The Tax and Legal Implications of Tying the Knot

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With the Supreme Court's entering its decision in Obergefell just over one year ago and wedding season upon us, many same-sex couples across the United States may be finalizing, or just embarking on, their wedding plans. Many may wonder: what are the legal and financial advantages and disadvantages to marriage?

Married couples must file **income tax** returns jointly, or married filing separately, which can be a disadvantage because married couples reach higher income tax brackets earlier than single people with the same level of income. However, spouses can share some income tax deductions, whereas unmarried couples cannot. In addition, married couples can exclude $500,000 from capital gains tax upon sale of a principal residence even if only one of the spouses owns the residence. The individual capital gains tax exclusion for a primary residence is $250,000.

If an employer pays for an unmarried couple's health insurance, the employer contribution for the nonemployee is imputed income to the nonemployee, which is reportable income. In addition, the employee's contribution for his unmarried partner's health insurance must be made with after-tax dollars. With marriage, employer contributions for the health insurance of an employee's spouse are not imputed income and the employee may use pretax dollars to pay his share of health insurance premiums for his spouse.

Social Security offers benefits for spouses in several ways. A spouse may claim a Social Security benefit based on his or her own earnings record, or a spousal benefit, which is 50% of the amount of his spouse's Social Security benefit as calculated at their full retirement age. Both current spouses and ex-spouses, if they were married for over ten years and did not remarry prior to age 60, are eligible for a spousal benefit. Widowed spouses can collect survivor's benefits as early as age 60. Additionally, a widowed spouse can collect a survivor's benefit while deferring his own benefit until age 70. This is advantageous if the surviving spouse's benefit amount at age 70 would be larger than the widow benefit because he can claim the widow benefit for several years before switching to his own benefit. Once both spouses are receiving benefits, the surviving spouse will receive whichever benefit amount is higher, but not both.

If a spouse does not have a sufficient work history to gain Social Security benefits, he may be eligible for free **Medicare** Part A at age 65 based his spouse's work history.

Medicare-eligible spouses who are covered by a working spouse's health insurance plan need not accept Medicare Part B, but instead can delay paying for it until the spouse's health insurance coverage ends. In contrast, an unmarried person who is receiving health insurance through his spouse's employer must accept Medicare and pay for it when eligible.

In the event of the need for long-term care for one spouse, **Medicaid** regulations protect some assets for the benefit of

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the healthy spouse. However, there are no such protections available to unmarried couples. Furthermore, a five-year transfer penalty applies when assets are transferred from an unmarried person to his partner.

Due to the **unlimited marital deduction**, married citizen spouses can transfer unlimited amounts of property during lifetime and at death to their spouses without imposition of a gift or estate tax. In addition, spouses can make split gifts, which are gifts that are considered to have been given in part by both spouses. A surviving spouse can also claim his spouse's unused federal estate tax exemption amount in addition to his personal exemption amount of $5,000,000, which increases each year and is currently $5,450,000.

Where there is no unlimited marital deduction for unmarried partners, there may be an estate tax due at the first death, which could seriously deplete the estate available to support the surviving partner. In Massachusetts, for example, there is an estate tax on estates over $1 million.

Joint property is presumably owned fifty percent by each spouse for married couples and therefore one half of jointly owned property is included in the first to die's taxable estate. However, one hundred percent of jointly owned property is presumed included in the first to die's taxable estate for unmarried couples. To overcome this presumption unmarried couples need to prove contribution, which can be problematic if records are not maintained.

When unmarried couples **give** property to their partners they are subject to the annual exclusion amount, currently $14,000 each year to each recipient, or they are making a taxable gift for federal gift tax purposes. Each person can currently gift $5,450,000 during lifetime, or at death before the imposition of a gift or estate tax.

Retirement assets such as a 401(k) or IRA may be inherited by spouses and then can grow, tax deferred, until the surviving spouse turns age 70.5 years old. However, when an unmarried person receives an account from his partner, he must take minimum required distributions immediately based on his life expectancy. Therefore, there is a loss of tax-deferred growth on the retirement plan if the surviving unmarried partner has not reached retirement age. Spouses may name their own beneficiaries of retirement plans, who will enjoy tax-deferred growth based on their own life expectancies, but when an unmarried partner dies, his predeceased partner's benefit will be subject to income tax all at once.

There are other **estate planning** considerations for unmarried couples. Unmarried partners are not next of kin, so certain protections available to spouses are not available. For example, absent a valid health care proxy for medical decisions, a partner may not be granted access to his or her loved one in an intensive care unit. Spouses are next of kin, so they have rights with respect to their spouses' funeral and burial, but unmarried partners do not.

It's imperative that unmarried couples have current wills to protect their partners. An unmarried partner must be named as his or her partner's personal representative, sometimes called executor, in order to have priority to serve over family members. Furthermore, there are no protections under the law for unmarried partners who are inadvertently omitted from a partner's will, but there are such protections for married couples.

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