Rhode Island, Same Sex Divorce and Portability: Imperfect Together

by James F. McDonough, Jr. on August 13, 2013

Rhode Island Governor Chafee issued an executive order directing the state to recognize same-sex marriages performed out-of-state. The executive order does not, however, permit same sex divorce. Society is in a state of limbo where executive orders can address some, but not all, of the issues.

How does one address the use of the Federal Estate Tax Exemption, currently $5,250,000, for same-sex couples in states that do not recognize same-sex marriage? If A and B marry in a state that permits same-sex marriages and then move to a state that does not recognize same-sex marriage, are they married for state death tax purposes? Typically, a couple must be married under state law before they are eligible for the marital deduction. Whether they are married is of critical importance for federal estate tax purposes where marital deduction, the $5,250,000 Exemption and the portability of the Deceased Spouse Unused Exclusion Amount ("DSUEA") are the pillars of estate planning. Portability is where the surviving spouse adds the exemption of the first-to-die to his or her own. In states that have an estate tax that follows federal law, there may be new impediments that prevent consistency.

Consider the same-sex marriage of A and B where A dies and B survives. If the marriage of A and B is not recognized by the state of residence, what is the Deceased Spouse Unused Exclusion Amount ("DSUEA")? Is B entitled to use A's exemption or is it lost if not used?

Assume that B survives A and then remarries C. In theory, B should lose the DSUEA from A because B has remarried and the couple of A and C are therefore only entitled to the DSUEA of either A or C. This is the rule that applies to traditional couples.

If the state recognizes the same-sex marriage, then B should be entitled to have estate tax portability of A's DSUEA. Suppose the state where A and B reside does not recognize their marriage. We could, conceivably, file a federal estate tax return on A's death and elect portability. B, however, would not be able to elect portability on the state level, so B may be forced to use A's exemption instead. Is it possible, where a state follows the federal estate tax rules, to file completely different returns because of this disconnect?