

# The Guttenberg Press

*Preserving Your Assets ... Planning Your Future*

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Dear Friend,

*What advice can we offer in dismal economic times? Any cause for optimism? Any silver linings?*

*First, don't panic. It's difficult to make sound decisions if you do. It's a good time to get a realistic handle on your financial lives. Make sure you have quality advisors, including financial/investment advisor, accountant, life insurance agent, and attorney (business and estate planning). Your advisors need to be professionals who can understand your and your family's financial and personal needs and objectives. We can offer recommendations as needed.*

*There is indeed cause for optimism. President Obama just signed into law the \$787 billion economic stimulus bill specifically designed to resurrect the economy. It's an unprecedented infusion that hopefully will reverse the dismal outlook.*

*On the estate planning front, strategic and timely "silver lining" opportunities abound in the current tax and economic climate. Please review the lead article and discuss with us.*

*Let's stay in touch,*

Aryeh

## New Estate Planning Changes - and Opportunities - for 2009

Increased exemption levels in 2009, low interest rates and down economy have created many timely estate planning opportunities for 2009. Here is a summary:

**#1. Estate Tax:** *The federal estate tax exemption has increased from \$2 million to \$3.5 million- the largest increase ever.*

While the estate tax is scheduled to be repealed in 2010, that almost certainly will not happen. I base my view on President Obama's own position as well as the thinking of tax legislative counsel and the current economic climate. So let's discuss how we can take advantage of this opportunity. If wills are structured properly, a married couple could actually exempt \$7 million of assets from federal estate tax. That's the largest amount ever- but the proper trust structure needs to be included in your wills or revocable trusts.

If, however, your assets (including life insurance) are less than \$3.5 million, then you still need to be aware that Maryland has its own estate tax- with its own exemption of \$1 million per person (and a 16% cap). That tax and low threshold, though exceedingly unpopular, is not likely to change this year because of the economic climate and state deficits. But, with a carefully drawn estate structure and the use of a special trust called the "Maryland QTIP," couples can at minimum save both federal and Maryland estate taxes. We have discussed this trust in prior issues, but please be sure this trust is incorporated into your estate plan.

If your Will was executed at a time when the exemption was lower- possible at \$600,000 or even \$1 million, your spouse may be shortchanged. See Page 2, column 1, for a summary of the trap and our solutions.

**#2. Generation-Skipping:** *The generation-skipping exemption has also increased from \$2 million to \$3.5 million.*

For high net worth families, this can be a boon as the senior generation can now pass down \$7 million of assets to grandchildren and to trusts for the benefit of their children during their lifetime – and have those assets (and all further appreciation) avoid estate tax in their children's estates. Maryland is an attractive jurisdiction for such long-term trusts. We have developed many such generation-skipping trusts for clients. In addition to the tax benefits, these trusts can serve to protect assets from creditors.

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## Formula Clause May "Disinherit" Spouse Due to 2009 Increase in Exemption... and Solutions

If your Will was executed before 2009 and a part of your estate was designed to pass to a trust for the benefit of family members other than your spouse, then you need to consider the effect of the new increase in the estate tax exemption for 2009 to \$3.5 million. If you executed your Will some time ago when the estate tax exemption was \$675,000, for example, you may have a formula clause in your Will that self-adjusts when the law changes. You may have then intended to pass \$675,000 to a family trust for the benefit of other family members (and thereby use the first spouse's exemption), with the balance passing to your spouse. If unchanged, that same formula provision could now pass \$3.5 million (or your whole estate if it is valued at less than that) to a trust for the benefit of children and perhaps give your spouse nothing.

■ **Example:** Herschel is married with children and grandchildren, and has a net worth of \$3,675,000. In 2001, Herschel's attorney drafted a Will with a formula clause which provides for a Family (Bypass) Trust for the benefit of his children and grandchildren. The balance would pass outright to his wife, Worrywart. When Herschel signed his Will in 2001, he believed that all of his net worth except for \$675,000 (i.e., \$3,675,000 less \$675,000, or \$3 million) would be available for Worrywart if he died.

### Results:

■ *If Herschel had died in 2001*, Herschel's objectives as to the support of Worrywart would be achieved. Approximately \$675,000 would pass to the Family Trust for the benefit of the children and grandchildren while the bulk of his estate would pass to Worrywart.

■ *But Herschel's objectives would be drastically thwarted under his formula clause Will if he died in 2009 without changing his Will.* Let's assume that Herschel's net worth does not grow and he dies in 2009. Worrywart, may be distressed to learn that she has no interest in most of the estate, and this may even compel her to exercise the right of election against Herschel's Will.

### *Solutions We Have Developed to Protect Spouse from Formula Clause Trap*

1. Use of Disclaimer Trust. Change structure from a formula clause that fluctuates with the estate tax exemption to a "disclaimer-activated" trust structure. We have found that for many, the disclaimer approach works best especially where many of the assets are held jointly between spouses.

2. Spouse as Sole Beneficiary of Bypass Trust. Change terms of Bypass Trust so that the spouse is the sole beneficiary (with no authority for distributions to children). We can structure this share so that income can be accumulated for the benefit of the spouse to allow the trust to grow and increase the "bypass" amount that eventually passes to the children.

#3. *Gifts: There are two important developments that could impact gifting in 2009:*

■ *Increase in annual exclusion (tax-free) gifts from \$12,000 to \$13,000.*

This is an inflationary adjusted increase, but it highlights a simple and effective way of reducing one's estate tax. Consider for example that a married couple with 3 adult children and 6 grandchildren can make tax-free gifts of \$234,000 (more if gifts are made to a child's spouse). Here's an annoying incongruity that you need to be aware of: the lifetime gift tax exemption is still \$1 million--different than the higher federal estate tax exemption of \$3.5 million, although lifetime gifts do use up the estate tax exemption. So, even if you exceed the \$13,000 annual exclusion, the total lifetime gifts must exceed \$1 million before gift tax is payable. I have heard talk at tax conferences and meetings about changes to the lifetime gift tax exemption to correlate to the estate tax exemption but there has been no action as of yet.

■ *Low interest rates and market meltdown have created unique gift and estate planning opportunities.*

Investors have taken a huge hit as the prices of stocks, bonds, real estate and most other assets have tumbled. But sharply lower prices, combined with rock-bottom interest rates, makes this an unusually attractive time for many people to transfer wealth to the next generation.

### Two Planning Techniques

Here are 2 such techniques that we are exploring and implementing for our clients:

■ **Charitable Lead Trust.** If structured properly, wealthy donors can seed favorite charities, pass money to heirs and shelter potential growth from taxes. The Wall Street Journal recently had an article extolling the benefits of charitable lead trusts as an estate planning device that balances charitable motivations, family wealth transfers, and reductions in estate and gift taxes. (Mike Spector, *Giving Smarter While Helping Your Estate: Bear Market Provides Boost to Little-Known Strategy* (Feb. 10, 2009)). We hope to address the planning techniques in subsequent issues. For now, please call us to see if it works for you. You can also visit our website (under publications) to access a PowerPoint presentation we gave to University of Maryland Medical System on charitable trusts.

■ **Grantor Retained Annuity Trust (GRAT).** A GRAT is an irrevocable trust designed to transfer the appreciation on assets contributed to it with minimal or no gift-tax consequences. If the assets appreciate at a higher rate than the IRS rate, the beneficiaries win. Again, this is a complicated technique and we need to explore all the variables with our clients before proceeding.

*Caveat: It's OK to Gift but Make Sure Spouse is Provided For*

We always counsel clients to ensure that both spouses would be adequately provided for before funds are available to other beneficiaries. This is important before deciding to make many annual exclusion gifts and certainly before larger gifts that utilize the estate tax exemption. But if you can afford to make such gifts while ensuring that you and your spouse are adequately provided for, then consider doing so-- especially if the tax advantages are significant.

## Questions We've Been Asked...



*As trusts and estates law practitioners, we deal and grapple with many questions in this area- from clients and others. We thought it would be helpful and informative if we shared these questions and our responses with all of you. Of course, this does not constitute legal advice and there may be more to the answer than we can include in this space.*

Topic: Irrevocable Life Insurance Trusts ("ILIT")

**Q** I am married. If I am the insured under a life insurance policy and my spouse receives the life insurance proceeds outright- and those proceeds are not subject to estate tax because it passes to my spouse- then why should I set up a life insurance trust?

**A** While the proceeds of life insurance would indeed pass to your spouse without estate tax (due to the unlimited marital deduction), any proceeds still held by the surviving spouse at her death would be part of that spouse's estate and be subject to estate taxes. The purpose of the life insurance trust (ILIT) is to make sure that the surviving spouse has the use of the proceeds during his/her lifetime but that the remaining proceeds would not be part of his/her estate and pass to the children or other beneficiaries free of estate tax (even without utilizing the spouse's estate tax exemption). This trust is indeed a "win-win" strategy for estate tax reduction.

**Q** Who should be the trustee of an ILIT?

**A** Since the ILIT is an unintuitive, formalistic "loop-hole" to the estate tax system, formalities must be meticulously complied with. "The devil is in the details" here and the ongoing formalities such as administering a trust account and the preparation and timing of tax notice letters (called "Crummey" letters) to beneficiaries are essential to achieving the tax savings. It is for that reason, in our view and experience, that a professional must be designated as a trustee to ensure that this ongoing fiduciary administration is handled properly. A family member, however, could serve as co-Trustee with substantial authority- depending upon the desired terms of the trust. Our firm administers these trusts with an efficient fiduciary system.

Topic: New IRA Charitable Rollover

*Note: The Pension Protection Act of 2006 permitted individuals who are 70 1/2 or older to roll over up to \$100,000 from an IRA directly to a qualifying charity without recognizing those assets as income. Congress recently extended the IRA charitable rollover provisions through December 31, 2009. Several of our clients have utilized this technique. Here are some of their questions:*

**Q** How will charitable distributions impact the minimum required distributions from my IRA?

**A** Shortly after you reach the age 70 1/2, you are generally required to receive distributions from your traditional IRA. Distributions from an IRA to a charity will receive the same treatment as distributions directly to you for the purposes of satisfying minimum required distributions. (Note that this requirement was waived by Congress for 2009.)

**Q** How will this new IRA Charitable Rollover benefit me since I could otherwise take the IRA distribution as taxable income and then claim a corresponding charitable deduction on the contribution?

**A** Because of the application of the percentage limitations on charitable contributions and the reduction of itemized deductions for higher income taxpayers, the charitable deduction may not totally offset the taxes resulting from the "taxable" IRA distribution. The direct rollover would, however, bypass your income and you would therefore obtain the maximum tax benefit.

**Q** To which charities may I make a qualified rollover? May I make a rollover to my private family foundation?

**A** Most contributions to public charities (other than supporting organizations) are qualified. However, distributions to "donor-advised funds" held by public charities are not qualified. Importantly, distributions to a private operating foundation or to a private foundation that elects to meet the "conduit" rules in the year of distribution are also qualified. A "conduit foundation" is one that pays out 100% of the contributions the foundation received in its tax year by the 15th day of the third month after the close of the tax year, in addition to meeting its regular 5% distribution requirements. A private foundation may elect to be or not to be a conduit private foundation from year to year.

*Note: We are now working with a family foundation to specifically meet the conduit rules in order to implement the IRA charitable rollover.*

Topic: Health Care Powers of Attorney and Advance Medical Directives

**Q** My sister and I are named as co-agents on my father's Health Care Power of Attorney, but we do not agree on his health care. We are virtually in a "stalemate." What happens now?

**A** The easy answer is that the 2 agents have to agree. However, assuming there can be no agreement and if the father is in a hospital or other medical facility, under Maryland law the dispute would need to be resolved by the institution's patient care advisory committee. Otherwise, mediation of some sort would need to be employed.

**Q** My mother has a signed handwritten note stating that she does not wish to be placed in a nursing home nor does she want to be placed on life support systems. Is this valid as an Advance Medical Directive under Maryland law?

**A** To be binding, an Advance Medical Directive needs to be signed and witnessed by two witnesses. However, if your mother is able to make an oral declaration in the presence of her physician or nurse practitioner and one witness, and this declaration is documented in your mother's medical records, then this oral declaration is valid as long as the physician or nurse practitioner and witness sign and date the documentation.

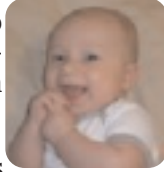




## Things We've Been Up to Lately

▀ Aryeh has been listed as a "Super Lawyer" in the area of Estate Planning & Probate in *Baltimore Magazine's* 2009 edition of *Maryland Super Lawyers*.

▀ Aryeh and Sandy are proud to announce the birth of our newest grandson, "Shua," born to Gary and Leba Guttenberg.

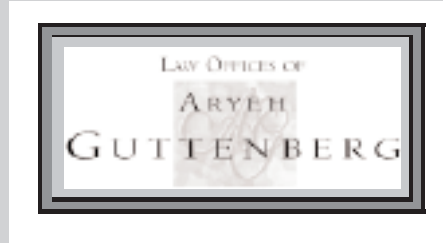


▀ Aryeh's 2009 Supplement to his "*Maryland Estate Planning Library*" is now out. The book, used by over 500 attorneys, accountants and trust companies in Maryland, was updated to address revised planning for the increasing differential between the federal estate exemption for 2009 (\$3,500,000) and the static and much lower Maryland estate tax exemption (\$1,000,000).

▀ Through diligence and ingenuity, paralegal Liz Lefkowitz facilitated the recovery of previously unknown assets for the estate of a dual Israeli/U.S. citizen who left a substantial estate to charities in Israel. Amanda and Aryeh had previously prevailed in an IRS Appeals case to ensure that the estate received a full charitable deduction and paid no federal estate taxes. Aryeh has used this case study in his law school class to illustrate the proper structuring of testamentary charitable bequests.



▀ On February 9, 2009, we celebrated and marked Liz's 5th year at our office. Our excellent paralegal team of Liz and Erin provides invaluable assistance to Aryeh and Amanda (and to our clients) in the areas estate planning and administration of estates and trusts.



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### ESTATES AND TRUSTS

- Estate and Trust Planning
- Will and Trust Preparation
- Estate and Trust Administration
- Charitable Gift Planning

### BUSINESS

- Formation – Corporations, Partnerships, Limited Liability Companies
- Planning and Structuring
- Business Succession Planning
- Business Agreements
- Mergers and Acquisitions

### TAX

- Planning and Structuring
- Representation Before IRS and Federal Courts
- Private Foundations

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