Berwitz & DiTata LLP

A STEP AHEAD

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Pre-Paid Funeral And Burial Plans

One important way to plan, in advance, for life's end is to pre-arrange and fund a funeral plan, also called a "Pre-Need Agreement." The funeral service, the charges of the funeral home, its staff, facilities and equipment, the arrangements for the preparation of the remains, the casket, vault or grave liner, transportation, and other incidental expenses such as permits, death certificates and obituaries are determined in advance and pre-paid. If privately funded or paid from an individual life insurance policy, a funeral plan arranged informally through a funeral home or funeral director is not subject to regulation. However, each state has promulgated rules governing formal funeral arrangements which regulate how plans are to be sold and funded, what the contracts must provide and what recourse purchasers have in the event of fraud or default. New York State residents benefit from the most comprehensive laws. The monies are deposited into an investment backed by the U.S. government, usually FDIC insured certificates of deposit, and

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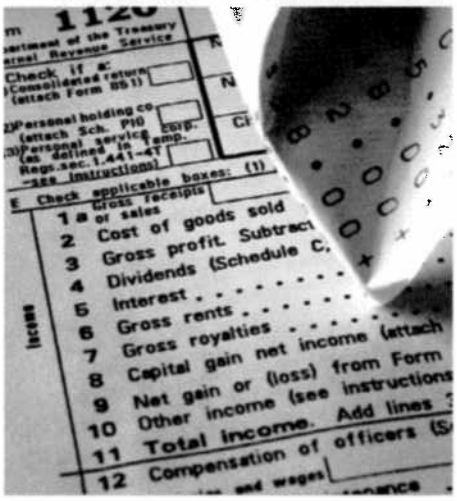
The 2010 Tax Act

Mark Twain wrote, "Suppose you were an idiot. And suppose you were a member of Congress. But I repeat myself." After being totally irresponsible and failing to act prior to 2010 to address the expiring estate tax provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), Congress has finally passed, and President Obama immediately signed, legislation increasing the unified credit and reinstating the "stepped-up basis" rules for decedents dying in 2010 and thereafter. However, the new legislation is only effective for two (2) years. Congress will have another opportunity to prove Mark Twain wrong at that time.

First The Good News

On Friday, December 17, 2010, President Obama signed the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 (the 2010 Tax Act). This Act extends, for the next two (2) years, many of the individual and capital gain/dividend tax cuts enacted during the Bush presidency. The 2010 Tax Act reduces payroll taxes, increases bonus depreciation, provides for alternative minimum tax relief and reinstates the estate tax. A summary of the estate tax provisions are discussed below.

Under EGTRRA, the estate tax had been suspended for decedents dying in 2010. It was scheduled to be revived in 2011, utilizing the



$1,000,000 unified credit and maximum tax rate of 55% that was in effect in 2001, before EGTRRA was enacted.

The 2010 Tax Act decreases the maximum estate tax rate to 35% and establishes the unified credit against estate taxes at $5,000,000 for individuals and $10,000,000 for a married couple. The exclusion amount is to be adjusted for inflation. It reinstates the traditional "stepped-up basis" rule for all assets included in a gross estate. Prior to its passage, under EGTRRA, the stepped-up basis rules were replaced with a modified carry over basis, see our

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Trusted Family Advisor Program

Major lifetime events trigger changes in estate planning. Often our friends and clients only think to call us at the sad times in their lives: when illness, incapacity or death of a family member occurs. They know that we will assist them with guardianship, probate or trust administration, asset protection and Medicaid planning. When a beneficiary, trustee or executor passes away, we hear from you. But we would like to celebrate the happy events with you, too. At the birth of a child or grandchild you may want to provide in some special way for the newcomer. You may decide to purchase a new or larger home, or move to "more manageable" quarters. Children marry - or divorce. Your assets may increase - or decrease. You may inherit - or suffer business setbacks. We encourage you to advise us of these changes because estate plans need to be reviewed to ensure that they will continue to accomplish your goals.

In order to better serve all of our clients and friends, several years ago we initiated the "Trusted Family Advisor" (TFA) Program. The TFA Program is simple. Just contact our firm any time you or a member of your family requires the services of an attorney - for any purpose. We hope that you will never need an attorney because of an injury, car accident, medical malpractice, employment dispute, divorce or Family Court matter. However, while we do not practice in these areas of law, we will refer you to an attorney who has expertise and who can protect your rights. Of course, we will provide you with representation in any of the areas encompassed by our practice: elder law, guardianship, Medicaid planning and obtaining Medicaid benefits, estate planning, and probate and trust administration, including contested matters.

It is our hope that you will take full advantage of the TFA Program and allow us to be your Trusted Family Advisor. We would welcome any thoughts or suggestions you might have to make this Program more helpful. We always look forward to hearing from you.

Pre-Paid Funeral And Burial Plans

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100% of the principal and interest must accrue to the benefit of the trust.

There are a number of advantages to pre-planning and pre-funding. First, it allows individuals the opportunity to make a personal and specific selection of the products and services that meet their needs. For some, it is comforting to know that money has been set aside and will reduce the burden on family members at a difficult time and when they are most vulnerable to manipulation. It ensures that the family will not raid savings, sell assets, take loans or arrange other financing to pay for a funeral and burial. It may ensure that, if products and services currently purchased are not available in the future, equivalent substitutes will be provided at no additional cost.

Under New York law, pre-arrangements may be cancelled at any time prior to death and the entire balance, including interest, must be refunded unless the plan is intentionally *irrevocable,* which it customarily is for a Medicaid or SSI recipient. Even an irrevocable preplan may be transferred to a different funeral home at any time. Pre-need arrangements may be "guaranteed," meaning that the price of the goods and services is guaranteed not to exceed the balance in the trust account at the time the funeral is provided, or "non-guaranteed." Either way, within 10 days of the arrangement, the funeral director must deposit the funds to the funeral trust program.

For Medicaid applicants, funeral pre-planning is an important step. To the extent that funds are available that might otherwise disqualify the applicant from eligibility, funeral planning can be undertaken and the funds contributed are "exempt." If only one member of a married couple is applying for benefits, the funeral pre-arrangements for both are considered "exempt."

Unfortunately, there may also be problems with prepaid funeral arrangements. If a purchaser moves to another state and wishes for the final arrangements to be made there, there may be no transfer options or different rules governing the funding option. Unless the plan properly itemizes the goods and services, the provider could later substitute less expensive items or omit goods and services that were originally anticipated. If the goods and services purchased are not available in the future, the family may be required to pay more than the budgeted amount. If the provider goes out of business, or fails to secure the funds for the future payment, there may be no recourse.

The 2010 Tax Act

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article entitled "Capital Tax Time Bomb" on our website and the Spring 2009 edition of our newsletter "A Step Ahead."

For decedents who died during 2010, the 2010 Tax Act allows the representative to elect between (a) a federal estate tax based on a $5,000,000 exemption, a 35% tax rate and an unlimited step-up in basis or (b) no federal estate tax and a modified carry over basis. The time within which to file estate tax returns and make payments has been extended, for estates of decedents dying after December 31, 2009 and up to the date of enactment of the Act, for nine months.

The 2010 Tax Act allows a surviving spouse of a decedent who passed away after 2010 to elect to use the unused portion of the estate tax exclusion of a deceased spouse, which provides the surviving spouse with a larger exclusion. This is referred to as "portability."

The 2010 Tax Act has also made some significant modifications to gift and generation skipping transfer taxes. Under the Act, the gift tax is retained. However, the highest gift tax rate is reduced to 35% and the lifetime exclusion is increased to $5,000,000. Under EGTRRA, the generation skipping tax (GST) did not apply for the year 2010. The 2010 Tax Act revives the GST with a 35% rate and $5,000,000 exclusion. It also reunifies the gift and estate taxes for gifts made after December 31, 2010. Each tax type had a separate exclusion amount prior to the enactment of the Act.

And Now the Bad News

By enacting the 2010 Tax Act, Congress has applied a temporary band-aide approach to the estate and gift tax issues rather than a more permanent fix. This will lead to a great deal of confusion and ultimately be detrimental to the many people who mistakenly believe Congress has appropriately addressed these issues.

We have spoken with many people who now believe, erroneously, that they do not have to do estate tax planning. We have been told that the portability provisions make estate tax planning unnecessary, because any unused unified credit of a deceased spouse can be used by the survivor. This belief ignores significant limitations contained in the new legislation. For example, it does not take into account the New York State estate tax. By failing to incorporate estate tax planning now, couples who own property worth more than $1,000,000 will pay more in state estate taxes than they would otherwise pay.

The perceived ability to utilize the unused unified credit of the first spouse to die will fail if the second spouse dies after December 31, 2012, when the law reverts back to the 2001 levels and portability did not exist. Also, if the surviving spouse remarries, the unused portion of the deceased spouse's unified credit is no longer available, again resulting in a greater tax.

When all of the deceased spouse's assets are left to the surviving spouse, that spouse is free to name new beneficiaries. Surviving spouses may remarry or become estranged from children who had a close relationship with the deceased spouse. Either of these events could result in the surviving spouse choosing to redirect his or her assets, after the death of the first spouse, including the assets received from the first spouse, to someone other than the beneficiaries selected by the deceased spouse.

Another factor to consider is that Medicaid planning, and other asset-protection planning, can be incorporated into the plan of the first spouse to die. Certain trusts created for a surviving spouse can protect those assets from being considered in determining the Medicaid eligibility of the surviving spouse. A properly drafted trust created under the Will of the first spouse to die can allow the trust assets to be used for the benefit of the survivor to enhance his or her quality of life and to supplement, but not replace, governmental benefits. This planning technique is lost when the assets are left to the surviving spouse outright.

Clearly, the 2010 Tax Act can significantly impact estate plans regardless of when the plans were created. Having your plans reviewed on a regular basis by a qualified attorney allows your particular situation to be evaluated so that an appropriate plan can be devised which is tailored to your needs. If you have questions related to how this Act might affect your existing estate plan, please contact Berwitz & DiTata LLP to arrange for a consultation. Those whose estate plans were prepared by our firm will not be charged for this consultation. As a courtesy to readers who have not had their estate plan prepared by Berwitz & DiTata LLP, we will charge a nominal fee of $350.00 for the consultation.

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Lisa Mevorach Joins Berwitz & DiTata LLP

Lisa Mevorach, Esq.

Berwitz & DiTata LLP welcomed Lisa Mevorach as an associate attorney of the firm in January. Lisa has been practicing in the areas of commercial litigation, construction and general business law and landlord/tenant matters and the representation of those with disabilities including Article 81 and Article 17A proceedings. She is an Office of Court Administration Part 36 Certified Receiver, Guardian, Guardian Ad Litem, Referee and Real Estate Broker in Nassau, Queens and Bronx counties. She obtained her law degree from City University of New York School of Law. Lisa is a member of the Nassau, Queens and New York State Bar Associations and has been admitted to the Eastern and Southern District Courts. In addition, she is a member of the Gold Coast Lake Success Rotary. Lisa volunteers at the Interfaith Food Pantry in her community and is a member of the Master's swim team that practices at C.W. Post College. She is married and has four children. It is our pleasure to have Lisa on board and she looks forward to meeting with our friends and clients.

Would You Like To Read About It Here?

We at Berwitz & DiTata LLP are proud of our newsletter and hope that each issue brings our clients and friends insightful and timely information. We endeavor to write articles geared to your interests and concerns. We would be happy to receive your feedback. More importantly, if you have a question or would like us to address a particular topic, please call and let us know. We will try to include it in one of our next issues. Just call or drop us a line.

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