

Two Things Are Always Certain?

As the saying goes, there are two things that are always certain: death and taxes. This is not so for the federal estate tax and the generation-skipping transfer tax. On January 1, 2010, the one-year repeal of the federal estate tax and the generation-skipping transfer tax began, and whether Congress will reinstate it for 2010 remains uncertain. At first glance, this repeal seems beneficial. That is, wealthy families may avoid significant estate tax liabilities. However, after taking a closer look, the result may be increased capital gains tax liabilities for estate beneficiaries and transfers of wealth to unintended beneficiaries.

The current 2010 federal law is as follows:

- There is no federal estate tax for individuals dying in 2010;
- There is no generation-skipping transfer tax in 2010;
- There is no income tax step-up in basis for beneficiaries who receive property from a decedent who died in 2010. Instead, beneficiaries will receive a carryover basis. Specifically, the beneficiaries' basis will be the same as the decedent had in the asset at death; and
- The federal gift tax continues with the same \$1 million lifetime exclusion amount. The gift tax rate is reduced to 35% from 45% in previous years. The annual exclusion amount remains at \$13,000 per donor per donee.

In 2011, the law is scheduled to change as follows:

- The federal estate tax exemption amount is \$1,000,000;
- The generation-skipping transfer tax exemption amount is \$1,000,000;
- The highest estate tax rate increases to 55%;
- The federal gift tax rate increases to 55%; and
- The generation-skipping tax rate increases to 55%.

These laws for 2010 and 2011 are likely to change in the future, possibly retroactively.

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What This Means for You and Your Estate Plan

Proactive estate and gift tax planning is very difficult and fraught with risk. However, certain defensive steps may be in order.

With the repeal of the federal estate tax, your estate plan may be affected if it contains a formula clause. A formula clause ties the distribution of your assets to the federal exemption amounts for estate tax, generation-skipping transfer tax, or both. Due to the current repeal, beneficiaries who were to receive assets above the respective tax exemption amounts may now cease to be beneficiaries. A typical marital deduction estate plan utilizes the amount of the federal estate tax exemption to divide a couple's assets between the surviving spouse and the family share on the first spouse's death. Under this plan with the current law, the family share receives the entire estate of the deceased spouse. If the surviving spouse is not a beneficiary of the family share, he or she may receive nothing from the deceased spouse's estate.

Changes in the tax laws and the current uncertainty of what is to come may warrant a review and update of your current estate plan. [Reinhart attorneys](#) are available to review and discuss your current estate plan and to revise the plan as necessary to create the flexibility needed for the current law, as well as the future uncertainty

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