



Briefings

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The Estate Tax Repeal — *What You Need to Know and Do*

Although not predicted, a deadlocked Congress allowed repeal of the federal estate tax by not extending the federal estate and generation skipping transfer (GST) taxes. Since Congress failed to act by December 31, 2009, the federal "death tax" vanished on January 1, 2010. On December 31, the federal estate tax provided credits to exempt all estates under \$3.5 million from federal tax, while the tax for estates over \$3.5 million was a flat 45 percent. As of January 1, 2010, the tax became zero, regardless of the size of the estate. There is, however, talk of retroactive reinstatement of the federal tax. Minnesota (with a \$1 million exemption amount), as well as many other states, did not repeal their state estate tax. And, Congress also left us with a carryover basis again. Unfortunately, this means that many of the wills and trusts that were drafted over the past 30 years will not work properly. Given the disappearance of the federal tax, your spouse could lose trust benefits or an unintended tax liability could be caused.

With the budget issues Washington faces, Congress could bring the estate tax back to life this year. In any event, even if Congress fails to act, the repeal is short lived. The repeal is to sunset at the end of 2010, then the federal estate tax would revert to its pre-2001 form, i.e. estate tax on estates larger than \$1 million at rates of 41 to 55 percent.

As we wait to see what Congress does, there are things you need to review and consider. For decedents who die in 2010, the "step-up" in tax basis of property that estates were able to take advantage of in the past may now be replaced with "carryover basis." This means the decedent's basis in the property carries over to the beneficiary who inherits the property, passing on the decedent's appreciation and unrealized capital gain in the property to that beneficiary. The carryover basis rules do provide for a limited basis step-up for smaller estates and some additional basis step-up for spouses, but it is now even more important for everyone to keep good records of the acquisition cost or purchase price of all property. A carryover basis return will be due nine months after a death, reporting the basis on all of the decedent's property.

Maintaining good basis records will greatly help the personal representative give the necessary information to the government and to beneficiaries.

For the last 30 years, clients with larger estates used marital/credit trust arrangements to minimize and defer federal and Minnesota estate taxes. Often the will or trust would use a formula based upon the federal estate tax rules to achieve the optimal amounts going to the marital trust (Trust A) and to the credit trust (Trust B). Now that the federal rules are repealed, the formula may put everything in one trust or the other, causing a waste of the Minnesota estate tax exempt amount, or worse yet, cause Minnesota estate taxes to be due upon the death of the first spouse. Since the federal Qualified Terminable Interest Property rules (QTIP) are repealed, if the marital trust was drafted as a QTIP trust, that trust may not qualify for the marital deduction any longer and cause a Minnesota estate tax to be due.

Although estate taxes may not be a concern for everyone, it is prudent to understand the consequences of the repeal. The new rules could mean that beneficiaries will owe capital gains on inherited assets, which could affect many individuals, small businesses, and family farms that previously didn't have to worry about inherited capital gains. Some modifications to your will or trust may be needed to properly deal with the allocation of the limited basis step-up for small estates and spouses.

If you have not reviewed your estate planning documents for some time, now would be a good time to dig them out of your files and have one of our estate planning attorneys review your plan. Even if you recently had your will or trust prepared, some fine tuning may be necessary for your plan to work as intended. Call us to discuss your options for plan adjustments as we await Congressional action.

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Dennis Patrick contributed to this article. Dennis focuses his practice on estate planning, taxation, probate and business transactions. dpatrick@tn-law.com

TN TOP 5

Legal Documents Every Business Owner Should Review or Complete Annually

Independent Contractor Agreement

Did everything run smoothly with your independent contractors last year? Are you sure that the IRS would consider them contractors, as opposed to employees? How are they getting paid and what responsibilities do they have? Make sure your agreement clarifies what is expected of your contractors and what they can expect from you in return.

Employee Handbook

Each year, have your attorney review your employee handbook to make sure it is up-to-date with any changes in federal or state law that occurred. Consider any policies you might have changed in the past year. Policies pertaining to the use of social media (e.g. Facebook or Twitter) are also increasingly important. If you don't have an employee handbook, don't wait until something bad happens to decide you need one.

Buy/Sell Agreement

Depending on the economy or economic state of your industry, the current value of your business may have changed and this can have

major repercussions when it comes to a buy/sell agreement. In a multiple-owner LLC or Corporation, not having a buy-sell agreement can create unforeseen problems upon the death, divorce or disability of an owner.

Effective Non-Disclosure and Non-Compete Clause

Has the landscape of your industry changed? Have new employees created the need for a tighter policy? Make sure you're protected; have your attorney review this document annually so you aren't caught off-guard or in a compromising position when an employee leaves. It's also important to know if your non-compete and non-disclosure provisions are enforceable, both in relation to their scope and the circumstances in which they were signed.

Corporate or LLC Annual Renewal

This one isn't up for debate and it's not difficult or expensive; the annual renewal for business entities is required by the Minnesota Office of the Secretary of State each year. You can renew online at https://online.sos.state.mn.us/abr/corp_annual_filing.asp

If Only Tiger Woods Could Resolve His Issues Through ADR

Resolving a dispute is never easy, but there are options available that could mitigate some of the not-so-pleasant aspects of a trial and even avoid litigation. Simply put, Alternative Dispute Resolution (ADR) is a means of resolving matters without formally litigating the case in front of a judge or jury. It allows parties to choose a method of resolution that they feel comfortable with and that is most appropriate for their situation (mediation, arbitration, collaborative law, etc.). Parties can use ADR to resolve disputes in a variety of areas, including family law, employment law, real estate or consumer and business settings among others.

The various forms of ADR can give the parties differing degrees of control over the outcome, with mediation and collaborative law providing the most and arbitration the least. In mediation instead of letting a judge or jury decide their fate, the parties work with a trained "neutral" that they have selected and who will assist them in trying to come to an agreement. This gives the parties to the dispute the opportunity to be creative and work to find a resolution they can live with in the end. Given that mediation and collaborative law involve the direct participation of the disputing parties, it can not only lead to increased satisfaction with the outcome but the parties may be more likely to comply with the final agreement. Because mediation and collaborative law are also a more "user-friendly" way to resolve a dispute, this may enable the parties to preserve their relationship with one another, which is especially important in family law situations.

Another advantage of mediation and collaborative law is that the parties can customize the settlement provisions of their dispute as long as the parties agree to those specific terms. The parties might, for example, agree to keep the dispute confidential and not make disparaging comments about each other in relation to the dispute and after the process is complete.

Since ADR is not a matter of public record nor is it open to the public, the process and the outcome of a dispute can stay confidential. This could be a big plus for companies trying to protect trade secrets, or anyone trying to keep his or her private life private and stay out of the media spotlight.

Another factor to consider is that ADR typically takes significantly less time. Backlogged courtrooms can have you waiting a year or more for your case to be heard. Unlike a court hearing where the parties are assigned a date and time to show up and litigate their case, the parties also have some say over the scheduling process for ADR. Likewise, the parties can more quickly set a date with ADR, and once a date has been selected the process can be completed in as little as one day.

Rule 114.01 of the Minnesota General Rules of Practice requires ADR in civil cases. In other words, all parties to a civil lawsuit must participate in some form of ADR in attempt to resolve their dispute. It may make sense for parties to try ADR even before initiating a lawsuit in order to save on the emotional toll and often drawn out process of preparing for a trial. In general, parties do not conduct discovery or take depositions as part of the ADR process. The time and money savings from avoiding extensive discovery and depositions could make it worth trying to resolve a dispute earlier through ADR rather than later in court.

Although ADR isn't the right fit for every individual or every case, it is a viable option to consider if you are involved in a dispute. To determine whether litigation or some form of ADR is the best fit for your situation, you should talk with your lawyer. To learn more about the ADR services that Thomsen & Nybeck, P.A. offers, you can visit <http://www.tn-law.com/CM/PracticeAreaDescriptions/Alternative-Dispute-Resolution.asp>.

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Debra Newel is an Associate in the Litigation Practice Group. She concentrates her practice primarily in the areas of general civil litigation, real estate litigation, insurance litigation, construction litigation and townhome and condominium law. dnewel@tn-law.com

NEWS & NOTES

Working Towards a Greener Future

Thomsen Nybeck looks forward to distributing certain information and notices electronically. Please be sure we have your correct address on file by sending an email to Angela Flagg at aflagg@tn-law.com (subject line "Electronic List"). Please include your name and phone number.



Dennis Patrick (1) was named a 2010 Five Star Wealth Manager, a recognition for top wealth managers who scored highest in overall client satisfaction on a survey to consumers, financial service professionals and subscribers to Mpls St. Paul Magazine and Twin Cities Business. Only 6 percent of wealth managers in the Twin Cities area are given this distinction.



Chris Renz (2), Matt Drewes (3) and Ryan Wood (4) were named to the 2009 list of Rising Stars in Mpls St. Paul Magazine, an honor bestowed upon only 2.5 percent of attorneys in the state each year.



Matt Drewes (3) and Chris Renz (2) co-authored an article entitled "FCC Rule Against Exclusive Cable Provider Access in CICs Upheld by Federal Appeals Court," and **David McGee (6)** authored an article titled "New FHA Certification Rules: Will Your Association be Approved?" both of which appeared in the winter 2010 issue of the CIC Midwest Magazine.*



Brad Boyd (5) presented information to more than 700 real estate agents and brokers at a continuing education seminar regarding foreclosure and real estate market issues.



Thomsen Nybeck recognized staff member **Sandy Constantine** for her 25 years of service to the firm.



Ryan Wood (4) and Chris Renz (2) were faculty for a continuing legal education seminar presented by Minnesota CLE in December entitled "How to Effectively Prosecute and Defend DWIs in Minnesota."

Brad Boyd (5) was quoted in the Minnesota Lawyer's article "Mortgage valid despite wife's failure to sign," which appeared in its February 1, 2010 edition.

The 17th Annual Thomsen Nybeck Community Associations Seminar has been scheduled for March 10, 2010. Further information to come.

On February 24, 2010, **David McGee (6)** will present on the topic of the New FHA Certification Rules at the CIC Midwest Lunch & Learn event.

The **Thomsen Nybeck firm website** at www.tn-law.com has received a "fresh coat of paint," including updated practice area descriptions and images. Be sure to check the website often for helpful information and the latest firm news.

*Copies of articles are available in the "Articles" section of the firm's website.

ATTORNEYS

This newsletter is presented to you by the attorneys of Thomsen Nybeck:

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PRACTICE AREAS

Thomsen Nybeck has in-depth experience and knowledge in the following practice areas. For a complete list, visit www.tn-law.com. Call us at (952) 835-7000 to discuss your concerns or to determine if you have a case.

Business Law
Civil Litigation
Construction Defect Litigation
Corporations & Partnerships
Criminal Law
Employment Law
Estates, Wills and Trusts

Family Law
Financing
Personal Injury
Real Estate
Taxation
Townhome & Condominium Law
Wind Energy

"Large enough to be effective.
Small enough to care."