

June 6, 2014

To Our Clients and Other Friends:

As most of you are aware, the Honorable John E. Jones, III, United States Federal District Judge for the Middle District of Pennsylvania, issued an opinion on May 20, 2014, in the case of *Whitewood, et al. v. Wolf, et al.* (a copy of the opinion is available [here](#)).

The issue in the case was the constitutionality of two provisions of Pennsylvania's Domestic Relations Code that limit marriage in Pennsylvania to opposite-sex couples and prohibit the recognition of same-sex marriages legally entered into in other jurisdictions (more specifically, [23 Pa. C.S. 1102](#) and [23 Pa. C.S. 1704](#), collectively, the "Marriage Laws"). The Court held that the Marriage Laws are unconstitutional under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and entered an order permanently preventing the enforcement of the Marriage Laws.

On May 21, 2014, Pennsylvania Governor Tom Corbett announced that he will not appeal the *Whitewood* decision on behalf of the Commonwealth. As a result, Pennsylvania has become the nineteenth state in the United States, along with the District of Columbia, to recognize same-sex marriages, both those celebrated in Pennsylvania and those celebrated elsewhere where same-sex marriages are permitted by state law.

Despite the holding in *Whitewood*, we cannot say with certainty that the law has changed permanently. Across the country, several courts have struck down similar same-sex marriage bans, and in at least seven states, those decisions are being appealed. It is likely that one of these cases will be heard on appeal by the United States Supreme Court. Although it is unlikely given the high Court's opinions in recent years, it is possible that the Supreme Court may rule that these states' same-sex marriage bans are constitutional, which could reinstitute the Pennsylvania Marriage Laws struck down in *Whitewood*.

While the decision in *Whitewood* may or may not affect you and your planning, we feel it is important to bring to the attention of all of you a number of consequences of the *Whitewood* decision, and of the similar decisions in other states.

Same-Sex Marriage under Federal Law

Most of you will recall that on June 26, 2013, in [Windsor v. United States](#), the United States Supreme Court struck down Section 3 of the Defense of Marriage Act ("DOMA"), a 1996

federal law that effectively barred same-sex married couples from receiving federal marriage benefits. *Windsor* was a federal estate tax case commenced by Edith Windsor, the surviving spouse of Thea Spyer, who died a resident of New York. Thea's estate paid \$363,053 in federal estate tax following Thea's death because transfers to Edith, as the surviving spouse, did not qualify for the unlimited marital deduction for federal estate tax purposes.

As a result of the decision in *Windsor*, most federal agencies, including the Internal Revenue Service under [Revenue Ruling 2013-17](#), announced that same-sex marriages would be recognized for federal tax and non-tax purposes based on the law of the state where the couple was married, and not the law of the state where the couple lived. In other words, if a couple residing in Pennsylvania was married in a state recognizing same-sex marriages, such as New York, then for federal purposes, the marriage would be recognized as a legal marriage. In the estate planning context, this means that same-sex spouses can make transfers to each other during lifetime and at death in unlimited amounts without paying federal estate and gift tax, so long as the spouse is a U.S. citizen. Prior to the holding in *Windsor*, federal estate and gift tax may have been imposed on such transfers at a rate of up to 40%. *Windsor* did not directly address the validity of same-sex marriages for state purposes.

Same-Sex Marriage under Pennsylvania Law

The decision in *Whitewood* extends to same-sex couples who marry in Pennsylvania, or who marry in a state that legally recognizes same-sex marriages, the many benefits afforded to married individuals in the Commonwealth, including the following:

Pennsylvania Inheritance Tax. Pennsylvania imposes a tax on inheritances at various rates depending on the relationship between the decedent and the beneficiary. Property passing to a spouse is taxed at 0%. Prior to the holding in *Whitewood*, property passing to a same-sex spouse was taxed at 15%, the rate applicable to unrelated, non-spouse individuals.

Inheritance Rights. Under the Pennsylvania intestacy laws (the laws that apply to an individual who dies without a will), surviving spouses have certain inheritance rights, and are a presumed (and favored) heir. The exact rights vary depending on whether or not the deceased individual is survived by any issue or parents (in which case the surviving spouse and the issue or parents share the estate in certain proportions).

Elective Share Rights. When a married person domiciled in Pennsylvania dies leaving a will, the surviving spouse has the right to elect against the will to receive a statutory minimum share of the decedent's estate. This so-called elective share is equal to approximately one-third of the decedent's estate. Prior to the holding in *Whitewood*, a same-sex surviving spouse had no elective share rights, and so one same sex spouse could disinherit the other.

Property Rights. Married persons may own real property as tenants by the entireties, a special form of ownership that carries certain asset protection benefits. Prior to the holding in *Whitewood*, joint ownership between same-sex married persons was limited to tenants in common or joint tenants with rights of survivorship, neither of which offer heightened creditor protection.

Rights as Fiduciary. If an individual does not name an executor of his or her estate under a will, the surviving spouse has priority to serve as administrator of the estate. In addition, a spouse has priority to serve as health care representative for his or her spouse if the spouse has not otherwise named a health care agent.

Domestic Relations Laws. The Pennsylvania Domestic Relations Code applies to the rights and responsibilities of spouses generally, including marriage, divorce, parental rights and duties, and adoption. As a result of the decision in *Whitewood*, the rights and responsibilities applicable to married individuals will be extended to same-sex married individuals.

Evaluating Your Estate Plan

Many of our clients make provisions in their wills in favor of the “spouse” of a child or of another descendant. For example, clients may make outright bequests to such individuals, or, in the more likely case, give their children and other descendants the right to appoint income and/or principal of a trust to the child’s or descendant’s “spouse.” Sometimes the term “spouse” is defined in gender-specific terms, such as “widow” or “wife,” or “widower” or “husband.” It is unclear how a court will interpret gender-specific language in light of *Whitewood*. In many cases, it may make sense for clients to address specifically whether or not they wish to include same-sex spouses as beneficiaries or possible beneficiaries.

In addition, our clients who have entered into same-sex marriages, or are contemplating marriage, may wish to:

- Engage in spousal planning, including the consideration of prenuptial and postnuptial marital agreements.
- Review their estate plans. Even though both federal and Pennsylvania law now permit assets to pass at death without estate or inheritance tax from the deceased spouse to the surviving spouse, or in certain types of trusts for the benefit of the surviving spouse, this only applies if the form of gift otherwise qualifies for the marital deduction under federal and Pennsylvania tax law. For example, generally speaking, a trust for the benefit of a surviving spouse only qualifies for the marital deduction if the surviving spouse is the sole beneficiary of the trust during the surviving spouse’s lifetime, and, for federal purposes, receives all of the trust income. When no marital deduction was available it often made sense for same-sex couples to have estate plans that included trusts with other beneficiaries. Such estate plans need to be reviewed.
- Review the titling of financial and other assets to determine whether a form of joint ownership may be appropriate. In some cases even if an asset was titled in both spouses’ names before marriage it may be beneficial to retitle the asset after marriage as joint tenants by the entireties. For example, an asset owned by a couple “A and B” prior to marriage is owned 50% by each and at death does not pass automatically to the survivor. This does not change just because A and B marry, but only if the asset is retitled.

- Review the beneficiary designations applicable to non-probate assets, such as retirement assets and life insurance, to determine whether any changes are necessary. For example, federal law gives a surviving spouse certain rights in the 401(k) plan of his or her deceased spouse, and if the goal is to leave that asset at death to a third party a spousal waiver must be signed.

The holding in *Whitewood* also may affect the rights of non-Pennsylvania residents with assets located in Pennsylvania. For example, out-of-state clients with real estate located in Pennsylvania may wish to review their estate plans in light of these changes.

If you feel that your situation needs to be reevaluated in light of the major changes to Pennsylvania and federal law, please contact your HTT&S lawyer.

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