TD Wealth

Financial Planning Considerations for Same-Sex Couples

The passage of The Civil Marriage Act on July 20, 2005, embracing same-sex marriages across Canada represented a significant milestone in recognizing equal rights for same-sex couples. Today, gay and lesbian couples enjoy substantially the same legal rights as opposite sex couples across the country. However some differences remain in a number of provinces in respect of rights of common-law and those of married couples.

Whether you are married, considering marriage or a common-law union, a relationship is a major life event that should prompt you to review your financial situation. While a marriage or common-law relationship is a loving partnership between two people, it also has legal and financial implications. To ensure sound planning, it is necessary to have a good understanding of the tax, family law and estate implications of marriage and common-law relationships.

Tax Considerations

From a tax perspective, common-law couples are treated on an equal footing with legally married couples. For the purpose of the federal Income Tax Act, you are a "common-law partner" if you cohabit with another person in a conjugal relationship, whether that person is of the same or opposite sex, if (a) that relationship has lasted at least 12 continuous months; (b) the two of you are legal parents of a child (including a natural or adopted child); or (c) he or she has custody and control of your child (or had custody and control immediately before the child turned 19 years of age) and your child is wholly dependant on that person for support.

This means that partners — married or common-law, same-sex or opposite-sex — receive the same tax benefits and are subject to the same obligations. In the "Tax Considerations" section of this article, references to "spouse" and "partner" are used interchangeably and include both marriage and common-law relationships.

Tax filing and tax credits

- If your marital status has changed (this includes entering into a common-law partner relationship), you will need to inform CRA. Use CRA Form RC65 *Marital Status Change* for this purpose.
- Some tax advantages of being a spouse include the ability to claim a tax credit for a financially dependant partner, and to transfer credits and amounts (such as the age amount, disability amount, tuition amount and pension income amount) to a partner. In addition, credits based on receipted payments (such as charitable donations or medical expenses) may be combined by partners to maximize the tax credit.

- On the other hand, certain credits may be lost or reduced as a result of using the combined net family income to determine the income threshold. These include the GST credit, and the Canada Child Tax Benefit.

Income splitting

One of the benefits of being a spouse is the availability of various income-splitting strategies.

There are some advantages for couples when saving for their retirement in a registered retirement saving plan (RSP). Partners may take advantage of a **spousal RSP**. Contributions to the plan are deductible from income by the contributor, and the funds once they are withdrawn will be fully taxable in the hands of the partner, thereby splitting income in retirement (subject to spousal RSP attribution rules).

Partners may also **share their Canada Pension Plan (CPP)** payments. Provided both partners are over the age of 60 and receive CPP payments they may share a portion of the pension benefit earned during their time together.

In addition, since 2007, **pension income splitting** is permitted. Canadians who receive income which qualifies for the pension income credit are permitted to allocate up to one-half of that income to their partner. At any age, pension income from a defined benefit or defined contribution pension plan may be split with a partner; while for those who are 65 years or older, incomes from an annuity and registered retirement income fund (RIF) are also eligible to be split.

Tax-deferred rollover of certain assets

At death, RSP and RIF assets can be rolled over on a tax-deferred basis to a surviving partner. This has the effect of extending tax-sheltered growth of those assets until the death of the surviving partner.

During one’s lifetime, non-registered assets can also be transferred to a partner without triggering capital gains. However, as a result of income attribution rules, the transferor will still be responsible for the tax on the investment income earned from the transferred asset as well as any gain or loss on the subsequent disposition of that asset.

Tax-free rollover of TFSA

The Tax-Free Savings Account (TFSA), introduced in January 2009, permits tax-free growth of amounts held in such an account. This account can be transferred to a surviving partner tax-free following the death of the other partner where it can continue to grow on a tax-free basis.

Less favourable tax implications being in a spousal relationship

i) Application of income attribution rules

As discussed above, non-registered assets may be transferred on a tax-deferred basis from one partner to another during his or her lifetime. However, any subsequent investment income or gain earned on the transferred asset will be attributed back to the transferor.

Nevertheless, some income splitting strategies between partners can be implemented to avoid the attribution.

One such strategy is the use of a **prescribed rate loan**, which involves the higher-income partner lending a sum of money to the lower-income partner at a fixed interest rate prescribed by the government. If the borrower pays interest on the loan annually by January 30th, any investment earnings are taxed, minus the interest payment, at the borrowing partner's tax rate.

ii) Reduced availability of principal residence exemption

It is quite common for individuals to enter into relationship each owning their own home. Some people naturally decide to move into one home and then sell the other. If this occurs subsequent to the marriage, the home they move into continues to enjoy principal residence status; however, the other home may become a secondary residence. When the secondary residence is sold potential capital gains may arise. This is due to the tax rule that stipulates that only one property per family unit may be designated as a principal residence each year. To minimize any potential capital gains liability, it may be a good idea to review the principal residence exemption rules when deciding to move into a home together with your partner.

Family and Estate Law Considerations

Perhaps because common-law couples are not treated differently from legally married couples for income tax purposes, many people are under the impression that common-law couples always enjoy the same rights as legally married spouses. In reality, this is not necessarily the case when it comes to family and estate law. While marriage and divorce are governed by federal legislation, family and estate law falls within the provincial domain and can therefore vary dramatically from one province to another.

In certain provinces, there are still significant differences between the treatment of legally married couples and common-law couples, in respect of property rights, the matrimonial home, support obligations and intestate succession (dying without a valid Will). The very definition of "common-law" varies across the country and may range from two to three years of cohabitation depending on the province (or less if the couple are the parents of a child).

Property division

Generally, provincial legislation views marriage as an economic partnership, and when marriage ends – whether as a result of separation, divorce and/or death – the spouses are commonly entitled to an equal share of the matrimonial assets accumulated during the period of marriage. However, in some provinces, the definition of "spouse" does not include a common-law partner for the purposes of property division.

Matrimonial home

Another difference between married and common-law relationships in some provinces has to do with ownership and/or possession of the matrimonial home. Whereas married couples may have equal right to possession and ownership of the matrimonial home in certain provinces, this is not the case for common-law couples.

Spousal support

Common-law partners generally have the right to seek support payments from their partners provided they meet the cohabitation period (a shorter time period may apply if the common-law partners are the parents of a child) set out in their province of residence. Some provinces have imposed a time limit in which a common-law partner must initiate the application for support.

Intestate succession

Generally under provincial legislation, the surviving spouse is entitled to an automatic share of the estate of a spouse who dies intestate. Some provinces provide a common-law partner with the same rights as those who are married but some do not. The result may be that if you die without a valid Will your relatives - not your partner - may inherit your property.

Dependent relief

A surviving spouse may bring an action against their spouse's estate if they are not adequately provided for in their deceased spouse's Will. Many, but not all, provinces have similar rights for common-law partners.

Planning Ideas for Same-Sex Couples

- **Develop a financial plan** together to reflect your new family situation: update net worth, cash flow and investment plans, explore ways to minimize your taxes and review your retirement and other long-term goals.
- If you or your partner has minor children **review the child's education savings plan**. With a combined household income it may now be possible to save more towards other goals such as funding the post-secondary education of a child.
- **Make sure your Wills are prepared or updated**, since marriage commonly invalidates a Will made prior to marriage (unless it was made in contemplation of marriage). In the context of same-sex relationships, family members may be unwilling to accept the partner as a beneficiary; and family members who are excluded from a Will which favours a partner may challenge the validity of the Will.

  This makes it particularly important for the solicitor attending to the execution of the Will of same-sex partners to establish testamentary capacity, the absence of suspicious circumstances, and undue influence.

- Partners may not automatically have legal authority to manage each other's financial affairs or make health care decisions. Having **continuing powers of attorney** in which the partner is the designated attorney will ensure that they have the ability to handle your financial affairs or make health care decisions for you in the event of incapacity.
- **Consider joint registration of assets** such as bank accounts, principal residence, and cars "with right of survivorship" [Note: not applicable in Quebec]. This enables the surviving partner to assume immediate ownership in the event of the death of the other partner. By excluding these assets from the deceased's estate, probate may also be avoided.
- **Beneficiary designations**: Naming your partner as the beneficiary of your pension and registered plans [Note: not applicable in Quebec] aides in a smooth, tax efficient transition of assets, as funds can be rolled over to the surviving partner on a tax-free basis and may avoid probate.

- In view of your new status, review your life, disability, and critical illness **insurance** needs to help ensure adequate coverage and the beneficiary who you want to receive any insurance payouts is named in each policy.
- Consider using a **domestic contract** to determine how assets are to be distributed on divorce or death, exclude certain assets such as a business, or determine support requirements.

Financial planning issues are often complex with multiple financial, tax and legal considerations. Whether you and your partner are married or common-law partners speak to your TD Wealth advisor who can help you determine what is right for you and where necessary, seek additional professional advice.

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