



Estate Planning in the Future – Did the Presidential Election Really Change Anything?

By Heidi L. G. Orr

As I write this article on a beautiful, sunny October afternoon in Seattle, the United States is only four weeks away from the next presidential election. When this article is published in December 2008, we will know the identity of the next president of the United States. At some point thereafter, we should have a sense of what will happen with the federal estate tax system.

Every individual has a credit available to offset estate taxes. In 2009, the federal credit, which is currently \$2,000,000 per person (\$4,000,000 for married couples), will increase to \$3,500,000 per person (\$7,000,000 for married couples), with a top tax rate of 45 percent. The federal estate tax is scheduled to be repealed in 2010. In 2011, the federal estate tax scheme will revert to the tax rates and credit amounts that were in effect in 2001. At this point, everyone agrees that the federal estate tax will not be repealed, but no one quite knows what the federal estate tax system will be in the future.

Neither Senator Obama nor Senator McCain wants to repeal permanently the federal estate tax. Senator Obama proposes freezing the federal estate tax exemption at \$3,500,000 per person (\$7,000,000 for married couples), with a maximum tax rate of 45 percent (i.e., keeping in place the structure that will exist in 2009). Senator McCain proposes raising the federal exemption to \$5,000,000 per person (\$10,000,000 for married couples) and cutting the tax rate to 15 percent.

It is important to note that it is Congress, and not the President of the United States, that will debate, negotiate and, ultimately, pass legislation determining the future of the federal estate

tax system. Whoever loses the presidential election will return to Congress and will have a vote in determining the future of the federal estate tax system. This year, all 435 seats in the House of Representatives and 35 of 100 Senate seats will be up for election. Most political pundits are predicting that Democrats will retain control of both the House and Senate. This strongly suggests that Senator Obama's proposal to freeze the federal estate tax system as it will exist in 2009 has a good chance of ultimately being adopted by Congress, even if Senator McCain wins the presidential election.

Although we will eventually learn what changes will be made to the federal estate tax system, will it really change estate planning in Washington state? Will the differences between Senator Obama's and Senator McCain's proposals with respect to the federal estate tax system really make a difference when it comes to estate planning in Washington? The answer to these questions is "no."

Washington state's estate tax system currently provides for an exemption of \$2,000,000 per person (\$4,000,000 for married couples) with tax rates between 15 percent and 19 percent. Therefore, regardless of who wins the presidential election and what Congress ultimately decides to do with the federal estate tax system, our state's estate tax system will remain out of step with the federal estate tax system and individuals must continue to deal with these differences in their estate planning documents.

Given the foregoing, what should Washington residents do with respect to their personal estate planning? Anyone with estate planning documents that were signed prior to 2002 and who have potentially taxable estates at either the

federal or Washington state levels should consider updating their estate planning documents to make sure their documents appropriately address the differences between federal and Washington state estate tax laws.

Specifically, married couples with estates that are taxable at both the federal and Washington state levels should contemplate using a "one lung" (sometimes referred to as an "all marital") trust. This type of plan allows the executor of the deceased spouse's estate to elect to qualify all or a portion of the trust for the estate tax marital deduction. The "non-elected" portion of the trust will be "taxed" in the estate of the first spouse to die (typically using all of the deceased spouse's estate tax credit). By structuring the estate plan this way, the executor will be able to coordinate the federal and Washington state estate tax credits to minimize the total estate tax liability by adjusting the portion of the trust for which the election is made. This type of plan gives the executor of an estate the power and flexibility to make elections at death based on the laws in effect at that time.

Regardless of the current size of your estate, you should carefully review your estate planning documents to make sure that they meet your current needs, do what you want and expect them to do, and are flexible enough to address the uncertainty about the future of the federal estate tax system.

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