TIAA-CREF Individual Advisory Services

Love, marriage and money: Financial planning tips for same-sex couples in the new age of marriage equality

With the Supreme Court's historic ruling on marriage equality, many of the longstanding obstacles that same-sex couples have faced in financial, estate and legal planning have been lifted. But even with the expanded rights that come with being married, couples still need to focus on creating a solid financial and estate plan that reflects the goals of both partners. This kind of strategic planning—best carried out with the guidance of financial and legal professionals—can help you build a financially secure future according to your wishes and ensure your priorities in the event of a health emergency or death.

Financial and estate planning is just as important for couples who choose not to marry and need to navigate critical issues, such as how they manage their shared assets and how they designate their legal beneficiaries. In all cases—married and unmarried couples alike—good planning is the key to long-term peace of mind. Also, you should give careful consideration to financial issues before marrying.

Marriage equality is now the law in all 50 states. The Supreme Court's decision in *Obergefell v. Hodges* in June 2015 held that same-sex couples have a right to marry under the Constitution and that states may no longer deny this liberty. The Court further held that there is no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

The *Obergefell* ruling comes after the 2013 *US v. Windsor* case, which struck down the section of the federal Defense of Marriage Act, which limited federal recognition of marriage as between people of the opposite sex. Although this extended more than 1,000 federal rights and responsibilities to same-sex married couples, including certain rights held by the spouse of a retirement plan participant, it did not alleviate the need to understand and plan for disparate state laws.

Proper estate and retirement planning can help you and your spouse plan for your later years. Legal documents such as wills, trusts, powers of attorney and healthcare directives can offer important protection to ensure that your wishes are upheld. Some common planning moves to consider include:

Income tax considerations

All legal same-sex marriages are recognized for federal tax purposes, including income and estate taxes. Legally married couples must file their income taxes as either married filing joint or married filing separate. Your choice is affected by the available personal and dependent exemptions, the standard deduction, Individual Retirement Account (IRA) contributions, and earned income tax credit or child tax credit eligibility.

Financial Services

If you and your spouse each have relatively high incomes, together, you may face the so-called "marriage penalty," in which your combined tax bill is higher than if each of you filed separately. However, by jointly itemizing deductions you may be able to offset how much tax you owe.

Recognition of same-sex marriage for income tax purposes may affect how you approach retirement planning.

Employee benefits and retirement planning

In September 2013, the Department of Labor (DOL) ruled that legally married same-sex couples can participate in employee benefit plans, regardless of whether their marriage was recognized by the state in which they lived. Prior to this ruling, married same-sex couples living in a state that did not recognize their marriage were subject to federal tax on employer benefits provided for their spouses, and costs were typically payable on an after-tax basis. So, for example, health insurance purchased to cover your same-sex spouse can be done on a pre-tax basis, lowering your taxable income.

Recognition of same-sex marriage for income tax purposes may also affect how you approach retirement planning and the beneficiary designations associated with your retirement accounts. The required minimum distribution rules applicable to IRAs and qualified retirement plans allow more distribution options when these accounts are payable to your surviving spouse, rather than a non-spouse beneficiary, after your death. For example, your surviving spouse will have the option of rolling the retirement account into his or her own name and treating as his or her own account. Be sure to review your beneficiary designations to ensure that you understand the implications those designations will have on your overall estate plan.

Social Security

While the federal government recognizes all marriage, the Social Security Administration has been limited to extending benefits only to same-sex spouses residing in states that recognize their marriage. The Court's ruling in *Obergefell* will effectively extend these benefits to all married couples.

There are certain eligibility requirements in determining whether you will be eligible to receive Social Security benefits based on your spouse's record. Subject to those requirements, some of the Social Security benefits that are available to married couples include:

Spousal retirement benefit: You may be able to collect Social Security benefits based on your spouse's earnings record rather than your own. Typically, you will be eligible to receive the greater of either your own benefit or an amount equal to 50% of your retired spouse's benefit. One common strategy is for the spouse with the higher earnings record to file for benefits upon reaching full retirement age and to suspend his or her claim. The spouse would then claim a reduced spouse's benefit. This "file and suspend" strategy can be somewhat complicated and should be discussed with your financial or tax advisor.

Spousal disability benefit: If your spouse is disabled and receiving Social Security disability benefits, you may be able to collect a monthly benefit based on your disabled spouse's benefits.

Lump-sum death benefit: Following your spouse's death, there is a one-time lump-sum death benefit of $255 available to a surviving spouse, or, if none, to a minor child.

Surviving spouse benefit: As a surviving spouse, you are entitled to receive the greater of your own retirement benefit, or, your deceased spouse's benefit. You could also consider delaying receipt of your retirement benefits while you collect the survivor's benefit based on your spouse's earnings record.

The need for an estate plan

If you lack a well-executed estate plan, the laws of the state in which you reside determine who has certain rights in the case of your death or incapacitation. For example, if you become incapacitated, absent a valid durable power of attorney for healthcare, state law will determine who can make your healthcare decisions. In some cases, these laws may also determine who has the right to visit you in the hospital. If you do not have a valid durable power of attorney for financial matters, your spouse or partner may not be able to access your financial accounts—to meet your family's expenses or to even manage assets. If you die without a valid estate plan, your estate will be distributed per your state's laws of intestacy, which may go against your desired plans.

Incapacity planning

Consider naming both a general durable power of attorney and a durable power of attorney for healthcare, also called a healthcare proxy. A general durable power of attorney will authorize a named individual to act for you in most financial transactions as your agent. A healthcare proxy authorizes the named individual to act on your behalf in all medical and personal need type situations.

Financial matters: A general durable power of attorney can allow your agent to perform simple tasks such as paying your bills for you, or more complex tasks such as managing your investments and transferring your property. Typically, you would name your spouse to act as your agent. However, you could require two agents to act either jointly or individually depending on your situation. Absent a durable power of attorney, your spouse would have to petition the court to be appointed guardian or conservator in order to be able to handle your affairs. This can be a costly and time-consuming process.

A healthcare proxy designates the party of your choosing to make your medical decisions in the event that you are unable to so do.

Financial institutions may raise questions about the "staleness" of a durable power of attorney, even though there is no law suggesting that the passing of time will invalidate a power. For this reason, you should consider updating your durable powers of attorney every several years. Additionally, you could contact your financial institutions to determine whether the institution has its own power of attorney form or required documentation.

You should also note that powers of attorney are only valid during your lifetime. Upon your death, the powers of attorney will expire.

Medical matters: A healthcare proxy designates the party of your choosing to make your medical decisions in the event that you are unable to so do. It may also incorporate an advanced directive or living will provisions. These provisions are your instructions to healthcare professionals to provide or withhold certain types of medical treatment. The document should also incorporate a provision authorizing medical professionals to divulge your healthcare information in accordance with the Health Insurance Portability and Accountability Act (HIPAA). If an existing document does not do so, it should be replaced or supplemented.

Planning for death

Create a legal framework to ensure your assets pass according to your wishes.

Absent a will or other form of estate plan, probate assets will pass per your state's laws of intestacy. As a result, it's important to create a legal framework to ensure your assets pass according to your wishes. There are several key parts:

Will: A will is a legal instrument expressing your wishes with respect to several important matters following your death. First, a will disposes of your property. Your will can identify who you wish to leave assets to and how those assets should be distributed. In your will, you name your executor, who is the person that is charged with carrying out your wishes and settling your estate.

If you have minor children, the guardianship provisions contained in your will are especially important. If only one spouse is recognized as the legal parent and that partner dies, the surviving spouse could lose all rights with respect to the child. Your will can include language indicating that you recognize your surviving spouse as the child's parent and that he or she shall be given priority over others as the child's guardian.

Revocable trust: A revocable trust is especially effective for individuals with property in different states, in states in which the probate process is particularly onerous or simply for individuals who wish to avoid any type of delay in granting their heirs access to the assets. The trust will contain the primary provisions for distributing your assets during incapacity and post death and appoint the party (the successor trustee) who will be in charge of the process.

In order for this planning to be effective, coordinate asset ownership with the terms of your estate plan. Transfer ownership of your assets from your individual name to your respective revocable trusts. When you transfer assets to a revocable trust, the assets are still "yours"—you maintain complete control over the trust and any assets held in the trust, you can amend or revoke the trust at any time. The assets that you transfer to the trust during your lifetime will simply avoid probate. You should note that even if you are using a revocable trust as your primary estate planning vehicle, you should have a will. Your will would simply "pour" any assets that remain in your name, and which you have not transferred to the trust during your lifetime, over to your trust.

Providing for your spouse

There are many ways in which you can provide for your spouse following your death. You can leave assets outright to him or you can leave assets to a trust for his or her benefit. Part of this planning may depend on whether tax planning is part of your estate plan. Be sure that your plan will meet your objectives.

There are several benefits to leaving assets to your spouse in trust, including

1. The ability to receive trust income in annual or more frequent installments,
2. entitlement to trust principal as needed for your partner's support and health during his or her lifetime,
3. asset protection from your spouse's creditors and inheritance claims made by your partner's family, and
4. the ability to direct those individuals and/or charitable organizations you would like to benefit from the assets remaining in the trust at your partner's death.

If you decide to establish a lifetime trust for the benefit of your spouse, you may also wish to consider the benefits of naming an independent third party, such as TIAA-CREF Trust Company, FSB, as Trustee. An independent third party can serve as a neutral decision maker, effectively balancing the needs of your spouse and your remainder beneficiaries.

Coordinating asset ownership and beneficiary designations

One of the most important, and most often overlooked, aspects of an estate plan is the manner in which assets are owned and beneficiary designations are structured. It is imperative that asset ownership and beneficiary designations be coordinated with your overall estate planning objectives in order to make sure that the provisions of your estate plan are met. For example, your estate plan could implement tax planning and could create a trust for the benefit of your spouse, but if your assets are owned jointly with right of survivorship, the assets will pass directly to your spouse, and will not be used for tax planning.

Should tax planning be part of your estate?

The federal gift, estate and GST tax exemption amount is now permanently set at $5 million—indexed for inflation—and the top tax rate is 40%. For 2015, the indexed exemption is $5.43 million per taxpayer. This high exemption amount eliminates the need for estate tax planning for many clients. Further, the concept of “portability” allows a surviving spouse to apply his or her deceased spouse’s unused exemption amount (DSUEA) either during his or her lifetime for taxable gifts or at death for estate tax purposes. This means that married couples are able to shelter more than $10.8 million from federal estate tax without employing traditional “credit shelter trust” planning at the first spouse’s death.

New decisions for same-sex married couples

Recent rulings have a significant impact on same-sex married couples. As equal treatment for same-sex couples continues to evolve, be sure you are working with a financial advisor, accountant and tax professional who are familiar with the developing landscape.

For more information on any of the issues discussed in this piece, contact your TIAA-CREF Advisor.

TIAA CREF
Financial Services

C24284

238120_555609
A15033 (07/15)