

# *Estate and Financial Planning News You Can Use*

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## **TAX RELIEF ACT IS APPROVED: EXTENSIONS AND RATES SET THROUGH 2012**

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On December 17, 2010, President Obama signed into law the Tax Relief Unemployment Insurance Reauthorization and Job Creation Act of 2010 (the "Act"). The new law extends the Bush Administration's federal income tax rates, and among other things, provides new federal estate, gift and generation-skipping transfer ("GST") tax exemption levels and rates for 2010 through 2012.

### **Transfer Tax Exclusion Amounts and Rates for 2011 and 2012**

Under the Act, the exclusion amounts for each of the estate, gift and GST tax are increased to \$5 million, per individual. This would allow a married couple to pass up to \$10 million tax free during their lives or upon their deaths. In addition, a married couple could shelter up to all of that \$10 million from the application of current and future GST tax.

The Act provides a substantial increase in the ability to make lifetime transfers. Since 2001, the applicable lifetime gift credit has been locked at \$1 million. Now increased to \$5 million starting in 2011, individuals who may have previously gifted their \$1 million credit are provided an additional \$4 million that can be transferred during life.

The highest tax rate applicable to each of the estate, gift and GST will be 35% (down from 45% as provided under the 2009 law).

### **"Portability" Provides For Transfer of Unused Estate Exclusion Amounts**

The Tax Relief Act provides for a change that allows a surviving spouse to apply any unused estate exclusion at the first spouse's death to his/her own estate. For example, if the first spouse dies in 2011 using only \$4 million of estate tax exclusion, the Executor of the first spouse may elect to have the surviving spouse utilize the remaining \$1 million of estate tax exclusion at his/her death. Therefore, at the surviving spouse's death, the total available estate tax exclusion will be \$6 million. In order to take advantage of this portability provision, a Federal estate tax return must be prepared and filed for the first spouse's estate.

The GST exclusion amount, however, is not "portable."

### **Estate Tax Applies For 2010, Subject to Opt-Out**

The Act retroactively applies the estate tax for all individuals dying in 2010. The Act, however, allows the Executor of an individual dying in 2010 to elect to opt-out of the estate tax and apply the rules for carryover basis on inherited property.

For a decedent who died in 2010, the applicable estate tax rate is 35% and the exclusion amount is \$5 million per individual. In addition, inherited assets will receive a step-up in basis. The step-up will reduce capital gain income recognized by an heir upon the future sale of appreciated inherited assets.

If the Executor opts-out of the estate tax, no tax is due but the inherited assets will be subject to the carryover basis regime. The carryover rules applicable in 2010 allow for a limited basis step-up, but heirs receiving the appreciated assets may need to consider the potential impact of future capital gains recognition.

The Act also reinstates the GST tax for transfers made in 2010, but the applicable tax rate is zero. Therefore, if you made a gift in 2010 directly to grandchildren, there is no GST tax due. The new law also reinstates the GST available exclusion for transfers in 2010, at \$5 million, that can be allocated to a trust created or funded during 2010.

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If a decedent passed away in 2010, please contact us if you have any questions regarding the most advantageous rules to apply to the estate.

### **Impact of the Tax Relief Act On Your Plan**

#### *1. Formula Wills*

For married clients with less than \$5 million, if your Will funds a trust (often referred to as the "Credit Shelter Trust") with a common formula based on the "federal applicable credit amount," your entire estate will likely be allocated to the Credit Shelter Trust. This could result in over funding the trust, leaving little outright for your surviving spouse.

Although most Credit Shelter Trusts do provide for the continued support of a surviving spouse, we suggest you schedule an appointment to review your plan to ensure the trust is funded appropriately and according to your wishes.

For married clients with more than \$5 million, if your Will funds a trust in a similar fashion as explained above, the Credit Shelter Trust will be funded to the maximum extent available, i.e. \$5 million. Depending on your plan, the balance above the \$5 million will likely pass to a surviving spouse, either outright or in trust. If this is consistent with your intentions, there may be little to do. However, you should schedule a meeting to review your documents if this level of funding is not desired.

The portability of the estate exclusion amount allows a surviving spouse to take advantage of unused estate exclusion at the first spouse's death, without requiring the use of a trust. We do continue, however, to value the importance of utilizing trusts. Among many benefits, trusts can keep appreciation out of the estate of the second spouse, assist with spendthrift beneficiaries, and provide creditor protection.

#### *2. Disclaimer Trusts*

Over the past few years, due to the unknowns surrounding the future of the estate tax, many wills have been prepared to include a "Disclaimer Trust." This type of trust provided flexibility for clients to determine how much to fund the trust upon the death of the first spouse. Keeping in mind that there are many benefits to using trusts, as well as the portability of the exemption amount, you may wish to have your documents reviewed to determine if disclaimer provisions are still appropriate for your plan.

#### *3. Gifting*

For individuals who wish to make large gifts to grandchildren, now may be the time. The gift tax exclusion amount in 2010 is still \$1 million at a top tax rate of 35%. However, as explained above, the GST tax rate for gifts to grandchildren, or trusts for their benefit, is zero (the rate will increase to 35% in 2011). Gifting to grandchildren in 2010, regardless of the amount, will result in no GST tax, even where some gift tax is payable.

For individuals who have already given \$1 million away during their lives, Congress has just given you an opportunity to transfer \$4 million more during your life. Starting in 2011, individuals have the ability to give away an aggregate of \$5 million of property during their lives without payment of tax (\$10 million for married couples). Gifting is a great way to "freeze" the value of appreciating assets and move them out of your estate.

If you would like to discuss the start or continuation of a gifting program, please contact our office and schedule an appointment.

#### *4. The Act Does Not Restrict "GRAT" Use*

Many proposals regarding the estate tax that were previously submitted to Congress included provisions that would have curtailed the usefulness of a Grantor Retained Annuity Trust ("GRAT"), including restrictions on discounts and minimum terms for the trust. The Act did not include any new provisions relating to GRATs, therefore they continue to be a viable tool to move future appreciation out of your estate. If you are considering the usefulness of a GRAT in your estate plan, we would be happy to meet with you to discuss this strategy while it is currently available.

#### *5. Back To The Future In 2013*

You may have noticed that all the changes discussed in this article only apply to tax years 2010 through 2012. That is because, absent subsequent legislation making the new law permanent, the estate, gift and GST exclusion amounts will be reduced to \$1 million and the tax rate increased to 55% for each, effective January 1, 2013.

From a historical perspective, the tax rates applicable in 2010 through 2012 are the lowest since a 20% rate existed from 1926 through 1932. While it is far too early to speculate as to whether the current exclusion amounts and tax rates will survive past 2012, it is advisable to schedule a meeting with your estate planning attorney to maximize opportunities with the current rates.

## NEW LAW AFFECTS HEALTH CARE DECISION MAKING

*Natalie H. Weiskotten, Esq.*

### Introduction

On March 16, 2010, New York Governor David A. Paterson signed into law the Family Health Care Decisions Act (the "Act"), which took effect immediately. The Act allows family members and close friends to make health care decisions, including decisions to withhold or withdraw life-sustaining treatment, on behalf of patients who lack decision-making capacity and who have not prepared advance health care directives, such as a Health Care Proxy and Living Will. When a patient lacks decision-making capacity, and has not prepared any advanced health care directives, the Act effectively appoints a decision maker (also referred to as a "surrogate" or "agent") from a list of individuals ranked in order of priority, including family members, domestic partners and close friends.

### Determining Lack of Decision Making-Capacity

The Act requires that the attending physician make the initial determination that an adult patient lacks decision-making capacity to a reasonable degree of medical certainty. The attending physician, as defined by the Act, is the physician selected or assigned by hospital policy who has primary responsibility for the treatment and care of the patient. Where more than one physician shares responsibility, or, where a physician is acting on the attending physician's behalf, any such physician may act as an attending physician pursuant to the Act. The determination must include an assessment of the cause and extent of the patient's incapacity and is subject to an independent concurring determination in certain circumstances.

### Potential Surrogates and Medical Decisions

The potential surrogates, listed in order of priority, are as follows:

- (1) Court-appointed guardian;
- (2) Individual designated orally by the subsequently incapacitated individual;
- (3) Spouse, if not legally separated from the patient, or domestic partner;
- (4) Adult son or daughter;
- (5) Parent;
- (6) Adult brother or sister; and
- (7) Close relative or friend.

If the patient objects to the determination of incapacity or to the choice of surrogate, or to a health care decision made by a surrogate, the patient's oral objection will prevail unless a court determines that the patient lacks decision-making capacity or another legal basis exists for overriding the patient's decision. Furthermore, if an adult patient has already made a decision about the health care either orally or in writing, the physician need not seek the consent of a surrogate.

The surrogate has all the powers the patient would have in making his or her own medical decisions, including the decision to withhold or withdraw life-sustaining treatment. The Act directs that the surrogate make decisions in accordance with the patient's wishes, and take into account the patient's religious and moral beliefs. If the patient's wishes are not reasonably known and cannot be ascertained, the Act requires that the surrogate make decisions in accordance with the patient's best interests.

### Decisions to Withhold or Withdraw Life-Sustaining Treatment

A surrogate may withhold or withdraw life-sustaining treatment for a patient if the patient will die within six months or is permanently unconscious, as determined by two independent physicians, and treatment would be an extraordinary burden to the patient. A surrogate may also withhold or withdraw life-sustaining treatment if the patient has an irreversible condition, as determined by two independent physicians, and treatment would involve such pain, suffering, or other burden that it would be inhumane or extraordinarily burdensome to provide treatment under the circumstances. Providing nutrition and hydration orally, without reliance on medical treatment, is not considered health care and therefore can not be taken away by the surrogate.

### Individuals with Developmental Disabilities

Under the Act, individuals with mental retardation or developmental disabilities are within the class of individuals for whom health care surrogates may be appointed. However, the Act does not apply to individuals without decision-making capacity who have developmental disabilities or reside in mental hygiene facilities, if health care decisions for those individuals could be made under Article 80 or 81 of the Mental Hygiene Law. For example, if there is a guardian (appointed in the Surrogate's Court) for someone with developmental disabilities, then decisions for that patient are governed by the New York guardianship law.

### Conclusion

Even with the passage of the Act, New York residents are still strongly encouraged to prepare a health care proxy specifically appointing your decision maker, that includes an indication of your preferences with regard to your health care. The proxy form can be tailored to give the agent as much as or as little authority as the patient desires, and the agent must make decisions in accordance with the patient's wishes or best interests. Without preparing and properly executing these documents, future care decisions will be made subject to the language of the Act, which may not comport with your personal wishes.

## MORE AMENDMENTS TO NEW YORK'S POWER OF ATTORNEY LAW

*Brian K. Janowsky, Esq.*

Effective September 13, 2010, the New York State Short Form Statutory Power of Attorney law was amended. This amendment follows a previous overhaul of the power of attorney law that went into effect on September 1, 2009.

The recent amendment was passed to remedy several concerns regarding the application of the 2009 law. The first concern was that the language of the 2009 law was so broad that it governed any instance where an agent was appointed to act on behalf of a principal, including those instances in the business and commercial context (not just powers for estate and financial planning purposes). The second concern surrounded the presumption that any power of attorney executed after September 1, 2009, automatically revoked any previously executed power of attorney, including those business and commercial powers not related to estate and financial planning.

The amended law provides that where a power is given primarily for a business or commercial purpose, the same protections are not required as those primarily used for estate and financial planning purposes. The itemized list of business and commercial powers that are excluded from the application of the power of attorney law is as follows:

1. a power of attorney given primarily for a business or commercial purpose, including without limitation:
  - (a) a power to the extent it is coupled with an interest in the subject of the power;
  - (b) a power given to or for the benefit of a creditor in connection with a loan or other credit transaction;
  - (c) a power given to facilitate transfer or disposition of one or more specific stocks, bonds or other assets, whether real, personal, tangible or intangible;
2. a proxy or other delegation to exercise voting rights or management rights with respect to an entity;
3. a power created on a form prescribed by a government or governmental subdivision, agency or instrumentality for a governmental purpose;
4. a power authorizing a third party to prepare, execute, deliver, submit and/or file a document or instrument with a government or governmental subdivision, agency or instrumentality or other third party;
5. a power authorizing a financial institution or employee of a financial institution to take action relating to an account in which the financial institution holds cash, securities, commodities or other financial assets on behalf of the person giving the power;
6. a power given by an individual who is or is seeking to become a director, officer, shareholder, employee, partner, limited partner, member, unit owner or manager of a corporation, partnership, limited liability company, condominium or other legal or commercial entity in his or her capacity as such;
7. a power contained in a partnership agreement, limited liability company operating agreement, declaration of trust, declaration of condominium, condominium bylaws, condominium offering plan or other agreement or instrument governing the internal affairs of an entity authorizing a director, officer, shareholder, employee, partner, limited partner, member, unit owner, manager or other person to take lawful action relating to such entity;
8. a power given to a condominium managing agent to take action in connection with the use, management and operation of a condominium unit;
9. a power given to a licensed real estate broker to take action in connection with a listing of real property, mortgage loan, lease or management agreement;
10. a power authorizing acceptance of service of process on behalf of the principal; and
11. a power created pursuant to authorization provided by a federal or state statute, other than this title, that specifically contemplates creation of the power, including without limitation a power to make health care decisions or decisions involving the disposition of remains.

Additionally, the amended law reversed the presumption created under the 2009 law regarding revocation. Currently, the execution of a new power of attorney does **not** automatically revoke a power of attorney executed at a prior time, unless the document specifically provides for revocation in the "modifications" section of the form.

Another small change relates to the power to gift without the use of a "Statutory Gift Rider." The 2009 law change introduced the use of a "Statutory Major Gifts Rider", a document executed and used in connection with the power of attorney to convey gifting powers to an agent. As such, there was almost no gifting powers allowed under the power of attorney itself, therefore it became a very limited tool for financial and estate planning purposes. Under the 2009 law, however, an agent could gift up to \$500 to any person or charity, per year, without using a gifting rider. The amended law has change the name of the form to a "Statutory Gift Rider" and reduced the allowable gifting under a power of attorney, with the use of the gift rider, to \$500 in the aggregate per year.

The amendments generally apply retroactively to all powers of attorney which were executed under the 2009 law change. Therefore, a form executed after September 1, 2009 and before September 12, 2010, remains a valid power of attorney. However, the retroactive application alleviates the concern that there is or was an inadvertent revocation of business or commercial power.

The new power of attorney law continues to be studied and it is anticipated that there will be additional future amendments to refine the effectiveness of the law. Keep a watch for future updates from Bond, Schoeneck & King, PLLC.

The foregoing is only intended to provide a general discussion and, therefore, should not be relied upon for your estate planning needs. However, if you have any questions about this memorandum, or its application to your specific situation, please contact any of the members of our Estates and Financial Planning Practice Group listed below.

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