2024 Year-End Estate Planning Advisory

November 26, 2024

Overview

This year was busy for trusts and estates practitioners. With 2025 marking the final year of the Tax Cuts and Jobs Act (TCJA), many of its implications for federal corporate and individual income tax, gift, estate and generation-skipping transfer (GST) tax and fiduciary income tax are set to sunset on January 1, 2026. At that time, the prior transfer tax exemption amounts (indexed for inflation, using the chained consumer price index (CPI) figure) will be restored. This, alongside cooling inflation levels, has caused many individuals and families to review their existing estate plans and desire to take advantage of the higher exemption amounts. Accordingly, estate planners, appraisers, accountants and tax preparers alike worked in concert to effectuate significant gifts of cash, marketable securities and interests in entities.

The Corporate Transparency Act (CTA) also went into effect on January 1, resulting in a massive amount of reporting obligations for newly formed entities. With the year-end reporting deadline for entities created prior to January 1, 2024, drawing ever closer, clients and their advisors have performed countless analyses of both simple and complicated structures to ensure the reports are filed on time.

Most recently, we had a significant presidential election. In 2025 the Republicans will have control of the White House, Congress and a sympathetic Supreme Court, so it is possible that not only will some (or many) of the provisions of the TCJA get extended, but significant other tax reforms may be passed. While the permanency of the TCJA's provisions remains uncertain, the current environment provides a great deal of opportunity for new planning. Given the continuing uncertainty, we are encouraging clients, above all, to build flexibility into their estate plans and to use this window of opportunity, where appropriate, to engage in planning to take advantage of the increased estate, gift and GST tax exemptions.

In prior editions of our Year-End Estate Planning Advisory, we included detailed discussions of the TCJA and its important estate planning components. If you wish to review a more thorough analysis of the TCJA and other recent legislation like the Inflation Reduction Act, please see our most here and here. The following are some key income and transfer tax exemptions and rate changes under the TCJA, including inflation-adjusted amounts for 2024 and 2025.

Inflation-Adjusted Tax Figures

Federal Estate, GST and Gift Tax Rates

The federal estate, gift and GST applicable exclusion amounts are as summarized below. In simple terms, these dollar figures represent the amount of wealth that each individual can transfer during their lifetime and/or at death (in the aggregate) before incurring any federal transfer taxes (which currently are assessed at a maximum rate of 40 percent):

2024	2025
$13,610,000	**$13,990,000** *(an increase of $380,000)*

The federal estate tax exemption that applies to non-resident aliens was not increased under the TCJA. Under current law, the exemption for non-resident aliens remains at $60,000 (absent the application of an estate tax treaty).

Annual Gift Tax Exclusions

Each year, individuals are entitled to make gifts to donees using the "Annual Exclusion Amount" without incurring gift tax or using any of their applicable exclusion amount against estate and gift taxes. The Annual Exclusion Amount, per donee, is as follows:

2024	2025
$18,000	**$19,000** *(an increase of $1,000)*

Thus, in 2024, a married couple together can gift $36,000 to each donee without gift tax consequences. (*Consider doing so before the end of the year if you have not done so yet!*) If one spouse makes a $36,000 gift, the other spouse can agree to split the gift by consenting to gift splitting on a timely filed gift tax return.

For those with noncitizen spouses, please note that the limitation on tax-free annual gifts made to noncitizen spouses will increase from $185,000 in 2024 to $190,000 in 2025. Those with citizen spouses may make unlimited gifts to their citizen spouse without incurring a gift tax or using lifetime exemption amounts.

In order to qualify for the annual exclusion, gifts must be of a present interest. To the extent gifts are being made to a trust, care must be taken to ensure that the appropriate powers are included in such trust in order to qualify such gifts as present interests. Accordingly, before making any gifts, you should contact your Katten Private Wealth attorney to determine if the gifts you are contemplating qualify for the annual exclusion and if such gifts would necessitate the filing of a gift tax return.

Federal Income Tax Rates

There are presently seven individual income tax brackets, with a maximum rate of 37 percent. The 37 percent tax rate will affect single taxpayers whose income exceeds $609,350 in 2024 ($626,350 in 2025) and married taxpayers filing jointly whose income exceeds $731,200 in 2024 ($751,600 in 2025).

Estates and trusts will reach the maximum rate with taxable income of more than $15,200 in 2024 ($15,650 in 2025).

Corporate Transparency Act

The CTA went into effect January 1, 2024, and requires a "Reporting Company" (described below) to disclose specific information regarding itself, its "Beneficial Owners" (described below) and its "Company Applicants" to the US Treasury Department's Financial Crimes Enforcement Network (FinCEN). The underlying purpose of the CTA is to curb illicit activity by non-transparent entities with respect to which the government does not know who is running or profiting from the entity's operations. Failing to comply with the CTA is not an advisable option because willful noncompliance may result in material criminal or civil penalties. Additional background information on the CTA and its reporting requirements can be found in our November 8, 2023 CTA Advisory and 2023 Year-End Estate Planning Advisory.

In general, a "Reporting Company" means a domestic or foreign corporation, limited liability company, or other similar entity that registers with a US State or Tribal Office and is not otherwise exempt from the CTA's reporting requirements. Based upon the foregoing registration requirement, common law trusts do not meet the definition of a Reporting Company. There are currently 23 limited exceptions. Nevertheless, the scope of the CTA is quite extensive.

A Reporting Company is required promptly to submit to FinCEN reports regarding (i) the Reporting Company, (ii) its Beneficial Owners (i.e., individuals that have substantial control over a Reporting Company and/or individuals that directly or indirectly own or control at least 25 percent in the aggregate of the total ownership interests (which is broadly construed) of a Reporting Company), and (iii) its Company Applicants (i.e., individuals who file the required registration and individuals who are primarily responsible for such filing). A comprehensive overview of the CTA detailing Reporting Companies, Beneficial Owners, Company Applicants and Beneficial Ownership Information is available here.

There are limited, specific exemptions from the definition of a Reporting Company. A full list of those 23 exemptions is contained in the link referenced immediately above. Notably, Family Offices are not specifically exempted from the definition of a Reporting Company. However, the following exemptions from the definition of a Reporting Company may be pertinent in the Family Office/Private Wealth arena:

- **Large Operating Company.** Taxable entities that (a) employ more than 20 employees on a full-time basis in the United States, (b) filed in the previous year federal income tax returns in the United States demonstrating more than $5 million in gross receipts or sales in the aggregate, and (c) have an operating presence at a physical office within the United States.

- **Banks.** A registered bank as defined in Section 3 of the Federal Deposit Insurance Act, Section 2(a) of the Investment Company Act of 1940 or Section 202(a) of the Investment Advisers Act of 1940 (e.g., certain private trust companies).

- **Investment Advisor.** Registered investment advisors under the Investment Adviser Act of 1940 (e.g., a multifamily office).

- **Tax-Empty Entity.** Organizations described in Section 501(c) of the Internal Revenue Code of 1986 (e.g., a private foundation).

- **Subsidiary.** Wholly owned, directly or indirectly, subsidiaries of exempt entities (other than money services business, pooled investment vehicles or entities assisting a tax-exempt entity). Note that this exemption is specifically tailored to subsidiaries of exempt entities, not parent companies, holding companies or other affiliates of exempt entities.

- **Inactive Entities.** Entities formed before January 1, 2020, that (a) are not engaged in an active business, (b) are not owned by a foreign person, (c) have not experienced a change in ownership in the preceding 12-month period, (d) have not sent or received funds in an amount greater than $1,000 in the preceding 12-month period, and (e) do not otherwise hold any assets.

While common law trusts are not independently considered Reporting Companies, these types of trusts can be *Beneficial Owners* of Reporting Companies – either under the substantial control test or the ownership test described above. For those trusts that qualify as a Beneficial Owner of a Reporting Company, the analysis regarding reportable individuals "looks through" to the following specific individuals:

- A beneficiary, if such beneficiary (a) is the sole permissible recipient of income and principal, or (b) has the right to demand distributions or withdraw substantially all trust assets.

- A trust's grantor, if such grantor has the right to revoke the trust or otherwise withdraw the assets of the trust.
- Trustees or other individual(s) with the authority to control or dispose of trust assets.

Despite numerous comments requesting clarification, the CTA's final regulations do not provide guidance with respect to what specific individuals fall into the category of "other individuals who can dispose of trust assets" (e.g., Trust Protectors, Business Advisors, Distribution Committees or Investment Advisors). Thus, a key takeaway with respect to identifying which individuals are reportable when a trust is a Beneficial Owners of a Reporting Company is that the specific terms of the trust need to be closely examined and analyzed.

Back in March 2024, Judge Liles C. Burke of the US District Court of the Northern District of Alabama issued an opinion finding that the CTA was unconstitutional. While those headlines were attractive, the ruling was limited to the specific plaintiffs in the case and was promptly appealed. Subsequent constitutional challenges in other jurisdictions have thus far not been successful. Therefore, unless and until a higher court finds that the CTA is unconstitutional, nearly all Reporting Companies remain subject to the CTA and should continue to file their Beneficial Ownership Information Reports (BOIRs).

CTA reporting is already well underway. As flagged in our recent September 17, 2024 CTA Advisory, entities formed or registered to do business under the law of a US State or Indian tribe prior to January 1, 2024, must submit their initial BOIRs to FinCEN by January 1, 2025. Entities formed or registered in 2024 must submit their initial BOIRs to FinCEN within 90 calendar days of formation or registration, and entities formed or registered on or after January 1, 2025, must submit their initial BOIRs to FinCEN within 30 calendar days of formation or registration.

As a reminder, each Reporting Company shall report the following information on its initial BOIR: (a) full legal name, (b) any trade name or d/b/a, (c) its principal place of business, (d) the State, Tribal, or foreign jurisdiction of its formation and (e) a unique ID number (e.g., an EIN). Moreover, each BOIR shall contain the following information about the Reporting Company's Beneficial Owners and, for Reporting Companies formed or registered to do business on or after January 1, 2024, their Company Applicants: (v) full legal name of such individual, (w) date of birth of such individual, (x) the current residential address of such individual, (y) a unique ID number for such individual (e.g., an unexpired passport number or driver's license), and (z) an image of the document from which such unique ID number was obtained. Any changes to the information set forth on a BOIR must be promptly reported (within 30 calendar days of such change) to FinCEN on an updated BOIR.

CTA analysis, including determining the Beneficial Owners of a Reporting Company and whether any exemptions apply, is a fact-specific inquiry that involves a review of the CTA and its regulations, the corporate structure and the applicable governing documents. This case-by-case determination of Beneficial Owners becomes increasingly more complex when Reporting Companies are owned directly or directly by trusts. Thus, depending on the complexity of the corporate structure, including the terms of the applicable governing documents and any relevant trust agreements, CTA review and compliance may require substantial attention. **Katten attorneys are available to advise and assist you with respect to CTA analysis and compliance.**

Important Planning Considerations for 2024 and 2025

The "big ticket" item of the TCJA is the significant increase to the lifetime gift, estate and GST tax exemptions. Under the TCJA, the exemptions were increased from $5 million (adjusted for inflation) to $10 million (adjusted for inflation). In 2024, these amounts are $13.61 million and in 2025, are $13.99 million. *Absent any changes in the law*, the increased exemptions under the TCJA are set to "sunset" (expire) as of January 1, 2026, back to $5 million. With inflation adjustments, it is anticipated that, after sunset, the exemptions will be in the range of $7 million in 2026, meaning individuals who do not use any of the exemptions prior to the sunset will lose nearly $7 million in their lifetime gift exemption and married coupled will lose nearly $14 million in lifetime gift exemption. What follows are several planning ideas to consider prior to the sunset.

Year-End Checklist for 2024

First, before going into greater detail on available strategies, here is a short checklist of easy-to-implement estate planning strategies that can be utilized prior to the end of 2024:

- Make year-end annual exclusion gifts of $18,000 ($36,000 for married couples).
- Make year-end IRA contributions.
- Create 529 Plan accounts before year-end for children and grandchildren, and consider front-loading the accounts with five years' worth of annual exclusion gifts, taking into account any gifts made during the year to children and grandchildren.
- Pay tuition and non-reimbursable medical expenses directly to the school or medical provider.
- Consider making charitable gifts (including charitable Individual Retirement Account (IRA) rollovers) before year-end to use the deduction on your 2024 income tax return.

Review Formula Bequests

Many estate plans utilize "formula clauses" that divide assets upon the death of the first spouse between a "credit shelter trust," which utilizes the client's remaining federal estate tax exemption amount, and a "marital trust," which qualifies for the federal estate tax marital deduction and postpones the payment of federal estate taxes on the assets held in the marital trust until the death of the surviving spouse. While the surviving spouse is the only permissible beneficiary of the marital trust, the credit shelter trust may have a different class of beneficiaries, such as children from a prior marriage. With the TCJA's increase in the exemption amounts, an existing formula clause could potentially fund the credit shelter trust with up to the full federal exemption amount of $13.61 million in 2024 and $13.99 million in 2025. This formula could potentially result in a smaller bequest to the marital trust for the benefit of the surviving spouse than was intended or even no bequest for the surviving spouse at all.

There are many other examples of plans that leave the exemption amount and the balance of the assets to different beneficiaries. Depending on the class of beneficiaries of the credit shelter trust, if the taxpayer lives in a state where the federal and state exemption amounts are decoupled, the taxpayer's estate may inadvertently find itself subject to estate tax at the state level. Taxpayers should review any existing formula clauses in their current estate plans to ensure they are still appropriate, given the increase in the federal exemption amounts and the implications of the potential sunset of these exemption amounts. In addition, taxpayers should consider alternative drafting strategies, such as disclaimers, to maintain flexibility in their plans.

Income Tax Basis Planning

Taxpayers should consider the potential tradeoffs of utilizing the increased exemption amounts during their lifetimes to gift assets to others, as opposed to retaining appreciated assets until their death so that those assets receive a stepped-up income tax basis. Taxpayers may want to consider retaining low-basis assets, which would then be included in their taxable estates and receive a step-up in income tax basis, while prioritizing high-income tax basis assets for potential lifetime gift transactions. In addition, if a trust beneficiary has unused federal estate tax exemption, consideration should be given to strategies that would lead to low-income tax basis assets currently held in trust, and otherwise not includible in a beneficiary's taxable estate, being included in the beneficiary's taxable estate, such as:

- granting the beneficiary a general power of appointment over the trust assets;
- utilizing the trust's distribution provisions to distribute assets directly to the beneficiary, so that the assets may obtain a step-up in basis upon the death of the beneficiary to whom it was distributed; or

- converting a beneficiary's limited power of appointment into a general power of appointment by a technique commonly known as "tripping the Delaware tax trap."

Consequently, the assets included in the beneficiary's estate would receive a step-up in income tax basis at the beneficiary's death and would take advantage of the beneficiary's unused federal estate tax exemption amount. Whether these techniques should be implemented depends on a careful analysis of the basis of the assets held in trust, the beneficiary's assets and applicable exclusion amounts, which should be discussed with advisors.

529 Plan Changes

The TCJA expanded the benefits of 529 Plans for federal income tax purposes. Historically, withdrawals from 529 Plans have been free from federal income tax if the funds were used toward qualified higher education expenses. Under the TCJA, qualified withdrawals of up to $10,000 can now also be made from 529 Plans for tuition in K-12 schools. As a result, the owner of the 529 Plan can withdraw up to $10,000 per beneficiary each year to use towards K-12 education. The earnings on these withdrawals will be exempt from federal income tax under the TCJA. However, because each state has its own specific laws addressing 529 Plan withdrawals and not all states provide that withdrawals for K-12 tuition will be exempt from state income taxes, taxpayers should consult with their advisors to confirm the rules in their respective states. A concern with 529 plans is that leftover funds no longer needed for educational purposes may be trapped in the account unless a penalty is paid when the account is withdrawn for a non-qualified purpose. SECURE 2.0 (discussed further below) permits a beneficiary of 529 accounts to roll over up to $35,000 over their lifetime from any 529 account into a Roth IRA.

Planning to Utilize Increased Federal Exemptions

Given that the increased federal exemption amounts are currently set to sunset at the end of 2025, it may be prudent to make use of these increased amounts before they disappear (with the caveat that the law may, of course, change prior to 2026). We note that a change in the law can occasionally occur with little advanced notice and that 2025 will be a very busy time for estate planners and, perhaps more importantly, appraisers. Accordingly, for individuals who plan to use their exemption prior to the end of 2025, clients are encouraged to complete that planning in 2024 to avoid the 2025 rush (plus, the sooner an individual acts, the more appreciation on and income from the transferred assets can accumulate outside of the taxable estate).

Gifting Techniques to Take Advantage of the Increased Applicable Exclusion Amount

Taxpayers may want to consider making gifts to utilize the increased federal exclusion amount. It is less expensive to make lifetime gifts than to make gifts at death because tax is not imposed on dollars used to pay gift tax, but estate tax is imposed on the dollars used to pay estate tax. In addition, taxpayers may benefit by removing any income from and appreciation on the gift from their estate. However, taxpayers should seek advice if they have used all their applicable exclusion amount and would pay federal gift tax on any gifts. Making gifts that result in significant gift tax payments may not always be advisable in the current environment.

A countervailing consideration of lifetime gifting is that the gifted assets will not get a step-up in basis upon death (as would assets held at death) and will thus generate capital gains tax if they are subsequently sold for an amount higher than their basis. The Internal Revenue Service (IRS) released Revenue Rule 2023-02, which reiterated this previously well-established trade-off. Accordingly, the decision of whether and how to embark on a lifetime gifting strategy depends on several factors, including the basis of the transferor's various assets, their projected income and appreciation, the total amount of the transferor's assets and the transferor's remaining applicable exclusion amount. For individuals with assets far exceeding their applicable exclusion amounts, lifetime gifting of high-basis assets generally may be recommended. However, individuals with total assets close to or below their applicable exclusion amounts should exercise caution before making gifts of low-basis assets. Instead, those individuals should consider holding their assets until death to achieve a step-up in basis upon death while minimizing estate taxes. Of course, maintaining a comfortable standard of living is a factor that also must be considered. We are available to discuss this analysis with you in more detail.

If undertaking a gifting strategy, gifts to utilize the increased exemption may be made to existing or newly created trusts. For instance, a taxpayer could create a trust for the benefit of the taxpayer's spouse (a spousal lifetime access trust (SLAT)) and gift assets to the SLAT utilizing the taxpayer's increased federal exemption amounts. The gifted assets held in the SLAT should not be includible in the taxpayer's or spouse's respective taxable estates, and distributions could be made to the spouse from the SLAT to provide the spouse with access to the gifted funds, if needed, in the future. Of course, marital stability and the health of the other spouse need to be considered. Additionally, gifts could be made by a taxpayer to dynasty trusts (to which GST exemption is allocated), which would allow the trust property to benefit future generations without the imposition of estate or GST tax.

There are several important considerations to remember when using a SLAT or SLATs. Both the taxpayer and the taxpayer's spouse can create SLATs for each other, but the SLATs cannot be "reciprocal." That is to say, the two SLATs cannot have the same trust terms with the only difference being the identity of the beneficiary. Under the reciprocal trust doctrine, gifts made to irrevocable trusts that are deemed reciprocal are treated as being included in each grantor's taxable estate, which leads to the opposite of the desired result. There are several easy ways to ensure that SLATs are not reciprocal, namely:

- having a different class of beneficiaries (i.e., spouse versus spouse and descendants);
- including powers of appointment with different classes of potential appointees;
- different termination date of each SLAT; and
- distribution standard (best interests versus support).

Another important consideration when utilizing multiple SLATs is the timing of the gifts. This is particularly important if the taxpayer and the taxpayer's spouse have unequal assets. In a situation where one spouse has a significantly larger portion of a married couple's assets, SLATs can still be used, first with one spouse gifting a portion of assets to the other spouse, followed by the receiving spouse gifting the same assets to a SLAT for the benefit of the first spouse. Importantly, and in particular, when considering the impending sunset of the exemption amounts, this is not a strategy that can be implemented in the span of a few days, weeks, or perhaps, even in a month or the same calendar year. Although there is no clear answer, the 2021 *Smaldino* case provides some guidance. *See Smaldino v. Commissioner*, T.C. Memo 2021-127. In *Smaldino*, the taxpayer engaged in a series of transactions, as follows:

- The taxpayer transferred a 41 percent interest in an LLC to his spouse.
- *One day later*, the spouse transferred the same 41 percent LLC interest to a Dynasty Trust for the benefit of the taxpayer's descendants.
- That same day, the taxpayer transferred an additional 8 percent in the LLC to the Dynasty Trust.
- The end result was the taxpayer owned a 51 percent interest in the LLC, and the Dynasty Trust owned a 49 percent interest in the LLC.

The Tax Court held that the taxpayer made a gift of a 49 percent interest in the LLC to the Dynasty Trust because the taxpayer's spouse was never admitted as a member of the LLC, never exercised the rights of a member and no evidence was presented that the spouse ever received any benefit or burden of being a member. As a result of the finding, gift tax was assessed against the taxpayer.

Although *Smaldino* had some particularly egregious facts for the taxpayer, the importance of the timing of such transactions cannot be understated. Notably, *Smaldino* did not specify a timeline that would have deemed the taxpayer's spouse's gift of the 41 percent LLC interest valid. In an ideal situation, a sequence of transactions that requires the taxpayer to make a gift to the taxpayer's spouse prior to the taxpayer's spouse gifting those same assets would be completed over separate tax years (i.e., a gift to the taxpayer's spouse in 2024 tax year, a spouse's gift to irrevocable trust in 2025 tax year). With limited time remaining until the sunset, now is the time to consider such a gifting strategy.

In addition to using a SLAT, taxpayers may make gifts to irrevocable dynasty trusts (to which GST exemption is allocated) for the benefit of the taxpayer's children and/or more remote descendants to allow trust property to benefit future generations. If the strategy is properly implemented, no estate or GST tax will be incurred.

Other Techniques to Take Advantage of the Increased Applicable Exclusion Amount

In addition to making gifts to utilize the increased exemption, below is a summary of several other broadly applicable recommendations:

- **Sales to Grantor Trusts.** In addition to making gifts to irrevocable trusts, taxpayers should consider sales to grantor trusts (or a combination gift/sale). A sale would be in exchange for a down payment (say 10 percent) and a promissory note for the balance, and any interest payments owed back to the grantor may not be subject to income tax, nor should the sale trigger capital gains tax (since the taxpayer is also the taxpayer of the grantor trust for income tax purposes, so it is essentially a sale to oneself). The increased federal exemption may provide a cushion against any asset valuation risk attendant with such sales. Taxpayers who enter into such sale transactions should consider taking advantage of the adequate disclosure rules to start running the three-year statute of limitations. Interest rates on promissory notes are presently at high rates but generally are still advantageous to engage in this type of transaction. Of course, the asset being sold, if not publicly traded, should be appraised by a qualified appraiser.

- **Loan Forgiveness/Refinancing.** If taxpayers are holding promissory notes from prior estate planning transactions, from loans to family members or otherwise, they should consider using some or all the increased federal exemption amounts to forgive these notes. Consideration could be given to refinancing existing notes, but given the higher interest rates, that may not be advantageous at present.

- **Allocation of GST Exemption to GST Non-Exempt Trusts**. If a taxpayer's existing estate plan utilizes trusts that are subject to GST tax (GST non-exempt trusts), consideration should be given to allocating some or all of the taxpayer's increased GST exemption amount to such trusts.

- **Balancing Spouses' Estates.** For married taxpayers, if the value of the assets owned by one spouse is greater than the increased federal exemption amounts and greater than the value of the assets owned by the other spouse, consideration should be given to transferring assets to the less propertied spouse. Such a transfer would provide the less propertied spouse with more assets to take advantage of the increased federal exemption amounts, especially the increased GST exemption, which is not portable to the surviving spouse upon the first spouse's death. Taxpayers should be mindful, however, that transfers to non-US citizen spouses are not eligible for the unlimited marital deduction for federal gift tax purposes, and such transfers should stay within the annual exclusion for such gifts ($185,000 in 2024; $190,000 in 2025) to avoid federal gift tax. Additionally, creditor protection should be considered before transferring assets from the joint name or from one spouse's name to the other spouse's name. Note that the annual exclusion for gifts (to donees other than a spouse) is $18,000 in 2024 and $19,000 in 2025.

- Life Insurance. Taxpayers may wish to review or reevaluate their life insurance coverage and needs with their insurance advisors.

Review and Revise Your Estate Plan to Ensure It Remains Appropriate

As noted above, any provisions in wills and trust agreements that distribute assets according to tax formulas and/or applicable exclusion amounts should be reviewed to ensure that the provisions continue accurately to reflect the testator's or grantor's wishes when taking into account the higher applicable exclusion amounts. Consideration should also be given to including alternate funding formulas in wills or trust agreements that would apply if the federal estate tax exemption amounts do sunset in 2026.

Additionally, in light of the increased exemption amounts, taxpayers should also consider whether certain prior planning is now unnecessary and should be unwound, such as certain qualified personal residence trusts, family limited partnerships (FLPs) and split-dollar arrangements.

Allocation of GST-applicable exclusion amounts should be reviewed to ensure that it is utilized most effectively if one wishes to plan for grandchildren or more remote descendants. In addition, due to the increased GST exemption amounts available under the TCJA, allocation of some or all of one's increased GST exemption amounts to previously established irrevocable trusts that are not fully GST exempt may be advisable.

Taxpayers should continue to be cautious in relying on portability in estate planning, as portability may not be the most beneficial strategy based on your personal situation. In addition, a deceased spouse's unused exclusion (DSUE) may not be available upon remarriage of the surviving spouse. Furthermore, since the DSUE amount is frozen upon the first spouse's death, no appreciation is allocated to the DSUE amount between the first spouse's death and the surviving spouse's subsequent death, which would limit the amount of transfer-tax-free assets that could pass to beneficiaries. However, when a credit shelter trust is used in lieu of portability, the appreciation of the assets funding the credit shelter trust will inure to the beneficiaries' benefits. However, portability may be a viable option for some couples with estates below the combined exemption amounts. Portability can be used to take advantage of the first spouse to die's estate tax exemption amount, as well as obtain a stepped-up basis at each spouse's death. Portability can also be used in conjunction with a trust for the surviving spouse (a QTIP trust) to incorporate flexibility for post-mortem planning options. Factors such as the asset protection benefits of utilizing a trust, the possibility of appreciation of assets after the death of the first spouse, and the effective use of both spouses' GST exemption and state estate tax should be discussed with advisors in determining whether relying on a portability election may be advisable. For taxpayers looking to make a portability election, effective July 8, 2022, Rev. Proc. 2022-32 provides certain taxpayers with a more simplified method to make the portability election, allowing them to be able to elect the portability of a DSUE up to five years after the decedent's date of death.

Unmarried couples should particularly continue to review and revise their estate planning documents and beneficiary designations. Since the advent of same-sex marriage, it is now clear that domestic partners, even if registered as such, do not qualify for the federal (and in many cases state) tax and other benefits and default presumptions that are accorded to married couples.

Finally, in view of the potential sunset of many pertinent provisions of the TCJA, estate plans should provide as much flexibility as possible. As noted above, formula bequests should be reviewed to ensure they are appropriate under current law, and consideration should be given to granting limited powers of appointment to trust beneficiaries to provide flexibility for post-mortem tax planning. A trust protector (or trust protector committee) may also be appointed to give a third party the ability to modify or amend a trust document based on changes in the tax laws or unforeseen future circumstances or to grant certain powers to trust beneficiaries that may have tax advantages under a new tax regime (such as the granting of a general power of appointment to trust beneficiaries in order to obtain a stepped-up basis in trust assets at the beneficiary's death).

Mitigate Trust Income Tax and Avoid the Medicare Surtax With Trust Income Tax Planning

Non-grantor trusts should consider making income distributions to beneficiaries. Trust beneficiaries may be taxed at a lower tax rate, especially due to the compressed income tax brackets applicable to non-grantor trusts. Additionally, a complex, non-grantor trust with an undistributed annual income of more than $12,500 (adjusted for inflation) will be subject to the 3.8 percent Medicare surtax. However, some or all of the Medicare surtax may be avoided by distributing such income directly to beneficiaries who are below the individual net investment income threshold amount for the Medicare surtax ($200,000 for single taxpayers, $250,000 for married couples filing jointly and $125,000 for married individuals filing separately).

To determine whether trusts should distribute or retain their income, beneficiaries' circumstances and tax calculations should be carefully evaluated.

Transfer Techniques

Many techniques that have been utilized in prior years continue to be advantageous planning techniques under the TCJA. Due to the potential sunsetting of many applicable provisions of the TCJA, consideration should be given to planning that minimizes the risk of paying current gift taxes but still allows taking advantage of the increased exemptions amounts to shifting assets and appreciation from the taxable estate. Additionally, consideration should be given to selling hard-to-value assets to grantor trusts, due to the increased exemption available to "shelter" any valuation adjustment of these assets upon audit. Lifetime gifting and sales transactions remain very important in providing asset protection benefits for trust beneficiaries, shifting income to beneficiaries in lower tax brackets, and providing funds for children or others whose inheritance may be delayed by the longer life expectancy of one's ancestors.

Grantor Retained Annuity Trusts (GRATs)

GRATs remain one of our most valuable planning tools, though given recent higher interest rates, their practicality has decreased. Under current law, GRATs may be structured without making a taxable gift. Therefore, even if one has used all his or her applicable exclusion amount, GRATs may be used without incurring any gift tax. Because GRATs may be created without a gift upon funding, they are an increasingly attractive technique for clients who want to continue planning to pass assets to their descendants without payment of gift tax in the uncertain tax environment.

A GRAT provides the grantor with a fixed annual amount (the annuity) from the trust for a term of years (which may be as short as two years). The annuity the grantor retains may be equal to 100 percent of the amount the grantor used to fund the GRAT, plus the IRS-assumed rate of return applicable to GRATs. For transfers made in November 2024, this is 4.4 percent. For transfers made in December 2024, the applicable rate will be 5 percent. As long as the GRAT assets outperform the applicable rate, at the end of the annuity term the grantor will be able to achieve a transfer tax-free gift of the spread between the actual growth of the assets and the IRS assumed rate of return. Although the grantor will retain the full value of the GRAT assets, if the grantor survives the annuity term, the value of the GRAT assets in excess of the grantor's retained annuity amount will then pass to whomever the grantor has named, either outright or in further trust, with no gift or estate tax.

Qualified Personal Residence Trust (QPRT)

A similar type of transaction is a transfer of the taxpayer's residence to an irrevocable QPRT. A QPRT allows the taxpayer to enjoy the use of the property for a predetermined term. A gift to a QPRT will result in a taxable gift, but the value of the gift is the present value of the grantor's remainder interest in the property, which is dependent in part on the term of the QPRT. The value of the gift also accounts for any mortgage or other debt on the property. When the QPRT terminates, the residence is distributed to the remainder beneficiaries (or to a continuing trust for their benefit), and all the appreciation in the property is outside of the grantor's taxable estate. If the grantor still desires to reside in the property, the grantor can lease the property from the remainder beneficiaries (or from a continuing trust for their benefit) for fair market value, which provides an additional income stream to the trust, and the rent payments are taken out of the grantor's taxable estate without incurring any gift tax.

Sales to Intentionally Defective Grantor Trusts (IDGTs)

Sales to IDGTs have become an increasingly popular planning strategy due to the increased exemption amounts under the TCJA.

In utilizing a sale to an IDGT, a taxpayer would transfer assets likely to appreciate to the IDGT in exchange for a down payment (say 10 percent) and a promissory note from the trust for the balance. From an income tax perspective, no taxable gain would be recognized on the sale of the property to the IDGT because it is a grantor trust, which makes this essentially a sale to oneself. For the same reason, the interest payments on the note would not be taxable to the seller or deductible by the trust.

If the value of the assets grows at a greater pace than the prevailing applicable federal rate (AFR) (For sales in November 2024 the rate is 4 percent for a short-term note. In December 2024 the rate is 4.3 percent for a short-term note.), as with a GRAT, the appreciation beyond the federal rate will pass free of gift and estate tax.

The increased federal exemption amounts may provide a cushion against any asset valuation risk attendant to such sales. Additionally, the increased exemption amounts permit the sale of a substantially larger amount of assets to grantor trusts. Typically, grantor trusts should be funded with at least 10 percent of the value of the assets that will be sold to the trust. With the higher exemption amounts, those who have not used any of their exemptions could contribute up to $13.61 million (or $27.22 million if splitting assets with a spouse) to a grantor trust in 2024. This would permit the sale of up to $136.1 million (or $272.2 million) of assets to the trust in exchange for a promissory note with interest at the appropriate AFR.

Consider a Swap or Buy Back of Appreciated Low-Basis Assets From Grantor Trusts

If a grantor trust has been funded with low-basis assets, the grantor should consider swapping or buying back those low-basis assets in exchange for high-basis assets or cash. If the grantor sold or gave (through a GRAT or other grantor trust) an asset with a low basis, when that asset is sold, the gain will trigger capital gains tax. However, if the grantor swaps or purchases the asset back from the grantor trust for fair market value, no gain or loss is recognized. The trust would then hold cash or other assets equal to the value of the asset that was repurchased. Alternatively, many grantor trust instruments give the grantor the power to substitute the trust's assets with other assets, which would allow the low-basis assets to be removed from the trust in exchange for assets of equal value that have a higher basis. Then, on the grantor's death, the purchased or reacquired asset will be included in the grantor's taxable estate and will receive a step-up on a basis equal to fair market value, eliminating the income tax cost to the beneficiaries. Those whose estates may not be subject to estate taxes due to the current high exemption amounts may utilize swaps or buy-backs to "undo" prior planning strategies that are no longer needed in today's environment. Particular care should be taken when considering swapping assets that are hard to value. In that circumstance, an appraisal from a qualified appraiser should be obtained to support the valuation of the swapped assets. This not only helps limit fiduciary liability claims but also protects against an argument that the swap was not done for assets of equal value, which could potentially result in a gift being made by the grantor to the trust.

Consider the Use of Life Insurance

Life insurance presents significant opportunities to defer and/or avoid income taxes, as well as provide assets to pay estate tax or replace assets used to pay estate tax. Generally speaking, appreciation and/or income earned on a life insurance policy accumulates free of income taxes until the policy owner makes a withdrawal or surrenders or sells the policy. Thus, properly structured life insurance may be used as an effective tax-deferred retirement planning vehicle. Proceeds distributed upon the death of the insured are generally completely free of income taxes. Taxpayers should consider paying off any outstanding loans against existing policies in order to maximize the proceeds available tax-free at death, although potential gift tax consequences must be examined. Note that the decision to pay off such loans requires a comparison of the alternative investments that may be available with the assets that would be used to repay the loans and the interest rate on the loans.

Use Intra-Family Loans and Consider Refinancing Existing Intra-Family Loans

While these techniques work better when interest rates are low, because the exemption amounts are so high, many techniques involving the use of intra-family loans should be considered, including:

- The purchase of life insurance on the life of one family member by an irrevocable life insurance trust, with premium payments funded by loans from other family members.
- The creation of trusts by older generation members for the benefit of younger family members, to which the older generation members provide a small seed gift and then loan more substantial funds. The spread between the investment return earned by the trust and the interest owed on the note will create a transfer tax-free gift.
- Forgiving loans previously made to family members. The amount that is forgiven in excess of the annual gift tax exclusion amount will be a gift and thus will use a portion of one's applicable gift tax and/or GST tax exclusion amount. This may be a beneficial strategy considering the increased exemption amounts.

Installment Sale to Third-Party Settled GST Tax-Exempt Trust

Unique planning opportunities and transfer tax benefits may be available if a relative or friend of the taxpayer has an interest in creating and funding a trust for the benefit of the taxpayer and/or the taxpayer's family. For example, a third-party grantor (e.g., a relative or friend of the taxpayer) could contribute cash to a trust for the benefit of the taxpayer, allocate GST tax exemption to that gift, and then that trust could purchase assets from the taxpayer in exchange for such cash and a secured promissory note in the remaining principal amount of assets purchased. While this sale could result in payment of capital gains tax to the taxpayer (ideally at an earlier, lower value), this planning could present the following potential benefits:

- there should be no transfer tax concerns for the third-party grantor if the grantor's other assets, even when added to the value of the foregoing gift, would not be sufficient to cause the estate tax to apply at the grantor's death (this depends on what the estate tax exemption amount is at the grantor's subsequent death);
- the assets could receive a step-up in basis as of the date of the initial sale;
- the taxpayer could be a beneficiary, hold a limited power of appointment over, and control who serves as trustee, of the trust;
- the appreciation in the value of the asset being sold from the date of the initial sale above the interest rate on the promissory note (e.g., 3.7 percent is the mid-term AFR for a sale completed in November 2024 and 4.18 percent is the mid-term AFR for a sale completed in December 2024) would accrue transfer-tax-free for the benefit of the taxpayer and/or the taxpayer's family; and
- the trust could be structured in such a way as to provide protection from the taxpayer's creditors and remove the trust assets from the taxpayer's and his or her family members' taxable estates.

To achieve the foregoing benefits, it is important that only the third-party grantor makes gratuitous transfers to the trust and that the third-party grantor is not reimbursed for such transfers.

Disclaimer Planning

If applicable, taxpayers may consider disclaiming assets they stand to inherit from a predeceased spouse or other relative. This keeps the disclaimed assets out of the taxpayer's estate, and if structured properly, the disclaimer is not treated as a gift. This could be a useful tool for taxpayers looking to take advantage of the GST exemption, as the GST exemption is not portable and does not receive the same double exemption as the gift/estate tax exemptions receive. Additionally, this may be useful in a jurisdiction like New York, where the state-level estate tax exemption is lower than the federal estate exemption. Accordingly, by a surviving spouse disclaiming assets that are going to be received from the deceased spouse and using some or all of the deceased spouse's available estate tax exemption, it is possible that the resulting net worth of the surviving spouse is below the state-level estate tax exemption.

Consider Charitable Planning

A planning tool that is very effective in a high-interest rate environment is a Charitable Remainder Annuity Trust (CRAT), which combines philanthropy with tax planning. A CRAT is an irrevocable trust that pays an annual payment to an individual (typically the grantor) during the term of the trust, with the remainder passing to one or more named charities. The grantor may receive an income tax deduction for the value of the interest passing to charity. Because the value of the grantor's retained interest is lower when interest rates are high, the value of the interest passing to charity (and therefore the income tax deduction) is higher.

Alternatively, a strategy that works better in a low interest rate environment is a Charitable Lead Annuity Trust (CLAT). A CLAT is an irrevocable trust that pays one or more named charities a specified annuity payment for a fixed term. At the end of the charitable term, any remaining assets in the CLAT pass to the remainder, noncharitable beneficiaries. As with a GRAT, to the extent the assets outperform the IRS assumed rate of return, those assets can pass transfer-tax-free to the chosen beneficiaries. A CLAT may become an attractive option if interest rates fall.

Be mindful of the ability to make IRA charitable rollover gifts, which allows an individual who is age 70 1/2 or over to make a charitable rollover of up to $100,000 (adjusted for inflation, pursuant to SECURE 2.0, discussed next) to a public charity without having to treat the distribution as taxable income. Other types of charitable organizations, such as supporting organizations, donor-advised funds or private foundations, are not eligible to receive the charitable rollover. Therefore, if a taxpayer needs to take a required minimum distribution, he or she may arrange for the distribution of up to $100,000 (adjusted for inflation) to be directly contributed to a favorite public charity and receive the income tax benefits of these rules. Due to new limitations on itemized deductions (i.e., the cap on the state and local tax deduction), some taxpayers may no longer itemize deductions on their personal income tax returns. Without itemized deductions, these taxpayers could not receive the income tax benefit of a charitable deduction for charitable contributions.

Retirement Planning

The Setting Every Community Up for Retirement Enhancement Act of 2019 (the SECURE Act), was originally signed into law on December 20, 2019. Intended to assist and encourage Americans in saving and investing for retirement, the SECURE Act incentivizes retirement planning by providing Americans with more choices for retirement saving, as well as increasing access to tax-advantaged savings plans. On December 29, 2022, the SECURE Act 2.0 (SECURE 2.0) was signed into law as part of the Consolidated Appropriations Act, 23, with SECURE 2.0 intended to build upon the original SECURE Act. SECURE 2.0 brings major changes to the administration of IRAs, both during the lifetime of the IRA account holder and after the account holder's death. The IRS released the final regulations for SECURE 2.0 on July 19, 2024.

SECURE 2.0 and the final regulations create a new structure for IRA required minimum distribution (RMDs) for all IRA owners and the IRA owner's designated beneficiaries. With SECURE 2.0, the required beginning date (RBD) for the start of RMDs is delayed as follows to April 1 of the year following the year in which the individual turns: (i) ***age***

72 for an individual who was born in calendar year 1950 or earlier (**note that the RBD is still age 70 1/2 for those who attained age 70 1/2 prior to December 31, 2019**); (ii) ***age 73*** for an individual who was born on or after January 1, 1951 and before December 31, 1959; and (iii) ***age 75*** for individuals who were born in calendar year 1960 or later. Further, SECURE 2.0's finalized regulation clarified that the RBD for individuals born in calendar year 1959 will be age 73 (as individuals born in 1959 previously had two RBDs, age 73 and age 75).

The finalized SECURE 2.0 regulations formalized a new "10-year rule" pertaining to RMDs by beneficiaries of inherited IRAs. Designated beneficiaries of inherited IRAs are classified as either "Eligible Beneficiaries" or "Non-Eligible Beneficiaries." Individual Eligible Beneficiaries include surviving spouses, disabled and chronically ill persons, minor children of the original IRA owner or persons not more than 10 years younger than the original owner. Individual Non-Eligible Beneficiaries encompass a broader class of beneficiaries and include most non-spouse beneficiaries.

The 10-year rule requires that an individual Non-Eligible Designated Beneficiary who inherits an IRA from an account owner who died prior to the original account owner's RBD fully distribute the inherited IRA on or before the end of the 10th anniversary of the original account owner's death. During the 10-year period, Non-Eligible Beneficiaries are required to take, at a minimum, stretch-style distributions each year until year-end of the calendar year that includes such 10th anniversary, at which year-end the IRA must be fully distributed. With respect to a Non-Eligible Beneficiary who inherits from an IRA owner who has already begun taking distributions, the remaining interest in the IRA must be distributed at least as rapidly (the ALAR Rule) as the original account holder was taking distributions as of his or her date of death. This means that an inherited IRA can be subject to both the 10-year rule and the ALAR Rule.

Eligible Designated Beneficiaries are not subject to the 10-year rule and may choose between traditional stretch distributions and the 10-year rule (although the plan administrator can restrict options). The surviving spouse of a deceased account holder will be able to elect to have the inherited account treated as their own. However, the finalized regulations do require a surviving spouse to take "hypothetical RMDs" if the 10-year rule treatment is not elected. If a surviving spouse initially elects 10-year rule treatment on the inherited IRA but subsequently elects a spousal rollover of said account, the surviving spouse will be required to take make-up payments of the hypothetical RMDs to the current date.

For purposes of determining whether an Eligible Designated Beneficiary is a minor under a 10-year rule analysis, an Eligible Designated Beneficiary is a minor until age 21. Upon attaining age 21, the 10-year rule applies to the beneficiary and the beneficiary must take annual stretch-style RMDs during the next 10 years covered by the 10-year rule, just as with an individual Non-Eligible Designated Beneficiary.

Another new feature of SECURE 2.0 and the finalized regulations concerns Roth IRAs. Under SECURE 2.0, if the entire IRA interest is held in a designated Roth account, a Non-Eligible Beneficiary subject to the 10-year rule will not be required to take a distribution in the first nine years after inheriting the IRA but rather can take the entire distribution in year 10. Please note, however, that a Non-Eligible Designated Beneficiary can only elect this treatment if the entire IRA interest must be held in a designated Roth IRA.

SECURE 2.0 has also brought about significant changes to trust beneficiaries of IRAs. SECURE 2.0 classifies most trusts as Non-Eligible Designated Beneficiaries, subjecting most trusts to the 10-year rule and creating complications if a trust is named as a beneficiary of an IRA. However, SECURE 2.0 permits certain trusts to take stretch-style distributions, as discussed below.

Whether a trust beneficiary of an inherited IRA is subject to SECURE 2.0's 10-year rule or can take traditional stretch-style distributions requires an analysis of the trust's underlying beneficiaries. If a trust is classified as a "see-through" trust, the trust's beneficiaries will be deemed to be the ultimate beneficiaries of the inherited IRA. Generally, SECURE 2.0 creates two categories of see-through trusts for RMD purposes. The first such trust is called a "conduit trust," meaning a trust in which all distributions from an IRA are required to be distributed to specific beneficiaries pursuant to the original IRA owner's estate plan. The other type of trust is known as an "accumulation trust," whereby distributions from an IRA are allowed to accumulate in trust, and all trust beneficiaries are treated as beneficiaries of the inherited IRA.

As the 10-year rule applies to most trusts, an analysis of a trust's beneficiaries is required to determine whether such beneficiaries qualify as an Eligible Designated Beneficiary or a Non-Eligible Designated Beneficiary. Just like with individuals who inherit an IRA, most non-spouse beneficiaries of a trust that inherit an IRA will be subject to the 10-year rule and designated as a Non-Eligible Beneficiary. Further, trusts that divide on the original IRA holder's death will require an analysis of each subtrust. By way of example, a trust that divides into five separate subtrusts on the account holder's death will require five separate analyses as to whether each trust is an Eligible Designated Beneficiary or a Non-Eligible Designated Beneficiary. In addition, and as is the case with individuals, the ALAR Rule applies to inherited IRAs where distributions have already started. Traditional stretch-style distributions are generally available to trust beneficiaries who would otherwise qualify as Eligible Designated Beneficiaries.

SECURE 2.0 permits irrevocable trusts benefitting a chronically ill or disabled individual to take traditional stretch-style distributions if such trust is an "applicable multi-beneficiary trust" (AMBT). An AMBT limits distributions to the chronically ill beneficiary during his or her lifetime (and then can subsequently make payments to other beneficiaries). SECURE 2.0 allows a qualified charity to be designated as the remainder beneficiary of an AMBT inheriting an IRA and for the qualified charity to take traditional stretch-style distributions following the death of the trust's initial beneficiary.

SECURE 2.0 and the finalized regulations have also provided new rules regarding the exercise of a power of appointment (POA) for beneficiaries of see-through trusts. SECURE 2.0 permits a beneficiary to hold and exercise POA over his or her trust following the death of the original IRA account holder. SECURE 2.0 permits the powerholder/beneficiary to both exercise their POA by September 30 of the year of the original IRA owner's death or modify their POA to a restricted group of identifiable individuals. Any such exercise or modification by the powerholder/beneficiary will cause the newly named individuals to be considered beneficiaries of the IRA.

In terms of required documentation for plan administrators, SECURE 2.0 requires the trustee of a trust designated as the beneficiary of an IRA to provide the plan administrator either (i) a copy of the trust instrument, or (ii) a list of all beneficiaries of the trust (describing how and when a beneficiary is entitled to a distribution).

With respect to RMDs for years prior to January 1, 2025, IRS Notice 2024-35 provides that the IRS will not impose penalties for failure to take an RMD for years one through nine from an inherited IRA that is otherwise subject to the 10-year rule. Otherwise, the final SECURE 2.0 regulations confirm the prior SECURE 2.0 penalties. Starting January 1, 2025, failure to take an RMD from an inherited IRA will result in a penalty of 25 percent of the RMD amount, reduced to 10 percent if timely corrected.

The SECURE 2.0 provides a few changes to catch-up contributions to certain retirement plans for individuals age 50 or older. High-income employees over age 50 (those who earn more than $145,000, indexed for inflation) must make any "catch-up" contributions into a designated Roth account in such plans. Individuals over age 50 who earn less than $145,000 can continue making any catch-up contributions directly to their regular 401(k) account. Under the SECURE Act 2.0, catch-up contribution levels are now indexed for inflation. Note that the IRS has delayed the effectiveness of these rules until January 1, 2026.

SECURE 2.0 permits a beneficiary of a 529 Plan to make a tax-free rollover of any remaining funds into a Roth IRA (not to exceed the annual Roth IRA contribution limit), provided that the 529 Plan account has been open for at least 15 years and the funds used for the rollover have been in the 529 Plan for at least five years. The lifetime amount a beneficiary can rollover from their 529 Plan to a Roth IRA tax-free is $35,000, and such an amount is not indexed for inflation.

Another feature of SECURE 2.0 is the ability for an account holder to withdraw up to $1,000 from their account for certain emergency expenses (generally defined as an unforeseeable or immediate financial need relating to personal or family expenses) without incurring a 10 percent early withdrawal penalty. There is also an option to repay the distribution within three years. If the withdrawn emergency amounts are not repaid during that three-year window, no additional emergency distributions will be allowed.

SECURE 2.0 has slightly modified the rules governing qualified charitable distributions (QCDs). A QCD is a payment by an IRA account holder directly from the IRA to a qualified charity. Individuals aged 70 1/2 or older can contribute an amount not to exceed $100,000, now indexed for inflation and $105,000 in 2024, to a qualified charity.

Select Federal Caselaw Updates

United States v. Paulson, 131 AFTR 2d 2023-1743 (9th Cir. May 17, 2023) [EP116-125]

Allen Paulson (the Decedent) died on July 19, 2000, survived by his third wife Madeleine Pickens (Madeleine), three sons from a prior marriage, Richard Paulson (Richard), James Paulson (James) and John Michael Paulson, and several grandchildren, including granddaughter Crystal Christensen (Crystal). Richard post-deceased his father and was survived by his wife, Vikki Paulson (Vikki). The Decedent's gross estate, valued at approximately $200 million, was mostly held in a revocable trust (the Trust). Years after the Decedent's death, following multiple disputes between the Decedent's fiduciaries and beneficiaries, audit inquiries, and failed elections to defer payment of the Decedent's federal estate taxes, roughly $10 million of federal estate taxes, plus interest and penalties, remained unpaid. The United States ultimately brought suit against certain of the Decedent's heirs in their capacities as trustees, transferees or beneficiaries (collectively, the defendants), alleging that they were personally liable for the Decedent's unpaid estate tax liabilities pursuant to Internal Revenue Code (Code) Section 6432(a)(2).

While the lower court held that a beneficiary was not liable for unpaid estate taxes as a beneficiary of the Trust because they didn't receive life insurance benefits, and other beneficiaries were not liable for unpaid estate taxes because they were not in possession of the estate's property at the time of the Decedent's death, the US Court of Appeals for the Ninth Circuit (the Court) reversed the lower court's decision and held that persons who hold estate property or receive it on or after the date of death are personally liable for unpaid estate taxes on that property. In so holding, the Court was the first to interpret the provisions and legislative history of said Section 6432(a)(2) to determine its meaning. Code Section 6432(a)(2) imposes personal liability for a decedent's estate taxes on transferees and others who receive or have property from an estate. It states, in the relevant part:

> "If the estate tax imposed by chapter 11 is not paid when due, then the spouse, transferee, trustee (except the trustee of an employees' trust which meets the requirements of section 401(a)), surviving tenant, person in possession of the property by reason of the exercise, nonexercised, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under sections 2034 to 2042, inclusive, to the extent of the value, at the time of decedent's death, of such property, shall be personally liable for such tax" (26 U.S.C. Section 6432(a)(2)).

One question before the Court was whether the limiting phrase "on the date of the decedent's death" modifies only the preceding verb "has" or also the more remote verb "receives." The Court ruled in favor of the United States that the phrase "on the date of decedent's death" does not limit the verb "receives," holding that Code Section 6432(a)(2) "imposes personal liability for unpaid estate taxes on the categories of persons listed in the statute who have or receive estate property, either on the date of the decedent's death or at any time thereafter, subject to the applicable statute of limitations."

In so ruling, the Court followed "the rule of the last antecedent," which provides that a limiting clause should be read to modify only the noun or verb immediately before it. Contrary to the opinion of the single dissenting Circuit Judge, the Court also noted that to accept another interpretation would be contrary to the statutory text and context, even though it would be possible, under the decided interpretation, for the personal liability of an individual to exceed the value of the property received by them if such property had significantly declined in value after receipt. Overall, the Court felt there were sufficient safeguards preventing this remote possibility from materializing, especially considering the government's affirmations that the personally liable transferee is only responsible to the extent that the property actually had or was received by such an individual.

After deciding that Code Section 6432(a)(2) imposes personal liability on those categories of persons listed in the statute who have or receive estate property on or after the date of the decedent's death, the Court was tasked with determining whether the categories of people listed included the defendants. The Court held that Vikki, Crystal and James were successor trustees of the Trust, and therefore liable for unpaid estate taxes in such capacity to the extent of the value of the property included in the Trust at the time of the Decedent's death. The Court also found Crystal and Madeleine liable as beneficiaries of the Trust, finding more broadly, based on contextual case law and analogous statutory usage, that the term "beneficiary" as used in Code Section 6432(a)(2) included a "trust beneficiary." The case was remanded to the district court to calculate the proportion of estate taxes owed by each personally liable individual.

As a practical result of *Paulson*, a nominated successor trustee may wish to inquire as to the liabilities of an estate or trust before accepting their role. Additionally, executors and trustees should consider withholding distributions until all estate or trust liabilities are satisfied. On the other hand, beneficiaries who receive distributions should learn whether there are any outstanding liabilities of the estate or trust before spending their distributions. In a case where the payment of estate tax was duly deferred, the timeline for observing these precautions may be extended.

Schlapfer v. Comm'r of Internal Revenue, T.C. Memo 2023-65

On May 22, 2023, the Tax Court issued a decision in *Schlapfer v. Comm'r*, T.C. Memo 2023-65, making its first ruling on what constitutes adequate disclosure of a gift for gift tax purposes under Treas. Reg. 301.6501(c)-1(f)(2). By ultimately applying a "substantial compliance" approach to disclosure, the Tax Court favorably found that the taxpayer met the requirements for adequate disclosure despite not adhering to a stricter standard.

By way of background, Ronald Schlapfer (Taxpayer) had ties to both Switzerland and the United States. In connection with his career, in 1979, Taxpayer moved to the United States from Switzerland and obtained a non-immigrant visa, declaring his intention not to reside permanently in the United States. At the time, Taxpayer's mother, aunt, brother and uncle – his only family – remained in Switzerland. Between 1979 and applying for US citizenship on May 18, 2007, Taxpayer was married, had children, got divorced and in 1990, was remarried to his current wife (Mrs. Schlapfer) with whom Taxpayer had a son in 1992. Also, in 2002, Taxpayer started his own business, European Marketing Group, Inc. (EMG), a Panamanian corporation that managed investments, holding cash and marketable securities. At the time of EMG's formation, Taxpayer owned all 100 issued and outstanding shares of common stock of EMG.

On July 7, 2006, Taxpayer applied for a LifeBridge Universal Variable Life Policy (the Policy). His stated purpose for taking out the Policy was to create and fund a policy that Taxpayer's mother, aunt and uncle (his brother died in 1994) could use to support Taxpayer's nephews. Taxpayer was the initial owner of the Policy, the mother, aunt and uncle were named as the insured, and Taxpayer and Mrs. Schlapfer were designated as primary beneficiaries. On September 22, 2006, the Policy was issued. By November 8, 2006, Taxpayer had transferred $50,000 in cash and his 100 shares of EMG to an account in order to fund the premium payments on the Policy. On January 24, 2007, the Policy was assigned to Taxpayer's mother as owner, and by May 31, 2007, the Policy had been irrevocably assigned to Taxpayer's mother, aunt and uncle as joint owners.

As part of the Offshore Voluntary Disclosure Program (OVDP) meant to give US taxpayers with offshore assets an opportunity to comply with US tax reporting and payment obligations, in 2012, Taxpayer filed a Form 709, US Gift (and Generation-Skipping Transfer) Tax Return for the year 2006, along with several supporting documents. One such document was a protective filing for the gift of 100 shares of EMG, described as a controlled foreign corporation, having a value of $6,056,686. The protective claim stated that the gift was not subject to gift tax because at the time the gift was made, Taxpayer did not intend to reside permanently in the United States. Taxpayer inaccurately reported the gift as a gift of EMG shares and not a gift of the Policy because he thought the Policy was an example of an entity that the OVDP instructions required be disregarded upon filing. He also stated that the EMG shares were assigned to his mother, even though the ultimate assignment was to Taxpayer's mother, aunt and uncle as joint owners. In June 2014, the IRS responded to Taxpayer's OVDP submission with a request for additional documentation and information, to which Taxpayer timely responded in July 2014.

In January 2016, the IRS opened an examination of Taxpayer's 2006 Form 709. Ultimately, after discussions and the IRS's assertion that that the gift was actually a gift of the Policy in 2007 (and not the EMG shares in 2006), the IRS issued a notice of deficiency claiming Taxpayer was liable for $4,429,949 of gift tax and $4,319,200 worth of additions to tax. Both the IRS and Taxpayer filed summary judgment motions with the Tax Court, with Taxpayer, on the other hand, asserting that the three-year limitations period applicable to the gift had run, given Taxpayer's adequate disclosure of the gift on his 2006 Form 709. Accordingly, the question before the Tax Court was whether the gift in question, as reported on Taxpayer's 2006 Form 709, satisfied the rules of adequate disclosure such that the statute of limitations had expired before the IRS claimed a deficiency.

Code Section 6501(c)(9) provides that the Commissioner may assess a gift tax at any time if a gift is not shown on a return unless the gift is "disclosed in such return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature of such item." Prior case law provides that disclosure is considered adequate if it is "sufficiently detailed to alert the Commissioner and his agents as to the nature of the transaction so that the decision as to whether to select the return for audit may be a reasonably informed one" (*Thiessen v. Commissioner*, 146 T.C. 100, 114 (2014), quoting Estate of *Fry v. Commissioner*, 88 T.C. 1020, 1023 (1987)). Treasury Regulation 301.6501(c)-1(f)(2) provides that transfers reported on a gift tax return will be considered adequately disclosed if the return provides the following information: (i) a description of the transferred property and consideration received therefor; (ii) the identity of and relationship between each transferee and the transferor; (iii) if transferred in trust, the trust EIN and description its terms, or, in lieu of such a description, a copy of the trust instrument; (iv) a description of the method used to determine the fair market value of the transferred property; and (v) a statement describing any position contrary to any proposed, temporary or final Treasury regulations or revenue rulings.

The provisions of Code Section 6501(c)(9) and analogous Code provisions provide support that the information relating to a gift disclosed on documents other than the gift tax return (for example, the supporting documents submitted through the OVDP) is properly considered when analyzing whether the gift was adequately disclosed. Additionally, in Treasury Decision 8845, the IRS provided that its express rejection of a "substantial compliance" approach did not mean "that the absence of any particular item or items would necessarily preclude satisfaction of the regulatory requirements, depending on the nature of the item omitted and the overall adequacy of the information provided."

With this as background, the Court held that the Taxpayer substantially complied with the requirements of Treas. Reg. 301.6501(c)-1(f)(2) such that the IRS was adequately apprised of the nature of the gift. With respect to requirement (i), even if Taxpayer failed to describe the gift correctly, stating the gift was of the EMG shares and not the Policy itself, he provided sufficient information regarding the underlying asset, (i.e., the EMG shares), the value of which primarily comprised the value of the Policy. Regarding Taxpayer's identification of the transferees and his relationship with them, the fact that he inaccurately stated only his mother as a transferee was held immaterial since the other transferees were also family members, and there would be no change to understanding the nature of the gift had his aunt and uncle been identified from the start. Finally, the financial reports of EMG that were provided with Taxpayer's submission to the OVDP were sufficient to allow the Court to determine the fair market value of the EMG shares.

Thus, the Court held that Taxpayer met the requirements for adequate disclosure, and, accordingly, the three-year statute of limitations, including extensions, had expired prior to the IRS's issuance of the notice of deficiency.

Anenberg v. Commissioner, 162 T.C. No. 9 (May 20, 2024)

Alvin Anenberg (Decedent) died in 2008 and was survived by his wife, Sally Anenberg (Sally), and two sons from a prior marriage. At his death, pursuant to his estate plan, assets (including shares of Decedent's business) were distributed to a QTIP marital trust (Marital Trust) for Sally. The Marital Trust required that trust income be distributed to Sally, at least annually, and it authorized the Trustee to distribute principal to Sally for her support. Upon Sally's death, the assets of the Marital Trust were to be distributed to Decedent's sons.

In October 2011, the Trustee of the Marital Trust petitioned a state court to terminate the Marital Trust and distribute all the assets outright to Sally. Sally and the remainder beneficiaries consented to the petition. The court approved, and all the assets of the Marital Trust were distributed to Sally. A few months later, Sally gifted and sold the assets (including shares of Decedent's business) to trusts for Decedent's children and grandchildren. Sally timely filed a 2012 gift tax return reporting the gifts to the trusts and reporting the sales as non-gift transactions.

In December 2020, the IRS issued a Notice of Deficiency, asserting that Sally's estate owed over $9 million in gift tax as a result of the termination of the Marital Trust and the subsequent sales of the company shares under IRC Section 2519. Generally, IRC Section 2519 provides that the disposition of a qualifying income interest in a QTIP Marital Trust is treated as a transfer of all the remainder interests in the property. Sally's estate argued that neither the termination of the Marital Trust nor the subsequent sales constituted a gift because Sally received full consideration for the property she was deemed to transfer. Under IRC Section 2501(a)(1), gift tax is imposed on the transfer of property by gift – a transfer that is made without receiving full and adequate consideration.

The Tax Court agreed with the estate and unanimously rejected both of the IRS's positions. The court began its analysis by reviewing the policy behind QTIP marital trusts which is to defer taxation on QTIP trust assets until the death of the surviving spouse. It found that, at the time of the termination of the Marital Trust, even if a transfer occurred for purposes of IRC Section 2519, no gift resulted when the assets were distributed to Sally because she received full ownership of the assets in return. These assets would be subject to estate tax upon Sally's death. Accordingly, imposing a current gift tax on the value of the remainder interest under IRC Section 2519 would result in double taxation. The court also found that no deemed transfer under IRC Section 2519 occurred when Sally sold the company shares following the termination of the Marital Trust. Once the Marital Trust was terminated, the qualifying income interest for life terminated and there could be no disposition of something that did not exist. Notably, the court did not address whether Decedent's sons made a gift by consenting to the termination and distribution of the Marital Trust assets to Sally.

McDougall v. Commissioner, 163 T.C. No. 5 (September 17, 2024)

Clotilde McDougall (the Decedent) died in 2011 and was survived by her husband, Bruce McDougall (Bruce), and their two children, Linda and Peter. At her death, pursuant to her estate plan, assets were distributed to a QTIP marital trust (Marital Trust) for Bruce. The Marital Trust required that trust income be distributed to Bruce, at least annually, and it authorized the Trustee to distribute principal to Bruce for his health, education, maintenance and support. Upon Bruce's death, the assets of the Marital Trust were to be distributed to the Decedent's children.

In October 2016, Bruce and the children entered into a non-judicial settlement agreement (the Agreement) to terminate the Marital Trust and to distribute all the assets outright to Bruce. On the same day, Bruce sold the assets he received from the Marital Trust to a trust for his children (the Children's Trust) in exchange for a promissory note. Bruce, Linda and Peter each timely filed their own gift tax returns disclosing the transactions as non-gift transactions.

The IRS issued a Notice of Deficiency to Bruce asserting that the termination of the Marital Trust and subsequent sale of the Marital Trust assets to the Children's Trust were subject to gift tax under IRC Section 2519. Generally, IRC Section 2519 provides that the disposition of a qualifying income interest in a QTIP marital trust is treated as a transfer of all the remainder interests in the property. In addition, the IRS issued a Notice of Deficiency to Peter and Linda asserting that the agreement resulted in gifts of their remainder interests in the Marital Trust to Bruce under IRC Section 2511. IRC Section 2511 provides that the gift tax shall apply to any gratuitous transfer whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

With respect to Bruce, the Tax Court rejected the IRS's position. It applied its holding in *Anenberg* and found that Bruce did not make a gift upon the termination of the Marital Trust because he received full consideration for the property he was deemed to transfer. Accordingly, Bruce was put in the same position he would have been in had the property been distributed outright to him at Decedent's death rather than to the Marital Trust. In addition, the Tax Court rejected the IRS's argument that the subsequent sale of the Marital Trust assets for promissory notes triggered IRC Section 2519. As described in *Anenberg*, once the Marital Trust was terminated, the qualifying income interest for life terminated so there could be no disposition of something that did not exist.

With respect to Linda and Peter, the Tax Court agreed with the IRS and found that a gift was made to Bruce under the Agreement. The court explained that before Linda and Peter entered into the Agreement, they held valuable property rights (i.e., the remainder interests in the Marital Trust). After they consented to the Agreement, Linda and Peter gave up those rights by agreeing that all the Marital Trust assets would be distributed to Bruce for which they received nothing in return. By giving up something for nothing, the Tax Court agreed that Linda and Peter engaged in gratuitous transfers subject to gift tax under IRC Sections 2501 and 2511.

Connelly v. United States 144 S. Ct. 1406 (2024)

In *Connelly*, the US Supreme Court addressed whether the value of life insurance proceeds used by a corporation to redeem a deceased shareholder's shares should be included in the decedent's estate for federal estate tax purposes.

Two brothers, Michael and Thomas Connelly, owned a closely held family roofing and siding business, Crown C Supply, Inc (Crown). The brothers had a stock purchase agreement governing the disposition of company stock on the first of their deaths, giving the surviving brother the right to purchase the deceased brother's shares. If the surviving brother chose not to exercise that right, Crown was required to redeem the shares. Crown had purchased $3.5 million in life insurance on each brother to fund such a redemption.

After Michael's death, Crown redeemed the shares from Michael's estate for $3 million, using the life insurance proceeds. Thomas, as the executor of Michael's estate, reported the value of Michael's shares as $3 million on the federal estate tax return. The IRS audited the return and determined that the $3 million value of the life insurance proceeds used for the redemption should be included in the valuation of Michael's shares in Crown. The IRS thus adjusted upward the total value of Crown to $6.86 million, resulting in Michael's 77.18 percent interest being valued at approximately $5.3 million. Based on this higher valuation, the IRS assessed an additional estate tax of $889,914. Michael's estate paid the additional estate tax under protest and filed for a refund.

At the District Court level, relying on *Blount v. Commissioner*, Michael's estate argued that the life insurance proceeds used for the redemption should not be considered part of the corporation's value. In *Blount*, the Eleventh Circuit had allowed insurance proceeds to be excluded if they were offset by a redemption obligation. The District Court rejected this argument and granted summary judgment for the government, holding that the life insurance proceeds should be included in the valuation of the estate. The court ruled that the redemption obligation did not reduce the fair market value of Crown, as the redemption itself did not diminish the economic value of the corporation or the shares.

The estate appealed to the Eighth Circuit, which upheld the District Court's ruling. The Eighth Circuit agreed that the life insurance proceeds should be included in the calculation of the corporation's fair market value for estate tax purposes. The Eighth Circuit emphasized that, under established tax law, life insurance proceeds payable to a corporation are considered an asset that increases the company's value. The court did not view the redemption obligation as a liability that would reduce this value because a fair market value redemption would leave the remaining shareholders' proportional ownership unchanged in economic terms. The Eighth Circuit's decision reaffirmed that life insurance proceeds cannot be excluded when calculating the value of an estate's shares.

The US Supreme Court granted *certiorari* and unanimously affirmed the lower courts' rulings. The Court rejected the reasoning from *Blount* and held that a corporation's contractual obligation to redeem shares using life insurance proceeds is not a liability that reduces the corporation's value for federal estate tax purposes. The Court's analysis hinged on the principle that a redemption at fair market value does not affect any shareholder's economic interest and so does not diminish the corporation's value.

The Court also found that including the proceeds as part of the corporation's fair market value is consistent with standard valuation principles and statutory estate tax requirements. The ruling emphasized that the key question in estate tax valuation is the value of the decedent's property at the time of death – not how the corporation's value might change post-redemption.

Connelly has significant implications, particularly for closely held family businesses that use life insurance to fund stock redemptions.

Connelly establishes that life insurance proceeds payable to a corporation must be included when calculating the fair market value of the corporation for federal estate tax purposes, even if those proceeds are earmarked for redeeming a decedent's shares.

Connelly will also influence how family-owned businesses structure buy-sell agreements and plan for business succession. When a corporation is obligated to redeem a deceased owner's shares, the life insurance proceeds used to fund that redemption will now increase the value of the corporation, thereby increasing the taxable value of the estate. Business owners may need to reconsider using redemption agreements as part of their succession plans, as this approach now carries the risk of increasing the estate tax burden.

Estate planners may need to explore alternative planning options, such as cross-purchase agreements, in which the surviving shareholders directly purchase the shares of a deceased owner using life insurance proceeds. In this structure, the life insurance proceeds are paid directly to the purchasing shareholders – rather than to the corporation – thereby avoiding the increase in the corporation's value. That said, cross-purchase agreements introduce other complexities, such as requiring each shareholder to obtain life insurance on the other owners.

Connelly reinforces the importance of proper valuation techniques in estate tax planning. Executors and estate planners must carefully assess the fair market value of closely held corporations, account for all assets (including life insurance proceeds) and structure agreements to minimize estate tax liability.

In sum, *Connelly* reaffirms the IRS's position on the inclusion of life insurance proceeds in estate valuations and underscores the need for careful estate planning to minimize tax liabilities for closely held businesses. Estate planners should evaluate existing agreements and explore strategies that align with the Court's ruling to avoid unexpected tax consequences.

Loper Bright Enterprises v. Raimondo, 603 U.S. ___ (2024)

In *Loper Bright*, the US Supreme Court fundamentally altered the landscape of administrative law by overruling *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, a key precedent that had shaped judicial review of agency interpretations of federal statutes for four decades. "*Chevron* deference" required courts to defer to reasonable agency interpretations of ambiguous statutes. Under such deference, agencies enjoyed significant discretion in interpreting statutory language – arguably expanding the scope of their regulatory authority and shifting the balance of power in favor of executive agencies over the judiciary.

Loper Bright stems from the National Marine Fisheries Service's (NMFS) interpretation of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), from which the agency implemented a rule requiring fishing companies to pay for at-sea monitors – an "industry-funded program."

A group of family-owned fishing companies challenged the rule, arguing that the MSA did not authorize the NMFS to impose these costs. Applying *Chevron* deference, the lower courts found the NMFS's interpretation of the MSA to be reasonable, and so upheld the agency's rule.

But in a landmark decision,[1] the Supreme Court overruled *Chevron* after concluding that *Chevron* deference was incompatible with the constitutional role of the judiciary and the Administrative Procedure Act's (APA) mandate that courts decide "all relevant questions of law." Instead, the Court held that courts must exercise independent judgment in interpreting ambiguous statutes without deferring to agency interpretations.

The Court closely examined the APA, which governs judicial review of agency action, noting that Section 706 of the APA mandates that "the reviewing court shall decide all relevant questions of law." The Court reasoned that giving agencies such deference effectively forced courts to relinquish their statutory duty under the APA to decide legal questions. The Court also noted that Congress passed the APA in 1946 as a direct response to limit the growing administrative state, and the APA's clear language suggested that Congress intended for courts to retain their traditional role of interpreting statutes – an intent that *Chevron* deference undermined.

The Court's opinion emphasized constitutional concerns about *Chevron*, drawing heavily from foundational separation of powers precedents. Because Article III empowers the judiciary with the authority to resolve legal disputes, and because *Chevron* blurred this separation of powers principle by allowing executive branch agencies to interpret the law, the Court concluded that *Chevron* undermined the judiciary's core responsibility to interpret statutes and serve as a check on the executive branch power.

Despite *Chevron*'s 40-year run, the Court rejected arguments that it should uphold *Chevron* on the basis of *stare decisis*. The Court described *Chevron* as unworkable and confusing in its application, cited several exceptions and qualifications that had been imposed on *Chevron* in its progeny, and noted that *Chevron* had become a tangled doctrine leading to inconsistent rulings – all factors undermining a decision to uphold precedent based on *stare decisis*.

Even so, the Court acknowledged the continued relevance of *Skidmore* deference, under which courts may give weight to agency interpretations based on their persuasiveness. Such *Skidmore* deference, however, is fundamentally different from *Chevron* deference in that *Skidmore* deference does not demand judicial deference, but permits courts to consider the agency's expertise, consistency and reasoning without surrendering the court's ultimate judgment.

The Court's opinion fundamentally reshapes administrative law and will have far-reaching implications not only for federal agencies and the "administrative state," but also for areas of tax law and estate planning, where agency interpretations of ambiguous statutory provisions play a critical role. The overruling of *Chevron* fundamentally redefines the relationship between courts and federal agencies, curtailing the agencies' authority to interpret statutory ambiguities without judicial oversight and placing the power of statutory interpretation firmly with the judiciary.

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[1] The Supreme Court consolidated *Loper Bright with Relentless Inc. v. Department of Commerce*, a related case from the First Circuit.

The implications could be sweeping. For tax practitioners, courts will no longer defer to the IRS's interpretation of tax regulations. Instead, courts will conduct their own independent analysis, which could lead to increased challenges to key areas of tax law.

This increased scrutiny may also complicate tax compliance, as taxpayers and tax practitioners would need to rely less on IRS interpretations and more on judicial precedent – which may be inconsistent across circuits. The burden on courts may also increase from the resurrection of challenges to portions of the tax code that were once thought to be settled based on deference to the IRS's interpretation of its regulations.

Similarly, ambiguities in gift, estate and generation-skipping transfer tax statutes may now be subject to judicial interpretation, rather than agency determinations, and this shift could introduce uncertainty into estate planning strategies that rely on regulatory guidance. Estate planners may also need to reconsider certain tax-saving techniques that were previously upheld under deference to IRS regulations.

Loper Bright marks a significant shift in administrative law, particularly affecting the balance of power between agencies and the judiciary. By overruling *Chevron*, the Court has reasserted the role of the judiciary in statutory interpretation, which is likely to have profound impacts across many areas of law. Agencies will now face greater challenges in defending their interpretations of ambiguous statutes, and courts will do more to determine the meaning of federal laws, leading to greater scrutiny of regulatory actions in complex and ambiguous legal regimes.

Legislative Proposals

President-Elect Donald Trump has not published a comprehensive tax plan as of the time of this writing, but he and Vice President-Elect J.D. Vance have made several proposals in campaign speeches, interviews and online. Though Trump has not articulated specific details, he generally supports making the tax cuts under the TCJA permanent, which includes extending the increased estate and gift tax exemption amount and maintaining a transfer tax rate of 40 percent.

On individual income tax, Trump has not provided details on whether he would further lower tax rates, but he has considered replacing income taxes altogether with increased tariffs. To the extent a personal income tax remains, Trump has proposed that tips, overtime pay, income earned by Americans living abroad and Social Security benefits should be exempt from income tax.

On long-term capital gains and dividends tax, Trump has not confirmed whether he supports reducing the maximum long-term capital gains tax rate from the current 20 percent to 15 percent.

On corporate income tax, Trump has endorsed reducing the current 21 percent rate to 20 percent, and even as low as 15 percent for corporations making products domestically. Trump is opposed to the clean-energy tax credits enacted under the Inflation Reduction Act of 2022.

On deductions, Trump has supported eliminating the $10,000 cap on deductions for state and local taxes (the so-called SALT deduction). Trump's position marks a reversal from his previous term in office, as it was he who imposed the $10,000 SALT deduction cap as part of the TCJA.

On tax credits, Trump has supported J.D. Vance's suggestion of a $5,000 child tax credit.

International Developments

It has been back to business as usual for the IRS and Department of the Treasury in 2024. US tax authorities are not shaking up the international private client landscape, but instead are providing useful guidance for taxpayers and tax professionals by releasing long-awaited proposed regulations on the reporting of foreign trusts and foreign gifts and publishing a memorandum detailing certain abusive foreign micro-captive insurance arrangements that are likely to come under more scrutiny. The Supreme Court has taken a similar tack in providing a narrow ruling in a case that many opined could lay the foundations for a net-wealth tax in the United States. We have included a summary of these and other material developments from 2024 that will affect the international private client landscape going forward.

Proposed Foreign Trust and Foreign Gift Regulations

In May 2024, the IRS released proposed regulations covering the reporting of foreign gifts and interactions with foreign trusts. These long-awaited regulations provided guidance in respect of both Form 3520, Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts, and Form 3520-A, Annual Information Return of Foreign Trust With a U.S. Owner. In addition to the guidance normally accompanying regulations on IRS forms (e.g., filing deadlines, procedures for requesting an extension, rules for dual-resident taxpayers and married couples), the proposed regulations also set forth new ideas regarding the taxation of loans from foreign trusts, uncompensated use of trust property and their related reporting which in some cases differs from current reporting requirements.

Under Section 643(i) of the Code, both (i) a loan from a foreign trust to a US person grantor or beneficiary or a US person related party to that US person grantor or beneficiary, and (ii) uncompensated use of trust property by a US person beneficiary or US person related party to that US beneficiary are treated as distributions to that US person grantor or beneficiary equal to the amount loaned or the fair market value of the uncompensated use of trust property. The proposed regulations changed the treatment of loans from a foreign trust by providing a carve-out for certain qualified obligations and changed the treatment of uncompensated use of trust property by attributing uncompensated use of trust property by a non-US person related to a US person grantor or beneficiary to such US person grantor or beneficiary.

Regarding the carve-out for loans from foreign trusts, the proposed regulations provide an exception to the general rule of Section 643(i) of the Code for loans of cash in exchange for a qualified obligation. A loan of cash (not marketable securities or other property) may be in exchange for a qualified obligation if it meets the following requirements: (i) the obligation is in writing; (ii) the term does not exceed five years; (iii) payments are made in cash in US dollars; (iv) the obligation is issued at par and provide for stated interest at a fixed rate or qualified floating rate; (v) the yield to maturity is not less than 100 percent nor greater than 130 percent of the AFR based on the same compounding period (with corresponding rules for qualified floating rates); and (vi) all stated interest must be qualified stated interest.

In addition to the above, for the initial year of the qualified obligation and each subsequent year in which the obligation is outstanding, the US grantor or beneficiary that received or is attributed the loan must (i) agree to extend the period for assessment in respect of the loan; (ii) report the status of the obligation including outstanding principal and interest payments; and (iii) must make all payments of principal and interest in accordance with the terms of the obligation. A reasonable grace period of no more than 30 days may be allowed for late payments. If any of the above requirements are not met, including following modifications to the qualified obligation, the outstanding principal plus any accrued but unpaid interest is treated as distributed to the US person grantor or beneficiary on the date the obligation ceases to be qualified.

Regarding the expansion of uncompensated use of trust property to include use by non-US persons related to a US grantor or beneficiary, the proposed regulations intend to treat such use by a non-US person related party (excluding a non-US person beneficiary) as a distribution to the related US person grantor or beneficiary unless certain filing requirements are met. If the non-US person-related party was related to more than one US person grantor or beneficiary, the distribution would be split equally amongst all related US persons. The IRS provides an exception to this treatment for US taxpayers that meet their normal reporting requirements in respect of such use but also includes an explanatory statement detailing how the non-US person-related party would have used the trust property without regard to the US person grantor or beneficiary's relationship to the foreign trust. The proposed regulations also include a similar rule and exception for US person grantors or beneficiaries that receive a loan from a related party of a foreign trust and provide an explanatory statement showing how the loan may have been made absent their relationship with the foreign trust.

In addition to the explanatory statements discussed above, deemed distribution treatment under Section 643(i) of the Code for use of trust property can be avoided if the foreign trust is paid fair market value for the use of the property within a reasonable period from the beginning of the use. The proposed regulations provide additional guidance on fair market value of the use and the terms and timing of repayment. Fair market value and reasonable period for these purposes are based on all facts and circumstances, including the type of property used and the period of use, and payments may be made on a periodic basis if consistent with arm's length dealings. The IRS helpfully also provides a safe harbor provision to the reasonable period requirement for payment made or periodic payments beginning within 60 days of the start of the use. Additionally, the IRS provides a *de minimis* safe harbor that mimics the so-called "Masters" or "Augusta" rule allowing for US person grantors or beneficiaries to avoid deemed distribution treatment for uncompensated use of trust property provided that such use by the group of US person grantors and beneficiaries does not in the aggregate exceed 14 days during the calendar year. The period for public comment on the proposed regulations ended in July 2024. Taxpayers and tax professionals now await the final version of these regulations which may not be identical to the proposed rules discussed above.

IRS Details Abusive Foreign Micro-Captive Insurance Company Fact Pattern

Also in May 2024, the IRS published Chief Counsel Advice Memorandum 202422010 detailing a fact pattern used by certain abusive foreign micro-captive insurance companies to help IRS agents in examinations. The fact pattern focuses on a foreign-regarded entity making an election under Section 953(d) of the Code, allowing foreign insurance companies to be treated as domestic corporations. Following this election, an insured domestic entity makes direct payments to the foreign captive company (or indirect payments if the foreign captive is the reinsurer) that are claimed to be deductible insurance premiums. The insured domestic entity does not deduct or withhold tax on the insurance payments made to the foreign captive. The foreign captive files a Form 1120-PC, U.S. Property and Casualty Insurance Company Income Tax Return, and reports the payments received from the insured domestic entity but excludes them from taxable income using the alternative tax for certain small insurance companies provided by Section 831(b) of the Code.

Following examinations of the foreign captive and insured domestic entity, the IRS found that neither entity could establish that payments made under the above fact pattern were insurance premiums. This finding was based on the arrangement lacking "insurance risk, risk distribution, or risk shifting, or was not insurance in its commonly accepted sense." As a result of this finding, more than half of the business of the foreign micro-captive was not insurance business making the captive ineligible for the 953(d) election and unable to use the 831(b) alternative tax. With the foreign captive no longer being treated as a domestic entity, the insured domestic entity should have been withholding 30 percent of the gross amount of Fixed, Determinable, Annual or Periodical (FDAP) payments made to the foreign captive. This Memorandum should serve as a good indication that the IRS is likely paying closer attention to arrangements similar to the fact pattern above going forward.

Supreme Court Upholds Mandatory Repatriation Tax

In June 2024, the Supreme Court delivered its opinion in *Moore v. United States*. The Moores challenged the constitutionality of the Mandatory Repatriation Tax (MRT), also called the "Transition Tax" under Section 965 of the Code. The MRT subjected US persons owning 10 percent or more of a controlled foreign corporation (a CFC) to US federal income tax on their *pro rata* share of the post-1986 untaxed foreign earnings of the CFC. By way of background, in 2006, the Moores invested in a friend's CFC in India and received a 13 percent ownership stake. The business was profitable but did not distribute income to the Moores or other American shareholders. When the MRT was introduced, the Moores were forced to include their *pro rata* share of the untaxed foreign earnings of the Indian CFC in their income and ultimately paid roughly $15,000 in taxes. The Moores's stated that income (and therefore income taxation) requires realization, and they argued the MRT did not tax income that they had realized. Answering the question of whether realization was a prerequisite to income taxation was thought by many to be a potential stepping stone to the introduction of a net-wealth tax. In light of this, many commentators believed that the Supreme Court would issue a narrow ruling limiting their judgment only to the matter at hand.

As expected, the Supreme Court issued a very narrow ruling upholding the MRT. The opinion draws many parallels between the MRT and both "Subpart F" or passive income of a CFC and pass-through taxation of partnerships and S-corporations and notes that both forms of taxation have been long accepted and constitutional in the United States. The Court also limited its ruling to tax on shareholders of an entity in respect of undistributed income realized by that entity, which has been attributed to the shareholders, when the entity has not been subject to US federal income tax on such income. The Supreme Court noted that realization was not a question they needed to answer, as the income had been realized by the CFC. Consequently, they did not rule on this point. As many had hoped, this ruling was relatively uneventful and did not set the precedent for the introduction of a net-wealth tax in the United States.

Tax Treaty Updates

We reported last year on the Senate's approval of the dual tax treaty between the United States and Chile. At that time, President Biden and the Chilean government both needed to give approval and have since done so. The US-Chile Dual Tax Treaty has since gone into effect applying from February 1, 2024, for withholding taxes and from January 1, 2024, for all other taxes. As part of the treaty coming into force, Chile has been added to the list of treaty partner countries in Notice 2024-11 used to determine whether a corporation is a qualified foreign corporation whose individual shareholders may benefit from reduced tax rates on dividends received. Hungary and Russia have both been removed from the list following the suspension of each country's dual tax treaty with the United States last year. The suspension of the US-Hungary Dual Tax Treaty officially went into effect for amounts paid or credited after January 1, 2024.

Ultimately, we saw fewer legal changes in the international private client arena in 2024 than in 2023. Although some of the guidance issued this year may have been surprising to taxpayers and tax professionals, they can appreciate the importance of additional insight into the US government's position on issues relevant to private clients everywhere. Hopefully, the US international developments in 2024 are not an outlier, and we will see more useful guidance affecting the global private client landscape in future years.

California Updates

Uniform Directed Trust Act and Uniform Fiduciary Income and Principal Act Become Effective

As reported in Katten's 2023 Year-End Advisory, the California Uniform Directed Trust Act (UDTA) and the Uniform Fiduciary Income and Principal Act (UFIPA) became effective January 1, 2024. The UDTA provides a method for regulating directed trusts in California and establishes the duties and responsibilities of the non-trustee fiduciaries and directed trustees. The UFIPA includes specific changes to the California Probate Code that provide trustees greater flexibility in managing unitrusts, or converting an income trust to a unitrust (unless the trust qualifies for a special tax benefit or involves a fiduciary who is not an independent person), allows fiduciaries to allocate tax receipts and make trust distributions, and further expands the power of trust fiduciaries to make determinations concerning allocation of income and principal, among other changes to trust administration and judicial oversight of California fiduciaries.

Increase to Small Estate Probate Procedures

Assembly Bill 2016 (AB 2016) passed the California Legislature on August 29, 2024, and was approved by Governor Gavin Newsom on September 21, 2024. Under existing law, the Probate Court establishes procedures through which a successor of a decedent may, without petitioning the court for letters of administration or filing a petition to probate the decedent's will, dispose of a portion of a decedent's real and personal property if the gross value of the decedent's estate does not exceed $184,500, which amount is adjusted by the Judicial Council every three years. These summary procedures allow some estates or portions thereof to be distributed to heirs in order to avoid unnecessary delays and expenses related to court supervision.

In recognition of the rising values of residences in the state, AB 2016 will materially change the small estate probate procedures in California. Specifically, AB 2016 will amend current law related to the transfer of real property and allow for the transfer of the primary residence of a decedent only via a Petition to Determine Succession to Real Property if the value of the real property does not exceed $750,000 – a significant increase from the current threshold of $184,500. While a petitioner is no longer able to include the decedent's personal property in a Petition to Determine Succession to Real Property, the Small Estate Affidavit procedure to transfer personal property of a decedent remains in place if the value of the property does not exceed $184,500. The proponents of the statutory change argue that the new law will ensure that average Californians can transfer their largest asset to their heirs without being forced to use the lengthy and costly probate process, ensuring the intergenerational transfer of assets, which is critical for low- and moderate-income households to build wealth.

However, the new law requires that a successor who files a Petition to Determine Succession to Real Property shall deliver notice of the petition to each intestate heir, beneficiary and devisee named in the petition – a complication that is not required under current law. The notice requirement will likely result in heirs making claims against the estate which will drive up the costs of administration. In addition, the law, as modified, is limited to a decedent's primary residence, whereas current law permits any real and personal property under the threshold to be summarily distributed.

The bill will amend Probate Code Sections 13100-13101, 13150-13152 and 13154, will repeal Section 13158 and will become effective January 1, 2025.

Strengthening of Regulations Concerning Professional Fiduciaries

The California Legislature has approved Assembly Bill 2148 (AB 2148) which governs the Professional Fiduciaries Bureau and which will oversee and regulate those persons acting in the capacity of a professional fiduciary in California. Professional Fiduciaries are routinely appointed to protect the interests of adults with mental disabilities, minors, elderly persons, conservatees and fiduciaries, to assist such persons with administration of estates and trusts, representation in court and as may otherwise be needed. Professional fiduciaries are held to a higher fiduciary standard than a lay trustee or trust fiduciary as they are licensed and represent themselves as having advanced skills, expertise and knowledge related to such administration.

AB 2148 seeks to address a gap in existing law by authorizing professional fiduciaries to organize as a "professional corporation" pursuant to the provisions of the Moscone Knox Professional Corporation Act. AB 2148 will require a professional fiduciary corporation to register with and be subject to the regulation of the Professional Fiduciaries Bureau and all other requirements under the Professional Fiduciaries Act. The bill will also prohibit a court from appointing a professional fiduciary to serve in any capacity unless such person is registered with the Professional Fiduciaries Bureau.

California Supreme Court Makes Long-Awaited Ruling Concerning Approved Method of Trust Modification

As previously reported, California courts have been split concerning the required procedure for modifying California revocable trusts since the Fourth District Court of Appeal handed down its decision in *Haggerty v. Thornto*n (2021) 68 Cal.App.5th 1003. In *Haggerty*, the court concluded that unless a trust expressly provides that a particular method of modification is exclusive, the stated method is not required for a modification to be effective, and the statutory procedure for modification and revocation is an acceptable method of modifying the trust.

The statutory provisions at issue in *Haggerty* are Probate Code sections 15401 and 15402, which govern modifications and revocations of California trusts. Section 15401 provides that a trust may be revoked by any method provided in the trust or by a writing, other than a will, signed by the settlor or any other person holding the power of revocation and delivered to the trustee during the lifetime of the settlor or person holding the power to revoke. The latter method of revocation is the "statutory" method. Section 15401 further provides that if the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation, then that method must be used to effectively revoke the trust. In contrast to Section 15401, Section 15402, which governs modification, provides simply that unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation. Because the provisions concerning modification do not include the language concerning situations in which a settlor has made a specific method of modification the exclusive method, courts have come to vastly different rulings in deciding how California trusts may be modified.

To wit, in stark contrast to the Fourth District's more lenient approach to modification in *Haggerty*, the Fifth District Court of Appeal in *King v. Lynch* (2012) 139 Cal.App.4th 1186, Third District Court of Appeal in *Pena v. Dey* (2019) 39 Cal.App.5th 546, First District Court of Appeal in *Balistreri v. Balistreri* (2022) 75 Cal.App.5th 511 and Second District Court of Appeal in *Diaz v. Zuniga* (2023) 91 Cal.App.5th 916 have all held that when a trust sets forth a method or procedure for trust modification, such designated method must be followed in order for a modification to be effective, *regardless* of whether the trust expressly provides that the designated method is the exclusive method of modification.

On February 8, 2024, the California Supreme Court issued its opinion in *Haggerty* and resolved the circuit split in favor of the Fourth District's interpretation. The court held that the statutory method for revocation is available where the trust provides for a method of modification but does not expressly make the method exclusive, setting aside the *King*, *Balistreri*, *Pena and Diaz* decisions.

As the California Supreme Court has now settled this issue, it is incumbent on California settlors who intend to control the method by which their trusts can be modified to provide an explicit statement in any trust instrument that directly sets forth the method of amendment or modification and which provides whether such procedure is the exclusive method by which the trust may be modified. Absent such explicit provision, a California revocable trust may be modified by a writing, other than a will, signed by the settlor or any other person holding the power of revocation and delivered to the trustee during the lifetime of the settlor or person holding the power to revoke.

Illinois Updates

Control and Protection of Trust Property

On August 9, 2024, Senate Bill 3343 (SB 3343) was signed into law, which amends Sections 809 and 810 of the Illinois Trust Code.

Section 809 of the Illinois Trust Code, titled "Control and Protection of Trust Property," currently requires that a trustee take reasonable steps to take control of and protect trust property. SB 3343 amends Section 809 of the Illinois Trust Code to specify that the trustee's duty includes "searching for and claiming any unclaimed or presumptively abandoned property."

SB 3343 further amends Section 810 of the Illinois Trust Code, titled “Recordkeeping and Identification of Trust Property,” to create additional duties for trustees terminating a trust. SB 3343 adds Section 810(e) of the Illinois Trust Code which will mandate that “[a] trustee shall maintain or cause to be maintained trust records for a minimum of seven years after the dissolution of the trust,” and Section 810(f) of the Illinois Trust Code which will require that “[p]rior to the destruction of trust records, a trustee shall conduct a reasonable search for any trust property that is presumptively abandoned or that has been reported and remitted to a state unclaimed property administrator.”

A similar amendment was initially proposed in January 2024 in HB 4320 but faced broad opposition and failed to proceed through the legislative process. Sections 809 and 810 of the Illinois Trust Code are now, however, amended through SB 3343. Other than these updates to the Illinois Trust Code, SB 3343 primarily amends the Revised Uniform Unclaimed Property Act. Early criticisms of SB 3343 include that the terms “trust records” and “reasonable search” are not defined, creating uncertainty. This amendment will have implications for, among others, corporate and individual trustees, including their legal, tax and other advisers. This amendment will take effect on January 1, 2025.

Illinois Power of Attorney Act

An amendment (Senate Bill 3421) to the Illinois Power of Attorney Act was signed by Illinois Governor J. B. Pritzker on August 9, 2024, and will take effect on January 1, 2025. This amendment states that it is unlawful for a third party to unreasonably refuse to accept an individual’s Illinois statutory short form power of attorney for property which was executed in accordance with the laws in effect at the time of such power of attorney’s execution. The amendment provides clarification for what “unreasonable” means by providing examples of when it is unreasonable for a third party to reject a properly executed Illinois statutory short-form power of attorney for property. The amendment also lists examples of reasonable causes to refuse to honor such power of attorney.

Notably, it is unreasonable to refuse an Illinois statutory short form power of attorney for property because such power of attorney is not on a form the third party receiving such power prescribes or because of a lapse of time since the execution of the power of attorney. The amendment also lists 14 reasonable causes to refuse to honor an Illinois statutory short form power of attorney for property. Reasonable causes include actual knowledge or a reasonable basis for believing the agent is engaged in fraud or abuse of the principal as well as the refusal of the principal’s attorney to provide a certificate that the power of attorney is valid.

Illinois Notary Public Act

Senate Bill 3513 (SB 3513) has been signed into law and amends the Illinois Notary Public Act to streamline the renewal process for notary publics who are attorneys, judges or their employees. This amendment states that licensed attorneys, judges or employees of attorneys or the court, may renew their appointments as notaries public (or electronic notaries public) without completing the course of study or passing the examination required for initial applicants. To take advantage of this streamlined renewal process, said individuals must instead submit a signed statement certifying that said person is a licensed attorney, judge, or employee of a licensed attorney or the court and that said individual has read and understands the Illinois Notary Public Act. This amendment seeks to ease burdens on legal professionals renewing their notary licenses. This amendment will take effect on January 1, 2025.

Electronic Wills, Electronic Estate Planning Documents, and Remote Witnesses Act

House Bill 2269 (HB 2269) went into effect on January 1, 2024. HB 2269 amends the Electronic Wills, Electronic Estate Planning Documents and Remote Witnesses Act, which governs electronic signature and electronic notarization procedures for “nontestamentary estate planning documents.” Nontestamentary estate planning documents are broadly defined in the statute as records “relating to estate planning that [are] readable as text at the time of signing and [are] not a will or contained in a will.” The statute provides a non-exhaustive list of examples of nontestamentary estate planning documents, including, but not limited to documents that create, exercise, modify, release or revoke (i) a trust, (ii) a trust power, (iii) a certification of trust, (iv) a power of attorney, (v) a power of appointment, (vi) an advanced directive, or (vii) a nomination of a guardian for the signing individual. HB 2269 explicitly overrides existing Illinois law to the contrary by providing that, even if other Illinois law "requires a nontestamentary estate planning document to be in writing, an electronic record of the document satisfies the requirement." However, practitioners may draft nontestamentary estate planning documents to preclude the use of electronic signatures or notarization on a document. These restrictions are valid and will void the electronic signature or notarization of such documents. It is important to be cognizant of and review for such restrictions before electronically signing a document.

Under HB 2269, an electronic signature is attributable to a person if "it was the act of the person." This is a fact-intensive inquiry and may be shown "in any manner, including by showing the efficacy of a security procedure." A security procedure is defined as a procedure that can verify that the electronic signature is that of a specific person, including using an identifying word, number or code.

Existing notary requirements remain in effect, but nontestamentary estate planning documents can be notarized remotely. If notarization is required, the notary must "associate the individual's electronic signature on the document together with all other information required to be included under other law." Witnesses may also remotely witness an individual's signature under this law. The requirement for witnesses is "electronic presence," which means that two or more people (i.e., the witness(es) and the individual signing the document) are able to communicate (i) in real-time and (ii) to the same extent as if they were in the same physical location. A live videoconference may satisfy these requirements.

The language of HB 2269 was adopted from the Uniform Electronic Estate Planning Documents Act (the UEEPDA) which was recommended to the states by the Uniform Law Commission. Illinois is the first state to enact a version of the UEEPDA. The UEEPDA is ultimately intended to increase flexibility for the execution of nontestamentary estate planning documents and broaden the scope of prior legislation which allowed for remote signatures of wills.

In re Estate of Stinnette, 2024 IL App (2d) 230174 (May 3, 2024)

In *Stinnette*, the mother of the decedent, Zharvellis Holmes (Decedent's Mother), filed a petition for appointment as administrator of the decedent's estate. In such petition, Decedent's Mother filed an affidavit of heirship referring to a minor child, Marcellis Jr. (Potential Son), as the decedent's "potential son." Potential Son's mother, Tafara Williams (Potential Son's Mother), filed a counterpetition for appointment as administrator of the decedent's estate. The trial court granted Decedent's Mother's petition and denied Potential Son's Mother's counterpetition without conducting an evidentiary hearing regarding whether Potential Son was the decedent's biological son. Potential Son's Mother appealed the trial court's ruling, claiming that (i) Decedent's Mother lacked standing for the appointment as administrator since Decedent's Mother did not have an interest in the decedent's estate (arguing the testator died intestate leaving Potential Son as the decedent's sole heir), and (ii) the trial court failed to conduct an evidentiary hearing before appointing Decedent's Mother as the administrator.

The appellate court first addressed the issue of whether, in an intestate matter, an individual must be interested in a decedent's estate to qualify as an administrator. The appellate court quickly dismissed this argument. The appellate court stated the administration of a decedent's estate is a creature of statute and that nothing in Illinois law, including the Probate Act of 1975 (the Illinois Probate Act), requires that an individual be interested in the decedent's estate to assume the duty of administrator. Section 9-1 of the Illinois Probate Act instead requires that such person has (i) attained the age of 18, (ii) is a resident of the United States, (iii) is not of unsound mind, (iv) is not an adjudged person with a disability (as defined in the Illinois Probate Act), and (v) has not been convicted of a felony.

The appellate court next visited Potential Son's Mother's argument that the trial court failed to conduct an evidentiary hearing. Critical to the analysis of who should be appointed as administrator of an intestate estate is the order of preference listed in Section 9-3 of the Illinois Probate Act. Orders of preference rank the priority of individuals seeking to become the administrator of an individual's estate. Such order of preference in the Illinois Probate Act lists the children of a decedent prior to the parents of a decedent. Despite Decedent's Mother qualifying as a potential administrator under the Illinois Probate Act, Potential Son takes preference if it is proved that he is the decedent's biological son. The trial court granted Decedent's Mother's petition without conducting an evidentiary hearing as to whether Potential Son was the decedent's biological son, and thus, whether Potential Son had preference over Decedent's Mother under Section 9-3 of the Illinois Probate Act.

The appellate court vacated the trial court's judgment and remanded for further proceedings. The appellate court held that the trial court erred by granting Decedent's Mother's petition before ruling on Potential Son's Mother's petition that Potential Son's Mother be appointed guardian of the decedent's estate and by failing to conduct an evidentiary hearing as to whether Potential Son was the decedent's biological son.

***In re Estate of McDonald*, 2024 IL App (2d) 230195 (Apr. 15, 2024)**

In *McDonald*, the appellate court clarified whether putative-spouse claims are barred by the limitations provisions of Section 18-12(b) of the Illinois Probate Act. The appellate court also analyzed the "good faith belief" requirement of the putative-spouse doctrine, which had not previously been examined in great detail by an Illinois court.

McDonald involves a decedent, John W. McDonald III (Decedent), who was disabled and in need of guardianship. In May 2017, Decedent's brother, Shawn McDonald (Decedent's Brother), was appointed as Decedent's plenary guardian of Decedent's person and estate. Decedent unsuccessfully moved to vacate the guardianship order. Decedent and his alleged putative spouse, Ellizzette McDonald (Putative Spouse) participated in a marriage ceremony approximately six weeks after Decedent's Brother was appointed plenary guardian. Deposition transcripts revealed that Putative Spouse knew, prior to the marriage ceremony, that Decedent was declared a ward of the court and that Decedent's Brother had been appointed as Decedent's plenary guardian. Decedent died intestate, and Decedent's Brother successfully filed a petition for letters of administration and an affidavit of heirship (in such pleadings, claiming that Decedent's marriage with Putative Spouse was void because Decedent, as a ward of the court, lacked the capacity to consent to the marriage). Putative Spouse moved to vacate the court's order appointing Decedent's Brother as administrator and asserted she was Decedent's surviving spouse and sole heir.

The appellate court first addressed whether putative-spouse claims are barred by the limitations provisions of Section 18-12(b) of the Illinois Probate Act. Section 18-12(b) of the Illinois Probate Act provides that "… all claims which could have been barred under this Section are … barred two years after decedent's death, whether or not letters of office are issued upon the estate of the decedent…." Putative Spouse argued that the word "claims" denotes claims *against* a decedent's estate which reduce the assets of the decedent's estate. Decedent's Brother countered that Section 18-12(b) of the Illinois Probate Act requires *all* claims against a decedent's estate be made within two years of the decedent's death. The appellate court decided with Decedent's Brother. The Illinois Probate Act broadly defines a "claim" as "any cause of action." As such, the two-year limitations provision applies to *any* claim regardless of its legal basis. The appellate court noted that the policy of strictly applying this limitations period facilitates the timely settlement of estates.

The appellate court next addressed Putative Spouse's "good faith belief" argument under the putative-spouse doctrine. "[T]he rights of a putative spouse are conferred upon anyone who has gone through a marriage ceremony and cohabitated with another in the good-faith belief that he or she was married to the other individual." The appellate court does not explicitly adopt the standard of "good faith belief" set forth in *Williams v. Williams*, 97 P.3d 1124 (Nev. 2004) (a Nevada Supreme Court case) but does apply such standard. The standard in *Williams* is that when an alleged putative spouse receives "reliable information that an impendent [to a valid marriage] exists, the individual cannot ignore the information, but instead has a duty to investigate further. Persons cannot act 'blindly or without reasonable precaution.'" The appellate court held that even if Putative Spouse's claims were not barred under Section

18-12(b) of the Illinois Probate Act, her claims would fail under *Williams*. The appellate court took note that prior to the marriage ceremony, Putative Spouse was aware Decedent was a ward of the court and that Decedent's Brother had been appointed plenary guardian. Further, following the marriage ceremony, Putative Spouse was aware that an independent counsel had been appointed to represent Decedent and that said independent counsel had cautioned Decedent *and* Putative Spouse that potential impediments to marriage existed. The appellate court thus affirmed the lower court's ruling that Putative Spouse failed to present a *prima faci*e case establishing the validity of her marriage to Decedent.

New York Updates

State Estate Taxation

For individuals dying on or after January 1, 2025, the basic exclusion amount will be equal to the federal basic exclusion amount indexed annually, but without regard to the passage of the TCJA of 2017.

New York Limited Liability Company Transparency Act

On March 1, 2024, New York Governor Kathy Hochul signed into law the amended New York Limited Liability Company Transparency Act (NYLTA). The New York LLC Transparency Act requires limited liability companies (LLCs) formed under the New York LLC Act or doing business in New York State to provide certain informational filings to the New York State Secretary of State relating to the beneficial owners of such entity. The NYLTA is a state corollary to the CTA which is discussed in greater detail above in this advisory and incorporates many of the CTA's provisions. The requirements of the NYLTA are to take effect on January 1, 2026.

The NYLTA originally included the creation of a publicly accessible online database where the full legal name and business address of each beneficial owner would be available. However, as part of the compromise between Governor Hochul and the New York State legislators championing the NYLTA, the provisions allowing for a publicly accessible database were removed, and the beneficial ownership information collected will now only be available to certain government and law enforcement agencies.

Any LLC formed or authorized to do business in the state of New York on or after January 1, 2026, will be required to provide the informational filing within 30 days of formation or authorization to do business in New York. All pre-existing entities would be required to file such information with New York State by January 1, 2027, or otherwise upon any amendment to the LLC's filed organizational documents. Unlike the CTA, the NYLTA requires all reporting companies to file annual statements either confirming or updating their beneficial ownership information. Additionally, while the categories of entities that are exempt from reporting under the New York LLC Transparency Act are the same as those under the CTA, the NYLTA requires potentially exempt entities to file an attestation of exemption.

Under the NYLTA, the Attorney General is authorized to investigate any LLC that does not provide its informational filing by the required date and may impose penalties of up to $500 for each day that the filing is late.

Transfer on Death Deeds

As part of the 2024-2025 Executive Budget, New York enacted a new law allowing for the use of transfer on death (TOD) deeds. A TOD deed allows the owner of real property to designate a beneficiary who will automatically inherit the property on their death, rather than having to receive such property as part of the probate process. The Transfer on Death Deed Law took effect on July 19, 2024, and is codified as Section 424 of the New York Real Property Law.

To effectively utilize a TOD deed, the deed stating that the transfer to the designated beneficiary is to occur at the current property owner's death must be notarized and signed by two witnesses who were present at the same time and witnessed the property owner's signing of the deed. The TOD deed must also be recorded during the owner's lifetime in the county where the property is located.

The utilization of a TOD deed allows the transfer of the property to happen outside of the often-drawn-out probate process without the transferor giving up current ownership and control. However, it allows for less flexibility in the administration of an estate where the real property may be needed to effectively execute other estate planning strategies and will not be appropriate in many more complex planning structures.

Multi-Person Bank Accounts

A new law has been proposed that aims to remedy the present issues regarding the treatment of multi-person bank accounts in New York. Currently, New York Banking Law (NYBL) Section 675 dictates that a deposit made into a joint account is considered to be owned in equal proportions by the account holders and, when the first of the account holders dies, the surviving account holder is considered to be the owner of the entire account. However, many joint accounts are opened merely for convenience purposes. A common example of a joint account used only for convenience is when an elderly parent and their adult child hold an account together so that the adult child can assist their parent in paying bills and generally managing the parent's funds. In this kind of situation, the intent is not for the parent to make a gift of one-half of the joint funds when deposited into the account or for the joint funds all to be left to the child upon their death, however, these are the presumed results under NYBL Section 675.

The only exception to this is NYBL Section 678, which was created in recognition of these "convenience accounts." Under NYBL Section 678, upon creation, a second account holder can be added to an account with the designation of only being an account holder "for the convenience of" the person who actually deposits the funds into the account. If this designation is made, then there is no presumption of survivorship rights when the first account holder dies, and the funds are only considered to belong to the individual who deposited the funds into the account. Convenience accounts under NYBL Section 678, however, have never become widely used, mainly due to the fact that most individuals do not realize that this is a designation that must be made when creating a joint account for convenience purposes.

The new law, NYBL Section 678-a, would replace the current NYBL Section 678, and NYBL Section 675 would only apply to those accounts created before the effective date of the law that are not modified to comply with NYBL Section 678-a after it becomes effective. Under NYBL Section 678-a, upon creation of a joint account, banks must require the account holders to complete a signature card that specifically establishes whether the account holders have survivorship rights or whether the account is for convenience only. NYBL Section 678-a also generally reverses the presumption of survivorship rights, so that an account created after the new law becomes effective will be presumed to be for convenience unless survivorship rights are designated on the signature card. Additionally, even if survivorship rights are designated, if there is clear and convincing evidence that survivorship was not actually intended, the account funds will still be allowed to pass under the decedent's estate.

The bill (A.9230-B/S.9383A) has been passed in both houses of the New York State legislature and is awaiting delivery to Gov. Hochul. If signed, the new law will be effective starting July 1, 2025, and banks will be required to notify existing joint account holders of the new signature card requirement within six months of the effective date.

Reduction in Recordkeeping Requirement for Notaries

On January 31, 2023, a law went into effect permanently authorizing remote electronic notarization for certain documents and making the requirement to keep a detailed log of all notarizations performed for 10 years apply to all notaries, regardless of whether the notarial act was done remotely or in person. The extension of the recordkeeping requirement received backlash for being excessively time-consuming and burdensome. Additionally, attorneys who perform notarizations for their clients also raised concerns about the potential attorney-client privilege and confidentiality issues that could arise from keeping such records. As a result, a bill (A.7241/S.8663) has been proposed that exempts those notaries performing non-remote electronic notarizations from the new recordkeeping requirements. The bill has passed both houses but has not yet been delivered to Gov. Hochul for signature.

Removal of Notary Requirement for Affidavits in Civil Matters

An amendment to the New York Civil Practice Law and Rules went into effect on January 1, 2024, removing the requirement for notarized affidavits in civil matters, which includes those in the Surrogate's Court. Previously, only attorneys, physicians, osteopaths, dentists and persons located outside of the United States were authorized to submit affirmations in lieu of affidavits. Now, however, any person who wishes to file sworn statements in a civil proceeding may do so, so long as the person affirms the truth of their statement under the penalty of perjury. This greatly eases the burden of submitting a statement to the court, especially for those involved in time-sensitive proceedings.

Remote Witnessing for Health Care Proxies

In yet another move to reduce procedural burdens, New York Public Health Law Section 29812-a was enacted to allow for Health Care Proxies to be witnessed remotely. In order to properly conduct a remote witnessing for a Health Care Proxy, the law specifies that (i) if the witness does not personally know the principal, they must be shown a valid photo ID; (ii) the execution of the document must be done using audio-visual conferencing technology that allows for direct interaction between the principal and any remote witness; (iii) a legible copy of the document must be transmitted to any remote witness within 24 hours of the execution; and (iv) any remote witness must sign the transmitted copy and return it to the principal.

North Carolina Updates

Remote Electronic Notary Act

As discussed in last year's advisory, the North Carolina Remote Electronic Notary Act (referred to as RENA or the Act) was enacted on July 8, 2022. This Act permanently codified remote electronic notarization (REN) and restored North Carolina's "temporary" emergency video notarization and remote video witnessing (EVN). The Act initially provided that the temporary EVN laws would expire on June 30, 2023, when the REN provisions became effective. This one-year period was intended to give the North Carolina Secretary of State time to make preparations and adopt relevant rules and regulations to implement the law.

On June 23, 2023, Governor Roy Cooper enacted amendments to the Notary Act under North Carolina General Statutes (NCGS) Chapter 10B. These amendments are generally changes to RENA, as well as responses to public comments to the North Carolina Secretary of State's Advance Notices of Proposed Rulemaking and Requests for Public Comment. Below is a summary of the most important changes:

Extension of Emergency Video Notarization and Emergency Video Witnessing and Delay of Remote Electronic Notarization. The effective date for "permanent" REN was changed from July 1, 2023, to July 1, 2024. As a result, the "temporary" EVN rules were extended until June 30, 2024. The EVN provisions were not extended past this date. Currently, notaries may not perform Remote Electronic Notarizations until the rules implementing the Act have been adopted. As of the date of this publication, rulemaking is still in progress. Therefore, there is currently no remote electronic notarization, emergency video notarization, or remote witnessing provisions in effect.

As noted in last year's advisory, there are several important differences between RENA and remote notarization and witnessing under EVN:

- EVN allows the execution of estate planning documents, but RENA specifically excludes wills and trusts. EVN allows for remote witnessing, but RENA does not include a provision for remote electronic witnessing that applies after June 30, 2024. Therefore, remote video witnessing is currently not permitted.

Changes to Journal Requirements. The Act required all notaries to maintain a journal of all notarial acts performed. This requirement applies to all notaries, not just electronic notaries. However, S.L. 2023-124, which was signed into law on September 28, 2023, provides that only an electronic notary who performs a remote electronic notarization shall maintain an electronic journal. Other notaries are not required to maintain a journal.

Remote Notary Authorization Changes. The amendment modifies various definitions sections to clarify that an electronic notary is a notary authorized to perform in-person electronic notarial acts as well as remote electronic notarial acts, and also adds defined terms for geolocation, remotely located principal and self-attestation. The Act also requires that an electronic notary must register with the Secretary before performing any electronic notarial act.

- There are certain documents that an electronic notary is barred from notarizing. Death beneficiary forms that require acknowledgment have been removed from this list of documents. Therefore, the amended list of excluded documents includes: A self-proved will executed pursuant to Article 4A of Chapter 31 of the General Statutes.

- A revocable or irrevocable trust or any other document amending the same except for a certification of trust or similar document. A codicil to a will. Any document related to the relinquishment of parental rights under Article 3 of Chapter 48 of the General Statutes.

Spousal and Child's Allowance Updates

Session Law 2023-120 was signed into law on September 14, 2023, updating the spousal and child's allowance statutes (i.e., years allowances). Generally, the updated statutes aim to provide a simplified procedure for the filing of petitions and awarding of allowances. Among other changes, the new law also confirms that a surviving spouse has priority in the satisfaction of an allowance if multiple requests are made. The new law also provides that the child's allowance is available to all children under age 21 and increases the child's allowance to $10,000. These new laws were effective on March 1, 2024, and apply to decedents dying on or after March 1, 2024.

Treatment of Former Spouses in Will and Trust Following Divorce

Session Law 2023-120 sought to equalize the treatment of divorced spouses in a will under North Carolina law and under the North Carolina Uniform Trust Code. Pursuant to new NCGS 31-5.4, after a divorce, a former spouse will be deemed to have predeceased the testator for all purposes under a will. The updated law provides that the statute does not apply if the spouses remarry each other before the death of the testator. In addition, the statute does not apply if the testator executes a subsequent valid will or other testamentary document that makes express reference to the will and that modifies the will. The corresponding section of the North Carolina Uniform Trust Code (Section 36C-6-606) was updated to conform to the new NCGS 31-5.4.

In addition, S.L. 2023-120 adds a provision stating that the statute does not apply to a revocable trust if the settlor executes a valid amendment to the revocable trust after a divorce. This language conforms to the updated NCGS 31-5.4. The law also carried forward the provision from the former statute that the statute will not apply if the spouses remarry each other before the settlor's death.

These new laws became effective on March 1, 2024, and apply to wills probated on or after that date.

Texas Updates

It has been a quiet year in Texas on the Private Wealth front as the Texas State Legislature enjoyed its biennial recess. Nevertheless, Texas' increasingly business-friendly environment saw some activity with its special new courts. Last year, we reported that the Texas legislature established special courts to oversee complex business cases. In particular, the new business courts have jurisdiction over the following:

- Disputes over $5 million that involve various corporate affairs, such as derivative actions, actions by a business or its owner against another officer or owner, and actions to hold owners or executives responsible for breaches of duty; cases involving publicly traded companies, regardless of the amount in question; and cases in excess of $10 million that involve contracts or commercial transactions and where the parties consent to the business courts' jurisdiction.

Certain classes of disputes are expressly outside of the business courts' jurisdiction. For example, the business courts may not hear cases brought under the Texas Family Code, Estates Code, Insurance Code and Title 9 of the Property Code, nor medical and legal malpractice, personal injury or insurance coverage cases. Five business court divisions opened on September 1, 2024, in Dallas, Austin, San Antonio, Fort Worth and Houston, and Texas Governor Greg Abbott has appointed two judges to each court. At the time of publication, it is too early to tell what impact these new business courts will have, though we expect to have more developments in 2025.

Additionally, 2024 saw new changes implemented to Texas' Franchise Tax. By way of background, Texas imposes a franchise tax on business entities – including LLCs, C Corporations, S Corporations, limited and general partnerships, etc. – formed or doing business in the state. In general, the franchise tax is levied at a rate of 0.75 percent on an entity's taxable margin. However, no tax was historically due when an entity's annualized revenue was less than $1.23 million. Even if the entity was not subject to the franchise tax, it was still required to submit a timely No Tax Due Report. In 2024, though, the minimum threshold increased to $2.47 million. In addition, entities that do not meet the taxable threshold are no longer required to submit a No Tax Due Report, thereby simplifying and reducing the cost of tax compliance.

We look forward to next year's report, as there should be an abundance of activity once the Texas legislature is back in session in 2025.

Florida Updates

Right-to-Know for Denial of Homestead Exemptions

Florida is one of a few states in the nation that allows for a property tax break for taxpayers who have a Florida home as their primary residence (otherwise known as a "homestead exemption"). To qualify for the homestead exemption, a taxpayer must annually file for such exemption with the Florida Department of Revenue.

As of July 1, 2024, if a property appraiser makes a determination that a taxpayer is not entitled to the homestead exemption from property tax, such appraiser must include with its determination information that (i) explains why the taxpayer is not entitled to such exemption; (ii) lists the years for which unpaid taxes, penalties and interest are due; and (iii) how the unpaid taxes, penalties and interest have been calculated.

Relatedly, additional legislation was passed, effective as of July 1, 2024, and applicable beginning with the 2025 tax roll, which provides that in instances in which a homestead exemption is granted because of a clerical mistake or omission by the property appraiser, the taxpayer will not owe any penalty or interest on the unpaid property taxes that are determined to be due. Additionally, if the taxpayer voluntarily discloses to the property appraiser that the homestead exemption was erroneously granted before the property appraiser notifies the taxpayer of the mistake or omission, no back taxes are due in connection with the unpaid property taxes.

Florida Uniform Fiduciary Income and Principal Act

The enactment of the Florida Uniform Fiduciary Income and Principal Act (FUFIPA) replaces the currently controlling Florida Uniform Principal and Income Act (FUPIA), which governs the default allocation of trust and estate receipts and disbursements between principal and interest for trusts and estates with a principal place of administration in Florida. This act, which goes into effect on January 1, 2025, is intended to modernize Florida's trust and estates law.

FUFIPA encourages the use of modern portfolio theory for investments by fiduciaries, which emphasizes capturing the total return on both income and principal appreciation. The fiduciary is also authorized to make adjustments between income and principal under certain circumstances, providing greater flexibility to fiduciaries to administer trusts for an extended term for the benefit of current and remainder beneficiaries. This is important considering the rule against perpetuities in Florida was extended in 2022 to a 1,000-year period. Such adjustments may also be made when administering a unitrust if such adjustments will assist the fiduciary in administering the unitrust in an impartial manner.

If a court determines that a fiduciary has abused their discretion in exercising the powers available to them under FUFIPA, the harmed beneficiaries are entitled to restore such beneficiaries to the positions they would have been in but for the fiduciary's abuse of discretion.

Supported Decision-Making

As of July 1, 2024, Florida now has authority allowing for supported decision-making by individuals with developmental disabilities who have not been adjudicated as incapacitated. The law provides for supported decision-making agreements that allow such developmentally disabled individuals to designate an agent to receive information and communicate on behalf of such individual with third parties but, unlike a durable power of attorney, does not allow the agent to make any decisions on such individual's behalf. This legislation is intended to benefit individuals who can live and work independently but may need some assistance with their decision-making without handing the ultimate control over a decision to a guardian or agent.

IN CONCLUSION: WE CAN HELP

We hope that this advisory helps you with your year-end estate and gift tax planning, and provides you with some interesting ideas to consider for the future. As always, the Katten Private Wealth practice stands ready and able to assist you with these matters at any time.

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