

# Estate Planning – 2009, 2010 & 2011

Presented to  
Estate Planning Council of Birmingham  
November 5, 2009

Harold I. Apolinsky, Esq.  
Estate Planning Law Specialist  
205.930.5122  
[hapolinsky@sirate.com](mailto:hapolinsky@sirate.com)

With support and assistance of our 14 other Sirote Estate Lawyers

The Alabama State Bar Requires the following disclosure.  
No representation is made that the quality of legal services to be performed is  
greater than the quality of legal services performed by other lawyers.

This document should not be construed as legal, tax, accounting or any other professional advice or service. No one should act  
upon the information contained herein without appropriate professional advice after a thorough examination  
of the facts of a particular situation.

Sirote & Permutt, PC

- I. Current Law**
  
- II. Why such a convoluted law?**
  - a. Are the wealthy evil?**
  
- III. Plan now or wait?**
  - a. Proposed tax legislation – HR 436**
  - b. President Obama’s Budget**
  
- IV. How to reduce or eliminate Estate Tax**
  
- V. Big tax reform in 2010?**

**Estate, Gift and Generation Skipping Unified Credit Exemption Equivalent Amount**

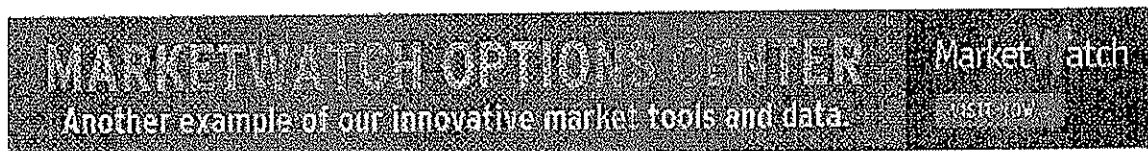
<b>Year</b>	<b>Estate and GST</b>		<b>Gift</b>		<b>Top Rate</b>
2001	\$675,000	\$220,550	\$675,000	\$220,550	55%
2002	\$1.0 million	\$345,800	\$1.0 million	\$345,800	50%
2003	\$1.0 million	\$345,800	\$1.0 million	\$345,800	49%
2004	\$1.5 million	\$555,800	\$1.0 million	\$345,800	48%
2005	\$1.5 million	\$555,800	\$1.0 million	\$345,800	47%
2006	\$2.0 million	\$780,800	\$1.0 million	\$345,800	46%
2007	\$2.0 million	\$780,800	\$1.0 million	\$345,800	45%
2008	\$2.0 million	\$780,800	\$1.0 million	\$345,800	45%
2009	\$3.5 million	\$1,455,800	\$1.0 million	\$345,800	45%
2010	100% of Estate	0	\$1.0 million	\$345,800	35% gift
2011	\$1.0 million	\$345,800	\$1.0 million	\$345,800	55%

## II. Why such a convoluted law?

- a. Are the wealthy evil?
- b. How some plan:
  - 1. Waltons
  - 2. Buffett
  - 3. Gates
  - 4. Kennedy
- c. Tax staff wish list (confidential)

### **Current Tax Staff Wish List For Changes**

1. Amend section 2053(a)(2) to disallow a deduction for any interest expense accruing to the estate after the decedent's death.
2. Amend section 2503(b) to provide that an annual exclusion is not allowable for a gift to a donee unless it is certain that the donee will eventually receive the gift property.
3. Amend section 2519 of the Code to provide that, to the extent that there is an underfunding of a disposition establishing a QTIP interest for a surviving spouse, the underfunded portion will be deemed a gift made by the surviving spouse. The statute of limitations would not begin to run on this gift until the later of the date it is reported in full or the date that the estate tax return of the surviving spouse is filed.
4. Amend section 2519 of the Code to provide that the purchase by the surviving spouse (or donee spouse) of the remainder interest in property subject to a QTIP election is deemed to be a gift of the amount of the purchase price. The statute of limitations would not begin to run on this gift until the later of the date it is reported in full or the date that the estate tax return of the surviving spouse is filed.
5. Amend section 2652(a)(3) to permit the estate of the decedent to elect to treat all or a portion of the property in a QTIP trust as if the election to be treated as QTIP had not been made.
6. Add new section 2047 to provide that if an individual has a power to remove and replace a trustee, then that individual shall be deemed to possess the power of the trustee.



## THE WALL STREET JOURNAL

OCTOBER 28, 2009

### **IRS Brings New Focus to Auditing the Rich**

By MARTIN VAUGHAN

**WASHINGTON** -- A new Internal Revenue Service enforcement unit targeting the *very* wealthy will help the tax agency decode partnerships, offshore trusts and other complex techniques used to hide income, IRS Commissioner Doug Shulman said Monday.

Dubbed the Global High Wealth Industry group, the unit will launch "a small number" of audits of individuals with assets or income in the tens of millions of dollars, Mr. Shulman told an accountants' trade group. An IRS official said the group would begin work on these initial audits in the next month.

The high-wealth group, housed in the IRS's large- and medium-sized business division, marks a sharpening of the IRS approach to auditing the very wealthy. Its creation is a response to the complex web of entities and transactions many high-net-worth individuals use to manage their financial affairs.

"You cannot assess compliance among the nation's wealthiest individuals by looking only at their **1040S** [tax returns]," Mr. Shulman said. "Our goal is to better understand the entire economic picture of the enterprise controlled by the wealthy individual and to assess the tax compliance of that overall enterprise."

Wealth advisers questioned how much the new IRS approach adds, since in some cases, even under the old structure, an audit of a highnet--worth person may have looked across multiple income sources and asset classes.

However, "audits can sometimes be quite insular and silo-like," said Ronald Aucutt, a partner at the law firm of McGuire Woods. In particular, gift-tax audits and income-tax audits are usually not coordinated, he said.

The reorganization is part of a multifront IRS effort to crack down on tax evasion by wealthy Americans. The agency is now sifting through the results of a partial amnesty program that netted 7,500 disclosures by Americans who held offshore accounts.

Write to Martin Vaughan at [martin.vaughan@dowjones.com](mailto:martin.vaughan@dowjones.com)

Printed in The Wall Street Journal, page M11

Copyright 2009 Dow Jones & Company, Inc. All Rights Reserved  
 This copy is for your personal, non-commercial use only. Distribution and use of this material are governed by our Subscriber Agreement and by copyright law. For non-personal use or to order multiple copies, please contact O m Jones Reprints at 1-800-843-0008 or visit [www.djreprints.com](http://www.djreprints.com)

7. HR 11 section 4702 would amend section 2035 of the Code by clarifying the present language. (This is a worthy effort.) But section 4702 also includes a new section 2035(a) which should not be enacted.
8. Amend the present section 2035(d)(2) to provide that a life insurance policy issued within three years of the decedent's death is includible in the gross estate even if the decedent did not technically own the incidents of ownership in the policy prior to death.
9. Amend section 2039(a) to provide that survivor benefits payable pursuant to an employer's nonqualified benefit plan are treated as payable under the same contract or agreement as the benefits payable under the employer's qualified pension plan.
10. Amend the estate, gift, and generation-skipping transfer tax provisions of the Code to limit the application of minority discounts when valuing transfers of minority interest in closely held corporations among family members.
11. Amend sections 2056(d)(2)(B), 2056(d)(4)(A), and 2056(d)(5)(i) to clarify that the acts required by these relief provisions must be completed before the estate tax return is filed and no later than one year after the due date for the return.
12. Amend section 2056(d)(3) to provide specific rules for allowance of the section 2013 credit for prior transfers for the estate of the surviving alien spouse.
13. Amend section 2056 to provide that, to the extent that property passing to the surviving spouse exceeds \$3,000,000, the marital deduction is limited to one-half of the value so passing.
14. Amend section 2604 of the Code to repeal the credit for certain state generation-skipping transfer taxes (GSTT).
15. Amend section 2612 to clarify that any generation-skipping transfer that meets the definition of a direct skip and the definition of a taxable termination shall be defined as a direct skip.
16. Amend section 6163 to provide for the deferral of estate tax that is attributable to the inclusion of an annuity in a decedent's gross estate.
17. Add a new section 7872A to provide for the valuation of loan guarantees for purposes of chapters 11 and 12.

### **III. Plan Now or Wait?**

**a. Proposed Tax legislation – HR 436; H.R. 3905 (A. Davis)**

**b. President Obama’s Budget Proposals**

- 1. Require reporting of Tax basis by Executor and Donor**
- 2. Eliminate Intra-Family Valuation Discounts**
- 3. Require minimum 10 year term for GRATs**

**c. President Clinton’s Budget Proposals**

- 1. Tax life insurance**
- 2. Repeal QPRTS**

**d. Grandfathering?**

**e. Remember IRS Wish List!**

**f. Hurry!**

## Calculate Your Estate Tax

<b>A. Fair Market Values of all assets (IRAs, Life Insurance, Tax Free Bonds, Etc.)</b>	\$
<b>B. Deductions:</b>	
1. Debts and Expenses	
2. Marital (no limit)	
3. Charitable (no limit)	
<b>C. Taxable Estate</b>	\$
<b>D. Add any Taxable Gifts (\$13,000 annually per donee plus tuition (school) and medical not taxable.</b>	\$
<b>E. Total Taxable Transfers</b>	\$
<b>F. Compute Tax (18% to 45%)</b>	\$
<b>G. Less Tax Credit</b>	\$ 1,455,800 *
<b>H. Net Tax Due (9 months)</b>	\$
<b>I. Add any Generation Skipping Taxes</b>	\$
45% - above \$3,500,000	

\* In Year 2001 - \$220,500

## **IV. How to Reduce or Eliminate Estate Tax**

### **14 Favorite Tax Minimization Techniques**

- 1. Maximize By-Pass Trust Funding**
- 2. Maximize Stepped-up Basis Benefits**
- 3. Irrevocable Life Insurance Trust Planning**
- 4. Qualified Personal Residence Trust**
- 5. Family Limited Liability Company and Family Limited Partnership Planning**
- 6. Grantor Retained Annuity Trusts**
- 7. Grantor Trusts as Gift Trusts**
- 8. Low Interest Rate Loans**
- 9. Private Annuities**
- 10. Charitable Planning Opportunities**
- 11. 529 Education Plans – Too Good To Be True, But They Are**
- 12. Consider Taxable Gifts**
- 13. Succession Planning is a Must**
- 14. Try to qualify for 6166 and 1.8% interest**
- 15. Asset Protection May Benefit Our Clients**

## 1. Maximize By-Pass Trust Funding

- Monitor changing exemption

2005 = \$1.5 million (save \$555,800)

2006 = \$2.0 million (save \$780,800)

2009 = \$3.5 million (save \$1,455,800)

2010 = unlimited (save 55% of net worth)

2011 = \$1.0 million (save \$345,800)

- Make sure both spouses have adequate assets in separate names
- Over and above IRAs if possible

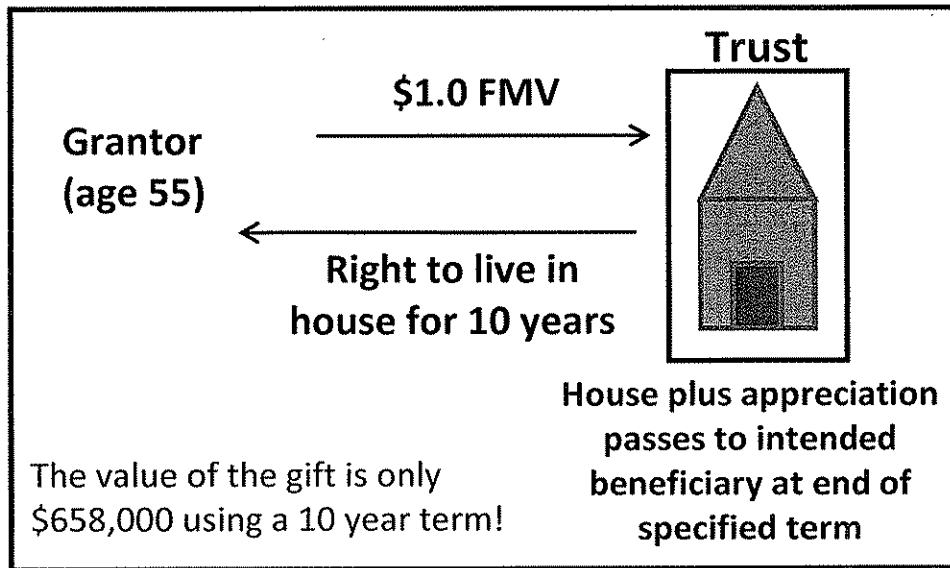
## 2. Maximize Stepped-Up Basis Benefits

- With warning, transfer low basis assets into dying spouse's name. Eliminate capital gains.

## 3. Keep Life Insurance Tax Free

- ILIT remains a good vehicle for owning life insurance. LLC may also work.
- Watch for 3 year rule
- You cannot be too thin or too rich!
- Have more than enough "concrete"

#### 4. Qualified Personal Residence Trust



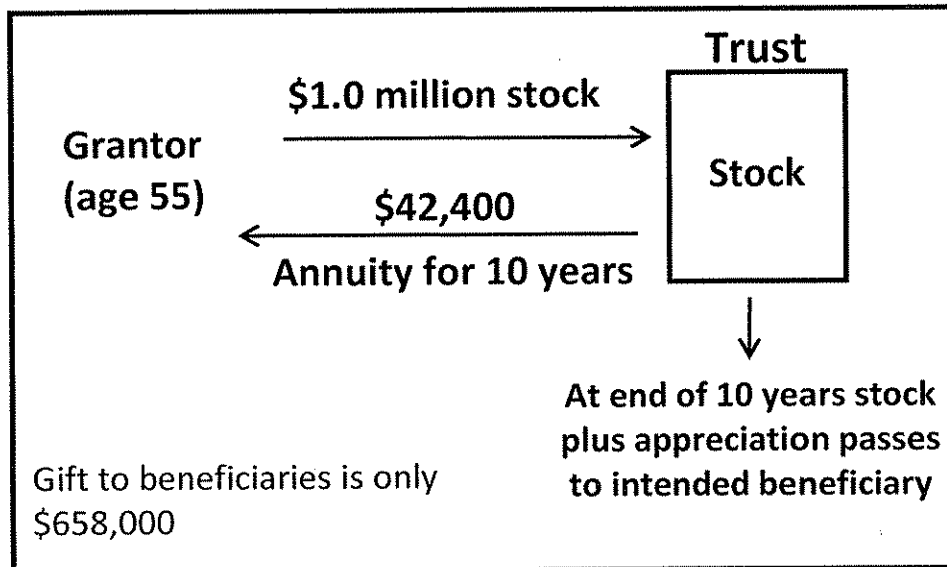
1. If assume 4% growth, potential Estate Tax Savings = \$452,000
2. 15 Year Term. **Gift:** \$511,000     **Savings:** \$709,000
3. 20 Year Term. **Gift:** \$377,000     **Savings:** \$998,000
4. Life Trust for survivor

#### 5. Family Limited Liability Company

- Focus on non-tax benefits: avoid ancillary probate, liability protection, succession planning vehicle
- Avoid bad facts: death bed transaction, personal assets in entity, substantially all assets in entity
- Discounts range from 30% to 50%. *Estate of Murphy vs. United States*, U.S. District Court W.O. Ark. (October 2, 2009)
- Consider paying gift tax. Possibly secure a 60% discount from Estate Tax (year 2010 the exception)

## 6. Grantor Retained Annuity Trust

Great leveraged gifting opportunity



1. If 4% growth, potential tax savings = \$452,000
2. If 15 years - \$44,500 Annuity. Potential savings \$709,000
3. If 20 years - \$47,400 Annuity. Potential savings \$1,000,000
4. **Can reduce gift to \$0.00 with rapidly appreciating assets!**

**Still Time to GRAT:**

<b>Bank</b>	<b>10/8/09</b>	<b>10/8/08</b>	<b>10/8/07</b>
<b>Regions</b>	<b>\$6.04</b>	<b>\$9.75</b>	<b>\$30.79</b>
<b>Wells Fargo</b>	<b>\$29.30</b>	<b>\$31.90</b>	<b>\$36.96</b>
<b>BBVA Compass</b>	<b>\$18.11</b>	<b>\$14.87</b>	<b>\$23.00</b>

**Bank of America**

April 2001 - \$25.00

October 2006 - \$55.00

Before Merrill-Lynch 08 - \$34.00

After Merrill-Lynch 08 - \$3.14

September 30, 2009 - \$16.92

1. Freeze \$3.14
2. Annuity
3. Shift growth to children
4. Get children wealth. Leave balance at death to foundation
5. Buy life insurance with annuity – Let IDGET/ILIT apply, purchase/O & B

## 7. Grantor Trusts as Gift Trusts

- Certainty regarding the Grantor's payment of income taxes. It is not a gift
- Rev. Rule. 2004-64

## 8. Low Interest Rate Loans

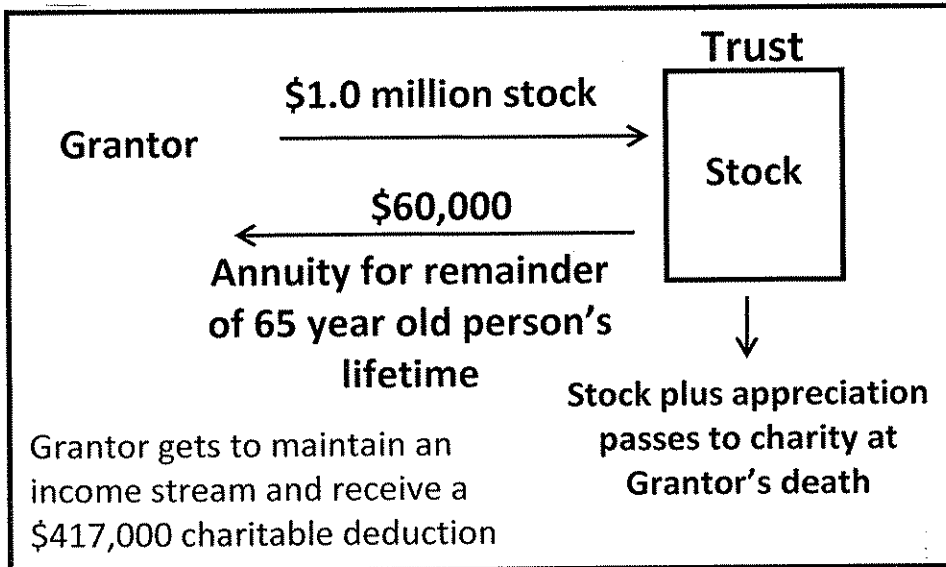
- Lock in low AFR rates
- Historically low
- Rates for annual payment loans

	<b>October</b>	<b>November</b>
<b>Long Term</b>	<b>4.1%</b>	<b>4.01%</b>
<b>Mid Term</b>	<b>2.66%</b>	<b>2.59%</b>
<b>Short Term</b>	<b>.75%</b>	<b>.71%</b>

## 9. Private Annuities

- Removes property plus appreciation from taxpayer's estate
- Defer gain recognition
- Retain income stream
- Beneficial in low interest rate environment

## 10. Charitable Remainder Trust



### Retirement Asset Charitable Planning

- IRA assets are potentially subject to 2 levels of tax: Estate & Income
- Avoid the taxes by naming a charity as beneficiary
- Watch out for designated beneficiary rules when naming a charity. Establish separate accounts for charitable beneficiary and non-charitable beneficiary
- Review Beneficiary Designation!

## **Top Eleven Foundations (in terms of assets)**

1. Bill and Melinda Gates Foundation
2. The Ford Foundation
3. J. Paul Getty Trust
4. The Robert Wood Johnson Foundation
5. Lilly Endowment
6. W.K. Kellogg Foundation
7. William and Flora Hewlett Foundation
8. David and Lucile Packard Foundation
9. The Andrew W. Mellon Foundation
10. Gordon and Betty Moore Foundation
11. The Hughes Medical Institute

### **11. 529 Education Plans**

- Save income, estate and gift taxes
- Use 5 annual exclusion amounts at once
- Distributions for “qualified higher education expenses” are income tax free

12. **Consider Making Taxable Gifts  
(Get a discount)**

**GIFT OF LIFETIME EXEMPTION OF \$1 MILLION**

<u>Year</u>	<u>VALUE</u>		<u>ESTATE TAX SAVINGS TO FAMILY</u>			
	<u>5%</u>	<u>8%</u>	<u>35%</u>		<u>45%</u>	
5	\$1,276,282	\$1,469,328	\$ 96,699	\$ 164,265	\$ 124,32	\$211,198
10	1,628,895	2,158,925	220,113	405,624	283,003	521,516
15	2,078,426	3,172,169	377,450	706,259	485,292	977,476
20	2,653,298	4,660,957	578,654	1,281,335	743,984	1,647,431

**GIFT OF LIFETIME EXEMPTION AFTER DISCOUNT  
(30%) LEVERAGING**

<u>Year</u>	<u>VALUE</u>		<u>ESTATE TAX SAVINGS TO FAMILY</u>			
	<u>5%</u>	<u>8%</u>	<u>35%</u>		<u>45%</u>	
5	\$ 1,823,259	\$ 2,099,039	\$ 288,141	\$ 384,664	\$ 370,467	\$ 494,568
10	2,326,992	3,084,178	464,447	729,462	597,146	937,380
15	2,969,897	4,531,669	689,464	1,236,084	886,454	1,589,231
20	3,790,424	6,658,508	976,648	1,980,478	1,255,690	2,546,329

## 13. Succession Planning for the Family Business

- Only 30% of businesses make it to the second generation. Only 13% to the third generation and only 3% to the fourth generation.
- Evaluate how taxes will be paid. Consider insurance to address liquidity problems. Estate Tax, bank loans, key man, extra working capital, etc.
- Tax Lawyers and Tax Accountants are to blame! We can fix!
- Ask tough question. What should be done with business if client dies in 2010 or 2011?
- Avoid losing 30% to 50% of value from forced sale or liquidation.
- Implement a Buy-Sell Agreement to plan for future Shareholders and to help eliminate unwanted Shareholders.
- Train next management to mediate any disputes.

## 14. Benefits of an Election under I.R.C. Section 6166

Melissa May, Esq

- Deferral of payment of estate taxes for up to 15 years
  - Portion of estate tax attributable to decedent's interests in certain closely held businesses may be deferred.
  - Payments are made in two to ten equal, annual installments.
  - The first installment may be deferred up to 5 years from the initial due date of the tax.
- Low interest rate
  - 2% interest on the deferred tax attributable to the first \$1,330,000 in business interests.
  - Interest rate on deferred tax attributable to any business interests in excess of \$1,330,000 is 45% of the Section 6621 rate. Currently, that interest rate under Section 6166 is 1.8%.

### Section 6166 Requirements

- Decedent must be a U.S. citizen or resident at death.
- The value, for Federal estate tax purposes, of decedent's interest in a closely held business must exceed 35% of decedent's adjusted gross estate.
- Decedent's personal representative must make a timely election on the estate tax return for decedent's estate.

### Definition of Adjusted Gross Estate

- Adjusted Gross Estate = Decedent's gross estate, less deductions allowable under I.R.C. Sections 2053 and 2054 (whether or not those amounts are actually deducted), all based on the facts and circumstances as of the due date of the estate tax.

### **Definition of Closely Held Business Interest**

- A closely held business interest is
  - An interest as a proprietor in a proprietorship carrying on a trade or business;
  - An interest as a partner in a partnership (or an LLC taxed as a partnership) carrying on a trade or business if (i) 20% or more of the total capital interest is included in the decedent's gross estate, or (ii) the partnership has 45 or fewer partners; or
  - Stock in a corporation carrying on a trade or business if (i) 20% or more of the value of the voting stock is included in the decedent's gross estate, or (ii) the corporation has 45 or fewer shareholders.
- For purposes of Section 6166, the ownership of a closely held business interest is determined as of the time immediately before decedent's date of death.

### **Trade or Business Requirement**

- For purposes of Section 6166, a closely held business must actively carry on a trade or business.
- The portion of the value of a closely held business that is attributable to passive assets is disregarded for purposes of Section 6166.
- Passive vs. active use of assets is determined on a case by case basis, by examining all facts and circumstances.

### **Real Property as an Asset of a Closely Held Business**

- For purposes of Section 6166, real estate may be a passive asset or may be an asset used in an active trade or business, depending on all facts and circumstances.
- Revenue Ruling 2006-34 gives a nonexclusive list of factors to consider when analyzing a real property management business for purposes of Section 6166:
  - Time spent by decedent, his agents and employees, or entity's agents and employees, with respect to the trade or business;

- Existence of an office for the activities of decedent and entity; whether or not they maintained regular business hours;
- Extent to which decedent, his agents and employees, and/or entity's agents and employees were actively involved in day-to-day activities of the business, such as:
  - Finding new tenants;
  - Negotiating and executing leases;
  - Landscaping and other, similar services;
  - Handling repair requests and complaints; and
  - Making, arranging, performing or supervising repairs and maintenance.

#### **Attribution Rules for the 45 Owner Test**

- Section 6166(b)(2)(B): Stock that is community property of a husband and wife, or that is owned by a husband and wife as joint tenants, tenants by the entirety or tenants in common is treated as owned by one shareholder. The same rule applies for a partnership interest owned by a husband and wife, which is treated as owned by one partner.
- Section 6166(b)(2)(C): "Property owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by or for its shareholders, partners, or beneficiaries. For purposes of the preceding sentence, a person shall be treated as a beneficiary of any trust only if such person has a present interest in the trust."
- Section 6166(b)(2)(D): Partnership interests and stock owned by a decedent's siblings, spouse, ancestors and lineal descendants are all treated as owned by the decedent.
- Although these attribution rules cannot be used to help an estate meet the 20% ownership test for a full Section 6166 election, a special election is available under Section 6166(b)(7) for estates that meet the 20% ownership test with the use of the attribution rules.

### **Aggregation of Interests in More than One Business**

- A decedent's interests in more than one proprietorship, partnership (or LLC taxed as a partnership) or corporation may be added together in order to meet the requirement that the decedent's interest in a closely held business must exceed 35% of the adjusted gross estate, if the decedent owned at least 20% in each of those entities.

### **Section 6166(b)(7) Election**

- If a full Section 6166 election is not available to an estate with significant closely held business interests, limited benefits may be available under a Section 6166(b)(7) election.
  - Interest rate on any taxes deferred under 6166(b)(7) is 45% of the Section 6621 rate (currently 1.8%).
  - Payment may be made in two to ten equal, annual installments.
  - First installment is due 9 months after decedent's death.
- Section 6166(b)(7) is available for partnership interests and stock that is not readily tradable (that is, if there is no market on a stock exchange or an over-the-counter market for such stock at the time of decedent's death).
- The attribution rules under 6166(b)(2) may be applied to meet the 20% test, for purposes of Section 6166(b)(7) only.

### **Consequences of a 6166 Election**

- The IRS may obtain a security interest.
  - The estate may be required to post a bond of up to two times the amount of deferred tax; or
  - The IRS may place a lien on property with a value equal to the full amount of the deferred tax (including penalties and interest).

- If a lien is required, the amount of any mortgage or other indebtedness secured by that property will be subtracted from the value of the property in determining how much property will be subject to the lien.
- Transfers of property for which a Section 6166 election was made are restricted.
  - If the aggregate of all dispositions of the business interest by the beneficiary or beneficiaries who received the interest equals 50% or more of the value of the interest, all remaining estate tax payments will be accelerated.
- If a beneficiary withdraws funds from an entity for which Section 6166 was elected, or if the entity has undistributed net income, all remaining estate tax payments will be accelerated.
- If a payment of principal or interest is not made, the balance of the estate tax payments will be accelerated.
- An estate that is held open due to a Section 6166 election will remain an eligible S-corporation shareholder for the duration of the payment period.

My Thanks to Melissa R. May, Esq.

## 15. Asset Protection May Benefit Our Clients

- a. Liability Insurance is best protection. But rarely affords 100% protection.
- b. U.S. Still a very litigious society. Too many lawyers?
- c. Cash value of life insurance protected from creditors by Alabama law.
- d. Life insurance proceeds, not payable to estate, is also protected.
- e. Qualified Profit-Sharing and Pension Accounts protected. IRA and Roth at some risk.
- f. If worried, consider transferring 20% of net worth to Asset Protection Trust. Alaska, Delaware, Tennessee, etc.

Hope waste of legal, accounting and Trustee fees. Too late if sued or claim has arisen.

### States that recognize spendthrift clause in self-settled trusts:

Alaska  
Delaware  
Nevada  
Utah  
Rhode Island  
Oklahoma  
Missouri  
South Dakota  
Tennessee  
Wyoming  
New Hampshire

Practitioners in Colorado believe they have case law that offers much the same protection. Illinois, Kentucky and Ohio have projects underway to study the legislation.

As for RAP, if you state it as the states which permit perpetual trusts, you will pick up some states (and D.C.) which have RAP but have exclusions that will allow a trust to be perpetual, for instance, if the trust document says the RAP does not apply. Also, some states., like Alaska, have rules which attempt to address the Delaware Tax Trap so that even though the RAP is generally inapplicable, in instances of a special power of appointment being exercised to create a new special power of appointment the interests must vest in 1000 years. So, rather than listing states that have repealed the RAP, I'd make the list

States that permit perpetual trusts (either through outright repeal of the RAP or as an exception to the rule in certain circumstances):

Alaska  
Colorado  
Delaware  
District of Columbia  
Idaho  
Illinois  
Maine  
Maryland  
Missouri  
Nebraska  
New Hampshire  
New Jersey  
Ohio  
Rhode Island  
South Dakota  
Virginia  
Wisconsin

**States that permit very long trusts:**

Florida (360)  
Nevada (365)  
Tennessee (360)  
Utah (1,000)  
Washington (150)  
Wyoming (1,000)

## Appendix A Some Current Proposed Legislation

### Steve Leimberg's Estate Planning Email Newsletter - Archive Message #1534

**Date:** 19-Oct-09  
**From:** Steve Leimberg's Estate Planning Newsletter  
**Subject:** AFRs for November Announced -

This is a quick look at where we are in the seemingly never ending story of the federal estate tax.

#### **EXECUTIVE SUMMARY:**

There are rumblings that the House of Representatives may vote for a one year extension of 2009 estate tax rates (\$3.5 million per individual exemption and a 45 percent maximum tax rate) rather than hammer out an agreement for a more permanent solution to the uncertainty in estate tax law.

Although the Senate would welcome a permanent solution rather than a mere one year patch, part of the Senate is still holding out for a much larger exemption and significantly lower rates – a result which may not be possible under the current economic situation.

If those two possibilities were not enough to put into the stew, the Congressional Budget Office (CBO) presented Congressional Committees with four options.

#### **FACTS:**

#### **DOING NOTHING – A HIGHLY UNLIKELY SCENARIO:**

Under current law, if Congress does nothing, there would be no estate tax for those dying ("push momma from the train") in 2010.

But then the estate tax would roar back with a vengeance in 2011 by dropping the exemption down to only \$1,000,000 per individual and imposing a whopping 55 percent top rate on taxable assets. (This, of course, was the financial engineering used way back to make the budget numbers seem to work and to justify much larger exemptions and lower rates but was never expected by most authorities to actually happen. 2010 seemed so far away when this cute game plan was set into effect).

### **3 KEY ESTATE TAX BILLS FLOATING AROUND:**

There are three major bills that are currently being considered:

Senate Bill 722 , House Bill 2032 , and House Bill H.R. 436.

#### **Senate Bill 722** would:

- (a) Make permanent the 2009 \$3.5 million exclusion and (top) 45% tax rates,
- (b) reunify the estate and gift tax credit,
- (c) allow for portability (allow a transfer of a deceased spouse's unused exemption to the surviving spouse), and
- (d) index the exemptions for inflation.

#### **House Bill 2032** would:

- (a) make permanent the exemption level at \$2 million,
- (b) index that level for inflation,
- (c) establish progressive tax rates of 45 percent for estates valued between \$2 million and \$5 million; 50 percent for estates valued at \$5-to-\$10 million; and 55 percent for estates valued over \$10 million,
- (d) reunify the estate and gift tax,
- (e) create exemption portability,
- (f) restore the state estate tax credit and
- (g) provide indexing for inflation.

#### **House Bill 436** would:

- (a) freeze the exclusion and rate at 2009 levels,
- (b) reunify the estate and gift tax so that the cap on tax free lifetime gifts would go from its present \$1,000,000 to \$3.5 million (but use up that protected amount so whatever exemption was used during lifetime would not be available at death).

- (c) limit the valuation discount for family limited partnerships, and
- (d) provide strict valuation rules for transfer of non-business assets.

### CONGRESSIONAL BUDGET OFFICE OPTIONS

**In a Congressional Budget Office report presented to the House and Senate Committees on the budget (See LISI Estate Planning Newsletter # 1500), four options were presented:**

**Alternative 1 would:**

- (a) Set the exemption for the combined tax at \$5 million starting in 2010,
- (b) index that amount for inflation,
- (c) set the tax rate equal to the top rate on capital gains (currently 15 percent in 2010 and 20 percent thereafter).
- (d) Allow Stepped-up basis for assets transferred from a decedent,
- (e) Deny a deduction or credit for state death taxes.

**Alternative 2 would:**

- (a) would make the same changes as Alternative 1, but a two –tiered rate would be used:

§ The first \$25 million of taxable assets would be subjected to the top capital gains rate, then...

§ taxable transfers above \$25 million would be taxed at 30 percent. (and the \$25 million threshold would be indexed for inflation.)

**Alternative 3 would**

- (a) Retain the \$3.5 million exemption,
- (b) index that amount for inflation,
- (c) set the top tax rate at 45 percent,
- (d) retain a step-up in basis,
- (e) allow a deduction for state death taxes.

**Alternative 4** would:

- (a) Repeal the estate tax in 2010,
- (b) Retain a \$1,000,000 gift tax exemption,
- (c) Institute a carryover basis regime

With respect to these four options, **Ron Aucutt** points out that

"CBO reports like this, which are issued from time to time, are usually routine contributions to the data available to Congress. They analyze the estimated spending and revenue impacts of proposals known to be under consideration or seriously proposed. They typically do not develop new options on their own or make recommendations among options. Usually the reports get relatively little public attention. But this time, presumably because of the high political profile of the cost of health care reform and the recent political spotlight on the CBO (including the unusual invitation of the CBO Director to the White House), this report inevitably has a higher profile. As with past reports, it purports only to analyze known "options for altering federal spending and revenues."

Well folks, are we having fun yet? Stay tuned to **LISI** for the latest!

**HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!**

*Steve Leimberg*

## H.R.3463

**Title:** To make the repeal of the estate tax permanent.

**Sponsor:** Rep Brady, Kevin [TX-8] (introduced 7/31/2009) Cosponsors (24)

**Related Bills:** H.R.205, H.R.533, H.R.1960

**Latest Major Action:** 7/31/2009 Referred to House committee. Status:  
Referred to the House Committee on Ways and Means.

---

### **COSPONSORS(24), BY DATE** [order is left to right]: (Sort: alphabetical order)

Rep Herger, Wally [CA-2] - 7/31/2009

Rep Ryan, Paul [WI-1] - 7/31/2009

Rep Linder, John [GA-7] - 7/31/2009

Rep Tiberi, Patrick J. [OH-12] - 7/31/2009

Rep Davis, Geoff [KY-4] - 7/31/2009

Rep Boustany, Charles W., Jr. [LA-7] -  
7/31/2009

Rep Roskam, Peter J. [IL-6] - 7/31/2009

Rep Pence, Mike [IN-6] - 7/31/2009

Rep Pitts, Joseph R. [PA-16] - 7/31/2009

Rep Schmidt, Jean [OH-2] - 9/15/2009

Rep Jenkins, Lynn [KS-2] - 10/8/2009

Rep Tiahrt, Todd [KS-4] - 10/27/2009

Rep Johnson, Sam [TX-3] - 7/31/2009

Rep Cantor, Eric [VA-7] - 7/31/2009

Rep Nunes, Devin [CA-21] - 7/31/2009

Rep Brown-Waite, Ginny [FL-5] -  
7/31/2009

Rep Reichert, David G. [WA-8] -  
7/31/2009

Rep Heller, Dean [NV-2] - 7/31/2009

Rep Boehner, John A. [OH-8] -  
7/31/2009

Rep Thornberry, Mac [TX-13] -  
7/31/2009

Rep Lucas, Frank D. [OK-3] - 7/31/2009

Rep LaTourette, Steven C. [OH-14] -  
10/1/2009

Rep Nye, Glenn C., III [VA-2] -  
10/20/2009

Rep Schock, Aaron [IL-18] - 10/27/2009

## H.R. 3905: Estate Tax Relief Act of 2009 (October 22, 2009)

Sponsors: Shelley Berkley (D - NV); Kevin Brady (R - TX); Artur Davis (D - AL) and Devin Nunes (R - CA). All Members of Ways and Means Committee.

1. Repeal "Repeal" in 2010. Tax-free amount \$3,650,000. Rate 44%.
2. 2011 - \$3,800,000 - Rate 43%. Increase tax-free amount by \$150,000 each year to 2019. Reduce rate 1% each year.
3. Thus in 2019: \$5,000,000 - Rate 35%.
4. \$5,000,000 indexed for inflation after 2019 (Round to \$10,000)
5. Repeal of carry-over basis.
6. Deduction for state death taxes, reduce 10% per year to 0% in 2019.

## NEED FOR FUNDAMENTAL TAX REFORM

NO. OF CODE  
SUBSECTIONS CHANGED

1981-Economic Recovery Tax Act (ERTA)	483
1982-Tax Equity and Fiscal Responsibility Act (TEFRA)	530
1984-Deficit Reduction Act (DEFRA)	2,245
1984-Retirement Equity Act (REACT)	44
1986-Internal Revenue Code (FGSA)	2,704
1987-Omnibus Budget Reconciliation Act (OBRA)	231
1988-Technical and Miscellaneous Revenue Act (TAMRA)	1,588
1989-Omnibus Budget Reconciliation Act	462
1990-Omnibus Budget Reconciliation Act (OBRA)	300
1993-Revenue Reconciliation Act	784
1994-General Agreement on Tariffs and Trade (GATT)	84
1996-Small Business Jobs Protection Act (SBACT)	
Taxpayer Bill of Rights 2, Health Insurance Portability and Accountability Act	746
1997 - Taxpayer Relief Act	1,169
1998 - IRS Restructuring and Reform Act	338
1998 - Surface Transportation Revenue Act	60
1998 - Tax and Trade Relief Extension Act	77
1999 - Omnibus Consolidation and Emergency Supplemental Appropriations	187
1999 - Tax Relief Extension Act	109
2000 - FSC Repeal and Extraterritorial Income Exclusion Act	16
2000 - Community Renewal Tax Relief Act	219
2000 - Installment Tax Correction Act	4
2001 - Economic Growth and Tax Relief Reconciliation Act	441
2001 - Victims of Terrorism Relief Act	35
2002 - Job Creation and Worker Assistance Act	186
2003 - Jobs and Growth Tax Relief Reconciliation Act	58
2004 - Working Families Tax Relief Act	118
2004 - American Jobs Creation Act	484
2005 - Energy Tax Incentives Act	190
2005 - Safe, Accountable, Flexible, Efficient Transportation Act	210
2005 - Katrina Emergency Tax Relief Act	5
2005 - Gulf Opportunity Zone Act	291
2005 - Mental Health Parity Act	1
2006 - Tax Increase Prevention and Reconciliation Act	101
2006 - Pension Protection Act	399
2006 - Tax Relief Act and Health Care Act	<u>244</u>

(Total changes in 26 years) 15,137

1913: income tax law was 14 pages  
 1954: 984 pages  
 1985: 3,159 pages  
 1992: 2,300 pages  
 1997: 2,554 pages  
 2000: 3,820 pages  
 2005: 9,545 pages

Commerce Clearing House published its first volume of 400 pages in 1913. It currently publishes 29 volumes of its tax service containing about 67,200 pages (as of November, 2004). (1939 Code + 15 years = 1954 Code + 15 years = 1969 law + 17 years = 1986 Code)

“A tree which is constantly shaken will not bear fruit”

## Estate Planning and Probate Attorneys - Birmingham Office

Katherine N. Barr

kbarr@sirote.com

Elizabeth H. Hutchins

ehutchins@sirote.com

Leigh A. Kaylor

lkaylor@sirote.com

Ronald A. Levitt

rlevitt@sirote.com

Melinda McEachern Mathews

mmathews@sirote.com

Melissa A. R. May

mmay@sirote.com

Joel A. Mendler

jmendler@sirote.com

J. Sanford Mullins, III

smullins@sirote.com

Joseph T. Ritchey

jritchey@sirote.com

Tanya K. Shunnara

tshunnara@sirote.com

Craig M. Stephens

cstephens@sirote.com

Judith F. Todd

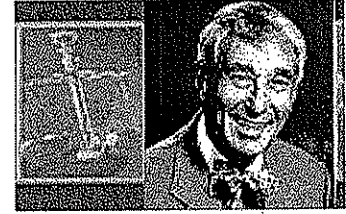
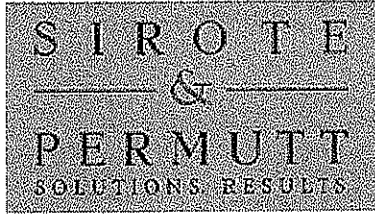
jtodd@sirote.com

Catherine L. Wilson

cwilson@sirote.com

Peter M. Wright

pwright@sirote.com



**Harold I. Apolinsky**  
**Shareholder**

Location: Birmingham  
Direct Line: (205) 930-5122  
Direct Fax: (205) 212-3888  
Direct Email: [hapolinsky@sirate.com](mailto:hapolinsky@sirate.com)

 [Download vCard](#)

**Practice Areas:**

- [Estate Planning](#)
- [Estate Administration](#)
- [Federal Income Tax](#)
- [Lobbying \(Federal & State\)](#)
- [Mediation](#)

**Education:**

B.S., University of Alabama, 1954  
J.D., University of Alabama School of Law, 1960  
*Editor in Chief, ALABAMA LAW REVIEW*  
*Farrah Order of Jurisprudence*  
LL.M. in Taxation, New York University, 1961  
*Teaching Fellowship*

**Professional Profile:**

Note: To review materials related to recent efforts to permanently repeal the Estate Tax, please [click here](#).

- Estate Planning Law Specialist
- Assists clients in developing their estate and financial plans and effect reductions in estate, gift, and generation skipping taxes
- Assists clients with probate of wills and administration of estates
- Registered Federal Lobbyist (focus: Repeal of Tax at Death)
- Adjunct Professor:  
*University of Alabama School of Law (1974-99), Estate Planning*  
*Cumberland School of Law (1976-2001), Estate Planning and Taxation*
- Recipient of the Association of Fundraising Professionals 2005 National Philanthropy Day Award: The Community Foundation of Greater Birmingham Outstanding Professional Adviser Award

- Chair, St. Vincent's Professional Advisor's Council 2005
- Recipient of the highest rating attainable by *Martindale-Hubbell*, a reflection of having achieved preeminent status in the areas of professional skill and integrity
- Listed by *Corporate Counsel Magazine* in their selection of the 2003 Best Lawyers in America: Tax Law
- Listed in *Best Lawyers in America* by Woodward White, Inc for at least twenty years
- Named "*Best of Class*" 2006 by Best of US Inc. for Tax Law
- Founder and Regent (1981-87) of American College of Tax Counsel; President (1981-83)
- Fellow, American College of Trust and Estate Counsel
- Member, Alabama Symphony Orchestra Endowment Board
- Member, The Group (organization of 150 tax/health lawyers representing family businesses and professionals)
- Chair, Small Business Council of America (1991-1993); Vice-President Legislation (1994-2000)
- Chair, Alabama Law Institute Committee which revised Professional Corporation Act
- Member, Tax Section of American Bar Associations  
*Chair, Regional Liaison Meetings Committee, (1991-1993)*  
*Chair, Personal Service Organization Committee, Tax Section, (1982-84)*
- Member, Alabama State Bar  
*Chair, Tax Section, (1972-73)*
- Member, American, Alabama, and Birmingham Bar Associations
- Argued and won Nash vs. U.S. , Supreme Court of the United States - 1970

**Publications:**

- Co-author, *J.K. Lasser's New Rules for Estate and Tax Planning*, published by John Wiley & Sons, Inc. 2001
- Contributing author, *J. K. Lasser Pro - Expert Financial Planning*, published by John Wiley & Sons, Inc. 2001.
- Author, *Tax Planning for Professionals*, Warren, Gorham & Lamont, 1986
- Contributing author of *Physician Financial Planning in a Changing Environment*, McGraw-Hill publishers, 1996 (endorsed by Medical Group Management Association [MGMA])
- Interviewed in *Mutual Funds Magazine*, August, 2001, about new estate tax legislation; see complete text at <http://www.mutual-funds.com/mfmag/archives/2001/august/speakingout.html>.
- Co-author, *Now You See It, Now You Don't - NOW YOU SEE IT AGAIN: The Federal Estate Tax*, *Senior Living*, August 2002.