

# Chicago Daily Law Bulletin®

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## Important reasons and tips to update an estate plan

The topic of death and taxes is not an uplifting discussion, but is a reality for everyone. Many individuals remark, "I will get an estate plan when I have an estate to plan!" The reality is that regardless of one's net worth, everyone needs a proper estate plan.

Here's why:

- Avoid guardianship and conservatorship proceedings.
- Document health-care wishes.
- Avoid guardian of the estate appointments for minor children.
- Circumvent probate.
- Leverage estate tax exemptions.
- Minimize income tax consequences for the next generation.
- Provide asset protection for beneficiaries.
- Maximize charitable planning.

With family and work demands, far too many clients allow estate planning to fall to the bottom of their to-do list. With this in mind, the following list serves as a summary of critical changes that need to be reviewed in an existing estate plan, or the information can be used as a useful checklist for the implementation of a new one.

### Income tax planning

With the increase in estate tax exemptions, there has been a paradigm shift in the estate planning world. Perhaps you have heard the recent buzz that income tax planning is the new estate planning. Specifically, now that the lifetime exemptions are so high, many clients are no longer concerned with estate taxes. Rather, the focus has shifted to minimizing 23.8 percent income tax.

For married couples, the traditional trust funding formula identifies how assets pass on after the first spouse's death. As a result of a revised or newly created estate plan, the formula can be customized to minimize or avoid income tax consequences for the next generation.

### Estate tax exemptions

Effective this year, the federal

estate tax exemption is \$5.43 million. This change increases not only the applicable exclusion amount available at death but also a taxpayer's lifetime gift applicable exclusion amount as well as the generation-skipping transfer (GST) tax exclusion amount.

This means a married couple, with proper planning, could transfer a \$10.86 million estate, gift and GST tax-free to their children and grandchildren this year.

However, the estate tax exemption in Illinois is only \$4 million, and the Illinois estate tax rate can be as high as 28.5 percent. Married couples with existing plans should have their estate plans reviewed to save, or defer the \$407,550 Illinois estate tax on the first spouse's death.

The tax rates for Illinois residents range from 28.5 percent to 50 percent when state and federal taxes are combined. With proper planning, these taxes can be minimized or avoided entirely.

### Remove rights of withdrawal

Historically, it was popular to allow beneficiaries the right to withdraw portions of principal of a trust upon reaching specific ages. When a beneficiary has a right to withdraw principal, the assets are included in their taxable gross estate and are potentially reachable by creditors.

Instead, where appropriate, clients are encouraged to designate an age in which the beneficiary may become sole trustee (or co-trustee) of their separate trust. This allows the maximum amount of estate assets to pass from generation to generation tax-free and ensures asset protection.

### Portability

The federal government now recognizes portability, which allows the estate of a married taxpayer to pass the unused part of the decedent's exclusion amount to a surviving spouse.

This can result in millions of dollars of estate tax savings.

However, portability is not applicable at the state level, and a



### THE BUZZ

LINDSEY  
PAIGE  
MARKUS

*Lindsey Paige Markus, a principal at Chuhak & Tesson P.C., draws on her early career in business, finance and clinically applied neuroscience to communicate with clients and develop creative solutions to fit their estate planning, wealth protection and corporate needs. She has been recognized as one of the 40 Illinois Attorneys Under Forty, a Woman Making an Impact in the Law and an Illinois Super Lawyer Rising Star. She is a collaborative law fellow and is licensed in Illinois and Florida.*

time-sensitive tax return must be filed to capture the additional exemption.

### Powers of attorney

The most recent statutory POA for property and health care became effective July 2011 and this January, respectively. More important, the healthcare power of attorney form (from 2011 and 2015) now incorporates language that comports with the Health Information Portability and Accountability Act (HIPAA) privacy provisions to ensure an agent will have access to the principal's health-care records to make informed medical decisions. These documents are critical to help avoid guardianship or conservatorship appointments.

Everyone over 18 should have POAs in place. It is important to remember that just because mom and dad are paying for their adult child's college education, it does not mean that they have access to that child's medical information in the event of an emergency.

### Title to primary residence

Since January 2011, Illinois has allowed married couples (or partners in a civil union) to hold title to a primary residence through their trusts as tenants by the

entirety (TBE) to reap the estate planning and asset protection benefits.

With its origins in common law, TBE ownership continues to be an incredibly powerful tool. Under TBE, spouses (or partners in a civil union) are considered to own the property together as a single legal entity. Therefore, creditors of an individual spouse may not attach and sell the interest in the property of a debtor spouse, although joint creditors may attach to the property interest.

This new form of titling allows for maximum wealth protection and estate planning.

### Inherited IRAs, asset protection

Individual retirement accounts are asset protected during one's lifetime, but the same is not true for inherited IRAs. In June 2014, the U.S. Supreme Court held that inherited IRAs to a beneficiary other than a spouse are not asset protected.

However, if a client names her revocable living trust as the beneficiary of an IRA, it is critical that the trust have conduit or look-through language to ensure the maximum income tax for planning. Absent such language, the IRA may have to be cashed out within five years or be distributed over the lifetime of the eldest beneficiary, thereby creating devastating income tax consequences.

### Same-sex marriage

Same-sex marriages are now recognized at the state and federal levels. If one of your loved ones is in a same-sex relationship, these rulings may have affect your estate plan (and theirs).

Clients must be vigilant in their planning to make certain their estate plan properly reflects their testamentary intentions, and ensures assets pass to designated beneficiaries such as family, friends and charitable organizations, instead of to federal and state governments, or the creditors of a beneficiary.