



20/20 on the upcoming year. . . .

There are several life events that serve as the opportunity to review and reassess your estate planning documents, such as wills, trusts and family business succession plans. Whether you are getting married, buying a new home or second home, starting a family, sending your children to college, transferring your family business to one or more of your children, or retiring and changing your domicile, these events create new and different needs that may change your previously established estate plan. In this year's Cassin Letter, we explore the need to attend to basis planning, using your exemption amount in advance of the sunset provision, and, considering how other changes in the law—such as, LLC disclosure laws and state income taxation of existing trusts—may affect your present estate plan.

Income Tax Planning for Estate Planning Practitioners

As a result of the Tax Cuts and Jobs Act (TCJA), the Federal estate tax exemption doubled to \$11,400,000 and it was estimated that only one in every 1,000 estates will be subject to estate tax. As of January 1, 2020, the Federal exemption will increase to \$11,580,000.

Prior to 2019, the top 40% Federal estate tax rate was the driving force behind many wealth transfers. Recipient (individual or trust) that acquired assets by gift, acquired the tax cost basis of the donor/transferor; upon the donor's/transferor's death, gifted assets do not get a step-up in basis and the recipient is left holding gifted assets with unrealized capital gain. Therefore, if your estate is no longer a taxable estate, you should be discussing income tax planning strategies to minimize or eliminate potential capital gain in the hands of your beneficiaries or ultimate heirs.

Some ideas to consider are:

- reviewing trust documents to see if you retained a power of substitution and use the power to substitute high basis assets for no or low basis assets;
- making loans to children rather than gifting low basis assets such as a home;
- decanting trusts into a new trust that is includible in the grantor's estate; and
- granting a general power of appointment to beneficiaries such that the trust becomes includible in his or her estate.

Another strategy is the investment of realized gains into opportunity zone funds or investments that will either defer, reduce or eliminate the gain depending on the holding period in the fund/qualified property investment.

Estate Planning for Taxable Estates over \$11,580,000

For individuals with assets in excess of \$11,580,000 (or \$23.16 Million for a couple), there has been greater activities to shield those assets from creditors and/or to make transfers in advance of

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TCJA's sunset. Unless there is legislative action to make the higher exemption amount permanent, as of January 1, 2026 the Federal exemption will revert back to figures from 2017, \$5,490,000.¹

Education Funding: 529 Plans v. Irrevocable Trusts

As the cost of college tuition continues to rise, funding a 529 plan can be a good idea. A 529 plan is a state-sponsored education savings account in which contributions can be invested and earnings growth is free from Federal and state taxes to the extent that proceeds are used toward qualified college expenses. On the flip side, 529 plan contributions made on behalf of a grandchild will be subject to Generation Skipping Tax (GST). Contributions to a grandchild's 529 plan will count against the grandparent's GST lifetime exemption of \$11.58 Million if they exceed the \$15,000.00 per beneficiary annual exclusion amount. As an alternative to a 529 plan, you may want to consider funding an irrevocable grantor trust. Not only can this approach offer more investment opportunities, but it offers the flexibility to apply funds to both education and non-educational purposes, thereby avoiding the potential penalties otherwise due in a 529 plan arrangement. On the other hand, irrevocable trusts have administrative costs, the terms of the trust cannot be changed or revoked and the investment income and gains are currently taxable. As educational funding is not a one-size fits-all solution, thoughtful consideration should be given toward each family's unique circumstances.

Taking Full Advantage with SLATs

As previously touched upon, the Tax Cuts and Jobs Act (TCJA) doubled the Federal gift, estate and generation-skipping transfer (GST) tax exemptions to \$11.58 million per person in 2019. As a result, wealthy individuals now have the opportunity to pass on a substantial amount of wealth tax-free, yet only for a limited amount of time as the increased exemption amounts are scheduled to sunset on December 31, 2025. A Spousal Lifetime Access Trust (a SLAT) is a vehicle that can allow married couples to take advantage of the increased exemption amounts. A SLAT allows one spouse to make a gift to an irrevocable trust that names the other spouse as a lifetime beneficiary of the trust. The gift constitutes a completed gift to remove the asset from the donor spouse's estate, but ensures that the donor spouse will still have access to trust assets through the beneficiary spouse as long as the couple remains married to each other. The "downside" is that upon the spouse's death, assets may not be paid back to the donor/spouse. Therefore, the donor spouse must have sufficient assets of their own to live on should the spouse predecease. Clients should evaluate whether to utilize SLATs prior to the expiration of the increased exemption amounts.

Transparency in NY Real Estate: Mandatory Disclosure Laws for LLCs

On September 13, 2019, Governor Cuomo signed a law which requires disclosure of the name and address of every member of a limited liability company (LLC) that acquires or sells residential real estate containing one to four family dwelling units in New York State. ([New](#)

<https://www.irs.gov/businesses/small-businesses-self-employed/estate-tax>
<https://www.dblllc.com/news/tax-cuts-and-jobs-act-impact-individual-taxes>
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[York State Tax Law §1409, New York Administrative Code §11-2105](#)). As such, if any member of the seller or buyer is itself a business entity, the names of the principals of that business entity will also need to be disclosed. The disclosure requirement is far-reaching in that it must continue until all private persons underlying any business entity within the ownership structure are identified. The disclosure rule does not apply to the purchase or sale of an individual condominium unit.

If you'd like to remain anonymous in your next NY real estate transaction, you may want to consider converting your LLC into a limited partnership or purchasing through a trust.

Is Your Trust Eligible for a State Tax Refund?

In June of this year, the US Supreme Court issued a decision on a state's ability to tax trust income. In *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, the Court held that a North Carolina law that allowed the state to tax any trust income that "is for the benefit of" a state resident violated the Constitution, specifically the 14th Amendment Due Process Clause. North Carolina took the position that it could freely tax trust income that had not been distributed to North Carolina beneficiaries by virtue of the fact those beneficiaries lived in North Carolina. During the tax years in question, *Kaestner* had no right to and did not receive any distributions and the Trust did not have a physical presence, make any direct investments nor hold any real property in North Carolina. The take-away from this case is that a state cannot tax trust income simply because a beneficiary of a trust lives in that state. Although the ruling in *Kaestner* is quite narrow and limited to a certain set of facts, the Court's ruling seems to have broader implications as it leaves open many questions that may affect a state's ability to tax a trust.

The following are some factors one may consider in determining whether a state may tax a trust:

- The residence of grantor/settlor- Although an important factor, this alone does not mean a state has jurisdiction.
- Whether or not the trustee chose not to distribute any income to the beneficiary in the taxing jurisdiction- In *Kaestner*, this factor weighed in favor of the state not having the right to tax the trust.
- Did the trustee have exclusive control over the timing and allocation of trust distributions?- This factor was heavily weighed on in *Kaestner*; the beneficiaries who resided in North Carolina could not control distributions to them from the trust.
- Is the trust governed by law of a different jurisdiction than the taxing jurisdiction?- In *Kaestner*, the trust in question was subject to New York law, not North Carolina law. Decanting may be a way to cure this defect if your trust was formed under the laws of a taxing state.
- The residence of individual trustees- This factor is critical. In *Kaestner*, the argument that the state did not have the right to tax the trust was supported by the fact that the trustee did not reside in North Carolina.

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- The physical location of trust records- In *Kaestner*, the trustee held all trust documents and records in New York, not North Carolina. Where are your trust documents right now? Are they currently only stored electronically? As we become more engulfed in our modern digital era this factor may hold less weight.

Although by no means inclusive, the above *Kaestner* considerations can certainly put trustees and draftsmen of trust agreements on the right path toward minimizing state taxation of trust income.

SUMMARY:

Changes in tax laws creates pivotal moments to reassess plans and take advantage of new possibilities. This is one of those moments.

If you are considering a change in domicile, you need your trust reviewed or just an estate plan check-up, please see a qualified estate planner or tax professional to ensure that you take all the necessary steps to make an effective change.

Sincerely yours,

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² I want to thank Kristin Cara who contributed to the writing of this year's client letter.
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