
Estate Planning Issues Involving Marriage of Same-Sex Couples

June 30, 2004

In *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003), the Massachusetts Supreme Judicial Court held that same-sex couples have a constitutional right to marry. The Court provided a grace period, which ended on May 17, 2004. Since same-sex couples may now marry in Massachusetts, among the important legal issues they should consider are the following estate planning and tax issues.

Important Estate Planning Rules

- § Since marriage revokes a will unless an “in contemplation of marriage” provision is included in the will or a codicil, same-sex couples planning to marry should execute codicils containing such provisions (before getting married). If already married, such couples should execute codicils reinstating the wills, or should execute new wills.
- § Same-sex couples should be aware of how their property would be disposed of (under the Massachusetts intestacy statute) if they marry and then either spouse dies without having executed a will, and should be aware of a surviving spouse’s right to elect against his/her deceased spouse’s will (and receive a portion of his/her property, specified by statute), both of which will apply to them if they marry.
- § Although Massachusetts now permits same-sex marriages, federal law will not recognize these, based on “DOMA” (the 1996 “Defense of Marriage Act”). Therefore, currently -- and unless litigation strikes down DOMA someday -- same-sex married couples are not entitled to federal estate and gift tax marital deductions; in addition to a gift tax, a generation-skipping transfer (“GST”) tax would be due upon a gift to a same-sex spouse who is more than 37 1/2 years younger than the donor spouse.
- § In addition to these estate tax considerations, same sex spouses may not file federal joint income tax returns or utilize the \$500,000 capital gains exclusion upon the sale of a principal residence and as a result of DOMA may not “roll over” a deceased spouse’s IRA or qualified plan account.

§ Although Massachusetts now permits a separate and independent estate tax marital deduction, this provision refers to federal law, leaving a question as to whether the Massachusetts estate tax marital deduction depends on the spouse being treated as a spouse under federal law.

What to Do

- § Educate yourselves on the Massachusetts “intestacy” and “elective share” statutes (we can provide copies of these to you, if you wish).
- § If you plan to marry, consider revising your estate plans in light of the *Goodridge* ruling. If you decide not to revise your estate plans, codicils should be executed that include “in contemplation of marriage” provisions, before getting married, so estate planning instruments are not automatically revoked upon marriage. If you have already married, contact us immediately to reinstate your revoked estate plans.
- § Same-sex spouses may include in their estate plans marital trusts that would qualify for federal and Massachusetts estate tax marital deductions should either of these become available in the future. Alternatively, you may decide to wait until either such deduction becomes available, and revise your plans at that time.

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Should you want to discuss any of the above further, please contact one of the following members of our Trusts and Estates Department:

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