

Estate planning surprises

Glen w. Bell, Jr., started selling tacos from his hot dog and hamburger stand in 1952. The idea of popularizing Mexican food was a big success. In 1962 Bell opened the first Taco Bell restaurant, and in 1964 he began franchising it around the country. The chain so prospered that Bell was able to sell it to PepsiCo in 1978 for \$125 million in stock.

Mr. Bell died January 16, 2010. We do not know how Mr. Bell invested his fortune following the sale of his restaurant chain. Had he simply invested the sales proceeds in the stock market, it could easily be worth ten times what he initially received.

We do know that, regardless of the size of Mr. Bell's estate, there will be no federal estate tax due upon it. The federal estate tax expired December 31, 2009, under a schedule provided in previously enacted law. Bell's heirs may have dodged a tax bullet worth tens, perhaps hundreds, of millions of dollars. It's been estimated that every day 15 Americans die with estates larger than \$3.5 million, the amount that was exempt from the estate tax in 2009. The executors of these estates face estate administration questions for which few are prepared.

Congress has promised to return to the question of federal estate taxes for 2010. There remains a real possibility that federal estate taxes will be restored for 2010 and that the restoration may be made retroactive to January 1. Therefore, the executors of Mr. Bell's estate need to be particularly watchful of legislative action. However, there is also a real possibility that Congress will not be able to reach an agreement on estate taxes, and the entire year will pass without a new law.

Unexpected consequences

Estate planners have long recommended that married couples use a two-trust plan to bring down the costs of keeping wealth within the family. In such a plan, a family trust is created to shelter the amount that is exempt from federal estate tax, while a marital trust provides for the surviving spouse. With such an approach, all federal estate taxes can be avoided until both spouses have died.

Given the fact that the amount exempt from federal estate tax has varied from year to year, it has been a routine practice for planners to incorporate formulas to divide the estate between these two trusts. Such a formula refers to the federal estate tax law and allocates assets so as to reduce the estate tax to zero.

What happens when there is no federal estate tax? That depends upon the specific will language chosen by the estate planner. Some formulas may fail to fund the family trust; some may fail to fund the marital trust. Neither result was likely intended, so some states are now considering special interpretive rules for wills of decedents dying during 2010, to try to conform the result to the testator's intention.

Adding to the confusion, the long-standing ruling that the tax basis of inherited assets is "stepped-up" to the fair market value at the date of a decedent's death has been suspended for 2010. In its place is "modified carryover basis" and a new basis allocation regime, in which the executor may allocate up to \$1.3 million in basis step-ups among the estate assets. An additional \$3 million in basis step-ups may be granted to assets passing to a surviving spouse.

Very few wills were drafted with the expectation that these new tax rules actually would take effect. But now we have them, and we have to work with the laws that we have. If you have a substantial estate, an early meeting with your estate planning advisors is a very good idea.

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