

# Report #15 (Wednesday / Friday)

A complete listing of the proceedings and speakers is available on [the Institute's Web site](#)

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This Report contains coverage of the Wednesday general session by Richard Robinson on 15% tax on Dividends and Capital Gains and the Friday morning session by Prof. Thomas Callanis on Domestic Partners and Inheritance

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The 15% Tax for Dividends and Capital Gains - Use It or Lose It Wednesday Morning, 1/12/05  
Presenter: Richard B. Robinson Esq.

Reporter: Herbert L. Braverman Esq.

Mr. Robinson brought to our attention again the new playing field for income taxation. Lower rates should prompt us to think about realizing gains sooner rather than later because of the lower rates we are experiencing. He points out that the maximum rate for qualifying dividends is reduced to 15% for individuals, estates and trusts. The rates for lower bracket individuals is reduced to 5%. For taxpayers in the 10% to 15% bracket, the rate is ZERO in 2008. This is a tax environment we have not had in recent memory.

For certain long term capital gains, property that had been taxed at 20% is now taxed at 15% for individuals, estates and trusts. Again, for lower bracket individuals, the tax rate is 5% and will be ZERO in 2008. These lower capital gains rates are scheduled to expire after 2008--Mr. Robinson is urging us to take advantage of these rates sooner rather than later. He notes certain exceptions, for example a 25% rate on certain recaptures and a 28% on certain collectibles.

"Qualified dividend income" means dividends received during the tax year from a domestic corporation or qualified foreign corporations received by a non-corporate taxpayer. Certain dividends are not "qualified dividends", such as those from a tax exempt corporation, certain dividends from a mutual savings bank, dividends paid by a RIC or a REIT, etc. But, Mr. Robinson focuses our attention on situations where qualified dividends make sense today.

Robinson discusses various situations where qualified dividends make sense for C corps and for S corps; similarly, he points out situations where redemptions are treated as qualified dividends for C corps and S corps, respectively, with the attendant low tax consequences. His illustrations are numbers-driven with schematics that I cannot reproduce for you. My best advice is that you obtain a copy of his outline and follow the money! He shows us that flexibility and creativity can mean substantial windfalls to our clients. Though circumstances may dictate the use of dividend planning versus redemption planning (or both), both are important to keep in mind. For example, if stock basis is high, dividend treatment results in more income, but basis is not lost. Where there is significant capital loss carryforward, redemption treatment may be preferred. If stock has been held only a short time, dividend treatment produces a better result, provided the qualifying dividend holding period has been satisfied. Dividend treatment strips out earnings and profits on a dollar-for-dollar basis and may set the stage for an S election or future capital gains distributions from a C corporation.

Robinson then turned to the topic of maximizing the benefits of capital gains realized sooner rather than later. If the 15% tax rate goes away, accelerating income in a 15% year could result in tax savings of 264% (15% vs. 39.6%). In other words deferral does not always produce the best tax result; the future tax burden from an increased tax rate may be substantially more than paying a current relatively low tax.

He goes through detailed analyses to demonstrate the advantages of the current tax environment in a variety of other situations, including corporate liquidations, partnership distributions and liquidations, Stock sales to related parties followed by liquidations and sales between related parties, locking in appreciation at capital gains rates.

His breakout session will no doubt delve into even greater detail regarding these matters.

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Domestic Partners and Inheritance: Past, Present and Future Friday Morning, 1/14/05

Presenter: Prof. Thomas P. Gallanis

Reporter: Herbert L. Braverman Esq.

Professor Gallanis highlighted the apparent changes in the American family structure over several decades. He reviewed the demographics with us to show that there are many same-sex unmarried partners in this country and even more different-sex unmarried partners heading families in this country.

He noted that inheritance laws in this country are focused on marriage, whether formal, common law in some jurisdictions and under the putative spouse doctrine who held a good faith belief that they were married.

The professor review the contractual basis for inheritance rights in nonmarital relationships , citing the well-known case of Marvin vs.

Marvin (Cal. 1976) . The contract analysis bogged down in an exploration of "consideration". What was the consideration for the nonmarital relationship--sex, sex+, services , services +, etc. The Professor suggested a broader view of long term commitment, to replace the contractual analysis of the past; this would be done without a distinction between same-sex and different-sex unmarried partners.

There appears to be a growing recognition of the rights of nonmarital partnerships. See, for example, ALI Principles of the Law of Family Dissolution, chapter 6, and comment g to the Restatement Third of Property Section 2.2. Both suggest that a domestic partner, whether married or unmarried, should have certain rights.

Hawaii, Vermont and California appear to be moving in this direction, as does Maine with its recent legislation on the subject. Hawaii has reciprocal beneficiaries register the relationship and gain rights previously provided to married persons. Of course, this law is aimed only at persons who are prohibited from marrying under state law (same-sex partners and others, say a grandfather and his granddaughter).

Vermont had civil unions for same sex partners, but not for different-sex unmarried partners.

California passed legislation effective 1/1/05 providing certain economic rights to domestic partners there. Maine has similar law, focusing on relationships , long-term commitment and rights between partners , rather than on marriage alone.

Massachusetts is dealing with the issue also in what the Professor would call a progressive manner.

On the other hand, the country has not reacted uniformly to this trend.

The Defense of Marriage Act, passed in 1996, defines marriage as a "legal union between one man and one woman as husband and wife." 35 states passed their own laws with strong language supporting only the historical and conventional. Alaska, Nevada and Nebraska adopted constitutional amendments banning same-sex marriage, although you can get some pretty snazzy trust in those jurisdictions. As for the Massachusetts experience, only New York and Rhode Island will respect a Massachusetts arrangement that is not conventional. Then, in 2004, as a backdrop to the war in Iraq, 13 states passed constitutional amendments denying recognition to same-sex marriages. Our country is thinking about a Constitutional Amendment of the same type, though Congress did not pursue this item on the President's agenda as yet.

Where should we be on this set of issues? Professor Gallanis feels we should apply inheritance rights on the basis of domestic partnerships to effect the intent of decedents, to protect families or households and to avoid economic disruption to households. This will require a new understanding of domestic patterns. It will come only in time, slowly as our society changes, although it is not clear that we will see such a change. Finally, the Professor attaches a model statute for your consideration. There is certainly a lot to think about in this arena.

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Our on-site local reporters who are present in Miami this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Shelly Merritt Esq., a solo practitioner in Boulder, Colorado, Connie T. Eyster Esq. of Hutchinson, Black & Cook LLC in Boulder, Colorado, Jason Havens Esq. of Havens & Miller PLLC in Dustin, Florida, Bruce Stone of Goldman, Felcoski & Stone, PA of Coral Gables, Florida, Herbert L. Braverman Esq. of Walter & Haverfield LLP in Cleveland, Ohio, and Jeffrey L. Weiler of Benesch, Friedlander, Coplan & Aronoff LLP of Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado who is the Chief Moderator of the ABA-PTL List.

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