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## Estate Planning in 2010: Thoughts On What To Do In Uncertain Times

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**W**e want to alert you to some important changes in the federal estate, gift and generation-skipping transfer (GST) tax laws that went into effect on January 1. In 2001, Congress passed a law that gradually increased the amount that persons could transfer at death free of estate and GST taxes. The amount grew to \$3.5 million in 2009. The ultimate purpose of the 2001 law was to repeal the estate and GST taxes in 2010 (but not the gift tax). The repeal has occurred, so that for the first time since 1916 there is no federal estate or GST tax imposed on the transfer of assets at death regardless of their value.

To make up for the lost estate and GST tax revenue, Congress provided in the 2001 law that the cost basis of inherited assets will no longer be adjusted to the date of death value. Instead, inherited assets will retain the decedent's cost basis. If the gains in an estate exceed \$1.3 million, then when the beneficiaries sell the inherited assets they will pay capital gains taxes. There is an extra \$3 million exemption for assets left to a spouse. Estimates are that the 2001 law will relieve about 5,500 estates from the burden of paying estate taxes in 2010 but will impose a capital gains tax burden on about 70,000 estates.

In order to gain enough votes in the Senate, Congress had to include a "sunset" provision in the 2001 law that eliminates all of the changes the law made at the end of 2010. Apparently, members of Congress assumed that between 2001 and 2011, they would be able to agree on a permanent solution to the transfer tax laws. That has not happened. Thus, unless Congress passes new legislation this year, there will be no estate or GST taxes imposed in 2010 and the basis of inherited assets will be the decedent's basis, not the date of death value of the assets. However, beginning in 2011 the estate, gift and GST tax laws will revert to what they were before the 2001 law was passed. Transfers at death in excess of \$1 million will be subject to estate tax, the top estate, gift and GST tax rate will become 55%, as it was before the 2001 tax law, inherited assets will receive a new basis equal to the date of death value, and several other important provisions will again be as they were before the 2001 law was passed.

These fundamental changes in the transfer tax laws present clients and their advisors with a difficult choice. Should clients revise their documents to take into consideration the law as it exists today or should clients rely on the possibility that Congress will pass legislation that either makes repeal permanent or reinstates the transfer tax system as it existed in 2009?

Here are some considerations that may help you decide what to do:

- If you are single and your taxable estate is worth \$1 million or less, your current will or revocable trust might give your beneficiaries the result you intended, regardless of whether you die in 2010 or later and regardless of whether the current law or retroactive legislation is in effect at your death. Otherwise, you should consider taking steps to minimize the estate taxes that will be due if you were to die in 2011 or later.
- If you are married and your combined taxable estates are worth \$2 million or less, your current will or revocable trust might give your beneficiaries the result you intended, regardless of whether you die in 2010 or later and regardless of whether the current law or retroactive legislation is in effect at the first spouse's death or the survivor's death. Otherwise, you should consider taking steps to minimize the estate taxes that will be due if the survivor of you were to die in 2011 or later.
- If you are married and your will or revocable trust contains a word formula to describe the maximum amount that may be transferred free of estate tax upon the first spouse's death (a common provision used for flexibility as asset values and tax laws changed), you should consider amending the formula provision so that it will give you the result you intend under current law. For example, no one knows how the IRS will interpret a provision that refers to the "maximum amount that I may transfer free of estate tax" when there is no estate tax in effect.
- For the same reasons, if your will or revocable trust contains a word formula to describe an amount that will pass outright or in trust for a charitable organization, you should amend the formula provision so that it will give you the result you intend under current law.
- If you have arranged for appreciated assets to pass to your beneficiaries outside the probate process (for example, by joint tenancy, transfer on death arrangements, or the terms of your revocable trust) and your estate is worth more than \$1.3 million, you should amend your will to authorize your executor to allocate the available basis increase to any assets in your estate, including those that will pass outside the probate process. This will reduce your beneficiaries' capital gains when they sell the appreciated assets.
- If you have nominated a person to serve as personal representative of your will who also may be a beneficiary under your will (including the trustee of your revocable trust if your will passes property to your revocable trust), you should amend your will to include provisions that will protect the personal representative/beneficiary from liability for breach of duty if he or she allocates basis to assets he or she will inherit. Those provisions also should protect the personal representative/beneficiary from an IRS claim that he or she made a gift to other beneficiaries by deciding not to allocate basis to assets he or she will inherit.
- If your estate plan anticipates making transfers to trusts so that future distributions from those trusts to your grandchildren or more remote descendants will not be subject to GST taxes, you should have

your documents reviewed. In addition, if you are interested in making gifts in excess of your annual exclusion amount (currently \$13,000 per recipient) to grandchildren or to trusts for grandchildren or more remote descendants, you should seek advice on how to structure those gifts in 2010 so that they would never be subject to GST tax.

We selected these items to describe planning opportunities for a broad range of clients. The list is by no means exhaustive. Your particular situation may be affected by provisions of the 2001 law that we have not mentioned.

Our Trust & Estates attorneys are closely monitoring developments in the estate, gift and GST tax laws. For the latest available information, please visit our website at [www.ruderware.com](http://www.ruderware.com). If you have questions about your planning needs, please contact one of our Trusts & Estates attorneys. ♦

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## ABOUT RUDER WARE'S TRUSTS & ESTATES GROUP

For over 80 years, attorneys in the Trusts and Estates practice group at Ruder Ware have counseled individuals, corporate executives, small business owners, dairy farmers, and philanthropists on how to prepare for the future. Whether a client's situation is straightforward or complex, our attorneys are able to implement creative and flexible strategies that fulfill a client's personal and business needs.

We offer comprehensive services in business planning; income, gift, and estate tax planning; and trust and estate administration. If clients seek professional management of their assets and simplification of their lives, we can serve as trustees of their assets, pay their bills, and handle distributions of money. If clients are concerned about protecting their assets, we can design trusts that provide protection from the claims of creditors. If clients desire to provide for future generations, our attorneys are experienced in succession planning and working through family dynamics to achieve broad-based acceptance of a coordinated plan. Simply put, our trusts and estates team is dedicated to helping you protect, manage, and dispose of your assets as you see fit, whether that is during your lifetime, in the event of your incapacity, or upon your death.

Our trusts and estates attorneys are widely respected among their peers. Some have been elected as fellows of the American College of Trust and Estate Counsel, the preeminent estate planning organization for attorneys in the United States. Others have been recognized for their service to the State Bar of Wisconsin in the areas of taxation, elder law, estate planning, and trust administration and have been selected for inclusion in Best Lawyers of America and Super Lawyers.

The services provided by our Trusts & Estates practice group include:

- Asset Protection Planning
- Elder Law
- Estate Planning
- Fiduciary Services
- Probate & Trust Administration

## Ruder Ware

As part of a full-service law firm, our attorneys provide clients with a one-stop approach to their legal needs. Ruder Ware, the largest Wisconsin law firm headquartered north of Madison, also provides legal counsel in Business Transactions; Litigation & Dispute Resolution; and Employment, Labor & Benefits.