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To Gift or Not to Gift: Balancing Income and Transfer Tax Benefits for Individuals Between $5 Million and $10 Million, and for Couples Between $10 Million and $20 Million

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I. INTRODUCTION

As advisors, if we knew when clients were to pass away, who was to survive them, the assets included in their taxable estates, and what the tax laws would be at the time of their deaths, we could all design perfect estate plans. We could also advise clients, with absolute accuracy, when and how to make lifetime gifts to minimize taxes and best effectuate their non-tax objectives. Of course, we cannot know any of these things, so we must simply do the best we can with what we have. In many cases, doing so requires building flexibility into the client's gifting strategy in anticipation of potential changes to the tax laws or a client's family or financial circumstances.

This article discusses how to design and implement lifetime transfers, including gifting strategies and provisions that are often overlooked by advisors. Above

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all, this article is designed to leave the reader with practical examples of how to add value to client relationships by providing creative and proactive solutions.

The remaining portions of this article are organized as follows:

- Part II establishes a framework by discussing the new planning paradigm that has emerged as a result of substantial increases to transfer tax exemptions;
- Part III underscores the importance of getting to know the client by reviewing the most common gifting motivations, as well as preliminary design considerations applicable to all gifting strategies; and
- Part IV explores transfer tax planning in more depth by providing a broad overview of gifts that consume gift tax exemption, including how to plan for three groups of clients —''affluent'' clients, ''wealthy'' clients, and ''super wealthy'' clients.

II. UNDERSTANDING THE CONTEXT: A NEW PLANNING PARADIGM DUE TO TAX LAW CHANGES

Before considering whether a client should make lifetime gifts, it is important to place the analysis in the proper context. While many clients desire to make gifts for non-tax reasons, as further discussed in Part III, below, other clients are primarily motivated by a desire to minimize transfer taxes. Tax-motivated gifts, however, have become much less common due to substantial increases in the transfer tax exemptions in recent years. In fact, as the number of taxable estates has steadily dwindled, advisors must often focus on minimizing income taxes, rather than transfer taxes. The paragraphs below discuss this new paradigm in more detail, including how potential legislation may impact transfer tax laws moving forward.

A. Increased Transfer Tax Exemptions, Portability, and Lower Transfer Tax Rates

Recall that in 2000:

- The basic exclusion amount from federal gift and estate taxes (the ''BEA'') was $675,000 per person;
- The generation-skipping transfer (''GST'') tax exemption amount (the ''GST Exemption'') was $1,030,000 per person;
- The maximum estate and gift tax rate was 55% (with an additional 5% surtax on the value of certain large estates);
- The GST tax rate was 55%; and
- The BEA not used by a deceased spouse was lost and could not be used by the surviving spouse.

A series of tax law changes in 2001, 2010, and 2012 increased the BEA and GST Exemption while also decreasing the transfer tax rates.[1] In 2021, as a result of the Tax Cuts and Jobs Act of 2017 (TCJA):[2]

- The BEA is $11,700,000 per person;
- The GST Exemption is $11,700,000 per person;
- The maximum estate and gift tax rate is 40%;
- The GST tax rate is 40%; and
- The BEA not used by a deceased spouse is ''portable'' and can be used by the surviving spouse.

Increases to the BEA have far outpaced the rate of inflation. Between January 2000, and January 2021, the consumer price index[3] increased by 57%.[4] By contrast, the BEA (previously not indexed for inflation) increased by 1,633% and the GST Exemption (likewise) increased by 1,036%. Meanwhile, the maximum transfer tax rate decreased by 27%. The BEA and GST Exemption are indexed for inflation in future years.[5]

In short, under current law at least, the federal wealth transfer tax system is no longer relevant to most taxpayers and is significantly less relevant to the remaining few. While taxpayers who have more may be inclined to give more, it is also clear that the number of taxpayers impacted by the federal estate tax, and therefore the number of taxpayers motivated to make lifetime gifts simply for tax reasons, has rapidly declined in recent years.

B. Greater Focus on Income Tax Planning

Although the federal transfer tax burden has decreased, the federal income tax burden for many cli-

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[1] Specifically, Congress enacted the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, and the American Taxpayer Relief Act of 2012, Pub. L. No. 112-240.

[2] Pub. L. No. 115-97.

[3] *See* United States Department of Labor, *Consumer Price Index-All Urban Consumers*, Bureau of Labor Statistics, All Items, 1982-84=100 (CPI-U), available at https://www.bls.gov/regions/new-england/data/consumerpriceindex_us_table.htm.

[4] From 168.8 in January 2000 to 264.877 in March 2021.

[5] *See* §2010(c)(3)(B). All section references herein are to the Internal Revenue Code of 1986, as amended (the ''Code''), or the Treasury regulations promulgated thereunder, unless otherwise indicated.

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ents (and trusts) has increased. The maximum federal income tax rate is now 37%. Most affluent taxpayers are also subject to a 3.8% surtax on net investment income and will pay tax on long-term capital gains and dividends at a rate of 20%. Consequently, most affluent taxpayers, including many trusts, could face marginal federal income tax rates as high as 40.8% on ordinary income and 23.8% on long-term capital gains and dividends. For residents in states that impose a state income tax, like California, New York, Georgia, and Hawaii, just to name a few, effective income tax rates can be even higher, particularly with the TCJA limiting the federal deduction for state and local taxes to just $10,000.

There has always been a tension between reducing transfer tax and reducing income tax. Often, transactions or techniques designed to reduce transfer tax can result in increased income tax. A classic example is the bypass or credit shelter trust. It may reduce transfer tax at the surviving spouse's death but at the cost of (i) forgoing a new income tax basis for appreciated assets and (ii) potential increased capital gains tax.

With the BEA at the highest level ever, the TCJA has created a new paradigm. Planners can no longer assume that removing an asset from the transfer tax base will result in overall tax savings. Rather, for most taxpayers it will be more important to plan for reducing income tax than for reducing transfer tax. Part III.B.1, below, discusses these income tax considerations in greater detail, with a particular focus on how they may impact lifetime gifting strategies.

C. Sunset of Increased Transfer Tax Exemptions

If the increases to the BEA and GST Exemption were permanent, it would be easier to plan for clients. Of course, nothing is ever really permanent when it comes to the estate tax. The TCJA reinforced this notion by expressly providing that the doubled exemptions are only temporary. Absent a statutory change, the doubled exemptions are set to expire at the end of 2025, with the BEA and GST Exemption returning to $5 million per person in 2026, indexed for inflation with a base year of 2016.[6] For purposes of this article (and to keep our math easy), we will take inflation out of the equation and assume a current BEA and GST Exemption of $10 million per person (i.e., the doubled exemption amounts under the TCJA, not indexed for inflation). We will further assume that BEA and GST Exemption will be $5 million per person in 2026.

Part of the difficulty in gift planning is that the doubled exemptions are ''use it or lose it'' amounts. In other words, when a taxpayer makes a lifetime gift, the BEA comes off the bottom, and not the top. For example, assuming the BEA drops to $5 million in future years, if a taxpayer makes a $4 million gift now, and has made no other taxable gifts in prior years, the taxpayer would only have $1 million of BEA remaining after the BEA decreases. Thus, the taxpayer would have to make gifts in excess of $5 million before the BEA decreases to receive any benefit from the temporarily doubled exemptions. Part IV.B.2.a, below, defines this as the ''wealthy client gifting threshold.'' Few taxpayers are in a financial position to make gifts of this magnitude, yet many are considering creative gifting strategies in an effort to minimize potential estate taxes.

In many ways, planning now looks a lot like planning in 2012, when the $5 million BEA and 35% tax rate were set to expire and be replaced in 2013 with a $1 million BEA and 55% tax rate. One silver lining this time around is that the IRS, through the issuance of final Regulations in 2019, has removed any fear of ''clawback'' if a taxpayer makes a lifetime gift that utilizes BEA available at the time of the gift, but not available at the time of the taxpayer's death.[7] Consider, for example, a taxpayer who makes a gift of $9 million in 2021, all of which is sheltered by the taxpayer's BEA. If the taxpayer later dies in 2026, when the BEA is $5 million, the final regulations generally provide that the taxpayer's BEA, for purposes of calculating any estate tax due, will be calculated as if it were $9 million, rather than $5 million.[8] As a result, the taxpayer's prior gifts in excess of the taxpayer's BEA at the time of his death should not be ''clawed back'' to produce a higher estate tax liability.

D. Potential Legislation

Clients often ask what will happen with the estate tax. It is very tempting to respond, ''I don't know,'' and leave it at that, but clients deserve a more nuanced answer. Providing a detailed analysis of potential legislation should help clients better understand certain planning recommendations, which should enable them to make more informed decisions. When engaging in this discussion with clients, planners generally walk through the following scenarios.

1. Estate Tax Repeal?

When Donald Trump was elected president in 2016 and the Republicans controlled both houses of Congress, rhetoric surrounding estate tax repeal reached a fever pitch. After all, Trump campaigned on repealing the ''death tax'' and through the years many Republi-

[6] *See* §2010(c)(3) (setting the BEA), §2631(c) (setting the GST Exemption by cross-reference to the BEA).

[7] *See* Reg. §20.2010-1(c).

[8] *See* Reg. §20.2010-1(c)(2)(i).

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cans, mostly from rural farmland communities, had, themselves, introduced bills to repeal the estate tax. It seemed like the perfect storm. And yet, even after the sweeping changes to the tax system ushered in by the TCJA, the transfer tax system remained, albeit with doubled exemptions for a seven-year window from 2018 through 2025.

Now that the 2020 (and 2021) election cycle has come and gone, the tables have turned. With Joe Biden in office and the Democrats controlling both houses of Congress, it is more likely that any tax legislation will reduce the BEA and GST exemption, rather than eliminating the estate tax altogether. Still, rumors of estate tax repeal are likely to continue to surface from time to time. Any discussion with clients, should start with a reminder that, except for a transition year in 2010, the estate tax has existed in some form or fashion since 1916, having been repealed and reinstated several times. Consequently, and at the risk of being completely wrong, it seems highly unlikely that the estate tax will be repealed any time soon.

2. Democratic Tax Legislation

With the 2020 Democratic sweep, there seems to be a groundswell of political support for taxing the wealthy. It remains to be seen, however, just how much that sentiment turns into legislative reality. In recent months Senator Bernie Sanders introduced the ''For the 99.5 Percent Act,''[9] and Senators Elizabeth Warren, Cory Booker, and Bernie Sanders, among others, introduced the ''Sensible Taxation and Equity Promotion (STEP) Act.''[10] Taken together, the Acts propose the following:

- Tax all capital gains at ordinary income tax rates;
- Reduce the estate tax exemption to $3.5 million per person;
- Reduce the lifetime gift tax exemption to $1 million per person;
- Increase the transfer tax rate from 40% to a more progressive rate structure ranging from 45% to 65%;
- Reduce or eliminate the effectiveness of many common estate planning techniques, including dynasty trusts, valuation discounts for closely held businesses, and grantor retained annuity trusts (GRATs);
- Include grantor trusts created and/or funded after the date of enactment in the taxable estate of the grantor at death;
- Eliminate the ''carryover'' basis for gifted assets and impose an income tax on built-in gain, subject to a $100,000 exception; and
- Eliminate the ''step-up in basis'' at death and impose an income tax on built-in gain, subject to a $1 million exception.

These proposals, if enacted into law, would dramatically alter the federal transfer tax system. There is a big difference, however, between a legislative proposal and a Congressional act signed into law by the president. In fact, the rhetoric surrounding President Biden's American Families Plan has focused primarily on income tax changes, such as increasing the income tax rate and eliminating the step-up in in income tax basis, to support its public spending programs. This has led many to wonder whether the current federal transfer tax laws will remain intact.[11] Whatever the outcome, advisors will be monitoring the situation closely, and many clients may prefer to wait until the last possible moment to make their lifetime gifting decisions.

E. Advising in the Face of Uncertainty: Remember the Status Quo

As discussed above, if Congress does nothing between now and 2026, the BEA and GST Exemption will return to $5 million per person, indexed for inflation with a base year of 2016. Without knowing exactly what will happen in the coming years, this status quo is probably a good place to start when planning for clients. No one can predict the future, however, so planners must recognize that any speculation regarding the federal transfer tax system, or even the future health of clients, is just that.

III. GETTING TO KNOW THE CLIENT: COMMON GIFTING MOTIVATIONS AND PRELIMINARY CONSIDERATIONS

When meeting with a new estate planning client, advisors typically begin by learning as much as pos-

[9] S.994, For the 99.5 Percent Act, 117th Cong. (introduced Mar. 25, 2021).

[10] S. __, Sensible Taxation and Equity Promotion Act of 2021, 117th Cong. (introduced Mar. 29, 2021), discussion draft available at https://www.vanhollen.senate.gov/imo/media/doc/STEP%20Act%20discussion%20draft.pdf; *see also* H.R. 2286, To Amend the Internal Revenue Code of 1986 To Treat Property Transferred by Gift or at Death as Sold for Fair Market Value, and for Other Purposes, 117th Cong. (introduced Mar. 29, 2021).

[11] *See* Nancy Cook and Laura Davison, *Biden to Omit Estate-Tax Expansion From Coming Economic Plan*, Bloomberg, The Washington Post (Apr. 29, 2021), available at https://www.washingtonpost.com/business/on-small-business/biden-to-omit-estate-tax-expansion-from-coming-economic-plan/2021/04/27/b1116e4c-a7a2-11eb-a8a7-5f45ddcdf364_story.html.

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sible about (i) the client's family, (ii) the client's assets and liabilities, and (iii) how the client would like assets to pass if taxes were not an issue at all. After gathering this information, the advisor can discuss how the federal transfer tax laws impact the client's estate planning goals, if at all. Ultimately, an advisor's role is to help design and implement a comprehensive estate plan that accomplishes the client's non-tax objectives while also minimizing taxes. For many clients, lifetime gifts form an integral part of this plan. The paragraphs below discuss preliminary considerations when designing a client's lifetime gifting strategy.

A. Non-Tax Reasons for Gifting

Tax planning is fun. It is so much fun, in fact, that advisors can sometimes get carried away with lifetime gifting strategies that may make sense from a tax perspective but do not make sense for the real person sitting across the table. It is important to remember, therefore, that at its core, lifetime gifting begins with a client's basic desire to benefit others. The key to all client relationships is trust, and when discussing a particular planning technique, it is vital for advisors to keep things practical while clearly communicating both the advantages and disadvantages of the technique.

With this goal in mind, advisors should assist taxpayers in identifying non-tax motivations for gifting, which all clients, regardless of their net worth, should be able to identify. Below is a non-exhaustive list of reasons a client may wish to make lifetime gifts:

- To satisfy a beneficiary's current health, educational, or other need;
- Beyond basic needs, to permit a beneficiary to enjoy assets or a certain lifestyle now, particularly while the client is alive and has a chance to enjoy the impact of the gift;
- To equalize prior or current gifts among family members;
- To forgive prior loans;
- To provide a beneficiary with an opportunity to learn how to manage finances;
- To help a beneficiary start a business or invest in an entrepreneurial endeavor;
- To supplement the income of a beneficiary who wishes to enter into a lower-paying, but socially impactful, profession;
- To help facilitate a beneficiary's charitable giving endeavors;
- To provide a beneficiary with access to capital without exposing the assets to the claims of the beneficiary's actual or potential creditors;
- To facilitate business succession planning and/or motivate younger family members to participate in a family business; and
- To provide the client with insight regarding how a beneficiary handles gifted assets.

There are, of course, many other reasons why a client may wish to make a gift to a family member, friend, or other individual. Whatever the reason, it is important to keep the client's basic objectives in mind, and, in certain cases, not let the tax tail wag the gifting dog.

B. Tax-Motivated Gifts

In addition to non-tax reasons for gifting, certain clients are motivated by tax reasons to make gifts. When making tax-motivated gifts, clients generally seek to minimize income and/or transfer taxes, each of which is discussed below.

1. Gifting to Minimize Income Taxes

As discussed in Part II.B, above, after substantial increases to the BEA and GST Exemption, estate planners must now place a greater focus on income tax planning than ever before. The paragraphs below review some of the most important income tax considerations when designing gifting strategies.

a. State Income Taxes

Many clients reside in states that impose a state income tax, in addition to the federal income tax that applies to all U.S. taxpayers. Clients in states with a high state income tax, such as Hawaii, California, or New York, may wish to consider gifting strategies to minimize their state income tax burden. One of the more common strategies involves the creation of an irrevocable non-grantor trust, or ''ING Trust,'' in a jurisdiction that does not impose a state income tax. ING Trusts have gained popularity in recent years, particularly in jurisdictions like Delaware, Nevada, and Wyoming, leading to the proliferation of ''DING,'' ''NING,'' and ''WING'' Trusts.

To form an ING Trust, a client generally transfers assets to a non-grantor trust in a state that (i) does not impose a state income tax and (ii) provides some level of creditor protection for self-settled irrevocable trusts. Most gifts are designed to be complete for income tax purposes, while incomplete for transfer tax purposes, meaning that the assets of the ING Trust should still be included in the client's taxable estate upon death. Because the ING Trust is a separate taxpayer, however, the goal is to avoid state income tax on the trust assets. ING Trusts, therefore, are often viewed as useful tools to minimize state income tax on passive investments. The challenge, of course, can

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be attempting to distribute earnings back to the client if the client continues to reside in a high income tax state.

Not surprisingly, many states have objected to the widespread use of ING Trusts to minimize state income taxes. Even so, the IRS appears more than ready to bless ING Trusts in certain circumstances, and continues to issue private letter rulings approving of the technique. There are many considerations involved in designing an ING Trust, including asset and trustee selection, and a full discussion of ING Trusts exceeds the scope of this article. Advisors with clients in states that impose a high state income tax, however, should at least be aware that an ING Trust, if properly implemented, may help alleviate some income tax burden.

b. Income Tax Basis

Given the increasing importance of income tax planning for estate planners, it is critical to understand how income tax basis is determined in the wealth transfer context. Under current law, §1015 generally provides a ''carryover'' basis for gifted property, meaning that the donee's income tax basis is generally the same as the donor's income tax basis at the time of the gift. If gifted property has an income tax basis greater than fair market value at the time of the gift, then for purposes of determining loss upon a later sale, the donee's income tax basis is limited to the fair market value of the property at the time of the gift. If the property appreciates after the gift, however, the donor's income tax basis in excess of the fair market value at the time of the gift can be used to minimize taxable gain. Meanwhile, for most assets included a client's taxable estate, §1014 provides an income tax basis adjustment, either up or down, to fair market value at the client's date of death. Thus, appreciated property receives a ''step-up'' at death, while depreciated property receives a ''step-down.''

For clients in community property states, §1014(b)(6) enhances the potential step-up by providing that both halves of any community property, and not just the one-half interest passing through the deceased spouse's estate, receive an income tax basis adjustment. This has spawned many creative planning techniques designed to facilitate a double step-up for clients who are not domiciled in a community property state, but nonetheless desire to take advantage of community property laws.

For the 99.94% of taxpayers who should not be subject to estate tax under current law, planning should typically focus on preserving the basis step-up for appreciated assets at death, while it still exists, rather than avoiding the estate tax. Income tax basis planning generally falls into one of two categories —''downstream'' planning or ''upstream'' planning. Downstream planning refers to techniques designed to ensure that a client's assets are included in his or her own taxable estate before being passed on to family members in the next generation. Upstream planning refers to the transfer of assets to family members in the older generation to be included in the older generation family members' taxable estates for purposes of achieving a higher income tax basis, oftentimes before being passed back down to the current generation.

(1) Downstream Planning

In appropriate circumstances, advisors should consider the following downstream planning options:

- Avoiding lifetime gifts of highly appreciated assets that would not generate estate tax;
- Preserving capital losses by gifting depreciated assets to an individual beneficiary or irrevocable grantor trust;
- Swapping high basis assets, such as a cash, for low basis assets from an irrevocable grantor trust that contains a power of substitution;
- Unwinding valuation discounts for client-owned assets;
- Causing inclusion of irrevocable trust assets in the estate of a settlor, a beneficiary, or a third party's estate;
- Causing inclusion of gifted assets (not in trust) in the donor's estate;
- Converting separate property to community property to facilitate a ''double'' basis adjustment at each spouse's death; and
- Changing ownership of spousal assets to achieve a new income tax basis for appreciated hassets and preserve the income tax basis of loss assets, particularly for clients with a shortened life expectancy.

(2) Upstream Planning

Upstream planning can potentially benefit a client who owns assets with substantial appreciation and has an older family member, such as a parent, who has ''excess'' BEA. The client can create an irrevocable trust for the benefit of a parent and fund the trust with the appreciated assets. The trust is designed to ensure that the appreciated assets are includable in the parent's estate by granting the parent a testamentary power to appoint the trust's assets to the parent's creditors. Upon the parent's death, the lapse of the parent's general power of appointment should cause the assets to be included in the parent's taxable estate, under §2041, entitling the appreciated assets to a basis step-up. The inclusion of the appreciated assets in the parent's estate should facilitate the use of the par-

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ent's BEA and GST Exemption, while reducing future capital gains tax. The default beneficiary upon the lapse of the parent's general power of appointment is generally a GST exempt trust for the benefit of the client or the client's family members, which is often designed to be protected from the claims of creditors and divorcing spouses.

Upstream planning is not without risk. One particular risk is §1014(e), which disallows a basis step-up if appreciated property is gifted to a parent (or any other person), but the parent dies within one year of the gift and the property returns to the donor. Section 1014(e) would not apply, however, if the appreciated property passed to a person other than the donor (e.g., a trust for the donor's descendants). It is also possible that §1014(e) would not apply if the property passed to a trust that included the donor as a permissible beneficiary. The IRS could also assert that any assets that return to a trust for the benefit of the client should be included in the client's taxable estate under §2036 or §2038, as further discussed in Part IV.B.3.c., below. In any event, with today's focus on income tax planning for many clients, upstream planning should continue to be a viable option in appropriate circumstances.

c. Charitable Planning

Although the focus of this article is not charitable giving, many clients are charitably inclined, and it is important to be familiar with basic charitable giving techniques. Setting aside the use of charitable annuity trusts for estate planning purposes, lifetime charitable planning often focuses on asset and donee selection to maximize the charitable income tax deduction, which can be as simple as advising clients to make gifts of appreciated property to public charities, rather than cash, to avoid paying the built-in capital gain tax on the donated property. It could also involve counseling clients who seek to make a long-term charitable impact regarding the differences between private foundations and donor advised funds, or educating clients with existing private foundations regarding the contribution of qualified appreciated stock to achieve a more favorable deduction.

2. Gifting to Minimize Transfer Taxes

a. State Estate Tax

Approximately one-third of the states impose a separate estate or inheritance tax. While many states have tied, or "coupled," their exemption amounts to the federal BEA, certain states, such Connecticut, Hawaii, Illinois, Maryland, Minnesota, New York, Oregon, and Washington, have not. Planning is more complex in these "decoupled" states, as estate plans must often be designed with multiple QTIP or bypass trusts as a result of the interplay between state and federal tax law.

Other than moving to another state, one strategy to avoid state estate tax is to make lifetime gifts. Unlike the state estate or inheritance tax, which exists in approximately one-third of states as described above, currently only one state, Connecticut, imposes a lifetime gift tax. A client who lives in a decoupled state that does not impose a gift tax can minimize state estate tax by making lifetime gifts that should not incur a state gift tax and should not be subject to state estate tax at the donor's death. Of course, the client must also navigate federal transfer tax issues, as further discussed below.

b. Federal Transfer Tax

As a general matter, lifetime gifts can be advantageous from a tax perspective for many reasons, including:

- Making gifts that do not consume the client's gift tax exemption in order to reduce the value of the client's taxable estate;
- Making gifts that do not consume the client's GST Exemption in order to reduce the value of the client's taxable estate and reduce potential GST taxes;
- Shifting appreciating assets, at a lower gift tax cost, from the client's taxable estate, to an irrevocable trust that is excluded from the client's taxable estate;
- Transferring assets with a valuation discount, such as minority interests in a closely held business, to an irrevocable trust that is excluded from the client's taxable estate;
- Funding irrevocable grantor trusts to facilitate the client's payment of the trust's income tax liabilities, which is not treated by the IRS as an additional gift;[12]
- Taking advantage of certain irrevocable trusts authorized by statute, such as GRATs and qualified personal residence trusts (QPRTs), to shift appreciating assets to lower generations at a reduced transfer tax cost; and
- In rare circumstances, gifting an asset and paying out-of-pocket gift tax, which is calculated on a tax-exclusive basis, rather than retaining the asset in the client's taxable estate and paying estate tax, which is calculated on a tax-inclusive basis.

There are certainly more reasons why a client may be motivated by transfer tax reasons to make lifetime gifts. Specific lifetime gifting strategies are analyzed in Part IV, below.

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[12] *See* Rev. Rul. 2004-64.

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C. Preliminary Gifting Considerations

Once a client communicates his or her desire to make a lifetime gift, the next step is to confirm that the gift is appropriate and, if so, to help structure the gift to achieve the client's tax and non-tax objectives. Below is a non-exhaustive list of preliminary considerations when structuring a client's lifetime gift:

- The client's financial needs, including the client's living expenses and required cash flows;
- The client's desire, if any, to maintain control over the gifted asset;
- The client's desire to protect the transferred assets from the donee's creditors, divorcing spouses, or even the donee's own spending habits and other vices;
- The client's ability to handle complexity or, in contrast, the client's desire to keep things simple;
- The client's risk tolerance, particularly if the gifting strategy involves a more aggressive strategy designed to maintain more control and access than an outright gift;
- The client's willingness to adhere to best practices to reduce tax and creditor risk;
- The client's budget for legal, accounting, appraisal, and other professional fees;
- The donee's age and station in life;
- The donee's family and financial circumstances;
- The donee's ability to handle complexity; and
- The assets available to gift, including each asset's fair market value, income tax basis, appreciation potential, and administrative ease.

Several of these preliminary considerations merit further discussion.

1. Client's Financial Circumstances

Before advising any client to make a lifetime gift, the client should confirm that, after the gift is made, the client will retain sufficient resources to provide for his or her needs, both now and in the future. This analysis will certainly be unique for each client, and generally should include the client's financial and investment advisors. In addition to reviewing the assets and income streams to be retained by the client, the client's lifestyle should also be closely examined, including the client's spending habits, desire for future gifts, potential health care costs, and other appropriate factors.

For super wealthy clients, it should be fairly obvious that they can afford to give away substantial assets without impacting their day-to-day lives or long-term needs. Despite what should be obvious, even the wealthiest of clients may have reservations due to the unlikely, but possible, event their financial fortunes change. Super generous (but not super wealthy) clients should be advised to remember their own needs, in addition to those of their desired beneficiaries.

2. Client's Family Dynamics

It is also important to understand and consider the client's family dynamics. This goal can be difficult at times, but clients should be pressed to ensure that they are being honest, even with themselves. For example, would substantial gifts to the donee incentivize or disincentivize the donee to be a productive member of society? (Is such a goal important to the client?) Is the donee financially responsible, or would this gift contribute to the donee's already poor financial decision making? Does the donee have substance abuse issues or other addictive tendencies? How strong is the donee's marriage? These can be difficult questions, but the better clients know themselves and their goals, the better we can assist in planning to help clients accomplish those goals.

3. Asset Selection

Some assets are better to transfer than others, and asset selection is a key element in designing an effective gifting strategy. As a general rule, particularly when gifts are motivated by tax reasons, clients should seek to give assets with high appreciation potential, as removing future appreciation from the client's taxable estate could result in significant transfer tax savings for the client's family. Clients should be reminded, however, that not every asset appreciates, and if an asset depreciates after a gift is made, the client's BEA could be wasted or, in the case of an installment sale transaction, the transaction could unintentionally result in a "reverse" wealth shift. With a reverse wealth shift, a client is often worse off, from a transfer tax perspective, than if the client had not made the gift at all.

Clients should also consider how an asset's income tax basis impacts its suitability for gifting, as further discussed in Part III.B.1.b., above. Because, under current law, most gifted assets will have a carryover income tax basis, it is usually better to gift high basis assets. Low basis assets should typically be retained by the client to be distributed through the client's taxable estate to obtain the basis step-up at the client's death. Moreover, it is important to recognize that some assets, like a family farm, may never be sold, in which case a low carry-over income tax basis should not be a significant deterrent to making a gift.

Finally, clients should consider how easy (or difficult) it is to gift certain assets. For example, depend-

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ing on the client's objectives, it may be more appropriate to gift separate property instead of community property, or vice versa. Some intangibles, such as cash, marketable securities, or public stock, are easy to value, easy to give, and easy to receive. Other intangibles, such as closely held business interests, are often more difficult to value, give and receive, but may offer greater appreciation potential as a result of valuation discounts at the time of the gift. The same may be true for real property and high dollar tangibles, such as collectibles or jewelry. In any case, before making a gift, the client should consider how difficulties in valuing, transferring, and administering the gifted property may impact the client's overall objectives.

4. Making Gifts Outright or in Trust

There are two basic ways to make a gift — outright or in trust. The biggest advantage to an outright gift is simplicity. To effectuate the gift, the client can simply execute any necessary paperwork to transfer the property and, if required, report the gift. At that point, the client should be finished and there should be no further administration or related costs. With an outright gift, however, the client may lose control of the gifted asset and will forfeit the opportunity to provide the donee with added creditor protection and estate tax savings.

Rather than making an outright gift, the client can transfer the property to an irrevocable trust for the benefit of the donee. Clients desiring to retain some level of control over the gifted assets may even serve as trustee of the irrevocable trust, provided the trust agreement is carefully drafted to ensure that the trustee's powers do not cause inclusion of the trust assets in the client's taxable estate. For example, the client's ability to make distributions should be limited to an ascertainable standard related to the beneficiary's health, education, maintenance, and support.[13] Moreover, a properly structured trust could provide the donee with creditor and divorce protection, and in certain cases, preserve the donee's eligibility for federal and state governmental benefits. An irrevocable trust may also serve to remove the trust property (plus all future appreciation) from both the donor's and the donee's taxable estates. If the trust is structured as a grantor trust, the client will pay the income tax attributable the trust's income without such payments being treated as additional gifts and allowing the trust asset to appreciate more rapidly.

On the other hand, creating and administering an irrevocable trust may increase transaction costs and add complexity, compared to an outright gift. Many clients may not have the appetite for this added complexity, and sometimes the value of the gifted property does not justify the added expense. From an income tax perspective, if the trust is a non-grantor trust, the trust will be subject to the highest income tax bracket at a much lower amount of income compared to an individual.[14]

Whether to make a gift outright or in trust is ultimately the client's decision and should reflect the client's objectives. In certain cases, such as with a minor or disabled beneficiary, the decision to utilize a trust should be relatively straightforward. In other cases, such as with a moderately valued gift to a responsible adult beneficiary, the analysis may be more difficult. Again, the more advisors know about their clients, including their clients' assets and family dynamics, the better the advisor's recommendations will be. Asking tough questions and making the effort to know a client's business and family are cornerstones of designing a suitable gifting strategy.

IV. TRANSFER TAX PLANNING FOR THREE GROUPS OF CLIENTS

After identifying a client's non-tax objectives, advisors can group clients into three categories based on net worth. The paragraphs below discuss these three client groups, as well as lifetime gifting strategies specifically tailored to each group.

A. Three Client Groups

Before designing and implementing a client's taxable gifting strategy, advisors should first work with the client to gain a comprehensive understanding of the client's current financial status (including any assets excluded from the client's taxable estate), appreciation potential, and remaining BEA and GST Exemption. This information should enable the advisor to classify the client in one of three categories —''affluent'' clients, ''wealthy'' clients, and ''super wealthy'' clients. As further described below, different tax planning strategies will be appropriate for each group of clients. Advisors should recommend specific tax planning strategies only after considering the client's non-tax objectives, including the client's tolerance for complexity, transaction costs, and potential loss of control.

Attempting to group clients into neat categories is an inexact science. Moreover, the categories themselves are moving targets. For example, unexpected increases or decreases to a client's net worth could make certain strategies more or less attractive, while

[13] *See* §2514(c)(1).

[14] In 2021, a trust reaches the highest income tax bracket upon earning over $13,050 of income.

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changes to the transfer tax laws could materially impact a client's taxable posture. Not only is it important that the advisor learn as much as possible about the client's financial position at the outset of the relationship, the advisor should also monitor changes to the client's financial circumstances over time that would merit an update to their gifting strategy.

1. "Affluent" Clients

Recall that, in 2026, the BEA is set to return to $5 million per person, indexed for inflation. ''Affluent'' clients are unlikely to have a taxable estate, even though they may have the financial means to make lifetime gifts. For purposes of this article, affluent clients have an estimated net worth of $5 million or less (or $10 million or less for married couples). Of course, if the BEA is further reduced by Congress, perhaps to $3.5 million or even $1 million, the definition of an ''affluent'' client will change as well.

Taxable gift planning for affluent clients is relatively straightforward. Because the client is unlikely to have a taxable estate under most circumstances, the client's gifts are not typically motivated by transfer tax savings. Rather, the client's non-tax objectives usually dictate the planning. As further discussed in Part III.A., above, gifts from affluent clients are often intended to satisfy a beneficiary's specific need or desire. Common taxable transfers from affluent clients include cash gifts to assist a beneficiary with making a down payment on a home or starting a business, the forgiveness of prior loans, or specific gifts of valuable property, such as jewelry, real estate, or a business interest.

When working with affluent clients to make taxable gifts, advisors should consider the potential income tax consequences associated with those gifts, as discussed in Part III.B.1., above, as well as any state transfer tax issues that could arise, as discussed in Part III.B.2.a., above. Because the taxable estate of an affluent client is unlikely to exceed the client's BEA, it is typically more important to minimize income taxes, rather than to plan for transfer taxes. This new planning paradigm is discussed in Part II.B., above.

Finally, after an affluent client makes a taxable gift, advisors should be prepared for the inevitable question from the client, ''if I do not owe any gift tax, why do I have to file a gift tax return?'' Although there is no monetary penalty for filing a late gift tax return when there is no tax due, filing the return is nonetheless a legal requirement. Advisors can also remind clients that filing a gift tax return helps track the use of their BEA and GST Exemption, which would be helpful if changes to the law or their net worth later subjected them to the transfer tax system. Finally, certain elections can only be made on a timely filed gift tax return, such as consenting to split gifts for a married couple, making a QTIP election for an inter vivos QTIP trust, timely allocating GST Exemption, or opting out of the automatic allocation of GST Exemption.

Affluent clients who wish to make taxable gifts need to recognize that gift tax reporting is simply the cost of doing business. If an affluent client can afford to make a taxable gift, the client can also afford to pay a professional to prepare a gift tax return.

2. "Wealthy" Clients

''Wealthy'' clients do not have a taxable estate under current law, but are likely to have a taxable estate once the doubled exemptions expire in 2026. For purposes of this article, wealthy clients have an estimated net worth between $5 million and $10 million (or between $10 million and $20 million for married couples). Again, the definition of a ''wealthy'' client may ebb and flow with changes in the federal transfer tax laws.

When planning for the three different groups of clients, wealthy clients present the most challenges. Unlike super wealthy clients, discussed below, wealthy clients cannot afford to give away the bulk of their net worth just to make use of the currently doubled BEA. Recall that, because BEA comes off the bottom and not the top, a client only begins to experience the benefit of the doubled BEA when the client's gifts exceed $5 million. On the other hand, unlike affluent clients, discussed above, wealthy clients are likely to have taxable estates as long as they survive until 2026. Planning for a wealthy client's use of the GST Exemption may be especially important given that the GST Exemption is set to drop to $5 million in 2026, and unlike the BEA, is not portable between spouses.

Wealthy clients are clearly the most challenging group of clients for which to plan and they face difficult choices. They generally cannot afford to make large taxable gifts and they face a looming estate tax obligation if they die after 2025 without having engaged in active tax planning. Planning for wealthy clients between should focus on lifetime gifts that provide clients with flexibility, and creative gifting strategies are further discussed in Part IV.B., below.

3. "Super Wealthy" Clients

''Super wealthy'' clients currently have a taxable estate, and are likely to have a taxable estate as long as the estate tax exists. Super wealthy clients, therefore, have a net worth in excess of $10 million (or in excess of $20 million for married couples).

Super wealthy clients can generally afford to make substantial lifetime gifts to make use of the currently doubled BEA and GST Exemption, and may not require as much flexibility or access to capital as wealthy clients, given their additional net worth. Con-

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sequently, super wealthy clients have the luxury of implementing more common and conservative gifting strategies than wealthy clients. For example, a super wealthy client may be able to give his entire BEA to a trust for the benefit of his children and grandchildren, whereas a wealthy client may stretch to make a gift of slightly more than $5 million to a spousal lifetime access trust, as further described in Part IV.B., below. Some super wealthy clients, however, regardless of their net worth, may never be comfortable making substantial lifetime gifts for fear of needing the money at some distant point in the future.

Planning for super wealthy clients is, in many respects, business as usual. Advisors should continue to recommend traditional lifetime gifting strategies, but with more urgency given the scheduled expiration of the doubled BEA and GST Exemption in 2026, as well as the recent legislative proposals to tax the rich. While it exceeds the scope of this article to provide a complete explanation of gifting strategies available to super wealthy clients, advisors should consider the following techniques, among others:

- Substantial outright gifts to descendants and other beneficiaries;
- Gifts to grantor trusts for the benefit of spouses, descendants, and/or other individuals;
- Installment sales to grantor trusts;
- GRATs;
- Remainder Purchase Marital Trusts (RPM Trusts);
- QPRTs and split purchase QPRTs (SP-QPRTs);
- ILITs;
- Beneficiary defective inheritor's trusts (BDITs);
- Beneficiary deemed owned trusts (BDOTs);
- Charitable lead trusts (CLTs) and charitable remainder trusts (CRTs);
- Family limited partnerships (FLPs);
- Intra-family loans and loan forgiveness;
- Private annuities;
- For spouses with a significant disparity in wealth, elect gift splitting for the wealthier spouse's gifts to facilitate the use of both spouses' BEAs and GST Exemptions; and
- In rare circumstances, making gifts to intentionally trigger a gift tax to take advantage of the tax-exclusive nature of the gift tax compared to the tax-inclusive nature of the estate tax.

Most gifting strategies for super wealthy clients attempt to ''freeze'' the value of the client's taxable estate by transferring an appreciating asset, which would otherwise generate additional estate tax (if it remained in the client's estate), to an irrevocable trust that should be excluded from the client's estate. In other words, a client can freeze the value of his taxable estate by shifting future appreciation to an estate tax protected vehicle.

Many gifting strategies for super wealthy clients also attempt to ''leverage'' the use of the client's BEA and GST Exemption by relying on valuation discounts for transfer tax purposes. Such valuation discounts generally include fractional interest, minority interest, and/or lack of marketability discounts, among many others.

It can be hard to achieve certainty when gifting hard-to-value property, such as real estate, artwork, or a closely held business interest. To avoid making too large a gift and unintentionally incurring out-of-pocket gift tax, clients can utilize formula clauses in their gift documents, such as defined valued clauses, or structure gifts with the beneficiary executing a disclaimer of any amount that exceeds the donor's remaining BEA, with the disclaimed amount returning to the donor or the donor's estate. Each of these techniques attempts to achieve a gift of a specific dollar amount, with a built-in adjustment to the percentage interest actually gifted in case of an IRS audit. One of the practical benefits of the temporarily doubled BEA and GST Exemption, beyond the increased amounts themselves, is the ability for super wealthy clients to make significant gifts of property that is hard to value, but that the client is comfortable has a value well below the client's remaining BEA. This extra cushion can oftentimes alleviate the need for a complex formula clause in the client's gifting documents.

Super wealthy clients often ask advisors whether they should utilize the doubled exemptions now or defer planning until 2025. On the one hand, deferred planning certainly provides the client with more flexibility by retaining ownership of the assets. On the other hand, gifting assets now removes future income and appreciation from the client's taxable estate and, if the assets are transferred to a grantor trust, facilitates a greater potential wealth shift through the client's payment of income tax generated by the trust assets. It also eliminates the risk that Congress decreases the exemptions prior to 2026 by legislative action. Many super wealthy clients will decide to utilize their doubled exemptions now, rather than waiting until 2025, and some may already have existing trusts that are appropriate vehicles for such gifts.

B. Creative Gifting Strategies for Wealthy Clients

As explained above, gifting strategies for wealthy clients should strike the right balance between mini-

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mizing transfer taxes and preserving sufficient assets to support the client's lifestyle and future needs. This balance can be very difficult to achieve. Unlike super wealthy clients, who often decide to utilize the doubled exemptions now, wealthy clients may be more comfortable deferring their gifting strategies. Planning for wealthy clients should generally focus on maximizing flexibility inside a gifting trust and, in certain cases, providing the client with some opportunity to access the trust funds at a later date. In other words, wealthy clients may need to "eat their cake and have it too."

Wealthy clients who wish to avoid potential estate tax upon death should consider making gifts to irrevocable trusts that consume more than $5 million of their BEA and GST Exemption (or $10 million for married couples), but also provide them with some potential access to trust assets in case of significant financial need. Naturally, these strategies carry a greater risk of IRS scrutiny, where the IRS is likely to argue that transferred assets should be included for estate tax purposes under §2036 or §2038, because of retained interests in or rights over the assets. This risk may not be present with transactions designed for super wealthy clients, where clients can forgo beneficial interests in transferred property. The paragraphs below explain some general considerations when designing trusts for increased flexibility, before discussing specific gifting strategies for wealthy clients.

1. Designing Trusts for Flexibility, Generally

Designing trusts for flexibility is a balancing act. On the one hand, the client typically prefers to have significant input as to trust investments and distributions and for the trust to be flexible enough to respond to unanticipated changes in circumstances, particularly if they impact the client's own finances. On the other hand, the client also desires transfer tax savings, which often requires the client to give up some level of control over and access to the trust assets. This balancing act is even more difficult for a client who seeks to dictate his family's use and enjoyment of trust assets from the grave. Given the current legislative uncertainty, however, irrevocable trusts for wealthy clients (compared to super wealthy clients) should generally be as flexible as possible, at least during the client's lifetime, while securing transfer tax savings. Consider the following, among other factors, when designing trusts for flexibility:

- Providing for an independent trustee who may make distributions of income and principal for any purpose whatsoever;
- Providing for a trust protector or advisor who can modify the trust (in certain ways), change trust situs, change governing law, add or remove beneficiaries, or grant powers of appointment;
- Including limited powers of appointment with a broad class of permissible appointees;
- Including formula general powers of appointment designed to maximize income tax basis or minimize GST taxes;
- Authorizing trust decanting, perhaps beyond what is already permitted by state statute;
- For grantor trusts, authorizing an independent trustee to reimburse the grantor for income taxes paid on behalf of the trust;
- Giving the grantor the right to swap assets with the trust or borrow from the trust;
- Facilitating the release of certain powers and interests to turn off grantor trust status if the income tax burden becomes too great for the grantor;
- Giving the grantor the right to serve as trustee (with certain tax-related restrictions), remove and replace trustees, and appoint successor trustees; and
- Limiting certain powers and provisions to apply only during the grantor's lifetime, thereby locking in certain provisions after the grantor's death.

Some of these features may increase the risk that the trust assets are subjected to the claims of the client's creditors and/or included in the client's taxable estate. Ultimately, the client must decide the level of risk that is appropriate to best accomplish the client's goals. When designing trusts for flexibility, advisors should educate clients regarding available alternatives and associated risks, draft trust agreements to best effectuate clients' objectives, and counsel clients regarding appropriate trust funding, administration, and reporting.

2. Strategies for Spouses

For two reasons, more planning options are available for wealthy clients who are married, compared to a wealthy client who is single. First, two persons have two BEAs and two GST Exemptions at their disposal (instead of just one). Second, and more importantly, many clients are comfortable naming spouses as beneficiaries of irrevocable trusts, with the hope (or, perhaps more accurately, the expectation) that if the client or the client's family has a financial need, the client's spouse will be able to receive a trust distribution to satisfy the need. The paragraphs below discuss gifting strategies that may be suitable for wealthy married clients.

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a. Utilize Only One Spouse's BEA and GST Exemption

Advisors often view married couples as a single unit for wealth transfer purposes, but it is important to remember that each spouse has a separate BEA and GST Exemption. Advisors must also remember that transfer tax exemptions come off the bottom, not the top, such that a wealthy client must give more than $5 million (or $10 million for a married couple) to capture any benefit associated with the doubled BEA and GST Exemption prior to any reduction in the exemptions. For purposes of this discussion, advisors can think of this as the ''wealthy client gifting threshold.''

One simple solution for married couples is to have only one spouse make gifts, rather than both spouses. That way, the wealthy client gifting threshold is only $5 million, instead of $10 million. Consider, for example, a husband and wife with a net worth of $16 million. The couple wishes to take advantage of the currently doubled exemptions, but they are only comfortable making a total gift of $8 million. If each spouse gifts $4 million, the spouses would not exceed the wealthy client gifting threshold. If the doubled exemptions expire in 2026, and revert back to $10 million per married couple, the spouses combined BEAs would total only $2 million. In contrast, if husband made a gift of $8 million, and wife made no gifts, husband's gift would exceed the wealthy client gifting threshold by $3 million. If the doubled exemptions expire in 2026, husband would have $0 of his BEA (and potentially GST Exemption) remaining, but wife would have her entire $5 million BEA and GST Exemption. In this example, therefore, if only one spouse made gifts, the couple could make total tax-free transfers of $13 million, compared to $10 million if the couple made gifts using the more traditional split gift method.

A spouse will often transfer assets to an irrevocable trust in which the other spouse is a beneficiary. Oftentimes the trust will be structured, for income tax purposes, as a grantor trust as to the donor spouse. This trust structure requires the advisor and client to carefully consider practical consequences. A transfer of assets from one spouse in excess of the wealthy client gifting threshold is likely to result in one spouse having access to substantially more wealth than the other spouse. While this dynamic may be tolerable if the spouses remain married, substantial inequities or difficulty could arise when the marriage terminates by death or divorce. While it may be possible to navigate around these issues, such as equalizing gifts between spouses before or after the initial gifting transaction, advisors must avoid possible application of the step transaction doctrine, which could undermine any potential transfer tax benefits. Moreover, advisors often represent both spouses with regard to their estate planning matters and must be mindful of the ethical duties involved in such a joint representation. Despite these potential challenges, there may be certain circumstances where utilizing only one spouse's BEA and GST Exemption makes sense.

b. Spousal Lifetime Access Trusts

One of the most common planning techniques for wealthy clients involves at least one spouse creating an irrevocable trust for the primary benefit of the other spouse and possibly other beneficiaries, such as children and more remote descendants. These trusts are often referred to as Spousal Lifetime Access Trusts, or ''SLATs.'' Although SLATs have existed for many years, they became extremely popular in 2011 and 2012, when the $5 million BEA was set to be replaced in 2013 with a $1 million BEA and a 55% estate tax rate. With the same dynamic potentially at play under current law, many wealthy clients are likely to consider funding SLATs with gifts in excess of the wealthy client gifting threshold.

A SLAT is, in essence, a pre-funding of the bypass or credit shelter trust traditionally formed upon the death of the first spouse to die. By funding a SLAT during lifetime, instead of waiting until death, the client can take advantage of the doubled BEA and GST Exemption amounts set to expire in 2026, while also removing appreciating assets from the transfer tax system. SLATs are often designed as grantor trusts for income tax purposes, obligating the donor spouse to pay all income tax attributable to trust income, while allowing the trust assets to grow and appreciate income tax-free. If the donor spouse is concerned he may lack sufficient funds in the future, he may take some comfort that his spouse is the primary beneficiary of the SLAT and presumably could receive a discretionary distribution that is sufficient to support the client's family (and indirectly, as a result, the client himself).

SLATs have widespread appeal as a means to save transfer taxes while also preserving assets for family use. As discussed in Part IV.B.2.a, above, however, married clients should be mindful of how substantially funding a SLAT may impact each spouse's access to capital, particularly in the case of an unexpected death or divorce. For this reason, many married couples desire that each spouse create and fund a SLAT so that both spouses are permissible beneficiaries of transferred assets, instead of just one spouse.

A client may create and fund a trust that benefits a spouse for life and avoids inclusion of the trust assets in the spouse's taxable estate at death. If a client creates and funds a trust for the client's own benefit, however, the trust assets are generally included in the client's taxable estate under §2036 or §2038, unless the trust is properly structured as a domestic asset pro-

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tection trust, as discussed in Part IV.B.3.b., herein. If each spouse creates and funds a trust for the benefit of the other spouse, the IRS may attempt to apply the ''reciprocal trust doctrine,'' a judicially created doctrine that developed in response to the potential for gift and estate tax abuse where two transferors create trusts for each other. Where applicable, this doctrine allows the IRS to uncross each trust and treat each spouse as the creator of the trust for his or her own benefit.[15] Accordingly, if both spouses seek to create and fund a SLAT, the SLATs must be substantially different in their structure and funding to avoid the application of the reciprocal trust doctrine.

Below is a list of some, but certainly not all, of the features that planners should consider when designing SLATs:

- To add general flexibility to the SLAT, consider the provisions listed in V.B.1;
- To facilitate broader access to the SLAT assets by the donee spouse (and possibly other beneficiaries), consider:
  - o Permitting the donee spouse to serve as a trustee, with distributions limited by an ascertainable standard;
  - o Giving the donee spouse the power to withdraw the greater of $5,000 or 5% of the SLAT assets each year; and
  - o Authorizing an independent trustee to make distributions to the donee spouse for any purpose whatsoever, and not just for health, education, maintenance, or support;
- To give the donor spouse more control over the SLAT and, potentially, some access to the SLAT assets, consider:
  - o Permitting the donor spouse to serve as a trustee, with distributions limited by an ascertainable standard;
  - o Allowing the donor spouse to swap assets with the SLAT;
  - o Allowing the donor spouse to borrow assets from the SLAT;
  - o Giving the donee spouse or other beneficiary a limited power of appointment, exercisable during lifetime or at death (possibly only with the consent of a non-adverse party) and including the donor spouse in the class of permissible appointees;
  - o Funding the SLAT with a residence that can be used by the donee spouse and the donor spouse without paying rent; and
  - o In states that permit self-settled spendthrift trusts, authorizing an independent powerholder to add the donor spouse as a beneficiary or grant the donor spouse a limited power of appointment at a later date;
- To reduce the risk that the reciprocal trust doctrine applies when each spouse creates a SLAT, consider:
  - o Making only one spouse a beneficiary, which is the most conservative approach;
  - o Making only one spouse a beneficiary initially, but authorizing an independent powerholder to add the other spouse as a beneficiary at later date;
  - o Naming different trustees for each SLAT;
  - o Including both spouses as beneficiaries, but with significantly different distribution provisions, such as mandatory vs. discretionary distributions, income vs. principal distributions, ascertainable vs. unlimited distribution standards, ''may'' consider other resources vs. ''shall'' consider other resources, sole beneficiary vs. multiple beneficiaries, and powers of appointment vs. no powers of appointment;
  - o Creating the SLATs on different dates and funding the SLATs with different assets; and
  - o Varying the timing and amount of distributions to each spouse;
- To address potential issues upon death or divorce, consider:
  - o Having the donee spouse fund an ILIT to obtain an insurance policy on the donee spouse's life, which could provide funds for the donor spouse if he or she survives the donee spouse;
  - o Requiring that the donee spouse be living and married to the donor spouse to receive distributions from the trust;
  - o Defining the donor's ''spouse'' as the person to whom the donor is married at the time of a distribution, thereby permitting the identity of the donor's spouse to change over time; and
- To maximize creditor protection for all beneficiaries, consider:
  - o Including a spendthrift provision;

[15] *Compare United States v. Grace*, 395 U.S. 316 (1969) and *Lehman v. Commissioner*, 109 F.2d 99 (2d Cir. 1939) (finding reciprocal trusts), *with Estate of Levy v. Commissioner*, T.C. Memo 1983-453 and PLR 200426008 (not finding reciprocal trusts).

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- o Providing for discretionary distributions of income and principal among various beneficiaries;
- o Naming an independent person who is not related or subordinate to the grantor or any beneficiary to serve as the sole trustee or to consent to any distributions;
- o Authorizing beneficiaries to use assets, such as residential real property, rather than requiring a distribution from the SLAT; and
- o Expressly providing that any distribution is considered the beneficiary's separate property; and

- To facilitate split gifts to a SLAT, structure the spouse's beneficial interest so that it is severable, ascertainable, and de minimis.

Again, the appropriate SLAT design will be unique to each client, and certain design features carry a greater risk of estate inclusion or creditor exposure. Advisors should assist clients in carefully weighing the advantages of broader control of and access to SLAT assets against potential creditor and estate inclusion risks.

3. Strategies for All Clients Desiring Access to Gifted Property

Some wealthy clients do not have a spouse, or even if they do, a SLAT may not be an appropriate planning vehicle. These clients should consider other planning techniques, all of which are designed to utilize the doubled BEA and GST Exemption while providing the client with some opportunity to access the gifted property in the event of financial need.

Whenever a wealthy client retains a right, however attenuated, to access gifted property, the risks of creditor exposure and estate inclusion increase. Advisors, therefore, should proceed with caution when recommending the strategies discussed below to wealthy clients, recognizing that some strategies may only be effective under the laws of certain states. Even so, some wealthy clients may be willing to assume these risks and, in fact, may not engage in any planning at all unless there is some assurance that the assets will be available if they later need them. If the planning risks materialize and assets are eventually included in the client's taxable estate, the client may view himself as no worse off than if he had done no planning at all, minus transaction costs and the opportunity cost of not pursuing other strategies.

a. Simple Methods to Preserve Access to Funds

Before getting too enamored with more exotic planning strategies, planners should remember that providing a donor with access to funds may be relatively easy. For example, if a wealthy client wishes to fund an irrevocable grantor trust for the benefit of his family members but wishes to retain some access to funds, the trust agreement could grant the client a swap power to reacquire trust assets for assets of an equivalent value, or an independent trustee could be given the ability to reimburse the grantor for income taxes paid on the trust assets.

Another method of providing the client with access to trust funds is to give the client the ability to borrow assets from the trust at the applicable federal rate. A borrowing power, while simple, could provide the client with a reliable source of liquidity during times of financial need. If a loan were to be outstanding at the client's death, the client's estate should be entitled to claim an estate tax deduction for the outstanding balance. Many wealthy clients may be comfortable relying on this borrowing power, with nothing more. In this sense, advisors should keep in mind to not let ''perfect'' get in the way of ''good enough.''

In addition to basic design considerations, a wealthy client may also favor estate planning transactions that provide the client with a steady cash flow. The most common example is an installment sale to a grantor trust, in which the client sells assets to a trust in exchange for a promissory note (or in some cases, a private annuity). Interest and principal payments on the note (or annuity payments) should provide the client with liquidity, while any future appreciation in the transferred property should occur outside of the transfer tax system as to that client. Moreover, for wealthy clients who are not ready to consume their entire BEA and GST Exemption now, but may wish to give more prior to 2026 or an earlier change in the law, a current installment sale would facilitate a quick and easy future gift through the client's forgiveness of all or a portion of the outstanding promissory note. There are many considerations in structuring an installment sale transaction, including initial trust funding, designing the purchase agreement and promissory note, and, if applicable, navigating guarantee fees.

b. Domestic Asset Protection Trusts

If a wealthy client could describe the ultimate ''eat your cake and have it too'' transaction, it likely would be an irrevocable trust created by the client, that is funded by the client with assets that consume the doubled BEA and GST exemption, is protected from the client's creditors, is excluded from the client's taxable estate at death, and yet still permits the client to be a permissible beneficiary. Well, such trusts do exist and are often referred to as self-settled spendthrift

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trusts, or more colloquially, asset protection trusts.[16] Before 1997, asset protection trusts were only available offshore in jurisdictions such as the Bahamas, Bermuda, and the Cayman Islands. In 1997, however, Alaska authorized asset protection trusts. Since then, a flurry of other states enacted similar legislation, resulting in 19 jurisdictions currently authorizing some form of "domestic" asset protection trust, or "DAPT."

A DAPT, in its purest form, would allow an independent trustee to make discretionary distributions of income and principal to or for the benefit of the grantor. A more conservative approach, however, would be to create a DAPT that does not name the grantor as a beneficiary but authorizes an independent powerholder to add the grantor as a discretionary beneficiary at a later date. This approach should provide another layer of insulation between the grantor and the trust, which may help if the trust is challenged by a creditor or the IRS.

DAPTs, however, are not for the faint of heart. Even if a client forms a DAPT in a state that authorizes self-settled spendthrift trusts, the DAPT is not immune from challenge, in particular if the grantor does not reside in the state in which the DAPT is created or otherwise maintain sufficient minimum contacts with the state. Depending on the client's solvency at the time the DAPT is created, there may also be fraudulent transfer concerns. Because DAPTs have been challenged successfully in bankruptcy courts,[17] wealthy clients should first consider whether more conservative alternatives are available to accomplish their planning goals.

c. Special Power of Appointment Trusts

Some wealthy clients may believe DAPTs are too risky, despite their potential benefits. An alternative technique involves the creation of an irrevocable spendthrift trust for the benefit of one or more beneficiaries, not including the grantor, in which a beneficiary or non-beneficiary is given a limited power to appoint the trust assets among a class of persons, including the grantor. Trusts with this feature are sometimes referred to as special power of appointment trusts, or "SPATs." This technique, if it works as intended, should enable a wealthy client to currently make use of the doubled BEA while having the possibility to benefit from the assets.

Conceptually, SPATs are similar to the upstream planning discussed in Part III.B.1.b.(2)., above, in that each technique involves a transfer of property to a beneficiary, with the possibility that the transferred property returns to the donor (or a trust for the donor's benefit). Unlike upstream planning, however, which is primarily designed to maximize income tax basis for the transferred assets through inclusion of those assets in the estate of an older beneficiary with excess BEA, a SPAT is typically structured to avoid inclusion of the assets in the beneficiary's estate. Specifically, upstream trusts will often grant beneficiaries a general power of appointment to cause estate inclusion, while SPATs usually only grant beneficiaries or third parties limited powers of appointment to avoid a taxable gift or estate inclusion.

SPATs offer considerable appeal for wealthy clients given the possibility that the trust assets could be available to the donor, or pass to a trust for the donor's benefit, through a third party's exercise of a lifetime or testamentary limited power of appointment. There are, however, several risks associated with SPATs. If a portion of the SPAT assets are appointed back to a donor, the IRS could argue that the all of the trust's assets should be included in the donor's taxable estate under §2036 pursuant to an implied agreement between the donor and the powerholder at the time the SPAT was created. In addition, if a donor creates a SPAT and the holder of a limited power of appointment directs the SPAT assets to an appointive trust for the benefit of the donor, the appointive trust should not grant the donor a lifetime or testamentary power of appointment. The IRS could assert that the donor essentially retained the right to alter, amend, revoke, or terminate the trust and, therefore, the assets should be included in the donor's taxable estate under §2038.

In addition to estate inclusion issues under §2036 and §2038, there is a separate, but related creditor rights issue under state law. Under the law of some states, there is a risk that the appointive trust "relates back" to the original donor of the SPAT, such that the appointive trust is actually a self-settled trust and therefore exposed to the claims of the donor's creditors. This issue might be avoided if the appointive trust (and potentially the SPAT) is governed by the law of a state permitting DAPTs or the applicable state law offered specific protection to appointive trusts under these facts. A number of states, including Delaware, Florida, Virginia, and Wyoming, protect appointive trusts created pursuant to an inter vivos QTIP trust. A more limited number of states, includ-

[16] *See* PLR 200944002 (finding that an asset protection trust formed under an applicable state statute should not be included in the grantor's taxable estate, but declining to rule on whether other facts, including a pre-existing arrangement between the grantor and trustee, would cause estate inclusion under §2036).

[17] *See Waldron v. Huber (In re Huber),* 493 B.R. 798 (Bkrtcy. W.D. Wash. 2013) (disregarding an Alaska DAPT because the State of Washington has a strong public policy against DAPTs); *Battley v. Mortensen*, Case No. A09-00565-OMD Adv. No. A09-90036-DMD, 2011 BL 139744 (Bkrtcy. D. Alaska May 26, 2011) (ruling that an Alaska DAPT was not protected under federal bankruptcy law).

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ing Arizona, Ohio, and Texas, extend this protection to other trusts, such as SLATs.[18]

If a wealthy client is considering a SPAT, it would be best to situs the SPAT (and subsequent appointive trust) in a DAPT state, or a state, like Texas, that would extend spendthrift protection to the appointive trust. As an added layer of protection, the appointive trust could not name the client as an initial beneficiary, but could provide that an independent person may add the client as a beneficiary at a later date. Regardless of the client's preferred structure, the planner should also take care to avoid application of the step transaction doctrine.

d. Retained Interest Gifts

(1) In General

Under the estate tax ''string provisions'' contained in §2035-§2039, and 2042, a taxpayer can make a completed taxable gift during lifetime, but the gifted asset can still be included in the taxpayer's gross estate upon death. For example, if a parent gifts a remainder interest in property to a child, but retains a life estate in the property, the property will still be included in the parent's estate under §2036. This basic concept, combined with the anti-clawback provision in the regulations[19] and the exception of assets included in the gross estate from adjusted taxable gifts,[20] may enable wealthy clients to make use of the doubled BEA by making completed taxable gifts prior to 2026, while still enjoying the property during their lifetimes.

In theory, retained interest gifts should not generate any additional estate tax. Section 2001(b) removes assets included in the gross estate from adjusted taxable gifts. Although the asset itself, at its date-of-death value, is included in the gross estate, its inclusion is offset under the regulations by the increased BEA utilized when the lifetime gift was made. Consequently, the only amount that should be subject to estate tax is the post-gift appreciation. As further explained below, this type of planning could be particularly advantageous when combined with the valuation rules of Chapter 14 of the I.R.C.

(2) Retained Income Gift Trusts

Many wealthy clients would be interested in a gifting strategy that (i) currently utilizes their doubled BEA, (ii) entitles the client to receive all income generated by the gifted assets for life, (iii) shifts future asset appreciation to descendants so that it is excluded from the client's gross estate, and (iv) upon the client's death the remaining assets pass to the client's descendants free of any additional estate tax but with an income tax basis adjustment. The Retained Income Gift Trust, or ''RIGT,'' if it works as intended, may achieve those objectives.

A RIGT closely resembles a pre-chapter 14 Grantor Retained Income Trust, or ''GRIT,'' except it lasts for the lifetime of the donor. The client transfers property to an RIGT, retaining an income interest for the client's lifetime. The client's descendants are often discretionary principal beneficiaries, and the trustee should consider distributing all appreciation to the descendants (or a trust for their benefit). The client's descendants (or trusts for their benefit) receive the remaining RIGT assets upon the client's death.

The client's transfer to the RIGT should be a completed gift in an amount equal to the full value of the property contributed to the trust because the client's retained income interest is not a ''qualified interest'' under §2702. At the client's death, the RIGT assets should be included in the client's estate, with the assets receiving an income tax basis adjustment under current law. Any appreciated principal that was distributed to the client's descendants during the client's lifetime should be excluded from the client's estate, but should not be treated as additional gifts because the gift was complete at the time the RIGT was created. Although the RIGT assets are included in the client's estate, they do not generate additional estate tax (beyond undistributed appreciation) because they are not treated as adjusted taxable gifts.

For example, assume that a settlor creates and funds a RIGT with $11 million in 2021. Settlor retains the mandatory right to receive all trust accounting income for his lifetime. Settlor dies in 2026 when the RIGT is worth $16 million and the settlor's estate (outside of the RIGT) is worth $4 million. If the 2026 BEA is $5 million, the resulting estate tax savings generated by the RIGT is $2.4 million [($11 million — $5 million) × 40% = $2.4 million]. The estate tax payable upon the settlor's death in 2026 will be $3.6 million. This amount is determined by first adding the value of the RIGT assets ($16 million) and the settlor's own assets ($4 million) to arrive at a gross estate of $20 million. Then, $11 million is subtracted from the $20 million gross estate ($9 million). Finally, the result is multiplied by the 40% estate tax rate [($20 million — $11 million) × 40% = $3.6 million].

[18] *See, e.g.*, Tex. Prop. Code §112.035(d)(2) (providing that a settlor is not considered a trust beneficiary by reason of a third party's exercise of a power of appointment), Tex. Prop. Code §112.035(g) (providing that the original donor is not considered the settlor of an inter vivos QTIP trust or SLAT after the death of the donor's spouse).

[19] *See* Reg. §20.2010-1(c) (providing that if a taxpayer makes a lifetime gift utilizing BEA in excess of the BEA at the taxpayer's death, the taxpayer's BEA will be the higher gifted amount for purposes of calculating any estate tax due).

[20] *See* §2001(b) (providing that gifts includible in the gross estate of a decedent shall not be counted as adjusted taxable gifts for purposes of calculating estate tax).

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(3) Enhanced Grantor Retained Income Trust

An Enhanced Grantor Retained Income Trust, or "E-GRIT," is an irrevocable self-settled trust that is intended to (i) utilize a client's doubled BEA, (ii) allow the client to retain broad lifetime access to the assets contributed to the E-GRIT, (iii) enable the client to direct the distribution of the E-GRIT assets upon death, and (iv) secure a new income tax basis under §1014(b).[21] Like the RIGT, an E-GRIT, if it works as intended, may be suitable for a wealthy client who seeks to utilize the doubled BEA before its expiration in 2026.

The E-GRIT takes the RIGT concept a step further by having a wealthy client retain not only an income interest in the trust, but also a right to receive discretionary distributions of principal. The trust agreement creating the E-GRIT will generally include the following provisions:

- The settlor may serve as the sole trustee of the E-GRIT;
- The settlor is required to receive all of the E-GRIT's net income for life and may be entitled to receive discretionary distribution of principal;
- The E-GRIT will include an "undistributed principal amount" and will prohibit principal distributions to the settlor if such distributions would reduce the value of the EGRIT's assets to an amount that is less than the undistributed principal amount. This provision should ensure that a portion of the contribution to the E-GRIT is a completed gift and that §2702 applies in determining the value of the settlor's gift to the E-GRIT;
- The settlor will retain a power of substitution to ensure that the E-GRIT is wholly a grantor trust for income tax purposes. This provision should require the settlor to pay income tax on all E-GRIT income and facilitate transactions between the settlor and the E-GRIT that are disregarded for federal income tax purposes;
- The settlor may retain a broad testamentary power of appointment; and
- The remainder beneficiaries, entitled to receive the unappointed E-GRIT assets upon the settlor's death, must be individuals (or trusts for their benefit) who are considered "members of the transferor's family" as defined in §2704(c)(2). This provision should ensure that the assets transferred to the E-GRIT are valued in accordance with §2702.

The intended tax consequences of an E-GRIT are as follows:

- The assets transferred to the E-GRIT should be valued pursuant to §2702;
- Section 2702 imposes the subtraction method in valuing settlor's gift to the E-GRIT. The settlor's taxable gift equals the full value of assets contributed to the E-GRIT minus the value of settlor's qualified retained interest in the E-GRIT assets. Because settlor's retained interest is not an annuity or unitrust interest, it is valued at zero, resulting in a taxable gift equal to the full amount contributed to the E-GRIT;
- Upon the settlor's death, the E-GRIT assets should be included in the settlor's taxable estate. The settlor's retained mandatory income interest should cause the assets to be included in settlor's estate under §2036(a)(1). The settlor's testamentary power of appointment and right to receive discretionary distributions of principal should also cause the assets to be included in the settlor's estate under §2038(a)(1);
- The E-GRIT assets should receive an income tax basis adjustment under §1014(b);
- The initial gift to the E-GRIT should be excluded from adjusted taxable gifts under §2001(b), which provides that taxable gifts made to the E-GRIT are excluded from "adjusted taxable gifts" in calculating the estate tax; and
- If the settlor dies after the BEA has been reduced, the Regulations provide that the BEA used to calculate the estate tax will be increased to an amount equal to the BEA used by all post-1976 taxable gifts if the total BEA used for such gifts exceeds the BEA in effect at the settlor's death.[22] In other words, there should be no clawback of settlor's use of the temporarily doubled BEA.

For example, assume settlor gifts $11 million to an E-GRIT in 2021 and dies in 2026 when the E-GRIT is worth $16 million and the settlor's estate (outside of the E-GRIT) is worth $4 million. If the 2026 BEA is $6 million, the resulting estate tax savings generated by the E-GRIT is $2.4 million [($11 million — $5 million) × 40% = $2.4 million]. The estate tax payable upon the settlor's death in 2026 will be $3.6 mil-

[21] *See* Eric R. Viehman, *Using an Enhanced Grantor Retained Income Trust (E-GRIT) To Preserve the Basic Exclusion Amount*, State Bar of Texas Advanced Estate Planning Strategies Course (Apr. 2019).

[22] *See* Reg. §20.2010-1(c)(1).

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lion. This amount is determined by first adding the value of the E-GRIT assets ($16 million) and the settlor's own assets ($4 million) to arrive at a gross estate of $20 million. Then, $11 million is subtracted from the $20 million gross estate ($9 million). Finally, the result is multiplied by the 40% estate tax rate [($20 million — $11 million) × 40% = $3.6 million].

(4) Intentionally Defective §2701 Transaction

Section 2701 was enacted in 1990 to eliminate the historic partnership or corporation recapitalization estate freeze technique. Prior to §2701, a parent who owned a business that was expected to appreciate in value would attempt to freeze the value of the parent's interest in the business and shift all future appreciation to descendants (or trusts for their benefit). First, the parent would recapitalize the entity with two classes of equity (e.g., preferred stock and common stock). The preferred stock would be granted rights (e.g., noncumulative dividend right, put right, conversion right, liquidation right, etc.) that would never be exercised but would cause the preferred stock to have a fair market value approximating the total value of the business. The parent would then transfer the common stock to trusts for the benefit of children with a nominal value for gift tax purposes. Upon the parent's death, the parent's estate would only include the value of the preferred stock. The appreciation in the value of the business after the date of the recapitalization would accrue solely to the common stock held in the children's trusts.

Today, this historic estate freeze transaction does not work. Section 2701 imposes the subtraction method in valuing the common stock (i.e., subtracting the §2701 special value of the parent's retained preferred stock-generally zero-from the value of the business), effectively accelerating the gift tax. Normally, planners seek to avoid the application of the special valuation rules of §2701, which can cause innocent clients to make unintentionally large gifts with potentially disastrous consequences. Wealthy clients seeking to utilize the currently doubled BEA, however, while also retaining access to the transferred property, may engage in a gifting strategy that intentionally trips §2701.

Consider, for example, a wealthy client who gives the common stock in a corporation to a trust for the benefit of her descendants, but retains the preferred stock. Under §2701, the value of the client's retained preferred stock is zero for purposes of calculating the value of the client's gift of common stock, meaning that the client is treated as gifting the value of the client's entire interest in the corporation. During the client's lifetime, she can access liquidity by receiving preferred dividends or exercising a right to put the stock to the corporation. At the client's death, the preferred stock is included in the client's gross estate, thereby receiving an income tax basis adjustment, but does not increase the estate tax due (except for post-gift appreciation).[23] As a result, wealthy clients could utilize their doubled BEAs while still retaining the right to receive preferred payments or put proceeds from the entity.

(5) Potential Disadvantages & Risks

Even though retained interest gifts may be attractive to wealthy clients, they do have some disadvantages. First, retained interest gifts, if effective, only utilize the doubled BEA, but not the GST Exemption, given that the GST Exemption cannot be allocated until the close of the estate tax inclusion period (ETIP). With a retained interest gift, the ETIP does not close until the client's death, at which point the increased GST Exemption may have already expired. Therefore, retained interest gifts are not appropriate for clients who desire to utilize their doubled GST Exemption.

Second, retained interest gifts may be inherently risky. These planning techniques rely on provisions in the I.R.C. and regulations that are principally designed to curb taxpayer abuse in other areas. By relying on these provisions to utilize the doubled BEA, wealthy clients would be using complex tax rules as a sword, when they were intended for use by the IRS as a shield. In fact, before the regulations were finalized, the Tax Section of the New York State Bar Association advised the IRS that the proposed regulations, as drafted, ''would permit individuals to make relatively painless taxable gifts that lock in the increased exclusion amount, even though they retain beneficial access to the transferred property.'' They asked the IRS to ''consider further whether gifts included in a decedent's gross estate should successfully lock in the temporarily increased exclusion amount available before 2026.''[24] The IRS declined to include an anti-abuse provision in the final regulations, but did note that such a provision was within the scope of its regulatory authority. Furthermore, the IRS noted that an anti-abuse provision would benefit from prior notice and comment and, accordingly, reserved the issue to allow further consideration.[25]

V. CONCLUSION

Designing a comprehensive gifting strategy has always been hard. It is even harder now in the face of

[23] *See* Reg. §25.2701-5(a)(3).

[24] *See* New York Bar Association, Tax Section, *Report No. 1410 — Report on the Proposed Section 2010 Regulations* (Feb. 20, 2019), available at https://www.nysba.org/Sections/Tax/Tax_Section_Reports/Tax_Section_Reports_2019/1410_Report.html.

[25] *See* 84 Fed. Reg. 64.995 (Nov. 26, 2019) (codified at 26 C.F.R. pt. 20).

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legislative uncertainty and constantly changing exemption amounts. The right approach requires learning as much about the client as possible, including the client's tax and non-tax motivations for gifting, as well as the client's ongoing financial needs and cash flow. For most clients, it is more appropriate under current law to plan for income tax savings, rather than transfer tax savings, and planners must learn to adapt to this new planning paradigm.

When considering a transfer that will consume gift tax exemption, advisors may group clients into three categories — affluent clients, wealthy clients, and super wealthy clients — in order to suggest techniques that are appropriate for each client group. Wealthy clients are the most challenging group because they are stuck in the middle of the expiring exemption amounts. Transfer tax planning for wealthy clients may require creative solutions designed to utilize the client's increased BEA and GST Exemption, while potentially permitting the client to access the gifted property directly or indirectly in the future.

As evident from this article, no one approach fits all, and each client's lifetime gifting strategy should be specifically tailored to that client's unique financial and family situation. Flexibility is key, balanced with a heavy dose of practicality. Planners should take comfort that, regardless of the future of the transfer tax system, good advice will always be in demand.

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