Y. Tax Law § 961(a), which mandates that federal rules regarding estate tax inclusion and deduction will apply to the calculation of estate tax under New York law.

[5] *See, e.g.*, Governor's Office of Employee Relations, Domestic Partner Health Insurance Eligibility, *available at* http://www.goer.state.ny.us/Labor_Relations/Contracts/Current/uuppsnu/08app25.cfm (last visited May 24, 2011); Office of the City Clerk of the City of New York, *Domestic Partnership Registration, available at* http://www.cityclerk.nyc.gov/html/marriage/domestic_partnership_reg.shtml#intro (last visited May 24, 2011).

deduction (and no tax deferral) is allowed for assets passing to a domestic partner.[6] Although New York law recognizes marriages of same-sex couples legally solemnized in certain sister states and foreign jurisdictions,[7] no marital deduction (and no tax deferral) is allowed for assets passing to the surviving spouse of a legally married same-sex couple resident in New York.[8] (Since New York does not currently impose a gift tax on lifetime gratuitous transfers,[9] the lack of a New York gift tax marital deduction is not at issue.) This is because, for purposes of the New York estate tax, New York law simply follows federal determinations with regard to all estate tax credits and deductions, including the estate tax marital deduction.[10] Pursuant to the federal Defense of Marriage Act ("DOMA"),[11] current federal law refuses to recognize the marital status of same-sex couples, even when those couples have been legally married in states or foreign jurisdictions solemnizing such marriages. Since no federal estate tax marital deduction is available to same-sex married couples, no New York estate tax marital deduction would be available, either.

## NEW YORK GENERATION-SKIPPING TRANSFER ("GST") TAX

New York imposes a GST tax on taxable distributions and taxable terminations from a trust to a skip person, if the trust includes New York property.[12] The distribution or termination has to occur at the same time as, and as a result of, the death of an individual.[13] The definition of "skip person" includes an individual two or more generations below the original transferor's generation (e.g., a grandchild or great-grandchild).[14] The spouse of the original transferor is considered of the same generation as the transferor, irrespective of the difference in age between them.[15] If the transferor and transferee are not married, however, generation assignment is based on their relative ages: any individual who is between 12½ and 37½ years younger than the

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[6] *See* N.Y. Tax Law § 961(a).

[7] *Martinez v. County of Monroe*, 50 A.D.3d 189, 850 N.Y.S.2d 740 (4th Dep't 2008) (requiring recognition of valid out-of-state same-sex marriages); *see* Memorandum from David Nocenti, Counsel to the Governor, N.Y. State, to All Agency Counsel, New York State (May 14, 2008) (directing all state agencies, in light of *Martinez*, to review their operations to ensure that their agencies extend respect to valid out-of-state same-sex marriages to the fullest extent permitted by law), *available at* http://data.lambdalegal.org/in-court/downloads/exec_ny_20080514_martinez-decision-on-same-sex-marriages.pdf (last visited May 24, 2011).

[8] *See* N.Y. Tax Law § 961(a).

[9] The New York State gift tax was repealed for gifts made on or after Jan. 1, 2000, by Chapter 389 of the 1997 Laws. *See* N.Y. State Department of Taxation & Finance, 1997 Amendments to Estate & Gift Taxes (Art. 26 and 26A of the Tax Law), *available at* http://www.tax.ny.gov/pdf/memos/estate_&_gift/m97_8m.pdf (last visited May 24, 2011).

[10] N.Y. Tax L. § 961(a).

[11] P.L. 104-199, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C.

[12] *See* N.Y. Tax L. Art. 26-B.

[13] *Id.*

[14] N.Y. Tax L. § 1025, citing I.R.C. § 2613(a).

[15] N.Y. Tax L. § 1025, citing I.R.C. § 2651(c).

original transferor is considered to be in the first generation below that of the transferor, and there is a new generation every 25 years thereafter.[16] In construing the New York GST tax laws, federal definitions of marriage apply.[17] In practice, the disparate treatment of married and unmarried individuals means that if there is a difference of over 37½ years between same-sex spouses, and the older spouse transfers assets in trust to the younger spouse, such transfer may eventually result in application of the New York GST tax, since such a couple would not be considered married for purposes of the federal, and consequently of the New York, GST tax. In the case of opposite-sex married individuals, on the other hand, all such transfers would be free of federal, and consequently of New York, GST tax, inasmuch as the spouses would be deemed in the same generation, regardless of age differential.

**FEDERAL TRANSFER TAX IMPLICATIONS**

Section 3 of DOMA defines "marriage" for federal purposes as "only a legal union between one man and one woman as husband and wife" and defines "spouse" as "a person of the opposite sex who is a husband or a wife."[18]

Challenges to Section 3 of DOMA are currently pending in the United States District Court for the Southern District of New York (*Windsor v. United States*[19]) and in the United States District Court for the District of Connecticut (*Pedersen v. Office of Personnel Management*[20]). In *Windsor,* Edith S. Windsor, a resident of New York City who was legally married to Thea C. Spyer in Canada (a marriage legally recognized in New York), paid more than $363,000 in federal estate tax[21] on her inheritances from Spyer's estate notwithstanding that, but for DOMA, no tax would have been due. Windsor, as executor of Spyer's estate, has sued to recover the federal estate tax that she was forced to pay, alleging that DOMA violates the Constitutional guarantee of equal protection under the law. Ordinarily, the determination of whether a couple is validly married for purposes of applying the federal estate tax marital deduction depends on whether the couple is considered legally married under the state law of their domicile.[22] In *Pedersen*, plaintiff challenges the constitutionality of Section 3 of DOMA based on the equal protection component of the Fifth Amendment and the federal government's historic deference to state law definitions of marriage. On February 23, 2011, U.S. Attorney General Eric Holder indicated that the Obama administration would no longer defend the constitutionality of Section 3 of DOMA and that classifications based on sexual orientation, including those with regard to the marital status of same-sex couples, should be subjected to a heightened standard of scrutiny,

[16] N.Y. Tax L. § 1025, citing I.R.C. § 2651(d).

[17] See N.Y. Tax L. § 1025, which provides that I.R.C. § 2651, which provides that different generation assignments, depending on marital status, apply for purposes of the GST tax.

[18] P.L. 104-199, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C.

[19] No. 10 CV 8435 (S.D.N.Y. filed Nov. 9, 2010).

[20] No. 3:2010cv01750 (D. Conn. filed Nov. 9, 2010).

[21] Complaint at 18-19, *Windsor v. United States*, No. 10 CV 8435 (S.D.N.Y. Nov. 9, 2010).

[22] C*f., e.g., Eccles v. Comm'r*, 19 T.C. 1049 (1953), *aff'd mem.*, 208 F.2d 796 (4th Cir.); Rev. Rul. 58-66, 1958-1 C.B. 60; Rev. Rul 29, 1953-1 C.B. 67.

given that lesbians and gays constitute a minority group with a documented history of discrimination.[23]

In light of Attorney General Holder's February 23, 2011, statements and the current court challenges to Section 3 of DOMA, it is possible that Section 3 of DOMA will be held unconstitutional, in which case an individual state's decision as to whether a resident of such state is legally married could be binding on the federal government. In such a case, New York's granting to same-sex couples of the right to marry could provide to such couples treatment equal to that of opposite-sex married couples, not only with regard to New York estate and GST taxes but with regard to federal estate, gift, and GST taxes as well.

**CONCLUSION**

We do not address here the contention that civil unions could be a valid alternative to civil marriage, other than to declare our agreement with the persuasive arguments to the contrary advanced by the Association in the *Report of the New York City Bar Association: Why Should New York Support Marriage Equality for Same-Sex Couples?* issued in April. In the words of that report, "[c]ivil unions enshrine second-class status in the law, and are not an adequate substitute for the status and rights conferred by marriage" inasmuch as they "would not provide the widely-recognized legal status conferred upon married individuals by the federal government and other states."[24]

The lack of marriage equality in New York (both the inability of same-sex couples to marry and the lack of recognition for tax purposes of valid marriages of same-sex couples solemnized elsewhere) causes gross inequities in the imposition of transfer taxes in New York. While recognizing the right of same sex couples to marry in New York might not in and of itself remove such inequities, it would pave the way for concomitant revisions in or constructions of the New York tax laws that would provide for greater tax fairness and equal protection under the law.

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[23] Letter from Eric Holder, U.S. Attorney General, to Hon. John A. Boehner re: Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html (last visited May 26, 2011); United States Department of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-222.html (last visited May 26, 2011).

[24] *Report of the New York City Bar Association: Why Should New York Support Marriage Equality for Same-Sex Couples?*, *supra* n. 1, at 6.