



Congressional Inaction On The Estate Tax Causes Both Confusion & Opportunity In 2010

By *Morris Sabbagh, Esq.*

WITH ALL THE HYPE about the repeal of the federal estate and generation-skipping transfer (GST) taxes and reduced gift tax rates in 2010, one would think that taxpayers have cause for great celebration. While tremendous opportunities may exist in 2010 for estate planning and post-mortem tax planning (tax planning techniques implemented by the survivors after the death of a loved one), caution is called for due to uncertainties about the future of these taxes.

The reason for the uncertainty is twofold. First, while under the Economic Growth And Tax Relief Reconciliation Act of 2001 (EGTRRA), the estate and GST taxes are repealed for 2010; they are scheduled to return in 2011 at much higher rates, and with lower exclusions, due to the "sunset" of EGTRRA. Second, it has been widely reported that several congressional leaders intend to restore the gift, estate and GST tax laws to pre-2010 levels, making the changes retroactive to January 1, 2010. Adding to the uncertainty is the question that many legal experts have raised about whether or not a retroactive estate tax would be constitutional.

The repeal of the estate and GST taxes is further complicated because it is accompanied by a whole new set of capital gains tax laws known as the "carryover basis rules." For many taxpayers, these new capital gains tax laws will be more costly and complicated to plan for than the estate and GST tax laws that they replace. If implemented, the carryover basis rules will require taxpayers to track their investments for multiple generations, which is likely to be an administrative nightmare.

Avoiding the Pitfalls

There are several ways to plan in 2010 to avoid the pitfalls of an uncertain future.

All Wills and Revocable Living Trusts Executed Prior to 2010 Must Be Reviewed - Many Wills and Revocable Living Trusts executed prior to 2010 were designed to take advantage of federal estate tax exemptions under pre-2010 tax laws. These documents often have formula provisions that define the inheritance of a spouse or other beneficiaries in terms of the estate tax exemptions available at death. In many cases, these documents, if not revised, may act to disinherit a spouse or other beneficiaries. Taxpayers should review these documents with their estate planners to ensure that they are consistent with their wishes whether or not estate taxes are repealed, and regardless of the estate tax exemptions existing at the time of death.

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Morris Sabbagh, Esq.

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An Employer's Obligations Under The Americans With Disabilities Act

By Andrew A. Kimler, Esq. & Eun C. Jo, Esq.

TWO RECENT COURT CASES serve as a useful starting place when considering an employer's obligations under the Americans with Disabilities Act (ADA). A former truck driver recently filed a lawsuit in federal district court against his former employer, United Parcel Service (UPS) and his former manager there. The complaint alleges that after 13 years at UPS, he was unlawfully fired after becoming diagnosed with intestinal cancer and having to undergo extensive medical treatment, which caused him to miss work, despite following company procedures and informing management of his situation. Among other things, the plaintiff claimed that his firing was unlawful under the ADA because it constituted unlawful discrimination on the basis of having a disability.

In another case, the court ruled that it was unlawful to fire an employee diagnosed with stage 3 breast cancer who took time off to obtain cancer treatment. In this case, the employee was denied extended medical leave by her employer, without any discussions about her needs or the reasonableness of her request for the extended leave.

"... an employer is not required to provide a reasonable accommodation unless the employee has requested one."

The Disability Laws

Federal and State laws prohibit discrimination against a qualified job applicant or an employee with a disability by requiring the employer to reasonably accommodate the disability unless to do so would pose an undue hardship for the employer. Whether a requested accommodation is reasonable or whether it would cause undue hardship for the employer is a matter that is considered on a case-by-case basis. The nature of the employee's disability and the size, resources and structure of the particular business are all to be considered.

At the federal level, the ADA prohibits discrimination against those with a "disability," which is defined as a physical or mental impairment that substantially limits one or more major life activities, such as breathing, walking, talking, or performing manual tasks. Those who have a history or record of an impairment, even if they do not currently have a disability and those who do not have a disability but are regarded as having one are protected by the laws. In addition, it is unlawful to discriminate against an individual, whether or not disabled, because of a relationship or association with another individual with a known disability. For instance, an employee could not be fired because a spouse has a disability.

Under State law, however, employees are offered broader protections. Unlike under the federal law, there is no requirement that the impairment substantially limit a major life activity. Rather, the impairment only has to prevent the exercise of a normal bodily function.



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Qualifications & Reasonable Accommodations

Having a disability, however, does not guarantee a job. To be protected against discrimination, a person must also be qualified for the position by having the skill, experience, and education that the job requires, and by being able to perform the essential functions of the job, with or without reasonable accommodations.

If a person has a disability and is qualified for the job, the employer must provide reasonable accommodations, which is a modification or adjustment to a job or the work environment, that allows a qualified applicant or employee with a disability to either participate in the job application process or to perform the essential job functions. Some examples of reasonable accommodations are as follows:

- Making changes to the work areas, such as lowering a paper cup dispenser near the water fountain so that an employee in a wheelchair can access the cups;
- Flexible scheduling to allow time off for treatment and/or recovery;
- Reassignment to a different position equal in pay and status.

Generally speaking, an employer is not required to provide a reasonable accommodation unless the employee has requested one. However, the employer should include in its employee handbook comprehensive policies and procedures that encourage open communication about the employee's needs relating to his or her disability. Where an applicant or an employee requires an accommodation, the individual herself, or her family member, friend, health professional, or any other representative, may make the request.

Upon receiving a request for an accommodation, the employer should promptly discuss with the individual his or

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The Most Valuable New Year's Resolution You Can Make

By Christopher J.L. Deziel, Esq.



AS THE NEW YEAR has begun, many of us are either engaged in or have already given up on our New Year's resolutions. Whether it be to quit smoking or lose weight, most resolutions are abandoned early on. The main reason for this is that these types of resolutions require an ongoing,

committed effort by the individual. On the other hand, if you knew that you could commit to a New Year's resolution that would require a minimal time commitment and would protect you and your family in times of disability, catastrophic illness or death, would you do it? Well there is: developing your estate plan.

It's a lot simpler than you think. If you commit yourself to allocate three hours or less, you can compile notes and supporting documentation to answer the following questions:

- What are the nature and extent of my assets? How are my assets held? Who are the named beneficiaries to my life insurance policies and retirement benefits?
- Who do I want to be the executor of my estate? Who would I want to take their place if they are not in a position to act? Do I want one executor or co-executors?
- If something happens to me and my spouse, whether by death or by disability, who would I want to be the legal guardian of my children? Who would I want as a back-up? Do I want a different person to be in charge of managing my children's money? What types of terms and restrictions do I want to place on that person?
- If I should become disabled, who would manage my financial and personal affairs? Who would take their place if they cannot act? What types of terms and restrictions do I want to place on that person? Who would I want to make medical decisions for me?
- If I should find myself in an incurable or irreversible condition that is likely to cause my death within a relatively short time, or I am unable to eat or drink without medical assistance, would I want all medical treatment to be terminated?

With the answers to these questions, your attorney will be able to prepare the appropriate documents to address your needs. Even if you don't initially have all the answers to these questions, a well-seasoned estate planning attorney will be able to assist you in making your final decisions. All in all, this is clearly a New Year's resolution you can stick with. So, sit down, make the commitment, and protect yourself and your family. It may be the most valuable New Year's resolution you've ever made. **M**

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news Briefs

Employers Must Give New Hires Written Notice of Pay Rate and Payday

Pursuant to a new labor law that went into effect late in 2009, New York employers must give newly-hired workers written notice of the rate at which they will be paid and their regular payday. The notice must be given to new employees before they do any work. The written notice must also include the employee's overtime rate of pay, if they qualify for overtime. (Most employees must receive overtime pay at one-and-a-half times their regular rate of pay for all hours they work over 40 in a given week.) Employers should also obtain a written acknowledgment of such notification. While no particular form is necessary, the New York State Department of Labor's sample form can be obtained from their website. **M**



Recent Law Expands Protections for Workers

In 2009, a new law went into effect that expands protections for workers who exercise their rights under state labor law. The law increases the minimum civil penalty against employers who retaliate against employees from \$200 to \$2,000 and the maximum penalty from \$1,000 to \$10,000. Moreover, the law allows the Commissioner of Labor to award lost compensation to workers who have been victims of employer retaliation. Examples of retaliation against workers who report labor law violations include demotions, pay cuts, or reassignments to less desirable schedules or duties. **M**

Employer's Obligations...

Continued from page 2

her needs, identify the appropriate reasonable accommodation and clearly document all accommodations offered to the employee, including any reasons behind providing or denying an accommodation. This is called an "interactive process" and an employer's failure to engage in this can constitute a violation of law. Where one or more accommodations address the employee's needs, the employer is free to choose the accommodation that places a lesser burden on the business.

The attorneys at Vishnick McGovern Milizio LLP are available to address any concerns that you may have with respect to addressing your needs in the complicated arena of employment disability law. **M**

Andrew A. Kimler, Esq. is a Partner in the Litigation Practice at Vishnick McGovern Milizio. He focuses in the areas of commercial, corporate and employment law, and is an experienced litigator. Eun C. Jo (EJ) is an Associate in the Litigation Practice Group. Mr. Kimler and Ms. Jo can be reached at 516-437-4385 or via email at: Akimler@ymmlegal.com and Ejo@ymmlegal.com, respectively.



news & Events

VMM Supports Opportunities for Underprivileged Students

Vishnick McGovern Milizio made a donation to E&T Educational Access, Information and Opportunity, Inc. to support the organization's efforts to introduce underprivileged high school students to careers in medicine. With the help of the firm's contribution, E&T was able to send 25 eleventh and twelfth graders from New York City to Boston, MA for a special convention on the subject.

Holocaust Memorial Center Grand Reopening

On February 28, 2010, the Holocaust Memorial and Tolerance Center of Nassau County will be holding its grand reopening, which features a new 2,500 square foot, state-of-the-art, multi-media Holocaust exhibit. Senior Partner **Bernard Vishnick** serves on the Board of Directors of the Center. Visit www.holocaust-nassau.org or call 516-571-8040 for more information.



Bernard Vishnick, Esq.
Senior Partner - VMM
Board Member - The Center

Baby News!

Congratulations to Associate **John Gordon** and his wife Karen on the birth of their baby girl. *Cassandra Mary* was born Saturday, January 16th at 5:03 p.m. - 7 lbs. 13 oz.



On The Cover

The December issue of **Queens Business**, which appeared in both *Queensborough* and the *Queens Courier* featured an in-depth cover article about **Vishnick McGovern Milizio LLP**. The firm's practice areas were highlighted, along with its scope of knowledge and sensitivity to client needs.

To read the full article, visit our website at www.VMMLEGAL.com.



Professional Achievements

Andrew A. Kimler, Esq. Guest Lectured

Andrew A. Kimler, Esq. served as a guest lecturer at New York Law School on the subject of appellate advocacy. 2 • 10 • 2010

VMM Presented On Employment Law

Andrew A. Kimler, Esq. and **Michael Stacchini, Esq.** presented to the Town of Islip Economic Development Committee on the subject of employment law. 2 • 25 • 2010

The Finer Points of Estate Planning and Jewish Law

Associate **Saul Elnadav, Esq.** was asked to help organize a class on Jewish estate planning for lawyers who practice within the Jewish community. Saul concentrates his practice on trusts and estates planning, and is knowledgeable about how traditional legal vehicles impact Jewish law. You can read Saul's blog, which covers a wide range of estate planning issues at: <http://trustsestateslaw.com>.


VMM Soccer Stars!

Vishnick McGovern Milizio proudly sponsored two Forest Hills Athletic Club Soccer teams: one for boys ages 9-12; the other for children 8 and under. We are pleased to report that under the leadership of VMM Partner **Joseph Trotti**, the 9-12 year old group **WON THE LEAGUE CHAMPIONSHIP!** Congratulations to all the boys and to Coach Trotti!




legal milestones Published Decisions

Partner Andrew A. Kimler and Associate Eun C. Jo (EJ) Win Case Involving Major Mortgage Company

Laskin v. Bank of America, N.A., et al., 8/21/09 N.Y.L.J. Plaintiff sued a mortgage broker, Countrywide Home Loans and Bank of America in connection with loans that were made to him, alleging, among other things, that the loans should be cancelled because he was a victim of predatory lending. The Court granted Countrywide's motion for summary judgment and dismissed the claims against Countrywide noting, among other things, that the Plaintiff failed to demonstrate any specific act by Countrywide that was misleading or deceptive and that the Plaintiff had timely received the required disclosures at closing, thus satisfying the federal disclosure requirements. The Court also concluded Plaintiff failed to act within the statutory period, so his right to rescind the subject loans had expired. This case was argued by Andrew A. Kimler, Esq. 




Senior Attorney, Michael Stacchini Prevails In The Appellate Division.

Pinkava v. Yurkiw, 64 A.D.3d 690, 882 N.Y.S.2d 687 (2nd Dept. 2009) Defendant had moved to dismiss Plaintiffs' complaint in which Plaintiffs (who were represented by VMM) sought specific performance of an oral agreement that the Plaintiffs had with the Defendant and her now deceased husband to sell their interest in an apartment building to the Plaintiffs. The Defendant argued that the parties did not have an oral agreement and that their partial performance of the agreement that included partial payment of the purchase price and contribution of time spent managing the property were insufficient evidence to prove an enforceable oral agreement. The Appellate Court upheld the ruling of the lower court that denied Defendant's motion and found that Plaintiffs' allegations of partial performance of the agreement were sufficient to show the existence of an enforceable agreement. 



Senior Partner Bernard Vishnick Wins on Will Contest of Child Status

Estate of Gilmore, 1/19/10 N.Y.L.J. Petition and Motion, of first impression, by two non-marital children who moved to determine in this probate proceeding their status as alleged after-known children entitled to benefits under the after-born statute. The decedent was survived by 11 children, but the Will benefitted only one child from his first marriage. Estates Powers and Trust Law §5-3.2 created a rule of presumed intent for a testator who may have inadvertently omitted a child born after a Will's execution. Thus the non-marital alleged after-known children sought to claim a portion of the inheritance as after-born children. Mr. Vishnick was successful in representing the decedent's child who was named in the Will arguing that there is no ambiguity in or other rights provided to such children under the statute. The Court agreed, ruling that it would not exceed its authority by reading claimants' language into the law, nor ignore the statute's language, concluding the claimants were not entitled to any rights under the after-born statute. 

Congressional Inaction...

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Annual Gifting Plans Should be Implemented or Reviewed

Individuals and families should consider implementing or revising annual gifting plans. Due to the lower gift tax rates in place this year and the repeal of the GST tax, wealth may be passed to grandchildren and future generations in 2010 at substantial tax savings. As with Wills, the key consideration should be flexibility. Plans implemented this year should account for all possible scenarios, and must take into consideration that gift and GST tax savings may be reversed if Congress implements changes retroactive to January 1, 2010.

Estates of Individuals Dying in 2010 Must Be Administered With Caution

As alluded to earlier, significant tax savings can be achieved by implementing post-mortem tax plans. The flip side is that a poor decision can be extremely costly to the estate. Therefore, in addition to closely monitoring future Congressional action on the estate and GST taxes, executors and beneficiaries of individuals dying in 2010 must be cautious when making any decisions regarding such estates. It is too early to predict whether estate and GST taxes will be imposed for 2010, or whether these estates will be bound by the carryover basis rules. Therefore any decisions that are made regarding tax elections, sales of estate assets and disclaimers during the administration of estates must be made with due regard for the different tax laws that may be implemented. Wrong decisions can be costly. It is more important than ever to consult with tax advisors and to maintain flexibility.

For many taxpayers, these new capital gains tax laws will be more costly and complicated to plan for than the estate and GST tax laws that they replace.

Track Purchases, Sales and Improvements - With the possibility that carryover basis rules may become permanent, individuals should make every effort to preserve records of any and all purchases, sales and improvements to capital assets, as these records will become more important for themselves, as well as for future beneficiaries.

A Time to Review

The major changes in the federal estate and generation-skipping transfer tax laws that took effect on January 1, 2010 created a great deal of uncertainty with respect to estate planning. In light of the legislative changes described in this article, many of the common estate planning vehicles that were put in place over the last several years may not have been written with the flexibility needed to avoid unintended outcomes.

For this reason, we recommend that if you have a Will, Trust or Gifting Plan (or would like to make one), you make an appointment with one of our Trusts & Estates Attorneys. Only a thorough review of your legal documents can determine if your intentions are well protected and if you are maximizing available gifting strategies. To make an appointment, please call Terry DeStasio at 516-437-4385, ext. 107 or email her at Tdestasio@vmmlegal.com. 

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Vishnick McGovern Milizio LLP is a proud sponsor of the MS Walk, which supports the National Multiple Sclerosis Society. These fun walks raise awareness and critical funds for the more than 42,000 Long Islanders who are affected by MS.

This year's walk is on May 2, 2010, and the VMM team will be out in numbers at Jones Beach State Park! We hope you will join us in supporting this important cause.

Here's how you can help:

- ✓ **Join the VMM Walk Team and spend the morning with us on May 2nd!** You can do this at our website at www.VMMLEGAL.com, or by going to www.nmssli.org and clicking on "The Walk" tab. Then choose "Join a Team" to register under the firm's name.
- ✓ **Make a donation** through our website (www.VMMLEGAL.com) or at www.nmssli.org. From the NMSSLI homepage, click on "The Walk" tab, and then on "Donate Now" to make a donation.
- ✓ **Ask your friends and family to join the cause.**



www.NMSSLI.ORG

For more information, you can call Joseph Milizio at 516-437-4385, ext. 108 or visit the National Multiple Sclerosis Society - Long Island Chapter website at: www.nmssli.org.