



GUNSTER

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**SOUTH FLORIDA
LEGAL GUIDE**

Lisa Schneider is a shareholder who joined the firm in 1994.

Practice Areas

- Estate and Trust Planning
- Probate and Trust Administration
- Tax Preparation and Audits
- Guardianship Administration
- Estate, Gift and Generation-Skipping Tax Planning
- Fiduciary Representation
- Advanced Estate Planning Strategies
- Tax Exempt Organizations
- Charitable Planning

Education

St. John's University, J.D., 1987

Dean's List, 1984-1987

State University of New York at Binghamton, B.A.,
cum laude, 1984

Certificate in Business Management

Bar Admissions

Florida Bar, 1994

Board Certified, Wills, Trusts and Estates, 2003

New York Bar, 1988

New Jersey Bar, 1987

Court Admissions

United States District Court

District of New Jersey, 1988

United States District Court

Southern and Eastern Districts of New York, 1988

Professional Associations & Memberships

New Jersey Bar Association

American Bar Association

New York Bar Association

Florida Bar Association

Palm Beach County Estate Planning Council

Martin County Estate Planning Council

Florida Association of Women Lawyers, Treasure Coast
Chapter, former member

Treasure Coast Planned Giving Council

East Coast Estate Planning Council

Foundation of the Jewish Federation of Palm Beach County,
Professional Advisory Committee

Palm Beach County Bar Association

Martin County Bar Association, Elder

Law/Probate/Guardianship Committee member

United Way of Martin County Foundation, Professional
Advisory Committee member, 2003-04

Honors

South Florida Legal Guide, Top Lawyer, 2009-10
Cambridge Who's Who Registry Among Executive and Professional Women, 2008-09
Florida Super Lawyer, 2007-09
Selected as a finalist for *South Florida Business Journal's* "Key Partners Awards," 2007-08
Who's Who of American Women, 2008
Who's Who in America, 2007
The Best Lawyers in America, Trusts and Estates, 2007-10
AV Rated as independently determined by Martindale-Hubbell
South Florida Legal Guide, "Top Lawyers," 2006 Annual Edition
Robb Report's *Worth Magazine*, "Top 100 Attorneys," December 2005, 2007
Florida Trend, Legal Elite, February 2004
South Florida Business Journal's "Best of the Bar," 2003-04

Seminars & Presentations

"Tax Planning in Times of Uncertainty: Estate, Gift, and GST Tax Issues for 2010 and Beyond," The Planned Giving Council of Palm Beach County, Speaker, May 11, 2010
"Estate and Trust Administration Paralegal Association of Florida, Inc. 2009 Spring Seminar," May 2009
"Disclaimers at the 25th Annual Estate and Probate Seminar," Palm Beach County Bar Association, May 14, 2008
"A Trustee's Job is Never Done," Treasure Coast Chapter of the Paralegal Association of Florida, Spring Seminar, April 2008
"New Disclaimer Statute," Probate & Pumpnickel CLE, November 2005
"IRAs and the Elective Share," Palm Beach Estate Planning Council Roundtable, March 2005
"Wealth & Wisdom," WXEL, The Decoupling of State Estate Taxes, August 2004
"Old Bags: The Power of the Purse," The Bank of New York, February 2004
"Wealth and Wisdom," WXEL, November, 2003
"Maybe You Can Have It All," Florida Association of Women Lawyers, Palm Beach County Chapter, April 2002
"Estate Planning After The Economic Growth and Tax Relief Reconciliation Act of 2001," Florida Society of Ophthalmologists, September 2001
"Women In The Know-Planning Beyond Your Will," AAUW, February 2000
"Estate Planning: A Woman's Perspective," American Heart Association, February 1997
"Critical Estate Planning Issues: The Private Agenda For Today's Woman," presented with U.S. Trust Company of Florida, January 1995

Seminars & Presentations (continued)

"The Benefits of Estate Planning," presented with The Citicorp Private Bank, December 1995
"Estate and Creditor Protection Planning for the Successful Professional," presented by Gunster, Yoakley, Valdes-Fauli & Stewart, P.A. and Integrated Planning Services, September 1994

Publications

"Leaving New York Tax 'Potholes' and Avoiding Florida Homestead 'Sinkholes,'" *The New York Law Journal*, January 25, 2010
"Two Halves Do Not Necessarily Make a Whole," *Palm Beach Daily News*, Co-author, January 2007
"Through the Looking Glass: Does Your Estate Plan Work??" *Palm Beach Daily News*, Co-author, January 2006
"A Move to the Sunshine State: Leaving the Cold and Taxes Behind," Co-author, *Palm Beach Daily News*, January 9, 2005
Quoted in "Prenuptial Agreements, the Increasingly Common Consideration for Couples Today," *Vive Magazine*, August 2004, by Judy Martel
"My Brother's Keeper," *Palm Beach Daily News*, January 2004
"Can Front Loading in a 529 Plan Backfire?" *Palm Beach Daily News*, January 2003
"New IRS Proposed IRA Regulations," *Palm Beach Daily News*, January 2002
"In My Grandchildren I Trust," *Palm Beach Post*, January 2001
"Florida's Elective Share Law—It Can't Be Avoided Anymore!" *Palm Beach Post*, December, 1999
"Medicaid Planning Ideas - What Works and What Doesn't," *Estate Planning*, contributing author, November/December 1993
"Planning for the Elderly or Incapacitated Client," Sanford J. Schlesinger and Barbara J. Scheiner, researcher and contributing draftsman, CCH 1993

Civic & Community Service

Jewish Women's Foundation of the Jewish Federation of Palm Beach County, former Co-Vice-Chair and Founding Trustee
American Association of University Women, Stuart Chapter, former member
American Heart Association, Martin County Division Board of Directors, former member
2000 Heart Ball Committee
American Heart Association, Planned Giving Committee, former chair
Arthritis Foundation, member
Adopt-A-Family, Advisory Board member

Tax Planning in Times of Uncertainty

Estate, Gift, and GST Tax Issues for 2010 and Beyond

Update on the Current State of the Law and Potential Impact on Planned Giving

May 11, 2010

The Planned Giving Council of Palm Beach County

By: Lisa A. Schneider, Esq.

Gunster, Yoakley & Stewart P.A.



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***Tax Planning in Times of Uncertainty
Estate, Gift, and GST Tax Issues for 2010 and Beyond***

I. 2010 – A One Year “Repeal” of Estate and GST Taxes

A. Highlights of 2010 Law.

1. Repeal of Estate and GST Taxes. As the law currently stands, the United States federal estate tax and federal tax on generation skipping transfers is not effective for estates of decedent’s dying in 2010 and generation skipping transfers occurring in 2010.
2. Modified Carryover Basis. Instead of the IRC § 1014 basis rule that provides for a fair market value basis as of the date of death or the alternate valuation date, IRC § 1022 will provide for a modified carryover basis regime.
 - a. The general rule will be that the basis of property acquired from a decedent will be the lesser of (i) the decedent’s basis or (ii) the fair market value as of the date of death.
 - b. The carryover basis may be increased (not above fair market value as of date of death) by specified permitted basis adjustments.
 - (i) All estates are allowed a \$1.3 million basis adjustment under IRC § 1022(b).
 - (ii) Estates are allowed an additional \$3.0 million spousal basis adjustment for property passing directly to or in certain marital trusts for the benefit of the surviving spouse.
 - c. Section 1022 basis adjustments represent the amount that basis may be increased and not the value of the property that is being transferred.
3. Gift Tax Remains Applicable. The United States federal gift tax remains in effect with a \$1 million lifetime exemption and 35% tax rate for taxable gifts in excess of the \$1 million lifetime exemption.
4. State Death Taxes. State death taxes that are independent of the federal tax system are not affected by the nonapplicability of the Federal estate tax.

B. Possibility of Retroactive Legislation to Continue to 2009 Law.

1. Constitutional Issues. There has been much commentary and speculation regarding whether Congress will attempt to enact legislation to reinstate estate and GST taxes retroactive to January 1, 2010. Although not conclusive, most of the case law supports Congress’s ability to

retroactively change tax laws unfavorable to taxpayers. *See, United States v. Carlton*, 512 U.S. 26 (1994).

2. Estates Adversely Effected by Carryover Basis Rules Who Would Not Have Been Subject to Estate Tax. A number of estates that would not have faced any estate tax might be harmed by the IRC § 1022 carryover basis rules. These include small estates (under \$3.5 million) with highly appreciated property, estates with large marital or charitable deductions, estates with significant liabilities. In these cases, the estates would welcome retroactive legislation.
3. Election for 2010? There has been some suggestion from leaders in Congress that any legislation in 2010 could include an election that would allow estates of decedent's dying in 2010 to elect whether 2009 or 2010 law will apply to the estate.
4. No Guarantee of any Legislation in 2010. Four months have elapsed without any Congressional action, and with other legislation pending, there is no guarantee that Congress will enact any estate tax legislation this year.

C. Planning Issues for 2010.

1. Use of Formula Clauses. Where formula clauses are used, carefully analyze the language in formula clause to determine whether credit shelter devise is fully funded or marital/charitable (what would typically be estate tax deductible) is fully funded. Pay careful attention to language used in formula to determine which is fully funded. Although there can be no assurances as to how a state court would interpret a will or revocable trust if challenged by a beneficiary, we must recognize that formula clauses intended to get to the same result when a federal estate tax was applicable can have very different results when no federal estate tax is applicable. Compare the following common formula clauses:
 - a. If my spouse survives me, I devise to the Trustee the largest pecuniary amount, if any, that can pass free of federal estate tax **by reason of** the applicable credit amount (unified credit) allowable to my estate pursuant to § 2010 of the Code...
 - b. The "Federal Estate Tax Exempt Share" shall be the largest fractional share of my Residuary Estate which will not increase the federal estate tax on my estate, **after taking into account** as credits against such tax only the unified credit and the credit for state death taxes (to the extent that taking into account such credit does not increase any state death tax that is determined by reference to such credit and is imposed by the state where I am domiciled at my death)...

- c. Although both intended to reach the same result, the different language in each clause would lead to the result that in Clause (a) nothing would pass to the credit shelter devise because there is no applicable credit amount while in Clause (b) the entire estate passes to the credit shelter devise.
 - d. Similar to formula clauses involving a surviving spouse, the use of formula clauses with respect to charitable gifts could also be impacted by the fact that there is no estate tax in 2010.
2. Avoid Outright Devises to Spouses. Outright devises to spouses should be avoided in 2010 because outright devises to spouse in 2010 will be subject to estate tax upon death of spouse in year after 2010. Trust can be created in which spouse has (i) mandatory income (ii) right to principal subject to ascertainable standard, and (iii) independent trustee has right to distribute in excess of standard without causing estate inclusion in estate of spouse.
3. Lifetime Gifting. Because the gift tax rate is 35% in 2010 (compared to 45% in 2009, and a top rate of 55% in 2011 under existing law), some people are considering making taxable gifts in 2010 to capture the lower tax rate and remove appreciation from the estate. Need to be careful and address potential GST issues.
4. GST Planning.
- a. Only outright direct skips are certain to benefit from nonapplicability of GST taxes in 2010. Transfers in trust in 2010 may be subject to GST tax in post-2010 year when distributions are made from trusts to beneficiaries who are skip persons or if the trust terminates in favor of skip persons.
 - b. In 2010, there is no GST exemption to allocate to trusts. Therefore, it is not possible to fund dynasty trusts in 2010. We need to be careful with respect to funding insurance trusts in 2010 which have a zero inclusion ratio. Consider loans or cash value to pay premiums in 2010.
 - c. Planning Opportunities

Since there is no estate tax, there is no estate tax inclusion period which prevents the allocation of GST when establishing a GRAT and CLAT. This is an opportunity to pass GRAT or CLAT assets to grandchildren gift and GST tax-free. Because of the potential for retroactive legislation, drafters need to use a formula clause based on the final outcome of legislation. Another alternative is to draft using disclaimers – remainder to grandchildren, who can disclaim to children. Greater issues if grandchildren are not adults:

Create an Intervivos QTIP trust (for spouse of course) and include a formula provision apportioning the amount covered by the grantor's GST exemption to a subtrust for grandchildren and future generations and a subtrust for grantor's children for the portion not protected by GST.

II. 2011 and Beyond – What Happens Now?

A. Sunset of 2001 Tax Act.

1. As if Never Enacted. For estates of decedents dying, gifts made, or generation skipping transfers after December 31, 2010, the Internal Revenue Code of 1986 shall be applied as if the changes in the 2001 Act "had never been enacted."
2. The estate tax exclusion amount returns to \$1 million.
3. The estate and gift tax rates return to the pre-2001 graduated rate structure with a maximum rate of 55% and a 5% surtax on estates over \$10 million to phase-out the benefit of the graduated rates and unified credit.
4. The GST exemption returns to \$1 million, but is adjusted for inflation for post-2001 years such that the GST exemption in 2011 will likely be between \$1.3 million and \$1.4 million.
5. Section 1014 basis rules will apply again.
6. The state death tax credit will be reinstated.

B. Legislation Might Cause 2011 Estate, Gift, and GST Taxes to Apply at 2009 Levels.

1. Many commentators believe it is likely that legislation will be enacted (either late 2010 or early 2011) that will cause the tax rates and exemption levels to return to 2009 levels in 2011.
2. Some proposals in the Senate have called for more generous exemptions (up to \$5 million) and lower rates (35% or 15%).
3. State Legislation

States such as Idaho, Indiana, Maryland, Nebraska, North Dakota, Tennessee, Utah, Virginia and Washington have enacted legislation construing formula provisions as though the estate and GST tax law in effect in 2009 remain in effect. Laws apply unless the document expresses a different intention. This is not necessarily desirable. It could

cause all assets in excess of the \$3.5 million exemption to pass outright to spouse and be taxed in spouse's estate where otherwise it could fund the credit shelter trust and avoid tax in the spouse's estate.

C. Other Pending Changes to Taxation of Gratuitous Transfers.

1. Legislation Curtailing Use of GRATs. The House of Representatives passed legislation imposing a minimum 10-year term for retained interests under IRC § 2702 and prohibiting "zeroed-out" GRATs (although, not specifying a minimum remainder value). Legislation has not been acted on by the Senate.
2. Valuation Discounts. Potential for legislation or regulatory action relating to curtailing the use of valuation discounts in family limited partnerships and limited liability companies especially with respect to investment assets.

III. Impact on Charities and Planned Giving

A. Challenges in 2010.

1. Formula Clauses in 2010. The interpretation of formula clauses for decedent's dying in 2010 may cause charitable devises to not be funded.
2. Revision of Estate Plans. Donors who were motivated to make charitable bequests solely or primarily for the estate tax benefits may execute amendments to estate planning documents to remove or reduce charitable bequests if they die in 2010 when the estate tax is inapplicable.
3. Carryover Basis Issues.

Bequests to fund charity with low-basis property.

CRTs will be more attractive to avoid or delay capital gains.

B. Return of Tax Benefits for Charitable Bequests in 2011.

1. Return of Tax Benefit for Charitable Bequests. The applicability of estate taxes in 2011 and beyond will cause there to be a tax benefit to making charitable bequests as existed prior to 2010.
2. Charitable Lead Trusts. In a low interest rate environment, charitable lead trusts will be an attractive planning vehicle.
3. Charitable Remainder Trusts. If interest rates increase, charitable remainder trusts will be an attractive planning vehicle.