

Montgomery Bar Association | Montgomery County, PA

# SIDEBAR

*Magazine* SPRING 2018

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*MBA Welcomes a Season of Change  
and New Beginnings*



**YOUNG LAWYERS SECTION  
PARTICIPATES IN  
MLK DAY OF SERVICE**



# Post Trump Tax Cut: Estate Planning For The Rest of Us

By Rebecca Sallen, Esq.

The largest tax reform in over three decades has now been signed into law. Considering the effects of the "Tax Cuts and Jobs Act" (Act) which became law on December 22, 2017, many are asking whether estate planning is still relevant.

The Tax Cuts and Jobs Act doubled the exemption from federal estate taxes from \$5.6 to \$11.2 million for individuals and \$22.4 million for married couples. As in prior years, these exemption rates are indexed for inflation, but now using a chained consumer price index approach. The Tax Policy Center estimates that approximately 11,310 individuals dying in 2017 will be subject to the estate tax of which only 5,460 estates will owe tax after credits and deductions. Portability of a deceased spouse's unused exclusion remains available, so that spouses with a combined estate up to \$22.4 million in value at the time of the survivor's death will not pay any federal estate tax with the proper planning and estate tax return elections. With this dramatic increase in the exemption and

even fewer clients subject to paying federal estate tax, the focus on estate planning has shifted.

## FLUCTUATING GOALS

As taxable estates have moved from \$600,000 in 1997 to \$1 million in 2002 to today's current rate, prior plans often reflected a desire to save money on taxes. This was accomplished by reducing the size of an estate through various techniques. The Act is scheduled to revert in eight years to \$5 million for an individual, adjusted for inflation. In 2026, the exemption will likely be in excess of \$6 million, significantly above most clients' estates. As a result, the specter of federal taxes is replaced by other concerns.

Many clients want to make lifetime gifts so that they can see the beneficiary enjoy it while they are alive. Gifting property prior to one's death reduces the size of one's estate, but forfeits a step-up in basis and creates taxable income for the heirs when they sell the property. Instead of encouraging clients to gift money to their children or grandchildren, attorneys should emphasize making gifts with high basis assets.

The higher tax exemption alleviates estate tax concerns which allow clients to focus on non-tax reasons for planning such as protecting and preserving assets. These non-tax reasons are an opportunity for attorneys to differentiate themselves and offer value to their clients.

## REVISIT OLD PLANS

Attorney should contact their former clients to make them aware of how the Act may affect their plans. Existing estate plans that were created to save money on estate taxes may no longer operate as intended. This is especially true if there were multiple trusts established at death based on formula clauses involving the estate tax exemption amount. Trusts drafted with a typical formula clause for a married couple may have funded a credit shelter trust for children using the full federal exemption. Without revising these plans, the result would leave less than originally expected to the surviving spouse or even nothing at all. Older trusts tend to contain now unnecessary restrictions on the survivor's control over trust assets. In addition, unrevised trusts may incur unnecessary capital gains at final distribution since the step-up in basis would not be available at the death of the surviving spouse.

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## SPOUSAL LIFETIME ACCESS TRUSTS

Married couples who want to take advantage of the temporary elevated exclusion but are concerned about loss of control over their finances or that lifetime current or expected lifestyle should decide whether a spousal lifetime access trust (SLAT) could strengthen their estate plan.

A SLAT allows a donor spouse to make aggregate gifts up to \$11.2 million free of gift taxes to a non-reciprocal, irrevocable trust that names their beneficiary spouse as a lifetime beneficiary of the trust. The beneficiary spouse or the couple's children may serve as the trustee if his or her discretion is limited by an ascertainable standard. The gift constitutes a completed gift to remove the asset from the donor spouse's estate, but ensures that the donor spouse will still have access to trust assets through the beneficiary spouse as long as the couple remains married to each other. Importantly, the SLAT may also give the beneficiary spouse a limited power of appointment to distribute assets among the couple's children after the death of a beneficiary spouse. Attorneys should counsel their clients to establish and fund a SLAT before the increased exemption amounts expire.

## POWER OF APPOINTMENT PLANNING

Structuring appropriate powers of appointment has always been a valuable technique in estate planning. Powers of appointment give the flexibility necessary to alter asset disposition if there is a change in the beneficiaries' circumstances such as a future divorce, disparate income among siblings or addiction. With the effect of the Act, practitioners should discuss using general power of appointments as a tool for basis reappointment, as holding such power would cause inclusion of the property subject to the power in an individual's gross estate for tax purposes. The inclusion of those assets allows those assets to receive a step-up in basis.

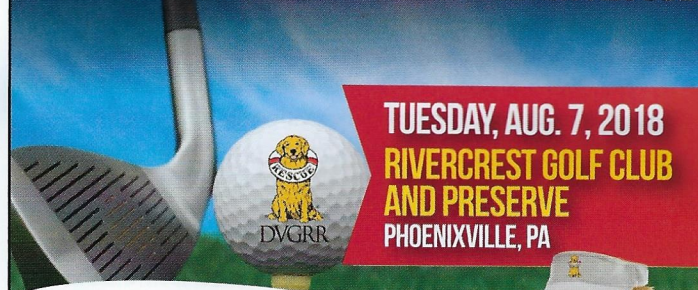
Clients concerned about capital gains may benefit from utilizing a power of appointment by giving an older, trusted relative a general power of appointment for basis step-up purposes. The step-up in basis will only relate to assets held by the trust and be valued at the death of the elderly relative. Prior to the Act, this may not have been a suggested strategy as the relative's taxable estate may have exceeded the exclusion after combining their estate with assets given by a power of appointment. Now the \$11.2 million exclusion for an individual allows many more clients to take advantage of this strategy.

## CONCLUSION

Tax law remains a moving target. The vast majority of Americans are no longer subject to the federal estate tax. However, a change in administration or control in Congress may lower the estate tax exemption to 2017 levels or even lower. Attorneys have the opportunity to provide significant value for their clients through well-drafted plans that contain the necessary flexibility. ■

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