



# Estate Planning Newsletter

December 2009 Issue

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## From the Estate Planning Group of Hinshaw & Culbertson LLP

*Hinshaw's Estate Planning Newsletter includes reports on opportunities and challenges that may impact individuals' estate plans. This publication is designed to keep readers aware of such opportunities and challenges so that they may determine whether changes to their estate plans are necessary or desirable. Our goal is to provide the information necessary to ensure that readers are effectively providing for their loved ones, planning for the transition of their businesses, protecting their assets, and paying as little tax as possible. Comments or suggestions concerning the Estate Planning Newsletter should be directed to Stephen A. Frost, Chair of Hinshaw's national Estate Planning Group.*

## Will Congress Let the Federal Estate Tax Repeal Become Effective?

The federal estate tax, which currently allows each taxpayer to transfer up to \$3.5 million worth of property tax-free upon his or her death, is scheduled to be repealed at the end of 2009. The repeal is only scheduled to apply to 2010. If Congress does nothing to address the issue, the repeal will automatically sunset at the end of 2010, and the current federal estate tax system will spring back to life in 2011. However, only \$1 million worth of property will be allowed to be transferred tax-free at death beginning in 2011.

A repeal is unlikely. The U.S. House of Representatives has already voted to maintain the current estate tax regime permanently. Various members of the U.S. Senate's Finance Committee have also expressed an intent to preserve the federal estate tax system as it currently exists. There has been talk about a one-year patch, a three-year patch and a permanent commitment to the status quo. Therefore, the U.S. Senate is expected to act before the end of 2009. Unfortunately, Congress is running out of time.

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## Estate Planning Group

Hinshaw's Estate Planning Group members provide the sound planning, strategic foresight and creative solutions required to capably manage and preserve assets. We help business owners, real estate owners, executives and other individuals comprehensively plan for the present and future. More specifically, we:

- Assist business owners, executives, and individuals in effectively and tax-efficiently planning for the financial ramifications of marriages, major lifetime events, disability and death
- Help our clients preserve wealth for the next generation, protect their beneficiaries, avoid or help mitigate the taxable effects of various activities, accomplish effective and smooth generational transfers, and facilitate charitable gifting
- Serve as trusted advisors in administering the assets and activities of trusts and estates, we assist with a full range of distinctive opportunities and challenges
- Help our clients achieve their goals, preserve their assets for the long term and ensure the present and future well-being of their loved ones with special needs by preparing for the adequate and sufficient provision of elderly, minor and/or disabled family members and other beneficiaries

Because the repeal of the federal estate tax remains uncertain and the possibility of a switch between tax systems remains a possibility, the current estate planning environment remains frustratingly muddled. Once Congress acts on this issue, it will be important for every taxpayer to have his or her estate plan reviewed. In the meantime, Hinshaw will be watching and waiting for Congress to act.

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## Low Valuations and Low Interest Rates Create Significant Gifting and Other Family Business Transfer Opportunities

Planning for the tax-efficient transition of a business, especially a family-owned one, can be challenging. Ironically, the current economic downturn provides an excellent planning opportunity for business owners who will be subjected to estate taxes or who desire to tax-efficiently transition their business interests. This is because estate and gift taxes are based upon value, and values have been significantly suppressed by the current market conditions. As a result, now is a great time for business owners to consider making large, tax-efficient gifts of ownership interests in their family-owned companies. Because interest rates are at record low levels rarely seen, it is also an excellent time to consider intra-family sales of business interests and real properties. To be successful, ownership and management transitions must be considered carefully by counsel with significant business and valuation experience. The advantage of this opportunity will be lost if one waits too long.

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## Estate Balancing Avoids Imposition of Federal Estate Taxes

The current federal estate tax system (which is likely to be maintained – see first article) allows each taxpayer to transfer up to \$3.5 million worth of property tax-free upon his or her death. With proper estate planning, a married couple may make combined transfers worth up to \$7 million free of estate taxes. Married couples should therefore have a certain amount of property held by each spouse so that they might take full advantage of estate tax savings available to them. Unfortunately, many married taxpayers waste this opportunity by not having assets worth at least \$3.5 million titled in the name of each spouse. Married taxpayers should therefore annually review the assets held by each spouse to help ensure against an otherwise avoidable assessment of federal estate taxes.

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## The Importance of Income Tax Planning Is Increasing

Estate planning includes income tax planning as well as estate and gift tax planning. As the number of estates subject to federal estate taxes continues to decline because the amount of assets which can be transferred tax-free remains high, income tax planning will take on greater significance. Assets held until death will receive a stepped up basis for income tax basis. Therefore, the capital gains on appreciated assets will never be recognized for income tax purposes. Assets gifted during lifetime receive a carried over basis for income tax purposes. As a result, the capital gains inherent in gifted property pass to the donees and will be recognized when the donees sell the respective properties. Therefore, many families may find that gifting to avoid future estate taxes is no longer necessary or desirable for income tax purposes.

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If you would like to join our electronic mailing of *the Estate Planning Newsletter*, please send your contact information to: [Info@hinshawlaw.com](mailto:Info@hinshawlaw.com).

Periodically, we send our clients and contacts electronic alerts, newsletters, invitations to seminars and events, firm mailings and other communications. You may unsubscribe at any time.

## How Protected Are Your Assets?

As the economy has languished, everyone has felt the pinch. In this climate, many individuals have become more aware of the myriad of ways in which their assets can come under attack. For example, professionals may fear malpractice lawsuits, and real property owners may have guaranteed debt or fear a slip and fall claim. To illustrate this point in another way, a Florida court recently held that an inherited individual retirement account (IRA) was an account separate from the original IRA and was not exempt from garnishment under Fla. Stat. Section 222.21(2)(a).

The time to worry about asset protection is before a problem occurs. Properly protecting one's assets requires a full review of his or her assets and liabilities. It also requires an understanding of protected assets, fraudulent conveyances and sophisticated asset protection techniques. Such practices include proper titling of assets, the use of entities to hold property and the use of special asset protection trusts — including offshore trusts. Hinshaw's estate planning attorneys are experienced in assisting taxpayers in these endeavors.

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## Limit for Annual Exclusion for Gifts Remains at \$13,000

"Annual exclusion" gifts are relatively small gifts which may be made tax-free to a donee. The annual exclusion limit for 2009 is \$13,000 per donee. The annual exclusion limit for 2010 will remain the same. Taxpayers with the resources to make annual exclusion gifts should seriously consider doing so as these gifts need not be reported for gift or estate tax purposes and will pass tax-free to the donee. Taxpayers should note that the \$13,000 limit includes all gifts to the donee during the year, and that special rules apply for gifts to trusts. If the donees are grandchildren or trusts for grandchildren, generation-skipping implications will also need to be considered. Finally, because a donee will receive a carried over basis in any property received, income tax implications will also need to be evaluated.

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## Consider Converting Your IRA Into a Roth IRA in 2010

Roth IRAs offer several tax advantages. For example, distributions from them are not subject to income tax, and no minimum distributions are required to be made from such accounts during the owner's lifetime. Taxpayers should therefore seriously consider converting their IRAs or qualified retirement plans into a Roth IRA in 2010.

Prior to 2010, many taxpayers could not convert their IRAs and qualified retirement plans into a Roth IRA because they had a modified gross income exceeding \$100,000. In 2010, however, taxpayers may convert their IRAs and qualified retirement plans into a Roth IRA regardless of their modified gross income.

The amount converted from an IRA or qualified retirement plan into a Roth IRA will be subject to ordinary income tax. Normally, the amount converted into the Roth IRA is subject to income taxation

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in the year of the conversion. However, a special election will be available in 2010. In 2010, a taxpayer may elect to have the amount taxed 0 percent in 2010, 50 percent in 2011 and 50 percent in 2012. Generally, converting to a Roth IRA will not benefit a taxpayer unless the income taxes due can be paid from sources other than the IRA or qualified retirement plan proceeds.

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## **Status of Illinois Estate Tax and QTIP Deduction Remains Confused**

Unless the Illinois legislature acts before the end of this year, the Illinois estate tax will cease to be effective after 2009. Although the Illinois legislature is expected to eventually restore the state's estate tax, it is unclear when it might do so. Also unknown is whether the state will continue to allow a special qualified terminable interest property (QTIP) marital deduction election.

Illinois now allows each taxpayer to transfer assets worth \$2 million tax-free at death. The special QTIP marital deduction election — applicable only in Illinois — is also currently allowed. Assuming that the Illinois legislature resurrects the Illinois estate tax and that the tax remains de-coupled from the federal estate tax, the future of the Illinois QTIP marital deduction remains uncertain. Details on this issue will follow as warranted in future issues of this newsletter.

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## **Indiana and Wisconsin Allow Transfer on Death Deeds**

Indiana and Wisconsin have each adopted a new estate planning tool called a "transfer on death deed." This device allows a landowner to execute during his or her lifetime a deed which transfers real property only upon the transferor's death. The landowner may revoke the deed during his or her lifetime. Using a transfer on death deed avoids probate and avoids administration costs related to the real property. The use of such deeds is likely to prove quite useful when smaller states are involved, and having an experienced estate planning attorney guiding the process can help ensure that complications are avoided.

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## **Illinois Adopts Convenience Accounts**

Individual owners of deposit accounts commonly name a joint tenant on the account as an accommodation. However, doing so can create confusion and conflict related to the account's ownership upon the death of the account creator. Illinois' recently enacted Banking Convenience Account for Depositors Act (Act) provides a solution, albeit a temporary one. The Act provides a new estate planning tool that persons who have named or are considering naming a joint tenant on a deposit account as a mere accommodation should consider. It becomes effective on January 1, 2010. However, the current version of the Act will sunset on December 31, 2015.

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*IRS Tax Advice Compliance Disclosure: To ensure compliance with the regulations governing the issuance of advice of federal tax issues, we advise you that any tax advice in this newsletter is not written with the intent that it be used, and cannot be used, to avoid penalties that may be imposed under the Internal Revenue Code. Further, any tax advice contained in this communication is not intended or written to support the promotion or marketing of any matter or transaction addressed by such tax advice.*

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**The Estate Planning Newsletter** is published by Hinshaw & Culbertson LLP. Hinshaw is a national law firm with more than 460 lawyers in 24 offices. We offer a full-service practice, with an emphasis in litigation, business law and corporate transactions, environmental, intellectual property, labor and employment law, professional liability defense, estate planning and taxation matters. Our attorneys provide services to a range of for-profit and not-for-profit clients in industries that include alarm and security services, construction, financial services, health care, hospitality, insurance, legal, manufactur-

ing, real estate, retail and transportation. Our clients also include government agencies, municipalities and schools.

Hinshaw was founded in 1934 and is headquartered in Chicago. We have offices in 12 states: Arizona, California, Florida, Illinois, Indiana, Massachusetts, Minnesota, Missouri, New York, Oregon, Rhode Island and Wisconsin.

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