

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
Fax. (843) 686-4355
HowellLawFirm@gmail.com

HiltonHeadEstatePlanning.com



Michael J. Howell



Margaret R. Howell

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Client Newsletter
By
Michael J. Howell
and
Margaret Rhea Howell

Summer Hours

The long, hot summer is fast approaching and so are client vacations and trips out of town. Therefore, we have changed our hours for the months of May, June, July and August. Our new summer office hours are 9:00 a.m.-5:00 p.m. Monday-Thursday. We will also have someone on call on Fridays.

Breaking News:
Legislation Has Been Introduced in
South Carolina, to Interpret Formula Trust
Funding Clauses, in Light of
No Federal Estate Tax in 2010

A bill has been introduced in the South Carolina Legislature, which is intended to help interpret Wills and Trust Agreements with certain formula clauses. These formula clauses were designed to determine the amount of assets needed to fund certain types of trusts after death. Unfortunately, the formulas were based upon an estate tax law that does not currently exist.

The law ended on January 1, 2010. However, the law will likely come back into existence on January 1, 2011, as part of the sunset of the Bush Tax Cuts from 2001. However, there may be significant differences from the law as it existed at the end of 2009.

We sent out an emergency newsletter in January to our clients and have included the issue in all subsequent client newsletters. We have also been routinely reminding our clients, through our newsletters since 2001, of the potential problems and the need to update their estate planning documents in order to avoid the problems.

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.

We avoided many of the problems by using Disclaimer Trusts, which allow a post mortem decision up to nine (9) months after the decedent's date of death to determine how much goes into the credit shelter trust. These credit shelter trusts are designed to save estate taxes upon the death of the surviving spouse, at the cost of some restrictions on the surviving spouse's ability to access funds. In other cases, we defined the trust funding clause, so as to avoid the problems.

The proposed South Carolina law, as of the first week in May, was designed to fund the credit shelter trust with the formula clause being construed under the federal estate tax law as it existed on December 31, 2009, rather than the actual 2010 date of death of the Settlor of the Trust or the Testator of the Will. As a practical matter, if passed, this would mean that the more restrictive family or credit shelter trust, which we often refer to as a Trust B, will be funded with up to \$3,500,000 of the decedent's assets.

The vast majority of our married clients would not choose this option unless the estate tax exemption is allowed to go back to \$1,000,000, which may happen in 2011; although, there are many commentators who believe that it will be changed back to the 2009 amount of \$3,500,000.

The reason why most would not choose the option, is because of the restrictions imposed upon the surviving spouse by a typical credit shelter trust and if there is an estate tax exemption that exceeds the value of their assets, then there may not be an estate tax in any event. If there is no estate tax, then there is no need for the more restrictive credit shelter trust.

However, this logic will not necessarily apply to a QTIP Trust for second marriages with children from a previous marriage or relationship. These are often created to prevent the surviving spouse from doing as he or she pleases with the funds. Nor does the logic necessarily apply if the beneficiary is a spendthrift or disabled person who needs to be protected.

For large estates, the decedent may in fact want to place as much as possible into a credit shelter

trust, probably with generation skipping transfer tax provisions, to protect the family wealth from future estate and generation skipping transfer taxes, especially given the uncertainty of recent years.

The proposed legislation also has a provision which will allow an interested person to petition the court for a different interpretation, if desired. The proposed law is somewhat straight forward and may solve the problem for those who did not have their estate planning documents updated.

The proposed law apparently also creates a legal presumption that the Trust or Will provision should be interpreted as of December 31, 2009. This presumption makes it more difficult on the party trying to achieve a contrary interpretation.

From talking with other practitioners around the state, there is some opposition to the proposed law. Many attorneys would prefer a facts and circumstances approach to the problem; whereby, if an interested party wants to go to court for a different construction, then there should be no presumption to overcome. It is believed by many that this will provide a more equitable result.

These concerns have gained some support. The latest proposal is simply to allow a petition to the court to construe the formula clause based more or less upon facts and circumstances without any presumption being imposed. I also understand that even this proposal is being reviewed by numerous individuals and committees and is likely to be changed even further.

Another proposal being discussed is to allow the Trustee or Personal Representative to make an election as to how to interpret the funding clause and then leave it up to the beneficiaries to bring a petition seeking a different interpretation without any presumption being imposed. This would be one of the least expensive proposals.

No matter which law is enacted, it will have the tendency to increase legal fees and costs for those who did not or do not update their documents. Clients should have their documents reviewed, and where necessary, updated, to avoid the problems.

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.

We will keep you posted on our blog on our website, if the legislation or similar legislation passes, so please check our website for updates.

**Married Couples with Pre-2002 Plans
Need to Have Their Plans Reviewed Immediately
in Light of Estate Tax Laws
Which Became Effective January 1, 2010**

This article was written prior to the legislation being introduced in South Carolina to mitigate the problems created by old formula clauses. The legislation highlights the importance of having your documents reviewed and updated.

In our last two (2) newsletters, we pointed out that those of our clients who had not had their Trust Agreements drafted or redrafted on or after January 1, 2002, need to have their estate plan and estate planning documents reviewed and likely updated, based upon the state of the current laws on estate and gift taxes, and the uncertainty that currently exists. If you have any questions, please review our January 2010 newsletter.

If you do not have a copy of the newsletter, one can be obtained by going to our website which is www.HiltonHeadEstatePlanning.com and looking under our "Client Newsletters" section. If you do not have access to the Internet, and can not find your copy of the newsletter, please give us a call and we will mail a copy to you.

Similar considerations apply to married couples and single individuals with Generation Skipping Transfer Trusts, or any other trust that has a formula gift based upon estate taxes, even if executed on or after January 1, 2002. After we sent out our last newsletter, we realized that there is still another somewhat smaller category of clients whose documents may be affected, even though they were updated on or after January 1, 2002.

These are the documents with Generation Skipping Transfer Trusts. They may need review and updating because they too may have a formula allocation, based upon estate and generation skipping tax law. Some will not, because during the planning we suggested what to do in the event that there was no generation skipping transfer tax; however, for

good reasons, clients often choose not to take our suggestions.

Generation Skipping Transfer Trusts are designed to continue for the lifetime of your children and then be distributed to your grandchildren, or possibly more remote descendants. Again, some, but not all, of these may also have formula provisions that may cause uncertainty. If you have any doubts, you should have it reviewed to be sure.

**Please Visit Our Website.
It is Up and Running and Fully Operational**

After many months of working on our website, it is fully up and running and operational. It is what is referred to as a "content rich" website, which means that it would be hard to go in and review everything because it has many hundreds of pages of text and information. Some of the information is quite serious, and some is humorous (i.e., *Alice and the Mad Hatter* when they discuss probate).

The website is designed both for the general public, prospective clients, and for those of you for whom we have done legal work in the past, which we refer to as 'returning clients' on our website. There are numerous articles and information on estate planning, probate, elder law issues, estate and gift tax issues, and asset protection planning.

The website is also set up so that you can perform a search to find the information that you are looking for.

Also included on the website are special offers and discounts designed to encourage people to use the website. This includes not only prospective clients, but returning clients as well.

We also have "The Howell Blog" where we post new articles and information on estate planning, probate, and related matters. The content of much of this newsletter is information from our website. Once this newsletter is published, it will also go onto our website and the Blog information will ultimately be removed and replaced with additional content.