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The Repeal is Here – Your Client May Need to Update Estate Plan

The recent (and likely temporary) repeal of the Federal Estate Tax has at least one consequence your clients may not be aware of.

Married people who don't update their estate plan could unintentionally disinherit a surviving spouse.

It's become common for married couples to use estate tax funding formulas in their estate plans to place the maximum amount of assets not subject to the estate tax into a Trust, often to benefit children. The remaining assets go to the surviving spouse.

But this year, there's no limit on assets that a client can pass to heirs without triggering the estate tax. And so, all of a client's assets might automatically move into a Trust and a surviving spouse could be out of luck.

Avoid Un-Intentionally Disinheriting a Spouse

Most states allow surviving spouses to claim part of an estate even if disinherited, but it can be costly.

To avoid this dilemma, clients should update their estate plans to remove these formulas for 2010. Instead, they can use dollar amounts or a percentage to designate where assets should go. Alternatively, they should consider transferring some assets to a spouse's name now to ensure sufficient funds are available to him or her.

How Did This Repeal Happen?

Most experts believed that Congress would carry the 2009 estate tax exemption of \$3.5 million through 2010 and address the estate tax this year. Instead, the House failed to act on a one-year extension and sent the Senate a bill to make the 2009 law permanent.

However, the Senate was so tied up debating health care reform and disagreeing over what to do with estate taxes that it did not act on the estate tax issue at all. Thus, the repeal took effect.

Congress' failure to adopt any estate tax legislation for 2010, as well as the possibility that no changes will be enacted at all this year, dramatically affects the estate planning considerations for many clients.

What will happen? Here are some possibilities:

- 1) Congress will again do nothing in 2010, in which case there is a nominal step-up in basis and no estate tax for those who die in 2010. In 2011, the estate tax exemption automatically reverts to \$1 million.
- 2) Congress will enact legislation to carry the 2009 exemption over to 2010 and make the legislation retroactive to Jan. 1, 2010. So if a client dies before the enactment, his or her estate could still be taxed.

Bottom Line: Act Now

Waiting to see what happens next is a bad idea. The earlier clients apply flexible estate planning the better. Encourage them to meet with an estate planning attorney to check if updates are needed.

As always, I hope this article has helped you and your clients. If you have a specific case or concern you'd like to discuss, please contact our office.



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Keith L. Davis, JD, MBA, LLM (Tax), CPA
Francis P. Brown, JD, MIM, LLM (Tax)
Janine A. Guillen, JD, MBA, RN

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523 Park Point Drive, Suite 350
Golden, CO 80401
Phone: 303-670-9855 Fax 303-670-5381