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Estate Planning Insights

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One Big Beautiful Benefit of the One Big Beautiful Bill

By now, you have likely heard about the One Big Beautiful Bill (referred to in this newsletter as the "OBBB") in some form or fashion. The OBBB has been a hot topic in the news this summer, largely due to Elon Musk's public disapproval of it and the ensuing disagreement between him and President Trump. The OBBB (which is not an official name) is a large bill, and many of the provisions do not or will not have a direct impact on estate planning. However, we would like to discuss one provision in the OBBB that directly relates to estate planning.

NOTE: Many commentators who have written summaries of the OBBB have used the word "permanent" to discuss the changes made to the estate tax, gift tax and generation-skipping transfer tax (the "GST tax") basic exclusion amounts (sometimes also referred to as the "exemption" amounts). This does *not* mean that the change made to those exemption amounts cannot be repealed and replaced with new amounts in the future. This simply means that this particular provision in the OBBB is not subject to a "sunset clause," meaning there is no specified date or event upon which this provision will expire. However, a bill without a sunset clause can still be repealed through the standard legislative process (i.e., in the future, Congress can pass a new bill which specifically repeals various provisions in the OBBB, including the exemption amounts, and replaces them with new amounts). So, when you read our newsletter or other summaries of the OBBB that contain this type of language, keep in mind that *permanent* does not necessarily mean *forever*.

Estate Tax, Gift Tax and GST Tax Exclusion Amount Increases

The provisions in the Tax Cuts and Jobs Act of 2017 providing for the estate tax, gift tax and GST tax exclusion amounts (same amount for each) were scheduled to "sunset" (expire) at the end of this year. If Congress had not passed the OBBB to change those provisions, the estate tax, gift tax and GST tax exclusion amounts beginning on January 1, 2026 would have dropped back down to $5 million (indexed for inflation).

But the OBBB was, in fact, passed and signed into law on July 4, 2025. Thus, as of January 1, 2026, the estate tax, gift tax and GST tax exclusion amounts will increase to $15 million. This amount will be adjusted annually, based on inflation. This particular provision in the OBBB is said to be "permanent" or, more accurately, does not contain a sunset clause (i.e., an expiration date). As noted already, however, future election results can lead to changes in the estate tax exemption amount (and the other exemption amounts).

As estate planning attorneys, we understand that a major goal of our clients is to avoid paying estate taxes upon one's death (or, in the case of married couples, upon the death of the surviving spouse). Because the OBBB has increased the estate tax, gift tax and GST tax exclusion amount to $15 million, it is time to review your comprehensive financial statement to determine if it still makes sense to include a Bypass Trust in your Will or revocable trust document.

Remember that an individual who makes "taxable gifts" during life is using some of his/her lifetime gift tax exclusion amount. An individual's use of any of his/her lifetime gift tax exclusion amount reduces the estate tax exclusion amount available to that individual's estate at death. We are not going to discuss the gift tax or the GST tax in this newsletter, but we wanted to point out that the gift tax and GST tax exclusion amounts were also increased by the OBBB.

Bypass Trust and Portability Election – Use of Either or Both?

We have written about this topic in our newsletters many times. However, we wanted to reconsider the Bypass Trust and portability election options given the passage of the OBBB.

As we have pointed out before, married couples do not "automatically" get two exemptions from the estate tax. Married couples must "do something" to obtain two exemptions. Otherwise, if their estate plan is designed to provide support for the surviving spouse for the rest of his/her life, they only obtain one exemption per couple.

Keep in mind that when the first spouse (the "deceased spouse") dies, to the extent the deceased spouse leaves his/her ownership interest in assets directly (outright) to the surviving spouse, assuming the surviving spouse is a US citizen, the deceased spouse is "wasting" (i.e., not using) his/her exemption from the estate tax due to the way the marital deduction works. If the deceased spouse leaves all his/her assets to the surviving spouse, the surviving spouse will then own 100% of the assets. The surviving spouse is just one person and, absent appropriate action, 100% of the assets will be includable in the surviving spouse's estate at death, with only the surviving spouse's exemption available to avoid or reduce the estate taxes payable upon his/her death.

Beginning in 1981 (the year when Karen Gerstner first began practicing estate planning law) through 2010, the primary way that most married couples obtained two exemptions from the estate tax was to include a Bypass Trust (a/k/a Credit Shelter Trust) in their Will or revocable trust document. The Bypass Trust, which had to be provided for in the Will or trust document before either spouse died, became effective on the death of the deceased spouse and was funded with the deceased spouse's ownership interest in the assets up to the limit (i.e., the deceased spouse's available estate tax exemption amount). Usually, the deceased spouse named the surviving spouse as Trustee of the Bypass Trust, which gave the surviving spouse control over the trust. In addition, usually the surviving spouse was named as the primary beneficiary of the Bypass Trust for life. On the death of the surviving spouse, the assets still held in the Bypass Trust were not included in the surviving spouse's estate, regardless of the value of those assets at that time. Thus, the Bypass Trust assets were distributed to the remainder beneficiaries of the trust (usually the couple's children or trusts for the couple's children) on the surviving spouse's death, free of estate taxes. In addition, the surviving spouse's estate could use the surviving spouse's own exemption from estate taxes to avoid estate taxes on the surviving spouse's personally owned assets at death. In that way, each spouse was able to utilize his/her exemption from the estate tax.

In 2011, as a “temporary” measure, and in 2013, as a “permanent” measure, Congress added a second way for married couples to get two exemptions from the estate tax: the portability election. To obtain two exemptions from the estate tax based on portability, the executor of the estate of the deceased spouse (which is usually—but not always—the surviving spouse), must file a US Estate Tax Return (Form 706) and specifically make the portability election in that return.

NOTE: For married couples, the need to “do something” to avoid estate taxes “kicks in” when the couple has a combined estate that exceeds **one** exemption amount, not two. Thus, couples whose combined estate will exceed the $15 million exemption amount in 2026 will want to “do something” to obtain two exemptions. Again, the two usual choices in terms of “doing something” are (i) planning to establish a Bypass Trust on the first spouse’s death and (ii) planning to make the portability election on the first spouse’s death (or planning to do both).

Suppose the deceased spouse died leaving all his/her assets outright to the surviving spouse (a U.S. citizen), thereby wasting (not using) his/her estate tax exemption amount due to the effect of the marital deduction. The surviving spouse, as Executor, could file a US Estate Tax Return (Form 706) for the deceased spouse’s estate and elect to transport the deceased spouse’s unused estate tax exemption (called the “DSUE Amount”) to himself/herself, resulting in the surviving spouse having two exemptions at that point: (1) the deceased spouse’s unused exemption (i.e., the DSUE Amount) and (2) his/her own exemption. The portability election is basically the only option for obtaining two estate tax exemptions when the deceased spouse did not create a Bypass Trust (or do other similar estate planning). However, portability has been used even in cases where the deceased spouse actually does create a Bypass Trust because, frequently, the Bypass Trust is not funded to the full extent permitted by law, resulting in the deceased spouse having some unused exemption that could be transported to the surviving spouse by making the portability election.

Using a Bypass Trust and making the portability election are not mutually exclusive options. Frequently, married couples use both. The deceased spouse’s community property one-half interest in the “after-tax” assets, plus any separate property owned by that spouse, is titled so that it can go into the Bypass Trust when he/she dies (Note: investment and brokerage accounts *cannot* be titled in both spouses’ names as JTWROS for this to work). However, the deceased spouse’s ownership interest in the pre-tax assets, such as pre-tax employee benefit plans and IRAs, is structured to be distributed directly (outright) to the surviving spouse because that provides a much better income tax result for the surviving spouse and, ultimately, the children. As already noted, direct (outright) gifts on the deceased spouse’s death to a surviving spouse who is a US citizen result in “wasting” the deceased spouse’s estate tax exemption to the extent of those gifts because of the marital deduction. Therefore, making the portability election is a way of preventing the waste of the deceased spouse’s estate tax exemption amount for those types of transfers.

Of course, while the estate tax exemption amount remains at such a high level, it may not be necessary for all married couples to obtain two exemptions from the estate tax. But, again, future federal legislation could reduce the estate tax exemption amount. Thus, one must stay abreast of changes in the exemption amount and make changes to one's estate plan as necessary.

At the end of this newsletter is a chart showing the estate tax exclusion amount for the years 1981 through 2026, as well as the estate tax rates applicable in each year. We are including this information to help you understand that, while your estate plan may have been appropriate from a tax standpoint when it was created, it may no longer be optimal now. For example, if you and your spouse included a Bypass Trust in your Wills in 2002 because your combined estate had a value exceeding $1,000,000, that was a sensible approach at that time in view of the estate taxes that would have been payable on the amount above $1,000,000 when the surviving spouse died. However, in view of the higher estate tax exemption amount now, keeping those Bypass Trust Wills could actually cause some undesirable results.

Bypass Trust and Portability Election Options – Some Considerations

No one who understands all the considerations could ever say, in a general way, that one of these methods—Bypass Trust or portability election—is always better than the other. In every case, it depends on the particular couple's facts and circumstances. Both methods have pros and cons. In other words, there is no "one size fits all." However, most of our surviving spouse-executor clients have been making the portability election on the deceased spouse's death, whether there is a Bypass Trust or not, because the Bypass Trust is not always "fully funded" (i.e., filled up with assets belonging to the deceased spouse that have a total value equal to the deceased spouse's available estate tax exemption amount). *Some* of the considerations relating to these two methods include the following: (i) the importance of creditor protection (protecting the assets from loss due to divorces and other lawsuits); (ii) the type of assets owned by the couple and the importance (or not) of the "adjustment" to tax basis (i.e., the so-called "step up in basis") on the surviving spouse's death; (iii) various other income tax issues related to placing assets in trust (or not); (iv) GST tax planning (i.e., creating lifetime divorce and creditor-protected trusts for children and grandchildren when the surviving spouse dies); (v) blended family "control" issues; and (vi) the need for professional management of the assets after the deceased spouse's death.

Future Possibilities

As discussed above, while some provisions in the OBBB are "permanent," they may only last until there is a shift in the political landscape. In 2021, separate proposals by various Democrats included dropping the estate tax exemption amount to either $3.5 million or $5 million. In addition, some Democratic proposals included increasing the estate tax rate to 45% for estates above the $3.5 or $5 million exemption and 50% and higher for estates exceeding $10 million. Other proposals included eliminating the "step up in basis" for capital assets at death.

If, due to future election results, the Democratic party is able to obtain (i) at least 50 US Senators, (ii) a majority in the US House of Representatives, and (iii) a Democratic President and Vice President, they would have the ability to enact new legislation reducing the estate tax exclusion amount and increasing the estate tax rate (using the budget reconciliation process in the Senate). We cannot predict future changes to the estate tax laws, but this is a reminder that nothing lasts forever (and "permanent" does not necessarily mean "permanent").

We hope this newsletter serves as a reminder that your estate planning documents should be reviewed (and, possibly updated) every 5-7 years due to changes in the federal tax laws and also due to changes in various Texas laws that relate to estate planning. As noted above, estate planning strategies that made sense 10 years ago may not make sense today based on the current tax laws. Another reason for regular estate planning check-ups is that there will be changes in your financial situation and family situation that will impact your estate plan and possibly require changes to your estate planning documents. We will not even know about those types of changes and will not be able to consider how those changes affect your estate plan unless you come in for an estate planning check-up.

A Recent Case Involving an "Ineffective" Portability Election

Because we have been discussing the portability election in this newsletter, it is important to note that if the executor of the deceased spouse's estate files a Form 706 (federal estate tax return) to make the portability election, that return must be prepared in accordance with the federal estate tax regulations. Each asset in which the deceased spouse owned an interest at death must be included in the return, must be accurately described and must be valued at its fair market value. (Remember that Texas is a community property state, that all assets are deemed to be community property when the first spouse dies [regardless of title], and that each spouse owns 50% of each community property asset.) In addition, all deductions reported in the Form 706 must be allowable, necessary and reasonable in amount.

In a recent case involving the family of Fay Rowland (the spouse who died first—referred to as the "deceased spouse") and Billy Rowland (the spouse who died second—referred to as the "surviving spouse"), the Tax Court denied the estate of the surviving spouse the use of the DSUE Amount of the deceased spouse that the Executor reported in the Form 706 that had been filed for the deceased spouse's estate because no values were shown in that tax return for the assets passing to various beneficiaries, including beneficiaries other than the surviving spouse. The distributions to children and grandchildren made by the deceased spouse would have used some of the deceased spouse's estate tax exemption amount and, therefore, would have reduced the DSUE Amount of the deceased spouse that was transported to the surviving spouse pursuant to the portability election. This "reporting failure" relating to the Form 706 that had been filed for the deceased spouse's estate was an expensive mistake. Per a Wall Street Journal article, the additional estate taxes payable by the surviving spouse's estate in the case of the Rowland family was said to be over $1.5 million. Thus, the best practice when preparing a Form 706 to make the portability election is to report all assets and liabilities in the manner necessary to satisfy the federal estate tax regulations.

Year	Estate Tax Exclusion Amount	Estate Tax Rate(s)
1981	$175,000	32% to 70%
1982	$225,000	32% to 65%
1983	$275,000	34% to 60%
1984	$325,000	34% to 55%
1985	$400,000	34% to 55%
1986	$500,000	37% to 55%
1987-1997	$600,000	37% to 55%

Year	Estate Tax Exclusion Amount	Estate Tax Rate(s)
1998	$625,000	37% to 60%[1]
1999	$650,000	37% to 60%[1]
2000-2001	$675,000	37% to 60%[1]
2002	$1,000,000	41% to 50%
2003	$1,000,000	41% to 49%
2004	$1,500,000	45% to 48%
2005	$1,500,000	45% to 47%
2006	$2,000,000	46%
2007-2008	$2,000,000	45%
2009	$3,500,000	45%
2010	Unlimited	N/A
2011	$5,000,000[2]	35%
2012	$5,120,000	35%
2013	$5,250,000	40%
2014	$5,340,000	40%
2015	$5,430,000	40%
2016	$5,450,000	40%
2017	$5,490,000	40%
2018	$11,180,000[3]	40%
2019	$11,400,000	40%
2020	$11,580,000	40%
2021	$11,700,000	40%
2022	$12,060,000	40%
2023	$12,920,000	40%
2024	$13,610,000	40%
2025	$13,990,000	40%
2026	$15,000,000[4]	40%

[1] The 60% rate applied to estates valued between $10,000,000 and $17,184,000, otherwise the top estate tax rate during these years was 55%.
[2] This amount was adjusted annually for inflation through 2017.
[3] This is the $10,000,000 basic exclusion amount per the Tax Cuts and Jobs Act of 2017, adjusted for inflation.
[4] This amount will be adjusted annually for inflation as long as not changed by future legislation.

Contact us:

If you have any questions about the material in this publication, or if we can be of assistance to you or someone you know regarding estate planning or probate matters, feel free to contact us by phone (713-520-5205), fax (713-520-5235) or email sent to:

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