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**THE WALL STREET JOURNAL.**

WSJ.com

JANUARY 2, 2010

## Estate-Tax Repeal Means Some Spouses Are Left Out

By [MARTIN VAUGHAN](#)

WASHINGTON—Spouses of those wealthy who die this year might find themselves with nothing if the family will isn't revised—a major wrinkle that could follow Friday's repeal of the federal estate tax.

As started on Jan. 1, estate taxes will be repealed for 2010 only. That means unless Congress acts otherwise, there is no limit to the wealth that can be passed on to heirs without incurring federal estate taxes through the end of the year.

But wills have often been written on the expectation that estate taxes were a fact of life for years to come, estate planners say. As a result, wills typically direct assets not subject to the tax be passed on to children—for 2009, up to \$3.5 million—with the rest directed to the spouse.

"You could be in a situation now where everything would go into a trust downstream to the kids and nothing is left to the spouse," said Greg Rosica, a tax partner at Ernst & Young. "There is a need to revisit the basic estate-planning documents to make sure that what you intend to have happen really does happen."

Most states allow a surviving spouse to claim a portion of the estate, even if the spouse is disinherited under the will. But doing so can be time-consuming and expensive.

In 2011, the estate tax is scheduled to snap back to higher rates similar to those prior to President George W. Bush's tax cuts. The roundabout series of changes—the result of a compromise to pass the tax-cut legislation—has been on the books for years, but estate planners anticipated congressional Democrats would prevent the 2010 repeal from taking effect.

Instead, amid disagreement over the proper level for the tax and preoccupied with health-care legislation, lawmakers punted, and the tax disappeared.

"Ten years ago, there was a lot of gallows humor about repeal when everybody said it would never happen," said Rep. Richard Neal (D., Mass.), chairman of the House Select Revenue Subcommittee. "Now, one of those never-happen moments has happened, and nobody's laughing."

Mr. Neal said "there is no question" Congress will reinstate the tax, retroactively to Jan. 1, early next year. That is also the intention of Senate Finance Committee Chairman Max Baucus (D., Mont.). But others aren't so sure.

"There are plenty of instances where Congress has changed tax laws retroactively, but this one is particularly high-profile," said George K. Yin, a tax professor at the University of Virginia Law School and former head of the Congress's Joint Committee on Taxation. "Since Congress has had so much difficulty around a permanent estate-tax solution to begin with, there's no reason to think a retroactive solution would be less controversial."

The uncertainty has left those subject to the tax and their advisers with no end of planning conundrums, and a

few opportunities.

In addition to the estate tax, the so-called generation-skipping transfer tax also disappears in 2010. That tax was imposed at 45% in 2009 on gifts to grandchildren.

There may be some hardy souls who bet Democrats in Congress won't succeed in passing a retroactive extension. These people may try to take advantage of the repeal of the generation-skipping tax by making large gifts to grandchildren. Those gifts would still be subject to the 35% gift tax in effect for 2010.

But there is substantial risk in making such a gift. If Congress passes a retroactive law, it could get hit with the 45% generation-skipping tax on top of the gift tax.

"I don't think many of my clients take that bet," said Justin Ransome, a partner in the national tax office of Grant Thornton. "If you're wrong, the toll charge becomes very significant."

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