

No Estate Tax - No Problem? - No Way!

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Notwithstanding the predictions of every estate planner and politician, Congress has allowed the unthinkable to occur - the elimination of the federal estate tax. While rumors continue to swirl about whether Congress will retroactively reinstate the tax for 2010, it is becoming more likely that Congress may take no action during 2010. The result of this failure to act puts all estate plans at risk and creates substantial confusion. Assuming Congress takes no action, we have certain known results:

- Beginning January 1, 2010 through December 31, 2010, there is no federal estate tax for persons dying during this period.
- There is no "stepped up basis" rule for decedents dying during 2010, although there are provisions permitting an estate to increase the basis of assets by \$1.3 million and a basis adjustment of \$3,000,000 available for a bequest to a spouse.
- On January 1, 2011, the estate tax will spring back into life, with an exclusion amount of \$1,000,000 (decreased from \$3.5 million in 2009) and an increase in the maximum tax rate back to 55%.
- The federal gift tax is still in place and has not been altered.
- The federal generation-skipping tax has also been repealed for 2010.

What are we to do? The first answer would be a question - how do you feel? Many individuals will simply leave everything in place, assuming that they will live until 2011 and the cost of contemplating death in 2010 is greater than the benefit. To make that determination, however, individuals should consider the following:

- Many wills use a formula to divide the estate between a surviving spouse and a trust for the family. This would have been done to minimize total estate taxes. The formula is based upon funding a bequest with the maximum amount available without paying any federal estate tax. However, since there is no federal estate tax in 2010, there could be unanticipated consequences. Specifically, depending on the will, either the spouse or the family trust might be left with nothing.
- Several states, including Georgia, are considering legislation which would provide a rule of construction that would interpret the formulas based upon the federal estate tax as it existed in 2009. This would preserve a formula allocation, but may or may not bring the best result. For example, if the family trust includes the spouse as a beneficiary, it might be best to allow the formula to leave nothing to the spouse directly. Everything going to the family trust would avoid estate tax in mom and dad's generation, while any bequest to the spouse would only defer the tax until the spouse's death at which time the estate tax is back in place.

- Also consider the non-tax application of the formulas. For example, if an individual is in a second marriage with children from a variety of marriages, there may be a desire to insure that the surviving spouse receives a direct bequest and does not "share" in the family trust with children from a prior marriage.
- If you have a will with a trust for your spouse, check to be sure that it is a "Q-TIP" trust. If not, and you die in 2010, the assets going to the trust would not be eligible for the \$3 million "basis adjustment" for a spousal bequest, which is only available in 2010. This would be a very bad result since you would defer the tax to your spouse (assuming the spouse lives until 2011), and would not receive the benefit of the basis adjustment.
- You may want to consider the possibility of a simple codicil describing differences in the disposition of your estate if you were to die in 2010, but that would leave the basic will in place so that a new will would not be necessary in 2011.
- Look at the possibility of making generation skipping gifts (directly or in trust) in 2010. Although the gift tax is still in place, there is no "generation skipping tax" for 2010. Particularly for wealthy individuals, this could be a unique opportunity to protect family assets
- While 2010 is a challenge, you should not lose focus on 2011. Unless the law is changed, the applicable exclusion will go from \$3.5 million in 2009 to \$1.0 million in 2011. Since many wills were written in contemplation of the increasing exclusion, you may want to review the implications of the anticipated reduction.

The failure of Congress to act creates substantial uncertainty for everyone. It is possible that Congress might still reinstate the estate tax for 2010, and may make it retroactive until the first of the year. It is appearing more likely, however, that no action will be taken and we will be left with no estate tax or generation skipping tax during 2010. Consequently, individuals may want to review their wills and estate plans with their advisors to discuss what changes they need to make for 2010, as well as for 2011.

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