

INSIDE THIS ISSUE:

*Will the Estate Tax be Repealed?* 1

*Estate Planning Learned from the Anna Nicole Smith Case* 2



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## WILL THE ESTATE TAX BE REPEALED?

Last year, the House of Representatives passed legislation to repeal the estate tax. The issue was set for a Senate vote in September, but was postponed due to Congress dealing with the aftermath of Hurricane Katrina.

Earlier this year, Majority Leader Frist pledged to hold a vote on the estate tax sometime in May. He reaffirmed this pledge in a "Dear Colleague" letter sent to his fellow Republicans on April 24, noting that "death tax" repeal would be a top priority on the Senate agenda in the next five weeks.

Specifically, Senator Frist stated in this letter: "Death tax is bad policy: it drives people to spend billions of dollars and create complicated tax structures for the sole purpose of avoiding payment. And it is immoral: the amounts subject to the death tax have already been taxed once. More to

the point, death should not be a taxable event. Because of Katrina, we could not act on repealing the death tax last fall. Now is our time. Here is our moment. Let's end the death tax forever."

In advance of this potential vote, the pro-repeal organizations have commenced an advertising campaign and reportedly plan to spend up to \$4 million promoting the legislation. But at this time, it appears as though repeal will not garner the necessary 60 votes when it is brought up for a vote in May. However, consideration of the estate tax issue could potentially provide a forum for the Senate to vote on a reform alternative. Democrats may seek a consensus on a reform proposal that could garner the necessary 60 votes for passage this year.

Senator Jon Kyl remains the chief negotiator for Senate Republicans. Senator Kyl

still publicly supports a reform deal with a 15% rate, and most likely an exemption in the \$5 million range. Senator Kyl has suggested in both public and private discussions that such a proposal could garner Senate approval, but it is unclear in light of the significant revenue implications of such a proposal.

On the pro-reform front, organizations have begun to estimate the potential long-term costs of estate tax repeal, or reform with a low rate and high exemption. In light of these potential costs, one pro-reform organization continues to advocate for a reform proposal with a \$2.5 million exemption and a 45% top rate. The vast majority of people would have no estate tax liability under this reform proposal, and enacting a permanent solution would allow those who would be subject to the tax to plan with certainty.

## ESTATE PLANNING LEARNED FROM THE ANNA NICOLE SMITH CASE

The Supreme Court's recent ruling in favor of Anna Nicole Smith gave her the right to continue fighting for a share of her late husband's vast estate. Obviously, her case holds some important estate planning lessons.

Smith, a former Playboy model, was 26 when she married 89-year-old Texas billionaire J. Howard Marshall in 1994. He died only a year later. She has been fighting one of her "son-in-laws" in court for more than a decade over a fortune estimated at as much as \$1.6 billion. The lower courts dismissed her claim.

The Supreme Court did not decide how much money Smith would get, if any. The ruling merely gave her permission to resume her claim.

Smith has yet to collect any of her late husband's estate. Smith maintains she is entitled to half of her late husband's estate based on his promise when she married him. But she has no written pre-nuptial agreement, and the bulk of his assets were held in a trust out-

side of his control, and therefore not available to share with Smith after his death. Smith contends that his son, Pierce Marshall, was instrumental in having his father's trust changed from a revocable to an irrevocable trust after her marriage in 1994. Pierce, the sole beneficiary of the estate, maintains that his father prepared seven trusts and six wills and none of them named either Smith or his older brother as beneficiaries. So far, he has successfully defended his position.

However, second marriages often require special estate planning. A lot of the issues raised in the Marshall case would not apply if individuals would take the time to communicate in their estate plan how their assets are to be administered and distributed. In most states, a surviving spouse cannot be disinherited since a surviving spouse has a right to claim a portion of the deceased spouse's estate. In Tennessee this right is limited to the "Probate Estate," meaning that the assets owned by the

revocable living trust of the deceased spouse are not subject to this claim of the surviving spouse. Also, this claim by the surviving spouse is only effective if the surviving spouse goes to court and claims the share allowed by law. Otherwise, the court will honor a will as written.

In second marriage situations, if you want to protect your children's inheritance, the new spouse can waive his or her rights to make a claim against the estate of the deceased spouse. This is usually done through a pre-nuptial agreement. If a pre-nuptial agreement is used, each party should have his or her own lawyer so there is no question of coercion. In addition, trusts can be used to provide for the surviving spouse while preserving the remainder of the assets for children.

This case illustrates the importance of making important estate planning decisions and putting these decisions in writing so that your estate planning objectives are clearly stated.



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