page 2
How to avoid taxes when giving away hard-to-value assets
Married couple's 'joint will' couldn't be modified later
page 3
Moving? Now's the time to update your estate planning
page 4
Many older powers of attorney and health care proxies should be reviewed

Legal Matters®
Estate Planning
spring 2012

New estate tax law affects widows and widowers who plan to remarry

Widows and widowers who are considering remarriage should be aware that a new federal tax law could potentially make a huge difference in how much of their assets they are able to leave to their heirs after taxes.

In general, anyone who is considering remarriage later in life should talk to an estate planner first in order to avoid possible tax problems. But this new law gives added urgency to this rule, because it potentially could result in huge additional taxes – or tax savings – and planning for this possibility is essential.

Generally, when a person dies, his or her estate can give an unlimited amount to a surviving spouse tax-free. However, if the person's bequests (plus large lifetime gifts) to other beneficiaries – such as children – total more than a certain "exemption amount," then an estate tax must be paid. For 2012, the exemption amount is $5 million.

©istockphoto.com

In the past, the general rule was that the exemption amount applied separately to each spouse. So if a husband died first, his estate could use his exemption amount, and when his wife died later, she would get her own exemption amount.

But under the new tax law, if the first spouse to die doesn't use all of his or her exemption amount, the difference can be passed along to the other spouse. So suppose a husband dies and doesn't use any of his $5 million amount (because he leaves everything to his wife). When the wife dies, her exemption amount will be her own $5 million *plus* the $5 million that the husband didn't use. So instead of being able to leave $5 million tax-free to her heirs, she can leave $10 million tax-free – a potential savings of millions of dollars.

So how does this affect remarriage? It has a big effect, because if a widow or widower marries a new spouse, and the new spouse dies first, the widow or widower will lose any

continued on page 3

Beliveau Law Group, LLC
Massachusetts offices: Waltham, MA; Danvers, MA; and Quincy, MA
New Hampshire offices: Manchester, NH and Salem, NH
Florida offices: Boca Raton, FL and Naples, FL
Main Telephone Number: (781) 890-8600 • Email: firm@beliveaulaw.com • Website: www.beliveaulaw.com

How to avoid taxes when giving away hard-to-value assets

As part of their estate planning, many people want to give away property during their lifetime in order to reduce the size of their taxable estate.

In general, you can give $13,000 a year to anyone you like without having to pay gift tax, and you can make additional gifts over this limit, over the course of your lifetime, up to the amount of your gift tax exemption (although these larger gifts will reduce your estate's exemption when you eventually pass away). Plus, you can give an unlimited amount to a spouse or charity.

One taxpayer found a way to avoid the gift tax even though the IRS said she had given away too many assets and was 'over the limit.'

One problem with making gifts for tax purposes is that some types of assets are hard to value. In particular, certain types of real estate, interests in a partnership, and stock in a family-owned business can be very difficult things on which to place a price tag.

You can obtain an independent appraisal of the assets' value, but some people worry that even if they do, the IRS might disagree with the appraisal. They are concerned that the IRS will say the assets are worth more than they thought, and claim that the gifts were "over the limit" such that they have to pay gift tax.

Recently, a woman named Anne Petter came up with a solution to this problem and beat the IRS.

Anne owned membership units in a family LLC. She gave some of the units to two family trusts. An appraiser valued these units at an amount equal to Anne's lifetime gift tax exemption. Anne also donated some units to charity. As part of the transfer to the trusts, she required that if the IRS appraised the units at a higher value, the trusts would have to give the difference to the charity.

The IRS did indeed appraise the units at a higher value, and it demanded that Anne pay $2.1 million in gift taxes.

But a federal appeals court in San Francisco sided with Anne. It said that no matter what value the IRS placed on the gift, as long as the trusts had to give any additional amount to the charity, Anne wasn't "over the limit" and didn't have to pay the gift tax.

Married couple's 'joint will' couldn't be modified later

Jerome and Sandra Murray signed a "joint will" in 1993. It provided that if one of them died, the other would inherit all the property. It also said that the will couldn't be modified unless they both agreed to any changes.

Unfortunately, the couple divorced in 2001. As part of the divorce settlement, Sandra received a condo in New York.

In 2006, she put the condo into a trust. The trust document said that if she died, the trust property would be distributed in whatever way she provided in her will. Since the joint will said nothing about the trust, Sandra wrote a new will. The new will said it wasn't intended to change anything in the joint will, but added that when she died, the trust property would be given to her children.

Sandra died in 2008, and the family went to court. Jerome claimed that he was entitled to the condo under the joint will, and the children claimed they were entitled to the condo under the new will.

The result? Jerome won. Since the joint will said that Jerome would get all the property, and the will couldn't be modified without his consent, the new will didn't matter and he was entitled to the condo.

The irony, the court said, was that if Sandra had really wanted her children to have the condo, she could simply have given it to them while she was alive.

Nothing in the joint will would have prevented her from doing so. But because she wanted to keep the title for as long as she was alive, the condo was subject to the joint will at her death.

Moving? Now's the time to update your estate planning

If you're moving (or considering moving) to another state, it's a good time to update your estate planning.

Of course, your estate plan should be updated any time you make a major change, such as buying or selling real estate. But even if you're not buying or selling anything, it's wise to review your estate plan when you move because different states have different laws about how estate documents are interpreted.

For instance, New Yorker Rosanne McGathy wrote a will in 1997. She moved to Arizona in 2005, and she passed away several years later. Her will made specific bequests to several trusts for relatives, and left the remainder of her estate to some other relatives and charities. McGathy had other assets that went to people outside the will, including a home she co-owned, a life insurance policy, and an annuity.

©istockphoto.com

Under New York law, if a will doesn't specifically say who pays the estate taxes, then the taxes are apportioned among all the assets, including the trusts, the home, the life insurance and the annuity.

Under Arizona law, however, all the taxes have to be paid out of the remainder of the estate – and no taxes would be charged against the trusts or the assets that went to people outside the will.

The various beneficiaries went to court over who had to pay the estate taxes. The Arizona Court of Appeals ruled that Arizona law applied, so the relatives and charities that received the remainder of the estate had to bear the entire burden of the taxes, while the other beneficiaries didn't have to contribute anything.

Rosanne could have avoided all this family strife and litigation simply by reviewing her estate plan when she moved, and specifically saying in her will how she wanted the estate taxes to be apportioned.

Different states have different rules about how estate documents are interpreted, so if you're thinking of moving elsewhere, you should review your estate plans.

New tax law affects widows and widowers who remarry

continued from page 1

"leftover" exemption from the first spouse, and will have only the exemption from the second spouse.

So suppose a widow "inherits" a $5 million exemption from her first spouse. If she remarries someone who has a $0 exemption, and he dies first, the widow will lose the original $5 million exemption. Potentially, her estate will have to pay millions of dollars in taxes that would otherwise have gone to her heirs.

On the other hand, suppose a widow inherits no exemption from her first spouse. If she remarries someone who has a $5 million exemption, and he dies first, the widow will inherit the $5 million exemption and her estate will potentially save a fortune in taxes.

Either way, this is something that should ideally be planned for carefully before the widow or widower ties the knot.

In addition to tax and financial planning, widows and widowers might also want to specifically address the issue of "inherited" exemptions in a prenuptial agreement.

Future changes?

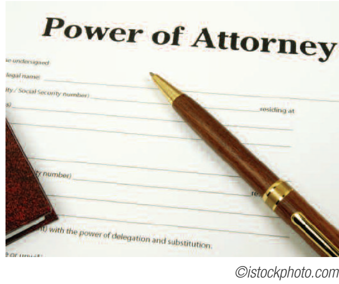
As things stand now, the law about inherited exemptions expires at the end of 2012. But there's a good chance that Congress will extend it, so it's wise to make plans regarding it.

The $5 million exemption amount is also scheduled to expire at the end of 2012, and it's not clear what will happen after that. It appears that if Congress does nothing, the exemption amount will reset at only $1 million starting at the beginning of 2013. This fact alone makes estate planning now all the more vital.

We welcome your referrals. We value all our clients. And while we're a busy firm, we welcome all referrals. If you refer someone to us, we promise to answer their questions and provide them with first-rate, attentive service. And if you've already referred someone to our firm, thank you!

This newsletter is designed to keep you up-to-date with changes in the law. For help with these or any other legal issues, please call our firm today. The information in this newsletter is intended solely for your information. It does not constitute legal advice, and it should not be relied on without a discussion of your specific situation with an attorney.

Many older powers of attorney should be reviewed



©istockphoto.com

Many power of attorney and health care proxy documents that were created years ago should be revised now as a result of a federal medical privacy law.

The law, known as HIPAA, generally prevents health care providers from disclosing your personal medical information to anyone but you and someone you've named as your "personal representative."

Medical privacy may be a good thing – but the law can create complications.

For instance, you may have a health care proxy that names someone you want to make medical decisions for you if you're not able to make them yourself. But if you haven't also named that person as your "personal representative" under HIPAA, then he or she might not be able to access your medical information in order to make informed decisions.

Here's another problem: Many power of attorney documents say that your agent can act on your behalf if you become incapacitated. But if your agent isn't also your personal representative under HIPAA, then even if you *do* become incapacitated, your agent might not be able to access your medical records in order to prove it – and as a result, the power of attorney might be of little value.

To make sure your agent doesn't get caught in this "Catch-22," your power of attorney and health care proxy documents should contain HIPAA clauses saying that the agent is also your personal representative. In some cases, it might also be good to sign separate HIPAA release forms.

Here's another issue: When people are admitted to a hospital, the hospital often asks them to fill out a generic health care proxy form. A lot of people dutifully fill out this form as part of the hospital paperwork. But if you do so, it could revoke the more carefully considered form you created as part of your estate plan. You'll want to be careful to make sure that the form you create as part of your estate plan is the most current form and the one on which the hospital will rely.

We'd be happy to help you make sure that these important documents are fully up-to-date.

BELIVEAU LAW GROUP, LLC

Massachusetts offices: Waltham, MA; Danvers, MA; and Quincy, MA
New Hampshire offices: Manchester, NH and Salem, NH
Florida offices: Boca Raton, FL and Naples, FL
Main Telephone Number: (781) 890-8600
Email: firm@beliveaulaw.com • Website: www.beliveaulaw.com