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Estate Planning | Wills & Trusts

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Estate Tax Update

The latest buzz from Washington does not include any resolution on the Estate Tax uncertainty for 2010 and beyond, but does suggest that two things appear to be likely: first, that the Estate Tax dilemma will not be resolved until after the November Congressional elections; and second, that the estates of those passing away in 2010 will have the option to apply the 2009 Estate Tax rules.

The first development is not all that surprising since neither party wants to be perceived as the party reinstating a tax that many people in the country are against as a matter of principal. Additionally, if a retroactive estate tax back to January 1, 2010, is implemented, Congress will almost certainly have a fight on its hands—a fight that they would prefer to postpone until after the elections.

The second development will require beneficiaries of the estates of decedents passing in 2010 and their accountants to make an extremely complex decision—whether the estate should choose to (a) apply the 2010 carryover basis and dodge the Estate Tax, or (b) apply the 2009 estate tax exemption of \$3.5 million and the Estate Tax rates applicable to assets in excess of the exemption while reaping the benefits of stepped-up basis on the assets of the estate. As discussed in Newsletter #4, accepting the carryover basis will mean that when such assets are sold, the beneficiary will owe capital-gains tax on the entire difference in value *from the date of purchase by the decedent* to the date of sale, rather than the difference in value *from the date of inheritance by the beneficiary* to the date of sale.

Needless to say, the ongoing absence of any resolution being reached by Congress, or even progress towards such resolution, is a source of anxiety for beneficiaries, attorneys and accountants, and when a resolution is finally reached, it may require the executors and trustees of decedents who passed in 2010 to make some swift decisions that will have a significant impact on the tax owed by the estate or the beneficiaries.

Reviewing Your Existing Estate Planning Documents

A common question from clients is whether and when their existing Estate Planning documents should be reviewed. In the past, the answer was simple—documents should be reviewed when there is a significant change in your family or financial situation, but at least every five to ten years. However, today there is a third event that should alert you to have your existing documents reviewed—changes in the law.

Changes in your family situation, such as marriage, divorce, birth of a child or grandchild or death of a beneficiary or trustee should alert you to consult an Estate Planning attorney and have your documents reviewed. If drafted properly, your documents will provide alternate provisions for most of these situations. However, it is imperative that any holes that such an event may leave are properly filled. Additionally, if you have minor children, it is important to keep your Guardians and successors up to date in accordance with your wishes. For example, if you named a couple that has since divorced, your Will should be amended.

Changes in your financial situation can cause additional tax liabilities which must be considered in your planning. Furthermore, significant changes in your assets may cause you to change the way that you wish to provide for your beneficiaries. For example, if your estate is small, you may be comfortable with the assets being distributed outright to your beneficiaries at your death. However, if your estate grows, you may prefer that the assets be held in Trust until your beneficiaries reach certain ages or you may consider providing for additional beneficiaries, such as grandchildren. Gift Tax and Generation-Skipping Transfer Tax considerations should also be discussed under these circumstances. Also, for a variety of reasons, you may have chosen to only have a Simple Will prepared at the time that your Estate Planning documents were drafted, but a Revocable Living Trust may now be necessary to serve your financial situation.

Changes in the Federal and Illinois Estate Tax laws are an annual occurrence these days. Most of these changes are forecast in advance and can be planned for or handled through flexible language in the documents themselves. However, it is crucial that flexibility not be assumed and existing documents be reviewed when such a change occurs or is expected to occur. A recent example of a significant change in the law occurred in 2005, when Illinois decoupled the state tax from the Federal Estate Tax. Even if changes are not required, it is beneficial to communicate with an Estate Planning attorney to ensure that your documents are serving your goals and that available tax exemptions are being leveraged to the maximum extent possible.

The result of an Estate Planning document review can take one of three forms: (1) no changes; (2) an amendment to the documents to make minor changes, or (3) a

completely new set of documents. Amendments are generally appropriate when the changes are limited to names, beneficiaries or trustees. A significant law change or changes to numerous sections of the Trust will more likely require a restatement of the Trust document and possibly a new Will and Powers of Attorney as well.

Definition of the Month: *Personal Property*

Personal property or personal effects includes items such as motor vehicles, boats, clothing, furniture, jewelry, hobby equipment and collections. Generally, personal property should be assigned to the Revocable Living Trust so that such property does not have to go through probate. The trust document should then provide for the distribution of personal property. Additionally, an independent memorandum may be left with the Trust gifting certain items of personal property to certain individuals.



Manish C. Bhatia is an Illinois attorney focusing his practice in the area of Estate Planning. Manish has focused his education and practice on Tax Planning, Estate Planning and Business Succession Planning since the first year of law school. He has also added Asset Protection, Elder Law and Nonprofit Organizations/Charitable Giving to his fields of practice. Manish is also a member of the Chicago Bar Association, the Asian American Bar Association of Chicago and the Indian American Bar Association.

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