

# Death + Taxes\$

They May be Certain, but Applicable Laws are Ever Changing

Many people believe that once they have a will or trust in place, they can lock the document away in a safe and sleep easy knowing that their affairs are in order. The truth is, estate planning documents must be periodically reviewed to adapt to an individual's personal circumstances, as well as changes in the law. **Case in point:** the recently passed legislation extending the income tax rate cuts also has important implications for estate planning.

On December 17, 2010, President Obama signed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the Act). The Act makes significant, but temporary, changes to estate, gift, and generation-skipping transfer (GST) taxes. In light of the Act, it is important to review your estate planning documents and determine whether amendments are necessary.

Given the typical structure of many people's current estate planning documents, we foresee a number of serious, unintended consequences that may occur without proper planning and modifications:

## **SURVIVING SPOUSE MAY BE LEFT WITH NOTHING**

Many married couples have trusts containing formula clauses allocating the amount of an estate that can be excluded from the estate tax, now \$5,000,000, to a trust called the "residuary trust" or "family trust" and allocating any amount in excess of the exclusion amount to a trust called the "marital trust." If not carefully planned and drafted in light of the new exclusion amount, this structure could lead to the surviving spouse being left with nothing.

## **SOME BENEFICIARIES MAY RECEIVE MORE, OR LESS, THAN INTENDED**

Some trust documents provide that an amount equal to the GST tax exclusion be paid to or for the benefit of grandchildren, with the balance going to children (that is, the parents of the grandchildren). If death occurs when the \$5,000,000 exclusion is in effect, the grandchildren may receive far more than was intended. Similarly, some trusts use a formula that makes a charitable bequest in order to reduce estate tax to zero. In these instances, the charity may receive nothing.

## **PROACTIVE STEPS MUST BE TAKEN FOR PORTABILITY**

The Act also provides for what is referred to as "portability." This means that if the full \$5,000,000 exclusion is not used at the death of the first spouse, the surviving spouse can use the remaining exclusion. However, the executor of the estate of the first spouse to

die must make an affirmative election on a timely filed estate tax return allowing the surviving spouse to avail himself, herself, or their estate of this unused exclusion. If that is your intention, your documents should affirmatively direct the executor to make this election.

**Bottom line** The increase in the estate tax, gift tax, and GST exclusions means that significant planning opportunities exist for individuals who are interested in transferring wealth and avoiding taxes. And risks abound for those who do not review existing planning documents.

A session with an estate planning attorney is very important to make sure that your objectives and the planning goals you have set for your family are accomplished.

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## **A FEW HIGHLIGHTS OF THE ACT INCLUDE**

- The estate tax exclusion is \$5,000,000 per individual in 2011 and 2012. Estate tax exclusion of \$5,000,000 was also made retroactive, effective January 1, 2010.
- The gift tax exclusion remains at \$1,000,000 for 2010, but increases to \$5,000,000 for 2011 and 2012.
- The estate and gift taxes are unified for 2011 and 2012, so the exclusion of \$5,000,000 may be used for lifetime gifts and at death.
- The maximum estate and gift tax rate is 35% effective January 1, 2010.

