

ESTATE PLANNING FOR SAME-SEX COUPLES IN NEW YORK

When New York passed the Marriage Equality Act effective July 24, 2011 (the "Act"), New York became the sixth state to permit same-sex couples to marry, affording them many of the benefits different-sex marriages have, prominent among them property and inheritance rights. This will have a significant effect on estate planning and avoid certain inequities that have existed for years. For example, if a same-sex spouse now dies without a Will and has no children, his or her estate will pass to the surviving same-sex spouse. Before the Act, the estate would pass to the parents or siblings of the deceased individual and the same-sex partner would have no rights to the estate. Also, the parents and siblings of the deceased same-sex spouse no longer have the right to challenge his or her Will.

For estate tax purposes, as with different-sex couples, when the first spouse dies, any assets left to a same-sex spouse will not be subject to New York estate tax due to the unlimited marital deduction. There will only be a New York estate tax upon the death of the surviving spouse.

However, as revolutionary as this change may be, state law changes have no bearing on federal law because the Defense of Marriage Act ("DOMA") does *not* recognize same-sex marriages. This means that same-sex couples cannot defer estate taxes until the surviving spouse dies and can only leave his or her spouse the first \$5,000,000 of assets free from estate tax.

There are now tremendous opportunities for same-sex couples to effectively plan for the disposition of their estates, but as long as DOMA is in effect, the estate tax savings will only exist for New York purposes. ■

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