SPECIAL REPORT

# Retirement Planning: From the Last Day at Work Until the Last Day of Life

Many older individuals find themselves less financially equipped to face the uncertainties of heightened life expectancies, escalating health care costs, and increasing risks of mental and physical incapacity. A joint Employee Benefits and Trusts and Estates Workshop held during the Southeastern Association of Law Schools 2010 Annual Conference addressed legal concerns facing an aging population. Panelists examined retirement and tax planning concerns from several different angles—inadequacies in the present 401(k) regime (and a call for annuities for more stable income for retirees), maximizing income support from Social Security, and planning for estate taxes and disability.—*Patrick E. Tolan, Jr., Associate Professor of Law, Barry University School of Law, Orlando, FL*

# Why Retirement Is Preferable to Death: Taxes

By Alyssa A. DiRusso*

Those choosing between enjoying an extended retirement and submitting to an earlier death may be inclined to choose retirement—for tax purposes. The potential tax-free transfer window of 2010 aside, the gross uncertainty of the federal estate tax system makes dying rich a very complicated endeavor. The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) has been creating headaches for estate planners for nearly a decade, but the migraine has peaked this year.

Under the terms of EGTRRA, between 2001 and 2009, the amount that could pass transfer tax-free at death increased while the highest marginal tax rate decreased. During the year 2010, EGTRRA would allow unlimited amounts of wealth to pass tax-free at death—but on midnight of December 31, 2010, Cinderella's dazzling tax chariot is transformed into a pumpkin. As the sun rises on the new year of 2011, it is as if EGTRRA had never been, and (absent congressional intervention—see more on this hopeless fairy tale dream below) taxpayers are subject to the measly inflation-indexed $1,000,000 exclusion applicable under prior law.

The problems EGTRRA causes for estates in 2011 and beyond are clear: estates anticipating no transfer tax burden may be subject to taxes, even estates of relatively modest wealth, and the incentive for a timely death to avoid these rules is strong. (Will the waning months of this year trigger the Grandma Got Run Over by a Reindeer Syndrome?) For the time being, 2010 poses troubles of its own.

One of the dirtiest messes of 2010 is the way EGTRRA has scrambled marital deduction planning. Many estate plans are drafted to include a formula bequest, granting a surviving spouse the lowest amount necessary to reduce the estate tax to zero. Applying the formula results in an easy math problem but a difficult legal one: the spouse gets the goose egg. Thanks, EGTRRA! Fortunately, we have state law to the rescue—kind of.

Several states have enacted or are considering legislation that would construe a marital deduction formula to mean something other than what it says. The legislation generally comes in two flavors: the Party Like It's 2009 statute or the Arm-Wrestle in Court statute.

Under the Party Like It's 2009 statute, which is considerably more common, marital deduction formula clauses carried out in a year in which there is no federal estate tax are to be construed as if it is 2009. This means $3.5 million may pass tax-free, and under a marital deduction formula clause, the remainder of the estate (not qualifying for any other deduction or exclusion) would pass to the surviving spouse. Quite a save for the surviving spouse in distress—but what about the seductive mistress—tax opportunity? Would the decedent want to miss out on this once-in-a-deathtime opportunity to avoid transfer tax? In some states, disgruntled beneficiaries may argue that 2010 law should apply, but clients wishing to avoid the impact of these statutes should revise their estate plans accordingly and opt out of their application. For state statutes applying this rule, see Idaho Code § 15-1-501; Ind. Code § 29-1-6-1(8); Md. Code, Estates & Trusts, § 11-110; Neb. L.B. 1047 (2010); S.D. H.B. 1201 (2010); Tenn. Code Ann. § 32-3-113; Utah Code Ann.

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