



**NEW YORK  
CITY BAR**

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**SUPPLEMENTAL REPORT ON LEGISLATION BY  
THE COMMITTEE ON ESTATE & GIFT TAXATION AND  
THE COMMITTEE ON TRUSTS, ESTATES & SURROGATE'S COURT**

**A.9857-C  
S.8056**

**M. of A. Carrozza  
Sen. Kruger**

AN ACT to amend the estates, powers and trusts law, in relation to certain formula clauses to be construed to refer to the federal estate and generation-skipping transfer tax laws applicable to estates of decedents dying after December 31, 2009 and before January 1, 2011.

**THIS BILL IS APPROVED WITH MODIFICATION**

This supplemental memorandum is offered by the Estate and Gift Taxation Committee and Trusts, Estates and Surrogate's Court Committee of the New York City Bar Association (the "Committees") in support of A.9857-C/S.8056, to modify the Estates Powers and Trusts Law in relation to credit shelter and similar formula provisions in Wills and trusts and provisions in Wills and trusts relating to the unused generation-skipping transfer ("GST") tax exemption after federal estate and GST tax repeal in 2010. We support the bill with one important modification, as further described below.

The Committees believe that the legislation is necessary to remedy unintended and potentially severe consequences that may result from such formula bequests or other dispositions under documents executed prior to repeal. However, we disagree with the provisions regarding bequests and other dispositions that refer to the GST tax exemption.

This bill contains language regarding the GST tax that is superfluous and confusing. In our initial memorandum in support of the legislation (a copy of which is attached), we urged modification of the bill's provisions regarding the GST tax so that the remedial legislation would apply only to direct skips to natural persons. In that regard, we suggested that the legislation should apply to any bequest that (i) makes reference to the GST provisions of the Code and (ii) is a "direct skip to a natural person." However, the sponsor declined to adopt our suggested modification. Rather than limiting the provision's applicability to direct skips to natural persons, the Assembly substituted "or" for "and." (See Section 1, subdivision (a)(2), line 15.) This change makes the bill, as currently written, applicable to all GST type transfers. If that is the intent of the legislation, then the reference to "direct skips to natural persons" is unnecessary and confusing. Therefore, while we again urge that the legislation be limited to such direct skips, if it is not so limited, then the reference to "direct skip to a natural person" should be removed from the legislation as follows:

(2) IF BY REASON OF THE DEATH OF A DECEDENT PROPERTY PASSES OR IS ACQUIRED UNDER A BENEFICIARY DESIGNATION, IN THE CASE OF A WILL OR TRUST OF A DECEDENT WHO DIES AFTER DECEMBER THIRTY-FIRST, TWO THOUSAND NINE AND BEFORE JANUARY FIRST, TWO THOUSAND ELEVEN, THAT CONTAINS A BEQUEST OR OTHER DISPOSITION BASED UPON THE AMOUNT OF PROPERTY THAT CAN BE SHELTERED FROM FEDERAL GENERATION-SKIPPING TRANSFER TAX BY REFERRING TO THE "GENERATION-SKIPPING TRANSFER TAX EXEMPTION", "GST EXEMPTION", "GENERATION-SKIPPING TRANSFER TAX", "GST TAX" OR SIMILAR WORDS OR PHRASES THAT MEASURES A SHARE OF AN ESTATE OR TRUST BASED ON THE AMOUNT THAT CAN PASS FREE OF FEDERAL GENERATION-SKIPPING TRANSFER TAXES, OR THAT IS OTHERWISE BASED ON A SIMILAR PROVISION OF FEDERAL GENERATION-SKIPPING TRANSFER TAX LAW; ~~OR IF SUCH BEQUEST WOULD HAVE PASSED AS A "DIRECT SKIP" TO A "NATURAL PERSON" WITHIN THE MEANING OF SUCH TERMS UNDER CHAPTER 13 OF THE INTERNAL REVENUE CODE OF 1986 IF THE DECEDENT HAD DIED ON DECEMBER THIRTY-FIRST, TWO THOUSAND NINE,~~ THEN SUCH WILL OR TRUST SHALL BE DEEMED TO REFER TO THE FEDERAL GENERATION-SKIPPING TRANSFER TAX LAW IN EFFECT ON DECEMBER THIRTY-FIRST, TWO THOUSAND NINE.

We remain concerned, however, with having the legislation apply to all GST type bequests or other transfers under Wills and Trusts of decedents dying in 2010 (rather than only to direct skips to natural persons). As stated in our prior memorandum, such application may result in future adverse GST tax consequences, for example, with respect to transfers in trust, since the GST exemption may not be allocated to transfers that occur in 2010. In addition, when the GST exemption may be allocated (in 2011 or thereafter), the GST exemption may be less than the amount passing pursuant to 2009 law. Therefore, future distributions may attract a GST tax.

For these reasons we initially urged that the bill's GST tax provisions be limited to apply only to direct skips to natural persons. In response, the Assembly sponsor raised a concern that our proposed modification may create the potential of disinheriting a spouse or children (a copy of Assembly Member Carrozza's memo is attached). It is true that this might occur, but only if the Will or Trust language referred to "an amount that can pass free of GST tax," or similar wording, without also saying "by reason of the GST tax exemption," or similar wording. In order to address this concern, other GST type bequests should be interpreted to mean "zero" so as to avoid the potential GST tax from applying in future years. In that case, the threat of disinheriting a spouse or children is not present. To achieve that result, the bill could be modified as follows:

(2) IF BY REASON OF THE DEATH OF A DECEDENT PROPERTY PASSES OR IS ACQUIRED UNDER A BENEFICIARY DESIGNATION, IN THE CASE OF A WILL OR TRUST OF A DECEDENT WHO DIES AFTER DECEMBER THIRTY-FIRST, TWO THOUSAND NINE AND BEFORE JANUARY FIRST, TWO THOUSAND ELEVEN, THAT CONTAINS A BEQUEST OR OTHER DISPOSITION BASED UPON THE AMOUNT OF PROPERTY THAT CAN BE SHELTERED FROM FEDERAL GENERATION-SKIPPING TRANSFER TAX BY REFERRING TO THE "GENERATION-SKIPPING TRANSFER TAX EXEMPTION", "GST EXEMPTION", "GENERATION-SKIPPING TRANSFER TAX", "GST TAX" OR SIMILAR WORDS

OR PHRASES THAT MEASURES A SHARE OF AN ESTATE OR TRUST BASED ON THE AMOUNT THAT CAN PASS FREE OF FEDERAL GENERATION-SKIPPING TRANSFER TAXES, OR THAT IS OTHERWISE BASED ON A SIMILAR PROVISION OF FEDERAL GENERATION-SKIPPING TRANSFER TAX LAW ("A GST BEQUEST") ~~AND OR~~ IF SUCH GST BEQUEST WOULD HAVE PASSED AS A "DIRECT SKIP" TO A "NATURAL PERSON" WITHIN THE MEANING OF SUCH TERMS UNDER CHAPTER 13 OF THE INTERNAL REVENUE CODE OF 1986 IF THE DECEDENT HAD DIED ON DECEMBER THIRTY-FIRST, TWO THOUSAND NINE, THEN SUCH WILL OR TRUST SHALL BE DEEMED TO REFER TO THE FEDERAL GENERATION-SKIPPING TRANSFER TAX LAW IN EFFECT ON DECEMBER THIRTY-FIRST, TWO THOUSAND NINE. ANY OTHER SUCH GST BEQUEST OR OTHER DISPOSITION (OTHER THAN A DIRECT SKIP TO A NATURAL PERSON) SHALL BE DEEMED TO BE A BEQUEST OR OTHER DISPOSITION OF ZERO.

### CONCLUSION

For the sake of avoiding unintended consequences and achieving greater clarity in this much-needed legislation, the Committees urge the bill's modification before it is signed into law.

Thank you for your consideration. Please feel free to contact the undersigned with any further questions or concerns.

Committee on Estate and Gift Taxation  
Michael Frankel, Chair  
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