ESTATE AND TAX PLANNING FOR SAME-SEX MARRIED COUPLES IN FLORIDA

Real Property, Probate & Trust Law Section

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The recent U.S. Supreme Court ruling in *U.S. v. Windsor* and subsequent guidance published by the Internal Revenue Service (IRS) has created numerous estate and tax planning opportunities for same-sex married couples nationwide. Because many of these couples may relocate to Florida to take advantage of Florida's lack of income, gift, and estate taxes, practitioners should apprise themselves of the various planning opportunities that now exist.

In *Windsor*, the U.S. Supreme Court held Section 3 of the Defense of Marriage Act to be unconstitutional as a deprivation of the equal liberty protection found in the Fifth Amendment. After *Windsor*, same-sex married couples were considered married for purposes of federal estate and gift tax laws if they had been married in a state that recognizes same-sex marriages and if they resided in a state that recognizes same-sex marriages. Therefore, immediately after *Windsor*, same-sex married couples who had been married in a state that recognizes same-sex marriages but who resided in Florida, a non-recognition state, could not avail themselves of the benefits of married couples under federal gift and estate tax laws. This all changed when the IRS issued Revenue Ruling 2013-17, which clarified that any same-sex marriages legally entered into will be recognized for federal income, gift, and estate tax purposes even if the same-sex married couples reside in a state that does not recognize same-sex marriages.

Florida appears to be an attractive home for same-sex married couples due to its lack of income, gift, and estate taxes.

The IRS's Notice IR-2013-72 makes it clear that same-sex married couples must now file their 2013 federal income tax returns (and all future income tax returns) as married filing jointly or as married filing separately. Additionally, this notice also states that individuals who were in same-sex marriages may file amended federal returns (income, gift, or estate) for one or more prior tax years still open under the statute of limitations. This option may create income, gift, and estate tax planning opportunities for same-sex married couples that should be evaluated.

Same-sex married couples (regardless of where they reside) are now able to take advantage of several federal tax benefits that were previously unavailable to them. These benefits include, but are not limited to, the following: (i) unlimited marital deduction for federal estate and gift tax purposes; (ii) "portability" of the deceased spouse's unused estate tax exclusion amount for federal estate tax purposes; and (iii) gift splitting for federal gift tax purposes.

A possible problem now arises when same-sex married couples reside in a state that does not recognize same-sex marriages but has a state income, gift, or estate tax. For example, under current law and IRS guidance, these couples will now be required to file their federal income tax returns as married filing jointly or as married filing separately, but they may very well be forced to file separate state income tax returns. For this reason, Florida appears to be an attractive home for same-sex married couples due to its lack of income, gift, and estate taxes, and Florida practitioners should be prepared to advise such couples on the various planning opportunities that are now available.

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