

Same-Sex Marriage Legalized in New York: Implications for Estate and Tax Planning

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New York recently became the seventh jurisdiction in the nation to permit same-sex marriages, which will have a significant impact on tax and estate planning for New York residents who are parties to same-sex marriages.

On June 24, 2011, New York joined Connecticut, Iowa, Massachusetts, New Hampshire, Vermont and Washington, D.C., to become the seventh jurisdiction in the nation to permit same-sex marriages. The Marriage Equality Act, which went into effect on July 24, 2011, will have a significant impact on tax and estate planning for New York residents who are parties to same-sex marriages.

Section 3 of the act provides that a marriage is valid regardless of whether the parties to the marriage are of the same or different sex. Because New York courts had already required recognition of same-sex marriages that were valid where contracted, this statutory declaration may have more symbolic than practical importance. More significant is Section 4 of the act, which prohibits the denial of an application for a marriage license on the grounds that the applicants are of the same or different sex. This means that same-sex marriages can now take place within New York State.

For estate planning and taxation purposes, the act's significance to individuals who are parties to same-sex marriages will likely be its impact on a wide variety of New York laws that treat individuals differently based on marital status. Section 3 states:

No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex.

The statement of legislative intent in Section 2 of the act, makes this point even clearer:

It is the intent of the legislature that the marriages of same-sex and different-sex couples be treated equally in all respects under the law. The omission from this act of changes to other provisions in the law shall not be construed as a legislative intent to preserve any legal distinction between same-sex couples and different-sex couples with respect to marriage. The legislature intends that all provisions of law which utilize gender-specific terms in reference

to the parties to a marriage, or which in any other way may be inconsistent with this act, be construed in a gender-neutral manner or in any way necessary to effectuate the intent of this act.

New York Estates

Estate Planning

New York's Estates, Powers and Trusts Law contains a number of provisions that give special rights to surviving spouses. For example, if an individual dies without a will, his or her surviving spouse is entitled to receive the deceased spouse's entire estate if there are no surviving issue or \$50,000 and one-half of the remaining estate if there are surviving issue. A surviving spouse has the right to elect to take one-third of the assets of his or her deceased spouse regardless of what the provisions of the deceased spouse's estate plan provide.

Before the Marriage Equality Act, there was some judicial precedent for extending the benefits of these provisions to the surviving spouses of same-sex marriages. The act provides a statutory basis for this extension.

Same-sex couples living in New York who are contemplating marriage and who believe that these special rights are not appropriate for them now need to give the same consideration to the possibility of waiving them in prenuptial agreements that different-sex couples do.

New York Taxation

The application of the New York tax rules to same-sex married couples is complicated by the role that the federal tax laws play in New York's tax system. For most income and estate tax purposes, New York tax law follows federal tax law. Under the Defense of Marriage Act (DOMA), the federal law provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

Income Tax

New York law requires that a "husband or wife" file state tax returns in the same manner as they file their federal returns. Federal non-recognition of same-sex marriage prohibits same-sex couples from filing federal joint returns. This could mean that individuals in same-sex marriages would be required to file state tax returns separately and to

calculate their taxable incomes as if they were unmarried. Such a requirement, however, would be inconsistent with the legislative purpose of the act.

The New York State Department of Taxation and Finance has acted quickly to resolve this inconsistency. On July 29, 2011 the Department announced that same-sex married couples must file New York personal income tax returns as married individuals even though they were required to file separate federal returns.

This resolution provides various New York income tax benefits to same-sex couples. These benefits include: pooling and splitting income, as well as deductions, potentially saving the higher-earning spouse from entering a higher tax bracket and allowing one spouse's deductions to offset the income of the other; lower tax rates for some married couples, depending on how much income is earned by each; and deductions that are available only to married individuals who file a joint return.

Married same-sex couples will also be able to enjoy the same [employment related income tax benefits](#) that different-sex married couples enjoy. If an employer offers domestic partner insurance, the employee, although required to include the value of those benefits in his or her federal gross income, will be able to exclude the benefits from his or her New York gross income.

Estate Tax

New York's estate tax is also based on federal tax principles. A New York decedent's taxable estate is the same as his or her federal taxable estate. The federal estate tax law permits a decedent's estate to deduct from the value of his or her taxable estate the entire value of the property given to his or her spouse so long as that spouse is a U.S. citizen. In addition, the estate is permitted to exclude from the value of the gross estate 50 percent of the value of property held jointly with his or her spouse. Federal non-recognition of same-sex marriages denies these benefits to the estate of a decedent who was a party to a same-sex marriage.

Federal nonrecognition could have meant that such estates would also lose these benefits for purposes of calculating their New York estate taxes. Because the federal estate tax is currently imposed only on estates worth more than \$5 million and the New York estate tax is imposed on estates with values greater than \$1 million, the loss of New York estate tax benefits would likely have had a far greater impact on most same-sex couples than the loss of the federal benefits.

A literal application of the rule requiring the federal taxable estate to be the starting point for the New York taxable estate would be inconsistent with the legislative purpose of the act to the extent that it resulted in disallowance of the marital deduction to same-sex married couples. The July 29th announcement by the New York State Department of

Taxation and Finance has resolved this inconsistency. It requires that the estate of a New York decedent who was a party to a same-sex marriage compute its taxable estate in the same way as a married individual even though it is not permitted to file its federal return as the estate of a married individual.

Federal Gift, Income and Estate Tax

Because DOMA prevents treating same-sex married couples as married for purposes of any federal law, married same-sex couples will continue to be treated as separate units for federal income taxation purposes, and will not enjoy spousal rights and privileges under federal estate tax laws. In addition, they will not be able to avail themselves of gift-tax benefits afforded to married individuals, such as gift splitting, which enables a married individual to double the amount of their tax-exempt gifts (\$13,000 for individuals versus \$26,000 for married couples), and unlimited gift-tax free transfers between spouses when the recipient spouse is a U.S. citizen. They will also benefit from some of the provisions in the federal tax law that work to the advantage of some unmarried taxpayers.

President Obama's announcement last February that his administration would no longer defend the constitutionality of DOMA as well as the recent introduction of a Congressional bill to repeal DOMA suggests that DOMA may have limited viability. A judicial or legislative repeal of DOMA would give New York same-sex married couples the same privileges under the federal tax laws that are allowed to different-sex married couples.

**Caitlin Gunther, summer associate, also contributed to this article.*

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