GLOBE INVESTOR

Same-sex snowbirds with property in the U.S. have reason to celebrate

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OPINION

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The 2013 U.S. Supreme Court ruling in the case of U.S. v. Windsor was instantly historic for same-sex couples.

Prior to Windsor, the Defense of Marriage Act (DOMA), a U.S. federal law, did not legally recognize same-sex marriage. As such, married same-sex couples did not receive the same federal tax and estate-planning opportunities as heterosexual married couples.

While the Windsor decision changed federal law to recognize same-sex marriage, it did not overturn the section of DOMA that permitted U.S. states to enforce their own rules regarding same-sex marriage.

However, in 2015, the U.S. Supreme Court wrote a landmark decision in its ruling of Obergefell v. Hodges. This decision effectively overturned all state laws that banned same-sex marriage. The decision also forced all states to officially recognize the legality of same-sex marriages performed out-of-state.

Although Canadian common-law marriages between same-sex partners are still unrecognized in the United States, there is much to celebrate about the positive changes resulting from the Windsor and Obergefell rulings. Legally married same-sex couples living in the United States and Canada now enjoy the same legal protections and benefits at both the federal and state levels under U.S. law.

The newly inclusive U.S. legal landscape is good news for legally married same-sex snowbirds who are planning to buy U.S. property or for those who already own property south of the border.

Below are reasons that married same-sex Canadians should celebrate when it comes to owning U.S. property in 2018.

U.S. ESTATE TAX

Canadian snowbirds who pass away owning U.S. property may have to pay estate tax on the fair-market value of their U.S. property at a rate of up to 40 per cent. Currently, a Canadian is subject to U.S. estate tax if they meet two tests: i) they own U.S. property valued at more than US$60,000; and ii) the fair-market value of their worldwide assets is more than US$11.2-million. (In 2026, this high exemption amount will fall to 2017's US$5.49-million exemption, adjusted for inflation).

Fortunately, the Canada-U.S. Tax Treaty provides a marital credit to a surviving spouse that can reduce or eliminate estate tax due when the first spouse dies. Before the ruling in Windsor, however, married same-sex couples were unable to benefit from this credit.

Today, Canadian same-sex snowbirds who are legally married should have to pay very little – if any – U.S. estate tax on the U.S. property they inherit from a deceased spouse.

U.S. INCOME TAX

Often, Canadian snowbirds purchase U.S. investment property, or they rent their U.S. vacation home for part of the year. Once you generate income in the United States, you must file a U.S. tax return.

In the United States, unlike Canada, individuals can file tax returns in one of four categories: single, married filing separately, head of household or married filing jointly. The married-filing-jointly category provides the benefit of income splitting, as well as additional federal tax credits and deductions.

With the federal recognition of same-sex marriage, legally married same-sex Canadian couples can file joint tax returns in the United States. Moreover, since Obergefell, Canadian same-sex couples have enjoyed filing state-level U.S. tax returns as married persons.

PROBATE

Prior to Obergefell, legally married same-sex couples who owned property in a state that did not recognize same-sex marriage, such as Florida, had to take steps to ensure that they owned property in a structure that would avoid probate on first-to-die.

For example, consider a legally married Canadian couple, Stephanie and Laurie, who each owned 50 per cent of a vacation home in Florida. They did not take any steps to avoid probate. Unfortunately, Stephanie passed away in 2014; her 50-per-cent share of the property was subject to probate – a time-consuming, expensive process – before it passed to Laurie. If Stephanie and Laurie had elected to own their home as joint tenants with rights of survivorship, then they would have avoided probate.

Now, in the post-Obergefell world, taking that step would be unnecessary in Florida. Note, however, that it would be advantageous of Stephanie and Laurie to own their U.S. property in a Cross Border Trust structure, which avoids probate as well as incapacity issues.

INCAPACITY

Legally married same-sex Canadian snowbirds who own property in the United States spend significant time south of the border and should therefore create power-of-attorney documents for both health care and property.

Before the Obergefell decision, even when same-sex spouses were named as attorneys in these documents, in states such as Florida that didn't recognize same-sex marriage, the same-sex spouse could have been legally challenged by disapproving family members as having authority to act.

Now there is clarity and security for same-sex married couples: A spouse is a spouse, regardless of their gender.

There has never been a better time for legally married same-sex snowbird couples to own property in the United States.