

Federal Estate Tax Uncertainty

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Effective January 1, 2010, the Federal Estate Tax was repealed for individuals dying in 2010 only. The Generation-Skipping Tax, which is a tax on transfers to persons more than one generation younger than the transferor, such as grandchildren, is also repealed for 2010. There continues, however, to be a 35% gift tax on gifts in excess of \$1,000,000 (\$2,000,000 for married couples). In 2010, instead of receiving a step-up in cost basis for property inherited from a decedent, the decedent's cost basis "carries over" to those who inherit the property; however, there are two limited exceptions to this rule, a decedent's executor can allocate up to \$3,000,000 to increase the basis of assets that the surviving spouse receives outright or through qualified spousal property; and allocate up to \$1,300,000 to increase the basis of assets passing to any recipients, but not above fair market value at death. Under current law, the Estate Tax is scheduled to return in 2011 with a \$1,000,000 exemption and a maximum estate and gift tax rate of 55%.

As indicated in a Wall Street Journal article in the Saturday/Sunday January 2-3, 2010 edition, estate planners have anticipated for some time that Congress would prevent the 2010 Estate Tax repeal from taking effect. The Wall Street Journal article quotes the chairman of the House Select Revenue Sub-Committee as to the Estate Tax repeal: "Everybody said it would never happen," and further, "There is no question" that Congress will reinstate the tax early in 2010 retroactive to January 1, 2010. The article goes on to note that reinstatement is also the intention of Senate Finance Committee Chairman Max Baucus, but points out that "others aren't so sure." While there is some precedent which might be deemed to support a retroactive reinstatement of the Estate Tax, some experts have questioned its constitutionality.

It may be uncertain how the provisions of some persons' estate planning documents will be interpreted if there is a death when there is no estate tax. This is because several provisions of typical estate planning documents are phrased in terms of tax concepts, such as the estate tax exemption amount and the marital deduction. Because those tax concepts are not in the law this year, there may be some question as to what those documents mean and how the property is to be disposed of pursuant to the terms of those documents. That in turn may cause tax questions to arise. For that reason, many persons' documents may need to be revised to contemplate a death during a period where there is no estate tax. Further, documents may be required to be revised in order to take into account the possibility of carryover basis.