

**Warshaw Burstein Cohen Schlesinger & Kuh, LLP**

**M E M O R A N D U M**

**To: Our Clients and Friends**

**Date: September 6, 2011**

**From Warshaw Burstein Cohen Schlesinger & Kuh, LLP**

**:**

**RE: Estate Planning Issues Presented by Same-Sex Marriage in New York**

---

The recently passed New York State law which grants same-sex couples the right to marry will provide state-based economic and legal benefits and rights that were previously limited to married couples of the opposite sex.

State recognition of same-sex marriage is not binding at the federal level because the Defense of Marriage Act ("DOMA") limits the definition of "marriage" to a union "between a man and a woman". This means that despite New York's new law, same-sex spouses will not enjoy certain federal benefits available to their opposite-sex counterparts – among which are the unlimited estate and gift tax marital deduction, the right to file joint income tax returns, spousal Social Security and retirement account benefits and the right to unpaid leave under the Family and Medical Leave Act when a spouse is ill.

The following issues should be considered when preparing an estate plan for same-sex couples:

Estate and Gift Tax Issues: The *estate tax* marital deduction, which permits a decedent's taxable estate to be reduced by the entire amount left to a spouse who is a United States citizen, is not available under DOMA for bequests to a same-sex spouse. If the estate – including any portion left to a same-sex spouse – exceeds the federal estate tax exemption of \$5,000,000, federal estate tax is payable.

Same-sex couples also will not enjoy the "portability" benefit provided by current federal estate tax law, which allows an opposite-sex surviving spouse to add the unused portion of a deceased spouse's \$5,000,000 estate tax exemption to the survivor's exemption.

(Despite DOMA, same-sex couples will now be able to claim an unlimited marital deduction for *New York* estate tax purposes.)

Same-sex couples are also treated differently for federal *gift* tax purposes. Unlike an opposite-sex spouse who is a United States citizen, to whom unlimited tax-free gifts may be made, same-sex couples, under DOMA, are limited to a \$5,000,000 lifetime federal gift tax exemption, and this exemption will be reduced wherever a gift in excess of the annual exclusion (currently \$13,000 per person) is made. Once an individual's total taxable gifts, including those to a same-sex spouse, exceed the federal exemption of \$5,000,000, federal gift tax will be payable.

The following discussion illustrates the differences in treatment for federal estate and gift tax purposes of property transferred between same-sex couples:

Jointly Held Property: If a same-sex married couple own real estate jointly with survivorship rights, the full value of the property will be subject to estate tax when the first spouse dies, except that portion to which the surviving spouse can prove he or she purchased or provided the funds. In the case of opposite-sex couples, it does not matter how much each spouse contributed because, as a result of the unlimited marital deduction, there is no estate tax on any assets received by a United States citizen upon the death of a spouse. (It should be noted that, for some estates, DOMA will result in favorable *income* tax treatment where a surviving same-sex spouse sells appreciated assets previously owned jointly.)

If an individual makes a same-sex spouse a co-owner of real estate, or registers most other assets jointly with that spouse, he or she will be deemed to have made a taxable gift of 50 percent of the property's value, thereby reducing to that extent the donor's available lifetime exemption.

Life Insurance: While an unlimited amount of insurance or other assets can pass free of estate tax to a spouse of the opposite sex who is a United States citizen because of the unlimited marital deduction, the total available exemption for all a decedent's assets, including insurance, passing to anyone else, including a same-sex spouse, is limited to \$5,000,000. Same-sex spouses (like some of their opposite-sex counterparts) may find it advantageous to assign ownership of their insurance to an insurance trust or to others, including their spouse or children.

Retirement Accounts: An opposite-sex spouse has the ability to "roll over" a deceased spouse's IRA (which can then accumulate and grow tax-free until the survivor reaches retirement

age). Same-sex couples are limited to "inherited IRA" treatment, which ordinarily provides less favorable withdrawal options.

Non-tax issues; Children: In addition to different tax treatment of bequests and gifts made between same-sex couples, issues may arise regarding the interpretation of will provisions for the benefit of children of same-sex couples. If an individual, whether or not married, wishes to make a bequest to a child who is neither an adopted nor a biological child, he or she must be careful in preparing a will not to rely solely on terms such as "child" or "issue", and instead should specifically identify the child. Where there is no will, only children who have been adopted may inherit from a decedent who is not their biological parent. They cannot inherit by virtue of a biological or adoptive relationship with the decedent's spouse. A suitable will can resolve this problem. Adoption will also alleviate the problem, and also protects a non-biological parent's visitation and custody rights in the event of a separation or divorce from the biological parent.

Please do not hesitate to contact us with any questions you may have concerning the new law or to discuss any aspect of your estate plan.

Peter L. Lese                      212-984-7882

Robert P. Wittes                212-984-7824

CIRCULAR 230 DISCLAIMER: We are required by regulations incorporated into Treasury Department Circular 230 to advise that this memorandum is not intended or written to be used and may not be used by any taxpayer for the purposes of avoiding penalties that may be imposed on the taxpayer.