DEAN
MEAD
ATTORNEYS AT LAW

Impact of the Tax Cuts and Jobs Act of 2017 on Estate Planning

Presented By:

Lauren Y. Detzel

David J. Akins

Matthew J. Ahearn

Brian M. Malec

Kyle C. Griffin

Where Were We vs. Where Are We Now

	2017	2018 (Pre-Act)	2018 (Post-Act)
Transfer Tax Rate	40%	40%	40%
Estate/Gift Tax Exemption	$5.49 million	$5.6 million	$11.18 million (est.)
GST Exemption	$5.49 million	$5.6 million	$11.18 million (est.)
Gift Tax Annual Exclusion	$14,000	$15,000	$15,000 (est.)
Inflation Adjustments	Standard CPI	Standard CPI	Chained CPI
Top Income Rate	39.6% in excess of $12,500	39.6% in excess of $12,700	37% in excess of $12,500
Misc. Itemized Deductions	Yes	Yes	No
Uncertainties	No	No	Sunset/Clawback

Relevant Income Tax Provisions of the Act

- Deduction for alimony payments is eliminated
  - Applies to agreements executed after 2018 and those executed prior to 2019 IF modified or amended after 2018 to apply new law.
  - Includes those payments made directly and through trusts under Code §682.
  - Result is that alimony recipient will include payments in gross income
- Roth recharacterizations are limited

New §1(j)(2)(E) - Change in Income Tax Brackets and Rates

Bracket	2017 Rate	2018 Rate
Not over $2,550	15%	10%
$2,550 - $6,000 $6,000 - $9,150	$382.50 + 25% $1,245 + 28%	$255 + 24%
$9,150 - $12,500	$2,127 + 33%	$1,839 + 35%
Over $12,500	$3,232.50 + 39.6%	$3,011.50 + 37%

New §67(g) - Suspension of Miscellaneous Itemized Deductions

- For taxable years beginning in 2018 through 2025
- What are miscellaneous itemized deductions?

Miscellaneous Itemized Deductions

- Itemized deductions are deductions **<u>other than</u>** those allowable in arriving at adjusted gross income (AGI); i.e., "above the line deductions" are NOT itemized deductions §63(d)(1)

- Miscellaneous itemized deductions are itemized deductions other than those listed in §67(b)

Exclusions From Miscellaneous Itemized Deductions Under §67(b)

- Interest
- Taxes
- Charitable contributions and gifts
- Deduction under section 691(c)
- Remember: deductions for certain items listed on §67(b) are subject to limitations under other Code sections

Miscellaneous Itemized Deductions

- Examples from the Joint Explanatory Statement of the House and Senate Conference Committee
  - Appraisal fees for a casualty loss or charitable contribution
  - Excess deductions (including administrative expenses) allowed a beneficiary on termination of an estate or trust §642(h)(2)
  - Indirect miscellaneous deductions from pass-through entities
  - Investment fees and expenses
  - Tax preparation expenses

Income Taxation of Estates and Trusts

- Generally, taxable income computed in the same manner as an individual, except as otherwise provided in Part I of Subchapter J, which governs the income taxation of estates, trusts and beneficiaries §641(b)

Determination of AGI of Estates and Trusts

- Computed in the same manner as an individual, with exceptions
  - Deduction for costs incurred in connection with the administration of an estate or trust, which would not have been incurred if the property were not held in the trust or estate §67(e)(1)
  - Deductions under §642(b) in lieu of personal exemption §67(e)(2)
  - Distribution deductions under §651 for simple trusts and under §661 for complex trusts §67(e)(2)
- Items in these categories are deductible in arriving at AGI and, therefore, are not itemized deductions

§67(e)(1) Costs Incurred in Connection with the Administration of the Estate or Trust

- Not miscellaneous itemized deductions only to the extent they are not “commonly or customarily incurred by individuals”. *Knight v. Comm’r.*, 128 S.Ct. (2008)

- Reg. §1.67-4 defines “commonly and customarily incurred by individuals”

Reg. §1.67-4 Deductions Not Commonly or Customarily Incurred by Individuals (1 of 2)

- Costs of estate and GST tax returns, fiduciary income tax returns, and the decedent's final individual income tax returns

- Certain incremental costs of investment advice beyond the amount that normally would be charged to an individual investor

Reg. §1.67-4 Deductions Not Commonly or Customarily Incurred by Individuals (2 of 2)

- Appraisal fees incurred to determine the fair market value of assets as of the decedent's date of death (or the alternate valuation date), for purposes of making distributions, or as otherwise required to prepare the estate's or trust's tax returns

- Probate court fees and costs; fiduciary bond premiums; legal publication costs of notices to creditors or heirs; the cost of certified copies of the decedent's death certificate; and costs related to fiduciary accounts

Carryovers and Excess Deductions on Termination of Estate or Trust

- If on termination an estate or trust has –
  - Net operating loss carryover or a capital loss carryover §642(h)(1)
  - Deductions in excess of gross income for such year §642(h)(2)
- Under prior law, the carryover or excess deductions were allowed as a deduction to the beneficiaries

Are NOLs and Capital Loss Carryovers and Excess Deductions Still Deductible?

- Carryovers – Yes, they are reductions in arriving at total income before any deductions are taken

- Excess Deductions – No, according to the Joint Summary of the Conference Committee

Planning Considerations Regarding Deductions

- Fiduciaries should consider the timing of payment of certain deductible expenses –
    - In the year an estate or trust is terminating
    - When decanting in situations in which the second trust will be a separate taxpayer and the decanting treated as a distribution from the first trust to the second trust; e.g., situations in which the first trust is decanted to a second trust funded by someone other than the settlor of the first trust

Planning Considerations Regarding Deductions

- Professionals representing fiduciaries should –
  - Bill separately for services rendered in respect to a terminating estate and related trust or terminating trust and continuing subtrusts
  - Pay attention to the allocation of fees to a terminating estate or trust and a continuing trust

§164(b)(6) - $10,000 Limitation on State and Local Taxes Applies to Estates and Trusts

- Deduction for the aggregate amount of the following taxes not incurred in a trade or business are limited to $10,000 -
  - State and local real property taxes
  - State and local personal property taxes
  - State and local, and foreign, income taxes
  - State and local sales tax

Planning Considerations

- Consider creating multiple trusts, each of which would have a separate –
  - $10,000 SALT deduction limit
  - Deduction in lieu of personal exemption
  - Run up the income tax brackets
- Separate trusts must have different settlors, beneficiaries or terms, or not be established for income tax avoidance, otherwise, the IRS has the authority to treat them as one trust §643(f)

Alternative Minimum Tax Exemption and Phase-out Thresholds

- AMT exemptions and phase-out thresholds increased for individuals, but not for trusts and estates

- AMT exemption amount and phase-out threshold for trusts and estates likely will be slightly lower than the amounts previously announced for 2018 due to the change in the method of computing inflation adjustments

Electing Small Business Trusts ("ESBT")

- Non-resident Alien now can be a potential current beneficiary of an ESBT §1361(c)(2)(B)(v)

- Charitable deduction of the portion of an ESBT holding stock in an S Corporation will no longer be determined under §642(b), but under §170 (same as individuals) §1361(c)(2)(E)

- These changes do not sunset in 2026

Potential Benefits of Change in ESBT Charitable Deduction

- Eliminates the requirement that charitable gifts must be made from gross income

- The charitable gift no longer has to be made pursuant to the terms of the governing instrument

Potential Detriments of Change in ESBT Charitable Deduction

- The percentage limitations applicable to individuals will apply to charitable contributions made by the portion of an ESBT holding S Corporation stock

- The substantiation requirements that apply to individuals also will be applicable to charitable contributions from an ESBT

"Hot Topics" in Estate Planning that were not Included in the Act

- Estate and gift tax repeal
- Modification of rules on valuation discounts
- Limits on GRATS
- 90 year limit on GST exemption
- 5 year mandatory payout period for designated beneficiaries on retirement accounts.
- Inclusion of grantor trusts in grantor's gross estate

Impact of the Act on Existing Estates and Trusts: What You Should Be Doing Now

1. Review formula clauses in existing wills and trusts;
2. Review existing irrevocable trusts;
3. Consider converting grantor trusts to non-grantor trusts;
4. Analyze tax year options for existing estates/revocable trust administrations; and
5. Move trusts subject to state income tax to Florida.

Review Structure of Existing Revocable Trusts and Wills

- Does the formula clause used in a will or trust still accomplish the taxpayer’s intent in light of the increased exemptions?

Review Existing Irrevocable Trusts

- Consider whether assets held in trust should be distributed to a beneficiary or the trust should be modified to cause inclusion in the beneficiary's gross estate.
- Results of inclusion are:
  - Obtain a basis step-up for appreciated assets for income tax purposes; and
  - Beneficiary can allocate additional GST tax exemption to assets passing upon his or her death.

Review Existing Irrevocable Trusts (cont.)

- Example: Assume $5 million of assets held in a GST non-exempt irrevocable trust providing for distributions to settlor's child, C, and at C's death, the remaining assets are distributable outright to C's issue. Assume further that C dies having $6 million of his own assets.

Review Existing Irrevocable Trusts (example cont.)

- If the trust was left "as is"

Prior to the Act	Under the Act
GST tax of 40%	GST Tax of 40%
No estate tax	No estate tax

- If the trust was modified to cause inclusion for estate tax (and utilize the beneficiary's increase exemptions)

Prior to the Act	Under the Act
No GST tax	No GST tax
Estate tax of 40%	No estate tax
Trust assets non-exempt going forward	Trust assets exempt going forward

Consider Converting a Grantor Trust to a Non-Grantor Trust

- Income tax on a grantor trust is a liability of the grantor.
- Payment of income tax decreases the grantor's taxable estate, which benefits the trust.
- With additional estate tax exemption of approximately $11.18 million for a couple, it may no longer be advisable to spend the grantor's assets on the tax liability for trust income as a means to reduce estate tax.
- Conversion may also expand the available deductions.

Analyze the Tax Year Options for Current Estate Administrations

- Estates have the option to elect a fiscal tax year
- First tax year may be less than 12 months
- An election can be made pursuant to Code § 645 to treat a decedent's revocable trust as part of the estate for income tax purposes. This results in the trust having the same fiscal tax year as the estate instead of a calendar year.

Analyze the Tax Year Options for Current Estate Administrations (cont.)

- Why is the selection of a tax year important?
  - The Act applies only to taxable years beginning after December 31, 2017 and before January 1, 2026. Thus, the tax year selected for the estate (or § 645 trust) will determine how long the pre-Act tax rules will continue to apply for decedents dying in 2017.
  - The question is how soon do you want the new rules to apply?

Move Irrevocable Trusts to Florida to Avoid State Income Tax

- Evaluate basis upon which state income tax is imposed
- Consider the location of trustee and beneficiaries

Higher Transfer Tax Exemptions Does Mitigate the Need for Proper Planning

- Non-estate tax reasons for planning include
  - Asset protection planning;
  - Business succession planning;
  - Protection from divorce;
  - Avoidance of litigation; and
  - Planning for spendthrift children.

DEAN MEAD
ATTORNEYS AT LAW

Impact of New Act on Planning for Married Couples

Presented By: Lauren Y. Detzel

I. Portability

A. "Portability" means that the personal representative of a deceased spouse's estate may elect to transfer any unused estate tax exemption at the deceased spouse's death to the surviving spouse. The unused exemption is known as the "Deceased Spousal Unused Exclusion" amount or the "DSUE" amount.

B. Portability is intended to provide a married couple the opportunity to utilize the exemptions of both spouses even if the couple failed to plan prior to the death of the first spouse. For example, assume H has $22.36 million of assets in 2018 and W has $0. Without portability, if W died in 2018 (without any assets), W's $11.18 million exemption would be lost. When H later dies in 2018, estate tax would be due on the $11.18 million of assets in excess of H's $11.18 million estate tax exemption. With portability, no estate tax would be due upon H's death because H could add W's unused $11.18 million exemption to H's exemption, thus giving H a total exemption of $22.36 million.

C. Surviving spouse can use the DSUE of the deceased spouse to make gifts during the lifetime of the surviving spouse. Gifts by the surviving spouse use the DSUE amount first before using the surviving spouse's exclusion amount.

D. GST exemption is not portable. First spouse must use it or lose it.

E. The DSUE amount is not indexed for inflation (even though the surviving spouse's exemption is indexed for inflation).

- Query – If first spouse dies before 2026 and the surviving spouse makes a portability election, so that the surviving spouse's estate and gift tax exemptions are increased, and then the surviving spouse dies after 2026 with Congress not extending the increased exemption, does the surviving spouse still get to take advantage of the full DSUE amount?

II. Goals / Objectives

A. Tax Considerations
   1. Transfer tax (estate, gift, generation skipping tax ("GST")) minimization
   2. Maximize step up in basis
      a) Death of first spouse – first step up
      b) Death of second spouse – second step up

B. Non-Tax Concerns
   1. Fulfillment of estate plan – assets go to whom and in the amount that the couple desires without chaos, family discord or even litigation

2. Protection of assets from predators and creditors
   a) If surviving spouse remarries, can the assets be diverted away from the intended beneficiaries?
   b) If a beneficiary (such as the surviving spouse) becomes vulnerable to manipulation (even by family members) can the assets be diverted away from the intended beneficiaries?
   c) If a beneficiary has creditors, will the assets be protected and used for the benefit of the intended beneficiaries or wind up in the hands of creditors?
   d) If a beneficiary divorces, will the former spouse of the beneficiary be able to take inherited assets as part of a divorce settlement?

3. Flexibility

   a) The laws are always changing – will the plan be able to keep up with subsequent law changes?

   b) Family circumstances (including the amount of the estate) may change. Will the plan be able to be changed to take into account changes in family circumstances?

4. Administration hassles and exposure

   a) How much expense and hassle will the plan incur? How difficult is it to understand?

5. Benefit during life of surviving spouse

   a) Does the plan allow for descendants (or other beneficiaries) to benefit while the surviving spouse is still alive? May be especially important in blended families.

C. These goals and objectives are largely the same regardless of the size of the estate, although many estates may not have to worry about estate tax minimization.

THREE APPROACHES

There are 3 basic approaches to dealing with planning between spouses, with variations on two of the methods. Instead of just looking at the size of the estate to determine which method to use, analyzing how each method satisfies the goals and objectives is the proper approach.

I. Traditional Approach – Bypass (credit trust) and excess to spousal trust (QTIP) or spouse

A. How It Works

1. Carve out an amount that can pass estate tax free upon death of first spouse due to remaining estate tax exemption and distribute such amount and/or assets to a trust that usually provides for discretionary distribution of income and principal to the surviving spouse and/or descendants. This trust may grant a power of appointment to the surviving spouse to change the ultimate distribution of the trust upon the spouse's death. If not exercised, the trust assets go to the descendants or other beneficiaries, in trust or otherwise as specified by the first spouse to die.

2. Unless a general power of appointment is granted or something else is done, the assets of the bypass trust are not included in the estate of the surviving spouse for tax purposes when he/she dies. Because the bypass trust is not included in the surviving spouse's estate, all appreciation in the assets in this trust "bypasses" estate tax. However, because the assets in the bypass trust are not subject to estate tax, there is no step up in basis in the assets upon the death of the surviving spouse.
3. The excess over the amount in No. 1 above is distributed in a way to qualify for the marital deduction, usually a marital trust such as a qualifying terminal interest trust (QTIP) or outright to the spouse. If in a marital trust, all income must be distributed each year solely to the spouse and principal may be distributed to the spouse in the discretion of the trustee. The surviving spouse may be given a power of appointment at death. At the death of the surviving spouse, the QTIP trust is included in the surviving spouse's estate for estate tax purposes and therefore, the assets in the QTIP get a step up in basis (the second step up).

4. The traditional approach may also provide for a “reverse QTIP” election to be made if the first spouse to die has more GST exemption left at death than estate tax exemption in order to not waste such excess GST exemption. The assets in the reverse QTIP trust are included in the surviving spouse’s estate for estate tax purposes, but will be generation skipping tax free.

B. Advantages and Disadvantages

1. Tax Considerations

a) Because the appreciation in assets in the bypass trust is not subject to estate tax when the second spouse dies, this method is the best method of the three approaches for transfer tax minimization. But because very few estates will be subject to estates tax under the new act (at least until 2026), this factor may not even be an issue. But if it is, this approach can make sure maximum benefit is taken of estate and GST exemptions.

b) In most estates income tax planning will be more important than saving transfer tax. Without using some method to cause the bypass trust to be included in the surviving spouse's estate, the bypass trust will not receive the second step up in basis. This may or may not be extremely important. If all the assets in the bypass trust are unlikely to be sold for the foreseeable future, such as interests in family entities, the loss of the second step up may not matter. Or if the assets in the bypass trust are all portfolio assets which turn over fairly frequently, such that the amount of unrealized gain in the assets at the death of the surviving spouse is small, the loss of the second step up in basis may not be material.

2. Non-Tax Issues
   a) Because use of the bypass/QTIP option involves assets staying in trusts, if drafted properly, these trusts can provide great protection from predators/creditors. However, because the marital trust must distribute all income to the surviving spouse, there is not as much protection for that trust as afforded by the bypass trust.
   b) If a QTIP trust is used and proper trustees named for the trusts, there is a high likelihood that the beneficiaries will receive what was intended, subject to needs of the surviving spouse. Powers of appointment are optional and they can be limited as to who may be the ultimate recipients and for how much.

c) As to flexibility, the use of powers of appointment can be provided for in such a way as to increase what otherwise is a fairly inflexible plan. A spouse can also give someone else some powers over the trust such as a trust protector, in an effort to increase flexibility. Also, giving a disinterested trustee the power to distribute trust assets "for any purpose" can add greater flexibility

d) This method will involve administering multiple trusts and of the three methods entails the largest administrative burdens. Not only will the trusts have ongoing administration required (tax return, annual accounting) but the process of funding the two, possibly three, trusts can be expensive and time consuming.

e) The bypass trust can provide for income and principal to be used for beneficiaries other than the surviving spouse.

II. Outright to Spouse – The Simple Approach

A. How It Works

1. Through a combination of (1) owning assets in joint names with the spouse; (2) naming the spouse as beneficiary of retirement plans and life insurance policies; and (3) having testamentary documents (revocable trust, will) name spouse as beneficiary of the estate, all assets end up in the hands of the surviving spouse after the death of the first spouse.
2. A portability election can be made to transfer to the surviving spouse any unused estate and gift tax exemption of the first spouse.

B. Advantages and Disadvantages

1. Tax Considerations

a) All assets will be included in the estate of the second spouse but with the portability election and the fact that the estate taxes will be payable by so few people, this may not be a problem.

b) The portability election doesn't apply to generation-skipping exemption amount so this method without more will cause the loss of any remaining GST exemption of the first spouse.

c) All assets get a step-up in basis on the death of the second spouse (the second step up), so this method achieves optimum income tax benefits.

2. Non-Tax Issues

a) This approach affords absolutely no protection from predators/creditors because all assets are owned by the surviving spouse outright.

b) As to the assurance that assets will be distributed the way the first spouse wanted, this plan doesn't work. All assets belong to the second spouse who can give them to anyone upon his/her death. This plan should normally not be used for any blended family.

c) Because there are no trusts created, the surviving spouse maintains maximum flexibility over the assets.

d) This approach has the least amount of administrative burdens and ongoing requirements.

e) Because all assets belong to the surviving spouse, no other beneficiaries can benefit from the first spouse's assets unless the surviving spouse makes a gift of his/her own volition.

C. Variation on the Plan

1. A surviving spouse may prefer to have some or all assets go into a bypass trust for the following reasons:
   - There is less than optimum estate and GST results
   - This approach affords no protection against creditors or predators
   - This approach doesn't give any benefits to anyone other than the surviving spouse.

2. In order to do this an option can be included in documents to allow the surviving spouse to disclaim all or any portion of assets the spouse receives (the “disclaimer option”). Any such disclaimed property will go to a bypass trust much like in the traditional approach. This allows the spouse to take into consideration facts and law that exist when the first spouse dies (as opposed to when the plan was put in place) and determine if the spouse wants to take advantage of appreciation in assets between the first and second death escaping estate tax, avoid the loss of the GST exemption of the first spouse, have assets go into trust to be protected from the spouse’s creditors or a subsequent marriage and potentially be able to allow beneficiaries other than the surviving spouse to benefit while the spouse is alive.

3. Problems with the disclaimer option

   a) The decision must be made by the surviving spouse who may not have the capacity or ability to decide to do so.

   b) If the spouse is insolvent, a disclaimer may not be valid. See Fla. Stat. §739.402(d)

   c) The spouse may not make the disclaimer timely – it must be made 9 months after the death of the first spouse.

   d) A disclaimer is invalid if the surviving spouse has accepted any benefits of the property to be disclaimed.

   e) The first spouse to die should not rely on the disclaimer option to provide for his/her children from a prior marriage.

III. Third Approach – All to a QTIP Trust

A. How It Works

1. The Trust/Will provides that all assets of the first spouse to die go into a QTIP trust as described in the bypass method above. All assets in the QTIP trust will be included in the surviving spouse's estate for tax purposes upon the death of surviving spouse and will receive a step up in basis (second step up).
2. Portability election is made so that any unused estate or gift tax exemptions can be given to the surviving spouse.
3. Reverse QTIP election can be made to take advantage of any unused GST exemption of the first spouse.

B. Advantages and Disadvantages

1. Tax Considerations

   a) Unlike approach No. 2, this method can take advantage of all of the first spouse’s tax exemptions, but doesn’t exclude appreciation in any assets from being subject to estate tax at the death of the second spouse.

   b) Gets second step up in basis at surviving spouse’s death.

2. Non-Tax Issues

   a) Because all assets are in a trust, there is protection from creditors and predators. However, because all income must be distributed to surviving spouse there is not as much protection as with a bypass trust.

b) First spouse to die controls the disposition of the trust when the second spouse dies (subject to giving the surviving spouse a power of appointment) so high marks for this approach on the fulfillment of estate plan issue.

c) All assets are in trust and without adding other things such as trust protector, powers of appointment, etc., there is not a lot of flexibility – except see variation on the plan below.

d) May only be one trust so although there will be ongoing trust administration there isn't the need to "fund" the trust which can be costly.

C. Variation on the Plan – The Clayton QTIP Election

1. There may be a desire to have some assets go into a bypass trust at the death of the first spouse – see reasons in second approach above. If so, and if provided for in the document, the Trustee can make a partial QTIP election and elect to have the non-elected portion of the QTIP trust severed from the elected QTIP trust and put in a bypass trust.
2. The election should be made by a Disinterested Personal Representative/Trustee and thus the decision is made impartially unlike a disclaimer by a spouse.
3. Have 15 months to make the partial QTIP election compared to the 9-month disclaimer period.
4. If Clayton QTIP option is elected, the bypass trust can benefit other beneficiaries during lifetime of spouse.

Who Should Be Concerned with Lifetime Gifting?

- Nearly all taxpayers do <u>not</u> need to make gifts to save transfer taxes
  - In 2015, only 0.2% of decedents were subject to the estate tax
  - In 2018, the transfer tax exemptions doubled, which will further reduce the number of decedents subject to the estate tax

- Wealthy taxpayers will need to consider a number of factors, including:
  - Current Net Worth
  - Cash Flow
  - Age(s)
  - Income/Appreciation of Assets
  - Available Exemptions (COLA)
  - Anticipated Inheritances
  - Estate Plan
  - Prior Gifts
  - Basis Issues

Top Tax Rates

	2017	2018	2026
Top Federal Income Rate	39.6%	37%	39.6%
Health Care Surtax	3.8%	3.8%	3.8%
Top Federal Ordinary Tax Rate	**43.4%**	**40.8%**	**43.4%**
Dividend and Capital Gain Rate	20%	20%	20%
Health Care Surtax	3.8%	3.8%	3.8%
Top Federal Capital Gains Tax Rate	**23.8%**	**23.8%**	**23.8%**
Top Estate & Gift Tax Rate:	**40%**		

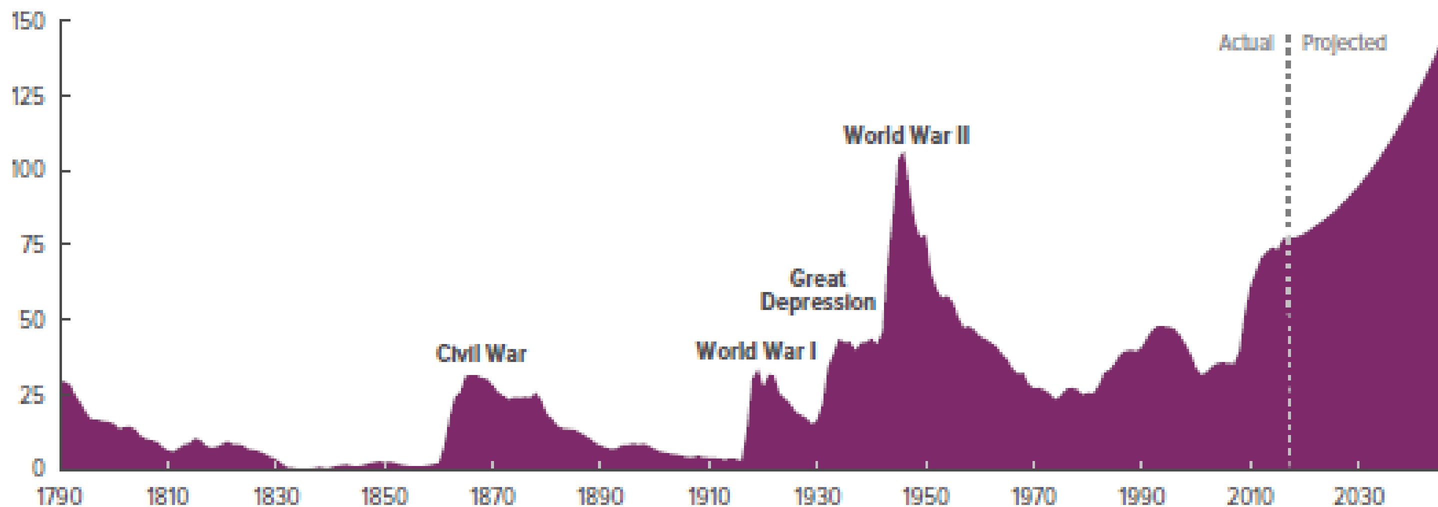
Will the Estate Tax be Repealed or Increased?

Table 1 Percentage of Adult Decedents Subject to Estate Tax, Exemption, Top Rate, Revenue and Percentage of All Federal Revenues, Selected Years, 1917-2015[18]					
Year	% Deaths	Exemption (2015 Dollars)	Top Rate (Amount 2015 Dollars)	Revenue (2015 Dollars)	% Revenue
1917	0.8%	50,000 (925,000)	10% (109 million)	6 million (112m)	0.6%
1921	0.9%	50,000 (675,000)	25% (133 million)	154 million (2.0b)	2.8%
1931	0.9%	100,000 (1.6 million)	20% (157 million)	48 million (754m)	1.6%
1941	1.1%	100,000 (1.6 million)	77% (162 million)	403 million (6.5b)	4.6%
1951	1.5%	60,000 (550,000)	77% (92 million)	708 million (65.0b)	1.4%
1961	3.7%	60,000 (475,000)	77% (80 million)	1.9 billion (15.2b)	2.0%
1971	6.5%	60,000 (350,000)	77% (59 million)	3.7 billion (21.8b)	2.0%
1981	1.8%	175,000 (450,000)	70% (13 million)	6.8 billion (17.9b)	1.1%
1991	1.3%	600,000 (1.1 million)	55% (5 million)	11.1 billion (19.3b)	1.1%
2001	2.1%	675,000 (900,000)	55% (4 million)	28.4 billion (38.3b)	1.4%
2011	0.1%	5 million (5.4 million)	35% (6.4 million)	7.4 billion (7.9b)	0.3%
2015	0.2%	5.4 million	40% (6.4 million)	19.8 billion (est.)	0.6%

- Estate tax adopted and subsequently enhanced in times of crisis
- WWI, great depression, WWII
- In 2015, estate tax accounted for only 0.6% of Federal revenue, which will be reduced further by the Act
- Importance has been slowly waning since 1970s
- Historically, estate tax averages 1-2% of Federal revenue and impacts about 2% of decedents

Will the Government Need to Raise Taxes?

- In 2016, government debt was 106.1% of the country's GDP
- The highest debt to GDP ratio was 118.90%, which was reached in 1946



Source: Congressional Budget Office. For details about the sources of data used for past debt held by the public, see Congressional Budget Office, *Historical Data on Federal Debt Held by the Public* (July 2010), www.cbo.gov/publication/21728.

- The Act adds $1.5 trillion to the deficit
- Risk that our nation's finances lead to additional taxes
- Historically, estate tax has been employed as a means to partially resolve financial hardships
- Impossible to quantify scope of future transfer taxes but taxpayers should consider possibility of more robust transfer tax system in the future
- Current favorable transfer tax laws should persist through current administration (through 2020)

What is the clawback and will it apply?

- Will estate tax have to be paid on the exemption that is used and then taken away?
  - Section 2001(g)(2) addresses the clawback by providing: “[t]he Secretary shall prescribe such regulations as may be necessary or appropriate to carry out this section with respect to any difference between –

    (A) the basic exclusion amount under section 2010(c)(3) applicable at the time of the decedent's death, and
    (B) the basic exclusion amount under such section applicable with respect to any gifts made by the decedent.”

Gift to Dynasty Trust

- Simple
- Effective
- Example: Assume an individual has a $20 million estate. Her estate grows at 8% annually. The following table shows the difference between making and not making a $10 million gift in 2018 when she passes away in 2025.

Gift to Dynasty Trust

	No Gift	Gift
Estate in 2018	20,000,000.00	20,000,000.00
Gift in 2018	-	(10,000,000.00)
Remaining Estate	20,000,000.00	10,000,000.00
Estate in 2025 (8% Growth Rate)	34,276,485.38	17,138,242.69
Adjusted Taxable Gifts	-	10,000,000.00
Taxable Estate	34,276,485.38	27,138,242.69
Tentative Estate Tax	13,656,394.15	10,801,097.08
Exemption of $11.18M at 2% Growth	(5,082,722.31)	(5,082,722.31)
Net Estate Tax	8,573,671.84	5,718,374.77
Net to Heirs	25,702,813.53	11,419,867.92
Value of Prior Gift in 2025	-	17,138,242.69
Total to Heirs	25,702,813.53	28,558,110.61
More to Heirs	$ 2,855,294.08	

Effect of Grantor Trust Status

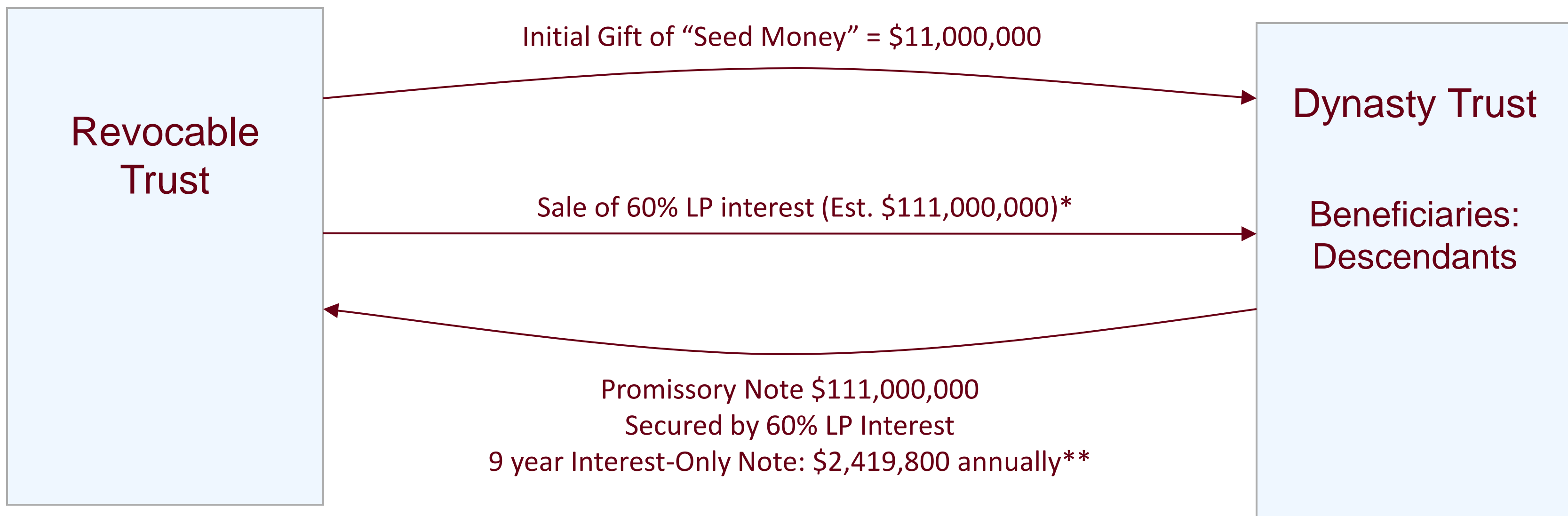
- The assets of a grantor trust are treated as owned by its grantor for Federal income tax purposes.
- The grantor trust can be excluded from the estate of the grantor for Federal estate tax purposes.
- Example: Assume the same facts in the prior example of the $10 million gift in trust and also assume the trust is a grantor trust for Federal income tax purposes and the tax rate of the donor is 30%.

Effect of Grantor Trust Status

	Gift to Grantor Trust	Gift Non-Grantor Trust
Estate in 2018	20,000,000.00	20,000,000.00
Gift in 2018	(10,000,000.00)	(10,000,000.00)
Remaining Estate	10,000,000.00	10,000,000.00
Estate in 2025 (8% Growth Rate)	17,138,242.69	17,138,242.69
Less 30% Tax Rate Paid on $10M Gift	(3,404,846.66)	-
Adjusted Taxable Gifts	10,000,000.00	10,000,000.00
Taxable Estate	23,733,396.03	27,138,242.69
Estate Tax	4,356,436.11	5,718,374.77
Net to Heirs	9,376,959.92	-
Value of Prior Gift in 2025	17,138,242.69	13,733,396.03
Total to Heirs	26,515,202.61	25,153,263.95
More to Heirs	$1,361,938.66	

Installment Sale to Grantor Trust

Limited Partnership
(1% GP; 99% LP)



*Purchase Price of LP Interest	
Net Asset Value	$308,333,333
LP Interest Sold	60%
Undiscounted Value	$185,000,000
Combined Discounts for LOM and LOC***	40%
Discounted Value/ Purchase Price	**$111,000,000**

** Based on AFR for January 2018

***Proposed 2704 Regs Withdrawn

Spousal Lifetime Access Trusts

- Each spouse creates an irrevocable trust for the benefit of the other spouse
- Each spouse has lifetime access to his/her own SLAT and neither SLAT will be included in a spouse's estate for tax purposes
  - Growth of SLAT escapes transfer tax
  - Descendants can be included as beneficiaries
  - GST Exemption may be allocated so that trust can pass down generations free of estate tax
  - SLAT will be grantor trust as to donor spouse
  - Use caution in allowing property to be appointed back to donor spouse

- Reciprocal trust doctrine would uncross trusts (i.e., each beneficiary would be deemed to have created his/her own trust) causing inclusion in the beneficiary's estate
- Avoid reciprocal trust doctrine by:
  - Create trusts at different times
  - Fund trusts with different assets and different values
  - Have different distribution standards (HEMS vs. any purpose)
  - Require trustee to consider other assets of one spouse, but not in the other trust
  - Permit one trust to be converted to a unitrust
  - Have different trustees and removal powers