The Colorado Lawyer
September 2008
Vol. 37, No. 9 [Page 73]

Planning for Other States' Estate Taxes

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State estate tax or inheritance tax is currently imposed by approximately half of U.S. states. Although Colorado is not one of them, Colorado attorneys need to be aware of these taxes so they can plan accordingly when their clients' property may be subject to such tax.

Colorado currently does not impose an estate tax. This is attributable to changes made to the federal estate tax laws in 2001. However, many other states do impose an estate tax, and Colorado residents may be subject to the estate tax imposed by another state if they own property in that state. Therefore, it is important for Colorado estate planners to understand how these state estate tax systems work so they can advise their clients.[1]

The Colorado Estate Tax

To understand why Colorado effectively has no estate tax, even though there is an estate tax provision in the Colorado Revised Statutes,[2] it is necessary to understand: (1) the coordination between federal estate tax and Colorado estate tax prior to 2001; and (2) the change to the federal estate tax laws that occurred in 2001. This knowledge also is helpful toward understanding why many states have changed their estate tax laws in the last few years.

Prior to passage of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA),[3] the federal estate tax system provided for a state death tax credit.[4] EGTRRA phased out the state death tax credit for the years 2002 through 2004. More significant, effective for estates of decedents dying after December 31, 2004, the state death tax credit formerly granted by the federal system was completely repealed and replaced with a deduction.[5] This change was included with many other changes to the Internal Revenue Code (Code) that were made by EGTRRA.[6]

The state death tax credit granted by Code § 2011 in effect gave a portion of the federal estate tax payable by a decedent's estate to the state. The majority of the states, including Colorado, had a "pick-up tax" equal to the federal state death tax credit and no other estate tax.[7] In such states, the total estate tax paid by the estate was not greater than would have been due if the state had no estate tax.

Colorado’s estate tax statute is an example of a pick-up tax statute. It states that "[a] tax in the amount of the federal credit is imposed on the transfer of the gross estate of every domiciliary."[8] Prior to EGTRRA, for a decedent domiciled in Colorado, the executor of the decedent’s estate would determine the adjusted taxable estate for federal estate tax purposes, then use that figure to determine the amount of the state death tax credit pursuant to Code § 2011(b). Because the Colorado estate tax was the amount of the federal credit, the amount determined in accordance with Code § 2011(b) was the amount of state estate tax paid to Colorado. The decedent’s estate then would take a credit on the federal estate tax return for the amount of state estate tax paid.

Prior to EGTRRA, a majority of the states had an estate tax system similar to Colorado’s.[9] Therefore, the state estate tax of most states was linked with the federal system. This was convenient for estate tax planning purposes because, for the most part, state estate tax did not need to be considered in the planning stage. In addition, estate planners who understood how the Colorado estate tax system worked also knew how the estate tax systems of most other states worked, because they operated on the same principle.

Some states, such as Colorado, have retained a pick-up tax tied to the state death tax credit and have not changed their estate tax laws to "decouple" from the federal estate tax. The Colorado estate tax statute has not been revised since the passage of EGTRRA; it still is tied to the state death tax credit. Therefore, because the state death tax credit was repealed, the state estate tax currently imposed by Colorado is zero. Accordingly, for decedents dying after 2004, no state estate tax return must be filed in Colorado and similar states.[10] Other states that have not decoupled (or have completely repealed their state estate tax), and currently impose no estate tax, include Alabama, Alaska, Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Idaho, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Dakota, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming.[11]

State Estate Tax Systems

In contrast to Colorado, some states that had a pick-up tax before EGTRRA have decoupled from the federal estate tax system to preserve their estate tax revenues. States may impose state estate tax on the estates of decedents who either: (1) reside in the state at death; or (2) own certain property in the state at death. In decoupled states, state estate tax may be due in addition to federal estate tax. Also, state estate tax may be due even if no federal estate tax is due. The estate tax systems of these decoupled states take three forms: (1) inheritance tax; (2) stand-alone estate tax; and (3) decoupled pick-up tax.

Inheritance Tax

An inheritance tax uses varying tax rates depending on the relationship of the beneficiary to the decedent. There is a zero tax rate on transfers to a spouse. Transfers to a trust for a spouse may or may not qualify for the zero tax rate. In some states, the zero tax rate also applies to certain relatives. Some states impose both an inheritance tax and a state estate tax. States with an inheritance tax include Indiana, Iowa, Kentucky, Maryland, Nebraska, New Jersey, Pennsylvania, and Tennessee.[12]

Stand-Alone Estate Tax

In contrast to inheritance tax, imposition of state estate tax is not dependent on the identity of the recipient (although deductions from the tax are available for qualifying transfers to or for the benefit of the spouse or charity). State estate taxes can be characterized as either stand-alone estate tax or decoupled pick-up tax.

A stand-alone estate tax means an estate tax (as opposed to an inheritance tax) that is not based on the former Code § 2011(b) state death tax credit. These states grant a state estate tax exemption, which is analogous to the federal estate tax exemption. However, the exemption granted by the state may not be the same amount as the federal exemption. If the decedent's estate is less than the state exemption amount, no state estate tax is due. In some of these states, the exemption amount is $1 million; in others, it is $2 million. There are other differences in how the estate tax systems of these states work, as discussed later in this article. States with a stand-alone estate tax include Connecticut, Kansas, Ohio, Oklahoma, and Washington.[13]

Decoupled Pick-Up Tax

A decoupled pick-up tax is a state estate tax based on the state death tax credit that was in effect just prior to EGTRRA. These states vary in recognizing the existing estate tax exemption amount under EGTRRA ($2 million in 2008), or granting an exemption amount tied to the federal exemption applicable in a prior year ($675,000 or $1 million). There are other differences in how the estate tax systems of these states work, as discussed later in this article. States with a decoupled pick-up tax include Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Oregon, Rhode Island, and Vermont.[14]

Tax Rates and Determining the Gross Estate

The estate tax rates imposed by states vary as much as the systems of taxation. For example, for 2008, the Kansas estate tax rate ranges from 1 percent to 7 percent[15]; the Washington estate tax rate ranges from 10 percent to 19 percent.[16]

If a state's estate tax might be imposed when a federal estate tax return is not required, the applicable state may not be able to use the federal determination of a gross estate or taxable estate. Consequently, states that impose estate tax when no federal estate tax is due have had to develop systems for determining the gross estate. These systems do not necessarily follow the federal rules. A notable example is New Jersey, which has adopted extensive regulations regarding its inheritance and estate tax. Included in these regulations is a provision limiting the valuation discounts for "family limited partnerships" to 10 percent in certain cases.[17]

Planning Considerations

Colorado estate planners need to be alert to the possibility that their clients' estates may be subject to state estate tax in another state. It can be difficult to identify which clients will be subject to state estate tax at death, because the state tax laws are constantly changing, and clients change domicile and buy and sell property throughout their lives.

At a minimum, practitioners should consider the possible imposition of state estate tax for clients who likely will move to another state, and for Colorado residents who own property in another state. For both categories of clients, the practitioner should determine whether the relevant state imposes a state estate tax; determine whether any state estate tax may be due; consider planning options to reduce or avoid state estate tax; and consider directions in the will for payment of any state estate tax. The practitioner also should consider retaining an attorney licensed in the relevant state to assist with such planning.

There are various resources that summarize which states impose estate tax and the exemption amounts offered by those states.[18] These resources provide a starting point to determine whether a client domiciled or owning property in another state may be subject to estate tax.

In some cases, a client may own property in a state that imposes a state estate tax, but no tax may be due. For example, the value of the property subject to state estate tax may not exceed the exemption amount offered by the state. A second possibility is that, in states that impose an inheritance tax, if the property passes to individuals who qualify for the zero tax rate, no inheritance tax will be due regardless of the value of the property located in that state.[19] A third possibility is that the state may not impose state estate tax on nonresidents.[20]

Discussed below are four techniques to reduce or avoid state estate tax: (1) changing domicile; (2) transferring out-of-state property to an entity; (3) gifting; and (4) marital deduction planning. Also discussed are directions for payment of state estate tax.

Domicile

States that impose state estate tax generally impose their tax on all property held by a resident decedent domiciled in the state at death. Most of these states also impose such tax on certain property in the state held by a nonresident decedent.[21]

Theoretically, an individual with a taxable estate who lives in a state that imposes an estate tax could move to a state that does not impose an estate tax, such as Colorado. If the individual effectively establishes domicile in Colorado, only the property left in the other state will potentially be subject to state estate tax, as opposed to the entire estate being subject to that state's estate tax. However, it probably is not realistic for most people to uproot themselves based on estate tax considerations. On the other hand, to the extent a client with a taxable estate lives part-time in two states, and if one of those states imposes an estate tax and the other does not, the practitioner might recommend that the client establish domicile in the state that does not impose estate tax.[22]

Transfer to an Entity

States that impose an estate tax on nonresidents levy the tax on estates of decedents domiciled in the state, and on real property and tangible personal property situated in the state owned by decedents domiciled in another state. These states vary on whether they also tax intangible personal property owned by nonresidents.[23] The U.S. Supreme Court held in *State Tax Commission of Utah v. Aldrich*[24] that it is constitutional for one state to impose inheritance tax on intangible personal property held by a nonresident. There, Utah imposed inheritance tax on shares of a Utah corporation held by a New York resident.

Although it is constitutional for states to tax certain intangible personal property owned by nonresidents, some states choose not to do so. Therefore, under the laws of some states, if the character of real property or tangible personal property is changed into intangible personal property, for nonresident decedents, it no longer will be subject to the state's estate tax.[25]

This change can be accomplished by placing such property into a limited liability company (LLC), partnership, or S corporation, because the ownership interests in such entities should constitute interests in intangible property. An added advantage of placing the property in such an entity is that the estate also may avoid an ancillary probate proceeding. However, practitioners should caution clients who wish to use a single-member LLC, because there is some concern that such an entity may be disregarded for state estate tax purposes as it is disregarded for income tax purposes.[26]

Before converting real property into intangible personal property, the practitioner needs to verify that this technique will work in the applicable state to avoid state estate tax. Some states, such as Oregon, impose a state estate tax on intangible personal property located in the state.[27] The Oregon statute provides an exemption from the tax on intangible personal property located in Oregon and owned by a nonresident, if a like exemption is made by the laws of the state or country of the decedent's residence in favor of residents of Oregon.[28] The Oregon Administrative Rules specifically provide that there is no such exemption allowed as to property owned by a deceased resident of a state that does not impose a "death" tax.[29] Because Colorado currently does not impose a death tax, it appears that Oregon will impose state estate tax on intangible personal property located in Oregon and owned by a Colorado resident.

The term "intangible personal property" includes "stocks, bonds, notes, currency, bank deposits, accounts receivable, patents, trademarks, copyrights, royalties, goodwill, partnership interests, life insurance policies, and other choices [*sic*] in action."[30] However, apparently, if a Colorado business entity (as opposed to an Oregon entity) holds Oregon real estate, the intangible personal property will not be located in Oregon and, therefore, the Oregon estate tax will not apply.

Even if the transfer of real estate to an entity effectively avoids state estate tax, there may be other tax or nontax ramifications that make the transfer inadvisable. In particular, there may be property tax or other implications with a transfer of the property that could present complications.

An example of a property tax consideration is California's Proposition 13, which limits the annual increase in the assessed value of real property for property tax purposes.[31] Under Proposition 13, property is reassessed on a "change in ownership."[32] There are various exceptions to the meaning of "change in ownership."[33] The change in ownership rule and the exceptions should be analyzed before undertaking a transfer of the property, to avoid an inadvertent reassessment of the property.[34]

An example of a different type of tax consideration is the Texas franchise tax.[35] The Texas franchise tax is imposed on "taxable entities" that are organized in Texas or doing business in Texas.[36] The term "taxable entity" includes corporations, LLCs, limited liability partnerships, and other entities, but generally does not include general partnerships.[37] If creation of an entity will result in imposition of a franchise or other tax, perhaps a different course of action should be pursued.

Before undertaking a transfer of out-of-state property, an attorney licensed to practice law in that state should be retained. The attorney should advise about state law implications and the effectiveness of the plan, and assist with any transfer of the property.

Gifting

A client owning property in a state that imposes a state estate tax could give away all or part of such property during life. Depending on the state, this could avoid any estate tax from being due in the state, because the gross estate for state estate tax purposes would not include the value of the gifted property.[38]

However, there are several potential gift and estate tax problems with this approach, in addition to the fact that the client may not want to relinquish ownership of the property. First, this technique will not work in states that pull back the gift into the estate for state estate tax purposes.[39] Second, a few states impose a gift tax, which could offset the usefulness of avoiding state estate tax.[40] Third, if the gift exceeds the client's available federal annual exclusion amount and lifetime gift tax exemption, it may not be worthwhile to pay federal gift tax to avoid imposition of state estate tax.

Marital Deduction Planning

Marital deduction planning needs to be carefully considered when advising clients who are subject to state estate tax, especially if the state grants a lesser exemption amount than granted by federal law. Depending on how the estate plan is designed, state estate tax could be due at the first death. Consider the following four scenarios:[41]

Avoid federal estate tax, but pay state estate tax. The client's estate has a total value of $3.5 million, and the client has his full federal estate tax exemption amount of $2 million (in 2008) available. The client has a typical marital deduction formula plan designed to reduce federal estate taxes to zero. Accordingly, an amount that can pass free of federal estate tax by using the decedent's federal estate tax exemption amount is devised to a family (bypass) trust for the benefit of the spouse and descendants, with the balance of the client's estate passing to or in trust for the surviving spouse in a manner that takes advantage of the unlimited marital deduction.

Under this plan, $2 million will pass to the family trust and no federal estate tax will be due at the first spouse's death. However, this plan does not ensure that no state estate tax will be due. If the client resides in a state that imposes state estate tax, and if the state grants an exemption amount that is less than $2 million, state estate tax will be due on the difference between the state exemption amount and total amount passing to the family trust. For example, if the state exemption amount is $1 million, the other $1 million passing to the family trust will be subject to state estate tax at the first death.

Avoid federal and state estate tax, but waste some federal exemption amount. The practitioner could prevent state estate tax from being due in the first scenario by drafting the marital deduction formula to eliminate state estate tax at the first spouse's death. With this plan, $1 million would pass to the family trust. This amount would use the full state exemption amount and half of the federal exemption amount. The other $2.5 million would pass to or in trust for the surviving spouse. Assuming this $2.5 million devise qualifies for the marital deduction, no federal or state estate tax would be due at the first spouse's death, but $1 million of federal exemption amount would be wasted. This result could be costly at the surviving spouse's death, when more assets are subject to estate tax than would have been if the family trust had been funded with assets that maximized the first spouse's federal exemption amount.

Avoid federal and state estate tax, and fully use the exemption amounts, with a marital deduction formula plan. It may be possible to fully use the first spouse's federal exemption amount while also eliminating federal and state estate tax at the first spouse's death. This can be accomplished with marital deduction formula planning or other planning options.

A formula plan would direct that an amount equal to the state estate tax exemption amount ($1 million) would pass to a family trust (Trust A). Trust A also would use half of the federal estate tax exemption amount. Another $1 million would pass to a trust that would qualify for the state qualified terminable interest property (QTIP) election (Trust B), so that the trust would qualify for the marital deduction for state law purposes and no state estate tax would be due. Although Trust B likely would qualify for the federal QTIP election,[42] the federal QTIP election would not be made, so that Trust B would not qualify for the federal marital deduction and instead would use the other $1 million of federal estate tax exemption amount. The remaining $1.5 million of the client's estate would pass to Trust C, which would qualify for both the federal and state QTIP elections, so that it would qualify for the marital deduction and no federal or state estate tax would be due on Trust C if the QTIP elections are made.

Avoid federal and state estate tax, and fully use the exemption amounts, without a marital deduction formula plan. The same result described in the third scenario above can be achieved without a marital deduction formula. For example, the client's will could leave all assets to a single "QTIPable" trust—meaning a trust that meets the requirements for the federal and state QTIP elections. The personal representative then can decide to make the federal and state QTIP elections for all, none, or part of the trust.[43] Such a partial QTIP election must be made on a fractional or percentage basis.[44]

To the extent the personal representative makes the QTIP elections, that share of the trust will qualify for the applicable martial deduction. If the federal or state QTIP election is made for only part of the trust, the personal representative may decide to divide the trust into separate trusts based on the fractional share of the trust for which the election is made.[44] The personal representative could decide to make partial federal and state QTIP elections to achieve the same result as described above in the third scenario, and then divide the trust into three trusts: (1) a trust for which no QTIP election is made (Trust A); (2) a trust for which the state QTIP election is made, but not a federal QTIP election (Trust B); and (3) a trust for which a federal and state election are made (Trust C).

The advantage of this non-formulary QTIP plan, in contrast to the formula plan in the third scenario, is that the decision of whether to create three trusts (to avoid federal and state estate tax at the first death) or whether to create two trusts (and either waste some federal exemption amount or pay some state estate tax at the first death but avoid the complexity and cost of administering a third trust) can be postponed until the first spouse's death. A potential disadvantage of this non-formulary QTIP plan is that all assets must be held in trust for the sole benefit of the surviving spouse for life.[46]

The techniques in the third and forth scenarios are dependent on being able to make a state QTIP election when a federal QTIP election is not made (for Trust B). Some states that impose an estate or inheritance tax specifically allow a state QTIP election to be made when a federal QTIP election is not made.[47] In some cases, the applicable state statute specifically allows the state-only QTIP election,[48] while in other cases permission has been granted by administrative rule.[49] The practitioner should check the applicable state's laws before assuming that a state QTIP election can be made when a federal election is not made.[50]

In most cases, the states that allow a separate state QTIP election track the federal requirements for determining whether a trust qualifies for the election. However, Oregon also permits such an election for certain qualifying trusts where the spouse is the sole discretionary beneficiary for life, as opposed to requiring that the spouse be entitled to all income.[51]

Tax Payment Directions

The directions in the will for payment of estate taxes should contemplate federal and state estate tax, keeping in mind that state estate tax may be due when no federal estate tax is due. In particular, as described above in the first scenario, with a marital deduction formula plan tied to the federal estate tax, no federal estate tax will be due at the first spouse's death, but state estate tax may be due. In such a circumstance, a typical estate plan directs that the marital share not pay any estate tax.

It may be better to have the marital share pay the state estate tax to maximize the amount passing to the family trust, because a typical family trust passes free of federal and state estate tax at the surviving spouse's death. However, paying state estate tax from the marital share decreases the marital deduction by the amount of tax paid. This, coupled with the fact that some states do not allow a deduction for state death taxes in calculating their own state estate taxes, can result in greater state estate tax due than if taxes are paid from the family trust.[52]

Mountains and Molehills

If the estimated amount of state estate tax that will be due at the client's death is minimal, the client may prefer to pay the tax rather than implement any special planning to avoid the tax. Nevertheless, the practitioner should alert clients who reside or own property in states that impose state estate tax if such tax may be due at their deaths. In particular, married clients generally expect that no estate tax will be due at the first spouse's death. In that case, even a small amount of tax due could be an unpleasant surprise for clients who are not forewarned.

GST Tax

This article focuses on state estate taxes. However, it is important keep in mind the possible imposition of state generation-skipping transfer (GST) tax. Similar to the state death tax credit for the estate tax, the Code previously granted a GST credit that was eliminated by EGTRRA for estates of decedents dying after December 31, 2004.[53] Many states, such as Colorado, imposed a GST pick-up tax tied to the federal GST credit prior to EGTRRA and have not revised their laws to decouple.[54] Even some states that have decoupled their estate tax have not decoupled their GST tax.[55] However, a few states have decoupled from the federal GST tax system and do impose GST tax.[56]

Future of the Estate Tax

Since the passage of EGTRRA, there has been much speculation that the federal estate tax laws will be revised. By either congressional action or inaction, the state death tax credit could be reinstated.[57] Assuming CRS § 39-23.5-103 remains in effect, Colorado again would impose an estate tax if the state death tax credit ever is reinstated. The same would be true for other states that have retained their pick-up tax.

However, the resurrection of the state death tax credit would not automatically result in the reintegration of the federal estate tax system with that of all fifty states. States that decoupled from the federal system will not necessarily recouple, in which case the challenges of planning for state estate tax would persist.

Meanwhile, the problems created by the difference between the federal and state exemption amounts become increasingly significant as the gap between the federal and state exemption amounts increases. For states granting an exemption amount of $1 million, the gap was $500,000 in the years 2004 and 2005. The gap has been $1 million in 2006, 2007, and 2008. In 2009, the gap will increase to $2.5 million.[58] If the federal exemption amount of $3.5 million is made permanent or increased, as some commentators believe,[59] the gap would be $2.5 million or greater for the immediate future.

Conclusion

Following the repeal of the state death tax credit pursuant to EGTRRA, there are many state estate tax systems throughout the country. Because the state exemption amount is not necessarily the same as the federal exemption amount, state estate tax may be due even if federal estate tax is not due. If a client has property in a state that imposes estate tax, or if the client may move to such a state, it may be appropriate to implement planning to reduce or eliminate state estate tax.

Notes

1. Except as otherwise noted, references in this article to state "estate tax" are to estate tax and inheritance tax.

2. CRS § 39-23.5-103.

3. Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub. L. No. 107-16 (2001).

4. I.R.C. § 2011.

5. *Id*.

6. Pub. L. No. 107-16, *supra* note 3.

7. Zaritsky, *Waiting Out EGTRRA's Sunset Period: Practical Planning While Congress Debates Estate Tax Repeal* ¶ 3.07 (WG&L, 2004).

8. CRS § 39-23.5-103(1).

9. Zaritsky, *supra* note 7 at ¶ 3.07[1].

10. *See* Colorado Department of Revenue, Taxpayer Service Division, "FYI Estate 1: Colorado Estate Tax" (May 2005), available at www.revenue.state.co.us/fyi/pdf/estate01.pdf.

11. Covey and Hastings, "Recent Developments in Transfer and Income Taxation of Trusts and Estates and State Trust and Estate Law," in *Heckerling Institute on Estate Planning, University of Miami School of Law* Ch. 1, ¶ 145 (Tina Portuondo ed., 2006); Fox, "2008 State Death Tax Chart" (April 21, 2008), available at www.mcguirewoods.com/news-resources/publications/taxation/state_death_tax_chart.pdf.

12. Covey, *supra* note 11 at ¶ 100.2[A]; Fox, *supra* note 11.

13. Covey, *supra* note 11 at ¶ 100.2[B]; Fox, *supra* note 11.

14. Covey, *supra* note 11 at ¶ 100.2[C]; Fox, *supra* note 11.

15. Kan. Stat. Ann § 79-15,203(b)(B).

16. Wash. Rev. Code § 83.100.040.

17. N.J. Admin. Code § 18:26-3A.2(b).

18. *E.g.*, Covey, *supra* note 11 at ¶ 145; Hirschson, "Decoupling Federal and State Estate Taxes: EGTRRA Creates Challenges, Opportunities for Sophisticated Estates," *BNA Weekly State Tax Report* (Aug. 26, 2005); Fox, *supra* note 11.

19. *E.g.*, Iowa Code § 450.10(6), which provides that the Iowa inheritance tax does not apply to:

[p]roperty, interest in property, or income passing to the surviving spouse, and parents, grandparents, great-grandparents, and other lineal ascendants, children including legally adopted children and biological children entitled to inherit under the laws of [Iowa], stepchildren, and grandchildren, great-grandchildren, and other lineal descendants. . . .

20. *E.g.*, New Jersey’s Form IT-NR Inheritance Tax Non-Resident Return (2-07), available at www.state.nj.us/treasury/taxation/pdf/other_forms/inheritance/itnrai.pdf (stating that there is no New Jersey estate tax for estates of nonresident decedents, but that the New Jersey inheritance tax does apply to real property and tangible personal property held by nonresidents in the state).

21. Zaritsky, *supra* note 7 at ¶ 3.07[2][a].

22. *Id.*

23. *Id.*

24. *State Tax Commission of Utah v. Aldrich*, 316 U.S. 174 (1942).

25. Zaritsky, *supra* note 7 at ¶ 3.07[2][a].

26. Hirschson, *supra* note 18.

27. Zaritsky, *supra* note 7 at ¶ 3.07[2][a]; Or. Rev. Stat. § 118.010(4)(a).

28. Or. Rev. Stat. § 118.010(4)(b).

29. Or. Admin. R. 150-118.010(4)(b).

30. Or. Admin. R. 150-118.010(1)(3).

31. Cal. Const., art. 13A.

32. *Id*. at § 2.

33. *Id.*

34. California currently does not impose an estate tax, but Proposition 13 is illustrative of the property tax considerations to be alert to when planning with property in other states.

35. As with California, Texas currently does not impose an estate tax, but the Texas franchise tax is illustrative of the considerations to be alert to when planning with property in other states.

36. Tex. Tax Code Ann. §§ 171.0001 *et seq.* (Vernon 2008).

37. Tex. Tax Code Ann. § 171.0002 (Vernon 2008).

38. Hirschson, *supra* note 18.

39. Pennsylvania and Maryland include certain lifetime gifts in the taxable estate. Hirschson, *supra* note 18 at n.20.

40. States that impose a gift tax include Connecticut, Louisiana, North Carolina, and Tennessee. *See* Covey, *supra* note 11 at ¶ 145.1; Hirschson, *supra* note 18 at n.18.

41. Similar examples are contained in Zaritsky, *supra* note 7 at ¶ 3.07[2][b].

42. I.R.C. § 2056(b)(7).

43. *See* Treas. Reg. § 20.2056(b)-7(b)(2)(i) (authorizing a partial qualified terminable interest property (QTIP) election for federal estate tax purposes).

44. *Id*.

45. *See* Treas. Reg. § 20.2056(b)-7(b)(2)(ii) (authorizing division of a partial QTIP if authorized under the governing instrument or otherwise permissible under local law). *See also* CRS § 15-16-401 (providing for a court-ordered division of a trust).

46. It is possible to create a non-formulary QTIP plan that includes the possible creation of a trust that is not "QTIPable" (*e.g.*, a discretionary trust for the benefit of the spouse and descendants). The plan can permit a disclaimer from the QTIPable trust to a family trust. Alternatively, a *Clayton* QTIP plan could be created, as described in Zaritsky, *supra* note 7 at ¶ 3.08[4].

47. *E.g.*, Connecticut, Indiana, Kentucky, Maine, Maryland, Massachusetts, Oregon, Pennsylvania, Rhode Island, Tennessee, and Washington. Covey, *supra* note 11 at ¶ 100.3[B][2]; Fox, *supra* note 11.

48. *E.g.*, Me. Rev. Stat. Ann. tit. 36, § 4062(2-B).

49. *E.g.*, Mass. Dept. of Rev., Directive 03-2: Issues Arising from Decoupling the Massachusetts Estate Tax (Feb. 19, 2003), available at www.mass.gov/?pageID=dorterminal&L=7&L0=Home&L1=Businesses&L2=Help+%26+Resources&L3=Legal+Library&L4=Directives&L5=Directives+-+By+Decade&L6=(2000-2009)+Directives&sid=Ador&b=terminalcontent&f=dor_rul_reg_dir_dir_03_2&csid=Ador.

50. Covey, *supra* note 11 at ¶ 100.3[B][3] (stating that some states do not allow a separate QTIP election).

51. Or. Rev. Stat. § 118.013(2); Covey, *supra* note 11 at ¶¶ 100.3[B][2] and 145.1.

52. Evans, "Paying State Death Taxes from the Marital Share," 21 *Probate & Property* 54 (Sept./Oct. 2007).

53. I.R.C. § 2604.

54. CRS § 39-23.5-106; Covey, *supra* note 11 at ¶ 145.1.

55. Covey, *supra* note 11 at ¶ 145.1.

56. *Id*. (*e.g.*, Massachusetts and New York).

57. EGTRRA § 901 (providing that EGTRRA will sunset on December 31, 2010, and the laws in effect immediately prior to the passage of EGTRRA will be reinstated, in which case the state death tax credit would be reinstated).

58. *See* I.R.C. § 2010(c) (providing that the federal estate tax exemption was $1.5 million for the years 2004 and 2005; $2 million for the years 2006, 2007, and 2008; and will be $3.5 million for the year 2009).

59. *See, e.g.*, Teitell, "My Crystal Ball," 147 *Trusts & Estates* 51 (May 2008); Shapiro Kaufman, "Gazing Into the Crystal Ball: A Prediction of Post-Election Action," 34 *Est. Plan. J.* (Dec. 2007).