



The Repeal of the Federal Estate Tax: Estate Planning in Uncertain Times

Although Trusts and Estates practitioners were well aware of the “Sunset Rule” provision contained in The Economic Growth & Tax Relief Reconciliation Act of 2001 (the “Act”), few, if any, took seriously the possibility that Congress would actually permit the one-year repeal of federal estate and generation-skipping taxes. But on January 1, 2010, the implausible happened. Congress adjourned in December without extending these transfer taxes so that as of the first of this year, both the federal estate and generation skipping taxes are repealed through December 31, 2010. While it is possible (and, we believe, most probable) that Congress will act to reinstate either or both of the taxes in the coming months, for the moment, there is no federal estate or generation-skipping tax for those who die in 2010. In the meantime, it should be noted that because of these changes, your Will and/or Trusts as drafted may no longer accomplish your intended goals. Specifically, bequests to spouses, children and grandchildren may be adversely affected by the provisions currently in effect. More than ever, this is a time to review your estate plan to consider how these developments relate to your specific estate plan and to avoid unintended adverse results.

We are, therefore, reaching out to our clients to not only apprise them of the current state of affairs but to highlight the more salient aspects of the Act as presently in force:

- Any individual dying in 2010 will pass their estate free of federal estate tax. This applies to every estate, no matter the value, and even if the entire estate is left to a beneficiary other than the spouse.
- Regardless of the size of the legacy, all property passing to grandchildren or more remote descendants will not be subject to transfer tax.
- Estate property will not be entitled to a “stepped-up” basis for federal tax purposes. Prior to 2010, most assets in a decedent’s estate were allowed to be valued as of date of death, effectively eliminating capital gains on subsequent sales. Now, inherited property will carry over the same basis as

when the decedent owned it. The heirs of an estate will have to determine the decedent's original cost and pay a capital gains tax on the appreciated property when it is sold. As a partial offset, however, there is a \$1.3 million allowance for assets passing to any beneficiary with an additional \$3 million allowance for property passing to the spouse which effectively "steps-up" the basis for the purpose of calculating capital gains tax.

- The federal gift tax continues with a \$1 million lifetime exemption. However, the top tax rate for taxable gifts is reduced from 45% to 35%. In light of the reduction in the gift tax rate, more serious consideration should be given to making gifts above the lifetime exemption anticipating that, in the future, a variation of the federal estate tax will be reinstated. In addition to the lifetime exemption, one of the most highly effective transfer tax strategies which remains in effect is the use of the "Annual Exclusion" which currently permits a gift of up to \$13,000 (\$26,000 for a married couple) to as many persons as they wish each year. This continues to be one of the best ways to transfer family assets, tax free.

Since Congress has failed to act, as of now, in the year 2011 the estate tax and generation skipping tax are scheduled to return to where they were in the year 2001, with a maximum rate of 55% for estates worth more than \$1 Million. We cannot anticipate what Congress will do. We do know, however, that, for the moment, these transfer taxes have disappeared. A taxable estate has nine months from the date of a person's death to submit the estate tax return to the Internal Revenue Service. It is conceivable, therefore, that Congress will wait until the summer of 2010 to decide upon restoring these taxes and making them retroactive to the beginning of this year. This will certainly prompt constitutional legal challenges which will leave matters in flux for those who die in the interim period, but it is very unlikely that this state of affairs will continue indefinitely.

Gift and estate planning is a continuing process. The constant changes that take place in the lives of our families and in the laws create a need for periodic "legal check-ups." A thoroughly planned estate should provide for an orderly transfer of assets while maximizing the transfer of wealth. A well-developed plan is probably one of the greatest gifts you can provide to your family. In light of these recent changes, we encourage you to review your estate plans. Please feel free to contact us with any questions or specific issues you may have. You can click [here](#) to access the Trusts & Estates group through our firm website.

U.S. Treasury Circular 230 Notice: U.S. Treasury Regulations require us to inform you that any U.S. tax advice in this communication cannot be used by you (i) to avoid tax penalties or (ii) to promote, market or recommend to another party any transaction or matter addressed herein.