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Same-sex marriage and estate planning

On Nov. 5, the Illinois General Assembly passed a bill legalizing same-sex marriage in Illinois, making it the 16th state to recognize same-sex marriages at the state level.

The House of Representatives passed the Senate's February 2013 bill, which sought "to provide same-sex and different-sex couples and their children equal access to the status, benefits, protections, rights and responsibilities of civil marriage." An avid supporter of the legislation, Governor Patrick J. Quinn signed the bill into law on Nov. 20.

The new law emerges on the heels of the U.S. Supreme Court's decision in June overturning a provision of the 1996 Defense of Marriage Act (DOMA) that effectively dissipated a same-sex couple's right to receive federal marriage benefits. Now, in the states allowing same-sex marriage, couples are entitled to more than 1,000 different federal benefits, including Social Security and pension benefits, retirement plans and marital deductions.

Illinois has recognized civil unions since January 2011 under the Illinois Religious Freedom Protection and Civil Union Act, which provided partners in a civil union the same protections and benefits that married Illinois couples receive. The act allows Illinois partners in a civil union the right to hospital visitations and the right to make medical decisions for one another as well as the right to inherit from one another in the absence of a will.

Additionally, the act afforded ownership of a shared residence as tenants by the entirety, which deems one's home to be owned by a married couple as a fused unit, making an individual creditor of either partner unable to reach the primary residence.

Despite the protections offered by the act, the Supreme Court in its DOMA ruling did not address if or how federal benefits would be applied toward states only recognizing civil unions. By allowing same-sex marriage, Illinois will now play a more instrumental role in securing federal benefits and

protections to same-sex couples and their children, including the following:

Estate planning benefits:

- Claim the marital deduction for gift and estate tax purposes
- Elect portability of the deceased spouse's unused applicable exclusion amount
- Split inter vivos gifts
- Name the spouse as beneficiary under a qualified retirement account and allow the surviving spouse to roll over the account to his/her personal account

Income tax planning benefits:

- Grant certain Social Security, Medicare and Medicaid benefits
- File joint income tax returns as a married couple and consider amending past returns
- Simplify the basis and contribution rules for jointly owned property
- In a divorce, eliminate adverse tax consequences for the transfer of property

Tax savings: With more than 1,000 tangible benefits, protections, rights and responsibilities that a marriage provides to couples and their children, taxes are often at the forefront of same-sex marriage discussions.

While marriage should not be purely a "financial decision," same-sex couples must be mindful of the tax implications of the marriage and should consult with an accountant regarding their particular situations.

For example, where one partner's income is higher, filing jointly as a married couple can translate into tax savings. Conversely, partners in similar earnings brackets may find themselves in a steeper tax rate when they combine their returns.

Estate and tax benefits: On the estate side, with proper planning, the new legislation allows Illinois residents to postpone any estate tax at both the state and federal level until the surviving spouse's death. Likewise, Illinois couples who legally wed will also be able to file joint taxes, receive Social Security survivor benefits and take advantage of other federal benefits afforded to traditional married couples.

Pre-nuptial agreements: While I am toasting to my clients' engage-

THE BUZZ



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ments, I am also encouraging them to be mindful of the financial and legal implications associated with a marriage — and potential divorce. According to the U.S. Census Bureau, more than 50 percent of marriages end in divorce.

While it is too early to determine any statistical significance for heterosexual versus same-sex couples, if we continue to operate on the premise that all marriages are created equal, it is difficult to imagine dramatically different results. Thus, clients entering into a marriage are encouraged to examine whether a pre-nuptial agreement is appropriate for the couple prior to the marriage.

Crossing state lines: Same-sex marriage laws will serve to reform the way that gay and lesbian married couples can plan for their futures, but partners entering into civil unions or marriages should take caution. Same-sex married couples moving to states that do not permit same-sex marriages, or only allow civil unions, are still left vulnerable.

Most states continue to deny such recognition and it remains unclear whether other states would respect an Illinois marriage or civil union. Illinois, however, will recognize marriages from other states, as Illinois' definition of

marriage has changed from an act between a man and a woman to one between two persons.

Another concern arises with couples looking to elope to Illinois, as state law rights, such as divorce, create significant complications for same-sex spouses moving to states which do not recognize the marriages and, thus, would not grant divorces.

Moreover, estate planning concerns appear for extended families and descendants of same-sex couples as well. For example, if a trust is governed under laws of a state not recognizing same-sex marriages, documents may have different meanings in different states.

Timing: Although the law is not poised to go into effect until June 1, Sen. Don Harmon, an Oak Park Democrat, has filed legislation to move up the effective date. Within one year of passing the legislation, parties to a civil union may have their union legally designated and recorded as a marriage, with the fee waived, effective on the date of the civil union.

Further, as June 1 is a Sunday, many counties are already discussing opening their clerk offices to allow couples to apply for a license and then have it officiated a day later by the government/religious official.

With 4,000 of the nearly 5,000 civil unions in the state issued in Cook County, Cook County Clerk David Orr's office already announced that it will be open on June 1.

While the Illinois legislation, the DOMA ruling and the civil union act are all significant steps toward establishing nationwide marriage equality, estate planning documents are still critical to ensure that one's wishes are respected.

At the very least, couples should have wills, powers of attorney for property and powers of attorney for health care. In addition, couples are encouraged to also execute revocable living trusts to help avoid probate, provide asset protection for beneficiaries and minimize estate tax consequences.

A special thanks to Chuhak & Tecson P.C. law clerk Lorien Schoenstedt for her contribution to this month's column.