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Attorney at Law

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Estate Planning | Wills & Trusts

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## The Mistress Gets the Condo

An issue that arises when gifting specific property by Will or Trust is whether the beneficiary is entitled to anything if the property is sold prior to the giftor's death. The doctrine of "ademption" provides that a bequest may only be satisfied with the specific property that is named. This issue was recently addressed by the Supreme Court of Georgia.<sup>1</sup>

Harvey, the decedent, who was a resident of Georgia, had left his Florida condominium to his mistress, Anne, by way of his Will. However, prior to his death, Harvey entered into a contract to sell the condominium. He then died prior to the closing date.

Based on Georgia law, which provides that the law of the state in which the property is located shall apply, the court applied Florida's law of testamentary bequests.

The court determined that a specific devisee (Anne) has the right to any remaining specifically devised property (the condominium) and any balance of the purchase price owing from a purchaser to the testator (Harvey) at death due to the sale of the property. Since, in this case, a balance was owed to the decedent from the sale of his real property located in Florida, the proceeds from the sale were due to the specific devisee who would have otherwise inherited the real property under the decedent's Will. Therefore, Anne was entitled to the proceeds from the sale of the condominium.

In Illinois, courts have determined that the intentional sale of property that is bequeathed in his or her Will indicates an intent to revoke the bequest. However, if the disposition of the property is unintentional (property is destroyed)<sup>2</sup> or the sale is completed by someone other than the decedent (trustee or agent),<sup>3</sup> then

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such intent to revoke the bequest does not exist and the recipient of the bequest would be entitled to proceeds from the sale.<sup>4</sup>

On the other hand, the Illinois Compiled Statutes provide that if the decedent entered into a contract to sell the property during his life but the sale was not complete prior to his or her death, as was the case in the fact pattern above, then the sale does not revoke the bequest and the property passes to individual who would have received the property under the Will.<sup>5</sup> In other words, whether the sale of property was completed will determine who is entitled to the proceeds.

Based on the complexity of the issues surround a specific bequest, it is important that the giftor's intent regarding such transfers be clearly stated and that Estate Planning documents be updated immediately following the sale or transfer of property that is bequeathed under a Will or Trust. As is often the case, proper drafting is the difference between a clean transfer of assets and a lengthy, expensive battle between heirs.

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1. *Parker et al. v. Melican*, 286 Ga. 185 (2011).
  2. *In re Estate of Kolbinger*, 175 Ill. App. 3d 315, 324, 529 N.E.2d 823, 829 (1988).
  3. *Hobin v. O'Donnell*, 115 Ill. App. 3d 940, 451 N.E.2d 30 (1983).
  4. *Bollman v. Pehlman*, 352 Ill. App.3d 1203 (2004).
  5. 755 ILCS 5/4-8.
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## **Estate and Gift Taxes Beyond 2012**

As discussed in the [January 2011 Newsletter](#), the *Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010* (the "Act") applies to the estates of decedents through 2012. As a first step towards progress beyond 2012, President Obama's proposed budget includes several provisions relating to the Federal Estate, Gift and Generation Skipping Transfer (GST) Taxes.

### ***Exemptions***

The Act increased the Federal Estate Tax exemption to \$5 million per individual and set a maximum Estate Tax rate of 35% for the estates of decedents dying in 2011 and 2012. The proposed budget would decrease the exemption to \$3.5 million and increase the maximum Estate Tax rate to 45%. Of course, this could be considered an increase from the \$1 million exemption which the Estate Tax would default to in 2013 without Congressional action.

Additionally, the Gift and GST exemptions were raised to \$5 million as well for 2011 and 2012 by the Act, which made lifetime planning much simpler since an

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individual's entire Estate Tax exemption could be used during his or her life. However, the proposed budget would reduce these exemptions to \$1 million and would also raise the maximum Gift and GST Tax rates to 45%.

### ***Portability***

The Act also introduced portability of the Estate Tax exemption between spouses, which would allow the surviving spouse to apply the remaining Estate Tax exemption of the deceased spouse to his or her own estate. While portability could allow great flexibility in planning, the uncertainty of its future beyond 2012 makes the flexibility difficult to utilize. The proposed budget includes a provision that would make portability permanent. Most estate and financial planners would agree that any stability in this area would be considered progress.

### ***Valuation Discounts***

Through the use of Family Limited Partnerships and Limited Liability Companies, individuals and families have been able to pass interests in their assets to their descendants at a discounted rate by applying discounts for lack of marketability and minority interest. Through litigation, the IRS has long battled such discounts, often successfully, by arguing that many of these entities do not operate a legitimate business and serve no purpose other than tax reduction. President Obama's proposed budget would create a category of "disregarded restrictions" that would be ignored in valuing property for Estate and Gift Tax purposes, limiting the use of family entities as a conduit for transferring discounted ownership interests down the family tree.

### ***Minimum GRAT Term***

A minimum term for Grantor Retained Annuity Trusts (GRATs) has been a topic of discussion for several years. In order to be successful, the grantor of a GRAT must outlive the term of the GRAT. One technique for planning with GRATs is to use "rolling" GRATs—multiple, successive GRATs with short terms of two or three years—rather than a single GRAT with a longer term. By doing so, the chances of the grantor surviving at least some of the GRATs are increased. The proposed budget would impose a minimum term of ten years on all GRATs, thus limiting their use in Estate and Gift Planning.

### ***Maximum GST Term***

Most states have either repealed or allow for opting out of the rule against perpetuities—a rule that forbids perpetual trusts. Thus, by opting out of Illinois'

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rule against perpetuities, an individual could theoretically create a trust for his or her descendants that would last forever. However, the proposed budget would limit GST trusts to a maximum of 90 years.

Of course, Republicans and Democrats will battle over these proposals in the months to come, but based on the provision of his proposed budget, it appears that President Obama is determined to tighten the screws on lifetime transfers.

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## Upcoming Events

### **July 1, 2011 – Illinois’ New Powers of Attorney**

Beginning today, July 1<sup>st</sup>, Illinois’ new Powers of Attorney laws will go into effect. Any Powers of Attorney executed in Illinois on or after July 1<sup>st</sup> must use forms updated to reflect the changes required by the new laws.

### **July 16, 2011 – EP Café, Evanston, IL**

I will be hosting [EP Café](#) on Saturday, July 16, at Café Mozart in Evanston from 10:00 a.m. to 2:00 p.m. You are welcome to come by, have a cup of coffee and have your Estate Planning questions addressed in a friendly, casual environment. There is no fee and no obligation for visiting [EP Café](#). Café Mozart is located at 600 Davis St. in Evanston (corner of Davis and Chicago).

Although our conversation will be casual and free of charge, I do ask that you [contact me](#) in advance and reserve a 30-minute window for a time that is convenient for you so that people are not waiting for others to finish.

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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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