Estate Planning Bulletin

Foster Swift Trusts & Estates Practice Group
October 2008

PRACTICE AREAS
Estate Planning

FEDERAL ESTATE TAX EXCLUSION

Under federal tax law each individual can transfer a certain value of property free from federal estate tax at death. This is commonly referred to as the "estate tax exclusion amount."

MAXIMIZING ESTATE TAX SAVINGS FOR MARRIED COUPLES

With a current estate tax exclusion amount of $2 million in 2008, a husband and wife may now pass a total of $4 million in wealth free of estate tax, but only if they have properly planned. For most couples, this means creating and funding separate revocable trusts for each spouse. For example, if a couple has $4 million, with $2 million titled in each spouse's trust, each spouse will fully utilize his or her estate tax exclusion under a $2 million exclusion However, if the trust of the first spouse to die is unfunded, and all assets pass to the surviving spouse, the entire $4 million will be included in the surviving spouse's gross estate for estate tax purposes. If the surviving spouse dies in 2008, he or she will only have a $2 million exclusion, leaving $2 million subject to estate tax at 45% ($900,000 of tax). Thus, proper titling of assets and accurate beneficiary designations are critical.

ESTATE TAX EXCLUSION AMOUNT INCREASES TO $3.5 MILLION IN 2009

When the estate tax exclusion amount increases to $3.5 million in 2009, couples with significant estates should review their estate plans to maximize the use of each spouse's $3.5 million exclusion by titling that amount in each individual's trust. The increased exclusion may require additional funding of each trust for maximum estate tax savings.

FUTURE CHANGES IN ESTATE TAX EXCLUSION?

The federal estate tax is currently scheduled to be repealed completely in 2010 and then the exclusion reduced to $1 million in 2001. Due to this dramatic change, both presidential candidates have talked about proposals to revise the estate tax. According to the October 15, 2008

Wall Street Journal, Senator Obama proposes to retain the $3.5 million exclusion and the 45% top estate tax rate. Senator McCain proposes to increase the exclusion to $5 million and reduce the top estate tax rate to 15%. Although the ultimate resolution is unclear, it is likely Congress will resolve this issue in 2009 and, hopefully, planners and clients will have a clearer picture for planning in the future.

CONCLUSION

For clients who have not reviewed their estate planning for several years, significant changes may be appropriate in the terms and funding of their trusts. For individuals who have funded their trusts, but have estates that exceed $3.5 million, additional retitling and planning may be necessary to maximize estate tax savings for future generations.

RECENT TAX DEVELOPMENTS

A number of recent events impact federal income and estate tax areas, including:

1. The $700 billion "bail out" bill signed by the President in early October included several tax changes. Among other things, it extends the ability of taxpayers age 70 ½ or older to transfer as much as $100,000 a year directly from an IRA to charity without owing income tax as a result of the transfer.
2. The IRS has taken the position that an IRA used to satisfy a charitable gift on death generates income tax liability if the IRA is paid to the participant’s estate or trust before it goes to the charity. We can use special provisions in the will or trust to avoid the tax, but the best arrangement is to designate the charity in the IRA beneficiary designation.
3. The income tax benefits of post-death "stretch" payout of IRA funds have been lost in several cases because the beneficiary or a financial institution does not comply with relevant tax regulations. Common errors include (a) the IRA owner naming his or her estate as beneficiary rather than his or her children directly, and (b) the IRA sponsor transferring the IRA to the beneficiary or to the beneficiary’s own IRA rather than properly establishing an "inherited" IRA.
4. The Tax Court has been ruling in favor of the IRS in a number of estate tax cases where the decedent gifted assets to younger generation members but retained improper "strings" or controls over assets. The result is that the assets are pulled back into the decedent’s estate, fully subject to estate tax.