

July, 2011

Re: **Same Sex Marriage in New York – Estate Planning Opportunities**

To our Clients and Friends:

New York State's Marriage Equality Act takes effect later this month, and many same sex couples will now choose to become spouses under New York law. Although same sex marriages are not recognized under federal law, New York creates a whole new set of opportunities, along with new issues, for estate and tax planning for same sex spouses. This letter highlights a few of the important issues raised by the Act.

A same sex spouse is considered to be a spouse for all purposes in New York, including its tax and estates laws. Thus, same sex couples may benefit from filing joint New York State income tax returns, but they must continue to file separate federal tax returns. If one dies without a will, New York law considers a same sex spouse to be the decedent's spouse for inheritance purposes.

New York Estate Tax implications. Late last year, the federal estate tax law was changed to exempt the first \$5 million of a person's estate from federal estate tax – at least until December 31, 2012 when these tax provisions are set to expire. New York continues to retain a \$1 million exemption from estate tax. Thus, for many couples with estates under \$10 million, the New York State estate tax may be the more significant tax. Prior to the Marriage Equality Act, a person who wished to leave his or her partner a \$5 million estate would pay approximately \$400,000 in New York estate tax, and no federal tax if the person died in 2011 or 2012. Now, if the partners are married, the surviving spouse will be eligible for a full New York State estate tax marital deduction, and there would be no federal or New York estate tax.

Lifetime Gifting. Lifetime gifting remains a tax pitfall for same sex couples. New York does not tax lifetime gifts of any nature; however, there is a federal gift tax. Since federal law does not recognize same sex spouses, gifts between spouses will not qualify for the federal gift tax unlimited marital deduction. This means that gifts to a same sex spouse in excess of \$13,000 per year will utilize a portion of the donor's lifetime exclusion and the donor must file a federal gift tax return. Transferring property, including changing title of a home or bank account, to "joint tenants", is generally considered a gift of one-half of the value of the property. Thus, these transfers should only be made following consultation with tax advisors.

Beneficiary designations are important. Beneficiary designations on retirement plan accounts such as IRAs and on life insurance policies should not simply say "my spouse"; the better procedure is to say "my spouse, [insert name]," to ensure that the proper person is identified.

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Also, federal law does not permit the surviving spouse of a same sex couple to transfer a deceased spouse's IRA or other retirement account into an IRA rollover account. However, the surviving spouse, like any other individual, can establish a valuable, but less-favorable, "beneficiary IRA" with these proceeds.

An updated will and related documents are critical. Same sex couples should draft wills which recognize their new legal status. It is a pitfall to rely on the laws governing intestacy (dying without a will) to transfer your assets, especially since children also have legal rights in intestacy. (The assets of a person who dies with a spouse and children and without a will in New York would pass approximately ½ to the spouse and the remainder to his or her children.) Also, a person may die as a resident of a state that does not recognize same sex marriage and that state's intestacy laws might disinherit the same sex spouse.

Pre-nuptial agreements are appropriate to deal with the possibility of divorce or to regulate the division of a person's estate. In the absence of a formal written agreement, an individual has the right to an "elective share" of his or her spouse's estate, which under New York law is approximately 1/3 of the estate.

Durable powers of attorney and health care proxies need to be updated to make certain that the right person is named to act in the event of incapacity.

Persons who rent property in New York City that is subject to **rent stabilization** laws should have their spouses added to their lease in order to protect their long-term tenancy.

Planning is essential. It should be obvious that same sex couples need to consult professional tax advisors in connection with their marriage. The New York Marriage Equality Act offers many tax opportunities, but these must be implemented with the understanding that federal law does not recognize these marriages. Careful planning and experience is required to successfully navigate through these laws to achieve optimum results.

Gerald & Lawrence Blumberg, LLP has represented same sex couples in their estate planning for decades. The Marriage Equality Act presents many opportunities and we look forward to working with clients and their advisors in this new era of estate planning.

We hope that you have a wonderful summer.

Gerald & Lawrence Blumberg, LLP