newsletter

**Oregon Estate Planning and Administration Section Newsletter**
Volume XIX, No. 1
January 2002

Published by the Estate Planning and Administration Section of the Oregon State Bar

# Educational Planning in the 21st Century

As the demand for higher education has increased, so has its cost, leaving concerned parents clamoring for more affordable ways to finance their children's college educations. Over the past few years, Congress has responded to this public demand with various changes to the tax code. The Taxpayer Relief Act of 1997 (the "1997 Act") was its first major attempt, creating Education IRAs and education credits. A second installment of education-oriented changes to the tax code passed earlier this year as part of the Economic Growth and Tax Relief Reconciliation Act of 2001 (the "2001 Act"). This article surveys various types of government-created aid intended to help Americans ensure that their children and grandchildren have the opportunity to obtain college degrees.

## Custodial Accounts and Direct Gifts

Custodial accounts hold outright transfers of assets from the donor to a minor, taking advantage of the Uniform Transfers to Minors Act and the gift tax exclusion of $10,000 per year per donee. Although the minor does not have control of the funds until he or she is 18 years old, the minor is considered the owner of the assets.

Even with the imposition of the "kiddie tax," having income-producing assets in a child's name can reduce income taxes. The calculation of income attributable to children under the age of 14 results in an exemption of $1,400 per year, with any excess unearned income being taxed at the parents' rates. In addition, the kiddie tax does not apply to children over the age of 14, allowing older children to be taxed at their own, lower rates. This $1,400 exemption and the exclusion of children over 14 from the kiddie tax can represent some limited tax savings, especially to higher-income taxpayers.

Even though some tax can be saved by using custodial accounts and direct gifts, there are two main concerns. First, once the child turns 18 he or she will have total control of the funds and may elect to spend the money on items other than education. Second, saving money in a child's name can prove disastrous when the child applies for financial aid. Schools generally consider 35 % of a child's assets and 50 % of his or her income to be available to pay for college, compared with only around 5 % of parent's assets.[1] Thus, children whose families have similar income and assets may receive very different financial aid packages, depending on whose name is on the college savings account.

Due to these considerations, most children will be better off if their college savings are owned by their parents, they take any financial aid that is offered (including low-interest student loans), and their grandparents delay making financial gifts until the student loans come due. For families that receive no financial aid or are hesitant to take out student loans, generous grandparents could pay tuition expenses, writing a check directly to the school. This method gives the donor complete control and results in no gift tax consequences. IRC §

## In This Issue

2503(e). Further, direct payment will not affect the child's eligibility for financial aid in the first year, although such a payment may affect future eligibility.

## U.S. Savings Bonds

Qualified U.S. savings bonds, Series EE bonds issued after 1989, and Series I bonds can be both state and federal income tax-free if the bondholder pays qualified higher-education expenses during the year the bond is cashed. If the total expenses paid are less than the amount received when the bond is cashed, only part of the interest is excludable. IRC § 135. Qualified higher-education expenses include payments of tuition and associated fees as well as contributions to Section 529 plans and Education IRAs, but do not include expenses associated with room and board. IRC § 135(c)(2)(C).

Not all taxpayers can take advantage of this special tax treatment. Any taxpayer who has a modified adjusted gross income of more than $69,100 ($110,100 if filing jointly) does not qualify. In addition, the bondholder must be at least 24 years old and be paying for the education expenses of the bondholder, the bondholder's spouse, or the bondholder's dependent, making this useless for grandparents.

## IRAs

IRAs, the staple of retirement planning for many Americans, allow tax deductible contributions to grow tax free until distributions are taken from the account. If distributions are made before the age of 59 ½, and are not for a qualified expense, an additional 10% tax penalty is assessed against the distributed amount. The 2001 Act raised the annual contribution limits from $2000 to $3000 in 2002, increasing up to $5,000 by 2008. The 2001 Act did this by amending § 408(a)(1), substituting "the amount in effect under § 219(b)(1)(A)" for the $2,000 maximum annual contribution limit. These provisions will sunset at the end of 2010.

To help make saving for college easier, the 10% penalty on withdrawals from these accounts before the owner turns 59 ½ is waived if those withdrawals are used to pay "qualified higher educational expenses" for the account owner or for his or her spouse, children, or grandchildren. IRC § 72(t)(7)(A). For IRA purposes, "qualified higher educational expenses" is broadly defined and includes room and board for students who attend school more than half time, allowing more leeway in what is considered penalty-free expenses.

Although this special treatment of educational expenses does give parents and grandparents another source of funds for college, they must remember that these withdrawals come at the cost of their retirement planning. For parents who have high school seniors and no college savings, withdrawals from their IRA may be a good last resort. However, for parents who have more time to plan for educational expenses, the recent increase in the contribution limit of Education IRAs make these new savings accounts much more attractive then using funds from a traditional IRA for college.

## Education IRAs

Education IRAs (renamed Coverdell Educational Savings Accounts by the 2001 Act) are, in essence, custodial accounts on which Congress has bestowed special tax treatment in exchange for certain limitations. First, an Education IRA must be designated as such upon creation and must have a named beneficiary. Second, all contributions to an Education IRA must be made in cash, and no contributions are allowed after the designated beneficiary's 18th birthday. Third, the balance of the account must be distributed to the beneficiary within 30 days of his or her 30th birthday or to the beneficiary's estate if he or she dies before the age of 30. IRC § 530. Fourth, the funds must be used for "qualified higher education expenses," which include room and board expenses for students who attend school more than half time, as well as tuition. In exchange for complying with these rules, all amounts distributed from the account and used to pay for qualified higher-education expenses are not subject to income tax. IRC § 530(d)(2). However, original amounts contributed to Education IRAs are not tax-deductible, and the annual contribution limits are per child, not per account.

Distributions from Education IRAs also retain their tax-free characteristics if they are contributed to a Section 529 plan. Furthermore, the 2001 Act repealed the excise tax on contributions made to an Education IRA during the same taxable year as contributions to a qualified state tuition program. IRC § 530(b)(2). The 2001 Act also increased the contribution limit from $500 to $2,000, IRC § 530(b)(1)(A)(iii), as amended by Pub L No. 107-16 § 401(a), and increased the income amounts at which phase-out of the contribution limits occurs for married taxpayers filing jointly from $150,000 to $160,000 of modified adjusted gross income to $190,000 to $220,000. IRC § 530(c)(1), as amended by Pub L No. 107-16 § 401(b). The phase-out range for single taxpayers remains between $95,000 and $110,000. IRC § 530. As discussed above, because Education IRAs must be set up in the student's name, a school's financial aid office will consider a higher percentage of these funds to be available for educational expenses, resulting in a lower financial aid package. This could result in lower- and middle-income taxpayers losing more in government aid than they saved in taxes. Although the 2001 changes to Education IRAs have improved their usefulness to American families, due to these factors the Oregon College Savings Plan, with its preferred Oregon tax treatment, may be a better option to save for college expenses.

## Qualified State Tuition Programs

Section 529 plans are actually two different types of plans that may be established by a state to help taxpayers save for higher education. The first type, Prepaid College Tuition Plans, allows taxpayers to pay tuition at the present rates and apply this credit against future education costs, avoiding any inflation in tuition. IRC § 529(b)(1)(A)(i). The second type, College Saving Plans, allows taxpayers to make contributions to an account established for a particular beneficiary for the purpose of funding qualified higher-education expenses. IRC § 529(b)(1)(A)(ii). Contributions to plans do not have an annual limitation. Instead, all contributions over the lifetime of the accounts cannot exceed the amount necessary to fund qualified higher-education expenses. Although no federal deduction is allowed for such contributions, no tax is due on the earnings until those amounts are distributed. The distributed earnings are then taxed at the student's lower rates.

Section 529 plans offer a great deal of flexibility because accounts can be transferred from one beneficiary to another. Amounts in these accounts can be transferred tax-free to a Section 529 plan for a different beneficiary, and the beneficiary on any account may be changed (within certain limitations). IRC § 529(e)(1)(C), (2).

Contributions to both types of plans are considered completed gifts, qualifying for the annual gift exclusion. Even though the owner of the account, not the beneficiary, retains control of contributed funds, these amounts are still removed from the owner's estate. Contributions of up to $50,000 can be made gift tax-free if they are prorated over a five-year period, allowing $10,000 to "lapse" under the annual exclusion each year. If the donor dies before the entire amount has lapsed, the amount that has not lapsed will be included in his or her estate. IRC § 529(c)(4)(C).

The newly enacted Oregon College Savings Plan is the second type of Section 529 plan. This plan requires a minimum initial contribution of $250 and has a lifetime maximum contribution limit of $150,000 per beneficiary. Contributions of up to $2,000 to these plans also have the benefit of being tax-deductible on Oregon income tax returns. Beginning in 2003, qualified withdrawals from these accounts will also be tax-exempt on Oregon returns. HB 3080, Or Laws 2001, ch 212. In addition, Oregon College Savings Plan assets are not currently considered to be owned by the child; therefore, they will likely have less of an impact on financial aid than will Education IRAs.[2]

Taxpayers investing in an Oregon College Savings Plan should be aware that either the account owner or the account beneficiary must be an Oregon resident to qualify to set up such a plan. However, if the resident moves out of state, contributions may still be made to that account and the beneficiary can still use the money when it is needed for education expenses. Other private Section 529 plans, such as those offered by other states, do not have residency requirements.

## Hope and Lifetime Learning Education Credits

Created under the 1997 Act, the Hope Scholarship and Lifetime Learning credits offer taxpayers a nonrefundable credit for a percentage of qualified tuition and related expenses, not including room and board, paid by the taxpayer. The Hope credit provides for a maximum credit of $1,500 for each of the first two years of higher education. The student must be pursuing a degree or other recognized certificate and attending school at least half-time. The Lifetime Learning credit is allowed for 20 % of the first $5,000 of qualifying expenses, with a maximum credit of $1,000 per return. Unlike the Hope credit, the Lifetime Learning credit is allowed for unlimited years during which any postsecondary education qualifying expenses were incurred, regardless of whether the student pursued a degree or attended school more than half-time.

For purposes of either credit, it does not matter who paid the education expenses, so long as the money was used for qualified tuition and expenses. Thus grandparents could pay tuition directly to the school without any gift tax consequences and the parents could claim the credit on their return. This separation of who pays the education expenses and who can take the credit benefits higher-income taxpayers who cannot claim the credit. The credit is phased out for taxpayers with adjusted gross incomes above $40,000 ($80,000 for joint returns) and eliminated for taxpayers with incomes above $50,000 ($100,000 for joint returns). A high-income taxpayer can choose to forgo claiming his or her child as a dependent, allowing the student, who has a much lower income, to claim the credit on the student's tax return. For students who have little taxable income, the tax savings may not be enough to make up for the parents' loss of the dependency exemption; however, many families will realize some tax savings using this strategy. Under the 1997 Act, neither credit was permitted in a year in which the student received distributions from a qualified tuition program. IRC § 25A(e)(2) (1997). The 2001 Act changed this rule, allowing taxpayers to claim the credit so long as the distributions from the qualified tuition program were not used to pay the same expenses for which an education credit is claimed. IRC § 529(c)(3)(B)(v), as amended by Pub L No. 107-16 § 402(b)(1). Neither credit is refundable, nor may both credits be claimed for the same student in the same year.

## Deduction for Qualified Higher-Education Expenses

Created under the 2001 Act, new § 222 allows for an above-the-line deduction for qualified higher education expenses, not including room and board, for taxable years 2002 through 2005. In 2002 and 2003, a taxpayer who has modified adjusted gross income of less than $65,000 ($130,000 for joint returns) can obtain an annual deduction of up to $3,000 for educational expenses paid by the taxpayer. That maximum annual deduction increases to $4,000 in 2004 and 2005. In addition, a taxpayer whose adjusted gross income does not exceed $80,000 ($160,000 for joint returns) will be allowed a maximum deduction of $2,000 per year in 2004 and 2005. IRC § 222(b).

Section 222 allows higher-income taxpayers who do not qualify to claim education credits a chance to deduct some of their education expenses. In 2002 and 2003, a taxpayer with a modified adjusted gross income of $89,000 will net tax savings of around $600 if he or she takes the maximum deduction allowed. The same taxpayer, who is in the phase-out range for the education credits, would be able to claim 55 % of the available Hope and Lifetime Learning credits, or $825 per Hope credit and $550 per Lifetime Learning credit. Thus, if this taxpayer has only one child who is eligible only for a Lifetime Learning credit, the taxpayer will recognize a higher tax savings if he or she uses the deduction instead of the credit. Taxpayers with lower incomes and taxpayers with more than one child eligible for an education credit will recognize a higher tax savings if they use the available credits.

Taxpayers will not be allowed to take deductions for amounts distributed from an Education IRA, amounts distributed from a qualified tuition plan that are excludable from income, or the amount of interest excludable for education savings bonds. IRC § 222(c)(2)(B). Also a taxpayer may not claim an education credit in the same year as a Section 222 deduction for the same student. IRC § 222(c)(2)(A).

For higher-income taxpayers, this credit can translate into significant savings. For example, a couple with a modified adjusted gross income of $100,000 will save $819 annually in taxes in 2002 and 2003, and $1,053 annually in 2004 and 2005. However, a different couple with a modified adjusted gross income of $89,000 —within the phase-out range for the education credits, but lacking a high enough income for the deduction to reflect a higher tax savings than the credit that is allowed—will save only $825 (for a single Hope credit) and $550 (for a single Lifetime Learning credit) each year.

## Student Loans

There are three basic types of government-sponsored student loans: Perkins loans, which are available to students with the greatest amount of financial need; federal subsidized loans, which are available to students with moderate financial need and accrue no interest while the student attends school; and federal unsubsidized loans, which are available to students with some financial need but require students to pay the interest, allowing them to capitalize these payments to avoid making payments during college. Interest rates for Perkins loans are fixed at 5 %, and the other two types of loans have variable rates with a maximum of 8.25 %.

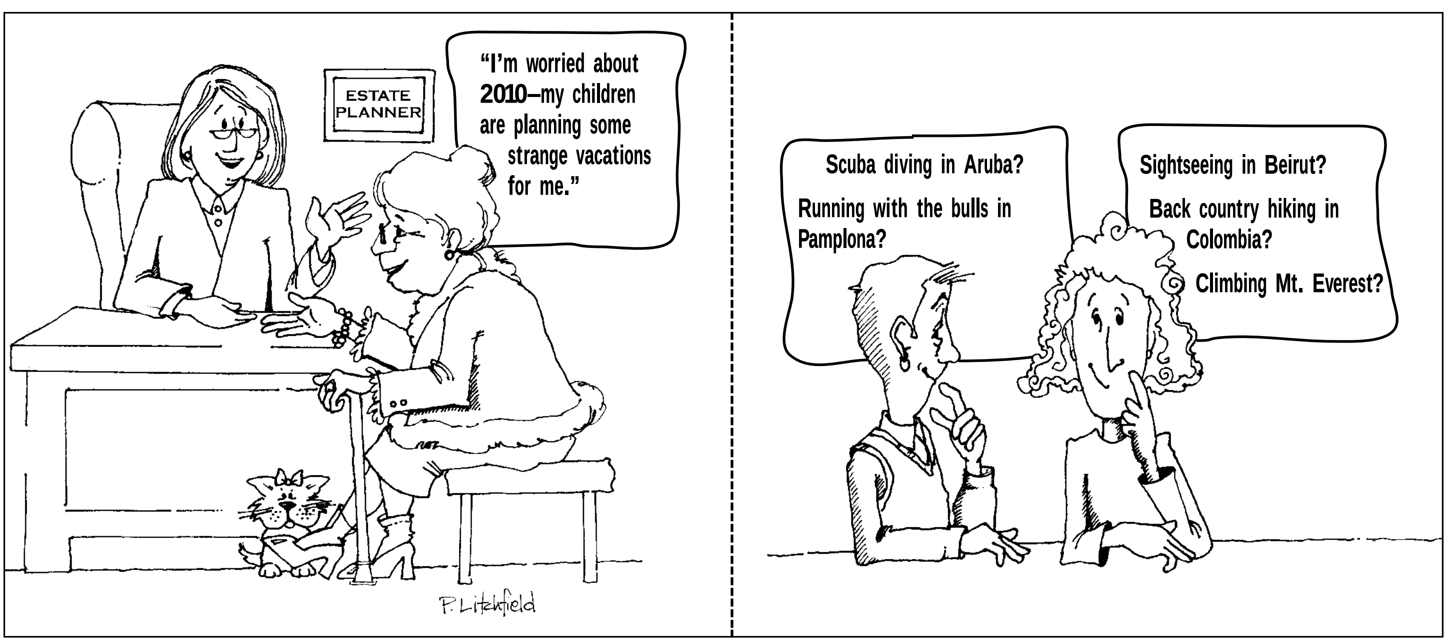
Section 221 permits payments of student-loan interest to be claimed as an above-the-line deduction if certain qualifications are met. First, the proceeds of the original loan must have paid only for qualified higher-education expenses while the student was attending school at least half-time. Second, eligibility to take the deduction is limited starting at incomes of $50,000 ($100,000 for joint returns), and no credit may be claimed with incomes of $65,000 or more ($130,000 for joint returns). Third, the education expenses must have been paid or incurred within a reasonable period of time before or after the loan was made. Taxpayers meeting these requirements may deduct up to $2,500 of the loan interest paid in that year, regardless of whether or not the payment of interest is voluntary. IRC § 211(b)(1). The 2001 Act also extended the time limit for this deduction to the life of the loan; formerly, interest could be deducted only if it was paid during the first 60 months of required interest payments. IRC 211, as amended by P.L. 107-16 § 412.

*Tricia M. Hill*
*The Clark Law Firm*
*Eugene, Oregon*

## Endnotes

1 Jennifer Mulrean, “13 Ways To Get More Dollars for Your Scholar,” at http://moneycentral.msn.com/articles/family/funds/7289.asp (last visited Nov. 14, 2001).

2 Julie Tripp, “Tuition Assistance: A New Savings Program Is Well Worth Studying for Oregonians Who Have Futures To Plan,” *The Oregonian* (Jan. 7, 2001).



# Estate Planning Under the 2001 Tax Act: Planning for the Unpredictable

The Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16, 2001 USCAN 115 Stat 38 ("EGTRRA"), made substantial changes to the estate, gift, and generation skipping tax ("GST") laws. The changes phase in over nine years beginning in 2002, with total repeal of the estate and GST tax laws (but not the gift tax) effective in 2010. Then, under a "sunset" provision, the EGTRRA changes are eliminated and current laws will again apply.[1] Few planners seem to believe that the new law will remain in its current form during the entire nine years, yet no one can safely predict how Congress might change it. Planning in this environment of uncertainty is challenging, but not impossible.

## Planning for Moderate Estates

The primary planning decisions under the new regime remain the same. The first is whether or not to engage in estate tax planning at all. Tax planning may not make sense for a client couple with a combined estate under a certain amount. That amount has roughly been the exemption amount ($675,000 in 2001) and should remain so as the exemption increases. Thus, in 2002, couples with assets of less than $1 million will not generally need tax planning, unless the value of their assets is likely to grow.

When advising clients with assets in excess of the exemption amount—but not greatly so—the decision in most cases will continue to be whether to employ a disclaimer trust, to which the surviving spouse may disclaim assets in order to reduce his or her taxable estate, or to include a credit shelter or bypass trust in the client's estate plan. The choice depends on the philosophy of the lawyer, the size of the estate and the desires of the client. Some lawyers dislike relying on disclaimer trusts because they do not trust the surviving spouse to make a reasoned decision or to properly make a "qualified" disclaimer for tax purposes; because they like the non-tax benefits of trusts generally, such as protection from creditors; or because disclaimer trusts are generally less flexible than bypass trusts (for example, the disclaimer trust may not confer on the surviving spouse a power of appointment). Disclaimer trusts do serve a useful purpose, however, in preserving tax planning flexibility where the client prefers to leave everything outright to the surviving spouse.

Some practitioners plan for clients with moderate wealth by using a Qualified Terminal Interest Property (QTIP) trust for the surviving spouse's share of the deceased spouse's entire estate. The personal representative (or trustee) must determine whether or not to make a QTIP election as to all or a portion of the trust. This approach takes the decision out of the hands of the surviving spouse (assuming he or she is not the personal representative). The regulations provide that the unelected portion may contain different terms than does the elected portion, allowing, for example, the elimination of the requirement that all income be paid to the surviving spouse, in favor of a discretionary income standard. Treas. Reg. § 20.2056(b)-7(d)(3).[2] The document should make clear what happens in the absence of an estate tax (and QTIP) election, i.e., which trust terms should prevail.

## Planning for Larger Estates

For the last 20 years or so, planning for larger estates that approach or exceed the exemption amount of both spouses has generally involved the use of a formula to divide the estate between a bypass trust and a marital portion (distributed either outright to the surviving spouse or to a marital trust). The formula may create a pecuniary amount to be distributed to the bypass trust with the residue distributed to the marital share, or a pecuniary amount may be created for the marital share, the minimum amount necessary to reduce taxes to zero, with the residue distributed to the bypass trust. Some lawyers use fractional share formulas rather than pecuniary formulas. For income tax reasons, lawyers generally would choose the method producing the smallest pecuniary portion or would use a non-pecuniary funding formula.[3]

Three factors make planning for larger estates more difficult under EGTRRA. First, there are now two moving targets: the size of the client's estate and the size of the estate tax exemption (which increased only modestly under prior law). Second, the possibility of estate tax repeal seems more likely and that would render formula clauses meaningless. Third, carryover basis rules may apply in the future.

The changes in the tax laws under EGTRRA, and the probability that these new laws will also change in the next few years, creates a level of unpredictability not previously experienced by most planners and advisors. Lawyers planning estates should not assume that any particular exemption amount will prevail, but should instead "run the numbers" in order to determine what each beneficiary's share will be under the plan as the exemption increases or if the estate tax is repealed.[4]

One cautious approach is to use the applicable exemption amount as much as possible through the use of a bypass trust to shelter as much of the couple's assets as possible from future estate taxes. One method of accomplishing this is to use the type of joint trust illustrated in PLR 200101021, in which the first spouse to die has a general power of appointment over all of the trust assets, so as to include all of the assets of the trust in the estate of that spouse for estate tax purposes through the application of IRC §§ 2038 and 2041. All of the trust assets, not just the portion owned by the deceased spouse, are then divided between a bypass trust and, if necessary, a marital trust.

As the exemption amount increases, bypass trusts are more likely to consume all or a large portion of the decedent's estate. The drafter who normally would use a formula bypass trust with a residual marital share should consider using a pecuniary marital formula with a residuary bypass trust instead, or use a fractional share funding formula, to avoid funding a large pecuniary share. It may be desirable (especially for the surviving spouse) to build as much flexibility as possible into the bypass trust, by including limited powers of appointment and "five and five" withdrawal powers. It may also be desirable to provide that all income of the bypass trust be distributed to the surviving spouse, in order to help qualify the trust as a QTIP trust under the carryover basis rules (discussed below).

Many estate plans currently employ GST trusts to absorb the "available GST exemption" of the decedent. Obviously, the lawyer should determine how the increase in the GST exemption and the possible repeal of the GST tax will affect the size of the trust. In most cases, the lawyer should consider including a ceiling in the amount passing to the trust, and in some cases consider including a floor.

The bottom line is to test all formula clauses and QTIP elections under various scenarios, including repeal. Planners should review all existing plans to determine the effect of the new laws. Some plans may need to be modified, especially where the applicable exemption amount or some portion of it passes directly to the children or other non-spouse beneficiaries and is not held in trust for the surviving spouse, or where a GST trust is used. On a positive note, as the exemption increases, the focus of planners will move away from purely tax-driven planning and towards helping the client achieve his or her dispositive desires.

## Planning Effects of New Basis Rules

The new carryover basis rules of § 1022, which will be effective in 2010 (only), allow a basis increase of up to $1.3 million for all assets held by a decedent at the time of death, with an additional increase of up to $3 million for property passing outright to a surviving spouse or in the form of a QTIP trust. Trusts benefiting the surviving spouse should be structured to qualify as QTIP trusts under the carryover basis rules. To qualify, the surviving spouse must be entitled to all trust income for life and no person, including the surviving spouse, may have a power of appointment exercisable in favor of anyone other than the surviving spouse during his or her lifetime. Unlike a QTIP trust established for marital deduction purposes, no QTIP election is required. Planners may be able to use disclaimers to obtain QTIP treatment for an otherwise disqualified trust. For example, a surviving spouse could disclaim a lifetime power of appointment in what would have otherwise been a bypass trust if the deceased spouse died prior to 2010, and thereby qualify the trust for QTIP treatment.

On the second spouse's death, assets passing from the QTIP trust to the remainder beneficiaries will not be entitled to the step-up, while assets passing directly from the surviving spouse will qualify. Therefore, the trust provisions should allow the surviving spouse to withdraw assets sufficient to use his or her personal $1.3 million basis step-up or allow the trustee to make a distribution in this amount on the death of the surviving spouse, if doing so is consistent with other tax and non-tax concerns. For larger estates, the trust may also allow the surviving spouse to disclaim assets in excess of the amount needed for the full allowable basis step-up (i.e, in excess of $3 million).

The basis increase allocation under the carryover basis regime is to be made by the "executor." IRC § 1022(d)(3). Presumably, this means the person or persons responsible for filing the return required by the new law. The decedent's will should guide the personal representative (or trustee, if applicable) in the allocation of the basis step-up, whether the document gives the personal representative unfettered discretion or requires some equitable allocation. The authority given to the personal representative should apply to all assets eligible for the basis step-up, not just probate or trust assets (much like a tax allocation clause would operate).

## State Tax Effects

Another new variable in the estate planning equation is that the new law may not affect the amount of the state inheritance tax payable in Oregon, even though the amount of the state death tax credit drops by 25% each year over the next four years and is replaced by a deduction. Oregon law directly refers to IRC § 2011—the state death tax credit allowed against federal estate taxes—in determining the amount of the state inheritance tax. ORS 118.010(2). When a statute adopts by specific reference the provisions of another statute, the provisions of the other statute are incorporated in the form in which they exist at the time of

**Questions, Comments or Suggestions About This Newsletter?**

***Contact:*** Susan N. Gary, 1221 University of Oregon School of Law,
Eugene, OR 97403-1221, (541) 346-3841, E-mail: sgary@law.uoregon.edu

the reference, and not as subsequently modified. *Seale v. McKennon*, 215 Or 562, 572 (1959). The author understands that the Oregon Attorney General's office is considering this issue. Until the issue is resolved, planners must consider the possibility that the inheritance tax will be based on a determination of the allowable state death tax credit under pre-EGTTRA law and factor in inheritance taxes when reviewing the client's estate plan. Tax allocation clauses in estate planning documents should be drafted to address this issue.

## Other Planning Issues

To provide additional flexibility in this unpredictable environment, planners may wish to employ one or more independent trustees or "trust protectors." These are independent persons or entities who have the power to modify trusts in certain respects, such as by changing standards or circumstances of distributions, terminating or extending the trust term, or changing the situs of administration.[5]

Clients should continue lifetime giving under the new Act and, if they are willing and able to do so, use their increased gift tax exemption as soon as possible. However, taxable lifetime gifts no longer make much sense for most clients. Through exempt lifetime giving, it may be possible for many clients to reduce their estates to a point at which an estate tax return is not required. Transfer and gift planning techniques employing Grantor Retained Annuity Trusts (GRATs), family limited partnerships, installment sales to defective trusts, and charitable trusts all remain viable ways to reduce the taxable estate under the new Act. As under prior law, it still makes sense for most clients to give away high basis assets and retain the low basis assets to which the basis increase exception to the carryover basis rules may apply.

Clients should be advised to maintain detailed basis records of their assets, especially for the more valuable assets. Good recordkeeping will help the client and the client's family in several ways. First, it will be much easier for clients to determine the basis of their assets now, and to maintain current records of assets they acquire in the future, than to try to determine basis years after the fact if carryover basis rules are indeed imposed. Second, assuming carryover basis does become reality, knowing the basis of the assets will help the client plan for the maximum basis increase. Third, the client's heirs will be able to maximize the use of the basis increase and will be able to establish basis for assets to which the basis increase was not applied.

## Conclusion

Planning under the new laws is not substantially different in theory than it was in the past. The primary problem for advisors will be dealing with the uncertainty imposed by the new law and the likelihood that Congress will somehow change the law in the near future. Perhaps the best way to plan for future changes in the law is to run the numbers under various assumptions to see what happens under the particular client's plan. Planners should anticipate the possibility of a carryover basis regime, which Congress may impose even if estate taxes are not repealed, and factor that into their plans. To avoid unintended consequences, practitioners should review estate plans more frequently than in prior years and advise clients to plan for anticipated law changes now, rather than take a "wait and see" approach, in cases where changes in the law may materially affect the plan.

*Stephen J. Klarquist, LL.M.*
*Zalutsky & Klarquist, P.C.*
*Portland, Oregon*

## Endnotes

1 For a detailed discussion of the law changes, *see* Timothy R. Strader, "The New Tax Act—An Overview of Estate, Gift and GST Provisions," *Or Est. Plan. & Admin. Sec. Newsl*. (Oct. 2001).

2 For a more thorough discussion of this technique, *see* Shannon Connelly, "Estate Planning Strategies under the 2001 Tax Act," *Lewis & Clark Tax Inst. Course Materials*, (Oct. 26, 2001); Jonathan Blattmachr & Lauren Detzel, "Estate Planning Changes in the 2001 Tax Act—More Than You Can Count," *J. Tax'n*, (Aug. 2001).

3 For an excellent discussion of marital/bypass formula clauses and the tax implications of each, *see* Jeffrey N. Pennell, "Estate Tax Marital Deduction," 843 *BNA Tax Management Portfolio*.

4 It may be desirable to include a provision that affirmatively states what will happen in the absence of estate taxes. *See* Blattmachr *supra* n. 2, for examples of various clauses for wills and trusts.

5 *See* Connelly, *supra* n. 2.

# CALENDAR OF SEMINARS AND EVENTS

- January 7-11, 2002 (Sponsored by University of Miami School of Law) **36th Annual Philip E. Heckerling Institute on Estate Planning**, Fontainebleau Hilton Resort and Towers, Miami Beach, FL. Telephone: (305) 284-4762.
- January 14-16, 2002 (Sponsored by USC - The Law School) **54th Annual Institute on Federal Taxation,** The Wilshire Grand Hotel, Los Angeles, CA. Telephone: (213) 740-2646.
- January 18, 2002 (Sponsored by Professional Education Systems) **Probate & Post Mortem Planning,** Embassy Suites Phoenix Biltmore, Phoenix, AZ. Telephone: (800) 826-7155.
- January 25, 2002 (Sponsored by The Estate Planning Council of Portland, Inc.) **31st Annual Estate Planning Seminar,** Oregon Convention Center, Portland, OR. Telephone: (503) 244-4320.
- February, 6, 2002 (Sponsored by Professional Education Systems) **Estate & Tax Planning Issues,** Crowne Plaza, White Plains, NY. Telephone: (800) 826-7155.
- February, 7, 2002 (Sponsored by Professional Education Systems) **Estate & Tax Planning Issues,** Marriott Melville, Melville, NY. Telephone: (800) 826-7155.
- February 21, 2002 (Sponsored by ALI-ABA) **Annual Winter Estate Planning Practice Update,** Gus J. Solomon Courthouse, Portland, OR. Telephone: (800) 222-8213.
- February 21-23, 2002 (Sponsored by ALI-ABA) **Advanced Estate Planning Techniques,** Maui, HI. Telephone: (800) CLE-NEWS.
- April 22-26, 2002 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates,** Plaza Hotel, New York City, NY. Telephone: (800) CLE-NEWS.
- May 30-31, 2001 (Sponsored by ALI-ABA) **Charitable Giving Techniques,** Boston, MA. Telephone: (800) CLE-NEWS.
- June 23-28, 2002 (Sponsored by ALI-ABA) **Estate Planning in Depth,** Madison, WI. Telephone: (800) CLE-NEWS.

## What's New

### *In re Matter of the Marriage of Albers*

174 Or App 243, May 9, 2001

This case raises the question whether the statutory rebuttable presumption of equal contribution and ownership of property acquired during a marriage applies in dissolution cases when one spouse acquires property by gift or inheritance prior to the marriage. *See* ORS 107.105(1)(f). In this case the couple had cohabited prior to their marriage, sharing living expenses and a joint bank account from which they paid bills, commingling their assets, and jointly managing their personal and economic affairs.

On *de novo* review, the court of appeals held that the wife's inheritance from her aunt was subject to the statutory presumption of equal contribution and ownership even though she received it during a two-year period prior to the marriage. Because the wife's aunt never met the husband, however, and, in fact, had made her will long before husband and wife met, the presumption was rebutted. Nonetheless, the court of appeals affirmed the trial court's decision to award part of the inheritance to the husband because it had become in part a "commingled asset" held in joint investment accounts. The only part of the inheritance not subject to division was the portion wife placed in an investment account in her separate name. Husband would have had a claim to one-half of the appreciation on this separate account, but, unfortunately, the value of the account had declined.

*Amy Silliman, Miller Nash LLP, Portland, OR*

PRESORTED STANDARD
U.S. Postage
**PAID**
Portland, OR
Permit No. 341

Oregon State Bar
Estate Planning and
Administration Section
PO Box 1689
Lake Oswego, OR 97035-0889