

**THE RESURRECTION OF THE DEATH TAX:
DECOUPLING AND THE ECONOMIC
GROWTH AND TAX RELIEF
RECONCILIATION ACT OF 2001**

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The estate tax, or so-called death tax, is among the most controversial issues in elder law. The federal government's recent passage of the Economic Growth and Tax Relief Reconciliation Act includes provisions that will repeal the state death tax credit. This repeal has the effect of eliminating the estate tax in many states. Mr. Bohl presents examples of several states' changes in estate tax law. Further, the author presents recommendations both for state legislators and attorneys in the field of estate planning. Mr. Bohl advocates for state-level estate taxes that stress predictability. State estate tax law is dense and confusing; attorneys must stay up-to-date with current estate tax law so as to provide the best advice for clients' needs.

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The author would like to thank his parents, Michael and Nancy, for their unconditional support, as well as his brother and sister-in-law, Brian and Kym, for their advice and guidance. He would also like to thank the Editorial Board and membership of *The Elder Law Journal* for their contributions to this piece, as well as Kamran Jivani and Barak Berman for their encouragement while writing this note.

I. Introduction

Four years ago, Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA).¹ The Act, championed by President George W. Bush in order to further his policy of tax reduction, includes provisions that will repeal the federal estate tax by the year 2010.² One often overlooked aspect of EGTRRA is the repeal of the state death tax credit.³ These and other changes on the federal level essentially repeal many states' local estate taxes.⁴ Recognizing the impending financial shortfall, some states revised their local estate taxes to compensate, while others simply absorbed the increased financial burden. Finally, a few states chose a cautious course and revised their laws for temporary periods. For the individual planning for the future, these changes mean much more complexity and uncertainty in his or her financial affairs.

This note sets forth recommendations for attorneys in the estate planning field as well as state legislators. For the estate planner, this note chronicles a few of the many changes in state estate tax law and proposes ways of revising estate plans so as to effectuate best the wishes of the client. With respect to the state legislator, this note outlines ways in which state laws can be modified in order to achieve greater clarity and uniformity among the fifty states.

In support of these propositions, this note will begin in Part II by discussing the legislative history of EGTRRA as a whole while specifically focusing on the provisions and proposed provisions relating to the repeal of the state death tax credit. In Part III, this note will analyze the responses of a few select states to the repeal of the state death tax credit. Additionally, this note will address the problems and opportunities created for clients attempting to plan for the distribution of assets upon death. Part III concludes by showing that the effects of the repeal of the state death tax credit are inconsistent with the legislative rationale for the repeal. Although this note is not intended as a

1. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified as amended in scattered sections of 26 U.S.C.A. (West 2002)).

2. *Id.* § 501(a), 115 Stat. at 69 (codified as amended at 26 U.S.C.A. § 2210(a) (West 2002)).

3. *Id.* § 532(a), 115 Stat. at 73 (codified as amended at 26 U.S.C.A. § 2011(f) (West 2002)).

4. See Aen Walker Webster et al., *Shifting Future for Estate Taxes: The Economic Growth and Tax Relief Reconciliation Act of 2001 Is a Harbinger of Good and Bad Tax News*, 176 N.J. L.J. 740 (2004).

comprehensive analysis of every aspect of the effects of the repeal of the state death tax credit, it will spotlight a few select problems raised as illustrative of the types of issues legislators and attorneys must consider.

II. Background

Many states currently impose their own estate taxes that work cooperatively with the federal tax structure.⁵ For example, California imposes an estate tax on its residents that is equal to the amount that can be taken as a credit for state death taxes under section 2011 of the Internal Revenue Code.⁶ Because California “does not impose a burden in addition to that which ordinarily would be imposed by the federal estate tax,”⁷ it does not impose its own tax;⁸ it merely “picks up”⁹ the amount allowed as a credit under federal law.¹⁰ California’s pick-up tax system is not unique; prior to EGTRRA many states across the country had similar laws.¹¹

However, with the passing of EGTRRA came a change in the federal tax law that has had a profound effect on pick-up tax systems throughout the country.¹² After the passage of EGTRRA, the credit for state death taxes paid was phased-out¹³ and eventually repealed.¹⁴ Consider the effect these changes will have on Texas’ pick-up tax system. Prior to the enactment of EGTRRA in 2001, a resident decedent with a \$2,000,000 taxable estate would pay a total of \$560,250 in estate

5. See, e.g., ARIZ. REV. STAT. ANN. §§ 42-4001(2), -4051(A) (1999).

6. 26 U.S.C.A. § 2011 (West 2002); CAL. REV. & TAX. CODE §§ 13302, 13411 (West 1994 & Supp. 2005).

7. *Hoffman v. Connell*, 87 Cal. Rptr. 2d 272, 275 (Cal. Ct. App. 1999).

8. *Id.* at 274.

9. This type of system is often referred to as a “sponge tax” system. See Dean L. Surkin, *The Impact of the Decoupling of State Estate Taxes on a Taxpayer’s Choice of Domicile*, 101 J. TAX’N 49, 50 (2004). However, in the interest of uniformity, these systems will be referred to as “pick-up” tax systems.

10. *Hoffman*, 87 Cal. Rptr. 2d at 275.

11. See, e.g., MD. CODE ANN., TAX-GEN. § 7-304(a) (LexisNexis 1997) (amended 2002); MINN. STAT. ANN. § 291.03 (West 1999) (amended 2002); WIS. STAT. ANN. § 72.01–.02 (West 1999) (amended 2002).

12. Webster et al., *supra* note 4.

13. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 531(a)(3), 115 Stat. 38, 72–73 (codified as amended at 26 U.S.C.A. § 2011(b)); see also 26 U.S.C.A. § 2011(b)(2)(B) (West 2002).

14. § 532(a), 115 Stat. at 73 (codified as amended at 26 U.S.C.A. § 2011 (West 2002)).

taxes.¹⁵ Of this amount, \$99,600 would be picked up by the State of Texas.¹⁶ In 2002, however, Texas could only collect \$74,700.¹⁷ In 2004, that number decreased to \$24,900.¹⁸ And finally, as of January 1, 2005, Texas was able to collect zero dollars from the estates of its resident decedents.¹⁹

The effect of EGTRRA on the states becomes even more striking in the aggregate. In 2000, Texas collected \$278 million in death taxes;²⁰ if EGTRRA had been fully in force in that year, Texas simply would have lost this revenue. In fact, the estimated aggregated loss for the fifty states over a ten-year period may be anywhere from \$50 to \$100 billion,²¹ with New Hampshire, New York, and New Jersey facing the greatest percentages of revenue loss.²²

On the other hand, a similar burden will not be placed on the federal government for quite some time. From 2001 to 2003, Texas, for example, suffered a 50% reduction in its share of the total estate tax while the federal government only noticed a 6.1% reduction in its share.²³ This is due to the fact that the credit for state death taxes paid was phased-out by 2005 while the estate tax at the federal level is be-

15. A taxpayer can determine his or her total estate tax by first finding the tentative tax on the estate under 26 U.S.C.A. § 2001(c) (West 2002) (The tentative tax for a \$2 million estate in 2001 was \$780,000). Next, the taxpayer will subtract his or her unified credit from the total estate taxes owed. The unified credit is equal to the tentative tax that would be owed on the exclusion amount set forth in 26 U.S.C.A. § 2010(c) (West 2002) (In 2001, the exclusion amount was \$675,000, giving the taxpayer a unified credit of \$220,000). Thus, a taxpayer with a \$2 million estate in 2001 would pay a total of \$560,000 in estate taxes.

16. TEX. TAX CODE ANN. §§ 211.001(4), .003, .051(a) (Vernon 2002). According to 26 U.S.C.A. § 2011, the federal credit for state death taxes paid for a \$2 million estate in 2001 was \$99,600. This number is obtained by first determining the adjusted taxable estate under 26 U.S.C.A. § 2011(b)(3) (West 2002) (“[T]he term ‘adjusted taxable estate’ means the taxable estate reduced by \$60,000.”). Accordingly, the adjusted taxable estate for an estate of \$2 million is \$1,940,000. The credit for state death taxes is then determined by the table set forth in 26 U.S.C.A. § 2011(b)(1) (West 2002). Thus, in 2001, the credit for a \$1,940,000 adjusted taxable estate was \$99,600.

17. 26 U.S.C.A. § 2011(b)(2)(B). Seventy-five percent of \$99,600 is \$74,700.

18. *Id.* Twenty-five percent of \$99,600 is \$24,900.

19. *Id.* § 2011(f) (West 2002) (“This section shall not apply to the estates of decedents dying after December 31, 2004.”). Because the credit for state death taxes will then be zero dollars, Texas will be able to collect nothing.

20. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002, 283 tbl.429 (2002).

21. Kevin Sack, *States Expecting to Lose Billions from Repeal of U.S. Estate Tax*, N.Y. TIMES, June 21, 2001, at A1.

22. *Id.*

23. Jeffrey A. Cooper et al., *State Estate Taxes After EGTRRA: A Long Day’s Journey into Night*, 17 QUINNIPIAC PROB. L.J. 317, 321 (2004).

ing phased-out over a much longer period and will not fully expire until the end of 2009.²⁴ As a result of the elimination of the credit for state death taxes paid, the federal government, after 2005, will enjoy an increase in the marginal federal estate tax rates from their 2001 levels.²⁵ Thus, the federal government is effectively redirecting state revenue into the federal piggy bank under the auspices of a federal tax cut.²⁶

A. Legislative History of EGTRRA

Questions of legislative intent thus arise: were the lawmakers aware of the potential problems with a disproportionate phase-out of the estate tax? And if they were aware, what benefits did they see in a disproportionate phase-out that would have caused them to enact the bill in the form they did? This section will provide a general overview of the legislative process underlying EGTRRA in order to shed light on these questions. Accordingly, the note will concentrate on discerning intent through conference reports, floor debates, and amendments, giving particular weight to those individuals most familiar with the legislation: the committee chairpersons and bill sponsor.

Any foray into legislative history, however, needs to be undertaken with great care. Indeed, discerning legislative intent, especially in compromise legislation, can be particularly nettlesome.²⁷ Some scholars have offered guidance on how to discern the intent of a legislative body.²⁸ Others have advocated a view that “intent” is some-

24. The estate tax on the federal level is phased out by increasing the unified credit amount over the course of eight years. 26 U.S.C.A. § 2210(c) (West 2002). Then, in 2010, the estate tax is eliminated. *Id.* § 2010(a) (“[T]his chapter shall not apply to the estates of decedents dying after December 31, 2009.”). However, on the state level, the estate tax is phased out over the course of three years, and in 2005, estate taxes for states that employ a pick-up system will no longer be possible. *Id.* § 2011(b)(2)(B); *id.* § 2011(f) (“This section shall not apply to the estates of decedents dying after December 31, 2004.”).

25. Cooper et al., *supra* note 23, at 322 tbl.3.

26. *Id.* at 322.

27. Professors Eskridge and Frickey warn researchers of potential pitfalls of statutory interpretation. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 327 (1990) (warning, to cite just one example, that individual statements are not necessarily demonstrative of the intent of Congress).

28. A leading theory in this area is Eskridge and Frickey’s seminal article *Statutory Interpretation as Practical Reasoning*. *Id.*

thing foreign to a legislative body,²⁹ saying that a diverse group of individual intents—as is certainly the case with the decision on the disproportionate phase-out of the estate tax, demonstrated below—cannot add up to one single definable intent.³⁰ The inquiry here, however, is more general in nature. Instead of attempting to use legislative intent to advocate a particular interpretation, this note merely attempts to discern the reasons, if any, behind the disproportionate phase-out of the estate tax.

The Economic Growth and Tax Relief Reconciliation Act of 2001 (H.R. 1836) was considered in the House of Representatives on May 16, 2001.³¹ After a relatively short debate on, and the rejection of, a proposed substitute amendment from Representative Charlie Rangel,³² the bill was passed and sent to the Senate.³³ At no point during the House deliberations did the issue of the Credit for State Death Taxes arise.³⁴ However, the bill did provide for a proportionate phase-out of the federal and state estate taxes³⁵ which was consistent with President Bush's recommendations.³⁶

1. SENATOR GRAHAM'S AMENDMENT

The Senate began consideration of the bill on May 17, 2001.³⁷ Spurred on by Florida TaxWatch, a nonpartisan watchdog group, Florida's Senator Bob Graham raised a potential problem with the way the estate tax was set to be phased-out in the Senate version of the bill.³⁸ Specifically, Senator Graham pointed out that the estate tax is a shared source of revenue and that, under the proposed senate bill, the phase-out on the state level occurs more rapidly than the phase-

29. Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 239 (1992) ("Legislative intent is an internally inconsistent, self-contradictory expression. Therefore, it has no meaning.").

30. *Id.* at 249 ("Individual intents, even if they are unambiguous, do not add up like vectors.").

31. 147 CONG. REC. H2207 (daily ed. May 16, 2001).

32. 147 CONG. REC. H2216–23 (daily ed. May 16, 2001).

33. 147 CONG. REC. H2223 (daily ed. May 16, 2001). The bill was adopted by a vote of 230 yeas to 197 nays. *Id.*

34. See 147 CONG. REC. H2207–23 (daily ed. May 16, 2001).

35. Keith G. Baker, *Accelerated Estate Tax Changes Pose Threat to Florida: First Year Impact \$460 Million Additional on Florida*, BRIEFINGS (Florida TaxWatch), May 2001, <http://floridatxwatch.org/resources/pdf/briefings/052001acceleratedEstateTaxChanges.pdf>.

36. *Id.*

37. 147 CONG. REC. S5028 (daily ed. May 17, 2001).

38. See generally 147 CONG. REC. S5097 (daily ed. May 17, 2001) (statement of Sen. Graham).

out on the federal level.³⁹ The result is that the states yield a disproportionate share of the cost of phasing-out the estate tax. As a preliminary matter, Senator Graham highlighted that the bill was inconsistent with President Bush's recommendations, which provided for an equal phase-out of the estate tax on the federal and state level.⁴⁰ Moreover, the Senator highlighted the fact that he believed that a disproportionate phase-out of the estate tax would implicate serious federalism concerns. Specifically, Senator Graham stated:

So effectively, what we are saying, with apparently no consultation with our brethren in the States, is that they are going to take the hit first because we are the ones who decide who has to carry the burden first. I think that is egregiously unfair in our Federalist system.⁴¹

In the Senator's view, it was particularly outrageous for the U.S. Senate, a legislative body implemented specifically to protect the individual states, to treat the states in this way.⁴² Additionally, many states derived a large chunk of their education funding from their share of the estate tax.⁴³ Finally, the Senator saw irony in the fact that the current bill, by imposing a serious burden on the states, would thereby cause additional hassles for the individual taxpayer in the form of, say, higher property or sales taxes.⁴⁴ As a result of his concerns, the Senator offered an amendment calling for an equal phase-out of the estate tax on the federal and state levels.⁴⁵

39. What we have before us tonight is a bill which would say that beginning January 1, 2002, just a little more than 7 months from now, the State share would be cut in half. Then it says that there will be gradual further reductions and then January 1, 2005, the State share would be zero. The Federal share, on the other hand, continues in effect until the year 2011.

147 CONG. REC. S5097 (daily ed. May 17, 2001) (statement of Sen. Graham).

40. "What President Bush had suggested was that there be an equal phase-out of the State share and of the Federal share. That is not what is in the bill before us tonight, unfortunately." *Id.* The Senator further commented that he believed that the President's recommendation was also more equitable than the bill under consideration. *Id.* ("But it does what the President has suggested—that we do it fairly . . .").

41. *Id.*

42. "[T]he U.S. Senate was peculiarly established to be the representatives of the interests of States, so we ought not to be the body leading this way." 147 CONG. REC. S5098 (daily ed. May 17, 2001) (statement of Sen. Graham).

43. *Id.* at S5098–99 (statement of Sen. Graham).

44. "Are [the States] going to have to raise property taxes to fill the gap? Are they going to have to raise sales taxes to fill the gap?" *Id.* at S5099 (statement of Sen. Graham).

45. *Id.* at S5097–S5098 (proposed amendment no. 688).

The principle challengers to Senator Graham's amendment were Senator Charles Grassley, the chairman of the Senate Committee on Finance,⁴⁶ and Senator Max Baucus, the ranking minority member of the committee.⁴⁷ The statements of these senators should be given particular weight, as they come from the committee leaders responsible for this bill.⁴⁸ Both senators emphasized that the legislation was the result of a compromise and expressed concern that Senator Graham's amendment might derail carefully negotiated agreements.⁴⁹ Acknowledging the fact that the current bill deviated from the President's recommendations,⁵⁰ both senators implied that a disproportionate phase-out of the estate tax was necessary in order to pass the bill as a whole.⁵¹ Indeed, Senator Grassley emphasized numerous times that this was the case, stating that:

Obviously, there are problems for some Senators. I respect their objection, but we did it in the best way we could in a compromising fashion, trying to do as much as we could with a lesser amount of money than what the President was trying to do in his tax program, and do it in a bipartisan fashion.

We brought a bipartisan bill out of committee 14-6. We have had quite a few bipartisan votes today . . . [A]gain, I remind everybody this is a work of compromise—more importantly, bipartisan compromise—so nobody has really gotten what they want.⁵²

Indeed, Senator Baucus echoed Senator Grassley's comments.⁵³ Thus, it appears as though the decision to change from a proportionate phase-out of the estate tax, as the President had recommended, to a disproportionate one was made to appease legislators worried about

46. 147 CONG. REC. H2832 (daily ed. May 25, 2001) (statement of Rep. Thomas); *see generally* 147 CONG. REC. S5099–S5100 (daily ed. May 17, 2001) (statements of Sen. Grassley and Sen. Baucus).

47. 147 CONG. REC. H2832 (daily ed. May 25, 2001) (statement of Rep. Thomas). *See generally* 147 CONG. REC. S5099–S5100 (daily ed. May 17, 2001) (statements of Sen. Grassley and Sen. Baucus).

48. George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, DUKE L.J., Feb. 1990, at 39, 41, 51.

49. *See generally* 147 CONG. REC. S5099–S5100 (daily ed. May 17, 2001) (statements of Sen. Grassley and Sen. Baucus).

50. "The President does not increase the unified credit. So, yes, his plan is a proportionate reduction." *Id.* at S5099 (statement of Sen. Grassley).

51. *See generally id.* at S5099–S5100 (statements of Sen. Grassley and Sen. Baucus).

52. *Id.* at S5099 (statement of Sen. Grassley).

53. "I urge the Senate to heed the wise words of the chairman of the committee." *Id.* at S5099 (statement of Sen. Baucus).

the price tag of the bill. Consequently, Senator Graham's amendment was ultimately rejected by a vote of thirty-nine yeas to sixty nays.⁵⁴

2. SENATOR NELSON'S AMENDMENT

After the defeat of the Graham amendment, Senator Bill Nelson, also from Florida, proposed another amendment.⁵⁵ This amendment was similar to Senator Graham's amendment in that the end result was a proportional phase-out of the state and federal estate taxes.⁵⁶ However, Senator Nelson's amendment differed from the previous proposal by providing for a temporary reduction in the top marginal rate cuts in order to make up for the lost revenue as a result of the equal phase-out.⁵⁷ Indeed, in the proposed amendment, the Secretary of the Treasury was given the responsibility of adjusting the tax rates accordingly.⁵⁸

Senator Nelson advocated his amendment on similar grounds as Senator Graham, stating that "this is an amendment everybody can vote for because you want to protect your States This would provide for a responsible full repeal of the estate tax while leaving time for our States to plan for this loss of revenue"⁵⁹

Senator Grassley, presumably worried about the delicate coalition of support for the bill, objected to this amendment as well.⁶⁰ After pointing out that this amendment was strikingly similar to Senator Graham's amendment from the day before, Senator Grassley noted that he was concerned that allowing the Secretary of the Treasury to adjust tax rates would violate the constitutional requirement that all revenue measures originate in the House of Representatives.⁶¹ Nevertheless, the Senate decided to vote on the amendment.⁶² Surprisingly, overnight, Senators Nelson and Graham picked up an additional three votes from the day before. But, it still proved not to be enough, and

54. 147 CONG. REC. S5253 (daily ed. May 21, 2001).

55. 147 CONG. REC. S5420 (daily ed. May 22, 2001) (Nelson amendment).

56. "This amendment . . . would result in the full repeal of the estate tax but would phase out the State estate tax portion at a rate consistent with the repeal of the Federal portion" *Id.* (statement of Sen. Nelson).

57. "[This amendment] would pay for it through a temporary reduction in the top marginal rate cuts." 147 CONG. REC. S5420 (daily ed. May 22, 2001) (statement of Sen. Nelson).

58. *Id.* (Nelson amendment).

59. *Id.* (statement of Sen. Nelson).

60. *Id.* (statement of Sen. Grassley).

61. *Id.*

62. 147 CONG. REC. S5421 (daily ed. May 22, 2001).

the amendment was killed by a vote of forty-two yeas to fifty-seven nays.⁶³ Thus, it appears that Congress was cognizant of the potential impact a disproportionate phase-out would have on the states, but nevertheless made the affirmative choice to impose this burden on its state counterparts.⁶⁴

B. Results of the Agreement

The bill passed in the Senate and proceeded to a conference committee in the House of Representatives. The bill that emerged from the committee, as negotiated, contained a disproportionate phase-out of the state and federal shares of the estate tax.⁶⁵ However, Senator Graham still voiced his objections, stating that:

Today we are poking a very sharp stick in the eye of our fellow Members of this federalist system. Without any consultation, without any consideration of the impact that it will have on their ability to meet basic obligations such as to educate our children, we have just taken \$10 billion a year out of the budgets of our 50 State partners in this American system of federalism.⁶⁶

Indeed, the very results that concerned Senators Graham and Nelson manifested from this agreement. The Senator's home state of Florida serves as an example: after the passage of EGTRRA, Governor Jeb Bush faced an \$800 million revenue loss from the phase-out of the estate tax that contributed to an overall \$3 billion budget shortfall.⁶⁷ The disproportionate phase-out even affected some states' education funding,⁶⁸ a concern raised by Senator Graham.⁶⁹

63. *Id.*

64. This conclusion appears to answer a question left open in Susan K. Hill, *Leaping Before We Look?: Repeal of the State Estate Tax Credit and the Consequences for States, Americans, and the Federal Government*, 32 PEPP. L. REV. 151, 181 (2004) ("What is unclear is whether Congress knew that it was diverting so much revenue away from the states.").

65. The conference report provided for the phase-out and eventual elimination of the credit for state death taxes by 2005 while eliminating the estate tax on the federal level in 2011. 147 CONG. REC. H2775-76 (daily ed. May 26, 2001) (EGTRRA conference agreement).

66. 147 CONG. REC. S5525 (daily ed. May 23, 2001) (statement of Sen. Graham).

67. Steve Bousquet, *Lawmakers Debate Best Way to Steer State Budget*, ST. PETERSBURG TIMES, April 3, 2003, at 1A.

68. This is especially true for Nevada, who funded its K-12 and Community College system with its share of the estate tax. Stephen C. Hartnett, *Federal Estate Tax Changes Darken Nevada's Fiscal Future*, NEV. LAW., Sept. 2002, at 11; see also NEV. CONST. art. 10, § 4. As discussed below, this bill put Nevada in a particularly precarious position, as the Nevada Constitution requires an amendment to allow for the imposition of a separate estate tax. *Id.*

Ironically though, some benefits for states like Florida flowed from the disproportionate phase-out and will blossom further in the event of a permanent repeal of the estate tax on the federal level. The benefit flows from the fact that the states with no estate tax after 2005 will attract more “snowbirds” to their state.

Indeed, for estate-planning purposes, all states will no longer be created equal, and states with no estate tax will enjoy a competitive advantage for retirees. As Richard S. Rothberg points out, post-EGTRRA, estate planners will now advise their clients to change their domiciles to less burdensome states such as Florida.⁷⁰ Thus, states with constitutional prohibitions against state-level estate taxes may reap an indirect benefit in the form of an influx of retirees (and their pocketbooks) wishing to avoid estate tax liability in decoupled states. While the benefit is not direct, it is a real one nonetheless.

III. Analysis

A. State-Level Response to EGTRRA

While an in-depth survey of every state’s response to EGTRRA is beyond the scope of this note, a close examination of the effects EGTRRA will have on a few select states will be illustrative. In the wake of EGTRRA, a state government has two options: (1) leave the state-level pick-up tax system in place and simply absorb the lost revenue or (2) retain the revenue by passing new legislation. The states not wanting to lose this revenue have been compelled to elect the latter option and “decouple” their laws from the federal state death tax credit by passing legislation that imposes distinct state-level estate taxes.⁷¹

Thus, these states can be divided into two categories: those that have not responded to EGTRRA and those that have enacted new legislation imposing separate estate taxes on their residents.⁷² The states

69. “We seem to be . . . indifferent to what we are doing to our . . . American education by destabilizing the primary source of financing for American education, which is the fifty States.” 147 CONG. REC. S5099 (daily ed. May 17, 2001) (statement of Sen. Graham).

70. Richard S. Rothberg, *Impact of New Federal Tax Law? Many New York Estates Will Not Benefit; Some May Be Penalized*, 226 N.Y.L.J. 11, 11 (2001).

71. See, e.g., MASS. ANN. LAWS ch. 65C, § 2A(e) (LexisNexis Supp. 2005); MINN. STAT. ANN. § 291.03 (West Supp. 2005).

72. For a general survey of various states’ death tax laws after EGTRRA, see Cooper et al., *supra* note 23.

that have decoupled from the federal structure can be further characterized as either fully decoupled or partially decoupled.⁷³ What follows is a brief analysis of a few select states' responses—or lack thereof—to EGTRRA, and the effects this will have on the average taxpayer facing estate taxes in that state.

1. STATES THAT EMPLOY A “PICK-UP” ESTATE TAX AND HAVE NOT DECOUPLED

Three of the nation's five most populous states have not affirmatively responded to EGTRRA and currently fall into the category of not decoupled.⁷⁴ Generally, states fall into this category either because there is a state constitutional bar or other procedural element that prevents the state from decoupling its laws or because proposed legislation calling for decoupling has failed.⁷⁵ In the absence of a separate inheritance tax or generation-skipping transfer tax that is not tied to the federal scheme, these states stand to lose a significant amount of revenue.⁷⁶ This section will discuss the effects of EGTRRA on four states: Florida, Texas, California, and Nevada.

a. Florida Florida's pick-up system died with the federal repeal of the federal state tax credit in 2005.⁷⁷ Florida has long had a strong public policy against the imposition of a separate estate tax.⁷⁸ Indeed, in an effort to attract wealth to the state, Florida passed a constitutional amendment in 1924 prohibiting the imposition of taxes on inheritances of residents.⁷⁹ When the federal government did not follow suit and enacted an estate tax with a credit for state death taxes paid, Florida further amended its constitution to allow for this revenue-sharing opportunity.⁸⁰

73. See *id.* at 324–30 (analyzing various states' responses to EGTRRA and categorizing them as “decoupled,” “partially decoupled,” or “no response”).

74. These states are California, Texas, and Florida, which ranked first, second, and fourth, respectively, in population size in 2001. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *supra* note 20, at 23 tbl.19.

75. See, e.g., ALA. CONST. amend. XXIII; FLA. CONST. art. 7, § 5(a); NEV. CONST. art. 10, § 4.

76. Howard Godfrey, *The Phaseout of the Federal State Death Tax Credit; Part 2*, 35 TAX ADVISOR 148, 148 (2004).

77. FLA. STAT. ANN. § 198.02 (West 2005).

78. See generally James E. Roberts & Alan Lindsay, *Tax Notes: Florida Statute 198.02—Constitutional or Not?*, 46 FLA. B.J. 303, 303–04 (1972).

79. *Id.* at 303.

80. The new amendment read: “[T]he power of the Legislature to levy such inheritance taxes or estate taxes . . . shall exist only so long as, and during the time

However, the Florida courts have repeatedly emphasized that this provision of its constitution only allows for revenue sharing with the federal government, not the imposition of an additional tax on Florida estates.⁸¹ As one Florida judge colorfully stated, “it was the intent of the people of Florida that the State of Florida would impose . . . only such taxes upon estates of decedents as could be paid to Florida and deducted from the federal taxes without increasing by one jot or one tittle the total tax burden upon such estates.”⁸² This sentiment has been strongly and consistently affirmed by Florida courts since that time.⁸³

Consequently, barring a constitutional amendment,⁸⁴ Florida will be forced to absorb the loss as a result of EGTRRA. The result is an estimated \$1.1 billion loss by 2005.⁸⁵ This loss is even more striking because 2.6% of Florida’s total revenue comes from its share of the federal estate tax.⁸⁶

b. Texas Texas imposes an inheritance tax that is, in reality, an estate tax based upon the federal tax.⁸⁷ Texas courts have said that the tax is a tax upon the right of succession rather than upon the property itself.⁸⁸ Indeed, the tax is not a “charge upon the general estate of the decedent” but an “impost tax or a tax upon the right of succession to be imposed upon the several amounts of the decedent’s estate to

that, a similar tax is enforced by the United States.” *Id.* at 304 (internal quotations omitted).

81. *Green v. State ex rel. Phipps*, 166 So. 2d 585, 587 (Fla. 1964) (“The Court finds that under Section 11, Article IX of [(precursor to FLA. CONST. art. 7, § 5(a))] . . . the legislature is without power to levy or authorize the levy of an estate tax which has the effect of increasing the tax burden upon the estate of a resident of Florida.”).

82. *Id.* at 589.

83. *Dep’t of Revenue v. Golder*, 326 So. 2d 409, 411 (Fla. 1976); *Dickinson v. Maurer*, 229 So. 2d 247, 249 (Fla. 1969); *Cockrell v. Lewis*, 389 So. 2d 307, 309 (Fla. Dist. Ct. App. 1980).

84. FLA. CONST. art. 7, § 5(a).

85. John Kennedy, *Shortcuts, Deep Cuts and Hard Cuts; Florida Legislature to Face a New Reality; Budget Cuts Most Likely to Hurt the Most for the State’s Neediest*, ORLANDO SENTINEL (Fla.), Jan. 20, 2002, at G1.

86. Sharon Harvey Rosenberg, *Jeb Bush’s Next Big Problem*, BROWARD DAILY BUS. REV., Nov. 12, 2001, at A6.

87. WILLIAM P. STRENG & MICKEY R. DAVIS, *RETIREMENT PLANNING: TAX AND FINANCIAL STRATEGIES* ¶ 20.04[2][f] (3d ed. 2004).

88. *State v. Hogg*, 72 S.W.2d 593, 594 (Tex. Comm’n App. 1934, judgment adopted); *Thompson v. Calvert*, 301 S.W.2d 496, 498 (Tex. App. 1957).

which the successors . . . are . . . entitled.”⁸⁹ However, from a revenue perspective, it is virtually identical to a traditional “pick-up” estate tax because it imposes a tax that is equal to the amount of the federal credit for state death taxes paid.⁹⁰

Texas’ tax also died in 2005 along with the federal state tax credit.⁹¹ While it is not clear how much revenue will be lost as a result, it is important to note that Texas collected \$278 million in death taxes in 2000⁹² and \$256 million in 1999.⁹³

Recognizing the problem, members of the Texas legislature attempted to pass legislation freezing the applicable rate to the state tax credit amount in effect on December 31, 2000.⁹⁴ However, the bill has not left committee, evincing a public policy decision on the part of Texas to absorb the revenue loss that will occur as a result of EGTRRA.

c. *California* The California legislature currently has not decoupled its estate tax.⁹⁵ Historically, Californians have displayed a strong distaste for taxes like the estate tax.⁹⁶ Therefore, it is no surprise that only a popular vote could decouple California’s estate tax laws from the federal scheme.⁹⁷ Nevertheless, California was able to generate revenue without imposing an additional estate or inheritance tax through the use of a pick-up tax system.⁹⁸ California has historically

89. Norton v. Jones, 210 S.W.2d 820, 821 (Tex. App. 1948).

90. TEX. TAX CODE ANN. §§ 211.003, .051(a) (Vernon 2002).

91. *Id.* §§ 211.001(4), .003, .051(a).

92. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, *supra* note 20, at 283 tbl.429.

93. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, 281 tbl.437 (2001).

94. H.B. 2532, 78th Leg., Reg. Sess. (Tex. 2003); S.B. 1149, 78th Leg., Reg. Sess. (Tex. 2003).

95. CAL. REV. & TAX. CODE §§ 13302, 13411 (West 1994).

96. *Id.* § 13301 (“Neither the state nor any political subdivision of the state shall impose any gift, inheritance, succession, legacy, income, or estate tax, or any other tax, on gifts or on the estate or inheritance of any person or on or by reason of any transfer occurring by reason of a death.”).

97. “[T]he Legislature shall not amend or repeal this act other than by an enactment which becomes effective only when approved by a majority of the electors voting thereon in a statewide election.” Initiative Measure of June 8, 1982, 1982 Cal. Stat. 5988, reprinted in CAL. REV. & TAX. CODE § 13301 app. at 340 (West 1994); see also Robert Salladay, *Estate Tax Cut’s Burden on State; Federal Break for Rich: \$1 Billion Loss to Budget*, THE S.F. CHRON., Feb. 2, 2004, at B1.

98. CAL. REV. & TAX. CODE § 13302 (“Notwithstanding the provisions of Section 13301, whenever a federal estate tax is payable to the United States, there is hereby imposed a California estate tax equal to the portion, if any, of the maxi-

received anywhere from \$787⁹⁹ to \$928 million¹⁰⁰ in estate tax revenues pre-EGTRRA. However, as a result of the phase-out of the State Death Tax Credit, California only collected \$135 million in a recent year and is facing a greater loss in the years to come.¹⁰¹ Surprisingly, the potential \$1 billion loss has gone largely unnoticed in the California legislature, perhaps because it is merely a part of a much more severe budget crisis facing that state.¹⁰²

d. Nevada After the passage of EGTRRA in 2001, Nevada may have faced the bleakest situation among the fifty states. Nevada, like Florida, constitutionally prohibits the imposition of a separate estate tax.¹⁰³ Nevertheless, pre-EGTRRA, Nevada took advantage of the revenue-sharing opportunity under the former federal structure by imposing a traditional pick-up tax.¹⁰⁴ One-half of this revenue funded the Estate Tax Endowment of the University and Community College System of Nevada (UCCSN), while the other half funded K–12 education.¹⁰⁵

With the repeal of the credit for state death taxes paid, Nevada's education system faced losses of \$13 to \$14 million, a staggering number comprising 7.31% of the UCCSN budget.¹⁰⁶ Barring the unlikely possibility of a constitutional amendment, the shortfall would require significant budget reductions.¹⁰⁷

The crisis has been averted, at least for the time being, as a result of action on the part of the Nevada Legislature coupled with a little bit of luck. Recognizing the UCCSN crisis on the horizon, the Nevada Legislature appropriated \$45.8 million to the college system in the event that estate tax revenues fell short of expectations.¹⁰⁸ In addition,

mum allowable amount of the credit for state death taxes, allowable under the applicable federal estate tax law . . .”).

99. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2000, 319 tbl.512 (2000).

100. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *supra* note 20, at 283 tbl.429.

101. Salladay, *supra* note 97.

102. *Id.*

103. NEV. CONST. art. 10, § 4.

104. NEV. REV. STAT. ANN. § 375A.100 (LexisNexis 1999).

105. NEV. CONST. art. 10, § 4; Hartnett, *supra* note 68.

106. Hartnett, *supra* note 68, at 11.

107. *Id.*

108. Michael Arnone, *State Spending on Colleges Drops for the First Time in 11 Years*, CHRON. OF HIGHER EDUC., Jan. 16, 2004, at 24.

Nevada reaped a windfall from its 2003 estate tax collections, enjoying a 23% increase in collections, totaling \$39.2 million.¹⁰⁹ This led to the largest 2003–04 increase in college funding in the country.¹¹⁰

Although Nevada may have temporarily avoided disaster, an \$89 million hole remains due to the repeal of the credit for state death taxes paid.¹¹¹ Nevada must either find new revenue or force students to cover the gap.¹¹²

2. STATES THAT HAVE DECOUPLED THEIR ESTATE TAX IN RESPONSE TO EGTRRA

a. Illinois Pre-EGTRRA, Illinois imposed a traditional pick-up tax system that shared revenue with the federal government¹¹³ and generally collected upwards of \$400 million in shared estate tax revenue per year.¹¹⁴ However, with the repeal of the credit for state death taxes paid, Illinois faced projected shortfalls of \$800 million from 2002 to 2007.¹¹⁵ Indeed, if the Illinois legislature had not acted, the state would have been hit with a loss of between \$89 and \$90 million in 2003.¹¹⁶

However, in June 2003, Illinois passed legislation decoupling the state system from the federal structure, saving the state \$45 million.¹¹⁷ This legislation is likely the most complex decoupling law enacted among the states.¹¹⁸ The new law sets forth three time periods and

109. Sean Whaley, *Nevada's Taxable Sales up 7.8 Percent in May*, LAS VEGAS REV.-J., July 24, 2003, at 1D.

110. Arnone, *supra* note 108.

111. K.C. Howard, *Regents Approve \$1.5 Billion Budget*, LAS VEGAS REV.-J., Aug. 21, 2004, at 5B.

112. *Id.* ("If students were required to cover the gap they would have to each pay \$45 per semester.")

113. Susan T. Bart, *This Is Me Leaving You: Illinois Departs from the Federal Estate Tax Scheme*, 92 ILL. B.J. 20, 20 (2004).

114. Greg Hinz, *State Gets Creative in Revenue Search; Estate Tax, Pension Arbitrage Play Floated to Offset Cuts*, CRAIN'S CHI. BUS., Feb. 25, 2002, at 1.

115. *Id.*

116. Steve Eder & Jon Sawyer, *Governors Ask Bush to Help with State Budget Shortfalls; Transportation, Medicaid Are Cited as Key Areas*, ST. LOUIS POST-DISPATCH, Feb. 26, 2002, at A1; Russell Lissau, *Candidates Address Budget Woes*, CHI. DAILY HERALD, Oct. 25, 2002, at 1.

117. Act of June 20, 2003, Pub. L. No. 93-30, 2003 Ill. Legis. Serv. 392 (codified as amended 35 ILL. COMP. STAT. ANN. 405/2 (West 2004)); *see also* Pat Guinane, *Dying Wealthy is Going to Cost More in Illinois*, ST. J.-REG. (Springfield, Ill.), June 18, 2003, at 21; *Revenue Changes*, ST. J.-REG. (Springfield, Ill.), June 1, 2003, at 8.

118. *See* Cooper et al., *supra* note 23, at 329 ("Illinois will be a decoupled state through 2004, partially decoupled in 2005 through 2008, fully decoupled again in 2009, and a pick-up state thereafter.")

imposes separate requirements for each.¹¹⁹ For the first time period, between January 1, 2003 and December 31, 2005, an Illinois decedent's estate tax will be calculated as if the phase-out of the federal credit had not occurred but still recognizing the changes in the federal exclusion amount.¹²⁰ For this time period, Illinois can be characterized as partially decoupled because the law recognizes the federal exclusion changes while ignoring the phase-out of the State Death Tax Credit.¹²¹ However, in 2006, Illinois becomes a fully decoupled state by imposing a separate exclusion amount of \$2 million.¹²² Finally, in 2010, the state will return to the old pick-up tax structure.¹²³ As a result, in the unlikely event that the federal structure remains unchanged, Illinois' estate tax will essentially be repealed in 2010.

Although this structure is not an ideal legislative solution,¹²⁴ it is likely the result of a compromise in the Illinois legislature.¹²⁵ The legislation in its original form would have fully decoupled Illinois from the federal structure by refusing to recognize the increased exemption amounts set forth in EGTRRA.¹²⁶ Because the federal exclusion would increase¹²⁷ while the state exclusion amount remained at \$675,000,¹²⁸ some estates would have been forced to pay state estate taxes when no federal tax was due. For these reasons and others, the Chicago Bar Association prepared a memorandum strongly advocating the recognition of the increased federal exclusion.¹²⁹ Thereafter, the law was changed to recognize the increased federal exclusion amounts until 2009.¹³⁰

The result for Illinois residents is a small window of opportunity and possibly an increase in combined federal and Illinois estate tax

119. 35 ILL. COMP. STAT. ANN. 405/2 (a-c) (West Supp. 2005).

120. *Id.* 405/2(a).

121. Cooper et al., *supra* note 23, at 328 (defining partially decoupled states as those that retain estate tax rates as they previously existed while recognizing the increased exemption amounts contained in EGTRRA).

122. 35 ILL. COMP. STAT. ANN. 405/2(b) (West Supp. 2005).

123. *Id.* 405/2(c).

124. Cooper et al., *supra* note 23, at 329.

125. See Bart, *supra* note 113, at 23.

126. *Id.*

127. 26 U.S.C.A. § 2010(c) (West 2002).

128. If Illinois had fully decoupled, the state would have recognized the exclusion amount in effect on December 31, 2001. This exclusion amount was \$675,000. 26 U.S.C.A. § 2010(c) (West 2000) (amended 2001).

129. Bart, *supra* note 113, at 23.

130. *Id.*

rates.¹³¹ The opportunity, as David Berek points out, is that married Illinois residents wanting to draft around the Illinois estate tax will be able to do so in 2009.¹³² For example, the couple may want to draft a second marital trust in order to prevent taxation on the portion of an estate that exceeds the Illinois exclusion amount of \$2 million but still falls within the \$3.5 million exclusion amount under the federal scheme.¹³³ This will not be possible in any year before 2009 because the Illinois structure tracks the increased federal exclusion amount until that year.¹³⁴

Second, real uncertainty now arises for Illinois residents owning property in other states, especially states that have not decoupled. The uncertainty arises in this context because the new Illinois tax is reduced by the lesser of either the amount of estate tax paid to another state or the maximum state tax credit allowable on the proportional share of the estate having a situs outside of Illinois.¹³⁵ This means that if the other state collects less than the pre-EGTRRA amount on estates, Illinois will pick up the difference.¹³⁶

Finally, from the standpoint of the estate, the possibility now exists for an increase in combined federal and Illinois estate taxes over the pre-EGTRRA levels.¹³⁷ Take, for instance, an Illinois decedent with a \$5 million estate dying in 2005. Before EGTRRA and Illinois' new decoupling legislation, the estate would have owed a total of \$2,064,500 in estate taxes.¹³⁸ However, under current law, the same estate would owe \$2,111,600,¹³⁹ an increase of 2%. Accordingly, many Illinois decedents will notice a tax *increase* as a result of EGTRRA.

131. *See generally id.*

132. David A. Berek, *Illinois' New Estate-Tax Law*, 91 ILL. B.J. 465, 467 (2003).

133. *Id.*

134. *Compare* 35 ILL. COMP. STAT. ANN. 405/2(b) (West Supp. 2005) (stating that the exclusion amount for 2006–2009 will be \$2 million), *with* 26 U.S.C.A. § 2010(c) (West 2002) (stating that the federal exclusion amount for 2006–2008 will be \$2 million and that the exclusion amount for 2009 will be \$3.5 million).

135. *Compare* 35 ILL. COMP. STAT. ANN. 405/3(b)(1) (West Supp. 2005), *with* 35 ILL. COMP. STAT. ANN. 405/3(b)(2) (West 2004).

136. Bart, *supra* note 113, at 24. (“[I]f the other state does not impose taxes equal to the 2001 pick-up tax on property having a situs in that state, Illinois greedily collects the difference.”).

137. *Id.* at 22.

138. The tentative tax on a \$5 million estate pre-EGTRRA for a decedent dying in 2005 was \$2,390,800. 26 U.S.C.A. §§ 2001(c), 2011(c) (2000) (amended 2001). The unified credit pre-EGTRRA was \$326,300. *Id.* § 2010(c) (2000) (amended 2001). Therefore, the total estate taxes owed would have been \$2,064,500.

139. Under current law, the total federal estate tax for a \$5 million estate in 2005 is \$1,720,000. The unified credit on this estate in 2005 is \$555,800. *Id.*

b. Nebraska In contrast to Illinois' new structure, Nebraska implemented a separate estate tax that is relatively straight forward. Prior to the enactment of EGTRRA,¹⁴⁰ Nebraska employed a traditional pick-up tax system.¹⁴¹ However, in 2003, the Nebraska legislature decoupled its law from the federal tax scheme and began imposing a separate estate tax.¹⁴² While the Nebraska law no longer references the Internal Revenue Code, it essentially adopted the table contained in section 2011(b)(1) without the phase-out provisions set forth in EGTRRA.¹⁴³

The Nebraska statute is easy to follow. To compare the statute to Illinois', consider, for example, the same decedent discussed above with a \$5 million estate dying in 2005. Under Illinois law, the state portion will vary from year to year, making estate planning particularly troubling.¹⁴⁴ However, the same estate in Nebraska would owe \$367,200 to the State of Nebraska, regardless of the year in which death occurs.¹⁴⁵ While it is true that the overall amount of estate taxes owed will fluctuate over the years due to the increasing unified credit amounts, estate planning will be much easier in Nebraska and similar states because the state portion will always remain constant.

c. Connecticut Hoping to recover at least \$55 million,¹⁴⁶ Connecticut decoupled its estate tax for a six-month period beginning in July

§§ 2001(c), 2010(c) (West 2002). The tentative tax in 2005 is \$2,275,800. *Id.* § 2001(c). Therefore, the total estate taxes owed to the federal government equal \$1,720,000. However, the estate now owes \$391,600, the equivalent of the state credit calculated under § 2011 as of December 31, 2001, to the state of Illinois. 35 ILL. COMP. STAT. ANN. 405/3(b) (West Supp. 2005). Therefore, the total combined estate taxes equal \$2,111,600.

140. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 532(g), 115 Stat. 38, 73 (codified as amended at 26 U.S.C.A. § 2011 (West 2002)).

141. NEB. REV. STAT. § 77-2101.01 (2003).

142. *Id.* §§ 77-2101.01 to -2101.03 (2003 & Supp. 2004).

143. Compare *id.* § 77-2101.03 (Supp. 2004), with 26 U.S.C.A. § 2011(b)(1) (West 2002).

144. Compare 35 ILL. COMP. STAT. ANN. 405/2(b) (West Supp. 2005) (stating that the exclusion amount for 2006–2009 will be \$2 million), with 26 U.S.C.A. § 2010(c) (stating that the federal exclusion amount for 2006–2008 will be \$2 million and that the exclusion amount for 2009 will be \$3.5 million).

145. Note that, for Nebraska estate tax purposes, the taxable estate will be the estate determined under federal law minus \$1 million. NEB. REV. STAT. § 77-2101(3) (2003). Thus, under §§ 77-2101.01 to -2101.03, the amount owed would be \$367,200, not \$495,200.

146. Harlan J. Levy, *For Six Months Only, a Higher Death Tax*, N.Y. TIMES, July 18, 2004, § 14CN, at 3.

2004.¹⁴⁷ Under Connecticut's temporary law, a state-level tax was imposed upon decedents dying between July 1, 2004 and January 1, 2005 at pre-EGTRRA levels.¹⁴⁸ The "don't die yet" tax, as some nicknamed it, had an exclusion amount of \$1 million—lower than the federal exclusion amount for the same time period.¹⁴⁹ The result was that estates valued over \$1 million but less than the federal exclusion amount of \$1.5 million paid Connecticut estate taxes, even though the federal government had not seen fit to impose a tax.¹⁵⁰ Moreover, the temporary law imposed a tax that was 1.3% higher than the normal, pre-EGTRRA level.¹⁵¹ For example, a \$1.5 million estate that would owe no federal estate taxes might have owed the state of Connecticut as much as \$84,000.¹⁵² Thus, for decedents that lived or owned property in Connecticut during this period, EGTRRA has effectively caused their taxes to be *raised*. This is hardly, as one representative articulated, "put[ing] the death tax to death."¹⁵³

While the temporary law expired on January 1, 2005, Connecticut was not without an estate tax for long. In June of that year, the Connecticut General Assembly changed the state-level estate tax laws once again, this time as a part of a two-year, \$31 million budget.¹⁵⁴ The new changes now permanently decouple Connecticut from the federal estate tax scheme¹⁵⁵ and impose a tax ranging from 5% for estates over \$2 million and 16% for estates over \$10 million.¹⁵⁶ Experts have estimated that the new legislation could generate anywhere from \$80 to \$100 million annually.¹⁵⁷

147. CONN. GEN. STAT. ANN. § 12-391 (West Supp. 2005).

148. *Id.* § 12-391(a).

149. Compare CONN. GEN. STAT. ANN. § 12-391, with 26 U.S.C.A. § 2010(c).

150. Compare CONN. GEN. STAT. ANN. § 12-391, with 26 U.S.C.A. § 2010(c).

151. CONN. GEN. STAT. ANN. § 12-391(a) ("The amount calculated under this subsection shall be multiplied by a factor of one and three-tenths and that product shall be the amount of tax due."); see also Cooper et al., *supra* note 23, at 326.

152. Levy, *supra* note 146, at 3.

153. 147 CONG. REC. H2836 (daily ed. May 26, 2001) (statement of Rep. Hayworth).

154. An Act Concerning the Budget for the Biennium Ending June 30, 2007, Deficiency Appropriations for the Fiscal Year Ending June 30, 2005, and Certain Taxes and Other Provisions Relating to Revenue, H.B. 6940, 2005 Leg. (Conn. 2005); William Yardley, *Connecticut Lawmakers Restore Estate Tax in Move to Balance Budget*, N.Y. TIMES, June 8, 2005, at B5. For further discussion of this legislation, see Christopher Keating, *Budget Passes as GOP Stews; Local Aid, Taxes on Wealthy Hiked*, HARTFORD COURANT, June 8, 2005, at A1.

155. See CONN. GEN. STAT. ANN. §§ 12-391(d)(1), (e)(1), (g) (West Supp. 2005).

156. See *id.* § 12-391(g).

157. Yardley, *supra* note 154, at B5.

Opponents of the bill worry that these taxes will drive away wealthy residents, who may flee to states with more amicable laws (and climates).¹⁵⁸ However, the new Connecticut law provides for a presumption that decedents are residents of the state of Connecticut.¹⁵⁹ A party wishing to rebut this presumption must submit a “request for determination of domicile” to the Commissioner of Revenue Services, who will issue a written ruling.¹⁶⁰

B. EGTRRA’s Effect on Estate Planning Bar Practices

The varied responses to EGTRRA on the state level have caused a great deal of uncertainty to enter the world of estate planning. The purpose of the following section is two-fold. First, this section will demonstrate that, as a result of EGTRRA, estate planning has now become more complicated than ever before. Second, this section will highlight a few select issues that estate planners should be aware of, in addition to some proposed solutions to those problems.

1. THE DEATH TAX TRAP

Estate planners with clients who live in a coupled state and own property in a decoupled state now need to be on the lookout for what has been lovingly dubbed the “Death Tax Trap.”¹⁶¹ For example, suppose that a client with a \$20 million estate lives in Florida, but \$2 million of that estate is property located in New York. Instead of calculating the tax on the proportional share of the New York property to the entire estate, New York will take the entire state death tax credit reduced by the amount of estate tax paid to other states.¹⁶² Florida, however, has not decoupled, and after 2005, the estate tax paid to Florida will equal zero dollars.¹⁶³ Therefore, New York collects the tax that would have been paid to Florida, had Florida decoupled. The end result is that the Florida resident ends up paying the equivalent of a New York resident estate tax on the entire estate, while the domicile

158. Christopher Keating, *Weighing Millionaires’ Tax; Some Say Imposing Levy on Income and Estates Risks Flight of Wealthy Residents from State*, HARTFORD COURANT, May 30, 2005, at A1.

159. CONN. GEN. STAT. ANN. § 12-391(h)(1).

160. *Id.* § 12-391(h)(2).

161. See Robert M. Arlen & David Pratt, *The New York (and Other States) Death Tax Trap*, FLA. B.J., Oct. 2003, at 55–56.

162. See *id.* at 58.

163. FLA. STAT. ANN. § 198.02 (West 2005).

state receives nothing. While the inequity of this situation is self-evident, it is nevertheless a real possibility that must be addressed for these clients.

Some commentators have recommended that property owned in decoupled states should be transferred to corporations, partnerships, or limited liability companies to avoid this potential problem.¹⁶⁴ Ownership of a limited liability company to which the estate has been transferred creates ownership of intangible personal property, and thus no estate tax will be owed.¹⁶⁵ However, this may not be effective in all states. Massachusetts, for example, has issued proposed regulations that would require a valid business purpose for the limited liability corporation.¹⁶⁶ This sentiment was recently addressed in the Fifth Circuit Court of Appeals, which affirmed a Tax Court ruling that a businessman retained sufficient control over transferred partnership assets to include them in his taxable estate.¹⁶⁷ Consequently, estate planners will need to draft these arrangements carefully, particularly ensuring that the new entity has a substantial nontax purpose.¹⁶⁸

2. CHANGE OF DOMICILE

Another option that some taxpayers have considered using to reduce estate tax liability at death is a change of domicile. In a post-EGTRRA world, an estate planner will need to be familiar with this area of law as well because now a move to Florida, California, Texas, or any other state that remains tied to the federal structure will reduce a decedent's estate tax liability. For example, a client moving a \$5 million estate from Nebraska, a decoupled state, to Florida, a coupled state, in 2005 would save \$495,200 in state death taxes.¹⁶⁹ However, before undertaking something as drastic as a change of domicile, the

164. Arlen & Pratt, *supra* note 161, at 58; William S. Forsberg, *The Snowbird's Plight: Migratory Minnesotans Must Beware Where They Land*, BENCH & B. MINN., Apr. 2004, at 35.

165. See Arlen & Pratt, *supra* note 161, at 59.

166. Charles D. Fox et al., *Ramification for Estate Planners of the Phase Out of the Federal State Death Tax Credit: Boom, Bust, or Unknown?*, 18 A.L.I.-A.B.A. COURSE OF STUDY 181, 196 (2003).

167. *Strangi v. Comm'r of Internal Revenue*, 417 F.3d 468 (5th Cir. 2005).

168. *Id.* at 479 (“[T]he proper inquiry is whether the transfer in question was objectively likely to serve a substantial non-tax purpose.”)

169. This is because Nebraska imposes \$495,200 in state level estate taxes in addition to whatever would be owed to the federal government. NEB. REV. STAT. §§ 77-2101.01, .03 (2003 & Supp. 2004).

process and ramifications should be thoroughly discussed with the client.

A taxpayer may change his or her domicile even if the sole purpose is to avoid taxation.¹⁷⁰ Indeed, courts have stated that “[a] court does not inquire into one’s motives for doing a lawful act.”¹⁷¹ However, some states aggressively pursue taxpayers who have changed their domicile for the tax benefits.¹⁷² For example, Maine’s Revenue Service has threatened criminal tax fraud prosecutions in some cases.¹⁷³ Moreover, the process of changing one’s domicile must be undertaken with great care, as it is possible that the courts in the new state might recognize the domicile change while the courts in the old state refuse to recognize the abandonment of domicile in their state, subjecting the estate to double taxation.¹⁷⁴ Although many states have procedures for resolving double taxation claims, estate planners should avoid this situation because of the time and expense involved.¹⁷⁵ Accordingly, if the client wishes to undertake a domicile change, the attorney must be sure it is done correctly and in accordance with the law.

As a preliminary matter, it is important to note that domicile is not the same as residency.¹⁷⁶ A person may have more than one residence, but may only have one domicile.¹⁷⁷ Residence is synonymous with physical presence, while domicile is “a place . . . to which the rules of Conflict of Laws sometimes accord determinative significance.”¹⁷⁸ For domicile to exist, there must be physical presence (or residence) and the intention on the part of the taxpayer to remain.¹⁷⁹ Moreover, the party asserting a change of domicile has the burden of establishing that the change has actually occurred.¹⁸⁰ Thus, the more

170. *DeBlois v. Clark*, 764 A.2d 727, 735 (R.I. 2001) (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 18 cmt. f (1971)); *Thayer v. City of Boston*, 124 Mass. 132, 148 (1878).

171. *State ex rel. Orr v. Buder*, 271 S.W. 508, 512 (Mo. 1925).

172. See, e.g., *Abigail King Diggins & Justin D. LeBlanc, Decoupling: Changes to Maine’s Estate Tax Law*, 18 ME. B.J. 140, 143 (2003).

173. See, e.g., *id.*

174. Compare *Dorrance v. Thayer-Martin (In re Dorrance’s Estate)*, 170 A. 601 (N.J. Prerog. Ct. 1934), with *In re Dorrance’s Estate*, 163 A. 303, 305–06 (Pa. 1932).

175. *Henry W. Comstock, Jr., Establishing or Changing Domicile When Clients Have Multiple State Contacts*, 12 EST. PLAN. 330, 331 (1985).

176. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989).

177. *Shaw v. Shaw*, 187 S.E.2d 124, 126 (W. Va. 1972).

178. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11(1) (1971).

179. *White v. Tennant*, 8 S.E. 596, 597 (W. Va. 1888).

180. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 19 cmt. c (1971).

the client can increase his or her contacts with the new state and decrease his or her contacts with the old state, the more likely a domicile change will be respected by a court.¹⁸¹ What follows below are some important factors to consider with respect to a potential domicile change.

A client wishing to change his domicile should establish his principal residence in the new state.¹⁸² If the client wishes to retain a residence in the former state, the type of residence obtained in the new state will be particularly informative of the intent prong of the domicile test.¹⁸³ For example, when an elderly woman moved from New Jersey to Florida, and put her former home up for sale, the court found that the nature of the new Florida residence was irrelevant.¹⁸⁴ However, when one retains the former residence, the court will take into account the “physical character of [the residences], [and] the time spent and the things done in each place.”¹⁸⁵ Therefore, if the client wishes to retain his former residence, it will be better for the client to purchase, rather than rent, a new residence because purchasing a residence is indicative of intent to stay for an extended period of time. Moreover, the client should spend as much time as possible in the new residence and precise records should be kept with respect to this time.¹⁸⁶ While not dispositive, more time spent in the new residence will certainly be indicative of intent to stay.¹⁸⁷

3. FUNDING FORMULAS

A change of domicile, while possible, may be too drastic a step for some clients. Often, clients in the later stages of life have established strong ties to the community that they may not want to sever merely to save some money after they die. In these cases, an estate planner will need to review the client’s plan in light of the changes in

181. Fox et al., *supra* note 166, at 195.

182. Comstock, *supra* note 175, at 330–31.

183. Shaw v. Shaw, 187 S.E.2d 124, 126 (W. Va. 1972) (holding that merely renting a room is informative of the lack of intent to stay).

184. O’Hara v. Glaser, 288 A.2d 1, 6 (N.J. 1972) (“[T]he critically important factor here is that regardless of where she lived on coming to Florida Miss Johnston’s decision had been made to abandon her domicile in New Jersey and maintain a permanent abode in Florida.”).

185. *In re Dorrance’s Estate*, 163 A. at 303, 305–06 (Pa. 1932).

186. JEFFERY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 8.02, at 151 (1982).

187. *Id.*

law. One area that will need to be reassessed is the use of formula credit shelter clauses in the client's estate plan.¹⁸⁸

Most estate planning for married couples involves creating a credit shelter trust¹⁸⁹ for the first spouse to die.¹⁹⁰ Customarily, when the first spouse dies, an amount equal to the federal unified credit exemption is taken out of the estate and put into a trust.¹⁹¹ The remaining assets are either given outright to the surviving spouse or left in a trust for his or her benefit.¹⁹² These assets avoid estate taxation thanks to an unlimited marital deduction.¹⁹³ The credit shelter trust serves two purposes: "(1) [to] avoid all estate taxes on the death of the first to die; and (2) [to] utilize fully the applicable exclusion amount of that first decedent to keep all assets in the credit shelter trust out of the estate of the surviving spouse for estate tax purposes."¹⁹⁴

However, because the unified credit is constantly changing, estate planners generally express the transfer through the use of a formula.¹⁹⁵ For example, instead of providing that a credit shelter trust will be funded with \$1 million, a formula might instead state that a credit shelter trust will be funded with an amount equal to the current federal unified exemption amount. However, with the passage of EGTRRA, the unified credit increases steadily until 2009.¹⁹⁶ The result is that the credit shelter trust may be funded with an amount much higher than previously anticipated.¹⁹⁷

Moreover, funding the credit shelter trust under these circumstances may now incur state-level estate taxes in fully decoupled states.¹⁹⁸ To illustrate, take a hypothetical decedent dying in 2009 with a \$5 million estate in a fully decoupled state. Further, assume that the decedent's will, drafted pre-EGTRRA, contains a formula credit shel-

188. See, e.g., T. Randolph Harris, *Top 10 Mistakes by Estate Planners*, 327 PLI 319, 323 (2004).

189. This is sometimes referred to as a "bypass trust" or "family trust." See Webster et al., *supra* note 4, at 740.

190. Andy Kremer, *New Gifting Incentives: Return of the Deathbed Transfer*, BENCH & B. MINN., Sept. 2004, at 19.

191. *Id.*

192. *Id.*

193. Diggins & LeBlanc, *supra* note 172, at 143.

194. *Id.* at 141.

195. Barbara A. Sloan, *Planning with the Phase-Out of the State Death Tax Credit: Working with the Credit Shelter Bequest After EGTRRA*, 2004 A.L.I.-A.B.A. COURSE OF STUDY 1447, 1464 (2004).

196. 26 U.S.C.A. § 2010(c) (West 2002).

197. Webster et al., *supra* note 4, at 740.

198. Kremer, *supra* note 190.

ter clause that provides for the funding of a credit shelter trust with an amount equal to the current federal unified exemption. Upon the death of the decedent in 2009, the credit shelter trust will be funded with \$3.5 million,¹⁹⁹ and only \$1.5 million will go to the surviving spouse. Additionally, the fully decoupled state, referencing the law as it stood pre-EGTRRA, only recognizes an exclusion amount of \$1 million.²⁰⁰ The result is a state-level imposition of an estate tax on \$2.5 million of the credit shelter trust. This was probably not what the client had in mind when the will was drafted pre-EGTRRA.

As a result, estate planners will need to review these clauses and make revisions when necessary. One option, especially attractive for those with moderately sized estates, is to create a “zero tax” plan that will fund the credit shelter trust with only an amount that can pass free of *both* federal and state estate taxes.²⁰¹ These determinations, however, must be made on a case-by-case basis.

4. LIFETIME GIFTS

As a result of the federal repeal of the state death tax credit, residents of decoupled states may face combined federal and state taxes as high as 60%.²⁰² However, as Debra L. Stetter points out, many of the currently decoupled states decline to impose taxes on lifetime gifts, thereby creating a large incentive to make these gifts before death.²⁰³ This option is particularly attractive for clients with estates valued at over \$10.1 million.²⁰⁴ For example, David Keene and Marcia K. Fujimoto assert that the estate tax liability will be a fixed percentage of any lifetime gift up to \$1 million.²⁰⁵ Accordingly, the estate tax savings could range anywhere from \$80,000 in 2003 to \$160,000 in 2010.²⁰⁶

199. 26 U.S.C.A. § 2010(c).

200. 26 U.S.C.A. § 2010(c) (West 2000) (amended 2001).

201. Cooper et al., *supra* note 23, at 336.

202. Debra L. Stetter, *Deathbed Gifts: A Savings Opportunity for Residents of Decoupled States*, 31 EST. PLAN. 270, 270 (2004).

203. *Id.*

204. David Keene & Marcia K. Fujimoto, *EGTRRA's Changes to the State Death Tax Credit: Good News for Some Estates, Bad News for Some States*, TAXES, Nov. 2003, at 23, 34.

205. *Id.*

206. *Id.* Keene and Fujimoto went on to point out that a similar result can be obtained with estates above \$2 million, provided death occurs before the year 2011. *Id.*

It is important to remember that any gift made will use up some of the federal exclusion amount available at death.²⁰⁷ Under certain circumstances, this might be the desired result, as it might serve to equalize the federal and state exclusion amounts upon death, thus avoiding the state-level tax that might be owed on the difference.²⁰⁸

C. Costs of Estate Planning

The issues discussed in the previous section seem to demonstrate that estate planning in the United States has become increasingly complex and costly in the wake of EGTRRA. However, as this section illustrates, one often-used rationale for the elimination of the estate tax as a whole is the decreased burden of estate planning on individuals and small business owners. Indeed, this rationale was invoked not only for the passage of EGTRRA,²⁰⁹ but as a reason for making the revocation of the death tax permanent.²¹⁰ Now, as a result of the disproportionate phase-out of the federal and state estate taxes, estate planning in the United States will likely become more expensive and uncertain than ever before.

1. TAXPAYER BURDEN AS LEGISLATIVE RATIONALE FOR REPEAL

The repeal of the estate tax has become a hot button issue in Washington, D.C.,²¹¹ despite the fact that the tax only affects 2% of decedents dying each year in the United States.²¹² One rationale often used to argue for the repeal of the estate tax is that it imposes a sig-

207. 26 U.S.C.A. § 2010(b) (West 2002).

208. See Diggins & LeBlanc, *supra* note 172, at 143.

209. 147 CONG. REC. S5211 (daily ed. May 21, 2001) (statement of Sen. Grassley).

210. 148 CONG. REC. H3241 (daily ed. June 6, 2002) (statement of Rep. Weldon).

211. Indeed, repeal of the estate tax is “high on the agenda of the closely-held business and farm communities, who allege that the existence of this tax stifles entrepreneurial initiative and makes the inter-generational transfer of farms and closely-held businesses prohibitively expensive.” Harry L. Gutman, *Reflections on the Process of Enacting Tax Law*, 26 OHIO N.U. L. REV. 183, 191 (1999). Moreover, this issue has become so hotly debated that some have even intimated that supporters of the estate tax are akin to communists. 148 CONG. REC. H3241 (daily ed. June 6, 2002) (statement of Rep. Cunningham) (“Does anybody know where the death tax reared its early head? Not to pay for a war but it was Karl Marx’s and Engel’s Communist Manifesto The Democrat socialists of America mantra is government control [of everything]. That is in their agenda.”).

212. Gutman, *supra* note 211, at 190–91.

nificant financial burden on individuals involved in estate planning.²¹³ Indeed, the standard argument along these lines may look something like this statement from Senator Bond of Missouri:

A good friend of mine farms along the Missouri River in western Missouri. When his father died they paid almost \$100,000 in accounting and legal fees to figure out how they could keep his farms from being broken up. Death ought not to be a taxable event. It is bad enough to have the undertaker arrive at your door. You don't want to have the tax man arrive at the same time.

The money we pay to accountants, to lawyers, and to insurance companies to try to get around this estate tax could be much more productively employed in investing in new equipment, in providing new jobs and better wages.²¹⁴

Indeed, many lawmakers were, and remain, appalled at the vast sums of money spent avoiding the estate tax.²¹⁵ Others point out the inefficiency of a system that encourages such complex and costly estate planning. For example, Representative Dave Weldon of Florida stated that "many, many Americans engage in very complicated estate planning to avoid paying the estate tax. I personally think that is very, very inefficient."²¹⁶ In a similar vein, Senator Grassley also voiced his objections:

Let me suggest probably the money that is wasted in this country on estate tax planning is the biggest waste of the productive resources in this country that you can have People who have worked hard, who are faced with the estate tax, who want to leave some money to their kids, just spend wasteful amounts of money on estate planning Wouldn't it be better if those estate planners . . . were doing something productive . . . as opposed to this nonproductive effort of estate planning?

When we do away with the estate tax, these folks will be able to do something productive.²¹⁷

Some have gone so far as to declare the entire estate taxing system in the United States as inefficient. In the words of Senator Jon Kyl of Arizona:

213. See, e.g., 147 CONG. REC. S1173 (daily ed. Feb. 8, 2001) (statement of Sen. Bond) ("Thousands of small businesses in this country waste millions of dollars each year on estate planning . . . just to keep the doors open if the owners die.").

214. *Id.*

215. 148 CONG. REC. H3267 (daily ed. June 6, 2002) (statement of Rep. Hulshof) (pointing out that one study estimated that Americans small businesses spend, on average, \$52,000 a year to avoid estate taxes).

216. 148 CONG. REC. H3241 (daily ed. June 6, 2002) (statement of Rep. Weldon).

217. 147 CONG. REC. S5211 (daily ed. May 21, 2001) (statement of Sen. Grassley).

Americans spend about the same amount of money each year on lawyers and insurance companies planning their estates as other Americans do in actually paying the estate tax, just about the same amount of money. It turns out to be a double tax, except each year, every single year, Americans spend \$20 to \$30 billion on estate planning.²¹⁸

These are just a few select excerpts from the House and Senate floor on this issue, and are by no means the only words spoken on this hotly debated issue.²¹⁹ However, it is clear that the underlying costs incurred by planning to pay the estate tax are a significant factor in the minds of many lawmakers, and are at least one reason for abolishing the estate tax.

2. STUDIES IN THE ACADEMY WITH RESPECT TO ESTATE PLANNING COSTS

Scholars have also studied the costs associated with estate planning in the United States. As Professor Schmalbeck of Duke University points out, much of the criticism of the estate tax as an inefficient tax is due to “an almost off-hand suggestion by two prominent economists nearly a decade ago to the effect that the overall wealth-transfer taxes compliance costs were a ‘sizable fraction’ of the total revenue generated by the tax.”²²⁰ While there is not a vast amount of reliable empirical research on the subject, there have been some studies with respect to the costs of complying with the estate tax in the United States. In general, the data set forth in these studies show that

218. 148 CONG. REC. S2891 (daily ed. Apr. 18, 2002) (statement of Sen. Kyl).

219. The legislative statements on this issue could likely fill many more pages. However, a few more pertinent quotes here should suffice: “And let’s, at the same time, ban all of the procedures whereby every small business in America and every family farm in America is planning for estate taxes to try to minimize their costs.” 148 CONG. REC. S5357 (daily ed. June 11, 2002) (statement of Sen. Gramm).

Planning and compliance with the estate tax can consume substantial resources. The National Association of Manufacturers has reported that more than 40 percent of its members have spent at least \$100,000 on death tax planning. . . . This is money that could have been better spent to expand the business and create new jobs—rather than dealing with the death tax.

148 CONG. REC. S5405 (daily ed. June 12, 2002) (statement of Sen. Allard). Similar comments have been made by other legislators as well. See, e.g., 148 CONG. REC. S5406 (daily ed. June 12, 2002) (statement of Sen. Bond); *id.* at S5407 (statement of Sen. Dorgan); *id.* at S5425 (statement of Sen. Murray).

220. Richard Schmalbeck, *Does the Death Tax Deserve the Death Penalty? An Overview of the Major Arguments for Repeal of Federal Wealth-Transfer Taxes*, 48 CLEV. ST. L. REV. 749, 765 (2000) (quoting Henry Aaron & Alicia Munnell, *Reassessing the Role for Wealth Transfer Taxes*, 45 NAT’L TAX J. 119, 138 (1992)).

estate planning costs, pre-EGTRRA at least, were perhaps not as significant as many believed.

Professors Joseph H. Astrachan and Roger Tutterow conducted some of the first real empirical research into this issue.²²¹ Their study found that, on average, businesses spend about \$33,000 per year on services in connection with estate planning.²²² Even this study, which has been criticized for not distinguishing estate planning costs from costs that would be incurred as a part of normal succession planning,²²³ seems to be drastically at odds with some statistics that some lawmakers have used.²²⁴

Moreover, in what appears to be the leading study in this area, Professors Davenport and Soled estimated that the average couple in 1999 spent merely \$5,000 on estate planning.²²⁵ Using that estimate, Davenport and Soled estimated that total estate planning costs in the United States for the year 1999 were around \$1 billion.²²⁶ While that number may be shocking at first glance, it is important to note that \$1 billion accounted for less than 7% of the expected receipts for that year.²²⁷

Davenport and Soled's study also seems to affirm the results obtained in an informal survey conducted by Professor James R. Repetti.²²⁸ In this survey, Professor Repetti conducted a simple survey of sixteen partners at prominent Boston law firms.²²⁹ The results indicate that it would probably cost a client between \$10,000 and \$25,000 to recapitalize a family business in connection with an estate plan.²³⁰ Moreover, a client is likely to incur anywhere from \$5,000 to \$25,000 in

221. Joseph H. Astrachan & Roger Tutterow, *The Effect of Estate Taxes on Family Business: Survey Results*, 9 FAM. BUS. REV. 303 (1996).

222. *Id.* at 306 tbl.2.

223. James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 870-71 (2001).

224. Compare Astrachan & Tutterow, *supra* note 221, at 306 tbl.2 (finding that the average estate planning cost for businesses is approximately \$33,000 per year), with 148 CONG. REC. S5405 (daily ed. June 12, 2002) (statement of Sen. Allard) (citing National Association of Manufacturers study that reported that more than 40% of its members have spent at least \$100,000 on death tax planning).

225. Charles Davenport & Jay A. Soled, *Enlivening the Death-Tax Death-Talk*, 84 TAX NOTES 591, 621 (1999).

226. *Id.*

227. *Id.* at 630 tbl.14. Among the many costs associated with the estate tax in the United States, the three primary cost categories are: "(1) IRS costs of administration, (2) taxpayer planning costs, and (3) compliance costs." *Id.* at 618.

228. See Repetti, *supra* note 223, at 871.

229. *Id.*

230. *Id.* at 872 tbl.9.

planning costs to create a family limited partnership or a limited liability company.²³¹ However, as Professor Repetti himself points out, these results suffer from the same flaw that the Astrachan and Tuterow study has been criticized for—specifically, these results fail to take into account costs that would be incurred irrespective of the estate tax.²³²

3. ESTATE PLANNING COSTS IN A POST-EGTRRA WORLD

While other studies have been conducted,²³³ the results of these surveys indicate that perhaps the costs of estate planning should not have been such a large concern pre-EGTRRA.²³⁴ One commentator actually chastised Congress for not investigating the veracity of claims that estate tax compliance costs were out of control.²³⁵ Ironically, though, the cost of estate planning will almost certainly become more of a concern in the future as a result of EGTRRA. As described above, the disproportionate phase-out of the estate tax and the repeal of the federal estate tax have caused many problems for estate planners across the United States. They now must revise estate plans, recommend changes, and finally, due to the extreme uncertainty resulting from the disproportionate phase-out, estate planners must continually monitor federal and state law to be sure that clients' estate plans remain consistent with their wishes. Consequently, the costs of estate planning in the United States will likely continue to rise in the near future.

This result was one of the significant reasons for abolishing the estate tax in the first place.²³⁶ Legislators concerned about the high costs of the estate tax planning would likely be shocked to find out that, at least for the near future, estate planning costs will drastically rise. Indeed, even if the federal estate tax expires in 2011, estate plan-

231. *Id.* at 871 tbl.8.

232. "But note that in a well-managed business, these costs could be incurred in any event to have a smooth succession of the business to the younger generation." *Id.* at 871.

233. For an overview of additional studies conducted on this issue, see Davenport & Soled, *supra* note 225, at 623–25.

234. Indeed, "[o]ne has to conclude . . . that claims of huge private compliance costs have been grossly exaggerated. They simply do not make sense, in view of what we know estate planners can and do provide their clients." Schmalbeck, *supra* note 220, at 766.

235. Gutman, *supra* note 211.

236. 147 CONG. REC. S5211 (daily ed. May 21, 2001) (statement of Sen. Grassley).

ning will remain a costly endeavor because issues like the death tax trap will continue to plague estate planners well into the future. This unfortunate result seems to be at odds with one of the fundamental reasons for doing away with the estate tax on the federal level. Thus, it appears that this portion of EGTRRA has not accomplished what it was intended to.

IV. Recommendations

A. State Legislation

When the federal government phased-out the state death tax credit, it provided a tax cut but placed the majority of the burden upon the individual states to pay for it.²³⁷ While the states that have chosen to decouple from the federal scheme cannot be faulted for doing so, it is important to note that as a result, the estate tax laws vary widely from state to state, even among the decoupled states. Some states no longer have an estate tax.²³⁸ Some states ignore both the phase-out of the state death tax credit and increases in federal exemption amounts.²³⁹ Some states are partially decoupled, ignoring the phase-out of the state death tax credit while recognizing the increases in federal exemption amounts.²⁴⁰ To make matters worse, some states move in and out of these categories.²⁴¹

The disparities among the laws of the fifty states created as a result of EGTRRA make estate planning, an area of law that counts on relative consistency and predictability in the tax laws, much more complex and costly.²⁴² Ironically, cost reduction of estate planning is one often-used rationale for elimination of the estate tax. Thus, the results brought about by the passage of EGTRRA are inconsistent with its purposes. Now that it appears that the federal law is likely to remain in place,²⁴³ state governments should help bring predictability to

237. Cooper et al., *supra* note 23, at 322.

238. See, e.g., NEV. REV. STAT. ANN. § 375A.100 (LexisNexis 1999).

239. See, e.g., N.J. STAT. ANN. § 54:38-1 (West 2002).

240. See, e.g., VT. STAT. ANN. tit. 32, §§ 7402(8), 7442a(a), 7475 (Supp. 2004).

241. See, e.g., Cooper et al., *supra* note 23, at 329 (“Illinois will be a decoupled state through 2004, partially decoupled in 2005 through 2008, fully decoupled again in 2009, and a pick-up state thereafter.”).

242. *Id.* at 336.

243. See William F. Hammond, Jr., *Election May Doom the Estate Tax*, N.Y. SUN, Nov. 12, 2004, at 1. While the House of Representatives has voted four times in the past four years to permanently repeal the estate tax, David E. Rosenbaum, *True to Ritual, House Votes for Full Repeal of Estate Tax*, N.Y. TIMES, Apr. 14, 2005, at A23, the

the process by either fully decoupling from the federal scheme or simply eliminating their estate taxes altogether.

For those states who wish to fully decouple from the federal scheme, state legislators should consider adopting a simple, predictable state-level scheme. One such scheme is that of Nebraska.²⁴⁴ The advantage of such a scheme over others lies mostly in its predictability, which, in a post-EGTRRA world, estate planners desperately need. Unlike those of many other states,²⁴⁵ a statutory scheme similar to Nebraska's would help estate planners because it will assure them that at least one component of the estate planning matrix, specifically the state-level tax, will remain constant regardless of the year that death occurs. Although it is true that the state will be imposing an additional tax burden on decedents in the form of higher taxes, the losses will almost surely be offset by the savings in planning fees as a direct result of increased certainty and predictability.

B. Estate Planners

A glance at a small sampling of some of the issues now facing today's estate planners is indicative of the increased cost and complexity now plaguing this area of the law. Estate planners need to bring themselves and their clients up to speed on the new problem of the death tax trap if their clients own property in more than one

trouble has historically arisen in the Senate, Editorial, *Death and Taxes; The House Goes Down the Same Road on Estates*, PITT. POST-GAZETTE, Apr. 17, 2005, at J-6. Indeed, the Senate was set to vote on a permanent repeal of the estate tax, but in the wake of Hurricane Katrina lawmakers scrapped the vote, deciding that it would be a political misstep to grant a perceived tax cut to the wealthy while many poor residents of New Orleans were stranded on their roofs without food or water. See Jeff Brown, *Repeal of Estate Tax May Be Delayed by Fallout from Hurricane Katrina; Combination of the Need for More Tax Revenues and a Desire to not Appear Favoring the Wealthy*, BUFFALO NEWS, Sept. 15, 2005, at B9; Shailagh Murray & Charles Babington, *GOP Agenda Shifts as Political Trials Grow; Katrina Puts Estate Tax Repeal on Ice*, WASH. POST, Sept. 6, 2005, at A06; Floyd Norris, *How to Assure the Very Rich Stay That Way*, N.Y. TIMES, Sept. 9, 2005, at C1; Holly Yeager, *Budget Plans Take a Back Seat to Katrina*, FIN. TIMES (London), Sept. 14, 2005, at 16. In fact, in light of the costs of Hurricane Katrina, some senators who previously supported a permanent repeal have now stated that they would oppose such a measure. Steve Duin, *Commentary, Ill Winds May Spare the Estate Tax*, OREGONIAN, Sept. 22, 2005, at D01.

244. NEB. REV. STAT. §§ 77-2101 to -2115 (2003 & Supp. 2004). Nebraska's scheme is quite similar to many other states' schemes, as well. However, Nebraska is used in this note because it seems to be the most concise and clear statutory scheme among those that have decoupled.

245. See, e.g., 35 ILL. COMP. STAT. ANN. 405/2 (West Supp. 2005).

state.²⁴⁶ This is particularly true for clients who either live or own property in decoupled or partially decoupled states. These clients may, at worst, face higher taxes and, at best, need to take steps to update their estate plan to carry out their intentions under the current law.

Moreover, estate planners now need to be familiar with the requirements for a formal change of domicile and need to consider advising clients with respect to any change of domicile that may be beneficial from an estate tax perspective. It should be remembered that a change of domicile, although sometimes beneficial, is a drastic step and may not be appropriate for every client. Nevertheless, it is an option that estate planners should be aware of in a post-EGTRRA world.

Finally, estate planners may need to revisit estate plans that use funding formulas based upon old law and have been laying dormant for a period of time. While it is important for estate planners to be aware of the changes among the states, they especially need to be aware that, as a result of EGTRRA, their clients' estate plans may now produce results contrary to their wishes. Accordingly, these plans will need to be revised to bring them into harmony with clients' wishes and current law.

Clients advised of potential options such as these will begin addressing some of the important issues now plaguing estate planning in the United States. Armed with an informed attorney, however, the client will be able to navigate through this newly dense jungle of estate tax laws.

V. Conclusion

The passage of the Economic Growth and Tax Relief Reconciliation Act in 2001 had a profound effect on estate taxation across the country. After the dust settled, state legislators and attorneys alike were appalled to find that planning for death in the United States had become a great deal more complex, unpredictable, and perhaps even impossible. While the comfortable and predictable world of estate tax laws on the federal and state level has now become a thing of the past, state legislators need to recognize the complexities that decoupling can create and modify the laws accordingly. In the meantime, attor-

246. See *supra* text accompanying notes 132–37.

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neys must equip themselves with the proper knowledge to guide their clients through the newly dense jungle of laws until new paths are cleared for those who follow.