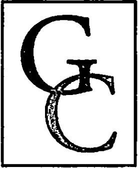

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SUMMARY OF THE FEDERAL ESTATE, GIFT, AND GENERATION-SKIPPING TRANSFER TAX PROVISIONS IN LIGHT OF THE PROVISIONS OF THE 2017 TAX ACT

H.R. 1 (the "2017 Tax Act") that was signed into law on December 22, 2017 provided for large increases in the estate, gift, and generation-skipping transfer tax exemption amounts. The exemptions have risen from $5,490,000 in 2017 to $12,060,000 today. In addition, since the exemption amounts are indexed for inflation, they will increase in future years. If Congress does not act sometime before 2026, the exemption amounts will be reinstated to $5,000,000 on January 1, 2026 with only a $1,000,000 exemption (as indexed for inflation since 2011).

A. Planning In Light Of The 2017 Tax Act.

Attention should be given to a number of issues, including the following:

1. Gift Planning.

Gifts are subject to gift tax once your cumulative lifetime gifts exceed the $12,060,000 lifetime exemption. The per year per donee gift tax annual exclusion will now increase to $16,000 and will continue to be available. For these smaller gifts, there is no gift tax owed, and no diminution of the $12,060,000 lifetime exemption.

Thus, any individual may give to another individual up to $16,000 annually without incurring a gift tax liability and without having to file a federal gift tax return. Thus, a married couple can transfer a total of $30,000 per year to a donee by either transferring community property, or transferring separate property with one spouse electing to split the gift with the other spouse. Since 1998 the annual exclusion amount has been increased by inflation rounded to the next lowest multiple of $1,000.

There also is an unlimited gift tax exclusion for amounts paid on behalf of a donee (regardless of the relationship to the donor) directly to an educational organization for tuition or to a health care provider for medical services.

Gift tax returns and the payment of gift tax are due annually. Gift tax returns and the payment of gift taxes will generally be due by April 15 for each year for gifts made during the preceding calendar year, except in the year of death, in which case the gift tax return and the payment of taxes is required along with the estate tax return. No gift tax return need be filed with respect to an interspousal gift, except for qualified terminable interest property trust transfers.

A prior gift may not be revalued by the IRS after the death of the donor, in connection with determining the estate tax due on the donor's death, if a gift tax return was filed which fully disclosed the value of the prior gift, and the statute of limitations relating to that gift tax return has expired. It is therefore important to adequately describe gifts on gift tax returns. It also may be advisable to file gift tax returns for non-taxable gifts (such as gifts under $16,000 per year) in order to start the statute of limitations.

Under the law, the value of gifts (other than life insurance) made within three years of death which exceed the annual exclusion amount will be brought back into the estate at their *date of gift value* only, thus allowing appreciation in the property between the date of gift and the date of death to not be subject to estate taxation.

2. Unlimited Marital Deduction.

For gifts and for individuals dying there is an unlimited deduction for interspousal transfers, whether of community property or separate property, if given or transferred in a form which qualifies for the marital deduction. To qualify for the deduction, property may be given either outright to the

surviving spouse, or to a marital deduction trust (generally called Trust A or the Survivor's Trust). A marital deduction trust requires all the income to be paid to the surviving spouse and confers upon the surviving spouse a general power of appointment. With a general power of appointment, the surviving spouse has the right to appoint the trust property to anyone he or she may designate without limitation. A surviving spouse, therefore, may appoint Trust A (or the Survivor's Trust) assets to a new spouse, to children of a prior marriage or to other persons who may not necessarily meet with the approval of the predeceased spouse. Thus, the predeceased spouse has to give up control over the ultimate disposition of the property in order for the marital deduction to be available, using such a trust.

A spouse also can create a type of trust (described in more detail below) which provides for the surviving spouse, but which distributes the trust assets to beneficiaries of the predeceased spouse's choice following the surviving spouse's death.

Because of the increase in the exemption amount, many individuals will not desire, or need, to utilize the unlimited marital deduction because a full marital deduction will not be needed to reduce the estate tax to zero. Based on the new exemption amount of $12,060,000, if the combined estates *(i.e., the estates of both spouses)* are and can be projected to be less than $12,060,000, all an individual's property can be left outright to the surviving spouse without estate taxes in either estate. For example, if Husband and Wife own $11,000,000 of community property and Husband dies leaving his entire estate *(i.e., one-half (1/2) of the community property, or $5,500,000)* to Wife, she will then own $11,000,000, which will be sheltered from federal estate tax in her estate. Whether Husband's half of the property is sheltered from tax on his death by the marital deduction or by the exemption amount is irrelevant because no tax will be payable on the survivor's death because of the exemption amount.

Consequently, in smaller estates, estate plans may be simplified by leaving everything to the surviving spouse outright, thus avoiding the use of one or more trusts for the surviving spouse's benefit. Non-tax reasons, such as management or control or probate avoidance, however, may be involved which may make a trust for the surviving spouse's benefit advisable, but the tax objective of sheltering a portion of the predeceased spouse's estate from tax on the surviving spouse's death would not be a concern in smaller estates.

If the combined estates are and can be projected to be less than two exemption amounts *(e.g., $24,120,000)*, there also is no need to utilize the marital deduction since the use of a "*bypass trust*" will result in no estate taxes in either estate. Since a marital deduction bequest to a surviving spouse will be included in the survivor's taxable estate, it is usually advisable to reduce the marital deduction bequest by at least an amount equal to the exemption amount. Thus, the reason for using a bypass trust (generally called Trust B or the Exemption Trust) is to take full advantage of the exemption amount. The goal is to take the amount that is exempt from estate tax on the death of the first spouse *(i.e., the* exemption amount*)* and transfer that amount to a trust that is structured in such a manner which will cause it to also escape, or "bypass," the death taxes which are imposed upon the death of the surviving spouse. If a bypass trust is used rather than leaving the amount outright to the surviving spouse, there is a savings in estate tax on the death of the surviving spouse because the bypass trust is not subject to estate tax on the death of the surviving spouse.

A bypass trust can provide benefits, protection and security for the survivor without unnecessary additional estate taxation on his or her later death. Such a bypass trust can offer the spouse almost all the benefits and flexibility that complete ownership would offer, if the testator wishes to go that far, or anything less than that.

A bypass trust may include all of the following: the right to receive all of the trust income regularly (which can

also be payable to the spouse and children); a generous provision for invasion of principal for the spouse's benefit by an independent trustee whose discretion need not be limited by an ascertainable standard; principal payments even upon demand of the spouse, so long as the survivor's power is limited by an "ascertainable standard" relating to his or her "health, education, support and maintenance"; an additional right to demand non-cumulative annual amounts of $5,000 or 5% of the trust principal, whichever is greater; and a broad special power of appointment (exercisable only by will, only by deed, or in either way) allowing the spouse to choose remainder beneficiaries in order to vary or to tax plan their shares and to adjust to changed personal, financial or legal circumstances. Often, the surviving spouse is appointed as sole trustee or co-trustee of the trust and thus controls or at least influences investment and administration decisions.

Assume Husband and Wife have an estate consisting entirely of community property worth $20,000,000 and Husband dies on January 1, 2018 leaving his entire estate to a bypass trust. Husband's entire estate ($10,000,000) will be sheltered by the exemption amount ($12,060,000). Wife will continue to own her half of the community property and will be a beneficiary of Trust B with benefits similar to those listed above. Assume further, that Wife dies on January 1, 2019 and that the assets owned by Wife and those held in Trust B have appreciated at 4% per year. Based on these assumptions, Wife's assets of $10,000,000 have appreciated to approximately $10,816,000, but that amount will be sheltered from tax by her $12,060,000 exemption amount. Trust B also will be valued at $10,816,000, but it too will pass tax-free to the children or other beneficiaries since Wife has no power or interest in Trust B that would cause its value to be taxed in her estate.

If the combined estates are in excess of $24,120,000 (that is, in excess of twice the exemption amount) or if the nature of the estate is such that it can be expected to appreciate so that the estate will be in this range, marital deduction planning is appropriate, and the typical plan desired

by spouses is one to eliminate the federal estate tax on the first spouse's death by using the unlimited marital deduction to the extent necessary *(i.e., for every dollar over and above the exemption amount available at the first spouse's death)* so that the exemption amount is not wasted.

If the unlimited marital deduction is taken advantage of, there can be a deferral of estate taxes until the death of the surviving spouse. The decision of whether or not to utilize the unlimited marital deduction will involve a consideration of the advantages and disadvantages of using the deduction. For example, if the tax is deferred, the tax on the death of the survivor may be in an amount larger than if a tax were paid by the estate of each spouse.

While the tax deferral allows the survivor to use the funds that otherwise would have been applied to the tax liability, and places the eventual estate tax burden on the ultimate beneficiaries of the estate, it must be remembered that the use of the marital deduction increases the estate subject to tax on the death of the survivor. If the assets appreciate (and all the income is paid to the survivor, thus also increasing the survivor's estate), the ultimate tax may be more than originally estimated and consequently the estate passing to the beneficiaries may be less. This is one of the advantages of not using the unlimited marital deduction because all further appreciation of the estate of the first spouse would pass to the ultimate beneficiaries without estate taxes being imposed again on the death of the survivor.

The arguments in favor of utilizing the unlimited marital deduction and thus deferring estate taxes are:

(1) The surviving spouse should not have to pay any tax (and be concerned with liquidity problems), which should be the concern of the children or the other ultimate beneficiaries;

(2) There still remains a chance that the estate tax may be repealed in the future;

(3) There is no reason to pay a tax before it is necessary;

(4) The primary objective of many estate plans is the care and convenience of the surviving spouse, not the ultimate beneficiaries;

(5) The marital deduction property may be sheltered from tax in the survivor's estate by the survivor's exemption amount;

(6) The marital deduction property may be consumed or given away by the surviving spouse prior to his or her death, or the assets may depreciate.

(7) Deferring the tax gives the surviving spouse the use and benefit of the tax money for the length of the surviving spouse's lifetime; and

(8) The ultimate beneficiaries will receive a higher income tax basis on the assets distributed and thus capital gains tax will be decreased (or eliminated) if the assets are sold.

The major arguments against deferral and in favor of paying a tax upon the death of the first spouse are:

(1) The possibility of greater retention of wealth within the family unit as a result of a lower cumulative tax being paid if some tax is paid at the first death and some at the second death. This was a possibility only under prior law when there was a progressivity in the estate tax brackets. However, under current law the rate is a flat 40% and, thus, if each estate is in excess of the estate tax exemption, the tax result will be the same regardless if the estate tax is paid or deferred and regardless of the appreciation in the estate.

(2) The sheltering of appreciation over the life of the surviving spouse from taxation on his or her subsequent death.

(3) Lessening the liquidity problem at the second death.

A plethora of factors must be considered to make the decision of whether or not to utilize the unlimited marital deduction. Among the variables involved in making the decision whether or not to utilize the unlimited marital deduction will be the size of the estate, the nature of the assets involved and their rate of appreciation, the life expectancy and income requirements of the surviving spouse, the personal desires and objectives, the family circumstances, and the anticipated estate tax repeal. In general, the greater the appreciation on the surviving spouse's assets, the less benefit will result from the use of the unlimited marital deduction. Conversely, the greater the after-tax interest that can be earned on the funds that would have been used to pay the tax in the first spouse's estate, the less benefit will result from not utilizing the unlimited marital deduction.

If the decision is made to utilize the marital deduction, the vehicle for the deduction must be selected. If the spouse wants to give the surviving spouse complete right of control over the marital deduction property and the spouse is capable of managing the property, an outright disposition may be advisable. If, however, the surviving spouse will need professional management of the property or probate avoidance is desirable on the survivor's death, a trust as the marital deduction vehicle may be preferable. Should the spouse desire to control the disposition of the trust following the survivor's death, a qualified terminable interest trust (generally called Trust C or the Marital Trust) should be used. This form of trust will be useful in any situation where both spouses have children from separate marriages or where one of the spouses is concerned about the surviving spouse remarrying and wants to insure that

upon his or her death, the trust principal will be disposed of in accordance with their desires. This type of trust allows an individual to leave property to a trust in which the spouse has a life income interest, but the remainder can be directed to pass to whomever the individual desires without the control or direction by the surviving spouse. Under prior law, such a transfer would not qualify for the marital deduction because it is a "*terminable interest.*"

However, under the law, the use of such a trust will qualify for the marital deduction if the decedent's executor (or the donor of an inter vivos transfer) so elects, provided the surviving spouse is entitled to all the income from the property and no person has the power to appoint any part of the property to any person other than the surviving spouse. If the election is made, the qualified terminable interest property shall be included in the gross estate of the spouse to whom the life income interest was given, unless the surviving spouse disposes of all or part of the income interest during his or her lifetime. At the surviving spouse's death, the property would pass as the individual indicated in the instrument and the surviving spouse would be precluded from giving away or otherwise diverting the property to anyone other than the intended beneficiaries. Thus, the use of a qualified terminable interest trust may be attractive in situations where both spouses have children from separate marriages or where one of the spouses is concerned about the surviving spouse remarrying. Any estate tax attributable to the qualified terminable interest property included in the surviving spouse's estate is recoverable from the recipients of the property, unless the surviving spouse directs otherwise in his or her will.

To allow for flexibility in determining whether or not to utilize the unlimited marital deduction, consideration should be given to the use of a disclaimer so as to allow the decision to be made by the surviving spouse after the first spouse's death. The marital deduction amount could then be disclaimed into the bypass trust providing for all the income to the spouse or a successive disclaimer could be made into a sprinkling trust for

the spouse and issue or just for the issue. Alternatively, disclaimers can be useful in allowing the surviving spouse to respond to the estate tax consequences in light of the size of the estate and the available credit when the first spouse dies. Thus, the entire estate could be left outright to the survivor unless he or she disclaims the outright gift in which case the optional A-B plan could be used.

Thus, what the law means for spouses with combined assets which will probably not exceed $12,060,000 at the surviving spouse's death, is that certain A-B plans may no longer be required and outright bequests to the surviving spouse may be appropriate since taxes will not be a concern.

For spouses with combined assets of between $12,060,000 and $24,120,000, a provision of the 2010 and 2012 Tax Acts impacts the need for A-B trust planning by allowing married couples to add any unused portion of the estate tax exemption of the first spouse to die to the surviving spouse's estate tax exemption. This "game changer" provision of the 2010 Tax Act dealing with the portability of exemptions can in some circumstances avoid the need for a bypass trust (Trust B) and still protect an estate of up to $24,120,000 from being subject to tax.

The portability provision of the 2010 and 2012 Tax Acts allows married couples to add any unused portion of the estate tax exemption of the first spouse to die to the surviving spouse's estate tax exemption. This will effectively allow married couples to pass $24,120,000 on to their heirs free from estate taxes with a simpler estate plan without the need for a bypass trust. For example, if the estate is distributed outright to the survivor, no part of the exemption is used because of the marital deduction available for assets passing to a surviving spouse. When the surviving spouse dies, they will have a $24,120,000 exemption available (viz., his or her own

$12,060,000 exemption, plus the deceased spouse's unused $12,060,000 exemption).[1]

For a surviving spouse's estate to take into account the deceased spouse's unused exclusion amount, the Act requires (in new IRC section 2010(c)(5)) the deceased spouse's executor to file an estate tax return (even if an estate tax return otherwise would not be due because the estate is less than the threshold amount requiring the filing of a return) computing such unused exclusion amount and making an irrevocable election allowing such amount to be taken into account. The Act would not allow the election if this return is filed after the due date (including extensions). Notwithstanding any IRC section 6501 statute of limitations, the Act allows the Secretary to examine a deceased spouse's return to make determinations about the unused exclusion amount after the expiration of the section 6501 period for assessing estate or gift tax relating to the unused exclusion amount. The Act requires (in new IRC section 2010(c)(6)) the Secretary to issue regulations to carry out these provisions.

Despite portability, the establishment of a bypass trust on the first death may be appropriate for non-tax reasons, including:

(a) Limiting, or eliminating, the ability of the surviving spouse to direct the disposition of the deceased spouse's assets on the surviving spouse's death.

(b) Limiting the right of the surviving spouse to spend principal so that it is preserved for only the surviving spouse's health, support and maintenance.

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[1] Similarly, if the predeceased spouse leaves $1 million to his or her children, the surviving spouse's estate can utilize the remaining $11.06 million of the predeceased spouse's exemption when the surviving spouse dies, in addition to his or her own $12.06 million exemption, for a total of $23.12 million.

(c) Providing creditor protection. The surviving spouse's creditors cannot, in general, reach the assets of the bypass trust.

In addition, the establishment of a bypass trust on the first death may be appropriate for the following tax reasons, and achieving a better tax result:

(a) If the assets that would be allocated to the bypass trust will appreciate in the future (at a rate greater than the inflation rate), with the result that the appreciation will avoid estate tax on the surviving spouse's death, regardless of the value of the surviving spouse's assets.

(b) If an allocation is made to the bypass trust of the deceased spouse's GST exemption. There is no portability of the deceased spouse's GST exemption and, by allocating it to the bypass trust, this could reduce GST taxes if the estate plan retains assets in trust for the lifetimes of the children and then ultimately passes the assets to the grandchildren.

(c) The surviving spouse could remarry, and if his or her new spouse predeceases them leaving only a very small amount, or none, of unused exemption, the surviving spouse's estate can only utilize the unused exemption of his or her "last spouse" and cannot use the unused exemption of the first spouse. If upon the death of the first spouse a bypass Trust had been established, then first spouse's exemption could have been preserved regardless of whether the surviving spouse remarried.

Conversely, there are reasons you might not desire to establish a bypass trust, including the following:

(a) A bypass trust, as a separate tax paying entity and as an irrevocable trust, confers rights on the ultimate beneficiaries, and thus obligations on the surviving spouse

to, among other things, invest the assets appropriately, follow the terms of the trust as to distribution of income and principal to the surviving spouse, to maintain separate accounting records of the assets held by the bypass trust and to account on a regular basis to the ultimate beneficiaries.

(b) There will be annual expenses for, among other things, preparing and filing fiduciary income tax returns for the bypass trust.

(c) The assets held by the bypass trust will not obtain a further stepped-up basis on the surviving spouse's death, so if they have appreciated in value during the surviving spouse's lifetime, the assets will pass to the beneficiaries with their historical bases.

(d) If there are changes in the circumstances of the children or grandchildren, the plan cannot be changed unless the surviving spouse is granted a power of appointment which can provide for flexibility so that the surviving spouse can choose the remainder beneficiaries in order to vary, or tax plan, their shares to adjust for changed personal, legal and financial circumstances. If such a power is used, however, the surviving spouse's ability to disclaim the bypass trust is affected.

If the non-tax and tax reasons for establishing a bypass trust are <u>not</u> significant for you, and if your total estate (including the assets of both spouses) is under $12,060,000, then a bypass trust would not be necessary. One way to provide for flexibility in this regard is for your plan to provide for an optional A-B (or A-B-C) plan.

If the non-tax and tax reasons for establishing a bypass trust are significant for you, then for spouses with combined assets of between $12,060,000 and $24,120,000, the use of an A-B plan may result in the total elimination of federal estate taxes at the death of both spouses.

For spouses with combined assets in excess of $24,120,000, the marital deduction would be needed to eliminate the estate taxes on the first spouse's death. For spouses with combined assets of $24,120,000 or more, the options generally available are:

(1) Transfer all assets outright to the surviving spouse without restriction (although this could result in greater estate taxes at the surviving spouse's death);

(2) Transfer to the bypass trust only that amount which will pass free of estate taxes upon the death of the first spouse (e.g., $12,060,000), and for spouses with combined assets of $24,120,000 or more, transfer the balance of the predeceased spouse's estate outright to the surviving spouse or to Trust A (which will result in no estate taxes at the death of the first spouse and less tax at the second spouse's death than under the first alternative);

(3) Transfer to the bypass trust the amount that may pass free of tax upon the first spouse's death and for spouses with combined assets of $24,120,000 or more, transfer the balance to a qualified terminable interest trust (which would result in the same taxation as under the second alternative above, but will preclude the surviving spouse from giving away or otherwise diverting the assets upon his or her death); or

(4) Transfer all of the decedent's assets to the bypass trust without utilizing the marital deduction (which for spouses with combined assets of $24,120,000 or more will cause an estate tax to be paid on the first spouse's death, which otherwise would not be payable under the other three alternatives, but could decrease the amount of tax paid at the surviving spouse's death).

C. Split Interest Gifts.

If interests in the same property are transferred in trust,

established during life or at death, in a qualified manner to a spouse and a qualifying charitable organization, and the individual and his or her spouse are the only non-charitable beneficiaries, the individual, or his or her estate, can receive the marital deduction for the value of the interest passing to the spouse and a charitable deduction for the value of the interest passing to the charity, resulting in no estate or gift taxes being imposed at either the decedent's death or at the surviving spouse's death.

D. Disclaimers.

A disclaimer is an unqualified refusal of a person to accept ownership of property and permits the disclaimed interest to be taxed as if the individual never received the property. The law is intended to provide uniformity in federal law treatment of disclaimers made in different states. The law provides that an individual can disclaim in accordance with the federal standards even though a comparable renunciation might not be within the state law definition of what constitutes a disclaimer.

E. Installment Payment of Estate Taxes and Special Exclusion For Family Businesses.

If the value of the closely held interest exceeds 35% of the adjusted gross estate, the estate may make annual interest payments for the first four years and thereafter pay the balance in up to ten annual installments of principal and interest. A special 2% interest rate will apply for the first $1,640,000 of the value of the business only in excess of the exemption amount, with a reduced interest rate (45% of the underpayment of tax rate) applying to any balance of the deferred payment.

F. Special Use Valuation.

Certain real property used in a farm or closely held business can be valued in an individual's estate at its current use rather than at its highest and best use. The amount of the maximum reduction in estate tax value from fair market value to

current use value may not exceed, however, $1,230,000, indexed for inflation after 1998 (again rounded to the nearest multiple of $1,000).

G. Qualified State Tuition Plans (also called Section 529 Plans).

Under the 2017 Tax Act, a good planning technique got even better. Section 529 Plans provide an important option for high income taxpayers. These plans are sponsored by state governments. The benefits include:

Assets in the account can be used to pay education costs at any public or private college, and beginning in 2018 may include expenses for public, private, or religious elementary or high school education up to $10,000 per student per year.

You can contribute up to $80,000 per beneficiary (typically your child or grandchild) in the first year, and treat it as a prefunding of your $16,000 annual gift tax exclusions for the next 5 years. This is better than giving $16,000 per year for 5 years, since income earned on the full $80,000 accumulates for the beneficiary from the beginning.

The maximum amount you can contribute is based on the estimated future cost of attending the most expensive college in the state, the age of the beneficiary, and projections about the future earnings. The maximum amount will exceed $100,000.

You can change beneficiaries or withdraw the money at any time. If you change to another member of the beneficiary's family, there is no tax consequence. Funds can be held for the beneficiary until the beneficiary is age 45. Funds not used for college or graduate school will be taxed (to the extent of the accumulated income) at your tax bracket with a 10% penalty, unless due to the beneficiary's death, disability or the beneficiary receiving a scholarship, in which case the penalty won't apply.

H. Life Insurance.

As the estate tax exemption has increased and the maximum estate tax rate has declined, it is appropriate to re-analyze the amount of insurance to maintain. Insurance coverage may be appropriate to replace income in the family if the primary wage earner dies, or to provide key person coverage for a business, or to fund buy-sell agreements, or to equalize gifts among children where there is a family business passing to some but not all of the children, etc.

I. Revisions Necessary in Light of the Increase in the Estate Tax Exemption or For Other Reasons?

If you are married and your estate plan provides for an amount equal to the estate tax exemption to pass to your children, or grandchildren or others, with the balance to your spouse, you should consider whether this comports with your desires. You may wish to limit the amount passing to the children, grandchildren or others to an amount less than the exemption. Otherwise, your spouse may receive too little and your children, grandchildren and others too much. Similarly, if your plan leaves the amount of the generation-skipping transfer tax exemption to grandchildren, you may want to consider limiting this gift, since it may leave your children too little and your grandchildren too much.