

# EGBL LEGAL REPORT

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## New tax law brings gradual estate planning changes

by GARY R. GEHLBACH

While the new federal tax legislation is expected to bring substantial changes in the gift and estate tax arena, most of those changes are prospective. The changes in the estate tax exclusion and the maximum estate tax rate, for example, will be implemented gradually through 2011.

The scheduled increases in the estate tax exclusion will result in even fewer estates paying estate tax. However, the amount of the exclusion may be misleading. A taxable estate generally includes not only all of a decedent's assets, but also the value of all assets in which the decedent had an interest, such as a joint tenancy (there is a special rule for joint tenancies between spouses). In addition, a decedent's taxable estate generally includes the death benefit of all life insurance policies on the decedent's life.

Married couples, without proper estate tax planning, are generally limited to one exclusion, usually taken when the second spouse dies. A major goal of estate tax plan-

ning for a husband and wife is to structure their estate plans in order to double the applicable exclusion, *i.e.*, to allow each spouse's estate to claim the exclusion. Another goal, especially in light of the new tax act, will be to defer any estate tax until the second spouse dies.

As a result of the new legislation, over the next couple of years families with gross taxable estates of less than \$1 million generally will avoid estate tax and probably can modify their existing wills and trusts to eliminate estate tax planning.

Couples with taxable estates of between \$1 million and \$2 million should be able to avoid all estate tax, but only with proper estate tax planning. This planning, considering the changes in the Internal Revenue Code, likely will be different than previous planning.



Couples with assets greater than \$2 million might be able to avoid or significantly reduce their estate tax exposure. Appropriately structured estate plans, however, will be required. The trusts and wills to be used for these estates likely will be substantially different than previous documents.

Interestingly, most farm families will not experience any estate tax relief under the new law until 2004. The reason for this is somewhat complicated. The current qualified family-owned business interest (QFOBI) deduction effectively raises the applicable exclusion for qualifying farm families to \$1.3 million. Because the applicable exclusion will exceed \$1.3 million in 2004, the QFOBI deduction will be eliminated from the Code, and qualifying farmers will at that time be eligible for an exclusion of \$1.5 million.

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## Court decision raises doubts about validity of revisions to employee handbooks

by DOUGLAS E. LEE

In response to a 1987 Illinois Supreme Court decision, employers spent the 1990s revising their employee handbooks to prevent the manuals from creating contracts of employment. Those employers now have to wonder whether they need to do it all over again.

The most recent Illinois Supreme Court ruling to complicate the employer-employee relationship is *Doyle v. Holy Cross Hospital*, which the court decided in 1999. In *Doyle*, the court held that an employee could sue to enforce previously existing terms in an employee handbook that the employer had revised during the employee's employment.

Mary Doyle was a long-term employee of Holy Cross Hospital in Chicago, working there as a nurse since 1960. In 1971, the hospital issued an employee handbook that set forth various employment protections for nurses. Twelve years later, the hospital issued a new handbook, which replaced the prior protections with a statement that nurses could be terminated with or without cause at any time. The new handbook also contained a disclaimer informing employees that the handbook was not to be construed as a contract of employment.

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## Estate planning . . .

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For the first time since 1976, in 2004 the gift tax exclusion will be separated from the estate tax exclusion. This will create a disincentive for making large lifetime gifts.

In 2010, the only year in which the estate tax is actually repealed, the new law provides for carry-over basis, a concept attempted as part of the Tax Reform Act of 1976 but repealed retroactively in the summer of 1980 as unworkable. (A taxpayer's income tax basis in property is his or her purchase price plus the value of capital improvements less allowed depreciation deduc-

tions.) The current law is (and has been for decades) that, with few exceptions, a decedent's income tax basis in an asset is "stepped up" to the date of death value. Therefore, when the beneficiary of the estate later sells the asset, taxable gain or loss is the difference between the net sales price and the date of death value. In other words, the decedent's basis becomes irrelevant upon death.

Carryover basis, however, will be resurrected upon the demise of the estate tax. Recipients of property from a decedent will receive a basis equal to the lesser of the decedent's basis or the market value of the property at the time of the decedent's death. There are two exceptions to this rule: (1) A maximum of \$3 million in the decedent's property may receive a stepped up basis if transferred to the surviving spouse, and (2) up to \$1.3 million of property transferred to others will qualify for step-up. Designing an estate plan to appropriately allocate basis may prove to be quite challenging.

Calendar year	Estate deathtime transfer exemption	Generation skipping transfer tax deathtime transfer exemption	Gift tax lifetime exemption	Highest estate and gift tax rates
2001	\$675,000	\$1 million	\$675,000	55%
2002	\$1 million*	\$1 million	\$1 million	50%
2003	\$1 million*	\$1 million	\$1 million	49%
2004	\$1.5 million*	\$1.5 million	\$1 million	48%
2005	\$1.5 million*	\$1.5 million	\$1 million	47%
2006	\$2 million*	\$2 million	\$1 million	46%
2007	\$2 million*	\$2 million	\$1 million	45%
2008	\$2 million*	\$2 million	\$1 million	45%
2009	\$3.5 million*	\$3.5 million	\$1 million	45%
2010	N/A (estate tax repealed)	N/A (GST tax repealed)	\$1 million	top individual income rate under law (gift tax only)
2011	\$1 million*	\$1 Million	\$1 million	55%

\* Reduced by gift tax lifetime exemption used.

before it takes effect in 2010, or that reinstatement in 2011 may be modified.

It is also possible that various state governments will enact their own death taxes. Presently 38 states including Illinois receive a significant portion of the estate tax paid, at very little cost (the administration is practically all at the federal level). Under the new law, states next year will begin losing billions of dollars in estate tax revenues annually.

The basic prototypes and paradigms we have used for estate planning will in many instances no longer be desirable. We are developing and utilizing new approaches in light of the new law. With much uncertainty about the future of estate tax, both federal and Illinois, and the 10-year phase-in of the new law, we highly recommend a more frequent review of one's estate plan.



## Grandparents lose ground in quest for visitation rights

by Rolfe EHRMANN

For grandparents, little is as important as seeing their grandchildren. As the law regarding grandparent visitation evolves, however, those grandparents are finding little sympathy in the courts.

Most people know the laws regarding grandparent visitation have changed but are unsure of what happened or how the change could affect them. Most grandparent visitation, of course, does not involve courts at all. A national survey found that almost all grandparents regularly interact with their grandchildren in a wide variety of ways and think their relationships with their grandchildren are "very positive." The cases that end up in court are limited to those few in which the relationship between grandparents and parents is so strained that the parents separate themselves - and the grandchildren - from the grandparents.

To address these situations, most states passed grandparent visitation statutes permitting judges to order visitation over the parents' objections. Last year, however, the U.S. Supreme Court declared a

Washington grandparent visitation statute unconstitutional. According to the court, fit parents presumably act in the best interests of their children. Therefore, the court said, as long as a parent otherwise adequately cares for his or her children, a judge cannot require grandparent visitation.

In the first Illinois grandparent visitation case since the Supreme Court decision, the Illinois Supreme Court also sided with the parents withholding visitation. In that case, a grandmother sued her son and daughter-in-law for visitation rights. Her son, who described his mother as "not a nice person in my life," claimed her interest in the children was not genuine and refused to allow visits. The court ruled that because both parents objected to the visitation, any court-ordered visitation would impinge "upon the constitutional right of parents to make decisions regarding the upbringing of their children."

While the law to date is not positive for grandparents, some issues remain undecided. Illinois courts, for example, have not yet ruled in cases in which only one parent objects to grandparent visitation or in which one of the parents is deceased.



## Parents can survive the call from the police station

by William C. Brozovich

With the coming of the school year comes scores of teenage parties. If alcohol is present at these parties, arrests for unlawful consumption can follow. And with those arrests come the calls in the middle of the night from the police station, leading parents to wonder, "Now what do I do?"

The first thing a parent must do is to maintain his or her composure. (There will be plenty of time later to express anger and displeasure at the child.) The first decision is whether to go to the police station or contact an attorney. When these calls come in the middle of the night, contacting an attorney might not be practical. The most viable option then is to go to the police station.

If the child is 16 or younger, he or she will be classified as a "juvenile" and the case will be handled pursuant to the Illinois Juvenile Court Act. The Act provides that upon the arrest of a juvenile, the officer shall reasonably attempt to notify the minor's parent or other person legally responsible for the minor's care. The officer then will provide the parent with information about the juvenile's arrest and where the minor is being detained.

Upon arriving at the police station, the parent should try to meet with the arresting officer and obtain as much information as possible about the arrest. The parent then will have a better understanding of the charges against the child. For a first-time misdemeanor offense, such as unlawful consumption, the minor usually will be released to his or her parents after the investigation and "booking" process.

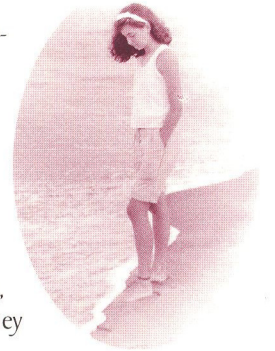
Within a few weeks after the arrest, the juvenile probation department will request a meeting with the juvenile and parents. At this meeting, a juvenile probation officer will gather background information and discuss how the case will be pursued. For a first-time offender, the probation officer usually will recommend a voluntary agreement

that includes enrollment in a diversion program, an agreement not to commit any further crimes and a substance abuse evaluation. If the minor complies with the terms of the voluntary agreement, the case will be closed at the end of an established time with no court involvement. If, however, the minor refuses to enter into a voluntary agreement or fails to comply with its terms, the case will be referred to the state's attorney for prosecution.

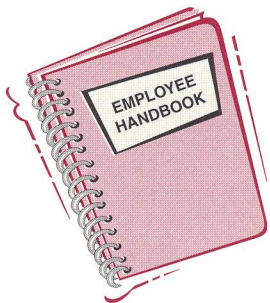
If the child is 17 or older, he or she will be treated as an adult under the Illinois Criminal Code. During the booking process, the teenager will be given the opportunity to make a phone call to a parent, an attorney or a friend. Under the Criminal Code, the arresting officer is not mandated to contact the parents.

The minor will be required to post a cash bond before being released. For a misdemeanor offense, such as illegal consumption, the bond will be \$100 (10% of the statutory bond of \$1,000). Upon posting bond, the minor will be provided with a bond sheet setting the terms of his or her release. The bond sheet also will have a "first appearance" court date that usually is between 14 and 60 days after the date of the arrest. Before the first appearance date, the child and his or her parents should speak to an attorney about the case.

An attorney can assist the family in many ways. Initially, he or she can explain the court process. An attorney also can obtain the police reports and other documents relating to the case. After analyzing these documents, the attorney can advise the family about whether to seek a trial or a plea agreement. Finally, the attorney can represent and speak for the minor in all court appearances.



## Handbooks . . .



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The hospital discharged Doyle in 1991, and Doyle filed suit. Doyle

first claimed her discharge violated the terms of the 1971 handbook. She then further claimed the 1983 revisions did not apply to her because she did not agree to give up the contractual rights created in the 1971 manual.

The hospital countered that it had the power to unilaterally change the handbook and that Doyle, by continuing to work after

the revisions, at least implicitly agreed to be bound by them.

The Illinois Supreme Court ruled for Doyle. Using traditional contract analysis, the court said the hospital could not take away the employment rights vested in 1971 without giving its employees something in exchange. Merely continuing those employees' employment, the court said, was not sufficient consideration to support the hospital's change in policy.

Attorneys advising employers have been hoping that Illinois courts would answer some of the questions left unresolved by the decision in *Doyle*. Most important, what consideration is sufficient to support a policy change? Does the *Doyle* ruling mean that employers that have revised policies several times are employing employees under sever-

al different employment "contracts"? And must employers offer consideration every time they change the terms of their health care plans?

Unfortunately, courts have offered little guidance on these issues. Employers therefore can address them only by examining the language of their handbooks (prior and existing) and the manner in which changes were adopted and disseminated. To be safe, employers should consider "republishing" their handbooks and supporting the republication with some consideration. Consideration generally assumed to be sufficient by employment lawyers includes a small cash bonus, a discretionary pay increase (even if timed to coincide with an expected annual raise) and an extra vacation day.





## Practice spotlight: Personal injury



Although not proclaimed in large Yellow Pages advertising or on television commercials, EGBL's representation of persons injured in accidents is a significant part of the Firm's practice.

Mr. Lee, a member of the American Trial Lawyers Association, regularly represents persons hurt in auto collisions, falls and other accidents. When a client suffers a work injury, Mrs. Heeg frequently represents him or her throughout the worker's compensation process.

The Firm treats its injured clients with

the same professionalism and attention that EGBL's business clients enjoy. The Firm keeps in regular contact with its injured clients and aggressively seeks appropriate recoveries through settlements and trials. When necessary, the Firm also represents clients in arbitrations to recover the benefits of uninsured and underinsured motorist insurance coverage.

A vital part of any personal injury practice is the complement of professionals employed to investigate and present the client's case. EGBL therefore works

regularly with physicians, accident reconstructionists, economists and private investigators. Through these relationships, the Firm can effectively and efficiently evaluate and prosecute clients' claims.

Medical and legal malpractice actions frequently require levels of expertise and specialization not available in Dixon and the surrounding areas. When its clients need these services, EGBL works with leading Chicago law firms to ensure these clients' claims are pursued vigorously.



## In Print and At the Podium

**Mr. Lee** recently presented two training sessions to a client's human resources professionals. The first involved background checks and other hiring issues. The second involved the interrelationship between the Family Medical Leave Act, the Americans with Disabilities Act and the Illinois Worker's Compensation Act . . . The *LAUTUM News*, the newsletter of the Illinois Association of Mutual Insurance Companies, published an article by **Mr. Gehlbach** in which he analyzed two recent judicial decisions impacting mutual insurance companies . . . **Mrs. Heeg** has been appointed to the Claims Committee of the Illinois Association of Mutual Insurance Companies . . . **Mr. Badger** has been elected president of the board of the Dixon

Public Library . . . **Mr. Lee's** most recent commentary for the web site of The Freedom Forum First Amendment Center ([www.freedomforum.org/first/default.asp](http://www.freedomforum.org/first/default.asp)) examined a federal appeals court ruling that could permit school officials to restrict parent input at certain parent meetings . . . **Mrs. Heeg** and **Mr. Brozovich** are serving as campaign co-chairs for the United Way's legal division . . . **Mr. Gehlbach** recently was re-elected president of the Dixon school board. Having served 12 years on the board, **Mr. Gehlbach**, whose term would have expired in November, has agreed to fill the unexpired term of another member who resigned for personal reasons.



## Deals and Decisions

**Mrs. Heeg** obtained the maximum recovery possible under an insurance policy for a child injured in an automobile accident. **Mrs. Heeg** also obtained settlements for two other family members injured in the same accident . . . **Mr. Lee** recovered a sizeable settlement for a client who injured her back in an automobile accident . . . In light of the Economic Growth and Tax Relief Reconciliation Act of 2001, **Messrs. Gehlbach** and **Badger** have developed new approaches to estate planning . . . As part of his family law practice, **Mr. Ehrmann** has created a complex Qualified Domestic Relations Order involving cross-transfers of substantial equities . . . **Messrs. Gehlbach** and **Lee** worked together to assist a client in maximizing an insurance

recovery following a fire loss . . . **Mr. Lee** represented the owners of Dixon's new Culver's restaurant in obtaining the necessary Special Use Permit from the City of Dixon and in forming a corporation and a limited liability company to own and operate the business . . . **Mrs. Heeg** has been advising clients on the local bankruptcy court's new Chapter 13 Model Plan procedure and the steps creditors must take to protect their rights . . . **Mr. Lee** is representing the owner of a landfill in Streator in the owner's request for local siting approval to attempt to expand the landfill . . . **Mr. Ehrmann** recently attended a statewide conference on death penalty cases.

