



FEATURE: ESTATE PLANNING & TAXATION

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TRUSTS & ESTATES

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How to Deal With Repeal

Dynasty trust planning will be an essential tool

Once again, it appears there's a strong possibility that the federal estate tax and generation-skipping transfer (GST) tax may be repealed. President Donald J. Trump and the Republican majority in the House and Senate all support a repeal of the "death tax."¹ One must only revisit the last time Republicans held control of the House, Senate and the White House in 2001 to identify the last time the estate and GST taxes were repealed under the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). EGTRRA was former President George W. Bush's tax plan that gradually increased the gift, estate and GST tax exemptions from \$675,000 to \$3.5 million and lowered the tax rates from 55 percent to 45 percent, culminating in a single year of outright estate and GST tax repeal in 2010, followed by a "sunset" of the entire law on Jan. 1, 2011, returning the transfer tax system to its draconian pre-EGTRRA state. The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (2010 Tax Act), signed into law on Dec. 17, 2010, established a \$5 million exemption and 35 percent estate and GST tax rate beginning Jan. 1, 2011. However, heirs of wealthy individuals who died during 2010 benefited greatly from the only period in the last 100 years when our nation had no federal estate or GST tax.²

Unless Congressional Democrats have a dramatic change of heart, or Republicans pick up eight additional Senate seats in 2018, it's safe to assume that any bill that includes estate tax repeal will sunset in 10 years. Without the vote of 60 Senators, the only way repeal can pass

without getting blocked by a filibuster is to enact the law as a "reconciliation" bill, which, under Senate procedure, can't last beyond 10 years. Of course, it's also possible that repeal could be undone in as little as four years if enough Democrats are elected to the White House and Congress. Thus, any future transfer tax relief is likely to be only temporary, lasting as few as four and not more than 10 years.³

What Will Repeal Look Like?

There are many unanswered questions regarding what will replace the estate tax if it's repealed. Trump has proposed some form of capital gains tax at death on assets in excess of \$10 million, with some limited exception for farms and family businesses. Another alternative is carry over basis like that found in EGTRRA. Regardless of the income tax regime that may be imposed at death, most prognosticators believe that the gift tax will remain in place. The gift tax was retained under EGTRRA supposedly as a necessary backstop to the income tax to prevent wealthy individuals, in the highest tax bracket or with limited off-setting deductions, from avoiding income taxes by transferring their assets to individuals with lower tax liability. But, is the gift tax really a necessary backstop to the income tax? Would someone really gift a large sum of assets to his child or someone else in a low income tax bracket with absolutely no guarantee that he'll ever receive those assets back in the future? That presumption seems far-fetched. Nobody would ever actually hand over his wealth to his child with the hope that the child will give it back, to save income taxes. Clients don't even want to let their children know about their wealth or receive an outright inheritance. Nor do they want to subject assets to creditor claims or to the grasp of their in-laws. Of course, you can't make gifts to trusts to lower income tax liability because of the compressed rate brackets of non-grantor trusts.⁴



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Perhaps the real motivation for retaining the gift tax is that Congress knows deep down that the estate and GST tax will return someday, and the benefit of repeal should only be reserved for the “lucky” few who die while it’s repealed. Without a gift tax, virtually everyone with a potential estate tax issue would make tax-free transfers of their assets to a flexibly drafted dynasty trust that will serve as a transfer tax-free safe haven for their family wealth for generations to come.

While we wait and see whether transfer tax changes are on the horizon, no one should pay gift tax now. Indeed, clients should limit their exposure to any strategy that carries with it a risk of a deemed gift, such as installment sales that might be re-characterized as a gift. Of course, on the flipside, final Internal Revenue Code Section 2704 regulations could be issued soon. The prospect of both estate tax repeal and the issuance of final IRC Section 2704 regulations simultaneously on the horizon presents an interesting “Catch 22” for clients considering doing installment sales at this time.

It’s anyone’s guess whether estate tax repeal will happen and, if it does, what it will look like. A discussion of the possibilities is beyond the scope of this article. Instead, let’s focus on the fears of every estate planner who wonders: “What will I do for a living if they get rid of the estate tax?” The answer is: “Don’t plan any vacations for a while because you’ll be busier than ever!”

Repeal Means Planning Opportunities

Many believe that without an estate tax to motivate estate planning, the practice will dry up because wealthy and upper middle class clients will no longer need to create credit shelter trusts, GST tax-exempt trusts or other trust structures created principally for transfer tax planning purposes. The practice of planners who primarily assist clients with estate freeze and estate reduction techniques, such as preparing grantor retained annuity trusts (GRATs), qualified personal residence trusts or credit shelter trusts, will see their practice change. But, repeal will produce untold complications and planning opportunities that will expand, rather than contract, most planners’ practices. At first glance, it may appear that repeal will reduce the number of trusts being created, but repeal will actually make properly designed dynasty

trusts a vitally important and powerful testamentary planning tool that will place the family in the best possible position to protect assets from creditors, avoid or minimize state income taxes, increase family wealth outside of the transfer tax system forever and react positively to the inevitable, but as yet unpredictable, future developments in the tax laws.

Historically, the size of perpetual dynasty trusts has been effectively capped at the maximum GST tax exemption amount. Clients have been forced to use installment sales, valuation discounts and other techniques to shift assets into their dynasty trust before death. Without an estate or GST tax, the main impediment to testamentary planning will be eliminated, and all clients with an estate that potentially exceeds even the lowest exemption limits over the last 20 years⁵ would be well advised to fund a flexible perpetual dynasty trust with all of their assets to protect against the inevitable imposition of a future transfer tax. It would be highly tax-inefficient for decedents to pass wealth directly into the hands of their children, possibly subjecting it to a future estate tax. Indeed, it will become conventional wisdom for virtually every estate-planning client to transfer all of his assets at death to a flexibly drafted dynasty trust that remains free from transfer tax forever. If the gift tax is retained following repeal, avoiding gift taxes without delaying intergenerational wealth transfers until death and planning to minimize the impact of a carryover basis or capital gains tax regime will become the most challenging transfer tax problems requiring expert planning advice.

Gift tax repeal would be a boon for estate planners and their clients because large perpetual trusts could be funded immediately during lifetime, shifting those assets outside of the transfer tax system. If the gift tax is repealed, everyone should fund an inter vivos, intergenerational, wealth shifting, super flexible dynasty trust, especially those with a large family business, closely held stock, real estate or other assets that will be hard-hit by a future estate tax.

Updating Estate Plans

For years following repeal, client documents will require updates, and decedents dying unexpectedly with old estate-planning documents will undoubtedly



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cause issues and complications that will need to be solved, including post-mortem planning. In 2010, many descendants died with out-of-date estate plans or plans that failed to pass assets in the most tax-efficient manner, or they passed assets to individuals or organizations in a manner they wouldn't have intended had they known that there would be no estate tax. Some estate plans use formula clauses that don't properly account for the possibility of repeal, cause ambiguities with repeal or fund trusts based on factual "if/then" scenarios without

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taking into account the settlor's intent regarding repeal. Many estate plans give children withdrawal rights at certain ages, which would be far more tax efficient if they funded GST tax-exempt dynasty trusts for many generations. Funding marital qualified terminable interest property (QTIP) trusts just to defer estate taxes might be unnecessary with repeal and could instead pass assets outright to descendants, the surviving spouse or, better yet, to a perpetual trust outside the transfer tax system. Formula clauses might cause some documents to bypass the surviving spouse altogether, passing everything to the children and leaving the surviving spouse with no means of support. Many documents could raise litigation over construction issues.

All of these estate plans will need to be reviewed and revised, and when clients die with such estate plans, advisors will need to perform post-mortem analyses to identify planning opportunities and concerns. Furthermore, all existing clients will need to have their estate plans evaluated and revised to include proper formula clauses and dispositive scenarios that take maximum advantage of repeal and properly implement settlor intent under the new laws.

There will be many years of work adapting to the new reality of estate and GST tax repeal. Just consider most planners' experience toward the end of 2012, when it was widely thought that the \$5 million estate and GST tax exemption was a limited one-time opportunity that needed to be taken advantage of quickly. The number of trusts and trust assets under administration ballooned in 2012, and most planners worked around the clock to accommodate clients' needs to create and fund trusts before the opportunity to take advantage of the sizable exemptions disappeared. Of course, the Taxpayer Relief Act of 2012, signed into law in the eleventh hour on Jan. 2, 2013, made "permanent" and indexed for inflation the \$5 million exemption. There's continued to be a tremendous amount of planning under this historically high cap on the amounts that can fund dynasty trusts, and this work will undoubtedly continue following repeal.

GST Planning

If there's no GST tax, then modifications to GST non-tax-exempt trusts and GST transfers can occur without adverse GST tax consequences. During 2010, when there was no GST tax, many planners triggered GST direct skips with asset transfers and modifications of GST non-tax-exempt trusts. At the very end of 2010, when it was clear that the estate and GST tax would soon return, many planners extended the life and tax efficiency of GST non-tax-exempt trusts by intentionally triggering a 0 percent GST tax under the 2010 Tax Act with a taxable termination or taxable distribution by decanting or otherwise modifying trusts to distribute assets outright to skip persons, terminate trusts or eliminate the interests of non-skip beneficiaries (that is, the transferor's children).⁶ When the GST tax is repealed, these could be useful strategies for GST non-tax-exempt trusts funded in excess of the applicable exemption in the past, or irrevocable life insurance trusts and long-term trusts that capture the remainder interest of a GRAT that are GST non-tax-exempt due to the nature of their funding.⁷

There may also be planning opportunities related to GST tax-exempt trusts. Under current law, modifications to GST tax-exempt trusts such as divisions, settlement agreements, decanting, judicial and non-judicial modifications and certain constructions can't be made without losing GST tax-exempt status unless the modifications fall within the safe harbors found in the



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Treasury regulations.⁸ Without a GST tax, a multitude of modifications might be possible for such trusts without concern about losing the trust's GST tax-exempt status.

For some trusts, it may be advisable to trigger inclusion in a beneficiary's estate to identify a new transferor for GST tax purposes, to extend the duration of a trust or to possibly get a step-up in basis (if capital gains are excluded up to \$10 million). This could be accomplished by modifying a trust to include a new general power of appointment or even by triggering the Delaware tax trap. For example, under Delaware law, it's possible to exercise a limited power of appointment (LPOA) in a manner that will cause the property subject to the power to be included in the powerholder's federal gross estate under the Delaware tax trap by exercising the power in favor of a new trust that contains an LPOA that can be exercised so as to postpone the vesting of the trust property for a period determined without regard to the date of the creation of the first power.⁹

Dynasty Trusts Essential After Repeal

After estate and GST tax repeal, dynasty trusts drafted to maximize flexibility and beneficiary control will become the ultimate planning tool, providing adaptability, control, creditor protection and state income tax avoidance, all in a transfer tax-free safe haven. That is, every client, big and small, should be packing as many assets as possible into flexible perpetual irrevocable trusts.

There are many important non-tax motivations for creating trusts irrespective of estate tax planning. Trusts are the only estate-planning tool that can provide liberal use, enjoyment and disposition of assets while avoiding taxes, creditors, divorce settlements and spendthrift heirs that cause dissolution of wealth in future generations. Holding assets in trust, as opposed to outright ownership, can also prevent disincentivized heirs. At what age would a high-net-worth client want his children to inherit all of his wealth? Clients rarely want all of their wealth to pass immediately into the hands of their heirs, particularly if an untimely death would cause assets to fall into the hands of heirs who are unprepared to handle it. Clients with special assets, such as privately held businesses and real estate, often prefer such assets to be held in trust, instead of passing outright to descendants. Perhaps one of the strongest motivations for trust planning will be the desire to protect assets from dreaded son-in-laws and daughter-in-laws.

The Super Flexible Dynasty Trust

Most descendants prefer outright distributions of wealth rather than receiving an interest in a trust that they perceive to be a costly and burdensome tool of the lawyers and bankers that takes away the beneficiaries' control and rights to the use and enjoyment of the assets. However, from the descendants' point of view, receiving their inheritance in the form of a well-designed dynasty trust instead of an outright bequest should actually be preferred over outright ownership. A trust drafted with enough built-in flexibility and control can provide descendants with all of the advantages of a trust, while offering them a level of control and enjoyment that's tantamount to outright ownership. A big challenge for wealth planners is to convince clients who would give everything outright if there's repeal that a bequest in trust can provide beneficiaries with all of the use and enjoyment of the assets that an outright bequest would provide, with many important additional benefits. Beneficiaries can possess all of the following powers without incurring adverse gift, estate or GST tax consequences or exposing the assets to creditor claims:

- **Enjoy protection from creditors and divorce claims.** A properly designed dynasty trust will protect trust assets from the claims of beneficiaries' creditors and spousal divorce claims if it includes a spendthrift clause and is governed by the laws of a state that protects trust assets from such claims.
- **Control investments.** Descendants can control all investment decisions or certain special holdings like closely held entities, real estate and concentrated positions, by serving as the investment advisor of a directed trust.
- **Direct distributions.** Within limits, descendants can have control over distribution decisions by serving as the distribution advisor of a directed trust. With the possible return of the estate or gift tax, such powers should exclude the descendant as a beneficiary or be limited to an appropriate ascertainable standard.
- **Remove and replace trustees and advisors and appoint a special purpose trustee.** Descendants can remove and appoint a trustee and any investment advisors, distribution advisors, trust protectors or any other power holder. Descendants can also have the power to appoint a special purpose trustee from time to time with exclusive power to exercise specific,



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limited or restricted powers, duties or responsibilities. Because the estate tax could return, the power to remove and appoint persons possessing powers that, if held by the beneficiary, would trigger a transfer tax, should be limited to successors who aren't related or subordinate to the beneficiary within the meaning of IRC Section 672(c).¹⁰

- **Serve as a co-trustee.** Descendants could serve as a co-trustee of their trust, although that role should be carefully limited to avoid adverse transfer tax concerns that could arise if the gift and estate tax are reinstated.
- **Use and enjoy assets.** The trustee can have discretion to permit beneficiaries to use and enjoy trust assets,

Grantors who are concerned about giving away a large portion of their wealth, or who wish to ensure there's some ability to alter the provisions of an irrevocable trust, might consider a spousal lifetime access trust.

such as living rent-free in residential real estate, with all of the advantages of assets held in trust, including continued immunity from transfer taxes and creditor protection. The trustee could also make and guarantee loans to beneficiaries or invest in a beneficiary's start-up business ventures.

- **Appoint assets at death or during life.** Beneficiaries can have lifetime and/or testamentary LPOAs over a fully discretionary trust, thus giving the beneficiaries substantial control over the disposition of assets, effectively allowing them to make tax-free gifts among descendants, facilitating gifts to charities and changing the dispositive plan. That is, the settlor's descendants can enjoy the benefit of the trust assets, and because the exercise of an LPOA over trust assets isn't treated as a gift, the dynasty trust's beneficiaries

can make intergenerational wealth transfers as and when appropriate without incurring gift tax through the exercise of LPOAs. Of course, if the beneficial interests include fixed rights to receive distributions, such as an income interest, the exercise of a lifetime LPOA could present adverse gift tax consequences.

- **Save state income taxes.** Depending on the state where the grantor and beneficiaries are domiciled, it may be possible to avoid all state income taxes on trust income and capital gains. If the dynasty trust is created in a jurisdiction that imposes no state income tax, the trust will avoid taxation in those taxing jurisdictions that base their income tax regime on the location of the trustee.
- **Limit information.** In some jurisdictions, it's possible to limit or eliminate the information that some or all beneficiaries are entitled to receive for a period of time with a so-called "silent trust." This could facilitate goals such as avoiding the wealth becoming a disincentive for a productive life or preventing beneficiaries who reside in high risk locations or who have personal problems from being harmed by the source of wealth. A designated representative could receive informal accounts on behalf of beneficiaries.
- **Promote productive lifestyles.** Trusts can include precatory language setting forth settlor values and wishes, creating incentives or precluding distributions in the case of drug or alcohol abuse, incarceration or other harmful behavior.
- **Protect special needs descendants.** Trusts can be designed to protect beneficiaries from losing governmental benefits such as Social Security Administration benefits, Medicaid and Supplemental Security Income benefits or any other benefits from any private or public profit or non-profit organization.
- **Protect assets from the return of the estate tax.** A dynasty trust that's designed to prevent federal estate tax inclusion or a GST tax under current law, and has enough flexibility within the document to adapt to changing circumstances in the future, should protect the assets held in the trust from any future gift, estate or GST tax, in perpetuity, should those taxes ever return.

A super flexible dynasty trust could be drafted with many additional features to ensure that it can adapt and



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withstand the test of time. It should be drafted so when the trust divides into per stirpital shares at the death of each generation, it's held for the primary beneficiary as well as his descendants as an open class who have purely discretionary sprinkle interests, to maximize flexibility. The trust should also include express decanting, merger and administrative amendment provisions, which may go beyond the scope of what's permissible under applicable statutes, to enable the possibility of changing the trust terms in the future to account for changes in circumstances or laws. Additionally, the trust could include the role of a non-fiduciary selector, who can add or remove beneficiaries, and a trust protector, who can hold a variety of powers defined in the document, such as changing the trust situs and governing law, receiving accounts and binding beneficiaries and making other decisions.

If the gift tax is also repealed, an intentionally defective grantor trust funded during lifetime will become essential. The grantor personally pays the income tax of a grantor trust, permitting the trust to grow tax-free. The payment of the trust's income tax isn't treated as a taxable gift to the trust.¹¹ Although this increased trust value isn't an issue if the gift tax is repealed, it would be advantageous if it were ever to return. The grantor can retain the right to be reimbursed from the trust for income tax liabilities and, so long as this doesn't cause the trust assets to become subject to the claims of the grantor's creditors, this shouldn't produce adverse estate tax consequences. The grantor is typically given a power to substitute trust assets to cause the trust to be a grantor trust.¹² Giving someone the power to add and remove beneficiaries will also accomplish this. A flexibly drafted grantor trust should give some party the ability to "turn off" grantor trust treatment by releasing or disclaiming the powers triggering grantor trust treatment.¹³

Grantors who are concerned about giving away a large portion of their wealth, or who wish to ensure there's some ability to alter the provisions of an irrevocable trust, might consider a spousal lifetime access trust (SLAT). A SLAT is a trust that includes the grantor's spouse as a discretionary beneficiary, yet contributions to the trust are completed gifts for gift tax purposes because the trust doesn't satisfy the requirements of a QTIP under IRC Section 2523(f)(2). With this structure, the grantor's spouse could receive distributions from the trust and could possess a lifetime and testamentary LPOA that could be exercised

to change the disposition of the trust assets without adverse transfer tax consequences. So long as the grantor's spouse is a beneficiary, the trust must be treated as a grantor trust for federal income tax purposes due to spousal attribution under IRC Section 673(e), and grantor trust treatment couldn't be turned off during the spouse's lifetime. A SLAT could be drafted to include a selector, who can add and remove beneficiaries, including the spouse. A selector can provide additional flexibility to alter the beneficiaries and remaindermen of an irrevocable trust if the spouse dies before the grantor, thus negating the flexibility afforded by the spouse's lifetime and testamentary POAs.

Another alternative for such grantors is to consider a self-settled asset protection trust that's designed as a completed gift or trust in which the grantor may be named as an additional trust beneficiary or is a proper object of the exercise of a POA held by someone other than the grantor. The retention of such potential interests shouldn't cause the trust to fail to be treated as a completed gift in jurisdictions that provide adequate creditor protection.¹⁴ Additionally, even after an irrevocable trust is created, there are options to modify the trust to include any provision that could have been included in the governing instrument of a trust that's created on the date of the modification on the written consent or written non-objection of the living trustor, all then living fiduciaries and all beneficiaries, either directly or through virtual representation.¹⁵

A Busy Time Ahead

Planners will be busier than ever if the estate and GST taxes are repealed, and eliminating the gift tax will make trust planning an even more pressing priority. The changes will produce many planning opportunities and legal issues to address. Dynasty trust planning will be an essential tool, and governing instruments will have to be sophisticated, flexible and account for the settlor's wishes regarding family control.

Imagine that following estate tax repeal, a wealthy client simply gives all of his assets outright to children or grandchildren because there's no longer an estate tax or GST tax exemption to limit such an outright bequest. Now those assets are in the children or grandchildren's hands. An outright bequest to a client's children will likely cause the wealth to dissipate in a single generation due to unprepared spendthrift descendants, untimely



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deaths, the possible return of the estate tax, creditors' claims and divorce settlements. If an estate or GST tax is ever reinstated, those assets would be included in the grandchildren's taxable estates. Even if the estate and GST taxes aren't reinstated, the gift tax will almost surely remain in place, and intergenerational transfers of wealth by those holding the assets would be limited. If any of the settlor's other descendants (like a grandchild's issue, for example) ever need money, the grandchild would be limited by the lifetime gift tax exemption in making that gift. Making a taxable gift would be foolish in the world of repeal. If those assets were in a dynasty trust, the grandchild would be able to make that same transfer, free of gift tax, through a discretionary distribution by the trustee or the exercise of an LPOA. A dynasty trust could sprinkle distributions among generations of the client's descendants, enable the use and enjoyment of trust property and adapt to future changes to the family situation and tax laws, while providing creditor protection and allowing the beneficiaries to enjoy substantial control over the trust, all while remaining outside of the transfer tax system in perpetuity.

Even if repeal doesn't occur, much of what's discussed in this article is equally applicable to planning with historically high gift, estate and GST tax exemptions in the current environment. 

Endnotes

1. Donald J. Trump's website says: "The Trump Plan will repeal the death tax, but capital gains held until death and valued over \$10 million will be subject to tax to exempt small businesses and family farms." See www.donald-jtrump.com/policies/tax-plan.
2. George Steinbrenner, owner of the Yankees, famously hit a "homerun" from an estate tax planning perspective by dying during 2010, saving his heirs hundreds of millions in estate taxes and rescuing his estate from liquidity issues and a possible forced sale of the Yankees. See <http://blogs.wsj.com/metropolis/2010/07/13/how-steinbrenner-saved-his-heirs-a-600-million-tax-bill/>.
3. For a more complete discussion of the possibility of estate tax repeal and other related possibilities, see Jonathan G. Blattmachr and Martin M. Shenkman, "Planning in a Time of Uncertainty: Part I," *Trusts & Estates* (January 2017), at p. 78.
4. One collateral effect of retaining the gift tax similar to the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) is that it would kill the use of incomplete gift non-grantor trusts (so-called "ING" trusts) to minimize state income taxation. See Todd A. Flubacher and Scott D. Goodwin, "DINGed But Not Dented," *Trusts & Estates* (July 2013), at p. 14. In 2010, the gift tax was triggered by any transfer in trust (even if the transfer would otherwise have been treated as an incomplete gift) unless the trust was treated as wholly owned by the donor or the donor's spouse under the grantor trust rules, presumably to prevent income tax shifting using trusts. Internal Revenue Code Section 2511(c) under EGTRRA provided: "Notwithstanding any other provision of this section and except as provided in regulations, a transfer in trust shall be treated as a transfer of property by gift, unless the trust is treated as wholly owned by the donor or the donor's spouse under subpart E of part I of subchapter J of chapter 1." EGTRRA Section 511(e) (amending IRC Section 2511).
5. It was only the year 2001 when the estate tax exemption was \$675,000.
6. Section 302(c) of the 2010 Tax Act provided: "In the case of any generation-skipping transfer made after December 31, 2009, and before January 1, 2011, the applicable rate determined under section 2641(a) of the Internal Revenue code of 1986 shall be zero."
7. Generally, irrevocable life insurance trusts aren't generation-skipping transfer (GST) tax exempt because a gift of a present interest to a trust using a lapsing power of withdrawal (that is, a *Crummey* withdrawal right) isn't GST tax exempt due to a lack of coordination between the gift tax annual exclusion and the GST tax annual exclusion. See IRC Section 2642(c)(2). Similarly, the remainder interest of a grantor retained annuity trust (GRAT) generally isn't GST tax exempt because no allocation of GST tax exemption can be made until the GRAT term expires. See IRC Section 2642(f).
8. Treasury Regulations Section 26.2601-1(b)(4).
9. See 25 Del. C. Section 504; See also IRC Section 2041(a)(3); Treas. Regs. Section 20.2041-3(e)(1)(ii).
10. There may be adverse transfer tax consequences if a beneficiary possesses the power to remove and appoint trustees or other fiduciaries if the fiduciary has a power of distribution not limited by ascertainable standards or other power that might trigger a transfer tax if possessed by the beneficiary, unless the appointed trustee isn't a related or subordinate party to the grantor under IRC Section 672(c). See Revenue Ruling 95-58.
11. Rev. Rul. 2004-64.
12. See Rev. Rul. 2008-22 (grantor's non-fiduciary power to acquire trust property by substituting property of equivalent value won't, by itself, cause the value of the trust principal to be included in the grantor's taxable estate under IRC Section 2036 or 2038, so long as the trustee has a fiduciary duty, under either the trust instrument or applicable local law, to ensure that the substituted properties are in fact of equivalent value, and the exercise of the power doesn't shift benefits among trust beneficiaries).
13. Note that there may be fiduciary concerns if this power is given to the trustee because shifting the income tax burden from the grantor to the trust arguably impairs the interests of the beneficiaries, and some commentators have observed that such a decision may be contrary to a fiduciary's duties owed to the beneficiaries.
14. See 12 Del. C. Section 3536(c).
15. See 12 Del. C. Section 3342; see also Uniform Trust Code Section 411. Such statutes shouldn't cause inclusion in the grantor's taxable estate. See Private Letter Ruling 201233008 (March 28, 2012).