I. Summary of U.S. and NY Estate & Gift Taxes

A. U.S. regime
   i. $5 million estate tax exemption amount ($5,120,000 in 2012); tax is paid by estate
   ii. $5 million lifetime gift tax exemption amount ($5,120,000 in 2012); tax is paid by donor
   iii. 35% top rate for 2011-2012
   iv. Estate tax exemption amount is portable for M/F married couples only
   v. Any gift tax exemption used during life is subtracted from estate tax exemption amount at death
   vi. $13,000 gift tax annual exclusion amount ($13,000 in 2012)
   vii. Unlimited estate and gift tax marital deduction for assets left to U.S.-citizen spouse, but for M/F married couples only
   viii. Unclear what exemption amounts and rates will be in 2013 and beyond

B. NY regime
   i. $1 million estate tax exemption amount ($1 million in 2012)
   ii. No gift tax
   iii. 5.6%-16% rate
   iv. Estate tax exemption amount is not portable
   v. Unlimited estate tax marital deduction for assets left to U.S.-citizen spouse for all married couples
   vi. No change in exemption amount or rate currently contemplated

II. Gift tax issues re: jointly held assets

A. Under NY law, assets placed into joint accounts are severable, i.e., each joint tenant can take a pro rata share of the property without having to account to the other tenant or tenants.

B. Because joint tenancy assets are severable, the IRS says that, if only one member of a same-sex couple contributes the funds to open a joint account or to purchase real property that will be jointly held, the contributing member of the couple will be deemed to have made a gift to the other member of the couple of one-half the value of the contributed
property. Since same-sex couples are not eligible for the unlimited U.S. gift tax marital
deduction, the contributing spouse may be liable for U.S. gift tax.

C. **Estate tax.** Upon the death of the first joint tenant, the value of all assets in the tenancy
property are presumed to have been contributed by the first tenant and will be included in
the first tenant’s U.S. taxable estate unless such presumption is rebutted by evidence to
the contrary; on the other hand, if the only joint tenants were a M/F married couple, the
Code mandates that 50% of the tenancy property be included in the taxable estate of the
first to die, regardless of who contributed the property. I.R.C. § 2040(b). NY now
follows this rule for same-sex married couples.

D. Thus, the change in law in NY could be advantageous or disadvantageous to a same-sex
married couple for NY estate tax purposes, depending on how much the first to die
contributed to the jointly held property.

III. **To take or not to take the New York unlimited marital deduction for estate tax**

A. It will always be advantageous to take the unlimited marital deduction for NY estate tax
for any assets passing directly to the surviving spouse.

B. In some cases, it may be advantageous to place certain assets (e.g., assets on which one
expects significant appreciation) in a bypass trust above the $1 million NY exemption
amount and therefore pay some NY estate tax on the first death with a view toward
greater NY and U.S. estate tax savings on the second death.

i. Both the assets placed in the trust and the appreciation on them will be removed from
the survivor’s taxable estate.

ii. Assets above the $1 million dollar NY exemption amount bequeathed to the bypass
trust will not be eligible for the NY marital exemption.

IV. **Importance of life insurance to provide liquidity on first death, given lack of federal
unlimited marital deduction for estate tax**

A. Because estate tax marital deduction is not available on federal level, greater chance that
estate of first to die may need liquidity to pay U.S. estate tax at death.

B. Thus, life insurance should figure into estate plan of same-sex couples, especially where
estate of first to die could be over U.S. estate tax exemption amount (currently $5 million,
but scheduled to drop to $1 million in 2013, unless Congress and the President act).

C. While life insurance proceeds are not taxed as income to beneficiary, they are included in
decedent’s gross estate for estate tax purposes if decedent possessed “incidents of
ownership” (e.g., power to change beneficiary, power to surrender, cancel, assign, or
borrow against policy, etc.) (Treas. Reg. § 20.2042-1(c)(2)).

D. A correctly structured irrevocable life insurance trust (ILIT) can be used, however, to
keep the value of the policy proceeds out of the taxable estate of the decedent and
perhaps out of the estate of the surviving spouse as well.

E. Thus, use of an ILIT can be a viable alternative to the federal marital deduction for tax-free transfer of wealth.

F. Each spouse can be a grantor of an ILIT for the benefit of the other, but care must be
taken that the provisions of the two trusts are not identical; otherwise, IRS can invoke
reciprocal trust doctrine and include policy proceeds in grantor’s taxable estate.