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## A 2017 Repeal of the “Death Tax?”

The estate tax, also referred to as the “death tax,” is a tax on the property you own at the time of your death. Currently, there is a federal estate tax exemption of \$5,490,000 per person, up from \$5,450,000, in 2016. This means that married couples can shield \$10,980,000 from this tax. Federal estate tax is due on any assets above the available exemption; currently, the estate tax rate is 40%.

Along with the federal estate tax, there is a federal gift tax on transfers during life, which generally has the same rates and exemptions as the estate tax. And there is a federal “generation-skipping transfer tax” that applies to certain transfers to grandchildren or to trusts for children that ultimately will benefit grandchildren.

With a Republican-controlled White House, Senate and House of Representatives, reform or even repeal of the federal estate tax is very plausible. Although no one can say with certainty at this time what changes may come, based on proposals made during the campaign, as well as various bills introduced over the past several years, it is reasonable to surmise that legislative changes in this area may include one or more of the following components:

- **A full repeal of the federal estate tax.**

Thus, an individual would be able to transfer an unlimited amount of his or her assets upon death without incurring any federal estate tax.

- **A full repeal of the federal generation-skipping transfer tax.** This tax has received less attention making it more difficult to speculate as to whether it would be retained or not.
- **Retention of the federal gift tax in order to prevent income tax shifting.** Without a gift tax in place, people would be free to move assets back and forth to shift income to a taxpayer in a lower tax bracket. Consider, for example, that a taxpayer in a high income tax bracket (such as a parent) could give low basis assets to an individual in a lower income tax bracket (such as a child). The individual in the lower income tax bracket could then sell the assets, pay the tax at a much lower tax rate and then give the proceeds from the sale (minus the taxes paid) back to the taxpayer in a higher income tax bracket.
- **Elimination of the “step up” in basis on a decedent’s assets to fair market value on the date of death.** Essentially, basis is the price you paid for an asset. Currently, upon your death, any assets you own receive a “step up” in basis equal to the fair market value as of date of death. If the federal estate tax is repealed, President Trump proposed that a step up in basis on assets above \$10,000,000 would not be permitted. For example, if you die with \$20,000,000 in assets, you will pay no federal estate tax; however, half of your assets will not receive a step up in basis and instead will keep the same basis you had before death (i.e.,

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“carryover” basis). The beneficiaries of those assets will incur significant capital gains tax (currently, 20% at the federal level) upon the sale of those assets.

- **Imposition of a deemed disposition tax.** A decedent would be deemed to have sold all of his or her assets the moment before death, with the result that an income tax would be imposed at death in lieu of an estate tax. This is sometimes referred to as a “deemed disposition tax.”
- **Phasing of any repeal.** An estate tax repeal could be phased in over time or could be subject to a 10-year “sunset” provision. Under current Senate rules, a sunset provision would allow the bill to pass the Senate with only a bare majority of 51 votes, as opposed to the 60 votes required to pass any legislation that significantly increases the federal deficit beyond a 10-year period.

The above is simply an outline of potential estate tax reforms. In light of the uncertainty with respect to a federal estate tax repeal, however, we recommend that our clients consider the following:

- **Your Current Estate Plan.** Revisit your will or revocable trust agreement to ensure that the disposition of your assets will remain consistent with your intentions even if the federal estate tax is repealed. For example, if your will or revocable trust contains typical planning involving an “estate

tax sheltered trust,” the proportion of your estate passing to the estate tax sheltered trust may be increased very substantially. If the beneficiaries of that trust differ from the beneficiaries of the balance of your estate, you should consider modifying your estate plan.

- **State Death Taxes. Discuss planning for state death taxes.** In the case of married couples, repeal of the federal estate tax could cause an increase in state death taxes levied at the time of death of the first spouse; however, with proper planning, this concern can be mitigated.
- **Lifetime Gift Planning.** Consider the effect of any possible repeal on lifetime gift planning. You may want to defer gifting in the interim until more is known about the likelihood and potential duration of a federal estate tax repeal.

These are uncertain times for tax reform, and therefore uncertain times for estate planning. As we have consistently seen in the past, new tax legislation creates different opportunities for our clients. We will be tracking legislative changes as they develop, and would be pleased to share that information with you and suggest appropriate estate planning strategies for your situation. If you have any questions or would like to discuss the impact of potential tax changes on your estate plan, please contact your Wiggin and Dana attorney.

*This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.*