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A SURPRISING RESULT OF THE NEW STATE ESTATE TAX RULES: THE FREEZE ON ASSETS PASSING TO A SURVIVING SPOUSE

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When the legislature enacted Chapter 31 of New Jersey Public Laws on July 1, 2002, there was concern among estate planners surrounding a number of important issues which the language of the new law fails to address clearly. For example, estates which are subject to the New Jersey estate tax but are not subject to the federal estate tax (i.e. estates containing between \$675,000.00 and \$1,000,000.00 in assets) are now required to prepare and file with the State of New Jersey a federal Form 706 (estate tax return) based on the federal tax law in effect on December 31, 2001. However, since the IRS will no longer be involved in verifying the information supplied on those returns, the question as to how and to what extent the New Jersey Division of Taxation will take on that responsibility has been left open.

In addition to those apparent omissions in the statutory language, the new rules impose a notable burden on estate beneficiaries, especially surviving spouses who will no longer have immediate access to assets passing to them from their spouse. This restriction stems from Section 54:38-6 of the new law which provides in relevant part that the estate taxes imposed by the act "shall remain a lien on all property of the decedent as of the date of the decedent's death until paid. No property owned by the decedent as of the date of the decedent's death may be transferred without the written consent of the director, or pursuant to such rules as the director may prescribe." Although a similar lien for the payment of New Jersey Inheritance Tax has long attached to estate assets, procedures for the expedited issuance of inheritance tax waivers have made the transfer of property after death manageable. Specifically, since transfers to a spouse, children and grandchildren are not subject to inheritance tax, the absence of a tax liability in that context is established simply by proving the relationship between the decedent and the beneficiary. Proving that no lien attaches under the new estate tax will necessarily be more complex.

On September 20, 2002, the NJ Division of Taxation announced that pending the approval of final regulations, it had adopted the following policies with respect to the lien:

1. Fifty percent (50%) of the funds held at a New Jersey bank, trust company, safe deposit company, building and loan or savings and loan association; at a national bank or credit union operating in New Jersey; or by any corporation or person on behalf of a decedent, must be withheld until a estate tax waiver is obtained. This rule applies regardless of whether the account is titled in the name of the decedent alone or jointly with another person and applies to all funds being held in any form, including certificates of deposit.
2. A waiver is not required to transfer automobiles, household goods, personal effects, funds held in an account in the name of a funeral director designated to pay burial expenses of the decedent or certain funds held in a credit union.
3. An estate tax waiver is required in order to transfer or release funds to a named beneficiary of a "payable on death" account. 100% of those funds will be withheld until the waiver is granted.

Since the Division of Taxation is still in the process of developing the forms, regulations and procedures necessary to implement the new law, it is impossible to predict at this time exactly what the impact of the new estate tax lien will be. However, there are methods of avoiding the lien available. Therefore, you may want to consider discussing the retitling of your assets for that purpose with your attorney.



Begley & Bookbinder, P.C. is a law firm that concentrates on Estate & Tax Planning, Elder Law, Estate Administration, Guardianship and Will Contests, Real Estate, as well as Medicaid Planning. We are based in Moorestown, NJ, with offices in Stone Harbor, Lawrenceville & Philadelphia, PA.

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