

## **Family Wealth Transfer Strategy #3 Estate Planning - Welcome to the World of Uncertainty**

**KURT D. PANOUSES, ESQ.**

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In 2008, the political climate kept calling for "change." I looked up "change" in Webster's New World Dictionary and "change" means "to put or take (a thing) in place of something else; to make different, to alter, to vary." No where did I see in the definition the word "uncertainty." But that is what Congress left us with for 2010 in reference to our estate tax and generation-skipping tax. Consequently, as of January 1, 2010, there is no estate tax or generation-skipping transfer tax. More importantly, there is no free "step-up" in basis - there may even be a "step-down!"

If Congress remains deadlocked, the estate tax returns in 2011, with a \$1 million exemption and a 55% tax rate. So, we go from a \$3.5 million estate tax exemption, and a 45% tax rate, to a complete repeal for 12 months, and then down to \$1 million exemption with a 55% tax rate. That concept is filled with difficult decisions for our clients, as well as for professionals making recommendations.

The 2009 calendar year was filled with bills brought by different members of Congress on how to deal with estate and other transfer taxes. I thought, for certain, it would be resolved by year-end. After attending a tax symposium in January, I am now of the opinion, this may not be resolved any time soon. This period of uncertainty, may continue through most of 2010. Many professionals believe legislation will come, but it may be retroactive to January 1 of 2010. Others are not so certain. The longer it goes, the more opportunity for a constitutional challenge to take place.

So, what should we be telling clients? Obviously, the answer to that question is dependant on the client's tolerance for risk. You can add an amendment or codicil to the estate plan that requests "the distribution of my estate is to be handled as if I had passed away on December 31, 2009." Others may request a percentage being distributed to (or in trust for) a spouse and a percentage being distributed to (or in trust for) children or other family members. What is important to note is the basic formula clauses historically used for clients may not work the way they were intended and may not address the client's needs. Is it malpractice? Probably not. Is it malpractice to ignore it? Maybe. What we should do is bring something to the attention of our clients to address the situation if there is a possibility they may pass away in this calendar year.

Every client that has significant wealth (greater than \$1,000,000) should review their estate plan to look at the formula used in their documents and to evaluate the fact that there may not be a free "step-up" in basis on all assets. It has been recommended that more "QTIP" (Qualified Terminable Interest Property Trust) trusts to be used to transfer assets to a spouse. Disclaimer language can also be used to allow for assets to be transferred directly to an alternate beneficiary. It is important to look at the basis of assets as there is now a \$3 million basis adjustment for assets passing to a surviving spouse and \$1.3 million of assets passing to others.

Perhaps there is no better time than the present to make contact with your clients to suggest they review their documents in light of their current portfolio and basis values. There is one question to ask your client, and that is, "How do you want your estate to pass if there is no estate tax?" That is something we have never emphasized in the past because there was always an assumption that the tax would exist. The clients have become used to a tax-free exemption amount and a free step-up in basis, both of which may be unavailable to them if they pass away in 2010.

As always, I am available to review a client's situation and be pro-active in the development of a plan that takes into consideration the various alternatives, which every family faces this year. One piece of advice would be to delay, if possibly, any distributions for any decedents who pass away in 2010 until the law is clarified. I know that may not be a popular recommendation, but it may be the best advice for a family in 2010.