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Changes proposed by Trump could open up big estate planning opportunities

With proposals to repeal the federal estate tax and the generation-skipping transfer (GST) tax on the table, the new administration may be opening up some rare estate planning options.

Under President Donald Trump's proposal, the current step-up in basis for income tax purposes on assets owned at death would be limited to $10 million of assets. The intention, according to the proposal, is to exempt small businesses and family farms.

It's likely that assets exceeding $10 million in value would be either subject to carryover basis rules of some kind or would be subject to capital gains at death. Under Trump's proposal, the current capital gains tax rate of 20 percent would be retained.

Whether the gift tax would be repealed remains unclear.

It's important to remember that for the estate tax and other transfer taxes, the devil is in the details, and many elements remain unknown. Speak to your estate planning lawyer to determine how any changes might affect your planning and to review your estate plan as a whole.

Potential planning tools

Here is a look at some planning tools that would be in play if the estate tax was repealed:

▸ **Dynasty trusts:** If the federal estate, gift and GST taxes are repealed for any length of time, taxpayers could create generation-skipping trusts known as dynasty trusts that could possibly last into

perpetuity.

Such trusts could be created to support future generations, allow for asset protection and avoid death taxes entirely. Dynasty trusts could also be created at death if the gift tax stays intact, but the estate and GST taxes are repealed.

▸ **Income tax planning:** If the federal estate, gift and GST taxes are repealed, income tax planning may become more prominent. Especially if the gift tax is repealed, there may be a significant focus on ways to shift assets among family members in order to avoid or

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In will contest, no need to oversell decedent's capacity

Imagine a situation where a loved one dies and there is a contest over the validity of the will. The question arises: What was the decedent's mental state in drafting the will?

A typical, knee jerk answer is that the decedent had a perfectly clear state of mind.

However, testamentary capacity doesn't require such a high level of clarity in communication and comprehension. Further, overstating a decedent's capacity might actually lead a trier of fact to become skeptical of the will proponent, especially if other evidence exists that the decedent's mind wasn't as clear as stated.

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When a will is contested, the proponent has to prove that the decedent had the capacity to make the will. Meeting that burden requires showing that the testator knew the nature and extent of his property, knew the natural objects of his bounty and was aware of the contents of his will. Age and sickness aren't determinative, and mental illness or failing memory do not preclude a decedent from having testamentary capacity to execute a will.

Cases on lack of capacity really come down to a he-said-she-said analysis. In one recent case in probate court in New York, an 83-year-old woman executed her will while in the hospital. A form in her records entitled "Adult Patient Without Capacity With Surrogate for DNR [Do No Resuscitate] Order," stated, "I have determined that the patient lacks capacity to make this decision," by reason of "dementia." The records also noted that the woman became disoriented during dialysis the day she was admitted.

Yet the woman's attorneys, whom she had known for years, said that her behavior at the time of executing the will was similar to that in her prior interactions with them and indicative of a sound mind. Further, her medical records from the day the will was executed said she was alert.

In this instance, the case didn't go to trial. The court said that the parties protesting the will didn't provide sufficient evidence to raise a triable issue of fact that the decedent lacked testamentary capacity.

However, in an earlier case before the same court, a woman in her eighties executed her will two years after suffering a debilitating stroke. A few months later she was found to be an incapacitated person under the state mental hygiene law. The court at that time said she needed one-on-one support and suffered from dementia.

Like the case noted above, evidence was offered on both sides. The proponent offered evidence that the attorney and others said the decedent was able to speak normally and understood her surroundings. However, the parties objecting produced evidence from a guardianship proceeding and the testimony of a treating physician that the decedent lacked testamentary capacity.

In this case, the court decided the case should go to a jury.

What happens in matters like these really depends on the facts and circumstances of the individual case. But it's important to keep in mind that in order to prove capacity to execute a will, it isn't necessary to demonstrate that someone who had challenges with verbal communication at the end of life or showed periods of confusion was of a perfectly clear state of mind. In fact, if you try to argue that too strongly, be aware that it might lead to skepticism on the part of the decider of your case.

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This newsletter is designed to keep you up-to-date with changes in the law. For help with these or any other legal issues, please call today. The information in this newsletter is intended solely for your information. It does not constitute legal advice, and it should not be relied on without a discussion of your specific situation with an attorney.

Changes proposed by Trump could open up big estate planning opportunities

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minimize the payment of capital gains taxes.

▸ **Charitable giving:** The effect of the Trump proposal on charitable giving at death remains unclear. It seems logical that the elimination of the estate tax (and thus the deductions associated with charitable giving) will trigger a significant decline in charitable giving at death. Also, one controversial element of the Trump plan states: "To prevent abuse, contributions of appreciated assets into a private charity established by the decedent or the decedent's relatives will be disallowed." This statement requires clarification, and might well never become law. But it does indicate an attempt to deter donations of appreciated assets to private foundations, which is allowed under current law.

How likely is repeal?

Keep in mind that we have been down this road before. So how likely is repeal this time? The answer is that it depends.

A so-called "permanent" repeal of the estate tax requires 60 votes in the Senate to avoid a probable filibuster. However, a 10-year repeal of the estate, gift and/or GST taxes could move forward through the budget reconciliation process, which doesn't involve the usual procedures and would only require a majority vote. Regardless of what happens during Trump's term, keep in mind that a new Congress could always reverse any change that might be made.

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Retirement accounts: Tips for taxpayers turning 70 1/2

It's a big year for the first set of baby boomers: They're turning 70 1/2. And that means getting prepared for their first mandatory distributions from tax-sheltered retirement accounts.

The first thing to keep in mind is that the amount of your required annual withdrawal is based on the assets in the account as of the prior December 31. For a taxpayer with multiple 401(k) plans, he or she must take a proportional distribution from each of the accounts. If a taxpayer has multiple IRAs, the payouts can be uneven. That is, the entire amount can be taken out of one IRA, if the taxpayer chooses.

As far as timing, a taxpayer can choose to get periodic payments or take a lump sum, typically later in the year, to defer paying taxes on the withdrawal.

IRA withdrawals are usually in cash, but you can also take them as shares of stock or a piece of real estate. If an IRA owner doesn't intend to spend the money that's withdrawn, such in-kind withdrawal options avoid commissions on selling investments and buying them again outside of the IRA. However, this type of withdrawal takes more time and necessitates finding out whether any other fees will be charged.

Keep in mind that federal law allows IRA owners to donate up to $100,000 of IRA assets per year, counting toward the required minimum distribution. The donation must be made to a qualified charity.

IRS: Account transcripts can serve as estate tax closing letter

A recent IRS notice confirms that an account transcript issued by the IRS qualifies as a substitute for an estate tax closing letter, as long as the transcript includes the proper transaction code.

An estate tax closing letter indicates that the IRS has accepted an estate tax return and that the estate's federal tax liabilities have been satisfied. Once the letter has been received, it makes it clear to the executor of the estate that it can proceed with finalizing the estate administration process.

The receipt of the closing letter is often needed to meet requirements for state law probate proceedings. It's rare for the IRS to reopen an estate tax return after a closing letter has been issued, except in certain extreme circumstances such as fraud or a major error by the IRS.

However, the IRS stopped automatically issuing estate tax closing letters effective June 1, 2015. Since then, the taxpayer's representative receives a closing letter only by request.

The new IRS notice (Notice 2017-12) makes clear that a taxpayer's IRS account transcripts noting transaction code 421 can serve as a replacement for an estate tax closing letter. This code indicates that Form 706, which is used to determine the amount of the estate tax, has been accepted as filed and an examination has been concluded.

According to the IRS, account transcripts that contain transaction code 421 are functionally equivalent to an estate tax closing letter.

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New law allows individuals to create special needs trusts

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Buried in a new federal law is a tiny change that will now allow individuals to set up their own special needs trusts.

The sum total of the change is two words — "the individual" — intended to correct a more than 20-year-old error. The change is called the Special Needs Trust Fairness Act.

Authorized under the Omnibus Budget Reconciliation Act of 1993, special needs trusts protect assets and allow an individual to maintain eligibility for governmental benefits such as Supplemental Security Income (SSI) and Medicaid.

Prior to the law being enacted, a person with a disability under the age of 65 would, in most cases, have to spend down to reach $2,000 or less in assets before becoming eligible for Medicaid and other governmental benefits. The individual would have to remain at that asset level to continue receiving benefits.

Under the 1993 law, a disabled individual's assets in a special needs trust are disregarded in evaluating the individual's assets for the purposes of obtaining government benefits. At death, the state that provided for the person's care would be repaid out of the assets remaining in the trust.

But here's the rub. The law allowed parents, grandparents, legal guardians and courts to create such trusts. So what happens to individuals with disabilities who don't have living parents or grandparents? Previously, their only option was to go to court to have a special needs trust created on their behalf.

Now, under the new law, individuals can create their own special needs trust.

This is a huge relief, because individuals can avoid the extra time and costs incurred from going to court. But it's still essential to have an attorney draft the trust properly and make sure it's customized to your needs and those of your loved ones.