



# A TIME TO WORRY, A TIME TO ACT



*There must be some way out of here...There's too much confusion, I can't get no relief.*

—Bob Dylan

This is an important advisory regarding estate tax law changes.

Currently, there is no estate tax in 2010. However, the estate tax returns with a vengeance in 2011 (think: *Creed from the Black Lagoon*). This odd set of circumstances arises because Congress did not act to change the law before 2010 arrived. The 2010 law and its critical impact on estate planning are briefly explained here.

Many clients' estate planning documents (prepared when there was an estate tax!) divide the estate of the first spouse to die into two portions. One portion is equal to the deceased spouse's unused estate tax exemption amount; the other portion is the balance of the estate. The exemption amount passes to a "Family Trust," and the balance passes to a "Marital Trust." Neither portion was subject to estate tax when the first spouse died. This approach typifies how most couples have planned for many years.

It is uncertain how such estate planning documents will be interpreted if there is no federal estate tax. Also, under the new 2010 law, inherited assets, when sold, could be subject to large capital gain taxes. Additionally, even though there is no federal estate tax in 2010, some states may still impose estate taxes. Accordingly, although the new law is scheduled to end December 31, 2010, it probably is appropriate for clients to come in and review their existing documents.

This is because most existing trust provisions are phrased in terms of temporarily antiquated estate tax concepts, such as the estate tax exemption amount and the marital deduction. If those concepts are inapplicable, there is a serious question as to what trust documents mean and how property transfers if a spouse dies in 2010.

With regard to the capital gain taxes, instead of an estate tax in 2010, we have "inherited" or "carry over" basis. "Basis" is the value from which gain or loss on assets sold is measured for income tax purposes. Under prior law, the income tax basis of an asset was typically changed

("stepped up") to its date of death value when its owner died. In 2010 there is no automatic step up in basis.

Rather, the deceased owner's basis in assets will be "carried over" to the persons who inherit the assets. There are "basis increase" allocations available under the 2010 law that enable the carried over basis to be increased, thereby reducing the taxable gain on sale. It may be appropriate for trust documents to be revised to take advantage of these new basis increase allocations.

There is some uneasiness about the new 2010 "carry over basis, no estate tax" law. Many expect the 2010 law to be repealed and the 2009 estate tax law to be retroactively reinstated. Is that constitutional?

The 2010 law may be effective for only one year. Under current law, in 2011 and beyond, the 2010 law of "carry over basis and no estate tax" goes away and the estate tax system returns, but with only a \$1 million exemption!

Be aware of the 2010 law and consider coming in to discuss your estate planning with us. Given all the tax uncertainty and the significant assets at risk, this is a time to worry, a time to act.



*Congress in session.*

*"No man's wife, liberty, or property are safe when the Legislature is in session."*

—New York Judge, Gideon J. Tucker, 1866