



The Tax Lawyer

## Gay Or Straight, Marriage Matters--For Taxes

Robert W. Wood, 08.17.10, 6:40 PM ET

It may sound myopic, but as a tax lawyer for 30 years, I tend to think of taxes first in all things. Even marriage. The gay marriage debate raises big issues, but I find taxes at the front and center of them. As a number of states and the IRS move to address marriage tax issues, you might think the main issue would be whether same-sex couples can file joint tax returns.

Indeed, in *Gill v. Office of Personnel Management*, 1:09-cv-10309-JLT, (D. Mass. July 8, 2010) same-sex couples married in Massachusetts argued that Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violated their equal protection rights by preventing them from filing joint federal income tax returns. The plaintiffs argued that a married individual who files a joint return is generally subject to a lower tax than an unmarried individual or a head of household. The court agreed, granting summary judgment for plaintiffs, though an appeal is expected.

Yet marriage has a whole host of tax issues, in addition to joint filing. Some of these issues can make the denial of joint filing look like small potatoes.

In fact, the biggest tax issues often come up on the unraveling of a marriage. Whether a couple is heterosexual or gay, the tax aspects of unraveling a relationship are very different inside and outside marriage. You might be shocked how these tax rules work.

If you're married, there's no limit on the amount of money or property you can transfer back and forth between spouses. There's no gift tax and no limit (except in those instances where the spouse getting the assets isn't a U.S. citizen). If you're not married, you are limited to \$13,000 per year tax free. Any gifts beyond that trigger an immediate gift tax or eat into your lifetime gift-tax exemption of \$1 million. If you use the gift tax exemption it reduces, dollar for dollar, the amount you can pass on estate tax free to heirs at your death, and most people prefer saving the exemption for their estates. (While the estate tax has lapsed for 2010, under current law the estate tax exemption will be just \$1 million come Jan. 1, 2011. For more on planning for the return of the estate tax, [click here](#).)

A divorcing couple can divvy up property tax free. Again, there's no limit. So if you jointly bought a house, you can transfer your interest to your ex without tax.

Not married? In that case, you'll likely face income or gift taxes. If you give your half of the house to your ex-partner and receive nothing in exchange, you've made a taxable gift.

Suppose you're not feeling that generous and instead are deeding your half of the house to your ex in exchange for some of your ex-partner's stock holdings? Then you both could be hit with income taxes. As the departing partner, you will be treated as selling your half of the house to your former partner. If you bought the house together decades ago for \$400,000 and it is worth \$1,000,000, your half has a \$200,000 basis and a value of \$500,000. That means you, the departing partner, will have a \$300,000 gain, although if you qualify for the exclusion of gain from the sale of a principal residence (up to \$250,000 per person), only \$50,000 of it will be taxable. What about the ex-partner who is keeping the house and handing over \$500,000 in securities? If the staying-put partner's basis in those stocks is \$300,000, he or she will have to recognize a \$200,000 gain. If the same couple had been married, there would be no taxes paid related to these asset transfers.

This is one simple example. If you look at a many-year relationship with significant assets, the taxes at stake can be enormous. In fact, the tax bill can be so big that in some cases, unmarried couples trying to untangle joint assets might consider getting married just so they can then qualify for the benefits of a tax free divorce! (For a real life example of a couple doing just that, [click here](#).) Of course, gay couples can only do this where marriage is permitted, since the tax law requires a valid marriage--even if it is a sham marriage for purposes of qualifying for a tax-free divorce.

Despite my focus on tax law, I realize the non-tax aspects of marriage are considerably more important than the tax aspects. Nevertheless, as you can see, taxes matter a great deal, especially if you have to unwind a relationship. Divorce isn't pleasant for anyone, but at least the tax laws don't contribute to the difficulty. (For more on the tax aspects of divorce, [click here](#).) In contrast, unwinding cohabitation can be a tough job for a tax adviser, and expensive for the couple.

### **Meanwhile, If You're Getting Married...**

The IRS has just released five tax tips for recently married taxpayers. It's not a bad list for newlyweds to keep in mind. Here are the IRS' suggestions:

1. Notify the Social Security Administration. Report any name change to the Social Security Administration (SSA), so your name and Social Security number match when you file your next tax return. To inform the SSA of a name change, file Form SS-5, application for a Social Security card, at your local SSA office. The form is available at [www.socialsecurity.gov](http://www.socialsecurity.gov), by calling 800-772-1213 or at local offices.
2. Notify the IRS. If you have a new address, notify the IRS by sending Form 8822, Change of Address. Download Form 8822 from [www.irs.gov](http://www.irs.gov) or call 800-TAX-FORM (800-829-3676).
3. Notify the Post Office. If your marriage means you moved, notify the U.S. Postal Service to forward your mail--you'll want to be sure you receive any IRS correspondence.
4. Notify Your Employer. Report any name and address changes to your employer(s) to make sure you receive your Form W-2, Wage and Tax Statement, after the end of the year.
5. Check/Adjust Your Withholding. If both you and your spouse work, your combined income may place you in a higher tax bracket. You can use the IRS Withholding Calculator at [www.irs.gov](http://www.irs.gov) to help determine the correct withholding for your new filing status. The IRS Withholding Calculator will provide you with a new Form W-4, Employee's Withholding Allowance Certificate to give your employer.

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