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Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2142

Date: 16-Sep-13

From: Steve Leimberg's Estate Planning Newsletter

Subject: [Alan Gassman: Why Same Sex Couples Will Be Moving to Florida and other Low Tax Cost States](#)

“Because of Revenue Ruling 2013-17, Florida is now a viable and exciting option for same sex couples. The IRS has stated that additional guidance on the ruling will be provided with respect to other Federal programs. Be sure to look out for this information as it will be helpful in planning your future in the wonderful Sunshine State.”

Alan Gassman shares his thoughts on why same sex couples will be moving to Florida and other low tax cost states.

Alan S. Gassman, J.D., LL.M. practices law in Clearwater, Florida. Each year he publishes numerous articles in publications such as BNA Tax & Accounting, Estate Planning, Trusts and Estates, The Journal of Asset Protection, and Steve Leimberg's Asset Protection Planning Newsletters. Mr. Gassman is a fellow of the American Bar Foundation, a member of the Executive Council of the Tax Section of the Florida Bar, and has been quoted on many occasions in publications such as The Wall Street Journal, Forbes Magazine, Medical Economics, Modern Healthcare, and Florida Trend magazine. He is an author, along with **Kenneth Crotty** and **Christopher Denicolo**, of the BNA Tax & Accounting book Estate Tax Planning in 2011 and 2012. He is the senior partner at **Gassman Law Associates, P.A.** in Clearwater, Florida, which he founded in 1987. His email address is agassman@gassmanpa.com.

Here is his commentary:

EXECUTIVE SUMMARY:

Before the IRS issued Revenue Ruling 2013-17, a same sex couple would not receive full married couple benefits under the estate and gift tax laws unless they were (1) married in a state that recognizes same sex marriages and (2) resided in a state that also recognizes same sex marriages.

The above ruling was used to carry out the U.S. Supreme Court's decision in the United States v. Windsor case as we discussed in [Estate Planning Newsletter #2123](#), which was entitled “Many Affluent Same-Sex Couples Will Be Leaving Florida and Where They Should Go.” This commentary was premised upon the court's decision to the effect that a same sex couple would not be considered as married for tax purposes if the state where they resided did not recognize the marriage. That changed very quickly!

FACTS:

On Thursday, August 29, 2013, the IRS took a very big step forward in ruling that same sex couples will be considered as married for federal income, estate and gift tax purposes. Any same sex marriage legally entered into in one of the 13 states enumerated in the chart below that allow same sex marriages, the District of Columbia, or a foreign jurisdiction with appropriate authority is covered under this ruling; notwithstanding whether the spouses reside in a state or other jurisdiction that recognizes their marriage at the time of the marriage or thereafter.

This brings forth a new era for same sex couples who are married or are considering marriage, and opens the door for a complete review of their asset, tax, marital agreement, and life planning. Planners will need to be able to address a number of important issues that can influence whether same sex couples should marry, stay married, divorce now, or take other steps to make the most of their situations. In many cases, each person should have separate legal and financial counsel in order to help determine what is in their best interests.

Revenue Ruling 2013-17 provides that Internal Revenue Code Section 6511 gives same sex married couples the option of amending their prior tax returns, going back 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever is later. Same sex couples may also choose to leave the prior returns intact or to amend one or more prior tax years. Time is already running as statutes of limitation march before us!

COMMENT:

As the result of this, affluent married same sex couples can reside in Florida to avoid state inheritance taxes, state estate taxes, and state income taxes, because Florida has none of these taxes and is also a pretty darned neat place to live (when it is not 100 degrees outside with 100% humidity, and the power is not working because of a lightning storm. The author may set up a generator distributorship as well.)

In addition to the above, same sex couples can bring their guns to Florida and use them almost anytime they want, as described in our "Are We the Gunshine State? Justifiable Use of Force in Florida in Chapter 776 - Or Did They Mean Section 1776?" article that was in the September 12th, 2013 addition of Gassman Law Associates Thursday Report, which can be found at Gassmanlawassociates.com, or at your local Thursday Report newsstand slot next to the orange flavored Twizzlers and Gator Repellent Whistle Key Chains.

This gives same sex couples some very good choices for tax planning purposes. Almost all affluent same sex couples (or couples where one spouse is affluent) will want to go to a good income tax advisor with the right software, to help determine what years they should amend and what years they should not amend.

Any gift tax return that involved a transfer to a spouse that used up any portion of the donor spouse's estate tax exemption should probably be amended to regain the exemption amount, unless there are other items on the gift tax return that are best not reopened, such as large gifts with questionable values to non-spouse individuals.

Amending a gift tax return will give the IRS three years after the date of the amendment to revisit all aspects of the gift tax return amended.

Same sex couples who are not formally married in one of the recognition states should consider whether the estate and gift tax and income tax advantages of getting married outweigh potential disadvantages. These disadvantages can include:

- having to leave qualified plan benefits to a surviving spouse who will not sign a waiver associated therewith,
- having alimony and property settlement right vest in a new spouse if the new spouse will not sign a binding prenuptial agreement as requested by the other spouse.

- having to have the new spouse on the healthcare plan of an employed spouse whose employer requires this,
- having to inform an employer that a same sex marriage exists in order to comply with personnel, office and associated requirements (which may occur in states that do not prevent discrimination against homosexual individuals, such as Florida, however many cities and counties in Florida have enacted ordinances prohibiting sexual orientation discrimination in the workplace),
- having to decide who to invite to the ceremony and who is going to pay for it or,
- whether to have Justice Ginsberg’s perform the ceremony.

Advisors who represent one or more members of an affluent same sex couple will need to reach out to let them know that if and when they are married, they can have a new estate tax plan that includes marital deduction planning, QTIP trust planning, and associated rights and responsibilities.

When the couple resides in Florida, it is probably also useful to have them consider a prenuptial or post nuptial agreement, even though Florida law will not give either spouse “marital rights or responsibilities” in the event of a divorce at the present time. Public policy considerations may impact the enforceability of these agreements in Florida. This could change in the not too distant future, and if so, alimony and property settlement rights might date back to when the couple was originally married, as opposed to dating back to when the Florida legislature and a future governor might sign such legislation into existence.

Conclusion:

Because of Revenue Ruling 2013-17, Florida is now a viable and exciting option for same sex couples. The IRS has stated that additional guidance on the ruling will be provided with respect to other Federal programs. Be sure to look out for this information as it will be helpful in planning your future in the wonderful Sunshine State.

| State | Does the State Recognize Same Sex Marriage? | Does the State Recognize Tenants by the Entireties (with Pure Protection?) | Does the State have an Estate Tax or Inheritance Tax? | Exemption Amount; Highest Estate and/or Inheritance Tax Rate (if applicable) | Does the State have an Income Tax? | Highest Income Tax Rate (if applicable) |
|----------------------|---|--|--|--|------------------------------------|---|
| California | Yes | No | No | N/A | Yes | 13.30% |
| Connecticut | Yes | No | Estate Tax (and state Gift Tax) | \$2,000,000; 12% | Yes | 6.70% |
| Delaware | Yes | Yes | No (repealed for deaths after June 30, 2013) | N/A | Yes | 6.75% |
| District of Columbia | Yes | Yes | Estate Tax Inheritance Tax (but spouses and descendants are exempt) | \$1,000,000; 16% | Yes | 8.95% |
| Iowa | Yes | No | No exemption; 15% | No exemption; 15% | Yes | 8.98% |
| Maine | Yes | No | Estate Tax | \$2,000,000; 12% | Yes | 7.95% |
| | | | Estate Tax and an Inheritance Tax (but spouses and | | | |

| State | Yes | No | Descendants are exempt from the Inheritance Tax | \$1,000,000 (estate only); 10% (estate); 10% (inheritance) | Yes | 5.75% |
|---------------|-----|-----|---|--|-------------------------------------|-------|
| Maryland | Yes | Yes | | | Yes | 5.75% |
| Massachusetts | Yes | No | Estate Tax | \$1,000,000; 10% | Yes | 5.30% |
| Minnesota | Yes | No | Estate Tax (and state Gift Tax) | \$1,000,000; 10% | Yes | 7.85% |
| New Hampshire | Yes | No | No | NA | Only on dividend or interest income | 5.00% |
| New York | Yes | No | Estate Tax | \$1,000,000; 16% | Yes | 8.82% |
| Rhode Island | Yes | No | Estate Tax | \$910,725; 16% | Yes | 5.99% |
| Vermont | Yes | Yes | Estate Tax | \$2,750,000; 16% | Yes | 8.95% |
| Washington | Yes | No | Estate Tax | \$2,000,000; 19% | No | N/A |

* "Pure Protection" refers to those state laws which protect Tenants by the Entireties assets from the creditors of only one spouse.

Also consider some advantages vs. disadvantages of marriage shown below:

| Advantages of Marriage | Disadvantages of Marriage |
|---|--|
| <ul style="list-style-type: none"> Savings with sharing a single health insurance plan: While the rules vary by state and employer, many health insurance companies already offer benefits to domestic partners and same-sex unions; others require marriage for shared coverage. | <ul style="list-style-type: none"> Responsibility of health care: Depending on which state you live in, if your spouse cannot pay their health care bills, then you may be held liable for the cost. |
| <ul style="list-style-type: none"> Security benefits go to the surviving spouse: Widowed spouses are entitled to their spouses' Social Security benefits if they are greater than their own. | <ul style="list-style-type: none"> Loss of benefits if you get remarried: If you are a widow or widower receiving a deceased spouse's retirement benefits or social security benefits you may lose those benefits if you get remarried |
| <ul style="list-style-type: none"> No Employer Taxes: If you work for your spouse, they do not have to pay social security taxes or unemployment taxes on your behalf. | <ul style="list-style-type: none"> Spousal Debt Responsibility: In community property states, most debt incurred by either spouse during marriage is owed jointly by the couple, even if only one spouse signed for the debt. |
| <ul style="list-style-type: none"> "Being Married" - Dr. Phil | <ul style="list-style-type: none"> "Being Married" - Rodney Dangerfield |

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

Alan Gassman

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