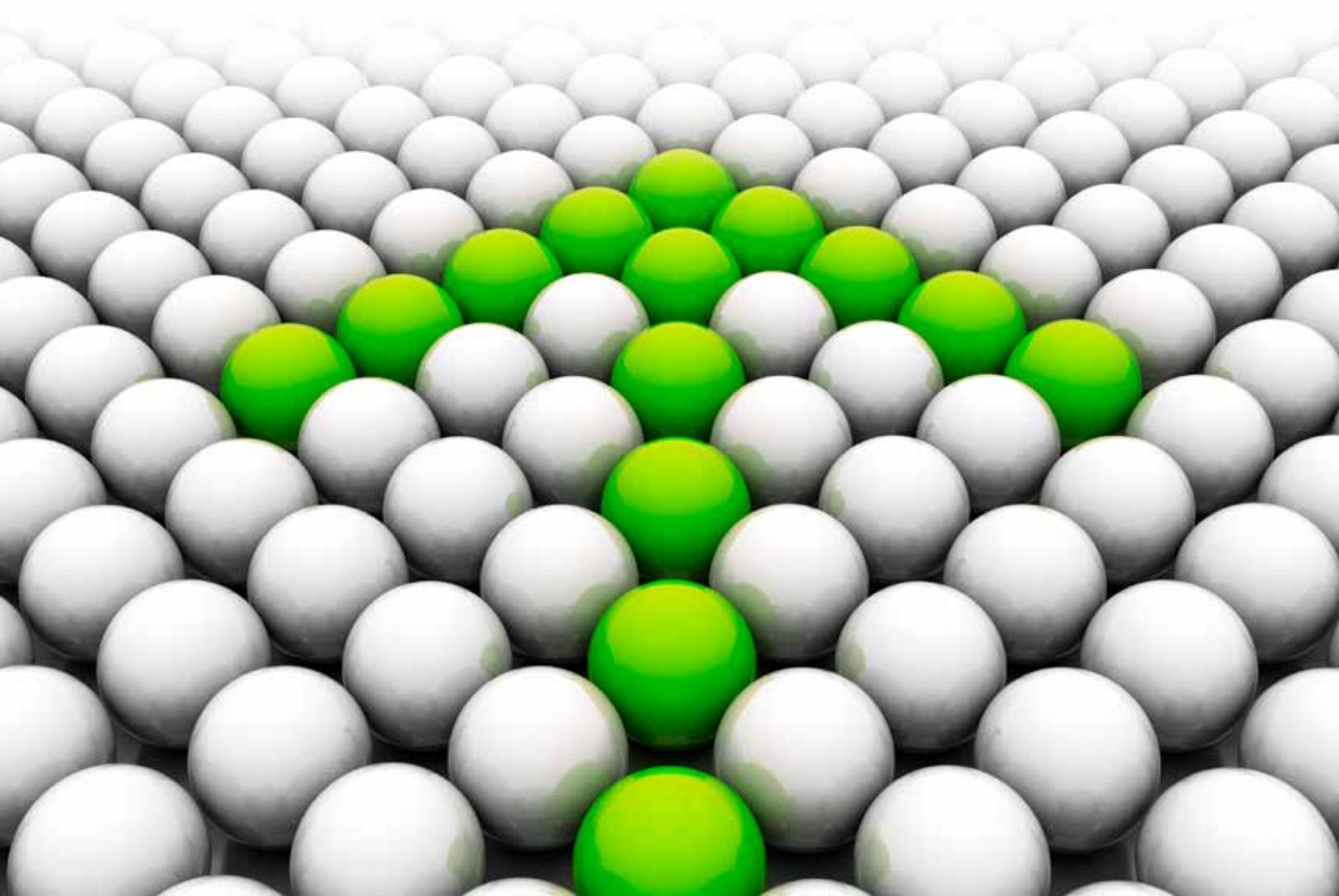


The Adviser's Guide to

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The AICPA established the Sidney Kess Award for Excellence in Continuing Education to recognize individual CPAs who have made significant and outstanding contributions in tax and financial planning and whose public service exemplifies the CPA profession's values and ethics. Sidney Kess was the first recipient of this award. Mr. Kess was selected as one of "125 People of Impact in Accounting" by the *Journal of Accountancy* in its June 2012 issue celebrating the AICPA's 125th anniversary. Mr. Kess was inducted into the New York State Society of CPA's Hall of Fame. He recently received the New York State Society's Outstanding CPA in Education Award.

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In conjunction with numerous tax planning lectures he has delivered for the National Law Foundation, Mr. Siegel has prepared extensive lecture materials on the following subjects: *Planning for An Aging Population*; *Business Entities: Start to Finish*; *Preparing the Audit-Proof Federal Estate Tax Return*; *Business Acquisitions: Representing Buyers and Sellers in the Sale of a Business*; *Dynasty Trusts*; *Planning with Intentionally-Defective Grantor Trusts*; *Introduction to Estate Planning*; *Intermediate-Sized Estate Planning*; *Social Security, Medicare and Medicaid: Explanation and Planning Strategies*; *Subchapter S corporations: Using Trusts as Shareholders*; *Divorce and Separation: Important Tax Planning Issues*; *The Portability Election*; and many other titles.

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A real estate professional will not qualify for the rental real estate safe harbor if the taxpayer who satisfies the real estate professional test does so by virtue of his or her non-rental real estate activities, such as construction or brokerage. If a real estate broker has two rental homes on the side, merely spending 100 hours on each property will be enough to materially participate in the activity assuming the broker is the only one devoting time to the activity. If the broker qualified as a real estate professional, the rental homes would not be considered passive activities. However, because the broker fails to spend 500 hours on the separate—or combined, if so elected—rental activities, he or she fails to satisfy the safe harbor, and does not meet the "rental trade or business" requirement either.

.03 The Self-Rental Income Issue

The final regulations provide that if rental income is treated as nonpassive by reason of 26 CFR 1.469-2(f)(6) (which recharacterizes what otherwise would be passive rental income from a taxpayer's property as nonpassive when the taxpayer rents the property for use in an activity in which the taxpayer materially participates or when the activity is properly grouped with a nonpassive trade or business activity under 26 CFR 1.469-4(d)(1)), the gross rental income is deemed to be derived in the ordinary course of a trade or business and therefore not subject to the net investment income tax. Gain or loss from the sale of the property will also be treated as gain or loss from the disposition of property held in a nonpassive trade or business.^{fn 61}

.04 Self-Charged Interest

Under the final regulations, a taxpayer who loaned money to a pass-through entity in which the taxpayer materially participates is not subject to net investment income tax on the interest received for such loan. The final regulations provide that in the case of self-charged interest received from a nonpassive entity, the individual may exclude from net investment income an amount equal to the individual's allocable share of the flow-through entity's deduction.^{fn 62}

Planning might suggest, for example, increased use of an S corporation into which several activities are combined. Assuming the S corporation carries on sufficient activities to allow it to be characterized as an "active" trade or business, the passive income "taint" from isolated activities may be removed. If that is accomplished, the payment of an S corporation distribution from an "active" trade or business will also avoid the definition of "investment income" under the new tax. That in turn suggests that the lowest "reasonable compensation" be established for the S corporation owners (to avoid as much as possible the 0.9 percent Medicare tax on compensation and self-employment income) and have the largest justifiable S corporation distribution paid—thereby minimizing or avoiding the 0.9 percent additional Medicare tax, other self-employment taxes, and the net investment income tax.

^{fn 61} 26 CFR 1.1411-4(g)(6).

^{fn 62} 26 CFR 1.1411-4(g)(5).

Chapter 42

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¶4201 Overview

The financial planner has a new challenge—the majority of our clients’ estates will not be subject to the federal estate tax when death occurs. How are we to plan for them—and indeed, convince them that planning is still important and necessary? This chapter discusses the new reality in financial and estate planning.

As of 2017, the applicable exclusion from the federal gift and estate tax is \$5,490,000. This number is indexed annually for inflation. The 2017 applicable exclusion from the generation-skipping transfer tax (GST) is \$5,490,000. Clients whose estates fall under these thresholds will be referred to as persons of moderate wealth for purposes of this discussion.

These exclusions became permanent as the result of the American Taxpayer Relief Act of 2012 (ATRA). ATRA provides an applicable exclusion amount for estates and gifts of \$5 million, indexed for inflation.^{fn 1}

ATRA also made permanent the concept of portability, which allows the surviving spouse to use the unused federal estate tax exclusion of a deceased spouse (the DSUE) who died after 2010. Depending on the estate plan of the first deceased spouse, portability can give the surviving spouse an available applicable exclusion for lifetime gifting and use at death of over \$10 million (in 2017, as much as \$10,980,000). The GST exclusion is not portable.

In 2001, 120,000 federal estate tax returns were filed, of which 60,000 were for taxable estates. In 2010, 15,000 returns were filed. In 2012, less than 4,000 taxable estate tax returns were filed. Estimates are that less than 0.2 percent of Americans—fewer than 2 out of every 1,000 people who die—will be subject to the federal estate tax with the current exclusion structure in place. The Tax Policy Center suggests that only 3,800 estates in the United States (1 in every 700 people who die) will pay any estate tax in 2017.

¶4205 The New Normal in Estate Planning—Simplicity and Client Resistance?

If clients no longer fear the imposition of costly transfer taxes and the complex planning needed to avoid such taxes, will clients be willing to embrace complex planning and the professional fees often associated with such complexity?

The client may want to opt for the most simple (and least expensive) of plans, which may make complete sense when viewed solely as a tax planning decision, but which may be a serious mistake when other planning considerations are raised. The challenge for the planner will be to convince the client that simple from the tax standpoint does not always translate to simple or even correct from a wide range of other perspectives.

It is certainly likely that many persons will take a "do it yourself" approach to planning. Will, trust, and many other document forms are readily available on the Internet (see, for example, www.nlfforms.com) and in book stores. Moreover, many people are aware of the changes in the law and the absence of federal tax liability. Many will therefore decide to save the cost of professional planning fees, believing that there are no penalties for failure since no tax will be owed, regardless of what they sign or do. Such a decision can be a huge mistake for some families.

¶4210 A New Emphasis in Planning

.01 Refocused Planning

The major focus for estate planning for married couples having assets under \$5.49 million will turn to core dispositive planning, income tax planning (such as achieving basis step-up at death), and the preservation and management of assets.

^{fn 1} IRC Section 2010(c).

.02 Core Dispositive Planning

Planning should begin with a review of the clients' current personal and financial situation and an examination of the current estate plan and all associated documents. The planning should consist of several considerations, including (a) the desired beneficiaries to whom assets should be given or bequeathed; (b) coordination of beneficiary designations, which is still required to achieve the desired result, and (c) a review of the client's existing estate planning documents from a new perspective.

As you review the client's existing documents, do formula clauses that made sense in a different tax environment still work? Take great care if the client's documents still include formulas referring to the "maximum amount that can pass without tax consequences" to children and balance to spouse. Will there be any balance? Be careful of formulas leaving the surviving spouse only enough assets to reduce the federal estate tax to zero. The applicable exclusion may get to zero long before a marital gift is needed. Are the formulas still needed if the client lives in a *decoupled state* (a state that still has an independent death tax with exclusions well below the federal level of tax exclusions)? Is there still a need for a credit shelter trust that no longer will generate federal estate tax savings?

What gifts has the client made? If they were made to trusts, how are the trusts structured and how are they operating? Are the trustees currently in place or named as likely successors the right choices? If there has been a pattern of gifting to family members that was motivated by transfer tax concerns that no longer apply, what are the expectations of those family members? A discussion may be needed.

Look at beneficiary designations of items that pass outside of a will (life insurance policies, retirement plans). If trusts designed to achieve transfer tax savings are designated beneficiaries, perhaps they are no longer desired or necessary.

A real concern for the planner in this situation is the motivation of the client. In the pre-ATRA world, taxes were a primary motivating factor. "I will plan your estate and save you taxes" was an acceptable way to overcome the client's reluctance to address planning. Now, estate tax savings has been largely or completely removed from that picture. The challenge for the planner is to get the client to focus on the non-tax aspects of planning which remain of primary importance.

.03 Areas Where Estate Planning Is Still Required

1. Planning for the disposition of the client's assets at his or her death
2. Asset protection planning (protection from creditors and predators)
3. Planning for disability and incompetency
4. Business succession planning (with or without concerns that the estate tax will force a succession plan to be implemented)
5. Planning for possible divorce and other family relationship dissolutions
6. Charitable giving (for its own sake, not for death tax savings, and because income tax considerations will still be relevant; techniques such as lifetime charitable remainder trusts would not be adversely affected at all)
7. Life insurance planning (other than to provide funds to pay death taxes)

8. Fiduciary litigation (may become a greater problem because there is more to fight over as an inheritance with the government out of the picture)
9. Retirement planning
10. Planning to pay state death taxes (in those states that have decoupled from the federal system and have their own death tax)
11. Planning to avoid or minimize gift taxes (if the client desires to give away more than the indexed applicable exclusion amount for gift tax purposes)
12. Planning for children with disabilities and special needs
13. Planning for spendthrift children (incentive and disincentive trusts)
14. Planning for clients who own real estate in more than one state, including ownership, asset protection, state income taxation, spousal rights, and probate issues (in addition to possible state estate taxes)
15. Planning for clients who are U.S. citizens or resident aliens who own property in other countries
16. Planning for nonresident aliens with assets in the United States or who plan to move to the United States
17. Planning for the possible future decrease in the estate, gift, and GST tax exemptions or increase in the transfer tax rates
18. Planning to pay education expenses, including contributing to IRC Section 529 plans
19. Identifying guardians for minor children, as necessary
20. Considerations arising with respect to eldercare planning
 - a. Making certain that appropriate durable powers of attorney and health care directives are in place. (This planning consideration is appropriate not only for elderly clients, but for all clients).
 - i. Consider more specific directives with respect to gifting to protect against possible elder abuse.
 - ii. Warn the power holder about not giving away assets that have substantially appreciated so that those assets will receive a basis step-up at death.
 - iii. Consider some directions about accessing digital assets in the event of incapacity or death.
 - b. With the demographic shift in the population and the aging of the baby boom generation, eldercare planning will take on a much greater significance. Planners should expect questions about when social security benefits should commence or be deferred and managing appropriate social security benefit strategies.

- c. Long-term care insurance will be an eldercare concern of many clients, as will Medicare benefits and Medicaid eligibility.

¶4215 Portability Must Be Addressed By Every Married Person

.01 Why Portability?

The primary motive for enacting portability of the federal estate tax exemption was simplifying estate planning for married couples. However, what often appears as simple may have a number of serious decisions associated with it. An issue all clients will face at all levels of wealth is whether to make the portability election at the death of the first spouse. Filing a federal estate tax return (Form 706) and making the election will be preferable in most cases.^{fn 2} Form 706 must be filed only when a decedent's estate exceeds the applicable exclusion (\$5,490,000 in 2017).

The assets of the decedent must be valued in any event for income tax basis purposes. The portability regulations allow a relaxed reporting procedure (when a return is not required but is filed for the purpose of taking advantage of portability) for filing the required federal estate tax return (Form 706) to list assets and their estimated approximate values rather than listing and supporting (with appraisals, for example) the values of each of the assets. Completing Form 706 will not be overly onerous and should not be especially expensive for the average client. If an estate tax return is not filed to make the portability election, the planner will want to obtain a waiver letter signed by the executor (and perhaps the beneficiaries).

If a federal estate tax return is required to be prepared in a decoupled state in connection with the filing of the state estate tax return, the incremental cost of filing the federal return will be even less onerous. ATRA made portability permanent, and there have been no legislative proposals to reverse that determination. The law allows portability of any unused applicable exclusion amount for a surviving spouse of a decedent who dies after 2010 if the decedent's executor makes an appropriate election by filing a timely federal estate tax return that computes the unused exclusion amount. The unused exclusion amount is referred to as the *deceased spouse's unused exclusion*, or the "DSUE amount." The surviving spouse can use the DSUE amount either for lifetime gifts by the spouse or for estate tax purposes at the surviving spouse's subsequent death. An individual can only use the DSUE amount from his or her *last* deceased spouse.^{fn 3}

Example 1: A and B are married. A dies. Form 706 is filed at A's death. B gets the DSUE as A's surviving spouse. Now B marries C. B can still use the DSUE from A for gifting or at death, as well as B's own applicable exclusion. B and C can also utilize C's applicable exclusion.

Example 2: Assume in the previous example that C dies while B is still living. Now, C is B's last deceased spouse. Any remaining unused DSUE that B obtained from A is now lost, since A is no longer B's last deceased spouse. If Form 706 is filed for C's estate, B may now obtain DSUE from C if any is

^{fn 2} IRC Section 2010 (c)(5).

^{fn 3} 26 CFR 20.2010-3(a)(3).

available. If C has no DSUE (perhaps C left the exclusion amount to children of a prior marriage), B has no DSUE available, and is limited to B's own applicable exclusion.^{fn 4}

There is a "use it or risk losing it" point to be made here. Gifts made by a surviving spouse will first use the DSUE amount from the last deceased spouse before using the surviving spouse's own basic exclusion amount.^{fn 5} If there is a subsequent marriage, the DSUE from the first deceased spouse remains available as long as the most recent spouse remains alive. If the second spouse dies, the unused DSUE of the first spouse is lost.

Every estate of a deceased married person should consider making a portability election. Even if the family assets are significantly below the federal estate tax filing threshold, it is possible that a windfall through good fortune or inheritance could occur in the future to increase a survivor's estate. The survivor could remarry a significantly wealthier person, making the DSUE of the deceased spouse a valuable asset. The survivor could sustain an injury leading to an unanticipated but significant financial recovery. Note that the GST exclusion is not portable. It must be used by every transferor—or lost.

The IRS announced in Rev. Proc. 2014-18 that a late Form 706 could have been filed to make the portability election for persons who died after December 31, 2010, as long as the form was filed by December 31, 2014. This late filing opportunity was not extended in the final portability regulations (Treasury Decision 9725, June 12, 2015). Instead, taxpayers who failed to make the election and now wished to do so had to request a private letter ruling and pay a \$10,000 user fee to be granted an extension of time to file the election. Important changes to this policy were announced in June 2017.

Since the end of 2014, hundreds, if not more, letter ruling requests were filed (and granted) under 26 CFR 301.9100-3 to extend the time to make a portability election where the decedent's estate was not otherwise required to file Form 706. Since the interests of the IRS would not be prejudiced by a late Form 706 filing and late portability election in such cases, relief was typically granted. See, for example, [LTRs 201725011, 201725013, 201725016, 201725018-201725021, 201725023, 201723025 \(June 26, 2017\)](#).

On June 12, 2017, the IRS issued Rev. Proc. 2017-34, IRB 2017-26 which provides a simplified method for estates of decedents that are not otherwise required to file Form 706 under IRC Section 6018(a) to obtain an extension of time to file Form 706 and elect portability, assuming certain criteria are satisfied.

The taxpayer must be an executor of the estate of a decedent who was survived by a spouse who died after December 31, 2010 and a U.S. citizen or resident at the time of death. A complete and properly prepared Form 706 must then be filed on or before the later of January 2, 2018, or the second anniversary of the decedent's date of death. The words, "FILED PURSUANT TO REV. PROC. 2017-34 TO ELECT PORTABILITY UNDER 2010(c)(5)(A)" must be written at the top of Form 706. Assuming these requirements are met, relief will be granted to extend the time to elect portability.

If a taxpayer does not meet the above requirements for relief, the estate can still request an extension of time to make a portability election by requesting a letter ruling and paying the required user fee. If a taxpayer had a letter ruling request pending on June 9, 2017 and the estate is within the scope of the

^{fn 4} 26 CFR 20.2010-3(a)(3).

^{fn 5} 26 CFR 25.2505-3(b).

Revenue Procedure, the ruling request file will be closed, and the user fee will be refunded. Portability is discussed at length in chapter 37.

.02 Simple Wills Are More Likely to Be Favored Now—Is That the Right Call?

With the portability provisions having been made permanent, married clients may be more inclined to proceed with fairly simple "all to spouse" will planning (the "I Love You" will), relying on portability to take advantage of both spouses' estate exemptions, rather than using more complicated bypass trust planning. Is that the correct decision from the planner's perspective? The lure of simplicity through portability and reduced planning costs may in some cases make the planning process more complicated to communicate fully to clients the advantages and disadvantages of planning alternatives. The advantages of simplicity and a stepped-up income tax basis at the surviving spouse's death may be a hard combination of perceived advantages to overcome.

.03 Why Still Consider Using a Bypass Trust at the First Spouse's Death in a Portable World?

The DSUE amount is not indexed for inflation. Is there concern about long-term appreciation between the first and second deaths? The bypass trust protects the surviving spouse's estate from being taxed on appreciation between the first and second death. If there has been appreciation that still leaves the survivor short of the federal estate tax threshold, consider using a trust and giving an independent person, such as the trustee or a trust protector, the right to grant the surviving spouse a general power of appointment over the assets in the bypass trust to force their inclusion in the spouse's estate, thereby gaining a basis increase with no estate tax liability.

Growth in the assets in a bypass trust is excluded from the estate of the survivor. Growth is not excluded from the gross estate of the surviving spouse where assets are received outright, or if they pass to a QTIP trust.

There is no portability of the GST exclusion. A bypass trust at the first death passing ultimately to skip persons can secure the benefits of the first decedent's GST exclusion.

There is an unlimited statute of limitations on values for purposes of determining the DSUE that begins to run from the time the first deceased spouse's estate tax return is filed. The statute of limitations does run on values if a bypass trust is funded at the first spouse's death. Recordkeeping must be maintained until the second spouse dies and that spouse's estate tax issues are resolved. The unlimited statute of limitations applies only to the proper calculation of the decedent's DSUE amount. The federal estate tax liability of the decedent's estate cannot be reopened once the standard statutory three-year statute of limitations has run.

The DSUE of the first spouse is lost if the surviving spouse remarries and the new spouse predeceases the surviving spouse. If the second deceased spouse leaves behind little or no unused exclusion, the surviving spouse has missed a potentially valuable opportunity. The surviving spouse can use the decedent's DSUE for lifetime gifting, and the ordering rules provide that the DSUE is used by the survivor before the survivor's own exclusion.

The state exemption amount is not portable (except, to date, in Hawaii, which has made its state estate tax exclusion portable). In a decoupled state, the client may, as a minimum, want to fund a bypass trust with the amount of the state death tax exclusion.

A bypass trust could be funded with discounted hard to value assets when there may be a low audit risk at the first spouse's death where there is no federal tax liability.

The use of a bypass trust can avoid unequal treatment that might otherwise occur in a blended family situation (where at least one spouse has children by a prior marriage). The presence of a blended family situation may be one of the more compelling reasons to advise a client to consider planning that is somewhat more complex, but essentially more protective of family members. Many clients are in blended family situations. According to statistics,^{fn 6} more than 29 million parents (13 percent) are also step-parents to other children, and 40 percent of married couples with children in the United States are step-couples. In such cases, at least one partner has a child from a previous relationship; this includes full and part-time residential stepfamilies and those with children under or over the age of 18.

In a blended family situation, substantial inequities may result if the credit shelter approach is not used. Potential problems can arise if there is hostility between the executor (perhaps a child by the decedent's prior marriage) and the surviving spouse's family. The executor may try to extort consideration for making the portability election, or simply refuse to make it. The executor may be unwilling to bear the expense of filing an estate tax return to make the election. (Where this may be a concern, consider drafting the will to provide that the executor would not be required to make the portability election unless the surviving spouse pays the expenses of filing the estate tax return.)

If assets are left outright to the surviving spouse, the spouse may give or bequeath the assets to persons other than the first decedent-spouse's descendants (or may favor some over others of those descendants in ways that the decedent-spouse would not have wanted). If the survivor has children of his or her own, they become the more likely beneficiaries where the spouse is entirely free to act. If the survivor remarries, there is the risk that the new spouse will benefit from the decedent spouse's property.

The first decedent may use a QTIP trust to control the ultimate disposition of the property. However, even if a QTIP trust is used, the surviving spouse may be able to take steps that would significantly disadvantage the decedent-spouse's descendants. For example, that spouse could request and receive principal distributions from the trust, or make large lifetime gifts using the DSUE amount of the first spouse to die, leaving no exclusion amount to apply against the marginal tax generated by the QTIP, or could gift the income interest or be entitled to a substantial estate tax reimbursement at the second death if there is a taxable estate which then includes the QTIP trust assets under IRC Section 2207A—even though the assets are "protected" in a QTIP trust.

Consider using a premarital or post-nuptial agreement in which the parties agree that the surviving spouse will make certain that the decedent's executor makes the portability election. Trusts provide a variety of important benefits, including asset protection, management, and restricting transfers of assets by the surviving spouse (although those benefits can also be utilized with portability by using a QTIP trust rather than a bypass trust). The client should consider carefully whether the surviving spouse is capable of managing assets. Is there fear of the spouse's remarriage or a concern about undue influence? Spend-thrift provisions, providing that trust beneficiaries cannot sell, pledge, or encumber their beneficial interests in the trust, should be included as a protection against creditors. The possible future incapacity of a spouse or descendant can be addressed through a trust. If appropriate, special-needs provisions can be asserted to guard against the trust assets being used for payments that could otherwise come from public assistance.

^{fn 6} www.pewsocialtrends.org/2011/01/13/a-portrait-of-stepfamilies/.

.04 Some Planning Situations Favor the Use of Outright Transfers to the Spouse and Reliance on Portability

There are several instances in which the use of outright transfers to the spouse may apply, including the following:

- The client insists on a strong desire for simplicity and wants nothing to do with any trusts.
- The spouse is an entirely competent individual who can manage assets capably.
- The spouses are in a first and only marriage, or it is not a first marriage but there are no children existing by a prior marriage of either spouse.
- The clients indicate much more interest in securing a basis step-up than getting future appreciation out of their estates, especially if they believe that any such appreciation will still leave them well short of the applicable exclusion amount.
- The clients own a residence or other assets that would be difficult to administer in a trust.
- The additional administrative and income tax costs of having assets in trust, such as the additional income tax and net investment income tax that may apply to undistributed trust income, outweigh the potential tax and non-tax advantages of trusts. In 2017, trusts with income in excess of \$12,500 have that income taxed at the highest tax rates—a threshold substantially below the threshold that individuals, whether single or married, must address.

¶4220 Income Tax Planning—The New Essential Planning Focus

.01 Income Tax Planning Will Replace Transfer Tax Planning as a Primary Focus

Income tax issues will overtake transfer taxes as the primary area of planning concern for persons of moderate wealth in an effort to minimize current income taxes and maximize the basis step-up available on death. For those clients domiciled in non-estate tax states, which are states that are not decoupled, income tax considerations will totally replace estate taxes as the tax planning focus of estate planning.

A key issue for clients in this range will be preserving a step-up in basis at the death of each spouse. For many clients, a potentially higher capital gains tax in the future, resulting from loss of a second basis step-up for assets that might be held inside a bypass trust, may be an unacceptable choice. The potential 20 percent federal capital gains tax, supplemented perhaps by a 3.8 percent net investment income tax, and possibly state income taxes, could result in some clients facing a capital gains rate approaching 30 percent or more.

A simple will or revocable trust leaving all of the assets outright to the surviving spouse will achieve a basis adjustment at the deaths of both spouses.

If a trust is desired for blended family protection or for management or asset protection purposes, using a QTIP trust or giving the surviving spouse a testamentary general power of appointment will allow a basis adjustment to take place at the surviving spouse's death.

Lifetime gifting of appreciating assets may no longer be recommended as a planning technique. For persons of moderate wealth, it will be more advantageous to retain appreciating assets and leave them to

heirs, thereby passing on the highest tax basis at death.^{fn 7} Had the assets been given away during one's lifetime, the basis to the donees would be the carryover basis of the donor,^{fn 8} most likely leading to more capital gain and net investment income tax liability for the donees.

.02 New Planning Considerations Will Focus on Income Tax Issues

A very significant part of the value of the moderate wealth client's estate presently consists of appreciated assets. Since these assets will not be subjected to transfer tax, the avoidance of both capital gain taxes and net investment income taxes and passing assets with a stepped-up basis becomes a primary concern. Traditional estate planning techniques used to reduce the value of assets on death, such as family limited partnerships and limited liability companies formed to create valuation discounts for estate tax savings, may be counterproductive to planning in the post-ATRA planning environment.

In a sense, estate planning is upside down from what has been traditionally favored. For persons of moderate wealth below the federal estate tax exclusion, the goal of planning is to now include everything possible in an estate at maximum value. This is quite a change from the traditional notion of exclude as much as possible, and minimize the value of whatever must be included.

This change in thinking must be embraced not only by the client, but also by the planner who must guide the client. It is an essential consideration in much of what must be done to plan estates effectively in the post-ATRA world. Practitioners have fought for many years to maximize valuation discounts for lifetime gift transfers and for the value of interests in any assets included in a client's estate. A key component of the documentation of many gift plans, and estate tax returns, has been the formal appraisal of the discount applicable to the non-controlling interest in an asset or entity involved. The IRS has resisted these discounts and often challenged them as excessive. With the majority of clients no longer facing a federal estate tax, claiming valuation discounts will provide no estate tax benefit whatsoever, but will reduce the value of the basis step-up and thereby increase the future capital gains costs the client's heirs will face.

Accordingly, creating asset transfers that generate significant discounts may no longer be desirable. Claiming discounts on transfers at death for minority interest or lack of marketability will only serve to reduce the value of property inherited by heirs from a decedent, and the basis of that property to the heirs. Where there will not be any federal estate tax at the decedent's death, such discount claims are counter-productive.

It is possible that the practitioner and the IRS will reverse roles in these situations, with the practitioner arguing for lower (or no) discounts. This issue actually may favor the taxpayer, since if an estate is well below the taxable threshold for federal estate tax, it may not be reviewed carefully, if at all by the IRS. Where that is the case, the IRS will not be in a position to challenge the taxpayer's value as too high and argue that a discount should be claimed.

Consider whether there are provisions in the governing documents of an entity (such as a partnership agreement for a partnership, shareholders' agreement for a corporation or operating agreement for an LLC) that were crafted to allow or encourage discounting (such as minority interests, preferred issues, or

^{fn 7} IRC Section 1014.

^{fn 8} IRC Section 1015.

below fair market value puts and calls). Where these are present, consider amending the governing document to minimize or eliminate the discounting opportunity.

This planning fix may not be as simple as it appears, since such a suggested revision may not be agreeable to other members of the entity involved if their estates are large enough to face a federal estate tax. It is possible that some, but not all of the members of the entity reside in a decoupled state where the discounting opportunity would be favorable. In making any changes to the governing document, consideration should also be given to not reducing asset protection benefits or taking away important non-tax considerations, such as a right of first refusal to keep a family asset in the family.

The new post-ATRA planning environment for persons of moderate wealth will give rise to a new approach to appraisals of property owned by a decedent. Nothing will change for persons whose estates are over the federal estate tax exclusion—they will continue to seek appraisals to minimize values that will have the effect of minimizing federal estate tax (and state estate tax, if applicable). For those persons whose estates are under the federal estate tax exemption and who are domiciled in a state that does not have a state estate or other death tax, maximizing the valuations of all estate assets so long as the person's estate remains under the federal exemption will provide the decedent's heirs with the most favorable income tax basis or capital gains result at no estate tax cost. For those persons whose estates fall under the federal estate tax exemption and under their decoupled state's estate tax exemption, it makes sense to maximize the valuations of all estate assets so long as the person's estate remains under the state estate tax exemption. This will provide the decedent's heirs with the most favorable tax basis or capital gains result at no estate tax cost.

The most difficult issues will arise for those persons whose estates fall under the federal estate tax exemption but over their state estate tax exemption. What will be the marginal tax impact of the state estate tax compared to the possible capital gains tax savings that high values (and high income tax basis) will result to the decedent's heirs? The heirs may be in the 20 percent or 23.8 percent capital gains tax bracket. The highest estate tax bracket for most states with a decoupled estate tax is presently 16 percent—except Washington, which has a top bracket of 20 percent. It may be intuitive to do everything possible (lifetime transfers or discounting) to reduce the impact of the immediate estate tax; however, the counterintuitive planning of maximizing values at death—especially looking at the likely state estate tax bracket compared to the federal and state income tax impact—may be the better long-term plan.

This latter consideration involves the planner in further issues, such as the likely disposition by the heirs of the assets owned by the decedent. Will they be immediately sold by the heirs, suggesting the capital gain saving is a primary consideration? Instead, will they likely be held long-term by the heirs, possibly for the duration of their own lifetimes, suggesting that saving transfer tax at the first death should be the primary consideration? Considerations of marginal tax rates, anticipated holding periods, whether tax-free conversion options exist (such as an IRC Section 1031 tax deferred like kind exchange) will all have to be factored into the planning process.

Deciding to disregard discounts on transferred property will be a more difficult issue in decoupled states, where the value of property at death will have a transfer tax impact. Focus on transferring possibly discountable property such as minority interests in S corporations, limited liability companies, and family partnerships to family members in lower income tax brackets so that the ongoing income can be earned there. Where the kiddie tax is not a factor, this planning can have an immediate benefit, and where the kiddie tax is applicable, the law forces the child's income tax liability to use the parents' tax rate. Persons outside of the kiddie tax range may be in the 0–15 percent tax bracket for qualified dividends and capital gains on the sale of property.

However, this suggestion may introduce complication and possible objection into the discussion. Is the transferred property income producing so that it makes sense to transfer the income-producing potential to persons in lower income tax brackets? Conversely, is the property not especially income producing but of low basis to the donor, so that the donor's transfer of the property will deliver a low carryover basis to the donee with little income potential but a possibility of a substantial future capital gain? The latter is not the ideal plan in the post-ATRA planning environment.

Another planning tool to consider in the quest for higher income tax basis adjustments is the IRC Section 754 election. This election is available for partnerships and LLCs taxed as partnerships. When a partner or LLC member dies, his or her heirs receive the partnership or LLC interest of the decedent with a basis equal to the date of death value of such interest, according to IRC Section 1014. That is the *outside* basis of the partnership interest. The basis of the partnership or LLC in its own assets (the *inside* basis) is not affected by the death of the partner or member. Accordingly, sales of low basis partnership or LLC assets will be taxable to the new heir partner—even though that person may have a high outside basis.

That is where the 754 election comes in. If the entity makes an election to have Section 754 apply, the inside basis of the decedent partner or member's share of the entity's assets is also stepped-up. This allows the heirs to apply the higher basis to the realization of the entity's income, and very possibly avoid income taxation. The partnership or operating agreement may provide for the 754 election to be made. If it is silent and planning suggests making it would be helpful to the heirs of any partner or member who dies, amend the appropriate agreement as soon as possible. This may be preferable to awaiting a death, then possibly having to negotiate making the election. Taking action before anyone dies may be the best strategy.

.03 Special Planning Concerns Where Trusts Are Used

Even where trusts are favored for all of the reasons discussed (management, asset protection, and blended family concerns), retaining income within a trust is not a favorable planning decision. Due to the highly compressed income tax rates for trusts (trust income in excess of only \$12,500 in 2017 is currently taxed at the highest marginal rate of 39.6 percent, the 20 percent marginal rate on long-term capital gains and qualified dividends is reached at \$12,500, and that is also the threshold for application of the net investment income tax), distributing trust income currently can be tax advantageous.

Compare the compressed rate threshold for trust distributions to the thresholds for individual taxpayers—single persons reach the net investment income tax threshold at \$200,000 of adjusted gross income and the 39.6 percent and 20 percent thresholds at \$418,400 of taxable income in 2017, and married persons filing jointly reach the net investment income tax threshold at \$250,000 of adjusted gross income and the 39.6 percent and 20 percent thresholds at \$470,700 of taxable income in 2017.

Although distributing income is a favored planning alternative, it may not always be an available option. What does the governing instrument require with respect to distributions? What about state law? What does the governing instrument or state law say about the distribution of capital gains to any current income beneficiary? As a general rule, capital gains are defined as and allocated to trust accounting principal, and are not readily distributable to income beneficiaries.

In preparing new trusts, it is suggested that the trustee be at least given discretion to distribute capital gains to the income beneficiaries. For existing trusts, look carefully at state laws. Is there a "power to adjust" provision allowing a trustee to distribute capital gains if not strictly prohibited by the governing instrument? Is there authority granted to a trust protector or other fiduciary to modify the document to al-

low such distributions? If not, consider decanting the trust to a new trust with broader provisions that would permit inclusion of capital gains in trust income. With all of that said, however, planning should not lose sight of why a trust was created in the first place. Appropriate consideration must be given to any relevant non-tax factors that weigh against making a distribution, prior to distributing trust income solely to save income taxes.

.04 Consider a Sprinkling Trust to Maximize Income Shifting Opportunities

A marital deduction qualified trust (QTIP or general power of appointment) must, of course, limit income distributions exclusively to the surviving spouse. Where a trust is created that is not a marital deduction trust (a bypass trust or any other trust desired by the grantor), consider including a broad list of current or permitted beneficiaries—possibly all of the descendants of the creator of the trust. This may provide trustees who are given the appropriate discretion to make distributions a larger pool of potential distributees in lower income tax brackets.

Where appropriate, think of each permitted beneficiary as a bucket to be filled from the trust without exceeding the thresholds of the lower tax brackets of these beneficiaries, with the goal of minimizing the overall impact on the family's income taxes. Tax planning is not the only issue here. Are current distributions by the trustees to selected beneficiaries appropriate? Will the beneficiaries be honest in reporting their income situation to the trustees? How will the beneficiaries behave if some receive more generous distributions from the trust than others? View the income distribution opportunity as just that—an opportunity, not an absolute requirement created by otherwise adverse tax laws.

.05 Take Advantage of the 65-Day Rule for Complex Trusts

An election is available under IRC Section 663(b) to have an amount paid or credited to a beneficiary within the first 65 days of a tax year to be treated as if paid or credited during the estate or trust's prior tax year. This election gives the trustee the opportunity to use information as to the income status of all beneficiaries for the prior year in planning a distribution to minimize overall family tax burdens.

This election can be used in a number of helpful planning situations, such as shifting income to a lower bracket taxpayer, shifting income to avoid an underpayment of estimated taxes by the trust, or moving income to a beneficiary to take advantage of a beneficiary's net operating loss or excess capital loss.

Most if not all of the income of a trust will be net investment income subject to the 3.8 percent tax when the 2017 threshold of \$12,500 is passed. Therefore, the trustee may consider taking advantage of the election to make income distributions in order to reduce the trust's exposure to the net investment income tax.

The 65-day election is made by checking the required box on Page 2, Other Information, Line 6 of Form 1041 for the trust (or estate, if applicable).

.06 Take Advantage of a Section 529 College Savings Plan

The advance funding of five years of IRC Section 529 plan contributions—that is, the permissible making of five years of annual exclusion gifts to a Section 529 plan in the current calendar year with no detriment for gift tax purposes—has long been used as part of a gift strategy to shift assets out of the donor's taxable estate. If the donor dies within the five-year period, there is a recapture and inclusion in the donor's estate of all or a portion of the gifts made for transfer tax purposes, representing the "unused" years of the gift tax present interest exclusion. Otherwise, the Section 529 plan holder is not subject to

estate tax inclusion. For those persons who will not face a federal estate tax, the potential recapture is of no consequence. However, with the gifted assets earning tax-deferred or excluded income within the Section 529 plan, there are many years of potential income tax savings available here. This makes the Section 529 contribution all the more appealing in the current planning environment.

¶4225 What Should Be Done With Life Insurance?

.01 Why Was Life Insurance Acquired?

Persons of moderate wealth will no longer need life insurance to fund the federal estate tax. If that was the only reason life insurance was acquired, and if the client sees no other benefit in retaining it, the client may opt to cancel the policy. There is anecdotal evidence that many persons have done just that in the post-ATRA planning environment.

If life insurance was acquired for more traditional planning reasons, such as payment of death-related expenses or financial security for heirs or education funding, and its central focus was not just to be a source of death tax payment, then it remains a viable asset for the purposes acquired. Of course, if the traditional reasons have changed, the planner should explore the continued viability of life insurance with the client.

.02 The Role of Life Insurance in Any Estate Plan

Life insurance is an asset possessed by virtually all clients to some extent. Assume that there is no need to retain life insurance to pay federal estate tax liabilities. What should be discussed with the client as to the ongoing role of life insurance in an estate plan?

The core reasons that most persons acquire life insurance never included using it as a source of tax payment. Tax payment was always a secondary objective, and one more appropriate for high net worth families, not families of moderate wealth. The post-ATRA planning world has not changed the reasons most people acquire life insurance, which include the following:

- To create an estate for the financial support and security of a family in the event of premature death
- To provide financial support for a surviving spouse and educational funding for young children
- To provide a readily available source of liquidity to pay debts, address funeral and administration expenses, fund bequests, and, where necessary, fund buyout agreements and other possible contractual obligations

There may be a need to preserve permanent life insurance to pay for state estate tax liabilities for those clients domiciled in decoupled states. This may not be a strong motivating factor for clients who may argue that a surviving spouse may move to a non-decoupled state, or that the state of current domicile may eliminate its estate tax. Some clients may decide that life insurance is the easy way to pay for state estate tax liabilities without doing other more complex planning and maintain a policy for this purpose. Others will embrace the concept of comprehensive planning to avoid state estate taxes and decide that life insurance protection for this purpose is not necessary.

Despite the client's best efforts to engage in comprehensive planning, it is possible that not all assets owned by a decedent will achieve the optimal basis step-up. In such a situation, life insurance policies

benefitting the client's children may be used to pay for the income tax cost the children will bear when the low basis assets are acquired by them and subsequently sold. It may be advantageous for non-tax reasons to gift some low basis assets during lifetime and accept the carryover basis result. The life insurance payable to the heirs at death can provide a source of income tax payment if these assets are liquidated. Planning may have favored a bypass credit shelter trust for a surviving spouse that resulted in a basis step-up at the first death, but not at the second death when the children inherit property still bearing the first decedent's date of death basis. The sale of the trust assets by the children may result in capital gains to them.

Life insurance can be used to provide direct bequests to children from a prior marriage. This may satisfy the client's desire to provide for children without having to address the blended family concerns of trusts or dividing assets between the current spouse and the children of an earlier marriage. Insurance left to the children so that the balance of the insured's estate can be left outright to the surviving spouse may be advisable both to maintain simplicity and achieve a full basis step-up for the assets passing to the spouse.

Consider recommending the acquisition of additional life insurance as an excellent income tax shelter. Permanent life insurance has significant income tax advantages as the result of the higher income tax rates and the 3.8 percent tax on net investment income. The build-up of cash value within a permanent life insurance policy is not considered net investment income and is not taxable to the policy owner. For the client in a high income tax bracket unconcerned about federal estate taxes, the favorable income tax treatment of life insurance (the tax-free build-up of cash values and the ability to access that cash value in a tax-advantaged manner through policy loans) may become an attractive planning option.

Access to cash values within a life insurance policy is possible even if the policy is held in an irrevocable trust, assuming the trust is properly drafted. Language can be included in an irrevocable trust authorizing an independent trustee to borrow the cash value and distribute it to the trust beneficiaries. Such distribution will be income tax free to the recipients. If one spouse is the insured who creates the trust and the other spouse is the primary trust beneficiary, the borrowing and distribution by the trustee can be for the benefit of the beneficiary spouse—with the insured spouse having no adverse tax effect from the availability of funds to the marital relationship. So long as the withdrawals do not exceed the income tax basis in the policy based on the premiums paid by the insured, withdrawals to the extent of the income tax basis are not subject to income tax. If additional cash is needed beyond the income tax basis, such cash should be withdrawn as policy loans to avoid income tax implications. For these income tax rules to apply, the policy must not be characterized as a modified endowment contract and should not be surrendered. Should the insured die with the policy in force, any cash value above the income tax basis not previously withdrawn is also not subject to income tax, even if the policy is then characterized as a modified endowment contract.

With the concern about the federal estate tax alleviated for the moderate wealth taxpayer, there is less reason to feel compelled to transfer a life insurance policy to an irrevocable trust. Retaining ownership of the policy allows the policy owner to access policy features such as long-term care riders or other benefits, and to withdraw cash values as needed without having to look to trustees or strain the language of a trust to secure a withdrawal from the policy.

As many life insurance sales persons are quick to point out, compare the return generated by a permanent life insurance policy with other investment returns realized by a client through his or her portfolio. The insurance policy return has exceeded interest rate returns on bank and money market funds, is often favorably compared with average dividend yields, and, depending on investment performance, may be favorably compared with the client's portfolio growth. Certainly acquiring or retaining some life

insurance as part of a person's investment profile is both a good hedge against the volatility of other investments and now, more than ever, a tax-favored investment in the post-ATRA world.

.03 Use Life Insurance More Aggressively in Planning

Consider the situation of a client who created and owns a successful business. Pre-ATRA planning would have suggested giving away pieces of the business during lifetime to avoid federal estate tax on appreciation and to secure minority interest and other discounts as the gifts are made. Now, consider leaving the business in the hands of the owner to assure a stepped-up basis on death, especially if it is likely to be retained by the surviving family members. To protect against any possible state estate tax, have the client acquire a life insurance policy that could be used, if necessary, to cover the state estate tax liability, allowing the business interest to pass untaxed to the intended beneficiaries.

Similar considerations favoring life insurance ownership would apply if the asset owned by the senior family member was appreciated real estate, rather than a business interest. Where family business succession planning is a potentially difficult issue if one family member is an appropriate successor to the business interest and other family members are loved equally but not seen as appropriate business successors, using life insurance to equalize benefits among heirs becomes an even more attractive option when the life insurance proceeds left to heirs will avoid estate tax. The business interest can be held until death, thus assuring a date of death basis to the heir and be specifically bequeathed to the intended beneficiary. If other children are residuary beneficiaries of the estate and named beneficiaries of life insurance policies, there is a greater likelihood that equalization among beneficiaries can be achieved absent concerns about whose share of the estate will be reduced through tax payments.

.04 What Should Be Done With Life Insurance Trusts?

If the client's estate is approaching the level where state or federal estate tax liability is becoming a possibility, an irrevocable trust to hold life insurance policies and remove them from the taxable estate remains a viable planning option. If the traditional non-tax reasons for using a trust are present, an irrevocable trust to hold life insurance policies remains an excellent planning tool. Life insurance is typically an easy asset to persuade clients to gift, since they do not see themselves enjoying the benefits of the proceeds of the policy, and absent a cash need, generally do not plan to withdraw the cash value. There is no carryover basis or basis step-up issue for a life insurance policy, so there is no detriment in giving it away during the client's lifetime.

In smaller estates, consider whether there is appropriate justification for a life insurance trust. There are legal, administrative, and tax preparation costs associated with a trust that may not be necessary. Absent the need for the protective benefits of a trust, consider just giving the life insurance policies to heirs while the insured is alive. The insured can keep making premium payments as an annual gift, but the policy will be removed from the insured's estate along with any issues of probate, potential claims of the estate's creditors, and the costs and administrative burdens of dealing with the policy after the insured's death.

The clients may have purchased survivorship life insurance and placed the policy into a trust. The purpose of the insurance was specifically to have a fund to pay federal estate taxes at the second death of a married couple. In light of the increased applicable exclusion and portability, the insurance may no longer be needed for that purpose. What should be done with the policy and the trust that holds it?

One answer would be to cancel the policy and have the trustee receive the cash value and administer it in accordance with the terms of the trust. That is an easy solution to suggest—but attention must be paid to the terms of the trust and the responsibilities of the trustee.

Other options might be to consider a tax-free exchange of the policy under IRC 1035 for a qualified annuity or another insurance policy that could offer more attractive terms (such as faster cash value build up that can be withdrawn) than the second-to-die policy offers. Alternatively, keep the existing policy but stop paying additional premiums and make the policy a paid-up policy based on the premiums paid to date.

Consider the status of the life insurance policy in the context of the annual administrative ritual of the trustee's receiving the premium notice, receiving a check from the insured, and addressing the annual Crummey notice issues. Assuming the client followed the correct Crummey notice procedures, is it necessary to continue to do so? In the worst case, an insurance trust will omit all references to rights of withdrawal and Crummey powers. Here, the premium payments by the insured will be viewed as future interest gifts, and a gift tax return will be required to be filed. Given the applicable exclusion and portability, the typical client will never have to pay gift tax or other federal transfer tax, so dispensing with the "Crummey dance" may be administratively favored with no adverse consequence.

If there is a desire to respect the Crummey withdrawal opportunity and avoid the gift tax return filing, consider a written waiver of all future withdrawal rights. Alternatively, it has been suggested that the client sign a one-time waiver stating that all Crummey rights in the future need be only given verbally. If this is done, be sure the trust document permits notices to be given verbally. Although these alternatives may not have the blessing of established law or IRS guidance, it can be argued that these suggestions are reasonable compliance with the Crummey procedures—and perhaps most importantly, if there will not be any transfer tax issues, no one will ever have to address any of these issues. Another suggestion could be to fund the trust with enough cash to pay the annual premiums for a number of years and ignore the present interest gift tax concerns that the Crummey power is intended to address. If transfer tax will not be an issue for the client, the excess gift to fund the trust will not prove to be a problem.

Include provisions in a life insurance trust to have it classified as a grantor trust. If the trust will own assets other than cash and life insurance, being deemed a grantor trust will allow the tax-free substitution of properties. Even if the trust will hold only life insurance, grantor trust status is still desirable as the trust will not be subject to the transfer for value rule if there is any transfer of the life insurance policies, even if the transfer is made for consideration.

¶4230 What Should Be Done with Retirement Plan Benefits?

The surviving spouse has always been the favored beneficiary of a decedent's retirement plans. A roll over of the decedent's qualified plan or IRA to a surviving spouse enjoys the marital deduction to avoid the estate tax and special rules to defer the income tax on the roll over. Where possible, spouses have typically favored a distribution of a retirement plan to the surviving spouse to take advantage of these tax benefits.

A problem has sometimes arisen in the larger taxable estates where the decedent's retirement plan is one of the major assets of the decedent's estate. In these situations, the only way to fund a bypass trust reasonably is to use the decedent's plan. When this is done, the applicable exclusion protects the plan from estate tax, but the inability to accomplish a spousal rollover results in immediate commencement of income taxation of the plan benefits based on the minimum distribution requirements for the oldest trust beneficiary.

In the post-ATRA planning world, where the decedent's estate will not be subject to taxation, and portability will allow the bypass trust to be avoided, the recommended planning strategy would be to leave the retirement and IRA benefits directly to the surviving spouse to gain the advantages of income and estate tax deferral at the first death, and then to rely on portability to be able to utilize the deceased spouse's unused estate tax exclusion amount at the surviving spouse's subsequent death.

The IRS has eased the concerns about making certain that the rollover to the spouse occurred within sixty days of receiving the distributed funds with the issuance of Rev. Proc. 2016-47 (August 24, 2016). If the sixty-day rollover is not completed in a timely fashion, it may no longer be necessary to apply for a private letter ruling and pay a \$10,000 user fee to "fix" the problem. A person may self-certify that the 60-day period may be waived, and the IRS has issued a form letter to use in the process.

Three conditions must be satisfied for self-certification, namely, (1) there can be no prior denial by the IRS for a waiver, (2) the reason for the late rollover must be one of 11 reasons listed in the form letter, and (3) the funds must be redeposited in an IRA account as soon as practicable after receipt—30 days is indicated as a "safe harbor" here. The 11 reasons to allow self-certification include: financial institution error; misplaced check that was never cashed; deposit of the check mistakenly in an account believed to be an IRA account; damage to principal residence; death in the family; serious family illness; incarceration; restrictions imposed by a foreign country; postal error; distribution was made due to an IRS levy, now recovered; the distributing company did not provide information to the receiving company.

The IRS can audit a return and decide the self-certification is not appropriate, leading to the reminder that the safest way to accomplish a rollover is through a direct trustee-to-trustee transfer.

As in any recommendation of an outright transfer to a spouse, the issues addressed earlier regarding management, creditors, or blended families should also be considered in the context of a retirement plan distribution. Where the protection of a trust is desired, the retirement plan assets could be left to a QTIP Trust, but such a designation involves a fair amount of administrative and drafting complexity^{fn 9} and will most likely result in a faster required withdrawal of plan assets that will accelerate the income tax liability.

Distributions from a retirement plan are income in respect of a decedent, so there is no basis step-up when the decedent dies. The distributions are not considered net investment income, so they are not subjected to the 3.8 percent net investment income tax. However, the withdrawal of funds from a traditional IRA or qualified retirement plan account is taken into account in determining if the AGI and taxable income thresholds have been reached. Consider converting a qualified plan or traditional IRA to a Roth IRA to both avoid having withdrawals be included in AGI (beyond the year of the actual conversion) and to avoid required minimum distributions if not needed.

¶4235 Changes in the Way Title to Property Should Be Designated

Traditional pre-ATRA planning for a married couple, especially in a common law state which does not enjoy the automatic split of marital property which is the law in community property states, always involved an uncomfortable discussion about how assets should be titled—ideally an amount of assets in the name of each spouse up to the amount of the applicable exclusion. This was recommended so that the estate of the first spouse to die could take full advantage of the funding of a bypass trust. If this was

^{fn 9} Rev. Rul. 2006-26.

not done, and the spouse with less property died first, there would be a shortfall in the available exclusions over two deaths, since an insufficient amount of property was owned by the poorer spouse who had the bad fortune of being the first to die.

As the exclusions grew in size, it became increasingly difficult (as well as burdensome and expensive) for many couples to retitle assets, such as real estate holdings or businesses. The spouse with the larger share of assets often was reluctant to retitle his or her holdings to the name of the less propertied spouse. Assets in joint names were recommended to be retitled as tenancies in common—a recommendation not always embraced by skeptical spouses. Even if there was willingness to make transfers, some assets could not be retitled, such as a business involving professional licenses or a family business with prohibitions on transferring interests outside the lineal family members.

Portability has made a great change here. Regardless of the title of assets at the first death, portability will grant the surviving spouse the deceased spouse's unused exclusion (DSUE) of the first decedent spouse, even if all of the assets were titled in the name of the surviving spouse. There is no longer a federal estate tax-driven need to retitle assets to divide them between the spouses. That said, retitling at least to some extent may be useful and helpful to meet the state estate tax exclusion in a decoupled state.

Title to property can now be used to address other important goals free of the tax-driven need to fund the bypass trust. Is one spouse an asset protection risk? Is a spouse involved in an activity where there is a possibility of malpractice or other liability claims? Where this may be the case, titling assets in the name of the lower risk spouse does not pose a tax problem where portability will preserve the DSUE of the first decedent, regardless of who is the property owner.

Controversy often arose about retitling assets that one spouse was gifted or inherited from his or her own family or brought to the marriage having earned or acquired them prior to the marriage. Where these assets were arguably safe from matrimonial claims of equitable distribution before retitling, changing the title suggested a gift and a withdrawal of the protection from separate property or equitable distribution claims. Portability makes these transfers unnecessary to gain a tax advantage. The advantage exists without the need for retitling.

Title to a person's home raises several issues that may be more easily addressed in the post-ATRA planning environment. Property held jointly between spouses as tenants by the entirety generally is given preferential asset protection treatment under most state laws. The creditors of one spouse cannot reach the property while the other spouse is alive. The choice of retitling this property to gain the benefit of the bypass trust versus losing the asset protection benefit was often difficult. The post-ATRA combination of the increased applicable exclusion and portability allows the client to avoid making any change in the form of ownership here. What if the clients took the advice of the planner several years ago and removed a home from tenancy by the entirety status and conveyed it to separate tenancy in common ownership? It is suggested that the clients reconvey the tenancy in common property to joint names and reestablish the tenancy by the entirety asset protection if permitted by state law. Transfers between spouses bear no gift tax liability here.

Where a state offers special property tax and other benefits if a homestead exemption can be claimed, not disturbing the title to property qualifying for such an exemption is generally a good idea. Some states (notably New York and California) have become especially aggressive in trying to extend the reach of their income taxes to persons who maintain an abode in those states, even if the persons are clearly domiciled elsewhere. Not having to be concerned about preserving a piece of title to property to qualify for federal tax benefits will allow persons to concentrate on issues such as domicile designations to make certain that they do not run afoul of aggressive state income tax rules.

Title considerations in jurisdictions outside of a person's true domicile may also trigger ancillary probate concerns. To avoid the cost and inconvenience of ancillary probate, consider owning such properties in a revocable living trust. That will avoid probate, but still gain the trust beneficiaries a date of death value as the basis when the trust grantor dies, because the property will be included in the deceased grantor's estate.^{fn 10}

Did the client create a qualified personal residence trust (QPRT) that still has years to run? If the client has an ultra-high net worth and is likely to be a federal estate taxpayer, leave the QPRT alone. For the client of moderate wealth, however, having a QPRT may no longer generate any needed tax benefit. Instead, if the client successfully outlives the QPRT document's terms, there will not be any estate inclusion, and the heirs will take a carryover basis from the decedent. This may now be viewed as a detriment to family tax planning.

Consider having the client continue to live in or use residence without paying any rent, despite the QPRT document's terms, once the term has expired, or find another retained interest that will place the QPRT property in the decedent's estate under IRC Section 2036. Have the grantor purchase the residence from the trust. Have the beneficiaries exercise a prohibited commutation that will void the QPRT qualification. With no concerns about federal transfer tax liability, suggestions such as these to gain the potential basis step-up from estate inclusion are worthy of consideration.

Several caveats should be raised here. First, if the client resides in a decoupled state, be careful about suggesting more assets to be included in the client's taxable estate. Balance the impact of state estate tax imposition versus capital gains (and possibly state income tax) savings. It may be relevant for tax planning if the QPRT involves a residence that will be sold by the beneficiaries as soon as possible after the grantor's death, or a residence such as a treasured vacation home that is not likely to be ever sold. If a residence will qualify as the principal residence of someone—the gain exclusion of IRC Section 121 may be available (if the criteria are satisfied) to avoid income tax concerns here. Consider the requirements of the trust, the obligations of the trustees, and the possible concerns of the beneficiaries. If the trustee is willing to act to break up the QPRT, be sure all beneficiaries of the trust are in accord, preferably by receiving an acknowledgement in the form of a written consent.

¶4240 Address the Status of Limited Liability Companies (LLCs), Family Limited Partnerships (FLPs), and Sales to Defective Grantor Trusts

In many cases, these entities (LLCs and FLPs) were formed to remove assets from the transferor's estate and obtain a valuation discount in doing so. In the post-ATRA upside-down planning world for the client of moderate wealth, the estate exclusion and the discount are both negatives.

The removal of the asset from the estate eliminates the basis step-up. The discounted value used in transferring the lifetime interest arguably also reduces the value of the asset at death—another limitation of the basis step-up. Over the last 20 years, there have been numerous cases litigated in the United States Tax Court addressing issues of whether retained rights and interests in family businesses should force inclusion in a decedent's estate. Perhaps taxpayers should look to the arguments raised by the government in these cases, and concede the government position is correct—and embrace it. File an estate tax

^{fn 10} IRC Section 2038.

return (non-taxable in the post-ATRA world of portability and large exclusions) and concede the inclusion of the value of the enterprise in the decedent's estate.

Should the entity be dissolved? Possibly, but there may be appropriate non-tax asset protection, management and business identity reasons to continue the entity. Be careful with a dissolution, however. Bear in mind the rule in partnership transactions that the distribution to one partner of appreciated property contributed by another partner within seven years preceding the distribution will cause the contributing partner to recognize the pre-contribution appreciation, as if the partnership had sold the property at its fair market value on the date of distribution.^{fn 11}

Does the operating agreement or partnership agreement contain provisions that suggest discounting would be appropriate? If so, consider amending the agreement to remove those provisions so that the value on death will be fair market value, not a discounted value.

Consider if the operating or partnership agreement can be modified to assure inclusion of the value of the entire entity in the decedent's estate. Perhaps a retained right to income or controlling management powers can be used to force IRC Section 2036 or IRC Section 2038 to become applicable to the decedent's retained powers. In *Estate of Trombetta*, T.C. Memo 2013-234, the Court found an implied agreement where the decedent, having transferred property to an irrevocable trust, made all decisions with respect to the property, led negotiations in refinancing the property, and retained sole signatory authority in connection with disposing of the property. The Court found the trust property was includible in the decedent's estate despite the transfer to the irrevocable trust. Continued use of property despite its transfer may be sufficient to require estate inclusion.^{fn 12} Evidence of continued exclusive use or enjoyment of property can suggest an implied agreement to retain an interest in the property despite its transfer to an irrevocable trust, and force an estate inclusion.^{fn 13}

Consider accepting an argument sometimes raised by the IRS when a controlling interest is present to add a control premium to the price of a decedent's asset to increase the value (and the basis to heirs) when the decedent's estate falls below the applicable exclusion threshold.^{fn 14}

If the client utilized the planning technique of the sale to the intentionally defective grantor trust, consider the client's federal estate tax status. If the client is expected to be a federal estate taxpayer, leave the grantor trust in place and have the client continue to pay the income tax and burn off potential estate taxable assets by doing so. If the client utilized the technique but is not likely to be a federal estate taxpayer, consider toggling off grantor trust status (relinquishing the powers that classified the trust as a grantor trust), especially if the income tax liability will then fall on persons in lower tax brackets, possibly below the thresholds for the highest income tax rates and the 3.8 percent tax on net investment income.

^{fn 11} IRC Section 704(c).

^{fn 12} *Estate of Linderme*, 52 T.C. 305 (1969); Rev. Rul. 70-155, 1970-1 C.B. 189.

^{fn 13} *Estate of Thompson*, 382 F.2d 367 (3rd Cir. 2004).

^{fn 14} *Estate of Salisbury*, T.C. Memo 1975-333.

In either event, whether or not the federal estate tax will be an issue, pay attention to the basis of the property the client used to sell to the trust. Absent further planning, the basis to the trust and to the trust beneficiaries is the carryover basis of the grantor, presumably a low income tax basis. If the grantor retained the power of substitution under IRC Section 675(4) as the power to make the trust a grantor trust, have the grantor produce or acquire property of equivalent value to what is in the trust, have an independent trustee so certify, and use this power of substitution to exchange the properties. The trust and its beneficiaries will now have property with a current fair market value basis and the grantor will get back the property with the low basis. If the grantor holds the property until death and leaves it to the persons who are the trust beneficiaries, they will obtain a stepped-up basis in that property as well.^{fn 15} Income tax on the appreciation will not be paid.

¶4245 Planning for Persons in Decoupled States

.01 More Difficult Considerations to Address

The family with moderate wealth may still have to address estate tax considerations if their state of residence is decoupled from the federal estate tax system and maintains its own estate or inheritance tax. Typically, the state exclusion is less than the federal exclusion, and the states other than Hawaii (to date, at least) do not offer portability of their exclusions. Such a situation will require more complex planning if the family wants to take advantage of the available state exclusions.

Planning complexities may be compounded by the fact that some states will change their laws to either reduce or eliminate the taxes, and others may go in the opposite direction and institute a tax or reduce an existing exemption. Another complexity is the domicile of the survivor. If the survivor relocates to a state that does not have an estate tax, planning that was done may not have been necessary, or planning that was never done may be rewarded. Uncertainty rules here!

Planning in decoupled states suggests using a bypass trust at the first death to capture the amount of the available state exclusion so that it avoids taxation at both deaths. The advantage of this choice is the absence of state death taxation on the excluded property. Be careful of formulas here. If the formula used is to tie the amount of funding of the bypass trust to the full federal estate tax exclusion, the state estate tax liability at the first death will approach \$475,000 under current law. If the formula is tied to and limited to the state estate tax exclusion, the state estate tax liability at the first death will be zero. The disadvantage of this choice to use the bypass trust at the first death is the lack of a stepped-up basis at the death of the surviving spouse and the possibility of future capital gain taxation at a rate higher than the state death tax rate.

The mathematics of all of this can become quite complex if time value of money issues are added to the analysis. When will the survivor die? When will property be sold? How much estate tax will be deferred? How much capital gain tax will be paid? These are all issues that can be addressed in these situations. Some clients are likely to reject planning for these complexities and opt for the more simplified and less costly planning suggested by the federal estate tax rules. Their attitude may be that if state taxes are due at the second death of a married couple, both spouses will be dead at the time, and let the children worry about it. They may say that if the surviving spouse lives long enough after the first death, state and federal laws may change dramatically or the survivor may relocate—so why spend a lot of money and planning anguish now when so much is unknown. Can it be said that they are wrong?

^{fn 15} IRC Section 1014.

Other clients will object to paying any tax that is not absolutely unavoidable, so they will embrace the bypass trust concept. For these clients, all of the issues of gifting or discounting that can be largely dismissed in addressing the federal exclusion and portability come back into focus and need to be addressed if the state estate tax becomes a matter of concern. Lifetime gifting in decoupled states is a favored planning technique. The suggestion would be to pay attention to basis where possible to avoid giving donees the lowest basis assets that will result in future capital gains tax.

Some states permit a state-only QTIP election to be made to take advantage of the marital deduction for state estate tax purposes, even if no such election has been made for federal purposes. Others prohibit such an independent election. Still others require the federal choices to be followed, but if no federal return is filed, a state QTIP election is allowed. Where permitted, consider use of the state-only QTIP to address the decedent's excess assets over the state excluded amount—especially if an outright transfer to the surviving spouse is not favored. The IRS eased some of these concerns when it issued Rev. Proc. 2016-49, IRB 2016-42 (September 27, 2016). Here, the IRS declared that it would allow QTIP elections to be deemed valid even if the election was not necessary to eliminate estate tax liability, setting aside Rev. Proc. 2001-38, which had suggested unnecessary QTIP elections could be held invalid.

¶4250 Summary: Key Estate Planning Techniques in the Post-ATRA Environment for Estates of Moderate Wealth

Where trusts are used, consider giving the beneficiary a lifetime or testamentary general power of appointment to achieve a basis step-up at the beneficiary's death. If the beneficiary is likely to be a federal estate taxpayer, suggest to the beneficiary that disclaiming such a power may be advisable. Alternatively, give the trustee or a trust protector the right to convey a general power of appointment on a beneficiary in an appropriate case.

As another alternative, consider use of the more complex and sophisticated approach of using the "Delaware tax trap."^{fn 16} This involves providing in a trust that the beneficiary is given a limited power of appointment that includes the power for the beneficiary to grant a presently exercisable power of appointment to another person (even a limited power to appoint property in further trust) that can further postpone the vesting of the appointed property. Where this power is exercised by the trust beneficiary, the appointed property will be included in the beneficiary's gross estate—exactly the result desired when the estate will not be subjected to the federal estate tax but seeks a stepped-up basis for the trust assets, and a result easily avoided when the estate is too large by having the beneficiary take no action to spring the Delaware tax trap. The beneficiary controls this decision. If this technique is to be used, the beneficiary should seek sophisticated tax advice before proceeding. For spouses, be sure to address the portability election. Do not fail to file Form 706 to make the necessary election. Take advantage of the extended time to file the portability election as outlined in Rev. Proc. 2017-34, discussed in this chapter in Section 4215 and in chapter 37 as well.

Where maximizing gifts to grandchildren is desired, remember that the GST exclusion is not portable. Have the first decedent spouse be the transferor to the grandchildren. This can be done either directly, or by creating a QTIP trust for the benefit of the surviving spouse and making the reverse QTIP election on the Form 706 filed for the first deceased spouse. That will make that spouse the transferor to the grandchildren and the surviving spouse will enjoy the lifetime benefits of the QTIP trust and will have his or

^{fn 16} IRC Sections 2041(a)(3) and 2514(d).

her full GST transfer opportunity still available.^{fn 17} A further advantage of this reverse QTIP trust planning is that the assets will receive a potentially stepped-up basis at the deaths of each spouse. If it is desired to assure that the surviving spouse will also be a transferor to grandchildren, consider creating a lifetime QTIP for the benefit of the surviving spouse with remainder to grandchildren.^{fn 18} Such a trust will be included in the estate of the beneficiary spouse, who will be the transferor of the property for GST purposes, and the trust assets will obtain a potentially stepped-up basis at the death of the spouse for whose benefit the lifetime QTIP was created.

Consider flexible planning that gives the surviving spouse the option of what planning to select at the first death. This is a useful suggestion for both the federal estate tax standing alone and for spouses who may live in decoupled states with their own state estate tax. Use an outright transfer to the surviving spouse with a disclaimer provision (by the surviving spouse) leading to a bypass trust where the spouse is a primary (or sole) lifetime beneficiary. This may seem to be an apparently simple choice; however, concern is often expressed as to whether the surviving spouse will actually proceed with a disclaimer. A qualified disclaimer must be made within nine months of the decedent's date of death. No extension of time to make a qualified disclaimer is available. Where a disclaimer plan is used and the surviving spouse is the beneficiary of the bypass trust to be funded by the disclaimer, the spouse may not be given a limited power of appointment over any trust which can be affected by the spouse's disclaimer—unless such a power is limited by an ascertainable standard.^{fn 19}

Alternatively, leave assets in a manner such that the executor of the estate of the decedent can elect QTIP treatment to the extent desired, with the balance of property possibly passing to a bypass trust or to some other beneficiaries—a so-called partial QTIP or Clayton QTIP provision.^{fn 20} This option takes the planning choice away from the surviving spouse and puts it in the hands of the deceased spouse's executor, who may be more objective, especially if there are blended family considerations that could cause a conflict for the surviving spouse. The regulations permit partial QTIP elections.^{fn 21} Such a provision could also be helpful in a decoupled state estate tax situation. If an automatic extension of time to file Form 706 is obtained, the executor has 15 months from the decedent's date of death to make the QTIP decision.

If desired, trusts created in this manner could give the surviving spouse a limited power of appointment.^{fn 22} The choices to be made in a flexible plan that would involve the funding of a bypass trust could include allowing discretionary beneficiaries other than the spouse so that the possibility of distributing income to persons in low tax brackets will be available. The trust could also encourage the trustee to

^{fn 17} IRC Section 2652(a)(3)(b).

^{fn 18} IRC Section 2523(f).

^{fn 19} 26 CFR 25.2518-2(e)(2).

^{fn 20} 26 CFR 20.2056(b)-7(d)(3) and 7(h) Example 6.

^{fn 21} 26 CFR 20.2056(b)-7(b)(2)(i).

^{fn 22} IRC Section 2056(b)(7)(B)(ii)(II).

distribute appreciated assets to the surviving spouse so that they will enjoy a stepped-up basis upon the surviving spouse's death.

Where trusts are used, bear in mind the highly-compressed income tax rates imposed on trusts. Wherever possible and appropriate, allow discretion in distributing income and principal to the trust beneficiaries.

If a bypass trust is utilized, bear in mind that the trust assets may be highly appreciated at the death of the surviving spouse with no basis step-up to the trust beneficiaries at the second death. Pay careful attention to the assets used to fund such a trust. For the family with moderate wealth, appreciation of assets should be favored in places other than the bypass trust.

The moderate wealth client whose assets may be approaching the threshold where the federal estate tax could apply must continue to pay attention to asset values in relation to the law. The client could utilize a program of annual gifting to stay below the threshold if that will be sufficient, or consider more involved planning (such as GRATs, for example) to restrict appreciation from overtaking the federal estate tax threshold.

For persons living in decoupled states, be sure to address the issue of how the state exclusion will be addressed, if at all. If there is state death tax paid at the death of either spouse, be sure it was an anticipated consequence of the estate plan selected, and that this consequence was communicated to interested family members before anyone has died. Be warned of surprised and angry heirs who thought they were told there would be no death tax when their loved one died. Their surprised reaction may accurately describe the federal estate tax, but not necessarily the state death tax.

