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Elaine Gagliardi on Uncertain Times: Anticipating Change and Reacting to Recent Wealth Transfer Tax Developments

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Featured Articles

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By Professor Elaine Gagliardi[1]

§ 1.01 Introduction

Looming on the horizon is the very real possibility of estate tax repeal. In the interim for those clients needing to immediately make estate planning decisions, the question becomes what planning strategies best meet client needs in the face of an uncertain estate tax. Acknowledging that the ultimate answer depends on individual circumstances and goals, some common planning strategies nevertheless emerge as better options than others to address particular client goals, especially those of married couples.

These planning strategies work well now and can be adapted to work well under the most likely Congressional response to repeal. Republicans have alluded to the possibility of repeal with no change to an estate's ability to take a stepped-up basis for property with built-in gain, of repeal with a carry-over basis for such property at death, and of imposing a Canadian-style capital gains tax at death. Analysis of each of these impending scenarios point to similar strategies as optimal in light of common client goals.

This article begins by assessing the likelihood of permanent estate tax repeal and, if repeal occurs, the possible replacement tax regimes on the table. Next, in light of likely replacement tax regimes, it analyzes the estate planning options that best meet client needs regardless of which replacement regime Congress might enact. The article specifically addresses the questions of: (1) whether clients should proceed with lifetime transfers currently; (2) how best to make the marital gift; and (3) whether the married decedent's estate should make the portability election. A continually shifting estate and gift tax landscape and the certainty of evolving family needs has encouraged state law enactment of legislation and development of techniques to respond to persistent change. These techniques also prove useful in the face of estate tax repeal.

§ 1.02 Anticipating Estate Tax Repeal

Key elements currently align to indicate a real possibility of estate tax repeal:

- Republicans control both houses of Congress and the presidency;
- The public expects tax reform generally and, more specifically, repeal of the much (mis)maligned "death" tax; and
- Congress recently funded the necessary infrastructure to ensure transition away from estate tax to an alternative basis focused regime when it enacted the basis consistency rules.

Uncertainty may rest more in whether estate tax repeal will be "permanent" (to the extent anything can be labelled as such) and what form of tax regime will succeed repeal, than whether estate tax repeal will

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occur. Even if estate tax repeal occurs, uncertainty will nevertheless remain if the political winds change to place Democrats in control in the next presidential election cycle. Given the political football nature of the estate tax, the need to respond to uncertainty will survive as an underlying theme of planning.

As this article goes to press, in the wake of speculation that Republicans may be losing focus on tax reform, Speaker Paul Ryan reasserted Republican resolve for estate tax repeal in his first speech on tax reform. During the speech, he singled out the estate tax saying, "First, we will eliminate harmful, burdensome taxes including the death tax …."[2] He then urged "permanent" relief, indicating, "These reforms—these tax cuts—they need to be permanent. Every expert agrees that temporary reforms will only have a negligible impact on wages and economic growth. Businesses need to have confidence that we will not pull the rug out from under them. They need the certainty from permanent tax cuts to hire more workers, invest in their businesses, and plan for the future."[3] While Speaker Ryan reaffirmed focus on estate tax repeal, he did not provide insight as to whether taxpayers would continue to benefit from a stepped-up basis for appreciated assets or face an alternate tax regime. Notably, neither the Republican Blueprint nor recently introduced bills for estate tax repeal make any change to application of IRC Section 1014 fair market value basis for transfers at death or application of the gift tax.[4]

Statements regarding estate tax repeal by President Trump, however, hint at replacement of the estate tax with an alternate set of rules. On reveal of President Trump's one page tax reform proposal setting forth as part of his simplification plan "repeal [of] the death tax," Director of the National Economic Council, Gary Cohn, during the press briefing responded to questions on repeal.

> Q: Thank you, Mr. Secretary. Quick question. You bring up repeal of the death tax, the estate tax. This is an issue that's been going on for decades. And it used to be they were always talking about phasing out the death tax over a period of years. Groups such as Jim Martin's 60-Plus Seniors Association said they wouldn't accept it and wanted immediate killing of the death tax. Is that what this is going to be? Or is it going to be a phase-out measure again?
>
> DIRECTOR COHN: Right now our initial proposal is to immediately phase out – when this proposal becomes effective – to phase out the death tax immediately.
>
> Q: You say "phase" and "immediate."
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> DIRECTOR COHN: *With the implementation of the new tax*, the death tax would disappear.[5] (Emphasis added).

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[2]Speaker Ryan's First Major Speech on Tax Reform, (June 20, 2017, Speaker Ryan Press Office), http://www.speaker.gov/press-release/full-text-speaker-ryans-first-major-speech-tax-reform (accessed June 21 (2017)).

[3] Speaker Ryan's First Major Speech on Tax Reform, (June 20, 2017, Speaker Ryan Press Office), <http://www.speaker.gov/press-release/full-text-speaker-ryans-first-major-speech-tax-reform> (accessed June 21 (2017)).

[4] Better.gop, *A Better Way, Our Vision for a Confident America* (June 24, 2016). *See also*, HR 631, 115th Cong, 1st Sess (2017), and S 205, 115th Cong, 1st Sess (2017) (both bills pressing estate tax repeal).

[5] Briefing by Secretary of the Treasury Steven Mnuchin and Director of the National Economic

The reference to "implementation of the new tax" suggests a replacement tax. Trump, during his campaign, implied as much. Candidate Trump's then campaign website indicated the repeal would be replaced with a gains tax.[6] The website did not clarify whether that promise meant a capital gains tax would be imposed at death in a manner similar to Canada's tax system or whether a carryover basis regime similar to that in place in 2010 is what he had in mind. Likely realizing that a capital gains tax would hit middle class taxpayers, including small businesses and farms much harder than the estate tax currently in place, Candidate Trump's website also referenced a $10 million exemption for gains to protect family farms and closely held businesses.[7]

Given Director Cohn's reference to a "new tax" and Candidate Trump's references to a capital gains tax, along with the need for budget neutrality, it is foreseeable that repeal of the estate tax will be followed by statutory changes to the determination of basis at death. If history proves predictive, fair market value at death basis will be replaced by some form of carryover basis in the absence of an estate or generation-skipping transfer tax. Such was the case with 2001 estate tax reform leading to the temporary repeal of the estate tax in 2010 in favor of a modified carryover basis system.[8] As part of earlier tax reform efforts in 1976, carryover basis also was enacted to ensure unified treatment of transfers during life and at death, yet was thereafter retroactively repealed ostensibly for reasons of time and cost consuming administration without any formal mention of the very real political costs of imposing on inherited wealth both an estate tax and an income tax on inherent gains.[9] Prior tax reform efforts, thus, have linked formally or informally as appropriate trade-offs the estate taxation of wealth transfers and the taxation of inherent gain on transfers of wealth based on carryover basis.

The federal estate tax celebrated its 100th anniversary in 2016. It has survived planned repeal more than once. Given its track record it will likely persist in some form going forward, even if only as a shadow to emerge with force in daylight some years down the road. The narrow margin of control in the Senate means that any repeal, if it happens, will likely be part of a budget reconciliation bill to avoid a filibuster. Like with the 2010 repeal, also passed pursuant to budget reconciliation, Congress may need to impose a limited window for the repeal. The last time round the window was a nine-year waiting period to repeal with sunset in the tenth year. This time round lawmakers indicate preference for immediate repeal, and some hint at extending the sunset window to "20 or 30 years."[10] On his website, Senator Pat Toomey indicates: "Congress has traditionally used a 10-year time frame, but nothing in the law prevents us from

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Council Gary Cohn, April 26, 2017, 1:38 pm EDT, https://www.whitehouse.gov/the-press-office/2017/04/26/briefing-secretary-treasury-steven-mnuchin-and-director-national.

[6] The campaign website was taken down at some point following conclusion of the campaign. Reference to the replacement capital gains tax was formerly found at <https://www.donaldjtrump.com/policies/tax-plan/?/positions/tax-reform>.

[7] *Id*.

[8] The Economic Growth and Tax Relief Reconciliation Act of 2001, 115 Stat 38 (2001).

[9] Osgood, Russell, *Carryover Basis Repeal and Reform of the Transfer Tax System*, 66 Cornell L Rev. 298, 305-307 (Jan 1981) (*citing* S Rep No 394, 96th Cong, 2d Sess 122, reprinted in [1980] US CODE CONG & AD NEWS 1008, 1128–29).

[10] Senator Pat Toomey on How to Enact Pro-Growth Tax Reform, https://www.toomey.senate.gov/?p=news&id=1914 (accessed June 22, 2017).

using a 20- or even 30-year time frame. A 20- or 30-year tax reform would be as close to permanent as we can get since Congress would be likely to overhaul the tax code within that period anyway."[11] The ultimate fate of the estate tax, thus, may not be known for several years despite the call for immediate repeal.

§ 1.03 Anticipating the Tax Future of Transfers on Death

To effectively advise clients in anticipation of estate tax repeal, planners need to consider likely scenarios to emerge in the wake of 2017 efforts to repeal the estate tax. Turning the estate planner's "crystal ball" to take into account various vantage points, a number of scenarios emerge—no repeal and continuation of the status quo, repeal and no replacement with preservation of the stepped-up basis for appreciated assets, repeal and replacement with a carryover basis regime ala 2010, and repeal and replacement with a Canadian-style capital gains tax. Each of the possible scenarios results in substantially different tax planning opportunities, but with some shared attributes. It is the common threads among these possibilities that yield "best" approaches. Analysis of these likely scenarios reveals an emergence of conjoined planning themes including the effectiveness of using flexible administrative powers and powers of appointment, and, for married couples, trust provisions allowing a qualified terminable interest property trust election.

[1] Planning for a Canadian-Style Capital Gains Tax

Canada imposes a capital gains tax on the transfer of certain property by gift or at death. Every 21 years, it also deems a disposition of property held in certain trusts thereby triggering recognition of gain.[12] Transfers of property to a spouse or common law partner, including to certain spousal trusts, can postpone payment of capital gains tax on the first death.[13] Canadian spousal trusts resemble QTIP marital deduction trusts in that the spouse is entitled to trust income and the testator controls the identity of those who take on the surviving spouse's death.[14] An exemption also protects taxation of a specified amount of gain resulting from dispositions of fishing or farm property to children.[15] If a Canadian-style capital gains tax were adopted in the United States, similar to Canadian spousal trusts, QTIP trusts likely would receive favorable tax treatment under new rules postponing tax on gain until a survivor's death. To avoid an unwelcomed deemed disposition of property held in trust, however, it would be important to include provisions allowing the executor at appropriate times to make outright distributions or to request trust modifications for the purpose of minimizing any future capital gains tax on transfers. A gift now could also avoid application of any capital gains tax at the donor's generation were the capital gains tax enacted.

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[11] *Id*.

[12] Canada Revenue Agency, Capital Gains 2016, T4037(E) Rev 16, http://www.cra-arc.gc.ca/E/pub/tg/t4037/t4037-16e.pdf (accessed June 22, 2017); Canada Revenue Agency, T3 Trust Guide, T4013(E) Rev 16, http://www.cra-arc.gc.ca/E/pub/tg/t4013/t4013-16e.pdf (accessed June 22, 2017).

[13] Canada Revenue Agency, Preparing Returns for Deceased Persons, T4011(E) Rev 16, http://www.cra-arc.gc.ca/E/pub/tg/t4011/t4011-16e.pdf (accessed June 22, 2017).

[14] *Id*.

[15] *Id*.

As candidate, President Trump also hinted at an exemption for up to $10 million in gains were this form of tax imposed on transfers at death. He also alluded that the exemption would apply to gains from disposition of small business, farms and ranches, however, the exemption amount could be made to apply more broadly. Because to do otherwise would be a difficult political sell, an exemption from the 21-year deemed disposition rule could very well be granted for trusts generally in an amount similar to the current generation-skipping transfer tax exemption. If this were the case, generation-skipping-style trusts might remain in vogue.

[2] Planning for a 2010 Carryover Basis Alternative

Republicans could opt to adopt the carryover basis alternative previously enacted and made applicable to those 2010 decedents' estates electing into IRC Section 1022 carryover basis in lieu of estate taxation. The IRC Section 1022 carryover basis regime caused beneficiaries to take inherited property with a carryover basis unless that basis was increased by allocation of "aggregate" or "spousal" "basis increase." Aggregate basis increase was an amount reflective of the applicable exclusion amount available to decedents' estates at the time of legislative enactment. Unlike the Canadian-style capital gains tax which can trigger recognition of gain at death, the IRC Section 1022 carryover basis rules postpone triggering any payment of tax on gain until the property sells.[16] Decedents' estates electing into IRC Section 1022 could allocate an aggregate basis increase amount among certain properties to increase basis and thereby reduce the ultimate amount of gain recognized on any eventual sale.[17] Married decedents' estates could also allocate an amount of spousal basis increase.

The former IRC Section 1022 limitations imposed on allocation of aggregate basis increase and also on spousal basis increase encourage inclusion of flexible distribution provisions and powers in trusts, and also preference use of QTIP trusts, as opposed to other marital deduction trust options. Aggregate basis increase can only be allocated to property owned by and acquired from the decedent.[18] Other than property held in a revocable trust or trust property that reverts to the decedent on death, property held in trust for benefit of a decedent generally is not eligible for allocation of aggregate basis increase.[19] Under the carryover basis regime of former IRC Section 1022, flexible trust powers allowing distribution of trust property to ensure ownership by a decedent at death proves important to maximizing use of aggregate basis increase and minimizing future tax under the IRC Section 1022 carryover regime at succeeding generations. In other words the tax cost of protecting property for succeeding generations under IRC Section 1022 is a carry-over basis until an event triggering gain. A spousal property basis increase of an additional amount is also allocable to eliminate gain recognition on certain outright transfers and transfers to QTIP trusts for the benefit of the surviving spouse.[20] The former IRC Section 1022 carryover basis rules also recognize the QTIP trust as a tax beneficial way to transfer property for the benefit of a surviving spouse. In all likelihood the amount of basis increase under any future carryover basis regime would reflect the current basis exclusion amount at time of enactment. This was implied by candidate Trump's reference to a $10 million gain exclusion. Given the potential for a substantial stepped-up basis,

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[16] *See, eg,* Rev Proc 2011-41, Example 6, 2011-2 CB 188.
[17] IRC § 1022.
[18] IRC § 1022(d)(1)(A). *See also*, Rev Proc 2011-41, 2011-2 CB 188.
[19] Rev Proc 2011-41, 2011-2 CB 188.
[20] IRC § 1022(c)(2)(B).

the inclusion of flexible distribution provisions proves all the more important, as is preserving the ability to transfer property to a surviving spouse in the form of a QTIP trust.

[3] Planning for Repeal, with Retention of the Gift Tax and the Opportunity for a Stepped-Up Basis

Current bills before Congress call for repeal of the estate tax, but not the gift tax.[21] The House bill also eliminates application of the generation-skipping transfer tax. It retains gift tax exclusion levels and Chapter 14 valuation rules, but applies a top 35 percent rate bracket for gifts.[22] The Senate bill amends the gift tax to deem as taxable gifts those transfers to non-grantor trusts, and specifically excepts from taxable gifts transfers to grantor trusts treated as wholly owned by the grantor or the grantor's spouse.[23] Retention of the gift tax has historically been thought of as a stop gap to the income tax preventing donors from transferring property to achieve lower income tax rates. For that reason the amendments in the Senate bill make sense as income from property held in a grantor trust is taxed at the grantor-donor's income tax rate, whereas income from property in a non-grantor trust typically is taxed either at the distributee's tax rate or the tax rate applicable to the trust. These provisions protect against use of a trust for purposes of avoiding the federal income tax.

The possibility of a stepped-up basis at death in the absence of an estate tax results in a substantial lock-in effect counter-productive to Speaker Ryan's goal of moving towards a vibrant economy. Clients would have every incentive to retain property until death in order to avoid capital gains tax, especially if it is depreciable or highly appreciated property. The impact of the lock-in effect is currently felt by clients whose wealth does not exceed the applicable exclusion amount causing them to refrain from current gifts or even sale absent application of a non-recognition provision. Unlike the alternatives discussed above, this option does not trade the estate tax for another form of "death tax" disguised in terms of an income tax, and would allow value, including appreciation, to pass from generation to generation unchecked by tax, provided property is not held in trust so as to lose the benefit of any allowable step-up in basis on a death subsequent to the donor's in the event amendments are not made to IRC Section 1014.

Notably, none of the bills before Congress indicate any change to IRC Section 1014, which sets forth rules for determining a fair market value basis as of death. Absent statutory amendment, once estate tax repeal occurs a number of its provisions become meaningless to the extent that fair market value basis depends on inclusion in a decedent's "gross estate," a concept tangentially "repealed" along with the estate tax. "Property acquired by bequest, devise or inheritance," property held in trust where the decedent could direct use of income during life and at all times prior to death holds a power to alter, amend, terminate or revoke the trust, and property passing by the decedent's exercise of a testamentary general power of appointment should continue to be eligible for a fair market value basis as none of these categories depend on gross estate inclusion.[24] Other trust property, including QTIP trust property, may not be eligible because fair market value basis for assets held in irrevocable trusts depends on inclusion in

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[21] 2017 introductions include HR 631, 115th Cong, 1st Sess (2017), and S 205, 115th Cong, 1st Sess (2017).

[22] HR 631, 115th Cong, 1st Sess (2017).

[23] S 205, 115th Cong, 1st Sess (2017).

[24] IRC § 1014(b)(1), (2), (3), and (4).

the decedent's gross estate.[25] If the estate tax is repealed, property held in those trusts would not be subject to inclusion in the decedent's gross estate as required. In that event property held in a QTIP trust would lose ability to gain a second step-up on the survivor's death. Also concerning to those living in a community property state is the likelihood that the surviving spouse's one-half share of community property would not be eligible for a fair market value basis because the decedent's one-half will no longer be included in determining the value of the decedent's "gross estate" in the absence of an estate tax.[26] On more careful consideration of these impacts, Congress may very well amend the statute at least to ensure application of the fair market value basis rule to QTIP trust property and both halves of community property.

§ 1.04 Political Viability of the Alternatives May Predict Ultimate Taxation of Death

The current estate tax impacts only the wealthiest segment of the population, with less than one out of every 20,000 decedents required to file an estate tax return.[27] As a consequence, more than 99 percent of Americans enjoy a step-up in basis for appreciated property and absolutely no federal estate tax. Interestingly, in 2010 when decedents' estates faced the choice of electing into carryover basis or sticking with the estate tax, all but the very wealthiest of estates chose the estate tax. Americans do not pay estate tax until the value of assets transferred exceeds the "applicable exclusion amount," which for individuals is $5.5 million and for married couples making a portability election can equal $11 million for the survivor. Any benefit from repeal of the estate tax, with retention of the stepped-up basis for appreciated assets, thus, would only be felt by married couples with assets in excess of about $11 million or individuals with assets in excess of about $5.5 million. Those taxpayers will benefit 40 cents on the dollar for every dollar transferred in excess of the almost $5.5 million per person basic exclusion amount. The tax savings impact of the other alternatives as compared to the status quo depends on whether Congress provides an exemption for the first $5.5 million of gain on assets owned by an individual or $11 million on assets owned by a married couple. If Congress adopts either the Canadian-style capital gains tax or the 2010 carryover basis alternative with an exemption at least equal to the basic exclusion amount, then tax savings from repeal and replacement would continue to impact only those taxpayers with assets in excess of the basic exclusion amount, but tax savings would amount to only about 20 cents on the dollar assuming a capital gains tax of 20 percent and current estate tax of 40 percent. This occurs because replacement of the estate tax with an alternative based on carry-over basis is essentially trading one tax for another, an estate tax for income taxation of inherent gain as of death. It would hit especially hard those taxpayers with low basis or fully depreciated assets, whereas it would have very little impact on those taxpayers with actively traded stock portfolios. Wealthier taxpayers generally have a greater amount of assets in stock.[28]

If Congress chooses to repeal the estate tax in favor of a Canadian-style capital gains tax or a carryover basis alternative, but does not provide an exemption for gain inherent in assets, regardless of whether gain inhered as a result of depreciation deductions or increase in value, both the wealthy and the not so wealthy might actually pay more tax than paid under our current system, which provides for a full step-up

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[25] IRC § 1014(b)(9), (10).

[26] IRC § 1014(b)(6).

[27] *See*, Estate Tax Returns Filed for Wealthy Decedents, 2006–2015, Statistics of Income, https://www.irs.gov/pub/irs-soi/2015estatetaxonesheet.pdf (accessed June 22, 2017).

[28] *Id*.

in basis and estate tax only on assets transferred in excess of the applicable exclusion amount, the $5.5 million for individuals and $11 million for married couples noted above. Thus, repeal of the estate tax with carryover basis and no exemption for gain would cause the not so wealthy (those individuals with less than $5.5 million and married couples with less than $11 million) to face an increase in tax of up to 20 cents on the dollar on property transferred at death assuming a 20 percent capital gains tax. In that scenario, a married couple that under the current system does not need to pay estate tax might have to pay up to $2.2 million in capital gains tax. This is potentially $2.2 million more than the married couple would need to pay in taxes under our current system. In addition, only those wealthy couples with assets in excess of 22 million would see any reduction in overall tax paid on transfers of property at death if the couple owns mostly low basis or fully depreciated assets. Thus, absent an exemption from any capital gains tax or carryover basis alternative equaling at least the amount of the current applicable exclusion, all married couples whose wealth does not exceed $22 million, including those couples owning closely held businesses, farms and ranches, could very well end up owing more overall tax if the estate tax was repealed in favor of carryover basis than if the status quo remained in place. If an exemption was not provided, the only sure winners would be married couples whose assets totaled in excess of $22 million.

Assuming the rhetoric of the "death tax" does not overshadow the real impact of a potential repeal in favor of a capital gains tax or carryover basis regime, it would be politically difficult for Congress to repeal the estate tax without continuing to allow a step-up in basis on assets transferring at death or, in the event of a capital gains tax or carryover basis alternative, providing for an exemption from gains or an increase in basis equal to the current applicable exclusion amount. To not provide such an exemption would save taxes for the most wealthy and potentially increase the cost of transferring property at death for every other American. It may also be that the very wealthy, after careful consideration, would prefer the estate tax to a tax regime that might not provide for the same planning opportunities as the status quo. This analysis leads to the conclusion that individuals with less than $5.5 million in assets or married couples with less than $11 million in assets, with planning, will likely not be impacted adversely by any future legislation, except perhaps as to necessitating planning to minimize capital gains tax.

That leaves the policy question as to whether wealthy taxpayers should at least pay a tax on inherent gain, assuming repeal of the estate tax. If Congress answers that question with a resounding "yes," it likely will choose to enact, in place of the estate tax, either a Canadian-style capital gains tax or a carryover basis alternative, and the choice as between the two may rest on how important immediate revenue is to the budget reconciliation process. A more immediate need for revenue would favor adoption of a Canadian-style capital gains tax. The political issue to overcome with the Canadian-style tax is that it replaces the need to pay an estate tax at death with the need to pay an income tax at death. For Republicans wanting to do away with "death" tax in any form, the carryover basis alternative would be more palatable. If cost of repeal is not an issue, repeal of the estate tax along with retention of stepped-up basis for appreciated property would yield the most savings for wealthy taxpayers. Some would see such a step as one more way to ensure economic growth. Others would view such legislation as exponentially increasing the growing wealth gap between America's most wealthy and its middle class. Some see the growing wealth gap as putting paid to the American dream and adversely affecting the ability of our democratic form of government to continue operating. Others would vehemently disagree.

§ 1.05 Planning Strategies in the Face of Uncertain Tax Reform

With the increase in the basic exclusion amount to $5 million, as adjusted for inflation, estate tax planning for all but the very wealthy has shifted focus from minimizing estate taxes to maximizing basis in an effort to minimize taxable gain. Under all of the likely alternatives to repeal of the estate tax, basis planning becomes of primary importance to all taxpayers. Only if the taxpayer's state of domicile imposes a state estate tax with lower exclusions than the federal estate tax will individuals, whose estates would be exempt from payment of federal estate tax, need to employ traditional estate tax planning techniques to minimize overall state estate tax.

In the face of uncertainty, particular planning options nevertheless recommend themselves regardless of which alternative finds its way to becoming law in the wake of Republican tax reform efforts, including:

(a) Gifts up to the unused federal applicable exclusion amount for clients who currently face payment of estate tax;
(b) Inclusion of trust powers allowing for discretionary outright distributions;
(c) Provisions allowing for tax modification of trust provisions;
(d) Use of a QTIP trust for the benefit of the surviving spouse; and
(e) Election of portability.

Key considerations in employing each of these planning suggestion follows.

[1] Undertaking Gifts Up to the Applicable Exclusion Amount

For those clients whose assets currently do not exceed the applicable exclusion amount, it is likely their assets will also be sheltered from any alternative tax regime that Congress might enact in the wake of estate tax repeal. Given this assumption, simple estate tax repeal would have no effect on the estate planning decisions of those clients given that the current estate tax has no impact. Essentially, for individual clients with assets of less than $5.5 million and married couples with assets of less than $11 million and proper planning, the estate tax (and for that matter gift tax) has no impact on planning decisions because no estate or gift tax would ever be owed by those clients. Repeal would not change this. The question becomes whether any replacement tax regime will provide similar exemption levels for inherent gains. During his campaign, President Trump alluded to a $10 million exemption from gain, but did not elaborate how this would apply. If history is anything to go by, in 2010, basis increase, allocable to reduce inherent gain, reflected the applicable exclusion amounts as of date of enactment and there is no reason to believe the case would differ this time round. Given political exigencies, the expectation would be that clients whose assets would be fully protected by the applicable exclusion amount in the absence of estate tax repeal should similarly be protected from loss of a step-up in the event Congress replaces repeal with either a gains tax or carryover basis.

In contrast, wealthier clients, whose estates would pay estate tax in the absence of repeal, should consider making gifts to tax effective trusts up to the value of any unused applicable exclusion amount. As a general rule, however, gifts should not exceed available applicable exclusion amount. Unnecessary payment of gift tax would not make economic sense in light of the prospect of estate tax repeal in 2017. Given uncertainty, the viability of any contemplated gift should take into account each of the probable estate tax reform scenarios.

In the event repeal efforts fail and the status quo remains in place, traditional estate planning wisdom recommends clients make gifts for the purpose of minimizing overall transfer tax. In the absence of estate tax repeal, any appreciation with respect to gifted property escapes further estate taxation. If unused generation-skipping transfer tax is also allocated to the gift, assets can escape estate taxation for successive generations. In addition, if the donor lives in a state imposing a state estate tax with exclusion levels less than the federal applicable exclusion amount, a gift now can also reduce the state estate tax bill on the client's death. Only Connecticut continues to impose a state gift tax with the remaining states allowing lifetime transfers to avoid state estate tax, although some provide a three-year estate inclusion rule. Assuming the current potential for combined federal and state estate tax savings outweighs the income tax cost of a carryover basis on the making of the particular gift, overall tax savings from a gift up to the applicable exclusion amount by wealthy individuals should result if there is no repeal during Trump's presidency.

A gift could also yield tax savings if Congress enacts a capital gains tax in lieu of an estate tax. If Congress were to implement a Canadian-style gains tax, a later gift or transfer of property on death by the client would trigger payment of tax on inherent gain. The need to pay that tax at the donor's generation, however, could be avoided if a substantial transfer were made now and sheltered from federal gift tax by the applicable exclusion amount. By transferring assets to the next generation, gain will likely avoid taxation for at least 21 years if a rule similar to that in Canada is imposed on trusts. In the event it is beneficial to avoid the deemed disposition rules as the 21 year mark approaches, planners should consider including trust powers allowing outright distributions and even trust termination in favor of then beneficiaries as appropriate to later minimize payment of taxes provided a tax-free roll out applies for trust distributions. A gift with built-in flexible distribution provisions could lead to tax savings in the event Congress repeals the estate tax in favor of a tax on gains at death.

In the event Congress adopts a carryover basis regime similar to that in place in 2010, a gift now likely would not result in tax savings. Transferred assets would take a carryover basis in the hands of the donee and be ineligible for allocation of aggregate basis increase to zero out gain under the carryover basis system on the death of the donor.[29] At best the donor-client would retain assets with sufficient inherent gain to fully use any allowable aggregate or spousal basis increase on the client's death. In that case a gift now, while not yielding tax savings, at least would not cause a loss of tax benefit. To hedge against the possibility of not having sufficient assets owned by the decedent at death, terms of any current gift should include provisions so that highly appreciated property could be returned to the donor. This could be achieved in different ways. If the client is domiciled in a state recognizing self-settled asset protection trusts, those trust provisions could allow an independent trustee to make discretionary distributions to the donor. Assuming rules similar to those in place in 2010 are adopted, so long as the donor-client survives three years following return of the trust property, basis increase could be allocated to the gifted property in the hands of the donor-client's estate on death.[30] Alternatively, if the donor was comfortable with tax status as a grantor trust for income tax purposes, a swap power could be included allowing appreciated assets to be swapped for high basis assets without triggering gain (or in the event the estate tax remains in place, gross estate inclusion).[31] Basis increase could then be allocated to the swapped low basis assets on

[29] IRC § 1015; IRC § 1022 (now repealed).
[30] *See* IRC § 1022(d)(1)(C) (now repealed).
[31] Rev Rul 2008-22, 2008-1 CB 796, *as corrected by* Announcement 2008-46, 2008-1 CB 983.

the donor's death. While a current gift might not yield tax benefit if Congress ultimately adopts a carryover basis regime, careful planning could avoid loss of tax benefits associated with basis increase.

If when looking into the crystal ball the client believes Congress will successfully repeal the estate tax and at the same time retain provisions allowing for a basis step-up on appreciated assets, the client may want to refrain from making a gift now. Assets gifted to beneficiaries in an irrevocable trust generally would not be eligible for a basis step-up absent special provisions. With the focus shifting to basis planning, taxpayers would want to avoid lifetime gifts which take a carryover basis.[32] If the client, after considering the likely scenarios on estate tax repeal chooses to move forward with a gift up to the applicable exclusion amount, to hedge against being stuck with a carryover basis for trust assets, the planner should consider inclusion of swap powers and distribution powers as discussed in relation to planning for possible imposition of the carryover basis rule. These strategies could minimize adverse tax consequences by achieving eligibility for a step-up in basis. Depending on who takes on death of the decedent, it may be important that the decedent survive for at least one year from receipt of the re- transferred property.[33] In addition, consideration should be given to anticipating modification of the trust to achieve optimum tax results. In this regard, the trust could grant a trust protector discretion to amend trust provisions in light of future tax reform. States adopting the Uniform Trust Code specifically allow the court to modify trust terms to achieve a donor's probable tax objectives. A clear statement regarding the donor's wish to minimize overall income, transfer or other applicable taxes that may result from future amendments to the tax code may encourage the court to make appropriate modifications.

[2] Drafting to Provide for Flexibility

In the interim, while America waits to see what becomes of the estate tax, clients proceed with preparation of estate planning documents and the making of transfers for myriad reasons other than tax planning. With a shift in focus to basis planning, it would be important to draft trusts with an eye towards including provisions allowing ability to increase basis and minimize or postpone triggering gain.
Effective basis planning under the three probable alternatives to the status quo differs in significant respects, yet each suggests that flexibility to make distributions and a clear statement allowing for modification of trust provisions may serve beneficiaries well in the future.

If Congress repeals the estate tax but retains IRC Section 1014 in its present form, to obtain a step-up in basis for property held in trust the decedent would essentially need to retain ownership or control over disposition of the property in order to trigger a stepped-up basis for appreciated property. Property passing by "bequest, devise or inheritance" from the decedent to the beneficiary will continue to receive a fair market value basis as of the date of the decedent's death.[34] Beneficiaries of trusts also take a fair market value basis where the decedent received or controlled the receipt of trust income and retained the right to alter, amend, terminate or revoke the trust at all times prior to death. Property passing on exercise of a testamentary general power of appointment held by the decedent also takes a fair market value basis. Other provisions of IRC Section 1014 require inclusion in the gross estate to trigger a date of death fair market value basis, and on repeal of the estate tax these provisions would become meaningless.

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[32] IRC § 1015.
[33] *See* IRC § 1014(e).
[34] IRC § 1014(b)(1).

If Congress adopts a carryover basis regime similar to that in effect for electing decedents' estates in 2010, in order to allocate aggregate basis increase to eliminate potential gain, the property essentially would need to be owned by the decedent or held in a qualified revocable trust. To receive the benefit of spousal basis increase property, it would need to pass to the spouse or for the spouse's benefit in the form of a qualified terminable interest property trust.

If Congress instead enacts a gains tax similar to that of Canada, for certain trusts it may prove beneficial to avoid a deemed disposition every 21 years. Trusts owning frequently traded public stock will likely not benefit from avoiding the 21-year deemed disposition rule. Neither will trusts that can offset gains with losses on the deemed disposition need to take any active measures to avoid gain. Some trusts, however, will benefit from avoidance of the gain triggered on the deemed disposition especially when the trust property consists of highly appreciated assets. In that event distributions to beneficiaries likely could be made as a tax-free roll out. The tax planning goal here will be to minimize gain from deemed dispositions, not as with other strategies to increase basis.

To allow for basis planning and minimization of gain ultimately recognized, regardless of which legislative scenario prevails, consideration should be given to inclusion of a number of strategies increasing flexibility to respond to future changes when drafting trusts. Among the various options for building the flexibility needed to react, not only to tax changes, but also to changes in family circumstances, are the following alternative options.

(1) If the client is comfortable with granting relatively broad powers to beneficiaries, consider granting certain beneficiaries broad special powers, sometimes referred to as limited powers, to appoint trust property, including in further trust, to or for the benefit of anyone other than the beneficiary, a person to whom the beneficiary owes a duty of support, the beneficiary's estate or the creditors of any of them. This power allows a beneficiary to distribute property at various times in a manner that yields the best overall tax results at that time. Special or limited powers can allow ultimate flexibility to essentially modify trust provisions, effectively achieve results similar to decanting, or distribute trust property outright to achieve tax savings under a different tax regime. Lifetime special or limited powers of appointment under current Code provisions generally do not result in adverse gift or estate tax consequences on exercise of the power if held by a person without a beneficial interest in the trust.[35] Testamentary special or limited powers of appointment under current Code provisions generally do not result in adverse gift or estate tax consequences by the holder.

(2) As mentioned earlier, consider whether it is beneficial to create a trust in a state recognizing self-settled asset protection trusts that allows an independent trustee to make discretionary distributions among the settlor and other beneficiaries. In those states that have not adopted asset protection trust legislation, the ability of a trustee to discretionarily distribute property to the settlor, in most instances, will cause the trust property to be subject to the settlor's creditor claims and, consequently, result in estate tax inclusion.[36]

(3) If the law of the governing state provides for decanting, consider including provisions that would allow maximum flexibility to decant. The Uniform Trust Decanting Act suggests that the most

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[35] IRC § 2514(c); Treas Reg § 25.2514-1(c). Estate of Regester v Commissioner, 83 TC 1 (1984).

[36] Rev Rul 76-103, 1976-1 CB 293. *See also* Unif Trust Code § 505(a)(2).

flexibility to decant occurs in trusts where maximum discretion is allowed a trustee to make distributions.[37]

(4) Alternatively, consider granting a trust protector maximum discretion to modify trust terms for the purposes of minimizing overall tax burden in light of amendments to the tax code. Care should be taken in granting such a power so as not to inadvertently cause inclusion in the gross estate of the settlor in the event estate tax is not permanently repealed as noted above with respect to discretionary powers to pay amounts to the settlor. The modification provision could be coupled with a provision specifying the client's ultimate intent with regard to beneficial interests, tax savings and creditor protection. Pursuant to the Uniform Trust Code a trust protector is deemed to owe fiduciary duties.[38] For this reason it is important to distinguish between powers granted a trust protector and a limited power of appointment granted to a person. The trust protector typically is provided grantor-type powers. These powers can be granted to a single person or to multiple people, often three to anticipate avoiding deadlock.

(5) Statutorily or through case law, it is further recognized that courts may modify trust terms to achieve probable tax preferences of the settlor.[39] Consider including an express statement of intent encouraging a court to allow modification of trust terms, including beneficial interests, for the purpose of making the trust more tax efficient in light of changes in family circumstances or changes in applicable tax laws.

Care should be taken to include only those options for building flexibility that reflect the client's comfort level with placing control in an individual or individuals to make changes to trust terms. Attention also should be paid to ensuring that options chosen will not conflict with each other or raise a question as to who may act and when.

[3] Choosing the Form of Marital Gift

The ultimate choice of marital gift most often depends on the client's comfort in giving the spouse final control of who will receive property remaining unused at the survivor's later death. For many clients, the desire to provide for children of an earlier union or the fear that a later marriage by the surviving spouse will result in the client's hard earned assets passing to that spouse often causes the client to opt for passing property pursuant to a qualified terminable interest property trust or QTIP. A QTIP trust requires all income be paid at least annually to the surviving spouse and that no principal distributions be made to anyone other than the surviving spouse during the spouse's lifetime.[40] The property remaining in the QTIP trust at the death of the survivor, however, passes as directed by the estate planning documents of the first spouse to die, thus resting dispositive control over who receives QTIP property in the client who is the settlor of the QTIP trust.[41]

Regardless of whether Congress repeals the estate tax and regardless of what form repeal takes with regard to basis and the taxation of inherent gains as of the date of death, clients who prefer making the

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[37] Unif Trust Decanting Act §§ 11, 12 (2015).

[38] Unif Trust Code § 808(d) (2010).

[39] Unif Trust Code § 416 (as amended 2010), http://www.uniformlaws.org/shared/docs/trust_code/utc_final_rev2010.pdf (accessed June 22, 2017).

[40] IRC § 2056(b)(7).

[41] *Id*.

marital gift on death in the form of a QTIP trust to ensure control over the ultimate takers of the client's property following the survivor's death, will likely obtain favorable tax consequences with use of a QTIP. If Congress opts for a Canadian-style capital gains tax, the QTIP trust should allow for deferral of that tax until the survivor's death. If on the other hand it opts for a 2010-style carryover basis regime, the estate should be able to allocate spousal basis increase to a QTIP trust. If the status quo were to prevail, the QTIP trust not only allows deferral of estate tax until the survivor's death, it also allows the decision for whether or not to elect the marital deduction to be deferred for up to 15 months following the death of the predeceasing spouse, which is the time for filing the estate tax return plus any allowed six-month extension. Only if Congress chooses to repeal the estate tax and make no statutory change to the rules of IRC Section 1014 would the QTIP trust lead to a less favorable tax result than an outright gift in that there would be no opportunity for a second step-up on the survivor's death. In light of demographics, it is highly likely that there will be political will to amend IRC Section 1014 in order to continue the currently provided stepped-up basis for appreciated property held in a QTIP trust and for both halves of community property even in the absence of an estate tax. Such a provision would continue policy to treat a couple as a taxpaying unit.

An outright gift of property to the surviving spouse allows the same tax benefits regardless of which of the likely estate tax repeal options Congress picks. It will provide for a second basis increase for appreciated property on the survivor's death under the status quo, estate tax repeal with retention of stepped-up basis and estate tax repeal with carryover basis. It will also allow deferral of gain were a capital gains tax enacted on estate tax repeal.

The best choice for the marital gift is not directly influenced by the uncertainty resulting from the possibility of estate tax repeal. It instead is impacted by a weighing of several other non-tax factors, including:

- Desire to provide for children of a prior marriage;
- Importance of ongoing control over use and disposition of property in the event of a later marriage;
- Creditor protection planning for the survivor and later for those beneficiaries who take on the survivor's death;[42]
- Whether for state estate tax purposes a state specific partial QTIP election is recognized for purposes of minimizing state estate tax owed on a survivor's death;
- Ability to fully use the decedent spouse's generation-skipping transfer tax exemption;[43] and
- Ongoing administrative costs of using trusts.

Most of these factors tip the scale towards using a QTIP trust for the marital gift. These factors, combined with the Service's recent pronouncement blessing the making of a simultaneous portability election,[44] and the ability to choose a partial QTIP election should it lead to better estate tax consequences

[42] While the income interest will not be protected, trust terms can provide for protection of the principal.

[43] IRC § 2652.

[44] Rev. Proc 2016-49, 2016-2 CB 462.

following the first death,[45] may make the QTIP trust the clear winner for the marital gift in the eyes of most clients.

[4] Incurring the Cost of a Portability Election

Estates of decedents' married at death, in light of the possibility of estate tax repeal, must decide whether the estate should incur the costs associated with making a portability election that very well could provide no benefit beyond the date of any estate tax repeal. The cost of making a portability election is essentially the cost of filing an estate tax return on the death of the first of the spouses to die.[46] The benefits of a portability election include, first, the ability to preserve for use by the survivor any exclusion amount that would otherwise be lost on the first death, and, second, the ability to transfer all property to a surviving spouse in a format that will achieve a second step-up in basis on the survivor's death. Were the estate tax to remain in place, the portability election, if made in conjunction with either an outright or "QTIP'ed" marital gift, allows the possibility of a second stepped-up basis on the survivor's death, something that could not be obtained if instead a credit shelter trust is used to pass property on the first death.[47]

For those estates currently facing the decision of whether to make a portability election, the Service recently provided a simplified procedure for taxpayers to extend the time for making this decision to the later of January 2, 2018 or two years following the decedent's date of death.[48] Essentially the ruling provides all eligible estates of those decedents dying after 2010 a chance to elect portability by January 2, 2018, or a bit longer if the decedent died after January 2, 2016, without the need to incur the added cost of requesting a private letter ruling, which can be substantial.[49] Application of the simplified extension procedure, however, is limited to those U.S. decedents' estates that have not yet filed a return and that would not be required to file a return but for the need to make a portability election.[50] For the simplified procedure to apply, the executor need only file a properly prepared return by the later of the two dates indicating at the top of the return that it is filed pursuant to the revenue procedure. Importantly, the January 2, 2018 or later date allows those estates eligible for extension to wait and see what happens with tax reform this fall before incurring the cost to make an election that may prove meaningless if Congress repeals the estate tax. Estates of decedents that must file an estate tax return whether or not electing portability must make the portability election on a timely-filed return and may not have the luxury of waiting to see what Congress does.

The Service recently confirmed that an estate may make simultaneous QTIP and portability elections.[51] Earlier, with the issuance of final regulations, Treasury had withdrawn the proposed regulation example indicating that simultaneous elections could be made and thereby raised a question about the ability to make simultaneous elections. Revenue Procedure 2016-49,[52] however, clarifies simultaneous elections in

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[45] IRC § 2056(b)(7)(B)(iv).

[46] IRC § 2010(c)(5); Treas Reg § 20.2010-2(a). A QTIP election also requires filing of a return, *see*, IRC § 2056(b)(7)(b)(5); Treas Reg § 20.2056(b)-7(b)(4)(ii).

[47] IRC § 1014(b)(1) and (10). A second step-up can also be obtained for property in a general power of appointment marital trust per IRC § 1014(b)(9).

[48] Rev Proc 2017-34, 2017-34 IRB 1282.

[49] *Id*.

[50] *Id*.

[51] Rev Proc 2016-49, 2016-2 CB 462.

[52] 2016-2 CB 462.

fact can be made. It indicates, however, that when simultaneous portability and QTIP elections are made, the estate may not thereafter argue that the QTIP election should be voided, as can be done when the QTIP election is made, but it is later determined that the making of the election was unnecessary.[53] The ability to make a simultaneous portability and QTIP election is welcomed news as it allows planning to protect assets for children of a first marriage and at the same time to obtain the opportunity for a second basis step-up on the surviving spouse's death.

Decedents' estates not required to file an estate tax return on the first death, but whose assets, when combined with that of the surviving spouse may require payment of estate tax on the later death, should strongly consider making the portability election. Preservation of the deceased spouse's unused exclusion amount for use by the survivor can protect the value of assets up to the applicable exclusion amount from both future estate tax and tax on any inherent gain. It is also possible, though unlikely, that transition rules in the event of estate tax repeal could in some form preserve benefits of making the portability election. Clients whose estates consist primarily of assets for which depreciation deductions may be taken will find it especially important to use an estate plan allowing for basis step-up on the survivor's death. Depending on the client's comfort level with an outright gift to their spouse, both an outright gift and a QTIP election, in conjunction with portability, can yield the second step-up. Those estates not required to file an estate tax return, and which have not yet filed, can make the simultaneous portability and QTIP elections even if the deadline for timely filing has passed at least until January 2, 2018 and longer if the decedent's death occurred after January 2, 2016.[54]

For couples whose combined assets will exceed the available applicable exclusion amounts to both spouses and who anticipate being required to pay federal estate tax on the survivor's death, in most instances, the credit shelter-marital deduction formula plan will yield the best tax savings assuming assets passing to the spouse are not depreciable assets or assets with a substantial inherent built-in gain. This assumes that combined federal and state estate tax rates exceed combined federal and state capital gains tax rates. This conclusion further assumes that the surviving spouse is unwilling to forgo use of the inherited property by making a substantial gift following the death of the first spouse to an intentionally defective grantor trust, which would allow the surviving spouse to achieve even greater tax benefits by paying the trust income tax and thereby essentially making additional tax-free transfers to the trust.[55] The QTIP trust, in contrast to an outright gift, allows the decedent's estate to defer making the decision as to whether or not to elect full marital deduction and portability or a partial QTIP election yielding a credit-shelter/marital deduction plan until the due date for filing of the federal estate tax return plus extensions.

In addition to possible overall tax savings implications of deciding to make a simultaneous portability and QTIP election, careful consideration should be given to the impact of making the QTIP election on the remainder beneficiaries. If the decision were made to forego the portability election and instead pass property pursuant to a credit shelter trust, either because the decedent's plan specifically provides for the funding of such a trust by disclaimer (or otherwise) or because a decision is made not to elect QTIP treatment for such a trust despite eligibility to do so, the remainder beneficiaries on the death of the

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[53] *Id*.

[54] Rev Proc 2017-34, 2017-34 IRB 1282; Treas Reg § 20.2056(b)(4)(i) (QTIP election may be made on the first late return filed so long as a return has not previously been filed).

[55] *See* Portability—L. Law and H. Zaritsky, So Many Questions, So Few Clear Answers, Heckerling Estate Planning Institute, University of Miami (2017).

decedent's spouse would receive all trust property of the "credit shelter trust" without bearing any burden for payment of estate tax that might be owing on the surviving spouse's death. If instead, a QTIP election were made with respect to all assets passing on the death of first spouse for the benefit of the survivor, although remainder beneficiaries of the QTIP trust would receive the benefit of a second step-up in basis for appreciated assets passing on termination of the QTIP trust at the surviving spouse's death, the QTIP trust would be required to reimburse the surviving spouse's estate for estate tax attributable to inclusion of the assets in the survivor's gross estate.[56] Thus, absent a direction in the survivor's testamentary documents waiving the right of reimbursement, the remainder beneficiaries could conceivably receive trust assets worth 40 percent less than if no QTIP election had been made. Thus, the decision to make simultaneous portability and QTIP elections can impact who bears the burden for any estate tax that would be paid on the survivor's death. This is an especially important consideration when the remainder beneficiaries of the QTIP are children from a prior marriage of the predeceased spouse. The issue, and potential dispute, might be avoided by negotiating a marital agreement requiring the surviving spouse to include a provision waiving the right to reimbursement in the event simultaneous portability and QTIP elections are made on the first death. It can also be avoided by drafting documents to require funding of the credit shelter trust on the first death.

It is also notable that recent case law may not in fact leave the decision to make the portability election entirely in the hands of the executor of the decedent's estate despite the Code and treasury regulations allowing the executor discretion to make the election.[57] In granting discretion, the Code and accompanying regulations acknowledge that it may be preferable not to make an election in certain circumstances. As already suggested, an executor might determine a better tax result could be achieved by not making a simultaneous portability and QTIP election in order to shelter anticipated appreciation in assets from federal estate tax on the survivor's death. Also, for example, if the gross estate includes hard to value assets, the personal representative may strategically choose not to make the portability election in order to avoid any possibility that the Service could revalue assets for purposes of determining the DSUE amount available to the surviving spouse.[58] Despite the discretion granted to the executor, at least one state court, in *Vose v. Lee,*[59] has required the executor to make the portability election where the surviving spouse had a taxable estate and not making the election would have resulted in a complete loss of the predeceased spouse's unused exclusion amount because the predeceased spouse did not have sufficient assets to use the DSUE amount. It is hoped that state courts would limit *Vose* to its facts recognizing the need to provide the executor discretion to elect portability based on tax planning decisions.

The *Vose* decision made surprising findings concerning the portability election, including its treatment as a valuable property right and the finding that its election by the executor is subject to the exercise of state law fiduciary duties. The court found that Vose, who was the surviving spouse, had standing to bring the petition even though he was not an heir or a beneficiary of the decedent's estate. Specifically the court indicated the portability election "grants Vose a potential interest in a part of Decedent's estate under the control of Lee as the administrator. Vose may have a pecuniary interest as the surviving spouse in the

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[56] IRC § 2207A (this assumes the decedent's will does not waive the right to reimbursement).
[57] *See* Treas Reg § 20.2010-1(a)(3); Treas Reg § 20.2010-3(d).
[58] *See* IRC § 2010(c)(5)(B); Treas Reg § 20.2010-3(d); Treas Reg § 25.2505-2(e).
[59] 2017 OK 3, 390 P3d 238 (Okla 2017).

portability of the DSUE, independent of his ability to take as an heir."[60] In *Vose*, the Oklahoma Supreme Court equated the making of the portability election with a "general duty to take charge of all the effects and personal assets belonging to the decedent and to preserve the same from damage, waste and injury."[61] It preceded that statement by admonishing that "[an] administrator is responsible for the faithful administration of the estate's property … and has a duty to preserve the estate."[62] The court gave short shrift to the argument by the child of the prior marriage that the estate should be able to demand consideration for the election of the DSUE amount indicating "the only person with an interest in and ability to use the DSUE, if it exists, is the surviving spouse. If the election is not made through the timely filing of an estate tax return, then it is lost."[63] In its decision, the court also rejected an argument that the antenuptial agreement controlled, indicating that the agreement could not have addressed the issue because the concept of portability did not exist at the time the agreement was entered. The court ended by labeling the safeguarding of the DSUE a "fiduciary obligation."[64] In light of *Vose*, it would be important for couples to specifically address the portability election as part of a marital agreement in order to avoid later dispute on the predeceased spouse's death. Both *Vose* and another state court in an unpublished case acknowledge the making of the portability election can be the subject of a negotiated agreement, whether the agreement is entered before or after the decedent's death.[65]

§ 1.06 Conclusion

Clients must continue to make estate planning and administration decisions even in the midst of uncertainty as to estate tax repeal. As in 2001, when Congress made the decision to ultimately repeal the estate tax, Republicans control both houses of Congress and the presidency, yet unlike in 2001 the Republicans are more fractured among themselves. Whether estate tax repeal becomes reality and whether fair market value basis as of date of death will continue to eliminate any income tax on inherent gain remains to be seen. The president during his campaign hinted that in the wake of repeal either a capital gains tax or a carryover basis regime may be enacted in place of the current system. Estate planning decisions, that must be made now, can best be made by taking into account the most likely options going forward. Making the best guess looking into the crystal ball, clients who would not be subject to estate tax now should consider refraining from making any gifts and should consider using a QTIP trust for the marital gift. Clients that face paying an estate tax absent repeal should consider the benefits of making a gift up to the applicable exclusion amount now provided the client has sufficient assets to live comfortably despite the gift, and should also consider using a QTIP trust for the marital gift. Clients whose estate might benefit from the second step-up in basis on a surviving spouse's death should proactively consider whether or not the executor should make the portability election to minimize the possibility of disputes as between the surviving spouse and children of a prior marriage, and to the extent possible should postpone incurring the cost of the portability election until after Congress has made its choice as to estate tax repeal and replacement, if any.

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[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] Vose v Lee, 2017 OK 3, 390 P3d 238 (Okla 2017); Walton v Estate of Swisher, 3 NE3d 1088 (Ind Ct App 2014).