

**Attorney Timothy P. Crawford, CPA, CELA\*, CAP\*\***  
wanted to share this information with you.

## **UPDATE ON STATUS OF ESTATE TAX**

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Many NAELA members are concerned about the repeal of the estate tax and what this means to how they manage their clients' planning needs. While it is the general consensus that the law will be reinstated retroactively, keep in mind that the general consensus was that we would not be in this position now.

To put it concisely, there currently is no estate tax, a \$1 million gift tax exemption, a gift tax rate of 35%, and carryover basis subject to some exemptions.

The major issue you will come across in wills and trusts is when the disposing documents use formula bequests, such as leaving an amount equal to the estate tax marital deduction to the spouse and any excess to a credit shelter trust or outright to children. In such a case, since there is no estate tax and the marital deduction does not exist, there is a question of whether the marital deduction bequest will be funded. If it is not, the surviving spouse will receive nothing. It is possible that a court might interpret this type of provision to be determined by applying the laws in effect at the time the document was signed. A similar situation arose in 1981, when the unlimited marital deduction came into being. Prior to 1981, the marital deduction was limited to the greater of \$250,000 or 50% of the estate. Where this formula was stated in the document, the unlimited marital deduction was not allowed. However, if the document stated "the maximum marital deduction allowed by law," the unlimited marital deduction would apply.

Under Section IRC 1022, basis of his or her assets will "carryover" to those who inherit the property. However, decedent's executor may allocate up to \$1.3 million to increase the basis of property but in no event higher than the fair market value as of the decedent's date of death.

The allocation of increased basis provision is not to increase the basis of property worth \$1.3 million to \$1.3 million, but rather to increase basis by \$1.3 million.

For example, a child of the decedent inherits property worth \$3million in which the decedent's basis at death was \$1.5 million. The executor may elect to increase the basis of the property to \$2.8 million. If the property were worth only \$2 million when the decedent died, the executor could increase the property's basis from \$1.5 million by \$500,000 to \$2 million (and no higher) and could allocate the remaining \$800,000 of basis increase to other appreciated property (limited, again, to the fair market value of such asset at the decedent's death).

If the decedent is married, the decedent's executor can also allocate up to an additional \$3 million to increase the basis of assets that the surviving spouse receives outright or through a QTIP trust (that follows the same rules that existed prior to 1/1/2010). Collectively, these items are referred to as "Qualified Spousal Property." Note that a QTIP trust qualifies for the estate tax marital deduction when there is an estate tax only to the extent the executor elects for it to qualify. However, no such election is necessary for a trust otherwise described in Section IRC 2056 to constitute Qualified Spousal Property to which the \$3 million basis increase may be allocated by the executor.

**“Those Who Plan Ahead Win.  
Those Who Don’t Plan Ahead Lose.”**

This article is not intended as legal advice. It is basic information. I would recommend that you call Attorney Timothy P. Crawford for a free conference to discuss your situation in more detail. Attorney Timothy P. Crawford can be reached toll-free at 1-888-634-6675. When you call in, please mention the fact that you have read this article.

\*Attorney Timothy P. Crawford is a Nationally Board \*Certified Elder Law Attorney. He has been Board Certified by the National Elder Law Foundation which has been approved as the Sole Certifying Organization for Elder Law Attorneys by the American Bar Association.

\*\*Timothy P. Crawford was invited to join the Council of Advanced Practitioners of the National Academy of Elder Law Attorneys (NAELA) in August of 2005. The \*\*Council of Advanced Practitioners (CAP) is a small group of premier elder law attorneys, all of whom have been members of NAELA for at least 10 years, are certified as elder law attorneys by the National Elder Law Foundation, and are AV rated the top in the nation by Martindale Hubbell. A Service that provides an independent rating of the quality of attorneys.

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