

CASSIN & CASSIN LLP

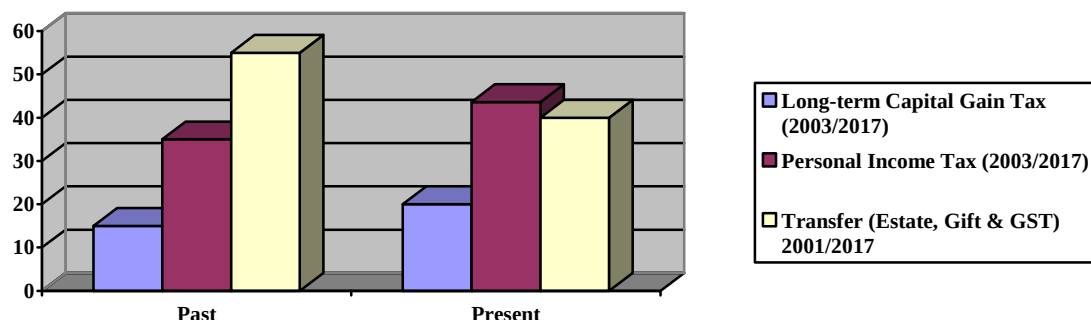
Planning in a New Era

Taxes, taxes, taxes

When I began working as a trust officer in 1986, the 1981 ERTA six-year phase-in to increase the unified transfer tax credit from \$47,000 (an exemption equivalent of \$175,625) to \$192,800 (an exemption equivalent of \$600,000) was complete and the top Federal estate tax rate was 55% on estates in excess of \$3,000,000. The Federal exemption rate is now \$5,49,000¹ and the top estate tax rate is 40% on estates in excess of \$10,000,000.

Top tax rates on Federal income, long-term capital gain and transfer (gift, estate and generation-skipping) taxes are getting closer. In fact, the top Federal income tax rate for individuals reporting taxable income in excess of \$470,700² (for a married couple subject to the Medicare surcharge of 3.8%) is higher than the top transfer tax rate for gift and estate taxes.

Federal Top Tax Rates



In addition to shrinking the discrepancy between the Federal top income and transfer tax rates, the Federal government increased the value of assets that an individual could pass free of transfer taxes. The transfer tax system is a unified system so the amount that you can give away free of gift tax during your lifetime or estate tax at death is one amount, known as the exemption amount. It is applied to gifts during your life and then the unused amount is applied to transfers on death.

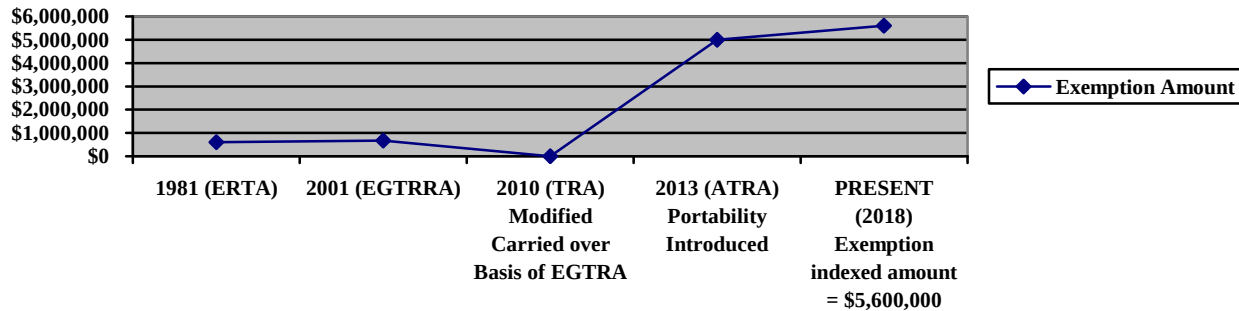
¹ On October 19, 2017, the IRS announced that the exemption amount will increase to \$5,600,000 in 2018.

² In 2018, the top Federal income tax rate for married individuals filing jointly is 39.6% on income in excess of \$480,050.

October 2017

CASSIN & CASSIN LLP

Federal Exemption Amounts 1981-2018



As a result, estate tax planning is more focused on income tax consequences. You should review your plan to ensure that your existing documents have taken into consideration possible income tax issues.

Inflation Adjusted Exemption Amounts for 2018

Federal Gift/Estate Tax Exemption	Jan. 1, 2018 – Dec. 31, 2018	\$5,600,000
Federal Annual Gift Tax Exclusion	Jan. 1, 2018 – Dec. 31, 2018 Applied per donee, i.e. person receiving the gift	\$15,000
Top Federal Gift/Estate Tax Rate	Applies to the tentative taxable amount over \$1,000,000 from which <i>inter alia</i> a credit for the federal exemption amount is applied.	40%
NYS Estate Tax Exemption	April 1, 2017 – December 31, 2018	\$5,250,000
Top NYS Estate Tax Rate	Applies to whole taxable amount for estates that are 105% over the exemption amount. The so-called cliff.	16%
NYS does not have a Gift Tax.		

Planning for estates less than \$5,600,000 (\$11,200,000 for a couple)

One thing that I have learned in 30 years in the industry is that smooth estate administration may have nothing to do with taxes. Consulting a knowledgeable and experienced trusts and estates attorney can prevent family conflict and save expenses on legal fees. Here are few considerations:

- How do you want to divide up your personal effects such as jewelry, china, silverware, artwork and other items of potentially sentimental value? There are many options. An honest conversation about your family and a clear statement of your intentions will allow your attorney to craft provisions in your Will that are tailor-made for your needs.
- If you are planning on avoiding probate by placing assets in joint accounts, did you ensure that all assets are jointly held? Do you know how assets like income tax refunds, automobiles, boats and other assets will be transferred upon death? And, did you consider what happens on the death of the survivor, especially if there are minor children?
- Do you know who is best able to manage all the family members? Who should be named as your executor? Sometimes it makes sense to name one or more of your children but sometime that is the worst idea and an independent person or corporation is best. Know the duties and responsibilities of an executor so that you can name the right person to act for you to ensure your wishes are carried out smoothly and with as little conflict as possible.
- If you do not designate who will receive your property upon your death, assets held in your name are paid according to state law. Do you know the intestacy law and does it reflect your wishes?
- If you have appreciated assets, is it best to gift these assets during your lifetime or structure a plan that causes them to be included in your taxable estate so that your heirs receive the assets with a stepped-up basis and, thus, will avoid capital gains tax.

The last point deserves illustration. If you die owning assets valued at \$5,000,000 the full amount is included in your taxable estate but your estate will not pay an estate tax because it is less than the Federal and NYS exemption amounts. Let us assume further that included in those assets is your home which has a tax cost basis of \$1,000,000 and a fair market value at date of death of \$3,000,000. If you leave your house to your children in your Will, your children will receive a Notice of Basis. Then, if your children sell the house after your death, there will be little or no capital gain because the tax cost basis was stepped-up to the date of death value of \$3,000,000. Alternatively, if you gave the house to your children before you died, you do not owe any gift tax because again the gift is less than the Federal exemption. (Remember, the Federal transfer tax system is a unified transfer tax system and amount NYS does not have a gift tax.) You will file a gift tax return reporting the gift but owe no tax and your remaining Federal exemption amount is now \$2,600,000 (\$5.6 million exemption less \$3 million used on the gift). However, your children's tax cost basis in the house is \$1,000,000. If they later sell the house at \$3,000,000, they will owe capital gains tax on \$2,000,000 or approx. \$400,000 using a simple 20% top rate calculation. In this example, an estate that will pay no estate tax can, with proper planning, save your heirs considerable capital gains taxes.

Digital Assets

(EPTL Article 13-A Administration of Digital Assets and *Matter of Serrano*)

Today, planning for digital assets is becoming more and more important. When we speak of digital assets, we are talking about digital assets that have a sentimental value (Facebook, Shutterfly, Twitter, Snapchat, Instagram, Gmail, Yahoo!) and digital assets that have a monetary value (PayPal, iTunes, credit card Reward Programs, other store credits). In addition, your fiduciary may need to marshal assets such as Bitcoins, domain names, Apps developed by the decedent, blog content which may be “original works of authorship” and manuscripts stored in the cloud, Dropbox, GoogleDocs, etc. If you become incapacitated or die, how will your representative handle these digital assets?

The Federal Stored Communications Act (18 USC 2701-2711) (“SCA”) prohibits the providers of public communications services from disclosing the content of the user’s communication except in limited circumstances. This Act often thwarted fiduciary efforts to obtain access to and control a person’s digital assets after death. One exception to the SCA is when the user provides “lawful consent.” In 2016, New York enacted Article 13-A to the New York Estates Powers and Trust Law (“EPTL”) which sets forth a hierarchy for the user to direct access to the content of electronic communications: (1) online tools; (2) directive in a Will or inter vivos instrument, including durable powers of attorney; and, then, (3) the terms-of-service (TOS) agreement. There is a distinction between a custodian’s obligation to disclose a person’s digital assets and its obligation to disclose the content of electronic communications; and the hurdles to access such material differs, i.e. whether there is a *directive prohibiting disclosure* of the asset or an *affirmative directive to disclose* content.

In *Matter of Serrano*, 56 Misc.3d 497 (2017), Judge Mella addressed the distinction in holding that in the fiduciaries application to access the decedent’s contacts, calendar and emails, Google had a statutory obligation to disclose the contacts and calendar of the decedent because there was no directive by the decedent prohibiting such disclosure. However, the content of the decedent’s emails could not be accessed by the fiduciary because there lacked an affirmative direction by the decedent to disclose the content of electronic communications, his Gmail account. Having failed to meet the initial hurdle for disclosure of the email content, the Court did not have to decide whether or not the emails were “reasonably necessary for the administration of the estate”. Presumably, under the EPTL 13-A, such a finding would allow the fiduciary access to the email content.

Here are a few planning suggestions:

- Make an inventory of digital assets and passwords
- Identify planning objectives (identity theft, memorial pages, prevent divulgence of secrets, preserve reputation, preserve “life story”)
- Update or initiate the use of online tools
- Update estate planning documents (Wills, Trusts and Powers of Attorney) to include provisions that contain your affirmative directive with respect to such digital assets and the content of electronic communications.

October 2017

CASSIN & CASSIN LLP

Google allows the account user the ability to designate an “Inactive Account Manager” who can access the account after a period of time designated by the user during which the account is inactive. Alternatively, a Google account holder may determine in advance what will happen to his or her data, e.g. deleted or sent to a designated person.

Facebook allows the account holder to appoint a “Legacy Contact.” This person may pin a post on the account holder’s Timeline, respond to new friend requests and update the profile picture. The Legacy Contact will not have the ability to post messages as the account holder or to see the account holder’s messages. The Legacy Contact can request to have the account permanently deleted after the account holder’s death.

Cassin & Cassin LLP appreciates your business and we look forward to advising you on these changing tax laws and regulations. If you would like to update your Will or Revocable Trust and/or have general questions about your overall estate plan, please contact me. I would be happy to discuss your New York State estate planning needs.

Mari Galvin, Partner
Trust & Estates Attorney
Individual Client Services
Tel: (914) 517- 6906
mgalvin@cassinllp.com

Cassin & Cassin LLP Office Locations
New York City (Main) Office: 711 Third Avenue, 20 th Floor, New York, New York 10017 Westchester Office: 2900 Westchester Avenue, Suite #402, Purchase, New York 10577 Dallas Office: 2651 North Harwood Street, Suite #210, Dallas, Texas 75201

© Cassin & Cassin LLP. All rights reserved. This memorandum is provided by Cassin for educational purposes only and does not constitute advertising or solicitation and should not be used or taken as legal advice. This memorandum is considered advertising under applicable state laws.
