



# TRUSTS & ESTATES

The newsletter of the Illinois State Bar Association's Section on Trusts & Estates

## 2010 year-end estate planning: Navigating the uncertainty

By Gregg M. Simon

Estate planning in 2010 has proven to be quite complicated due to the uncertainties surrounding the estate, gift and generation-skipping transfer tax laws. The midterm elections have changed the Congressional landscape, but there is still no certainty as to what (if anything) the lame-duck or the new Congress can (or will) do. While many of the usual planning techniques remain viable, the current state of the transfer tax laws provides for additional opportunities, but makes 2010 year-end planning a bigger challenge than in past years.

### Status of Estate, GST and Gift Taxes

The estate and generation-skipping transfer

taxes do not apply in 2010, although Congressional action to reinstate them is possible (with discussions still indicating that such legislation may be made retroactive to January 1, 2010). Without Congressional action, as of January 1, 2011, the federal estate tax will again be effective with a \$1 million exemption and a 55 percent top marginal rate. Likewise, the generation-skipping transfer tax will be effective with a \$1.36 million inflation-adjusted exemption and a 55 percent rate. While both of these taxes have been repealed for 2010, the gift tax has not. The gift tax rate this year stands at 35 percent, but will rise to a 55 percent top marginal rate in 2011. In this complex environment, where plan-

## Record low interest rates mean good times for estate planning

By Gregg M. Simon

Interest rates have continued to fall, hitting a historic low in December 2010. While that may sound like a bad thing to many readers, this economic environment presents significant opportunities for leveraging tax savings and transferring wealth to descendants on a tax-advantaged basis. Below are a few techniques worth considering:

- Minimal-Interest Intra-Family Loans
- Refinancing Existing Loans
- Grantor Retained Annuity Trust (GRAT)
- Charitable Lead Annuity Trust (CLAT)
- Grantor Trusts and Installment Notes

### Minimal-Interest Intra-Family Loans

A simple but attractive option is an intra-family loan. This can be done independent of other techniques and without adverse gift tax consequences—as long as the loan is made at the Applicable Federal Rate (AFR). These rates are currently at historic lows. For December 2010, the AFR is .32 percent for loans of three years or less, 1.53 percent for loans of three-plus to nine years, and 3.53 percent for loans of nine-plus years. Although your family member/borrower will owe you interest on the loan, if the funds are invested

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## 2010 year-end estate planning: Navigating the uncertainty

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ning is all the more important, the following techniques are worth considering:

- Annual Exclusion Gifts
- Tuition and Medical Gifts
- Lifetime Gift Exemption
- Taxable Gifts
- Generation-Skipping Transfer Tax Planning
- Making Use of the Economy
- Roth IRA Conversions

### Annual Exclusion Gifts

Making use of your annual exclusion gifts remains one of the most powerful—and simplest—estate planning techniques. For 2010, individuals can make an unlimited number of gifts of up to \$13,000 per recipient, per year. Over a period of time, this approach can result in substantial transfer tax savings, as both the gift itself and its income and growth are removed from the donor's estate. It also allows you to avoid paying gift tax or using any lifetime gift exemption (discussed below). However, if annual exclusion gifts are not made by the end of the year, that year's exclusions are lost.

### Tuition and Medical Gifts

You can still make unlimited gifts by paying tuition costs directly to the school or medical expenses directly to the health care provider (including the payment of health insurance premiums).

### Lifetime Gift Exemption

The lifetime gift exemption, which remains because the gift tax still applies, allows gifts of \$1 million in excess of the annual exclusion, tuition and medical gifts without the current imposition of gift taxes.

### Taxable Gifts

Although no one likes paying a tax, taxable gifts in 2010 may prove to be very beneficial. For example, those who believe they will be in a taxable situation no matter what action Congress takes will be taxed at a 35 percent rate for any gifts they make this year. If they make the same gifts (or die with the assets) in 2011, a 55 percent tax may be imposed. Thus, there is a 20 percent benefit for those who make gifts by the end of this year. (Additional benefits are also obtained if wealth

is transferred by lifetime taxable gifts, rather than at death, based on the differing manner in which the gift and estate taxes are computed and paid).

### Generation-Skipping Transfer Tax Planning

In order to ensure a death tax at each successive generational level, the generation-skipping transfer tax is imposed on transfers to grandchildren or more remote descendants. However, a 2010 hiatus from the generation-skipping transfer tax provides for additional planning opportunities.

While the break on the gift tax is a boon to children of wealthy parents, 2010 offers a rare opportunity for those who want to transfer wealth to grandchildren or more remote descendants. Gifts to grandchildren or more remote descendants can be made this year without the imposition of the additional generation-skipping transfer tax that, under current law, would incur a 55 percent tax in 2011. However, due to uncertainties as to how the generation-skipping transfer tax will be applied in future years, outright gifts, rather than gifts in trust, are advisable.

For existing trusts with grandchildren or more remote descendants as beneficiaries, consideration should be given to making distributions before year-end, even to the extent of terminating the trust. A distribution in 2010 carries no transfer tax, while a distribution next year may incur a 55 percent tax.

### Making Use of the Economy

The current market volatility, depressed asset values and historically low interest rates continue to create an environment ripe for estate planning and transferring wealth to descendants on a tax-advantaged basis. Assets with values that are temporarily depressed due to current economic conditions but are expected to recover would be good targets for a giving program. Based on the current applicable laws, the increase in value when the economy recovers and the appreciation thereon would pass to the donees free of gift tax. The lower current applicable federal interest rates also make gifting through a grantor retained annuity trust (GRAT), a charitable lead annuity trust (CLAT), intra-family loans, and the "sale to grantor trust" techniques

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even more beneficial. (For a more detailed discussion of these estate planning techniques, please see "Record Low Interest Rates Mean Good Times for Estate Planning.")

As the economy moves in cycles, it is likely that asset values and interest rates will eventually increase again. When they do, the opportunity to reduce—or even eliminate—your transfer taxes on such favorable terms may be gone. But prompt action to implement these techniques may be prudent for two reasons: (1) market conditions may change, making such planning less attractive, and (2) Congressional action may negatively affect such planning. Legislation was introduced in 2010 that, if enacted, would place substantial limitations on the use of valuation discounts in connection with family-controlled entities. That same legislation would also restrict the use of the highly recommended short-term zero-gift GRAT by

requiring GRATs to have a 10-year minimum term (increasing mortality risk) and a taxable gift upon formation (although the amount of the required taxable gift was not specified).

### **Roth IRA Conversions**

Beginning in 2010, anyone (regardless of income) is allowed to convert a regular IRA to a Roth IRA. Upon conversion, the entire converted amount is subject to income taxation at your current tax bracket. If you complete the conversion in 2010, the rollover can either be reported in 2010, or spread out ratably in 2011 and 2012.

There are certain unique features of Roth IRAs that make them particularly attractive. Distributions, for example, are generally income tax-free. In addition, the required minimum distribution rules do not apply to Roth IRAs during your lifetime. You can also pass a Roth IRA to a younger generation, thus allow-

ing it to continue growing income tax-free (although your beneficiaries will be required to take minimum distributions). Ultimately, converting a regular IRA to a Roth IRA will shrink the size of your taxable estate and the estate taxes that may be due thereon, and with careful estate planning, can foster decades of tax-free growth for these assets.

If you already converted a traditional IRA to a Roth IRA in 2010, you should review the current value of these assets. If your Roth IRA has decreased in value, you may be able to save taxes by reversing the conversion (and reconverting at a later time), thus only having to pay income tax on the smaller amount. Although a recharacterization can be done at any time up to the due date (including extensions) for filing your income tax returns, if the reversal is completed this year, the reconversion can be made in 2011. Otherwise it cannot be done until 2012. ■

## **Record low interest rates mean good times for estate planning**

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with a return in excess of the AFR, the wealth is transferred to the family member/borrower on a tax-free basis.

### **Refinancing Existing Loans**

Many parents may have made loans either to their children or to trusts for their children's benefit (e.g., outright loans, loans issued in connection with sales of assets or otherwise). The interest rate being charged on these loans may be significantly higher than the current AFR. If the loans can be prepaid without penalty, and if the parent/lender does not need the cash flow, consideration should be given to refinancing at the lower current interest rate. This technique will reduce the child's cash outflow, allowing the wealth to grow for his or her benefit outside the transfer tax regime.

### **Grantor Retained Annuity Trust (GRAT)**

A GRAT is a grantor trust whereby the trust pays the creator a predetermined annuity for a given term in exchange for the creator's contribution of property to the GRAT. At the expiration of the term, the assets remaining in the GRAT pass to the named beneficiaries

(e.g., descendants or trusts for their benefit). When a GRAT is established, the creator makes a gift that is equal to the value of the transferred property, less the value of the retained interest, actuarially determined based upon 120 percent of the AFR, rounded (the IRS "imputed rate"). If the creator survives the term, any assets remaining in the GRAT pass to the named beneficiaries without further gift taxation (whatever the value is at that time). However, if the creator dies during the GRAT term, the assets are fully included in the creator's estate (in essence unwinding the transaction). A lower interest rate increases the value of the annuity retained by the grantor and thus reduces the value of the gift of the remainder in a GRAT. The GRAT produces transfer tax benefits when the return on the assets transferred exceeds the IRS imputed rate (1.8 percent for December 2010).

Many factors affect the value of the gift upon creation of a GRAT, including the AFR, the value of the property being transferred, the term of the GRAT and the annuity percentage. Because the creator can control the term and annuity rate, the GRAT is typically structured to produce no taxable gift (e.g., a two-year term with an annuity equal to ap-

proximately 53 percent of the value of the property contributed). Such a "zeroed-out" GRAT would allow investment returns (interest, dividends and appreciation) of the assets in excess of the IRS imputed rate (1.8 percent for GRATs created in December 2010) to pass to descendants free of transfer tax.

The GRAT has been referred to as a "no lose situation." If the GRAT's investment return beats the IRS imputed rate, assets are transferred to descendants free of gift tax. If the return is less than the IRS imputed rate, then the assets simply return to the creator, in essence putting the creator back in the same position as if he or she had not created the GRAT.

However, time may be limited for this zeroed-out GRAT technique. There has been talk of Congress changing the law to require GRATs to have a minimum 10-year term and a minimum gift (e.g., potentially 10 percent of the value of the GRAT).

### **Charitable Lead Annuity Trust (CLAT)**

In a low-interest-rate environment, the CLAT is an effective technique to achieve philanthropic goals (i.e., annuity payments

to a charity) combined with the ability to transfer assets to descendants free of gift tax. A CLAT is similar to a GRAT but with the term annuity payments going to a charity (e.g., a private foundation). At the expiration of the CLAT term, the remaining assets pass to the named beneficiaries (e.g., children). The value of the charitable lead interest would not only pass free of transfer tax but can also be structured to provide the creator with a current income tax deduction. When a CLAT is established, the creator makes a gift to the remainder beneficiaries equal to the value of the remainder interest (actuarially determined, but with an option to use the IRS imputed rate for the month of the transfer or either of the prior two months). The annuity payment is typically designed to fully offset the value of the contributed property, so that there is no taxable gift upon creation of the

CLAT. The CLAT produces transfer tax benefits when the return on the assets transferred exceeds the IRS imputed rate.

### Grantor Trusts and Installment Notes

If a person creates a trust (e.g., for the benefit of his or her descendants) and includes certain grantor trust provisions, the income tax laws treat the trust and the creator as the same person (i.e., ignores the trust's existence). The creator, not the trust, then reports the trust income and pays the tax thereon. In essence, this allows the creator to make tax-free gifts to the trust for his or her descendants. Because the law requires the creator to pay the income tax on the trust's income, the grantor trust grows tax-free for the benefit of his or her descendants. As the creator's other assets are used to pay the income tax, this

technique also reduces the assets that would otherwise be subject to transfer taxation. The tax-free compounding of the grantor trust may create the greatest of all estate tax leveraging.

As the AFR is at an all-time low, creating and selling appreciating assets to a grantor trust for an installment note is currently quite attractive. Under the applicable rules, no gain or loss on the sale would be recognized. Although the grantor trust would be required to make payments on the note, the growth on the asset sold would inure to the trust beneficiaries. In essence, the grantor would be freezing the value of the transferred assets. The sale to the grantor trust produces transfer tax benefits when the assets sold appreciate more than the rate of the promissory note. With current interest rates at historic lows, this can likely be accomplished. ■



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### January

**Tuesday, 1/4/11- Teleseminar**—Patent and IP Law for the Business Lawyer. 12-1.

**Thursday, 1/6/11- Teleseminar**—Business Planning for the New Health Care Law: What You Need to Know About the Year Ahead. 12-1.

**Friday, 1/7/11- Chicago, ISBA Regional Office**—2011 Family Law CLE Fest. Presented by the ISBA Family Law Section. TBD.

**Tuesday, 1/11/11- Teleseminar**—Restoration of the Estate & Gift Tax in 2011: Planning & Drafting Issues, Part 1. 12-1.

**Wednesday, 1/12/11- Teleseminar**—Restoration of the Estate & Gift Tax in 2011: Planning & Drafting Issues, Part 2. 12-1.

**Friday, 1/14/11- Chicago, ISBA Regional Office**—New Laws for 2010 and 2011. Presented by the ISBA Standing Committee on Legislation. 12-2.

**Tuesday, 1/18/11- Teleseminar**—Asset-Based Finance: Business Borrowing Against assets in a Tight Credit Environment, Part 1. 12-1.

**Wednesday, 1/19/11- Teleseminar**—Asset-Based Finance: Business Borrowing Against assets in a Tight Credit Environment, Part 2. 12-1.

**Friday, 1/21/11- Teleseminar**—Ethics in Representing Elderly Clients. 12-1.

**Friday, 1/21/11- Chicago, ISBA Regional Office**—The Health Care Reform Act- An Overview for the Health Care Attorney. Presented by the ISBA Health Care Section. 9-12.

**Friday, 1/21/11- Collinsville, Gateway Center- Mississippian Room**—Tips of the Trade: A Federal Civil Practice Seminar- 2011. Presented by the ISBA Federal Civil Practice Section. 8:30-11:45.

**Tuesday, 1/25/11- Teleseminar**—Alternatives for Financially Distressed Mid-Size Businesses, Part 1. 12-1.

**Wednesday, 1/26/11- Teleseminar**—Alternatives for Financially Distressed Mid-Size

Businesses, Part 2. 12-1.

**Friday, 1/28/11- Teleseminar**—Attorney Ethics in Social Media- Blogs, Facebook, Twitter, YouTube and More. 12-1.

**Tuesday, 1/31/11- Teleseminar**—Dangers of Using “Units” in LLC Planning REPLAY. 12-1.

### February

**Tuesday, 2/1/11- Teleseminar**—2011 Ethics Update, Part 1. 12-1.

**Wednesday, 2/2/11- Teleseminar**—2011 Ethics Update, Part 2. 12-1.

**Friday, 2/4/11- Bloomington, Bloomington-Normal Marriott**—Hot Topics in Agriculture- 2011. Presented by the ISBA Agriculture Law Section; co-sponsored by the ISBA Mineral Law Section. TBD.

**Tuesday, 2/8/11- Teleseminar**—Sophisticated Choice of Entity Analysis, Part 1. 12-1.

**Wednesday, 2/9/11- Teleseminar**—Sophisticated Choice of Entity Analysis, Part 2. 12-1.

**Friday, 2/11/11- Chicago, ISBA Regional Office**—ADR- Arbitration and Mediation Issues- 2011. Presented by the Civil Practice and Procedure Section. 9-4:15.

**Tuesday, 2/15/11- Teleseminar**—The New Normal of Buying and Selling Commercial Real Estate, Part 1. 12-1.

**Wednesday, 2/16/11- Teleseminar**—The New Normal of Buying and Selling Commercial Real Estate, Part 1. 12-1.

**Monday, 2/21/11- Chicago, ISBA Regional Office**—Advanced Worker’s Compensation- 2011. Presented by the ISBA Worker’s Compensation Section. TBD.

**Monday, 2/21/11- Fairview Heights, Four Points Sheraton**—Advanced Worker’s Compensation- 2011. Presented by the ISBA Worker’s Compensation Section. TBD.

**Tuesday, 2/22/11- Teleseminar**—Asset Protection for the Middle Class, Part 1. 12-1.

**Wednesday, 2/23/11- Teleseminar**—Asset Protection for the Middle Class, Part 2. 12-1.

**Thursday, 2/24/11- Peoria, Hotel Pere Marquette**—Family Law-Nuts & Bolts for Downstate 2011. Presented by the ISBA Family Law Section. TBD.

**Friday, 2/25/11- Chicago, ISBA Regional Office**—Developments in Wage and Hour Law and Employment of Foreign Workers. Presented by the Labor and Employment Section. 8:55-1:30.

**Friday, 2/25/11- Teleseminar**—Ethics in Negotiations. 12-1.

**Monday, 2/28/11- Teleseminar**—Family Feuds in Trusts REPLAY. 12-1.

### March

**Friday, 3/4/11 - Chicago, ISBA Regional Office**—Dynamic Presentation Skills For Lawyers. Master Series Presented by the Illinois State Bar Association. 12:30-5.

**Saturday, 3/5/11- Downer’s Grove, Double Tree**—DUI, Traffic and Secretary of State Related Issues. Presented by the Traffic Laws/Courts Section. 8:55-4:00.

**Monday, 3/7/11-Friday, 3/11/11- Chicago, ISBA Regional Office**—40 Hour Mediation/ Arbitration Training. Master Series Presented by the Illinois State Bar Association and the ISBA Alternative Dispute Resolution Section. 8:30-5:45 each day.

**Wednesday, 3/30/11- Chicago, ISBA Regional Office**—Why International Treaties Matter to Illinois Lawyers. Presented by the International and Immigration Committee. 12-2.

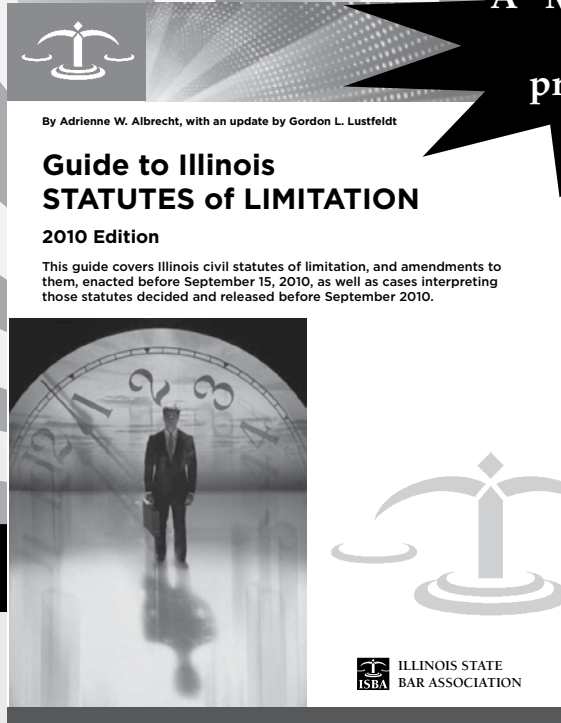
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**Friday, 4/1/11- Chicago, ISBA Regional Office**—Military family Law Issues. Presented by the ISBA Family Law Section and the ISBA Military Affairs Section. TBD.

**Friday, 4/8/11- Bloomington, Holiday Inn and Suites**—DUI, Traffic and Secretary of State Related Issues. Presented by the Traffic Laws/Courts Section. 8:55-4:00. ■



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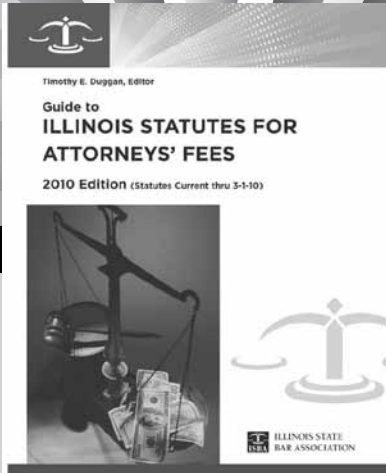
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