

Winter 2009

A newsletter written and published by Eizen Fineburg &amp; McCarthy, P.C.

## In This Issue...

- 1.... Wealth Preservation Strategies
- 1.... 2009 Federal Tax Changes Broaden Planning Opportunities
- 2.... Federal Tax Reporting Options for Victims of Investment Fraud

## Wealth Preservation Strategies

by Gary J. McCarthy, Esquire and Glenn R. Weiser, Esquire

You work hard in your business or profession to achieve success and accumulate wealth and financial security. Whether it is \$1 million or \$100 million, you owe it to yourself and your family to consider and evaluate methods and strategies to preserve and protect your assets and wealth. Preserving and protecting your hard-earned dollars deserves as much time and effort as earning them.

Personal asset protection and wealth preservation planning requires diligence and effort on your part and encompasses many different facets,

including tax and business planning, insurance planning, investment planning, estate and business succession planning and asset and wealth preservation planning. Many of these strategies are interrelated and may require complete and thorough analysis by various professionals, including attorneys, accountants, and investment advisors, in order to develop and implement an overall comprehensive plan. This article will discuss certain strategies to get you started in the asset protection process.

*continued on page 3*

## 2009 Federal Tax Changes Broaden Planning Opportunities

by Ted M. Greenberg, Esquire

### Waiver of Required Minimum Distributions from Retirement Plans for 2009

The Worker, Retiree and Employer Recovery Act of 2008 waives required minimum distributions for 2009 from retirement plans and IRAs. Most taxpayers, including plan participants, account owners and beneficiaries, who otherwise would have had to take a required minimum distribution in 2009 are not required to withdraw any amount in 2009.

### Broadening of the "Kiddie Tax"

The scope of the "kiddie tax" on investment income has been broadened. Previously, the kiddie tax only

applied to children under age 18. Now it also applies to children age 18 and to students ages 19 through 23 whose earned income does not exceed one-half of their support.

### Increase of the Federal Estate Tax Exemption

The federal estate tax exemption

The federal estate tax exemption increased to \$3,500,000 for individuals dying in 2009.

increased to \$3,500,000 for individuals dying in 2009. This is an increase of \$1,500,000 from the 2008 exemption of \$2,000,000. With proper planning, a married couple now can shelter \$7,000,000 from federal estate tax.

### Increase of the Federal Gift Tax Annual Per Donee Gift Tax Exclusion

The per donee annual exclusion for gift tax purposes increased to \$13,000 in 2009. This is an increase of \$1,000 from the 2008 annual exclusion of \$12,000. As a result, a married couple can make combined annual exclusion gifts of \$26,000 per donee. ■

## Wealth Preservation Strategies *continued from page 1*

The initial step towards developing an asset protection and wealth preservation strategy is to review and analyze potential creditor risks in order to obtain a firm understanding of the type of risk and exposure. Creditor risk and exposure may come in a variety of forms, some anticipated and some not. Risk can arise from your business or profession, marital discord or other unfortunate personal events involving you or members of your family. You might become a target simply because of your wealth. The end result is the same – loss or erosion of wealth.

Good asset protection planning employs a variety and combination of

strategies that range from simple to complex and offer varying degrees of protection. These strategies may encompass retirement, estate and gift planning, insurance considerations and the use of protective entities and other changes in asset ownership.

Basic strategies may involve the use of protective entities, such as trusts (both during and after lifetime), limited liability companies, corporations, and limited partnerships to conduct businesses and/or hold investments, as opposed to holding these interests individually. These vehicles will serve to protect and insulate your personal assets from claims against such entities.

For instance, if you own an investment property outright that is subject to a claim which may exceed or not be covered by insurance (e.g., an environmental or tort claim), all of your personal assets are exposed to the claim, including your savings, other investments and non-related business interests. By placing such investment property in a protective entity, you limit the exposure of your other assets to claims.

Another basic strategy may involve the manner in which you title your assets. In many jurisdictions, holding assets jointly with your spouse serves to protect such assets from a credi-

*continued on next page*

## Federal Tax Reporting Options for Victims of Investment Fraud

*by Joseph M. Hayes, Esquire*

The current headlines are fraught with stories of investor fraud, such as the Ponzi scheme perpetrated by Bernard Madoff. The tax reporting options for victims of these frauds will be discussed in more detail in the next Cutting Edge issue. In the meantime, a defrauded individual investor should immediately consider the following two federal income tax reporting options:

### **Amend Prior Years' Income Tax Returns.**

A defrauded individual investor may be able to amend federal income tax returns for any open tax years to: (i) account for the difference between income reported and income actually earned in those open tax years and (ii) receive a tax refund for the resulting difference in tax liability calculated for those years. At this time (the first quarter of 2009), the open tax years for an individual investor are 2005, 2006 and 2007. To amend his or her 2005 return,

however, he or she must file by April 15, 2009, unless he or she has received an extension to October 15 to file the 2005 return, in which case the filing deadline is the date that is three years after the date his or her 2005 return was timely filed.

### **Extension for 2008 Income Tax Return**

A defrauded individual investor should consider requesting an extension of time to file his or her 2008 income tax returns by April 15, 2009. In general, a defrauded individual investor may have two separate tax reporting options available to report investment losses due to fraud where his or her investments have no value and cannot be sold or exchanged to or with a third party. One is to characterize the loss as a "theft loss," which is an ordinary loss. The other is to treat the loss as a capital loss as a result of a "wholly worthless" investment. The analysis of the ap-

propriate tax characterization of an investment loss due to fraud and the tax year in which the loss can be reported is nuanced and fact sensitive. In addition, those who are invested through a hedge or feeder fund may wish to wait to see the fund's reporting position before determining how to individually report the loss. Therefore, a request for an extension to time to file in 2008 will allow a defrauded individual investor additional time to more thoroughly evaluate his or her tax reporting options for the investment fraud, as briefly described above, and to review and analyze any Internal Revenue Service guidance or legislative response regarding these investments losses that may be forthcoming, if any.

A victim of investor fraud should consult with a tax advisor to discuss the available tax reporting options. Please contact us if you would like us to review and analyze your investment losses and your tax reporting options. ■

tor claim asserted against you individually as opposed to you and your spouse jointly. This simple planning strategy may provide only temporary protection, as the asset may become exposed should the non-debtor spouse predecease the debtor spouse, leaving ownership of the asset to the debtor spouse. Further, there are other implications involved, both tax and marital, which need be evaluated before proceeding in this fashion.

You may want to consider transferring assets to other family members such as your spouse, children and/or grandchildren, whether outright, in trust or in the form of minority interests in protective entities. Again, there are implications that must be considered and evaluated before proceeding with this strategy, including issues concerning estate and gift tax, loss of control and benefit of the assets and the possibility that such assets may be exposed to the recipient's creditors.

More sophisticated and protective techniques involve the use of domestic or offshore asset protection trusts. If properly structured and implemented, these trusts will serve to protect the trust assets from claims asserted against you as well as from claims asserted against the beneficiaries of the trust, such as your family members. The laws of selected jurisdictions provide many planning opportunities in this arena. Depending on the jurisdiction where established, asset protection trusts will allow you to maintain the right to control and benefit from the trust assets.

Under traditional trust law, when you have property in trust and retain the right to benefit from the trust property, the property of that trust will remain accessible by your creditors. However, certain United States jurisdictions, such as Alaska, Delaware, and Nevada, among others, have enacted laws that allow you to benefit from the assets you placed in trust without exposing the trust assets to your future creditors. Using this trust structure, the settlor's creditors cannot reach the trust assets if you

comply with the state's self-settled asset protection trust laws.

Similarly, certain foreign jurisdictions, such as the Cook Islands and Nevis, have enacted laws which enable you to establish an asset protection trust. Many of these jurisdictions are the leaders in asset protection laws, enacting asset protection trust laws well before most of the United States jurisdictions followed suit. These offshore jurisdictions, in many instances, provide greater protection to trust assets as well as more flexibility. Further, the laws of such offshore asset protection trust jurisdictions protect the trust property by making it difficult for creditors to attack such trusts, including difficulty in obtaining jurisdiction over, or levying against, the trust assets. Certain jurisdictions, such as the Cook Islands and Nevis, for example, do not even recognize United States judgments. Thus, if a creditor obtains a judgment against you in the United States, the creditor would likely need to re-litigate the case in its entirety in the foreign jurisdiction, at the same time overcoming a burden of proof higher than what was originally litigated. Moreover, offshore jurisdictions present geographic, procedural, and financial hurdles to a creditor interested in reaching trust assets. The mere fact that a trust is a foreign trust with numerous hurdles that a creditor must overcome may in and of itself serve to deter creditors from pursuing claims against you or encourage settlement for a fraction of the claim.

Although the range of asset protection and wealth preservation techniques described above can seem overwhelming, a meeting with an experienced asset protection and wealth preservation advisor can help you evaluate the exposure, review options and develop a comprehensive asset protection and wealth preservation plan to protect and preserve assets and wealth. ■

Wealth Preservation strategies may encompass retirement, estate and gift planning, insurance considerations and the use of protective entities and other changes in asset ownership.

## Tax Provisions in the American Recovery and Reinvestment Act of 2009

The Internal Revenue Service is in the process of working to implement the tax-related provisions of the American Recovery and Reinvestment Act of 2009. We will report on the material tax-related provisions in a future Cutting Edge issue. ■

**Eizen Fineburg & McCarthy, P.C.**

**MAIN OFFICE:**

Two Commerce Square  
Suite 3410  
2001 Market Street  
Philadelphia, PA 19103  
Phone: 215.751.9666  
Fax: 215.751.9310

**NEW JERSEY OFFICE:**

1040 Kings Highway  
Suite 500  
Cherry Hill, NJ 08034  
Phone: 856.773.0945  
Fax: 856.773.0309

Visit us on the web at  
<http://www.efm.net>

the Cutting edge

Legal Team

Bernard Eizen, Herbert R. Fineburg,  
Gary J. McCarthy, Ted M. Greenberg,  
Joseph M. Hayes, Robert F. Kelly,  
Frank E. Noyes, II, Jack Terruso,  
Rachel Weidler, Glenn R. Weiser,  
Marvin Weiss, Nancy G. Frank, Eve  
Thomas, John N. Salla and Joseph  
M. Armstrong.

Disclosure Required by IRS Rules of Practice: Any discussion of tax matters contained herein is not intended or written to be used, and cannot be used, for the purpose of avoiding any penalties that may be imposed under Federal tax laws.

This publication is intended for general information purposes. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific situations. Articles in this publication are based on the most current information available at the time they were written. Since it is possible that the law and other circumstances may have changed since this publication, please call us to discuss any actions you may be considering as a result of reading an article.

© 2009 Eizen Fineburg & McCarthy, P.C. All rights reserved.

Best Wishes  
from EFM

We offer you our best wishes for health, happiness and prosperity for the New Year. We also want you to know how much we appreciate and value our relationship with you.

*From all of us at Eizen,  
Fineburg & McCarthy*

**E ■ F ■ M**

Eizen  
Fineburg &  
McCarthy

EIZEN FINEBURG & MCCARTHY, P.C.  
TWO COMMERCE SQUARE  
SUITE 3410  
2001 MARKET STREET  
PHILADELPHIA, PA 19103