THE ESTATE PLANNER

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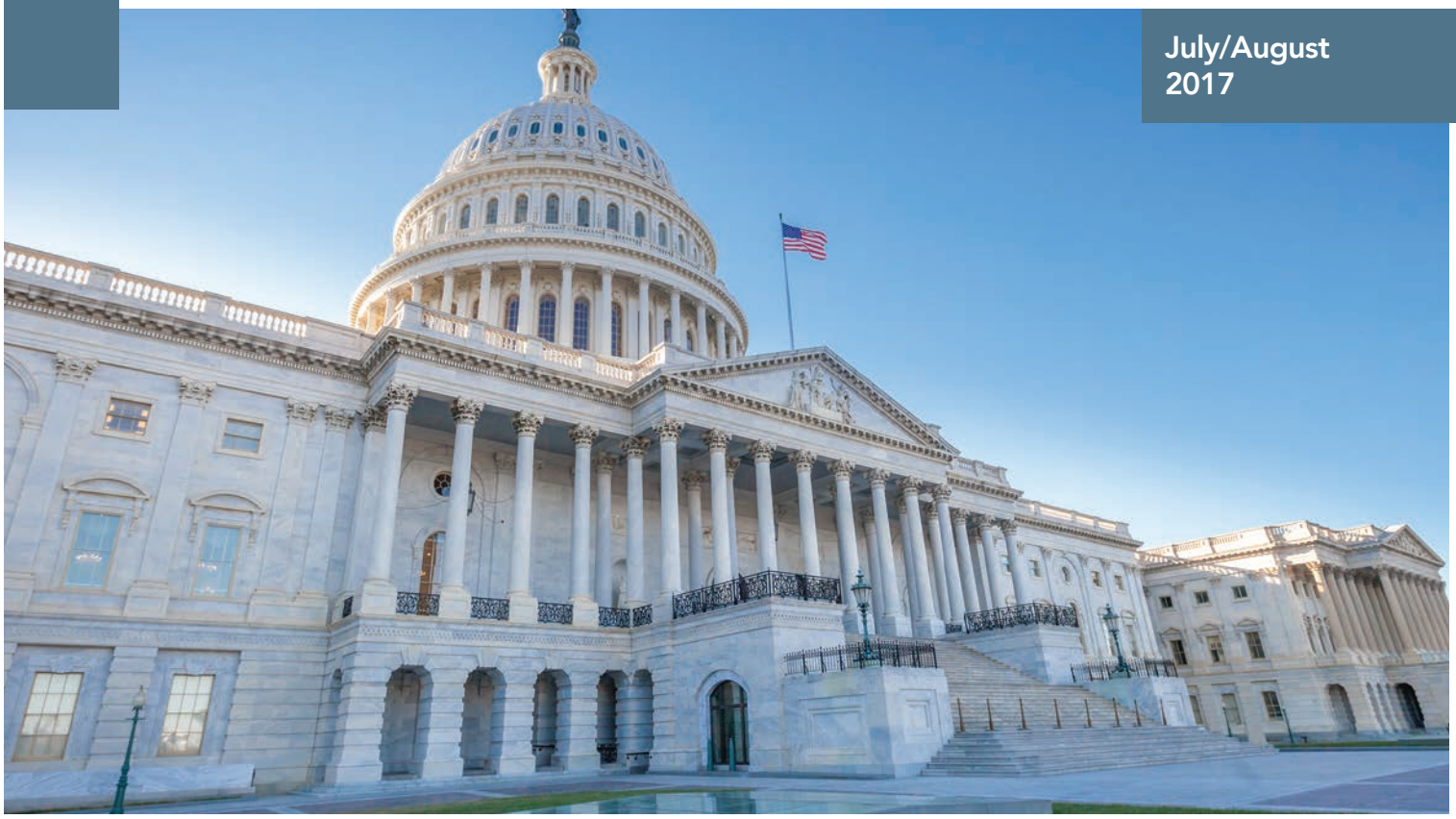

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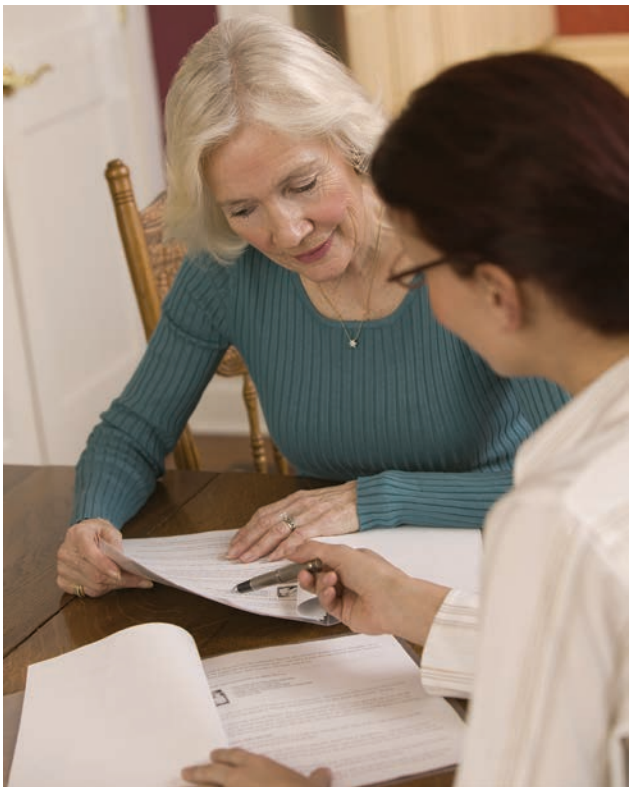
Uncertainty reigns

Estate tax repeal now a real possibility

Both President Trump and the Republican majority in Congress support elimination of "death" taxes, so there's a good chance a bill to repeal the estate and generation-skipping transfer (GST) taxes will appear on the legislative agenda soon. What would repeal mean for your estate plan?

Estate *planning* remains essential

One thing it would *not* mean is an end to the need for estate planning. Tax reduction is only one of many potential estate planning goals. Others include wealth preservation, asset protection, guardianship of minor children, family business succession, planning for loved ones with special needs, incentivizing desired behavior by beneficiaries, and charitable giving. Plus, depending on where you live, you may still be subject to state estate taxes, so many traditional estate planning strategies will remain relevant.



In addition, repeal would create a rare opportunity to shield your wealth against future incarnations of the estate and GST taxes. Most commentators believe that any repeal of these taxes will be temporary. For one thing, in order to pass, a repeal bill would likely have to "sunset" in 10 years. And, of course, there's always a possibility that future occupants of the White House and Congress will revive estate taxes.

Uncertainty remains

There's no guarantee that the estate and GST taxes will be repealed and, even if they are, uncertainty remains about whether the gift tax will survive and whether new tax regimes will be established to take their place. Possibilities include 1) a new capital gains tax on appreciated assets held until death (subject to a $10 million exemption amount), or 2) a carryover basis regime under which heirs would inherit the deceased's basis in assets (as opposed to the stepped-up basis prescribed by current law), thereby remaining liable for taxes on any appreciation in value as of the date of death.

New tax regimes will demand new planning strategies, so it's important to consult your estate tax advisor as soon as possible after any new legislation is enacted.

Increased focus on dynasty trusts

In the event of repeal, affluent families would be well advised to use carefully designed dynasty trusts to

avoid estate taxes permanently. An irrevocable dynasty trust allows substantial amounts of wealth to grow free of federal gift, estate and GST taxes, providing transfer-tax-free benefits for many generations to come. The longevity of a dynasty trust depends on the law of the state in which it's established. An increasing number of states permit trusts to last for hundreds of years or even in perpetuity.

The biggest obstacle to creating a dynasty trust is federal transfer taxes, particularly the GST tax — a flat tax, imposed at the highest marginal estate tax rate, on transfers to grandchildren or other "skip persons" more than a generation below you. GST tax is *in addition to* regular estate tax, a deadly combination that can quickly devour a substantial portion of your wealth. The tax can be triggered not only by outright gifts to skip persons (known as "direct skips") but also by taxable distributions from a trust to a skip person or a "taxable termination" of a trust. The latter happens when a trust no longer has any nonskip beneficiaries.

For these reasons, the key to preserving the value of a dynasty trust is to leverage your GST tax exemption. Currently, the exemption is $5.49 million, the same as the estate and gift tax exemptions. By allocating your exemption to trust contributions, you can ensure that the trust assets, together with any future appreciation in their value, permanently avoid GST taxes.

Repeal of the estate and GST taxes would eliminate this obstacle to dynasty trust planning, allowing you to share unlimited amounts of wealth with future generations free from any future transfer taxes that might be enacted. Keep in mind that, if the gift tax survives, the most tax-efficient method of funding a dynasty trust will be through a testamentary trust funded at death. The trust would need to be modified, however, if lawmakers bring back the estate and GST taxes during your lifetime. On the other hand, if the gift tax is repealed as well, you'll have a unique opportunity to fund a large dynasty trust immediately, permanently protecting its assets against future tax changes.

Watch out for formula clauses

Older estate plans often contain formula clauses tied to the federal estate tax exemption amount. For example, some married couples' wills or trusts provide that an amount up to the current exemption is automatically used to fund a credit shelter trust, with the balance going to the surviving spouse, either outright or in a marital trust.

Under current law, this approach makes the most of both the deceased's exemption amount and the unlimited marital deduction. But if the estate tax is repealed, this type of formula would cause the deceased's entire estate to pass to the surviving spouse or marital trust, potentially exposing these assets to estate taxes down the road.

In the event of repeal, be sure to replace outdated formula clauses with provisions that achieve your estate planning objectives in the most tax-efficient manner possible.

Act quickly

If and when Congress repeals some or all of the federal estate taxes, consult your advisor as soon as possible to discuss the potential impact on your estate plan. Depending on what the new tax regime looks like, it may be advantageous to adopt new income-tax-planning strategies and to modify any formula clauses in your plan. (See "Watch out for formula clauses" above.) And if your wealth substantially exceeds current exemption amounts, consider establishing a dynasty trust to provide your heirs with insurance against new transfer taxes in the future. ▮

Inheriting property?

Be aware of the basis consistency rules

Legislation enacted in 2015 can have a significant impact on many estates as well as on beneficiaries who inherit property from those estates. It provides that the income tax basis of property received from a deceased person cannot exceed the property's fair market value (FMV) as finally determined for estate tax purposes.

Why does this matter? Because it prohibits beneficiaries from arguing, as they did with some success in the past, that the estate undervalued the property and, therefore, they're entitled to claim a higher basis for income tax purposes. The higher the basis, the lower the gain on any subsequent sale of the property.

The law also requires estates to furnish information about the value of such property to the IRS and the person who inherits it.

Conflicting incentives

Under prior law, estates and their beneficiaries had conflicting incentives when it came to the valuation of a deceased person's property. Executors had an incentive to value property as low as possible to minimize estate taxes, while beneficiaries had an incentive to value property as high as possible to minimize capital gains, should they sell the property.

Under prior law, estates and their beneficiaries had conflicting incentives when it came to the valuation of a deceased person's property.

Generally, under Internal Revenue Code Section 1014, the basis of property received from the deceased is equal to its FMV on the date of his or her death. The property's value for estate tax purposes is deemed to be its FMV for inheritance purposes. However, in the past, beneficiaries could sometimes rebut this presumption with clear and convincing evidence that the estate undervalued the property (provided they weren't involved in the estate valuation).

To prevent beneficiaries from challenging a property's estate tax value, the 2015 law added Secs. 1014(f) and 6035. Sec. 1014(f) requires consistency between a property's basis reflected on an estate tax return and the basis used to calculate gain when it's sold by the person who inherits it. It provides that the basis of property in the hands of a beneficiary may not exceed its value as finally determined for estate tax purposes or, if no such

determination has been made, the value reported according to Sec. 6035. That section requires estates to furnish certain information about inherited property, including "a statement identifying the value of each interest in such property as reported on such return," to the IRS and to each person acquiring an interest in the property.

An asset's value is finally determined when 1) its value is reported on a federal estate tax return and the IRS doesn't challenge it before the limitations period expires, 2) the IRS determines its value and the executor doesn't challenge it before the limitations period expires, or 3) its value is determined according to a court order or agreement.

Estates that fail to comply with the new reporting requirements are subject to failure-to-file penalties. Beneficiaries who claim an excessive basis on their income tax returns are subject to accuracy-related penalties on any resulting understatements of tax.

An important exception

Sec. 1014(f) contains a significant exception to the basis consistency rule: This rule doesn't apply to property unless its inclusion in the deceased's estate increased the liability for estate taxes. So, for example, the rule doesn't apply if the value of the deceased's estate is less than his or her unused exemption amount. Proposed regulations clarify that, if the deceased's estate is liable for estate tax, all property included in the gross estate is subject to the basis consistency rule, except for property that qualifies for the marital or charitable deduction and property that isn't required to be appraised.

Communication is key

If you expect to inherit property from someone whose estate will be liable for estate tax, it's in your best interest to communicate with the executor to ensure that the property's value is reported accurately on the estate tax return. ▮

Zeros and ones …

Account for digital assets in your estate plan

Have you accounted for digital assets in your estate plan? Personal assets, such as online bank and brokerage accounts, and business assets, such as your company's website, domain name, client databases and electronic invoices, all fall under the umbrella of digital assets.

If you die without addressing these assets in your estate plan, your loved ones or other representatives may not be able to access them without going to court — or, worse yet, may not even know they exist.

What happens to digital assets after death?

There are numerous questions to answer concerning your digital documents and social media accounts, such as:

- How will your electronic records be handled after your death?
- Can family members obtain passwords and access to your accounts?

- Will the bills you're automatically paying online continue to be paid?
- What happens to other information you consider to be confidential?

Unfortunately, with the laws in this area still evolving, the answers often aren't clear. For example, a power of attorney may be thwarted by restrictive user agreements for social media sites. Another complication is that legal remedies vary from state to state, while many jurisdictions haven't enacted any legislation for these critical issues.

Proposed legislation uncertain

One possible solution, the Uniform Fiduciary Access to Digital Assets Act (UFADAA), has yet to be embraced. UFADAA puts responsibility for handling most matters squarely in the hands of the fiduciaries.

This proposed law was part of a two-year process by the National Conference of Commissioners on Uniform State Laws. It gives executors, administrators, trustees, conservators/guardians and agents acting under a power of attorney authority to access the digital assets of a deceased person.

For this purpose, "digital assets" include domain names, Web pages, online accounts, and electronic communications, such as email and social media messages.

A modified version of UFADAA was enacted in Delaware in 2014 and has been introduced in more than half of the states as of this writing. The National Academy of Elder Law Attorneys and AARP have also endorsed the law. But it faces staunch opposition from social media giants like Yahoo and Facebook, as well as the American Civil Liberties Union. At this point, enactment of the law in most states appears remote.

Taking action now is prudent

While lawmakers hash out the details of UFADAA, you can take steps today to help your family access your digital accounts after your death:

Compile a list of accounts and passwords. Provide email addresses, usernames and passwords to one or more relatives. Because passwords often change, update the list periodically.

Legal documents will be strengthened if they're revised, where necessary, to accommodate digital assets.

Rely on a password manager. As an alternative to a list of passwords, you might use a password manager to handle accounts. You'll find this particularly useful when you can't remember the latest password change or where you jotted down the information. With this method, a single password grants access to all identified accounts.

Review social media agreements. Read the fine print about your participation in social media sites and other online accounts. If you're not satisfied

with the terms upon closer inspection, you might terminate your account. Be especially wary of restrictions on the use of a power of attorney.

Find a storage unit. Another way to keep track of information is to use a digital storage unit. There are online services available, or you could save information using encrypted files on your computer or other device such as a thumb drive. Wherever it's kept, be sure to share the location of the information, and the password for the files, with a trusted individual who'll need to access the data on your behalf.

Coordinate estate planning documents. Legal documents like a will and durable power of attorney will be strengthened if they're revised, where necessary, to accommodate digital assets. If these documents aren't already in place, now is a good time to have them drafted.

Communication is key

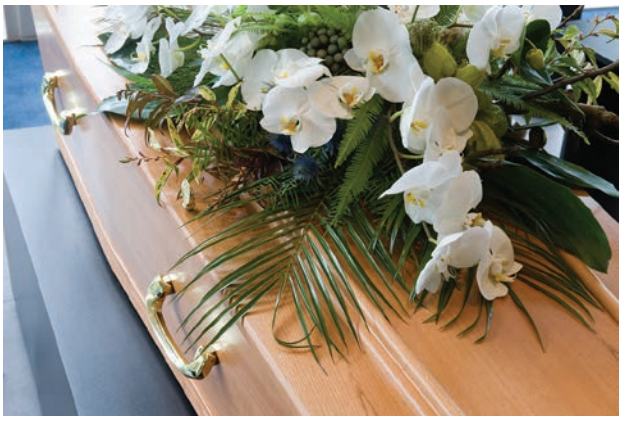
Most people keep their wills, insurance policies and other key estate planning documents in a safe place and let their families know how to find them. It's just as important, if not more so, to provide similar guidance for your digital assets. ▮

ESTATE PLANNING RED FLAG

You haven't made your burial wishes clear

It may be difficult to think about, but funeral arrangements are a critical component of your estate plan. Failure to clearly communicate your wishes regarding the disposition of your remains can lead to tension, disputes and even litigation among your family members during what is already a difficult time.

The methods for expressing these wishes vary from state to state, and may include a provision in your will, language in a health care proxy or power of attorney, or a separate form specifically designed for this purpose. Whichever method is used, it should, at a minimum, state 1) whether you prefer burial or cremation, 2) where you wish to be buried or have your ashes interred or scattered (and any other special instructions), and 3) the person you'd like to be responsible for making these arrangements. Some people also request a specific funeral home.



If you fail to make your wishes clear, and your family members disagree about how you would want your remains disposed of, the outcome will depend on applicable state law. Absent express instructions from the deceased, some states give priority to the wishes of certain family members, such as spouses or children, over other family members, such as siblings.

To avoid this situation, talk to your estate planning advisor about your wishes and ensure that they're properly documented.

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The Florida Treasure Hunt

Have you ever gone on a treasure hunt? Long gone are the days when you need to go on an adventure to discover lost property. Now, you can simply search a website run by the Florida Division of Unclaimed Property for lost property held by the State of Florida in your name.

The State of Florida currently holds over one billion dollars in unclaimed property including tangible and intangible assets. The tangible assets consist of jewelry, watches, and rare coins which are collected from abandoned safe deposit boxes. The State of Florida holds on to these items for an additional two years before they are sold at the Florida Unclaimed Property Auction. The intangible assets consist of money and securities from unclaimed wages and dormant accounts.

The State of Florida serves as the guardian of lost treasure because of the laws regarding escheated property. An escheat is the authority of the state to acquire title to property for which there is no owner. The escheat laws guarantee that property is not left in limbo and without an owner. In Florida, property is generally presumed abandoned if unclaimed within a certain period of time. If the true owner cannot be identified or located, or if the owner dies without any identifiable or locatable heirs or beneficiaries, then such property escheats to the State.

Our office often deals with escheated property in the administration of a decedent's estate. The most common situation occurs when a decedent passes away intestate, meaning without a valid will, and without heirs who are legally entitled to inherit the decedent's estate. The heirs who are entitled to inherit a decedent's estate are limited by the laws of intestacy. If no such heirs exist, then the decedent's estate escheats to the State.

Property can also escheat in the administration of a testator's estate. Florida law provides that any part of a decedent's estate not effectively disposed of by a will passes to the decedent's heirs under the intestacy laws. For example, if a testator provides in his will that his entire estate will pass to his son, if alive, and if not, to his issue, per stirpes, and the son dies without any issue, the testator's estate will pass under the laws of intestacy. If there are no identifiable or locatable heirs, the testator's entire estate escheats to the State.

The State of Florida holds escheated property for a certain period of time to allow for the true owner to assert a claim. If a valid claim is timely asserted, the claimant will receive the escheated property from the State. If no valid claim is timely asserted, then the State has an absolute right to the property and it becomes part of the State School Fund.

You can visit the Florida Division of Unclaimed Property's website at FLTreasureHunt.org to search for any lost property being held in your name. You can file a claim directly online or you can contact our office for assistance in reclaiming your lost treasure.

Happy Treasure Hunting!