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Estate Planning | Wills & Trusts

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Illinois Estate Tax Reinstated

On January 13th, Illinois Governor Pat Quinn signed into law the *Taxpayer Accountability and Budget Stabilization Act* (the “Act”)—legislation that received significant national attention due to the 66% increase in state income tax. However, the Act also addressed the lingering question of how Illinois would react to the *Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010*, signed into law by President Obama in December, which increased the Federal Estate and Gift Tax exemptions to \$5 million for decedents dying in 2011.

The Act reinstates the Illinois Estate Tax as of January 1, 2011, with an exemption of only \$2 million, continuing the conflict that Illinois estates have had to address since 2005, but with greater consequences.

Prior to the one-year lapse in the Federal Estate Tax in 2010, Illinois had decoupled from the Federal Estate Tax and provided an exemption of \$2 million while the Federal exemption was \$3.5 million. Upon the death of the first spouse, Illinois estates exceeding \$2 million were forced to determine whether to (a) apply the full Federal exemption and pay some state tax, (b) apply the state exemption and lose the remaining \$1.5 million of Federal exemption, or (c) *if the Estate Planning documents permit*, apply the state exemption and place the remaining \$1.5 million into a Qualified Terminable Interest Property (QTIP) Trust. Of course, having the opportunity to choose one of these options is dependent upon the flexibility provided by the language of the Trust.

With the Illinois Estate Tax exemption remaining at \$2 million while the Federal exemption is increased to \$5 million, building flexibility into an individual’s Estate Planning documents becomes even more important, as the QTIP Trust could hold as much as \$3 million in assets in order to defer any Estate Tax due on those assets until the second spouse’s death. It is crucial to confirm that your

Estate Planning Attorney understands the issues involved and that the flexibility required to deal with changes in the law is included in your documents.

Mark Madoff's Will & Updating Your Estate Plan

Mark Madoff, son of the infamous “Ponzi” schemer Bernie Madoff, executed a Will in late 2007. According to the *New York Post*, the Will set aside assets in trust for Mark’s two children from a previous marriage and his daughter from his current marriage and left the balance of his estate to his wife. The Will also named Mark’s father as Co-Executor of his estate along with Mark’s brother, Andrew.

In 2008, Mark and his wife welcomed a son, their second child together. In 2009, Bernie Madoff pled guilty to Federal charges of fraud after being turned in to authorities by Mark and Andrew. In December 2010, Mark Madoff committed suicide by hanging himself while his two-year old son slept in the next room.

Mark’s Will was never revised during the two years between the birth of his youngest child and his own death. Consequently, Mark died having provided for his wife and three of his children, but not the fourth. Additionally, the Will left Andrew as sole Executor of Mark’s estate, since their father is in jail serving a 150 year sentence.

There are two important lessons that we must learn from the example of Mark Madoff’s Will.

First, proper drafting can be the difference between your goals being accomplished and a loved one being abandoned. Prior to his death, if anyone had asked Mark whether he intended to provide for all of his children, it is safe to assume that the answer would have been ‘yes.’ Ideally, the Will would have been drafted to provide for all of Mark’s living children *as well as any children born or adopted thereafter*. It is unclear why this was not done, but the flaw in drafting clearly had a significant effect on the administration of his estate.

Second, an Estate Plan should be reviewed any time your family or financial situation changes (see Newsletter #6 for an explanation of when existing documents should be reviewed). Mark’s family situation had changed

significantly with the birth of a fourth child and the incarceration of his father. It is likely that a simple phone call or meeting with his attorney would have led to the attorney discovering the flaw in the document that abandoned Mark's fourth child and correcting it before it was too late. Additionally, knowing Bernie's situation, Mark would have had the opportunity to name an alternate Co-Executor to act with Andrew if he wished to do so.

When drafted properly, an Estate Plan can provide great flexibility for changes in family, finances and the law. However, when circumstances do change, it is wise to review the documents and have your Estate Planning Attorney confirm that your documents accurately reflect your intentions.

Elizabeth Edwards' Will & Privacy

Elizabeth Edwards, who passed away on December 7, 2010, left a Will which made a significant omission. The Will, signed on December 1, 2010, just days before her death, makes no mention of her estranged husband and former presidential candidate, John Edwards. John and Elizabeth Edwards separated in 2010 but had not filed for divorce at the time of Edwards' death.

The Will was filed in Orange County Superior Court in North Carolina on December 22nd. The document is a Pourover Will which names Executors and Guardians, but reveals minimal information regarding the distribution of her estate. Instead, the Pourover Will "pours" the decedent's assets into his or her Trust, which provides the terms of distribution. Unlike a Will, a Trust document is a private document that is essentially a contract between the Grantor and Trustee. Edwards' Will pours all of her assets into a "Revocable Declaration of Trust" which the Will indicates was established on December 2, 1992, but was amended and restated prior to the execution of her last Will. By establishing a Revocable Living Trust and utilizing a Pourover Will, Elizabeth Edwards prevented her desires for distribution from becoming public information.

Additionally, the Will (a) states that Edwards' daughter, Catharine ("Cate") Edwards, an attorney, is the acting Trustee of the Trust, (b) leaves all of Edwards' personal property to her children rather than John and also (c) appoints Cate as the Executor of her estate and the Guardian of any minor children.

Edwards' omission of her husband's name from her Will indicates that she may have left all of her assets to her children by way of her Trust as well. However, if this is the case, John Edwards would have the right to claim his "elective share" (one-third of Edwards' estate under North Carolina law) if he wishes to do so.

While privacy is only one reason to establish a Revocable Living Trust, it is a key feature that can facilitate a peaceful passing of your estate.

Definition of the Month: *Elective Share*

The "elective share" is a fraction, percentage or amount of the deceased spouse's estate, as legislated by state law, to which the surviving spouse is entitled in order to prevent an individual from completely disinheriting the surviving spouse. In Illinois, the fraction to which the surviving spouse is entitled is one-half of the probate estate if the decedent left no surviving descendants and one-third of the probate estate if the decedent did leave surviving descendants.



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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