NYSUT Member Benefits Trust-endorsed
Legal Service Plan
PREVENTIVE LAW GUIDE

A newsletter designed to help guide you through the legality of reality

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Disinheriting after death

By Candace Dellacona, Esq.

Disinheriting a family member or loved one from an estate is not as unusual as it may seem; statistics show that nearly 30% of decedents on average cut a family member out of their Will or leave less of an inheritance than a statute would otherwise provide.

Disinheriting a spouse

In New York state, the only person you cannot easily disinherit is your spouse as he or she is protected for public policy reasons. Specifically, if one were allowed to disinherit their spouse easily, the government's concern is that the disinherited spouse would become a public burden – relying on social services for support.

As such, spouses can only be disinherited when there is a legal agreement between both spouses "waiving" their respective rights to the other's estate. This "waiver" allows each spouse to leave his or her estate to whomever they choose. The presumption is that both spouses have been counseled regarding the assets they may be giving up by signing a waiver.

It is important to note that those having marital problems cannot easily disinherit spouses either. A marital separation does not automatically sever the right to inherit from a deceased spouse; a final decree of divorce and legal separation that includes the waiver to each other's estate is the only way to sever an inheritance between estranged spouses. Accordingly, it is important to change your Will as soon as a final decree of divorce is issued, or if a separation agreement is signed waiving the rights to each other's estate.

Disinheriting a child

Most people would be surprised to know that children are not entitled to inherit from their parents automatically. Children can be disinherited at the desire of their parents for whatever reason they choose; from the serious to the silly, no child is guaranteed an inheritance from mom or dad.

Parents may also choose to leave an unequal distribution to their children for any number of reasons as well. Sometimes, parents allow for an equal distribution to their children but are concerned about the way that their child spends money.

In this case or a situation where a parent wishes to leave their child money but does not care for the child's spouse, a Trust within a Will (or "Testamentary Trust") can be created. A Testamentary Trust is also not bound by any statute that requires said inheritance be fair or equitable among the other children.

For example, a Testamentary Trust can be drafted so that the money is managed by a Trustee and a child only receives an income stream from his inheritance; any access to the principal of the inheritance would have to go through the Trustee.

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Do you know about assumable mortgages?

By Daniel J. DeRosso, Esq.

Homeowners with a mortgage insured by the VA or FHA may consider using the terms of their loan as a marketing tool. These government-backed loans have an obscure and underutilized feature called assumability, which means that a qualified buyer may assume (or take over) the terms of the seller's current loan; this would then release the seller from further liability for the loan at closing.

With the recent rise in interest rates, this can be a great selling point. A seller can offer both a house equivalent to others being sold in the neighborhood but also a low-interest loan to match.

Further advantages to potential buyers are not having to pay the New York state mortgage tax, upfront mortgage insurance premium or for a new appraisal.

The loan may also be starting at a point where it is deep into amortization, thus requiring fewer years to pay off. The disadvantage to this is if the loan is so deep into amortization that the buyer needs to come up with a substantial cash down payment to make up the difference between the purchase price and the amount of the loan assumed.

However, for those who are otherwise qualified and can cover the down payment, assuming the seller's current mortgage benefits both the buyer and the seller and is something to consider in this volatile mortgage market.

Disinheriting after death

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Parents are sometimes concerned with the actual wording of the Will when it comes to disinheritance. Generally, when children are disinherited, they are mentioned in the Will but not in the ways that television or movies portray (such as "I leave my child, Jane Smith, $1.00.")

Instead, the child's existence is generally acknowledged but one would say "I specifically disinherit my daughter, Jane Smith, not for lack of love and affection but for reasons known to her." There is sometimes no love lost between a parent and child, and you would simply state, "I specifically disinherit my daughter, Jane Smith, for reasons known to her."

Final disinheritance suggestions

Many testators disinherit a loved one to make a statement that they did not feel comfortable making during their life. In a case where the testator wishes to explain the disinheritance, such explanation does not belong in a Will (which is a public document).

They would instead be encouraged to write a letter to explain their motivation in such disinheritance. This letter, generally referred to as a "Letter of Intent," is simply that... a letter explaining the intention or reason behind the disinheritance. This letter is not for public consumption but instead written to the disinherited party; it provides the rationale that a disinherited beneficiary is not always aware of during the testator's life.

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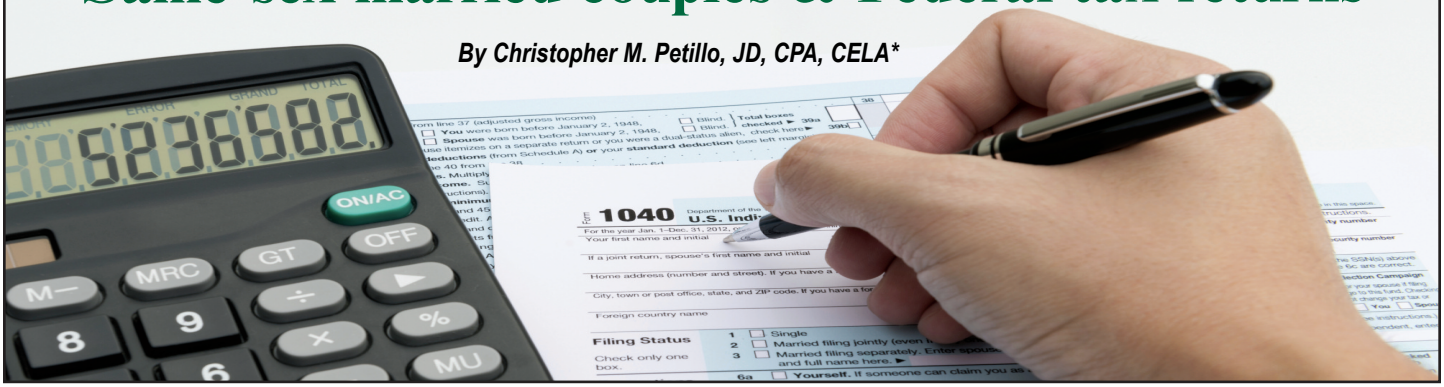
Same-sex married couples & Federal tax returns

By Christopher M. Petillo, JD, CPA, CELA*



Same-sex couples will now be entitled to the same benefits (or pitfalls) as heterosexual couples when filing their Federal income tax returns. The Internal Revenue Service, in response to the demise of the Defense of Marriage Act (DOMA), has set down rules so that same-sex married couples may now file joint Federal income tax returns.

As part of the rules mentioned above, same-sex couples that had been paying taxes on the value of their spouse's health insurance benefits will no longer do so. Inherited IRA spousal tax-free rollover rules are now available along with the ability to open an IRA for a non-working spouse using the earnings of the working spouse for qualification purposes.

In addition, same-sex married couples may go back and amend up to three years of Federal income tax returns if doing so would have resulted in a tax refund(s). If you would have owed money by amending, you are not obliged to amend and pay more.

Married Filing Jointly – A gift or curse?
The Internal Revenue Code has many "marriage penalties" built into the tax code. A couple with one earner will likely pay less taxes than if they were to file using the Single filing status as had been done in prior years. However, two-earner households will likely pay more taxes than they would have if they were unmarried and filed using the Single filing status.

Student loan marriage penalty
What if you fell in love in college or grad school and you both have loans? Unfortunately, there is a marriage penalty awaiting you in the land of the student loan interest deduction.

The maximum deduction for student loan interest is $2,500 for single filers. So can married couples deduct $5,000? Well, no, that is not the case. If both spouses have student loan interest, the maximum amount of student loan interest that can be claimed as a tax deduction is limited to $2,500.

The deduction is also limited by your income. If your modified adjusted gross income is under $60,000 (or $125,000 for married couples filing a joint return), you can deduct up to $2,500 in student loan interest. If both spouses earned $50,000 each, they can deduct a maximum of $2,500 (not $5,000).

State income tax returns
Couples in states such as New York, Massachusetts and California can also file jointly on their state income tax returns. In those states that do not yet recognize same-sex marriages, same-sex married couples may still have to file as Single (or head of household). This may make tax return preparation more time-consuming for couples in such states.

Federal estate & gift tax laws
Same-sex married couples are entitled to the same benefits as heterosexual couples. Benefits such as the Unlimited Marital Deduction for the estate tax-free transfer of assets to a surviving spouse – as well as the portability of the Deceased Spouse Unused Exclusion Amount – will now be available to all married couples, regardless of sexual orientation.

Keep in mind that the Federal government still has some unresolved issues to contend with such as Social Security benefits and veterans' benefits. If you have any questions about this topic, we strongly advise you to contact the National Legal Office of Feldman, Kramer & Monaco, P.C.

*Certified as an Elder Law Attorney by the National Elder Law Foundation

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For example, one of my clients felt constantly slighted by her son and daughter-in-law during holiday celebrations and was never invited to spend holidays with them. As a result, my client spent every holiday with her other son and his family and therefore left the kinder son her entire estate.

My client wrote a letter of intent to the disinherited son to explain her thought process and reason behind the disinheritance; once he read the letter, in his own mother's words and handwriting, he decided not to contest the Last Will and Testament.

If you are considering disinheriting a family member, it is important that you obtain a Will. If you pass away without a Will (referred to as "intestate"), New York state dictates who inherits from you and in what proportion.

The relationship that you have with your spouse, children or other inheriting family members – other than the familial relationship – is irrelevant to New York state if you pass away without a Will. The laws of intestacy take over if you pass away without a Will and dictate who will inherit from you and in what proportion.

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