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Estate Planning newsletter

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INSIDE THIS ISSUE

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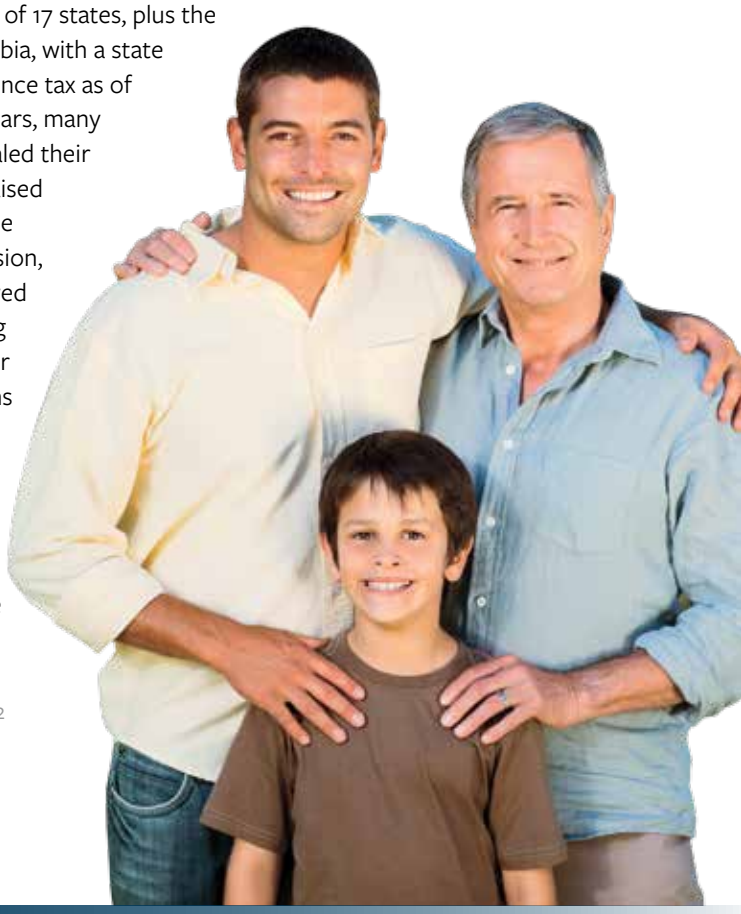
MINNESOTA ESTATE TAX UNCERTAINTY

The 2017 Regular Session of the Minnesota Legislature and its fallout have led the Governor and the Legislature to a Minnesota Supreme Court battle over the limits of the power of the executive branch. Recent changes to Minnesota's Estate Tax are one of the issues at the heart of the dispute between the Governor and the Legislature.

New Law

Minnesota is one of 17 states, plus the District of Columbia, with a state estate or inheritance tax as of 2017. In recent years, many states have repealed their estate taxes or raised exemptions. In the 2017 Regular Session, Minnesota followed that trend, raising the exemption for estates of persons dying in 2017 and increasing the amount of property that can pass free of Minnesota Estate Tax over the next three years.

continued on pg 2



MINNESOTA ESTATE TAX UNCERTAINTY continued from pg 1

Year of Death	Old Law	New Law
2017	$1.8 Million Basic Exemption Tax Rate 10%-16%	$2.1 Million Basic Exemption Tax Rate 12%-16%
2018	$2.0 Million Basic Exemption Tax Rate 10%-16%	$2.4 Million Basic Exemption Tax Rate 13%-16%
2019	$2.0 Million Basic Exemption Tax Rate 10%-16%	$2.7 Million Basic Exemption Tax Rate 13%-16%
2020	$2.0 Million Basic Exemption Tax Rate 10%-16%	$3.0 Million Basic Exemption Tax Rate 13%-16%

The Omnibus Tax Bill also made technical changes to the Qualified Farm Property Deduction. This deduction is an additional Minnesota Estate Tax exemption available for qualifying homesteaded agricultural property. To be eligible, the land must be inherited by family members who agree to keep the land in agricultural production, whether by farming it themselves or renting to a non-family member. The heirs must also agree not sell the land outside the family for three years after the decedent's death.

The new changes to the law make it clear that families will not lose the deduction if a governmental entity forces a sale of the land, or if the county assessor re-classifies less than 20% of the land as woodlands or waste during the three-year period.

Controversy

The Legislature passed the Omnibus Tax Bill very late in the Regular Session. The final Bill dictated that Minnesota Revenue would be de-funded in 2018 and 2019 if the Governor vetoed the Bill. In response, the Governor allowed the Tax Bill to pass without his signature, but line-item vetoed the Legislature's budget and refused to call a special session unless the Legislature agreed to undo certain provisions of the Tax Bill and another bill. One of the disputed provisions is the increases to the Minnesota Estate Tax exemption.

The Legislature sued the Governor, arguing his use of the line-item veto in this manner violated the Minnesota Constitution. A District Court judge ruled against the Governor, who appealed to the Minnesota Supreme Court. In an order issued on September 8, 2017, the Supreme Court determined that the line-item veto was constitutional, but questioned whether the result—the lack of a functioning legislative branch—might be unconstitutional. The Court ordered the Governor and Legislature to mediate their dispute and to provide the Court with more legal arguments and information regarding how to legally fund the Legislature if the Governor's veto stands.

Takeaway

The ultimate fate of the recent changes to Minnesota Estate Tax is tied to the Minnesota Supreme Court's decision on the Governor's line-item veto of the Legislature's funding. The Court's order to mediate essentially requires the Governor and Legislature to come back to the bargaining table on the Tax Bill. However, because the changes to the Minnesota Estate Tax are effective retroactively, for estates of persons dying January 1, 2017 or later, at least parts of law would be difficult to repeal. ■

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THE FEDERAL ESTATE TAX: REPEAL, REFORM OR ??

The Trump administration has pledged to work with Congress on major tax reform legislation. Any such proposal is anticipated to address the federal estate tax, which currently assesses a 40% tax on estates with a value in excess of $5.49 million. The administration tax reform proposals to date have been presented mainly in the form of summary highlights, without substantial detail. The most frequently repeated proposal has been an outright repeal of the estate tax. However, any straight repeal proposal may well be combined with a significant change in the law regarding capital gains treatment on assets that pass at death.

Presently, assets passing to heirs or beneficiaries at death receive a "step up" in cost basis. For example, real estate, stock or other business interests with an initial cost basis of $500.000, and that have grown over the years to a fair market value in excess of $6 million at date of death, are considered to have a cost basis of $6 million in the hands of the heirs – as if the heirs had purchased the assets at death from the deceased. If the

continued on pg 6

THE FEDERAL ESTATE TAX: REPEAL, REFORM OR ??

continued from pg 5

heirs act quickly and sell the assets following the senior family member's death, they pay no appreciable capital gains tax, since their cost basis is roughly equal to the sales price. The gain represented by the increased value in those assets during the life of the deceased is never taxed. The "step-up" basis rules thus provide a significant reduction in total potential taxes.

One idea being considered as part of the Trump administration's outline of a tax reform plan is to modify the "step up" rules in tandem with estate tax repeal. The change would be to limit the available amount of the step up to no more than $10 million and to "deem" a transfer at death to be a "sale". If the assets are valued in excess of the $10 million threshold, the estate would pay capital gains tax on the excess amount, presumably at the current rate of 15% (or 20% if the decedent is in the highest income tax bracket).

In practical effect, the combination of estate tax repeal with the proposed reform of the "step up" rule ends up looking more like an estate tax reform proposal, as opposed to a flat out repeal. The end result is that large estates will still pay tax, albeit at the lower capital gains rate and not at the current 40% estate tax rate.

As always, the devil will be in the details. If, for example, the threshold were lower than $10 million on the new step up rule, the number of families subject to the tax may increase. Currently, out of the 2.7 million people the Census Bureau estimates will die this year in the United States, only about 11,000 of them will need to file a federal estate tax return. Only half of those will actually end up paying estate taxes to the federal government, though the average amount of the tax paid by that relatively small number of estates is not small at $3.79 million.

After this summer's attempts to repeal and replace the Affordable Care Act, Congressional leaders have indicated they would next turn to tax reform. The complexities of full-blown income tax reform dwarf the potential impacts of estate tax repeal or reform, but it appears that one may not happen without the other. Stay tuned for the debate and we'll see whether we have repeal, reform or maybe even nothing at all.

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GUARDIANSHIP

There is often confusion regarding what a guardianship is and whether it may be necessary for a friend or loved one. This article is meant to provide a general overview of guardianships in Minnesota.

A guardianship is a relationship between a guardian, who is appointed and supervised by the Court to make personal decisions for an individual incapable of making such personal decisions, and a ward who is found by the Court to be unable to make personal decisions on his or her own behalf due to age, mental or physical incapacity. In the case of a guardianship, incapacity means an individual who is impaired and lacking sufficient understanding or capacity to make or communicate responsible personal decisions. They must have demonstrated deficits in behavior which evidence an inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety. Any competent person or agency may be appointed as the guardian, but the proposed ward's wishes and the prior relationship of the parties will be taken into consideration in any appointment.

To establish a guardianship, the following steps must be taken. A guardianship is initiated when a proposed guardian files a petition with the court in the county in which the proposed ward resides. Thereafter the court will schedule a hearing to determine if the conditions for a guardianship exist. Prior to the hearing the proposed guardian must undertake a background investigation conducted by the court. The court will also appoint a visitor to meet with the proposed ward to give notice of hearing rights and make an independent assessment of whether a guardianship is necessary (or which powers should be granted) to submit to the court. An attorney will be appointed by the court to represent the proposed ward and ensure their interests are being protected. Those persons interested in the proposed ward have the right to attend the hearing and object to the need for a guardianship for the proposed ward. The proposed ward must attend the hearing unless they have waived their right to attend or they are unable to attend by reason of a medical condition as evidence by a written statement

continued on pg 10

GUARDIANSHIP continued from pg 9

from a licensed physician. If after the hearing the court finds that a guardian is needed, and no less restrictive alternative is appropriate, then an order and letters of guardianship will be issued by the court. Letters of guardianship are evidence of the guardian's authority to act on behalf of the ward. After their appointment, a guardian must file with the court and provide the ward with an annual report of personal well-being. The ward must also be provided with a notice of rights on an annual basis that informs the ward that he or she has a right to end or modify the guardianship.

In the appointment of a guardian, they may be granted some or all of the following powers to act on behalf of the ward:

- the right to determine where the ward will live;
- to provide general cares and needs;
- to provide care, comfort and maintenance (such as food, clothing, shelter, health care, social and recreational, training and education);
- to consent to medical treatment on the ward's behalf;
- to supervise the ward's daily activities; and
- if no conservator is appointed, the guardian may prevent the ward from entering into any contract except for basic needs, and may apply for public assistance on the ward's behalf.

The court may restrict the guardian's powers based on the needs of the ward, and certain decisions undertaken by a guardian must have prior approval by the court. Importantly, a guardian does not have unlimited authority to act on behalf of a ward. Rather, the guardian has the responsibility to make decisions in the best interest of the ward and to take into consideration the ward's preferences and needs. The guardian must use their authority only as necessary to provide needed care and services. It cannot be used in a manner that limits the ward's rights or restricts his or her personal freedoms.

Importantly, a guardian is appointed to make some or all of the personal decisions for the ward as listed herein, but is not authorized to handle the ward's financial affairs. A conservator must be appointed to make financial decisions for the protected person. A conservatorship establishes the power of a conservator to contract, pay bills, invest assets, and perform other financial functions for the protected person. A guardianship may be established whether or not a conservatorship is also established.

Guardianship should only be sought if the proposed ward's judgment or decision making is a major threat to the individual's welfare. A court may deny a petition for guardianship if it finds there are less restrictive alternatives. Courts have established that the right to autonomy and self-determination should allow every person to make their own decisions. A least restrictive alternative is an option which allows a person to keep as much autonomy and self-determination as possible while still protecting the person. An example of a less restrictive alternative is the execution of an advance directive for health care when the proposed ward has capacity. This underscores the importance of any person planning for incapacity, no matter how young or healthy they may be. Likewise, a plan established by an individual when they have capacity that allows for formal or informal supports, a family plan for care that is agreed to by the incapacitated individual, or a plan established by a case manager or health care facility that implements and coordinates ongoing personal care needs, would all allow for the avoidance of a guardianship as being less restrictive alternatives.

The decision regarding whether a guardianship may be necessary for a friend or loved one, or establishing an estate plan that would avoid the need for a guardianship in the event of incapacity should be weighed and considered with an attorney. Our attorneys are available to work with you to help make the best decision relating to a proposed or ongoing guardianship, or to provide estate planning needs. ■

Gislason & Hunter LLP & CliftonLarsonAllen are Pleased to Present

A Complimentary Seminar

Wednesday, December 6

Courtyard Marriott
901 Raintree Road
Mankato, MN 56001

10:30 – Minnesota Estate Tax: Recent Changes, Tips and Traps for the Unwary

11:30 – Complimentary Lunch

12:30 – Succession Planning Tips for the Family Business and Family Farm

1:30 – 3:00 – Estate Planning – avoiding tax pitfalls

Registration

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Gislason & Hunter Estate Planning Services

Estate Planning is important to ensure the orderly transfer of family assets, as well as to protect those assets from unnecessary taxation. The Gislason & Hunter Estate Planning Practice Group offers a variety of services to assist you in creating the best plan for you, your family, your business or your farm.

Some of the many services our attorneys offer include the following:

- Drafting wills, trusts, codicils and powers of attorney
- Preparing health care directives and living wills
- Creating family business succession plans with emphasis on each family's particular goals and values
- Farm estate and succession planning
- Evaluating estate and gift tax issues and structuring planning options to minimize tax obligations
- Administering and assisting clients with probate proceedings, conservatorships and guardianships
- Advising on Medicaid, Medicare, nursing home and elder law issues
- Handling disputed estate and probate matters in litigation, arbitration or mediation formats

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