

TAX NOTES

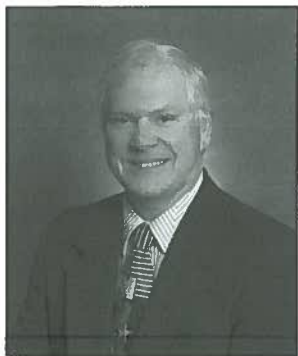
by C. Arthur Robinson II

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ESTATE TAX: *No News is Bad News*

by: C. Arthur Robinson, II, Esq.



In an article published earlier this year, I warned our clients and friends that Congress had failed to act with respect to the Estate Tax for 2010. At the time, there was widespread speculation that any gap in the Estate Tax would be a relatively temporary matter and that Congress would act quickly to reduce

the uncertainty to which many of our clients were subject. It has become apparent over the last six months that, in fact, the Estate Tax and changes to reinstate a reasonable estate tax is not high on Congress' priority list. As things stand at present under the current law, there are interesting potential consequences with respect to both forward planning as well as estates which are created in 2010. Let's address the forward planning issues initially.

As the law stands, on January 1, 2011, because the repeal of estate taxes is not revenue neutral, the Estate Tax will once again become part of our federal tax law. The structure of the tax, as presently scheduled to be reinstated on January 1, 2011, provides for an exemption equivalent of approximately \$1 million. This exemption equivalent amount will subject estates created in 2011 and beyond to significant additional taxes and will drastically increase the number of estates which are required to pay the tax.

In addition, the tax rate will increase from a 45% rate in 2009 to a 55% rate in 2011. It is also clear in Virginia and in a number of other states that estate taxes at the state level will spring back into existence.

In summary unless and until Congress acts, which appears unlikely, estates will face significantly greater tax burdens and a substantially heightened

challenge in terms of planning appropriately to ameliorate those burdens.

For those estates that are created this year, a different problem exists. The opportunity, such as it is, with respect to this year is starkly illustrated by a recent article in which a Texas billionaire by the name of Dan L. Duncan, whose estate is estimated to be approximately \$9 billion, will pay no estate tax as a result of Mr. Duncan's death. The savings in tax by Congress' failure to act is measured in billions and it points out the stark inequities created by Congress' failure to act as Mr. Duncan's estate, which is many times the size of hundreds of estates that paid tax in 2009, will likely escape estate taxation.

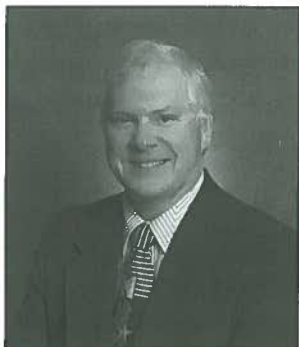
If Congress attempts at this stage to reinstate the tax on a retroactive basis, estates such as Mr. Duncan's are virtually certain to challenge the reinstatement of the tax on constitutional grounds. For many estates which are created this year whose size is large enough to exceed \$1.3 million, a series of income tax issues will flow from no estate tax being in place because the assets do not step up in basis to their fair market value as of the date of death. In fact, for estates created in 2010, the step up is limited to an inherent gain of \$1.3 million in assets, so a great many estates in the range of \$5 to \$10 million with significantly appreciated assets will actually have a greater tax burden as a result of the repeal of estate taxes than they would have faced had the estate tax stayed in place. This is so because the assets that do not step up in basis will generate capital gains income tax on their liquidation by beneficiaries.



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CHARITABLE INTENT AND TRUST DRAFTING: *Practical Concerns*

by: **C. Arthur Robinson, II, Esq.**



Often in our practice, we represent clients with charitable goals and intentions. Their desire to benefit charities ranges from simple gifts to their alma mater or other nonprofit institutions to elaborate and long term arrangements. In the area of donations to charities, it is critical to provide flexibility. It is

needed because the charities involved oftentimes will receive the benefit many years after the creation of the instrument providing for it and oftentimes, one or more elements of the arrangement as designed may not age well with the passage of time.

Even in the case of outright donation for a specific purpose, it is prudent to provide that once that purpose is accomplished, that either the funds can be converted to the general use of the organization, or if they are to be redirected, the conditions under which this takes place should be specified.

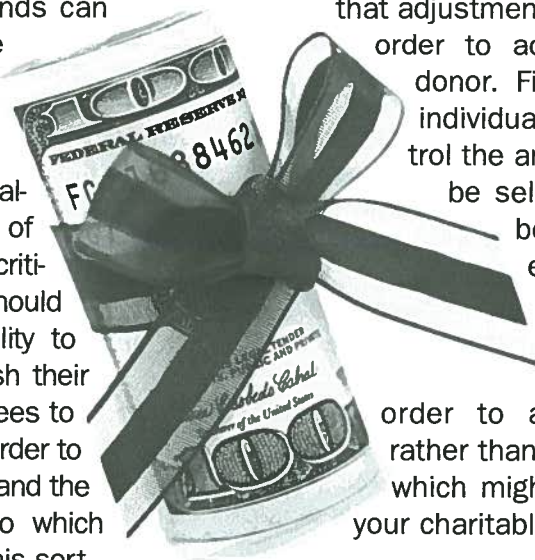
For planned giving arrangements, especially if funds are held in trust for some period of years, flexibility with respect to such trust is critical. Among the factors charitable donors should consider is vesting in the trustee the ability to reform the trust as necessary to accomplish their purposes, the ability on the part of the trustees to make changes in the charitable recipient in order to prevent the frustration of the donor's intent, and the ability to make appropriate changes as to which trustees will administer an arrangement of this sort.

It is far more commonplace than one might imagine, that disputes will arise as a result of failure to define with specificity what a donor intends and how a charity can and should conduct itself in order to be a receipt of a donor's beneficence. We have seen over the years significant litigation by and among charities vying for an interest in gifts made by clients, violation by charities of the restrictions placed on gifts by clients, attacks by charities on trustees

who were selected by donors in a variety of circumstances, as well as significant frustration of the donor's intent as the result of changes of circumstances and changes in organizations.

These difficulties arise because it is virtually impossible to predict how the future will play out. For that reason, assumptions about the existence of charities, how they will be managed, and a whole host of other concerns are often not taken into account when planning for a charitable donation. The watchword here from a drafting perspective is to provide as much flexibility as possible in order to accomplish the intent of the donor.

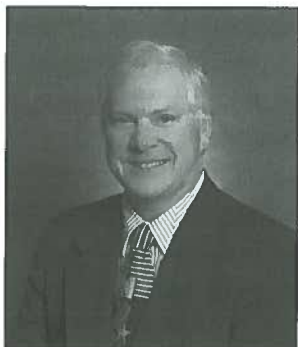
Step one is to lay out the intent of the donor as specifically as that individual can articulate it and describe the actual gifts to charity as a means to the end of accomplishing that intent. Step two is to build as much flexibility into the instruments as possible so that adjustments can be made by trustees in order to accomplish the intent of the donor. Finally, a clear statement of the individuals or entities that are to control the arrangement and how they may be selected and terminated should be a part of any plan. Our experience enables us at Wolcott Rivers Gates to assist you in designing these arrangements in order to accomplish your intentions rather than leaving to chance the results which might be obtained as a result of your charitable intent.



This article has been authored by C. Arthur Robinson, II, Esquire, who practices in the areas of tax planning and reformation, tax sensitive transactions, estate planning and estate administration. Please call Mr. Robinson at 757-470-5551 if he can be of any assistance to you with the matters mentioned in these articles or any other matter in his areas of practice.

CHANGES TO DURABLE POWERS OF ATTORNEY: *The New Virginia Act*

by: **C. Arthur Robinson, II, Esq.**



As of July 1, 2010, a new power of attorney statute for Virginia went into effect. The new statute, which applies prospectively to both new powers of attorney and powers of attorney created years ago, provides some significant changes of which all fiduciaries should be aware.

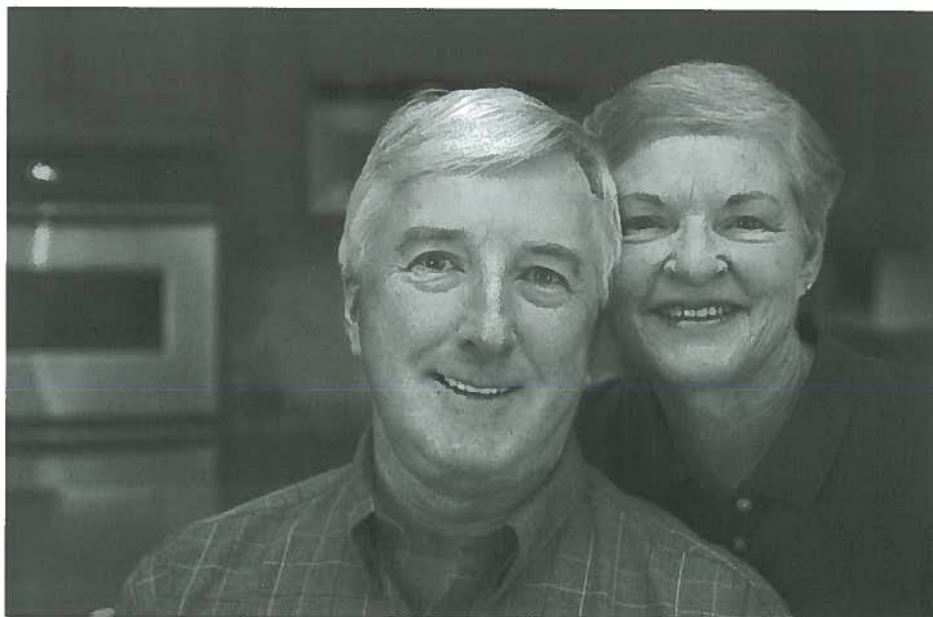
First, there is a change in terminology. Under the prior statute, the terminology typically used was "Attorney-in-Fact." In order to avoid the confusion created by this terminology, because it is sometimes difficult to distinguish between Attorney-in-Fact and Attorneys-at-Law, the new term for an individual who holds the Power of Attorney is "Agent."

In addition, there are significant changes with respect to the interpretation of these documents. The old statutory rule that Powers of Attorney were to be construed strictly against the individual who held the power have been, in large part, swept aside. Now, under the new statute, a Power of Attorney which is executed and properly notarized, can and should be recognized by third party financial institutions, and failure to do so can create significant and substantial liability on the part of such institutions. The new statute contains a mechanism that allows a properly executed and notarized power of attorney to be honored without further inquiry and shifts the burden of not doing so to the financial institutions refusing to comply.

The Virginia statutory changes are based on the Uniform Power of Attorney Act, but as is often the case, when each state enacts a uniform act, there are subtle changes made between the states. Under the Virginia Uniform Power of Attorney Act, life has

been simplified for Virginia principles provided their Powers of Attorney are in appropriate form. The contents of a Power of Attorney and how the Act will operate are very much dependent upon the contents of the Power of Attorney. As always, proper design and drafting is crucial to achieve the best results. We at Wolcott Rivers Gates are knowledgeable in this area and can assist you with these documents.

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ESTATE TAX - continued

Post-mortem planning for these estates will be complex and time-consuming and gathering information on the tax basis for assets will be both time-consuming and immensely frustrating for taxpayers and their advisors. To make matters worse, a whole host of uncertainties exist for these estates. Everything from properly interpreting documents to making wise decisions about how to allocate the limited step up will drastically increase the complexity of administering 2010 estates.

If all of this sounds complicated, then for those taxpayers who have an element of generation-skipping in their plan, the year 2010 creates a nightmare scenario in which many of the concepts embedded in the Generation-Skipping Tax Statute become null and void, at least for 2010. On first blush, this would appear only to affect the estates that are created in 2010 that have generation-skipping features. In fact, a wide variety of arrangements require, in order to achieve the best tax results, allocation of something known as the generation-skipping exemption. Both

the allocation rules for the exemption and the exemption itself do not exist for this year. As a result is that there is substantial uncertainty for certain trust arrangements going forward as to how the exemption might be allocated, if at all, when the generation-skipping tax is resurrected on January 1, 2011.

Congress' failure to act has created a great deal of complexity and uncertainty. While this uncertainty might appear to have a largely positive effect and affect only those estates created in 2010, in fact, the opposite is true. We at Wolcott Rivers Gates are familiar with these challenges and can assist you with them.

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