



Taxation and Uncertainty: Update on Same-Sex Couples' Rights

The law surrounding same-sex couples in Florida remains unsettled. In early October, 2014, the United States Supreme Court announced that it would not hear appeals from federal court decisions allowing same-sex marriages in Utah, Oklahoma, Virginia, Wisconsin, and Indiana. This announcement came after many projected that a definitive answer was coming from the Court. While the announcement determined the rights of same-sex couples in those states, it left the issue undetermined in Florida.

Following the United States Supreme Court's announcement, Florida Attorney General Pam Bondi requested that the Florida Supreme Court hear the issue and decide it "once and for all." However, the request was denied by the Third District Court of Appeals and it appears Floridians will have to wait for same-sex couples' rights to be determined.

Although same-sex couples are in limbo here in Florida, favorable federal rulings last year have extended many rights and opportunities to same-sex taxpayers. Because Florida does not currently impose a gift, estate, or income tax on individuals, the tax discussion in this article will be limited to federal taxes.

Estate and Gift Taxes. In *United States v. Windsor*, the U.S. Supreme Court held that the portion of the Defense of Marriage Act that defines marriage as a "legal union between one man and one woman as husband and wife" was unconstitutional. One obvious result of this ruling is the availability of the marital deduction for gifts between spouses. This deduction is available on future tax returns as well as for any open tax year including 2011 and all subsequent years. The same is also true for the estate tax marital deduction for returns filed in the last three years.

Not only does this mean that prior and future estate and gift tax returns may take advantage of the marital deduction, it also means that other estate planning routes are now available to more effectively utilize these deductions. One of the most common ways to use the estate tax marital deduction is by forming a qualified terminable interest property ("QTIP") trust. A QTIP trust allows a spouse to provide for his or her surviving spouse in a way that qualifies for the marital deduction and also to provide for children or other family members. The QTIP trust pays income generated by the trust to the surviving spouse and names other beneficiaries to receive the property after the second spouse passes away.



Fletcher H. Rush

TEL 941.639.1158

EMAIL frush@farr.com

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Federal law allows an individual to give up to \$14,000 each to any number of recipients each year without being deemed a taxable gift. For married couples who agree to combine their annual gift tax exemption they may collectively give \$28,000 each year to any person they choose. This concept of "gift splitting" allows a same-sex couple to combine their annual gift tax exclusion to give up to \$28,000 to one recipient each year.

Each U.S. resident or citizen has a \$5,340,000 exemption for estate and gift tax purposes in 2014. This number will increase to \$5,430,000 in 2015. This means that a person may die with up to the exemption amount in assets and not owe any federal estate tax. Further, any portion of the exemption the decedent did not use may be claimed by his or her surviving spouse under the "portability" rules. This relatively new concept of portability is now available to same-sex couples and should be appropriately planned for to make sure the couple gets the full benefit of nearly \$11,000,000 worth of exemption from federal estate taxes.

Income Taxes. Same-sex couples may now file joint income tax returns and may amend returns for tax years after 2010. Going forward, couples will want to keep in mind that being married may increase the amount of collective income taxes they pay, particularly for dual income couples. The filing status question has led to a lot of controversy with respect to states that impose income taxes. However, here in the Sunshine State, this issue is not of any particular concern unless couples have ties to other states.

Conclusion. The state of same-sex couples' rights in Florida is in flux while our court system processes the pending cases, but Floridians may take advantage of federal benefits. Further, many scholars predict that Florida will follow other states in finding that the definition of marriage in our Florida Constitution violates same-sex couples' rights, or at a minimum find that valid marriages established in other jurisdictions must be given full faith and credit. If that is the case, same-sex couples in Florida may consider the potential state benefits that may be coming their way, including the Florida homestead protection of a surviving spouse's right to claim an interest in the deceased spouse's homestead, the right of a surviving spouse to claim an elective share (30%) of the deceased spouses augmented estate, and the ability to title assets as tenants by the entireties which affords the couple an extra layer of creditor protection.

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