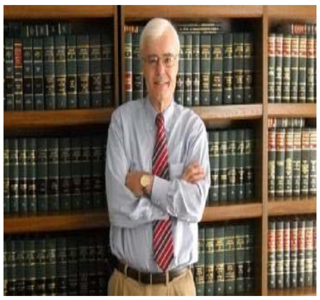
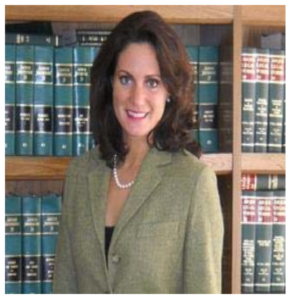
THE LAW OFFICE OF

MICHAEL J. HOWELL, P.A.

112 Executive Center
1 Corpus Christi Place, #112
Hilton Head Island, SC 29928
Tel. (843) 785-7590
Howell51@aol.com
HiltonHeadEstatePlanning.com



Michael J. Howell



Margaret R. Howell

May 2013

Summary of New Estate, Gift and Generation Skipping Transfer Tax Law

The America Taxpayer Relief Act of 2012 (ATRA) is now law. Technically, it was passed by Congress on January 1, 2013 and signed by the President on January 2, 2013. For the first time since the Bush Tax Cuts were passed in 2001, most of the tax cuts are permanent.

We do not have to worry about whether Congress will actually do something; they finally did. Since there were sufficient votes, it will not expire in 10 years. It now requires Republicans, Democrats, the President and both houses of Congress to make further changes.

I will leave it up to the CPAs to explain the income tax aspects of the law. The estate tax aspects are relatively simple.

There is a combined exemption of $5,000,000 per person from estate and gift taxes. The exemption is indexed for inflation, which makes it $5,250,000 for 2013. For a married couple, the exemption is up to $10,500,000, again subject to future inflation adjustments. The tax above the exemption amount is now 40%.

ATRA also contains portability. Portability means that a surviving spouse can use the unused exemption of his or her most recently predeceased spouse. However, the amount of the predeceased spouse's exemption is locked in as of the date of his or her death.

In the past, we were not sure if it was going to be the amount at the date of death of the first spouse or the amount at the date of death of the second spouse. This caused significant uncertainty in planning. Now we at least have some certainty.

In order for portability to apply, although no tax or estate tax return may otherwise be due, a timely estate tax return must be filed for the estate of the predeceased spouse. Timely is 9 months after the date of death of the first spouse which can be extended for 6 additional months. Although a complete return is also due, the IRS announced that it will loosen the requirements, somewhat, in order to make it easier to file the return.

One irony is that the IRS is not requiring the valuation of certain items that qualify for the estate tax marital deduction. The reason for the irony is that many of the items need to be valued in any event to calculate later capital gains and losses.

The estate tax return filed in this abbreviated manner is also subject to further review upon the death of the surviving spouse for purposes of determining if the portability amount is correct. Otherwise, the return would have been subject to the normal statute of limitations.

What portability means is that if a spouse dies in 2011 or later and leaves all of his or her assets to their surviving spouse, then the surviving spouse may use the predeceased spouse's exemption. If the decedent leaves assets to some other beneficiary who is not a spouse or qualified charity, such as a

Disclaimer

This newsletter is intended for the exclusive use of our clients who live in South Carolina. You have received this newsletter because, according to our file, we did estate planning work for you in the past and your primary residence is in South Carolina. If this is not correct, or we have mailed this newsletter to the wrong person, or if you have hired another attorney to take care of your estate planning work, or if you have moved out of state, or if you would otherwise like to be removed from our client mailing list, please let us know so that we can take you off of our client mailing list and/or move you to the proper list.

child, the gift reduces the portable amount by the value of the gift or bequest.

Although the surviving spouse's exemption will be subject to further inflation adjustment, the predeceased spouse's exemption will not be adjusted after his or her death. So, for instance, if a spouse dies in 2013, then his or her exemption will be locked in at $5,250,000.

The gift tax exemption is the same as the estate tax exemption. The lifetime exemption is one unified exemption that can be used to reduce either estate or gift taxes. Portability on the estate tax side may also allow larger gifts by the surviving spouse.

With both estate and gift taxes, the issues become much more complex if there is a subsequent marriage after the death of the first spouse. The exemption of the first spouse to die can be lost upon remarriage. This is because you can only use the exemption of the most recently deceased spouse and the new spouse may not have his or her own full $5,250,000 exemption, if they made substantial previous gifts. If the new spouse predeceases, then the exemption of the first predeceased spouse will be lost because the new spouse becomes the most recently deceased spouse.

The exemption amount of an individual will become a significant issue in negotiating premarital agreements between couples and may cause some to think twice before getting married, especially if one of them has used up his or her exemption. This may also cause "shopping" for spouses in order to use their exemptions.

Keep in mind that a mere $5,000,000 exemption at a 40% estate tax rate can be worth as much as $2,000,000 in tax savings. Oddly, this can make someone with modest means, who is substantially older and in very poor health, an attractive candidate for marriage.

The generation skipping transfer tax exemption amount is the same as for estate taxes with important differences. It is not shared with the gift and estate tax exemption and there is no portability. For this reason, even more caution needs to be observed with respect to how it is used.

The annual gift tax exclusion is now $14,000 per donee, also subject to future inflation adjustments. Proper gifts within the limits do not require filing a gift tax return and there is no loss of the lifetime exemption. Annual gifts in excess of $14,000 per donee will require filing a gift tax return and also use of the lifetime exemption for the amounts over $14,000, per donee. A gift tax return is also required when one spouse makes his or her own gift and also makes the gift for the other spouse, even if the gift is no more than $14,000, per donee.

A Fundamental Shift in Estate Planning Joint Trusts Will Become More Prevalent for Married Clients

With nearly 5 months of planning under the new law, a fundamental shift is developing in how we plan estates. This is because the vast majority of estates of married couples are under the new $10,500,000 limit or even the single limit of $5,250,000, even on Hilton Head Island.

This means that for joint estates under the exemption amounts, the husband and wife may no longer have to lock in the more restrictive Trust B to save estate taxes. This also means that estate planning has substantially changed.

In the past, we were concerned about having separate trusts for husbands and wives who in many cases would have preferred joint trusts. Joint trusts were not preferred due to accounting and other complexities that were involved pre-mortem and also post-mortem when it was necessary to split the trust into the Trust A and Trust B.

The Trust A, also called the marital deduction trust, often has little or no restrictions on the surviving spouse and is included in the surviving spouse's potentially taxable estate. The more restrictive Trust B is designed not to be taxed when the survivor dies to save estate taxes upon the surviving

Disclaimer
No portion of this material should be construed as legal, accounting or financial advice. It is merely intended as general educational information and does not necessarily represent the planning that should be done in your particular situation. If you want to use any of the techniques described herein, please contact our office before proceeding.

spouse's death, but the restrictions take away a significant amount of personal control from the surviving spouse.

Now, unless the joint estate is expected to be more than the $10,000,000+ exemption, or there are other non-tax reasons, there is no need for the trust to split upon the first death. This means that while both spouses are alive, they can enjoy the convenience of the joint trust and the survivor can have total control over the trust assets upon the death of the first spouse without the restrictions of the Trust B. Also, by incorporating traditional disclaimer planning, the joint trust can incorporate the estate tax savings option of a Trust B in the event the joint estate turns out to be significantly more than expected.

For those with larger taxable estates, we still recommend separate trusts. However, there is now much more opportunity for planning to reduce these taxes by using all or part of their exemptions with more highly sophisticated planning techniques.

Also, for spouses with children from previous marriages who use QTIP trusts to benefit their new spouse, yet ultimately protect their assets for children from the previous marriage or relationships, this particular type of joint trust planning may not be appropriate.

ART Children

Are you familiar with the term "ART Children?" No, it doesn't mean children who are skilled artists. It means Assisted Reproductive Technology Children.

According to the definition used by the CDC, Assisted Reproductive Technology includes all fertility treatments in which both the egg and sperm are handled. ART procedures involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman. They do not include treatments such as artificial insemination or procedures in situations where a woman only takes medicines to stimulate egg production without having eggs retrieved.

Since it is now possible to store sperm, eggs and embryos for future use, it is possible for children to be born long after the deaths of their biological parents. Some military personnel now engage in such planning so that they will have children, if they die in combat.

For now, estate planning does not cover a number of ART children or certain artificial inseminations as well as it should. Why? There are too many permutations and combinations of events to consider.

However, consider these examples. If a child predeceases their parent, and a grandchild is born some years later, do you want the grandchild to inherit? Does it depend on how many years later? Do you want to hold open your estate indefinitely? What other factors does it depend upon? What happens if the embryo is carried by a non-related third party? What happens if the embryo is carried by your daughter-in-law, but your son is not the sperm donor because he is not capable of having children? What happens if the embryo is carried by your daughter, but it is not her egg? What happens if your child is female, gay and her spouse or partner carries the baby with sperm from a sperm donor? What happens in the future if there is a clone? Similar considerations can apply to your own children. The complexities go on and on.

There are many unanswered questions, but in 2010, according to statistics compiled by the CDC, there were 47,000 ART children born in the United States. Therefore, the complexity of the issue will continue to increase.

For now, you should at least consider whether there may be ART or similar children in your family, already. If so, are they covered by your Will and Trust? Should they be? To be sure, changes may be needed.

Disclaimer

No portion of this material should be construed as legal, accounting or financial advice. It is merely intended as general educational information and does not necessarily represent the planning that should be done in your particular situation. If you want to use any of the techniques described herein, please contact our office before proceeding.

Safe Deposit Boxes Can Cause Problems After Death

I have discussed this issue several times in the past and during many, many office conferences with clients. Basically, unless you have valuables that must be stored in a lock box at a bank, we no longer recommend bank lock boxes.

As banks have become larger and larger, they have become harder and harder to deal with when a decedent has a bank safe deposit box, but all assets are in trust. Many banks are requiring Certificates of Appointment, Letters Testamentary or similar documents, in order to surrender the contents of a safe deposit box, even if it was joint and there is a surviving spouse. This is so even if you can prove by a bill of sale or other documentation that you own the property in the box.

The concern of banks is that they may turn over valuable contents to the wrong party. For certain items such as Wills, life insurance policies and deeds to cemetery plots, they can turn these over to certain individuals upon proof of death and the relationship of the individual to the decedent.

For other items in the safe deposit box, it is not so easy. By requiring a Certificate of Appointment, Letters Testamentary or similar documents, they are asking for you to open up a probate estate and have a Personal Representative appointed. This can be an unnecessary multi-thousand dollar task.

So far we have been successful with surviving spouses getting into the safe deposit boxes and obtaining the contents. However, we had a close call recently, which prompted inclusion of this article.

In that case and others, the bank finally accepted the documents that we filed with the probate court to probate the Will, although no Personal Representative was actually appointed and there were no Certificates of Appointment or Letters Testamentary issued. Although it was a good result, it created needless stress on the surviving spouse.

Also keep in mind that probating the Will is not the expensive part of the process. It is the appointment of the Personal Representative, which requires administration of the estate through the probate court; albeit, possibly an abbreviated one.

So although the bank asked for the Certificate of Appointment, they accepted something else. Did they realize that what they accepted was not what they were asking for? Maybe, maybe not; but it was a reasonable result.

If the survivor is otherwise a signatory on the box, the bank procedures have prompted many customers to simply go into the box after the death of the co-tenant, empty the box and take the contents with them without raising the issue of the death. There are certainly a number of issues associated with this procedure, and these individuals should at least have an inventory of the contents of the safe deposit box in case questions come up later as to what was in the box.

In order to avoid the issues, you should not have a safe deposit box unless you have items such as valuable jewelry, gold, silver, etc. that need to be locked up and you do not have an adequate home safe. If you must have a safe deposit box at a bank, then place it in the name of your trusts.

If there is a husband and wife then put it in the name of both trusts. This keeps open the argument that the trust does not die, so there is no reason to seal the safe deposit box when a Trustee dies.

I hasten to add that this is a good argument, but may not work, if the bank wants to argue the point. Again, unless it is otherwise necessary to protect valuable property, we do not recommend the use of a bank safe deposit box.

Disclaimer
No portion of this material should be construed as legal, accounting or financial advice. It is merely intended as general educational information and does not necessarily represent the planning that should be done in your particular situation. If you want to use any of the techniques described herein, please contact our office before proceeding.