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Same Sex Marriage in Illinois estate planning implications

On November 20th, Illinois Governor Pat Quinn will sign legislation making Illinois the 16th state to recognize same-sex marriages and county clerks will begin issuing marriage licenses to same sex couples June 1, 2014. From a benefits and estate planning perspective, the implications are huge for same-sex couples that have otherwise been left without many of the benefits enjoyed by opposite-sex married couples.

A little background is in order on how Illinois even got to this point. In 1996, then-President Bill Clinton signed into law the Defense of Marriage Act, which, among other things, defined marriage as between a man and a woman. This move ensured that only opposite-sex married couples would be afforded numerous protections offered by the federal government. These included survivor social security benefits, certain immigration protections for binational couples, access to military spousal benefits, insurance and protection plans for federal employee's spouses, and a plethora of tax benefits. At the state level, any form of formal recognition of a same-sex relationship was non-existent, and similar types of protections remained inaccessible to same-sex couples.

Fast forward 14 years to 2010. At that time, Illinois Governor Pat Quinn signed the Illinois Religious Freedom Protection and Civil Union Act which began to open the door for same-sex couples to receive some form of formal recognition of their committed relationships as well as a host of new benefits previously unavailable to them. These included expanded presumptions of jointly owned property, rights to make decisions about a partner's medical care in the event he or she was otherwise unable to make those decisions, expansion of workers' compensation benefits for partners, pension protections for surviving partners of state employees and modification of intestacy laws which permitted a surviving spouse at least some entitlement in a deceased partner's estate.

This past June, in *US v. Windsor*, the US Supreme Court invalidated section 3 of the Defense of Marriage Act, effectively opening the door for the federal government to recognize same-sex marriages that were legally entered in states permitting homosexual couples to marry. With the law declared unconstitutional and the government's subsequent refusal to enforce its mandates, same-sex couples could (in theory) receive the same federal benefits as heterosexual married couples. However; same-sex couples could only be afforded the protections federal law gave to heterosexual married couples if they were legally married. The implication of this revelation was that ruling DOMA unconstitutional did very little in the way of actually granting benefits to same-sex couples residing in states that did not recognize same-sex marriage. This included Illinois.

With Illinois' legalization of same-sex marriage will come access to the host of federal and state protections which otherwise were unavailable. From an estate planning perspective, this is a substantial departure from the status quo. Here are four areas where same-sex couples can now benefit.

Unlimited gift-tax exemption to spouses

Under the Internal Revenue Code, spouses have the ability to make unlimited gifts to each other without incurring any gift tax. Conversely, non-spouses, including same-sex couples in valid civil unions incur gift tax liability for gifts to each other in excess of \$14,000 per year. Same-sex married couples in Illinois will now receive the same federal gift tax benefit afforded to heterosexual married couples.

Portability of estate tax exemption

Portability refers to the ability of a surviving spouse to use the federal estate tax exemption amount of deceased spouse.

For example, say Husband and Wife have \$6 million in total assets and their individual wills transferred all assets to the surviving spouse. If Husband dies in 2013, Wife would inherit all of his assets without incurring any federal estate taxes (due to the ability of spouses to transfer unlimited assets to each other tax free). At this point all is well and good. However, without portability, Husband's estate tax exclusion has now been wasted. When Wife dies a year later, her \$6 million estate will be subject to estate tax since she is only permitted to exempt the first \$5 million of value from tax. This means that, without portability, Wife's estate would pay estate taxes at a rate of 45% on \$1 million- Enter sad beneficiaries.

But, look at the same example with portability. When Husband dies in 2013, all of his assets pass to Wife tax free just like the first example. However, now, portability will allow Wife to carry over Husband's exemption amount and preserve it. When Wife dies in 2014 not only can she use her exclusion but she can use Husband's unused exclusion as well (for a total exclusion amount of \$10 million) enabling her to pass the entire \$6 million estate to the chosen beneficiaries free of federal estate tax.

Now, portability will be available as an estate planning mechanism to legally married same-sex couples in Illinois.

Holding property as tenants by the entirety

In Illinois, married couples are able to hold title to real property as tenants by the entirety. Tenants by the entirety hold property similar to joint tenants with right of survivorship. In both cases, among other things, the property will automatically pass to the surviving tenant upon one tenant's death, however a tenancy by the entirety may protect the property from creditors of one spouse more than a joint tenancy. That's a great feature to say the least, but tenancies by the entirety are only available in Illinois to married couples. Now, that will mean same-sex married couples as well as heterosexual married couples.

Filing of Joint returns

Spouses have the choice to file federal tax returns either individually or jointly, while unmarried same-sex couples or those in civil unions only have the option to file individual. Now, same-sex married



couples in Illinois will have the option to file jointly, which can carry a number of tax benefits in the right situation.

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