

## NEBRASKA INHERITANCE TAX 2022 UPDATE

### DISCLAIMER

*This article is intended for informational purposes, only. It does not constitute legal advice. Nor is it a substitute for legal advice.*

In 2022, Nebraska, through LB 310, changed its inheritance tax law. These changes are discussed as an update to this article. The changes essentially increase the exemption amounts (the amount that can be transferred free of the tax) and, for certain classes of heirs, decrease the rate of tax. These recent changes take effect beginning with 2023.

Nebraska has an inheritance tax. Nebraska is one of six states that imposes an inheritance tax. Of Nebraska's neighbors, Colorado, Wyoming, South Dakota and Kansas do not have an inheritance tax. Iowa, which has an inheritance tax, exempts transfers to lineal descendants (children, grandchildren, etc.) and lineal ascendants (parents, grandparents, etc.) from inheritance tax.<sup>1</sup>

What is the Nebraska Inheritance tax and how does it work?

#### What Is Taxed?

The inheritance tax is technically not a tax on property itself but on the right to receive (or succeed to) property. It is therefore a liability of the person who is to receive the property and not a liability of the estate of the deceased person.

For residents of the state of Nebraska, most of what you own at the time of death is going to be subject to the inheritance tax. This includes property, and interests in property, which transfer to your heirs at the time of death through a will, in a trust, by deed, by title, by gift or, in some cases, by sale. It may include personal property that a Nebraska resident owns that is outside of the state of Nebraska. It does not include real estate owned by a Nebraska resident in another state. It does include Nebraska real estate owned by a resident of another state.<sup>2</sup> It also includes property that the deceased person either gave away or transferred for less than fair market value within the three years preceding the date of death.<sup>3</sup>

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<sup>1</sup> In Iowa, on June 16, 2021, the governor signed SF 619 which, among other tax law changes, reduces the inheritance tax rates by twenty percent each year beginning January 1, 2021 through December 31, 2024; the inheritance tax is repealed as of January 1, 2025.

<sup>2</sup> Nebraska inheritance tax may also apply to tangible personal property located in Nebraska even though it was owned at the time of death by a resident of another state. If a nonresident dies owning intangible personal property, such as accounts, located in Nebraska, that property will be subject to Nebraska inheritance tax only if the laws of the state of the decedent's residence impose a similar tax on property owned by a Nebraska resident in that state. See Neb. Rev. Stat. § 77-2007.01, Uniform Reciprocal Transfer Tax Act. See also *In re Estate of Holt*, 246 Neb. 50, 516 N.W.2d 608 (1994).

<sup>3</sup> Property that was given away more than three years before death is not subject to inheritance tax. "Given away" in this context means completely given away – no strings attached. Property given away within the three years before death under the federal gift tax annual exclusion amount (currently \$16,000; 26 U.S.C. § 2503) is also not included for calculating the inheritance tax.

### Tax Rate and Exemptions

There are three levels, or rates, of inheritance tax and separate exemption amounts, which are described in the law as transfers to immediate relatives, to remote relatives and to others.

#### Through 2022

<b>Class</b>	<b>Exemption Amount</b>	<b>Rate</b>
I <i>Immediate relatives</i>	\$40,000	1%
II <i>Remote relatives</i>	\$15,000	13%
III <i>Others</i>	\$10,000	18%

#### Commencing 2023

<b>Class</b>	<b>Exemption Amount</b>	<b>Rate</b>
I <i>Immediate</i>	\$100,000	1%
II <i>Remote</i>	\$40,000	11%
III <i>Others</i>	\$25,000	15%

### Exemptions

The exemption is the amount that the heir is entitled to receive that is free of tax; in other words, the tax kicks in after the exemption amount. In addition to the exemption amounts stated above, there are two additional exemptions: 1) Property passing to a spouse is not taxed (an unlimited exemption, you might say), and 2) commencing in 2023, property passing to an individual in Class I or II who is under 22 years of age is not taxed.

The exemptions are for recipients, meaning that each person who receives property from the deceased is entitled to the applicable exemption. For example, if a deceased person were to leave \$150,000 to each of three children, the first \$100,000 that each receives would be exempt, and tax would be payable on the remaining \$50,000, at 1%, or \$500 each.

Property transferring to charitable organizations is also exempt from inheritance tax.

### Rate of Tax

The rate of tax varies according to the *class* into which the person receiving property falls. These classes essentially define how closely related that recipient is to the deceased.

Class I - immediate relatives: ancestors (lineal ascendants, i.e. parents, grandparents, etc. on up the line), issue (lineal descendants, i.e. children, grandchildren, etc. on down the line) and siblings (brothers and sisters). The class also includes legally adopted children, and “any person to whom the deceased for not less than ten years prior to death stood in

the acknowledged relation of a parent.”<sup>4</sup> Finally, Class I includes the spouse or surviving spouse of any of these people. Inheritances given to people in Class I are subject to a 1% tax after the exemption amount.

Class II – remote relatives: aunts, uncles, nieces, nephews, or any of their lineal descendants, or to their spouses. The tax rises for Class II to 13%, with a \$15,000 exemption (11% and \$40,000 in 2023).

Class III – others: everyone else. The tax for these transfers is equal to 18% and the exemption is only \$10,000. (15% and \$25,000 in 2023.)

### Expansion of Classes I and II

Initially in 1976 and then again in 2022 (the latter with effect commencing in 2023), Classes I and II were expanded to include the following: a) relatives of a former spouse to whom the decedent was married at the time of the death of the former spouse and relatives of a spouse to whom the decedent was married at the time of his or her death; and (b) relatives of a spouse or former spouse of the decedent's parent, grandparent, child, sibling, uncle, aunt, niece, or nephew, if the decedent's parent, grandparent, child, sibling, uncle, aunt, niece, or nephew was married to the spouse at the date of death of the decedent or at the date of death of such spouse.

Let’s take one example. Husband dies, survived by his wife. They had no children between them. The husband had children from a previous marriage, none of whom was adopted by the wife. The children’s mother, the husband’s previous spouse, when she died, was married to the husband. The wife, now a widow, at the time of her death, leaves everything to her late husband’s children, to whom she was not related by blood or adoption. Before the expansion of Class I in 1976, this inheritance was taxed under Class III at 18%. After the expansion, the inheritance is included in Class I. The same result would occur if the wife had died before the husband and at the time of her death had left property to her husband’s children.

### Timeframes

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<sup>4</sup> A couple of points here. First, an adult (in Nebraska, someone 19 years of age or older) cannot be legally adopted. Second, the “acknowledged relation of parent” qualification, in the law sometimes called *in loco parentis*, is not restricted to an adult-child relationship. In other words, a person might come to act as a parent for the requisite 10-year period of time even when both parties are adults. The decision as to whether or not this parental relationship exists can sometimes require a court decision. It is interesting to consider the significance of a statement by the deceased in his or her Will that he or she treated someone as if that person were a child. These issues might arise in a number of contexts. For example, where an unmarried rancher or farmer felt that he or she had established a parent-child relationship with an adult hired hand (whether unrelated, or distantly related) and desired to leave property to that person. The difference between a 1% tax and an 11%, or even 15%, tax could make this issue significant. The Nebraska Supreme Court offered factors that courts should consider in making a determination of the requisite acknowledged parental relationship: (1) the family, (2) assumption of the responsibility for support beyond occasional gifts and financial aid, (3) exercise of parental authority and discipline, (4) relationship by blood or marriage, (5) advice and guidance to the child, (6) sharing of time and affection, and (7) existence of written documentation evincing the decedent's intent to act as parent. *In re Estate of Ackerman*, 250 Neb. 665, 550 N.W.2d 678 (1996)

The inheritance tax must be paid within 12 months of the date of death; if not timely paid, interest accrues at 14%, with penalties of 5% per month of the tax due up to 25% of the total tax. An estimate of the tax amount can (and usually should) be paid by that 12-month date if there is a delay in determining the final amount of the tax. (Neb.Rev.Stat. § 77-2010)

The inheritance tax is a lien against any real estate which is subject to the tax. It can therefore, if unpaid, create title problems. A title commitment, for example, in the context of a real estate sale or refinancing, may not be available where an inheritance tax determination was not made (and paid) at the time of death of a previous owner.

The lien for taxes is not endless. It expires, of course, when the tax is paid. Even if the tax is not paid, the lien expires 10 years after death, unless, within those 10 years, a court makes a determination of the amount of the tax, in which case the lien expires five years after the court determination. It is important to note that it is the *lien* for the tax against the real estate which expires, not the personal liability for payment of the tax. There is no limitation on the liability of the personal representative or the person who received the property subject to the tax. They remain liable for payment.

The person who receives property from the deceased is finally ultimately liable for payment of the inheritance tax.

Administrators, executors, or trustees have a duty to deduct the tax from an inheritance or to collect the tax from the heir. *Nielsen v. Sidner*, 191 Neb. 324, 215 N.W.2d 86 (1974). “All executors, administrators and trustees shall have full power to sell so much of the property of the decedent as will enable them to pay the tax, in the same manner as they may be enabled to do by law for the payment of debts of their testators and intestates, and the amount of the tax shall be paid as directed by section.” (Neb.Rev.Stat. § 77-2014)

#### Are There Other Exemptions?

In addition to the exemptions previously discussed (spousal exemption, exemption by class), certain property is not subject to the inheritance tax. For example, an employee benefit plan may be exempt under certain conditions.<sup>5</sup> As mentioned, gifts made within three years of the date of death under the federal gift tax annual exclusion are exempt. Life insurance death benefits, if not paid to an executor of the estate, are not subject to the inheritance tax. Transfers of property for religious, charitable, public, scientific, or educational purposes are also exempt, as are transfers in general to governmental bodies.

There are certain other exemptions and allowances applicable to the inheritance tax calculation. A \$20,000 homestead allowance is available for a surviving spouse or, if

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<sup>5</sup> “If any estate includes payments under an employee benefit plan, such payments shall not be subject to Nebraska inheritance taxation to the extent that (1) the benefit is life insurance otherwise excluded from taxation pursuant to section 77-2001, or (2) the benefit is not subject to federal estate taxation pursuant to section 2039 of the Internal Revenue Code.” §77-2007. (An IRA account owned by a decedent at death is considered part of the decedent's estate for Federal estate tax purposes. Sec. 2039(a). *Estate of Kahn v. Commissioner*, 125 T.C. 227 (2005).)

there is no surviving spouse, for minor or dependent children. There is a \$12,500 exemption for personal property to the surviving spouse and to children, whether or not the latter are minors. And a “family allowance” (up to \$20,000, payable in a lump sum or as monthly installments) is available to the surviving spouse and minor children for up to one-year; it is exempt not only from inheritance tax but from claims against the estate, other than claims for costs and expenses of administration. (Neb.Rev.Stat. §§ 30-2322 to 30-2325)

There are also deductions against the inheritance tax: funeral costs; expenses of last illness within six months of death; debts which the deceased person was liable for at the time of death and which are then in fact paid; any federal estate tax that is paid; and the costs of administration, including court costs and expenses, such as the costs of sale of property, personal representative fees, attorney fees, and other expenses and costs incurred in the preservation, management, and protection of the estate. (Neb.Rev.Stat. § 77-2018.04)

In addition, there is a credit for inheritance taxes that have been paid within five years of death on the same property. If the deceased person received property from someone who died within the five-year period before the decedent’s death, and if inheritance tax was paid on that property, there is a credit allowed for those previously paid taxes. For example, suppose a child receives an inheritance upon a parent’s death and pays a tax on that inheritance. Assume that the child then dies within five years of the death of his or her parent, leaving property to siblings or to his or her own children. There would be a credit available in the child’s taxable estate for the tax paid on property that the child inherited from his deceased parent. (Neb.Rev.Stat. § 77-2018.06)

#### Tax is Paid to the County

The tax is a state of Nebraska inheritance tax, but the county receives the money. The tax is paid to the county of the deceased person’s residence or, in the case of real estate, to the county in which the real estate is located. If real estate is owned in more than one county, the inheritance tax is apportioned among the counties according to the percentage of real estate in each county. Interestingly, the county judge and the county clerk are to inform the county attorney each year as to any inheritance taxes that they believe are owing but have not been paid.

#### How Are the Taxes Determined and Paid?

The determination of the tax – how much is to be paid – occurs as part of a probate proceeding in the county court. If there is no probate, if, for example, the deceased’s property is transferring through a trust or through beneficiary designation (*pay on death* or *transfer on death*), then a separate county court proceeding specifically for determining the inheritance tax is to take place. (Neb.Rev.Stat. § 77-2018.02) How does this separate proceeding work? In general, a petition is filed in the county court; it is called a petition for determination of inheritance tax. An inventory is prepared: what did the deceased own at death and what was the clear market value of the property at the date of death. For some estates this may require appraisals. An inheritance tax worksheet must be completed (essentially an inheritance tax return) and an effort made to reach

agreement with the county attorney as to the value of the taxable estate. (Neb.Rev.Stat. § 77-2018.03) (The county attorney has a duty to represent the state in inheritance tax determinations.) Assuming such agreement is reached, the tax is paid once the court approves the amount.<sup>6</sup> Such a proceeding can occur without the need for actual hearings in court. However, it is also possible that disputes might arise as to property valuation, exemptions, etc., which could then lead to litigation within the inheritance tax proceeding.

In addition, if the decedent, at the time of death, was 55 years of age or older or resided in a medical institution, a notice of the separate proceeding to determine the inheritance tax must be provided to the Department of Health and Human Services. A certificate of that notice must be filed in the county court as part of the inheritance tax determination. (Medical institution is defined in Neb.Rev.Stat. § 68-919 to mean “a nursing facility, an intermediate care facility for persons with developmental disabilities, or an inpatient hospital.”)

#### Apportionment – Who pays and how much?

Inheritance tax is a tax on the beneficiary and not on the decedent. In other words, the person receiving the inheritance is responsible for the tax. The statute in Nebraska provides that each person who receives an inheritance will pay his or her share, or that the personal representative will collect that amount of tax before the inheritance is transferred. This is known as apportionment: each heir pays their portion of the tax, based on the value of what they receive and the class into which the recipient falls.

A person is free to alter this apportionment pattern, and to provide, for example that the inheritance tax will be paid out of the estate without apportionment. The language needs to be clear in order to alter the statutory provision. (Neb.Rev.Stat. § 77-2038)

Take this case. Decedent leaves half of his estate to his niece (13% tax) and half to his daughter-in-law (1%). Under apportionment, the niece would owe \$65,000 in inheritance tax and the daughter-in-law would owe \$7000. However, the decedent’s will provides that the inheritance tax should be treated as an “expense of the estate prior to any distribution.” In other words, no apportionment, the inheritance tax is paid by the estate off the top, before any distributions are made. The daughter-in-law objected to payment of the taxes “off the top” and argues that the niece’s larger share of the tax should come out of her inheritance. The court sided with the niece and found that the will clearly showed decedent’s intention that the taxes be paid by the estate, before the equal distribution of the estate between the niece and daughter-in-law.

Let’s look at another case. Decedent leaves half of his estate to his son and half to his girlfriend of many years. His will states that the inheritance tax should be paid from the “residue of his estate,” that is from the funds that are left after bills and costs are paid and after the specific bequests to his son and his girlfriend are made. The inheritance tax to the girlfriend was over \$200,000 (18%) and the tax to the son (1%) was less than \$7000.

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<sup>6</sup> The county court is not required to accept the agreement of the county attorney as to determination of the tax, though it often does.

This sounds similar to the first case. However, in this case there was not enough left in the residuary estate to pay the taxes. The court therefore found that the decedent's instruction to pay the taxes from the residuary estate had failed, and that payment should revert to the statutory pattern, that is to apportionment. A win for the son in this case.

#### Valuation of Property Subject to the Tax

It is worth noting that agricultural real estate may sometimes be valued for inheritance tax purposes at the county assessed value, marked back up to fair market value. (This is after all the county assessor's determination of the fair market value of the real estate.) In general, this can be determined by taking the value from real estate tax statements and dividing that value by .72 in order to remove the statutory discount for agricultural land. (This percentage may vary by county and a precise figure should be obtained from the county in which the real estate is located.) Of course, there may be reasons for obtaining an appraisal or using a value other than marked-up tax assessed value. For example, if the heirs are going to sell real estate, it might be best to value the property at the known or estimated sale price. Even if that value results in a higher inheritance tax, it could very well result in lower capital gain tax on the sale of the real estate.

Let's look at an example. Assume that children are inheriting land from their deceased mother. Assume their mother paid \$1000 per acre for that land. In tax language, their mother had a \$1000 *basis* in the land. If she herself had sold it before her death for \$5000 per acre, she would have incurred a capital gain tax liability on the \$4000 of appreciation, or gain, in the land. The fact that she left the land to her children in a time-of-death transfer (as in a Will, or revocable trust, or time-of-death deed) entitles the children to an automatic basis adjustment, or, in this case, a step-up in basis. Essentially, this means that the children have a basis in the land equal to its value at the time of their mother's death. Assume that the children intend to sell the land and will be able to sell it for \$5000 per acre. If the marked-up tax assessed value at the time of the mother's death were \$3500 per acre, the inheritance tax based on that value would be approximately \$35 per acre – 1% of \$3500. If the children instead used the full fair market value of \$5000 per acre as the taxable value, the inheritance tax would equal \$50 per acre, an increase in tax of \$15 per acre. However, the \$15 per acre increase in inheritance tax might seem like a good idea when we look at the capital gain consequence. If the children's new basis in the land is \$3500 per acre and they sell it for \$5000, they will likely have to pay capital gain tax on the \$1500/acre difference, at a possible combined federal and state rate of 27%. This translates to \$405 per acre in capital gain tax, significantly more than the \$15 per acre difference in inheritance tax. In other words, it may be penny wise and pound foolish not to take full advantage of the basis adjustment in order to reduce the inheritance tax. Now, you may ask, is it possible to use one value for inheritance tax and another for basis adjustment? You will need to speak with your advisor about that one.

#### Life Estate and Remainder Values

Assume that the decedent transferred property at death to her children but that this transfer was subject to a life estate in her husband. The husband has a life estate; the children have a *remainder* interest. The inheritance tax on such a transfer may be computed as follows: the value of the life estate for inheritance tax purposes is computed

using actuarial tables to determine the percentage of value attributable to the husband (essentially based on his life expectancy), with the balance of the value being attributable to the remainder interest. (Neb.Rev.Stat. § 77-2008)

A testator may shift the burden of payment of inheritance taxes as between a life estate and remainder interests. *Stuckey v. Rosenberg*, 169 Neb. 557, 100 N.W.2d 526 (1960).

#### Powers of Appointment

In the case of a general power of appointment, interest in the property transfers from the donor to the donee at the time of the donor's death whether or not the power itself is exercised. In the special case of a general power of appointment where the donor and donee are also husband and wife, such transfer is not subject to inheritance tax. *In re Estate of Nelson*, 253 Neb. 414, 571 N.W.2d 269 (1997). 77-2008.03

#### Procedures & Administrative Filings

The 2022 changes impose a new administrative responsibility on the estate. The personal representative, upon distribution of the estate, is to report to the county treasurer the following information: the amount of tax revenue generated by distributions under each of Classes I, II and III, and the number of people in each class who received property that was subject to tax. In addition, the report should list the number of non-residents who received property that was subject to inheritance tax. The Department of Revenue is charged to produce a form for this reporting.

#### Conclusion

A couple of final points. People are sometimes urged to plan their estates in order to avoid probate. In such advice, it is often the costs that are associated with probate which people are being warned against. In many, if not most, informal probate proceedings, much of the work that is done is the same work that is required in an inheritance tax determination. Therefore, so long as Nebraska has an inheritance tax, avoiding probate as a means of savings costs may be an oversold idea, or, at any rate, one to be taken with a grain of salt. There may be numerous other compelling reasons to avoid probate, or positive reasons to use a trust or beneficiary designations, just as there may be good reasons for relying on a will and anticipating a probate. The point is that the avoidance of the administrative costs of probate alone may be an inadequate reason for determining the structure your estate plan, in particular in light of Nebraska's inheritance tax.

It is worth pointing out that where spouses own property jointly with rights of survivorship there is likely not to be a need for an inheritance tax determination upon the first death. Rather, only one inheritance tax determination will need to be undertaken, and that at the time of death of the surviving spouse.

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