

SPOTLIGHT ON COMMITTEES: DOMESTIC RELATIONS

by Toni Robinson, Hamden, CT

The Domestic Relations Committee can barely keep up with all the developments in its area. In addition to the controversy that has ensued since Massachusetts became the first state to approve same sex marriage, California is considering similar legislation and has adopted a new statute authorizing the equivalent of community property for unmarried partners. To add to these new state law developments, Congress enacted two major pieces of tax legislation in October. The first, the Working Families Tax Relief Act of 2004 contains many provisions affecting domestic relations planning; the second, the American Jobs Creation Act of 2004, also includes provisions of interest to our Committee.

A quick review of the Committee's activities should begin with the treatment of same sex and transgendered couples. Boston seemed the ideal venue for an examination of tax and estate planning for same sex and transgendered couples. Since Massachusetts began recognizing same sex marriages as a consequence of the decision of its highest court, there has been a great deal of confusion as to when these marriages will be recognized for tax (and other) purposes. Although federal tax law had long relied on state status for determining the right to file a joint return and the proper application of the rate tables, the Service has confirmed that federal law, the Defense of Marriage Act ("DOMA"), requires the federal taxing authorities to reject the validity of same sex marriages, even if they were legally authorized where performed (i.e., Massachusetts). (Letter from the Service to Eugene A. Delgaudio (June 14, 2004), available at <http://www.publicadvocateusa.org/news/article.php?article-95>.) For a discussion of the letter, see, Allen

Kenney, *IRS: Joint Filing Not Allowed for Same-Sex Couples*, 103 TAX NOTES 1455 (2004). For a discussion of the letter's effect on the ability of legally married couples from treaty countries to file joint returns, see, Anthony Infanti, *Prying Open the Closet Door: The Defense of Marriage Act and Tax Treaties*, 105 TAX NOTES 563 (2004).

DOMA also allows states to refuse to recognize same sex unions for the purpose of such things as spousal shares at death, health directives, and custody of children. That is, a same sex couple may have all the rights of spouses within the jurisdiction where same sex unions are authorized, but outside of those geographic areas, same sex spouses will have to rely on some of the methodologies other unmarried partners have utilized, most importantly, contracts. During our Boston meeting we learned that even contracts may not provide the desired result because even the ability to make binding contracts may be hindered by individual state laws; Virginia, for example, as part of its ban on same sex marriage, also bars the making of contracts in order to accomplish a legal result that is a normal consequence of marriage. Participants in the Boston meeting also heard from a panel of experts on planning and drafting tax and estate planning documents for same sex couples. Participants in these programs agreed that the Committee should sponsor more panels to investigate further the topics raised at this first presentation.

More recently, in San Diego, the Committee discussed innocent spouse litigation, including *Ewing v. Commissioner*, 122 T.C. No. 2 (2004) (on appeal) in which the petitioner sought equitable relief at the discretion of the Secretary. After the

Service denied relief, the taxpayer advanced some additional information that had not been presented to the Service before its ruling. The taxpayer's appeal asserted an abuse of discretion, with the Service arguing that it cannot abuse its discretion if the information is unknown to it.

The Committee's San Diego program also included an exciting panel on estate planning for high-income couples, who face uncertainty due to the possibility of permanent estate tax repeal and the increasing lifetime exemption amount. There was also a presentation concerning the new California Domestic Partner legislation that creates community property rights for domestic partners similar to those that exist for married partners. The panelists discussed this legislation and provided an update on the prospects for legalization of same sex marriage in California and the possibility that other community property states might follow California's action regarding the property rights of domestic partners.

Finally, the recent adoption of a unified definition of "qualifying child" affects many provisions in the Code, especially the various credits that apply to most low-income taxpayers. In addition to discussing this in San Diego, the Committee is exploring a joint meeting with the Low Income Taxpayers Committee. In future meetings the Committee also hopes to explore further the issues affecting transgendered taxpayers. Members interested in learning more about the Committee are welcome to attend its meetings or contact the Chair, Toni Robinson at Toni.Robinson@quinnipiac.edu. ■