

GUEST COLUMN

For same-sex couples, a tax trap for the unwary?

For the most part, Maryland has eliminated the assessment of inheritance tax upon the death of someone domiciled in the state. Monies left to a spouse, child, parent, sibling and son/daughter-in-law all are exempt from the assessment of inheritance tax. In all other situations, a 10 percent inheritance tax is assessed on the recipient of a Maryland inheritance.

During this past session in the General Assembly, there was proposed legislation to legalize same-sex marriage. Had it been enacted, married same-sex couples presumably would receive the same tax benefits as heterosexual married couples in Maryland. Namely, upon the death of one partner in a same-sex marriage, the remaining spouse would pay no Maryland inheritance tax if the estate was left to him or her.

Because the legislation did not pass, the 10 percent Maryland inheritance tax referenced above is still in effect. If one partner in a same-sex relationship dies and leaves the estate to the other partner, the *entire* estate will be subject to the inheritance tax.

Estate taxes are assessed in Maryland on estates worth \$1 million or more; the federal exemption amount is \$5 million. Therefore, if a Maryland domiciliary dies with an estate of \$950,000, there is no federal or Maryland estate tax to pay. However, if a decedent left a \$950,000 estate to a same-sex partner, the partner would have a \$95,000 inheritance tax liability.

Although the Maryland legislature did not provide an overall exemption from inheritance tax for same-sex couples, it recently

enacted an exemption from inheritance tax in a very specific situation dealing with a same-sex couple and their primary residence.

Section 6-101 of the Health-General Article of the Maryland Code provides a definition for a domestic partnership. The reason for the definition is to allow an individual to designate a same-sex partner to make various health care decisions.

The definition requires that (i) both individuals be at least 18 years of age, (ii) not be related by blood or marriage, (iii) not be married or in a civil union or domestic partnership with another individual, and (iv) both must agree to be in a relationship of mutual financial interdependence.

Additionally, the definition states that domestic partners may be required to provide an Affidavit, signed under penalty of perjury by both individuals, that they have established a domestic partnership, and may be required to provide other forms of proof (i.e. joint liability on a mortgage, designation as a primary beneficiary under a life insurance policy, or designation as the Durable Power of Attorney for Health Care).

Section 7-203 of the Tax-General Article of the Maryland Code sets forth the exemptions from inheritance tax.

The section provides that if two people satisfy the definition of domestic partners as provided in the Health-General Article above, and if they jointly own their primary residence which passes from the decedent to the domestic partner, then the residence will be exempt from the 10 percent inheritance tax.

A decedent's residence often is the single most valuable asset owned at the time of

death. This exemption from inheritance tax can be significant.

Whereas in the Health-General Article, the definition of a domestic partner states only that the Affidavit and other proof documents may be required, in the Tax General Article, the statute states that a domestic partner of a decedent must provide evidence of the domestic partnership.

A strict reading of the two Articles provides that only if the same-sex couple has the foresight to draft and execute an Affidavit would they be able to avail themselves of this significant inheritance tax exemption upon the death of one of them.

A second path for a same-sex couple to try to avoid inheritance tax is adult adoption. An adopted individual is treated like the adopting individual's "child" for inheritance tax purposes. The adopted same-sex partner would be exempt from inheritance tax in the same manner as a child who inherits from a parent.

Adult adoption has been used successfully in Maryland to allow an individual to inherit from his same-sex partner without having to pay the 10 percent inheritance tax. Until same-sex marriage is legalized, there will be an onerous 10 percent inheritance tax assessed on every dollar inherited by a domestic partner. Use of the planning methods discussed above may help ease the burden somewhat.

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