

SKATING ON THIN ICE:

Things the New \$5 Million Exemption Doesn't Account For BY GARY ALTMAN, ESQ.

In the D.C. Metropolitan area where I reside, the slight mention of “snow” sends thousands of people flocking to the stores in a mad dash to secure ice melt, shovels, bottled water, batteries and other precautionary necessities so that if/when the big snowstorm hits, they’ll be well prepared.

Unfortunately, the majority of people don’t apply the same “sense of urgency” to estate planning as they do towards snowstorm preparedness. (An estimated 60% of Americans will die without even having a will.) And with the recent passing of the Tax Relief Law of 2010, which sets the federal estate, gift and also generation-skipping transfer tax exemptions at up to \$5 million (\$10 million for a married couple), my concern is that even more people will delay meeting with an estate planner under the false belief that if they don’t have \$5 Million in assets, they have no reason to plan. Moreover, for the rare estate that does, the stakes are high and careful planning is required. The truth is that there’s a lot more to consider than just the federal estate tax. Here’s just a snapshot:

The Laws Will Change Again

First and foremost, this higher federal exemption and revised tax rate are not written in stone. The Tax Relief Act of 2010 is set to expire at the end of 2012, when the 2001 Tax Laws will automatically be reinstated. This means that the federal estate tax exemption will drop down to \$1,000,000, the GST exemption will be somewhat greater, and the maximum estate tax rate will return to 55% - unless Congress moves to change them yet again.

State Taxes

While your estate might qualify as off the hook on a federal level, it may still be subject to state estate taxes. Many states have moved away from the federal exemption level and exclude only up to \$1,000,000 (or some other amount significantly less than \$5,000,000) in assets. Furthermore, most individuals don’t realize that state laws are very specific about what can

and can’t be in a will, trust, or medical or financial power of attorney. They may also have specific guidelines on who can and can’t be a witness to a signing of a will or trust, and what formalities or protocols must be observed when signing.

Second Marriages, Elders & Asset Abuse

Unfortunately, there are many cases of abuse, where a child, caregiver or someone else becomes in control over an elderly person’s assets, to use as their own (and thus disinherit the elderly person’s desired beneficiaries). Moreover, it is not unusual for a widow or widower to marry again and then take some action to disinherit, fully or partially, children or other desired beneficiaries from the first marriage. Only through proper estate planning, which normally involves the use of trusts, can the financial assets be protected from an abuse of assets.

Guardianships

Whether you have many assets or not, it is essential for families with children to clearly define who should care for your children should you become unable to do so. A court will normally honor the wishes of the parent to determine who will become their legal guardian(s) for both the long and short term. That said, if these decisions are not put in writing, you have left it up to a judge to make decisions for you, sometimes after a messy and costly court fight. Moreover, many parents (or grandparents) of young children name these children as the direct beneficiary of retirement accounts and life insurance policies. In some states, like Maryland, this results in a Court controlling the investing and spending of this money until the child reaches the age of 18, when the child receives the money outright (to do whatever he or she wants).

Advanced Health Care Directives

Advanced Health Care Directives are instructions specifying what actions should be taken for your health in the event that

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GARY ALTMAN, ESQ.
Altman & Associates

ALTMAN & ASSOCIATES

ROCKVILLE One Central Plaza, 11300 Rockville Pike, Suite 708

COLUMBIA 30 Corporate Center, 10440 Little Patuxent Parkway, Third Floor

301.468.3220 TEL • 301.468.3255 FAX

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you are no longer able to make those decisions due to illness or incapacity. A “Living Will” is one form of an Advanced Health Care Directive. It records your wishes regarding various types of medical treatments, such as resuscitation, life support, artificial feedings and organ donation. A “Medical Power of Attorney” (also known as a “Health Care Proxy”) names the specific individual(s) you appoint make the aforementioned medical decisions on your behalf – again, if and only if, you become unable to do so. I encourage my clients to have both documents in place to provide the most comprehensive guidance and spare family members (who may or may not agree on what to do) from having to make end-of-life decisions for you.

Special Needs Planning

With cases of autism, substance abuse, dementia, and other psychological disorders on the rise, so to is the need for special needs planning. Many boomers have at least one family member (a child, grandchild, parent, grandparent or other) who may always need help managing personal care and/or finances. In the past, many practitioners focused exclusively on preserving public programs and benefits for their care. However, many public benefits programs are inadequate and need to be supplemented with other, more reliable, privatized resources. Estate planning tools, such as Supplemental Needs Trusts, can help families manage private funds while also preserving one’s eligibility for public benefits.

Distribution of Assets and Beneficiary Designations

A will alone cannot control the distribution of your assets at death. A will does not control the distribution of insurance or retirement accounts (such as IRAs and 401(k) plans without properly naming individual beneficiaries. Assume you opened

your IRA years ago naming your mother or ex-spouse as your beneficiary. Let’s say that you are now re-married and have named your spouse in a will as your beneficiary. When you die, the beneficiary named on the investment account forms trumps the will. Therefore, it is critically important that you make certain your beneficiary forms are up to date. The same goes in the titling of your home and bank and brokerage accounts. Proper estate planning coordinates your Will with your beneficiary designations to ensure that your assets are passed to the person you want them to, at the time and in the manner you want them to.

Digital Assets

Given the wealth of information we have housed on our computers and the Internet today, smart estate planning includes addressing how to handle digital assets in the event of death or incapacity. For example, what would happen to an e-mail account or a personal or business web site? Were there online financial or other accounts? What about passwords? Establishing an inventory of your “digital estate”, designating someone to manage it, providing for access to it and providing instructions on how you want it managed should all be considered and documented within your estate plan.

The Bottom Line:

These are just a handful of other important considerations outside of the federal estate tax – there are many more – and only a qualified estate lawyer can help you to identify and account for the complex situations that are unique to you. Don’t wait for the next tax law overhaul to take place, or bank on not having enough assets. Estate planning is not something you can afford to put off until tomorrow.

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