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SAME SEX MARRIAGES AND COMMUNITY PROPERTY

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Washington state is now the latest state to allow for same sex marriages. Importantly, for federal tax purposes the Defense of Marriage Act (DOMA) will not respect these marriages. Thus, the various provisions of the Internal Revenue Code that apply to married individuals (*e.g.*, the ability to file joint income tax returns, the estate and gift tax marital deduction, etc.) cannot be used by a same sex couple married under state law.

However, it is often overlooked that this is not a blanket rule. Since federal tax consequences are applied to property ownership as determined by state law, a state law marriage between two same sex individuals may still affect their income tax liabilities. Thus, for example, if a same sex couple owns community property under state law, each partner must report on his or her own income tax return 1/2 of the income from the community property. *See* CCA 201021050.

This treatment leaves open the currently unanswered question whether other community property rules will also apply. For example, will a double step-in basis in community property at the death of the first partner be allowed to occur as it would in non-same sex marriage?

Further adding to the tax difficulties in planning for same sex couples is that state laws may provide state tax benefits to same sex marriages even though they are not available at the federal level.

It is these subtleties and uncoordinated treatment that make planning in this area a challenge. For more on this subject, see *Effect of Same-Sex Marriage Laws on Estate Planning*, by Nicole Pearl and Carlyn McCaffrey in the January 2012 edition of Estate Planning Journal.

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