



Estate Planning Year End Update

Presidential Politics and the Estate Tax

In 2009 the Federal estate tax exemption will rise to \$3.5 million per person (in effect \$7 million per couple). The top Federal estate tax rate is 45%. Under current law the Federal estate and generation-skipping transfer taxes (but not the gift tax) are repealed in 2010, but come back in 2011 with a \$1 million exemption and a 55% rate. It is unlikely that complete repeal will occur given political and economic realities. The candidates' positions are not dramatically different. John McCain wants a \$5 million exemption and a 15% rate. Barack Obama wants a \$3.5 million exemption and a 45% rate. It seems likely that the Obama proposal will win out if Congress remains Democratic.

Other favorable changes may come to pass. The estate tax exemption may be made "portable" between husband and wife. This means that if the first spouse's estate does not fully use the first spouse's estate tax exemption, the unused portion will be available to the second spouse's estate. As a result, it may not be necessary to create a "bypass" or "exemption" trust when the first spouse dies to use that spouse's exemption. However, depending on personal and financial circumstances, a trust may still be advisable for a variety of reasons, including asset protection, Medicaid planning, state estate tax savings, or control over how the assets pass after the spouse dies.

To make up for the favorable changes, unfavorable changes may come to pass. It is possible that the popular estate planning techniques of grantor retained annuity trusts (GRATs) and valuation discounts for family controlled entities may be restricted or eliminated.

IRA Rollover Extended by Financial Rescue Bill

As has been widely publicized, the Emergency Economic Stabilization Act of 2008 included "sweeteners" to help ensure its passage. One of them is a boon to IRA owners who wish to use IRA funds to make charitable donations in a tax advantageous manner: the minimum required distribution may be satisfied by directing the entire amount to charity without the interim step of taking the withdrawal and paying income taxes on it. These "rollover gifts" may now be made in 2008 and 2009. To qualify:

- Donor must be age 70½ at the time the gift is made.
- Charitable gifts must be made directly from the IRA to the charity.
- Donor can make as many gifts in any amounts to as many charities as desired as long as the total does not exceed \$100,000.
- Gift cannot be made in exchange for a charitable gift annuity or to a charitable remainder trust, or to a private foundation, donor advised fund, or "Type III" supporting organization.

The \$230,000 Question

A married couples' Wills typically include a tax-savings provision called a "bypass" or "exemption" trust. This trust allows your family to take advantage of estate tax exemptions. The Trust is funded with the amount that can pass free of estate taxes. Your spouse is often the beneficiary of the trust. Your children also may be beneficiaries. At the spouse's death, the trust passes to your children free of estate taxes.

The problem with this standard estate plan is that, while the amount that can fund the Trust under Federal law is scheduled to rise to \$3,500,000 in 2009, the amount that can pass free of New York estate tax remains \$1,000,000. As a result, if the Will mandates that the trust be funded with the maximum Federal exemption, there will be a New York estate tax due of almost \$230,000 when that exemption rises to \$3,500,000. It may or may not

be advisable to pay that New York tax. If your estate is large, it may be worthwhile to pay the tax and allow your children to save a bigger Federal tax when your spouse later dies. It depends on each person's circumstances. For that reason, we advise in most cases that your Will allow the choice on funding (and thereby the tax) to be made by your spouse after your death.

Your Wills and finances should be reviewed to determine if the Wills should be changed in view of this increasingly onerous New York estate tax.

Year-End Giving

If the economic downturn has not completely eroded your portfolio, please consider the advantages of making gifts before the end of the year. The current economic situation is actually a boon for estate planning moves. There are easy ways for you to reduce your future estate tax bill, some as simple as writing a check. Others involve creation of trusts and other devices to take advantage of low current asset values and interest rates. The combination of these factors can produce highly advantageous results for your family. Moreover, what we all hope to see in terms of economic recovery eventually will be to the benefit of the gift recipients and escape estate taxes at your death.

The simplest gift technique means writing a check or arranging for stock to be transferred up to the annual tax free limit. The annual tax free gift amount will increase in 2009 from \$12,000 to \$13,000 each year per recipient (\$24,000 in 2008 and \$26,000 if you are married and your spouse consents).

You can make loans to your children at low interest rates. You can then forgive a portion of the loan each year using the annual tax free amount.

There is also an unlimited exclusion for tuition or medical expenses that you pay directly to schools or medical providers. It does not count toward the annual or lifetime limits.

Gifts to "529" college savings accounts can also get you a state income tax deduction, the funds grow tax-free, and distributions for education from the accounts are free of income taxes.

If you give securities, you should endorse them over to the donee. Getting the certificates retitled late in the year can be difficult. If you give a check, be sure the donee deposits the check in 2008 if you want the money to be treated as a 2008 gift for gift tax purposes. Alternatively, you can deliver a certified check to the donee this year. That counts as a 2008 gift, even if the check is not deposited until 2009.

Checks to charity do not require clearance before year end. Consider gifts of appreciated stock to satisfy your charitable giving. The charity pays no capital gains tax on the sale of the stock as you would, essentially allowing you to make charitable gifts at a reduced cost to you.

More complicated techniques such as Grantor Retained Annuity Trusts, Charitable Trusts, and Sales to Intentionally Defective Grantor Trusts are especially suited to take advantage of low values and interest rates now, in the expectation of increased values later.

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To learn more about these matters, please contact your regular GWT attorney.

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