

Planning for Estates Under \$10 Million



10TH ANNUAL LDS PHILANTHROPIES
NATIONAL PLANNED GIVING COUNCIL CONFERENCE
NOVEMBER 5-6, 2015
SALT LAKE CITY, UTAH

PRESENTERS:

GREGORY N. BARRICK

AND

JONATHAN H. HOAGLAND

DURHAM JONES & PINEGAR

Overview



- Changes under the American Taxpayer Relief Act of 2012 (“ATRA”)
- Blending Estate Tax and Income Tax Issues
- Planning Considerations While Clients Are Living
- Modifying Plans of Deceased Clients
- Questions

Estate Planner's View of Trusts



Changes under ATRA

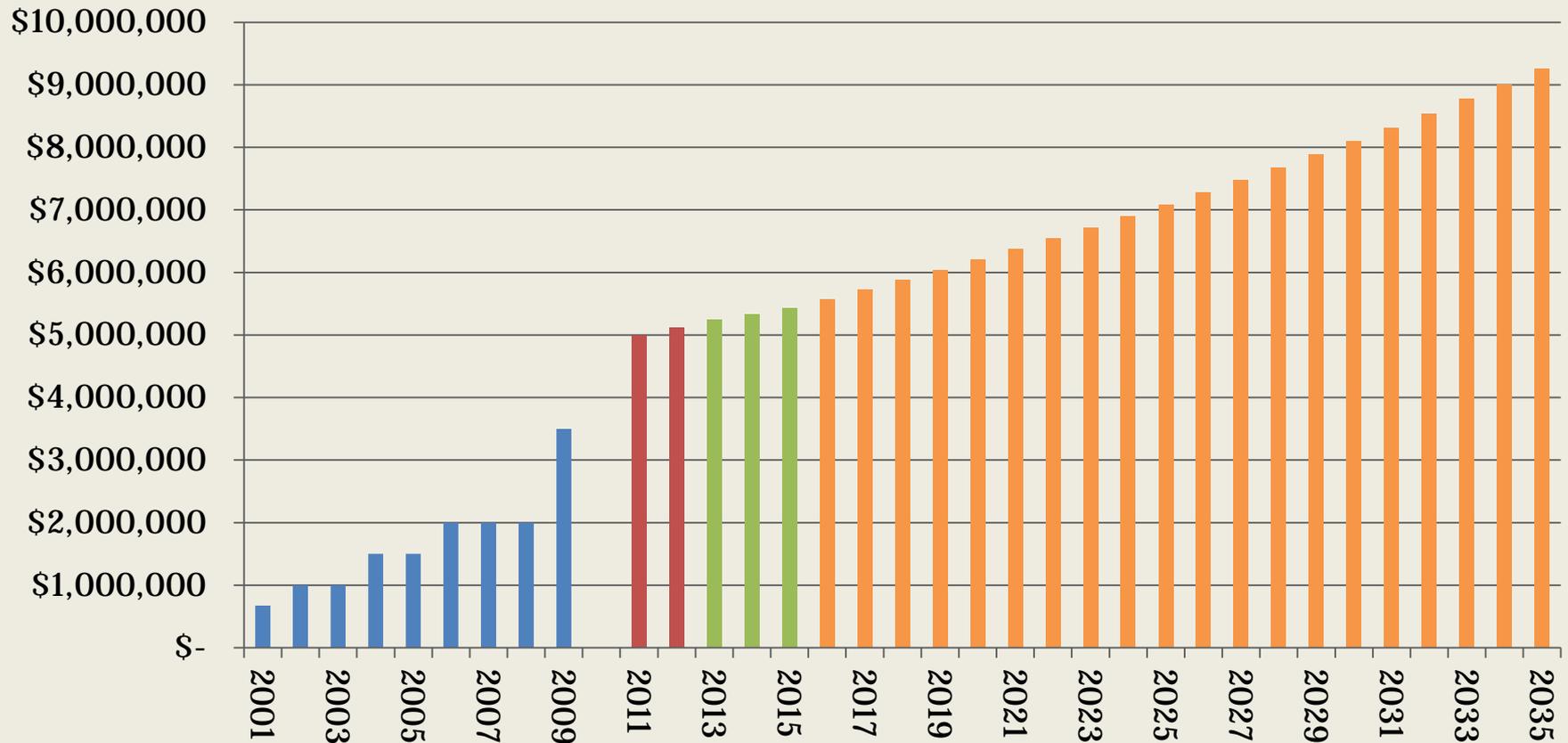


- Estate Tax Changes
 - “Permanent” \$5 million estate/gift/GST tax exemptions adjusted for inflation.
 - \$5.43 million in 2015
 - Assuming a 2.5% inflation rate, exemption will be about \$7 million by 2025 and \$9 million by 2035.
 - Taxable estate will be reduced significantly (60,000 estate tax returns filed in 2001; <4,000 filed in 2012; estimates of <0.2% of estates will be taxable)
 - 40% tax rate on taxable estates and gifts
 - Portability

A Little History and Some Projections



Estate Tax Exemption



Changes under ATRA



- Income Tax Changes
 - Top ordinary income tax rate: 39.6% (was 35%)
 - Long-term capital gain rate: 20% (was 15%)
 - Top income tax brackets
 - Married filing jointly: >\$464,851; Single: >\$413,201
 - Trust: >\$12,301
- Medicare tax of 3.8% on net investment income (“NII”) on income that exceeds \$200,000 (single) or \$250,000 (married filing jointly)
- State Income Tax Considerations
 - i.e., California: 13.3%; NY City: approx. 12.5%

Changes under ATRA



- Portability
 - The decedent can “port over” to a surviving spouse the decedent’s unused exclusion amount.
 - The “deceased spousal unused exclusion amount” (“DSUE amount”) can be used either for
 - gifts by the surviving spouse or
 - estate tax purposes at the surviving spouse’s death.
 - For estate, need to make “portability” election on a timely filed estate tax return
 - The DSUE amount is only available to the surviving spouse from his or her “last deceased spouse.”

Changes under ATRA



- Portability (cont.)
 - The DSUE amount is a fixed amount and not indexed to inflation, but the exclusion amount is indexed.
 - Does not apply to the GST tax, so using portability results in loss of GST exemption of first spouse to die
 - Statute of limitations remains open as to the DSUE amount until the surviving spouse's death
 - Need to consider if your state has an inheritance tax

Blending Estate Tax and Income Tax Issues



Issues and Planning



- For many clients, income tax planning at death now is more important than estate tax planning
 - Estate tax will not be an issue for 99% of taxpayers
 - Many clients own (or will own) highly appreciated assets
- Basis planning
 - A decedent's assets get a new basis at death
 - Asset values will change after the death of a spouse
 - New basis is a two-edged sword: “step-up” and “**step-down**”
- Need to consider impact of inter vivos gifting on both estate taxes and income taxes
 - Inter vivos gifting provides a carryover basis to the new owner

Issues and Planning

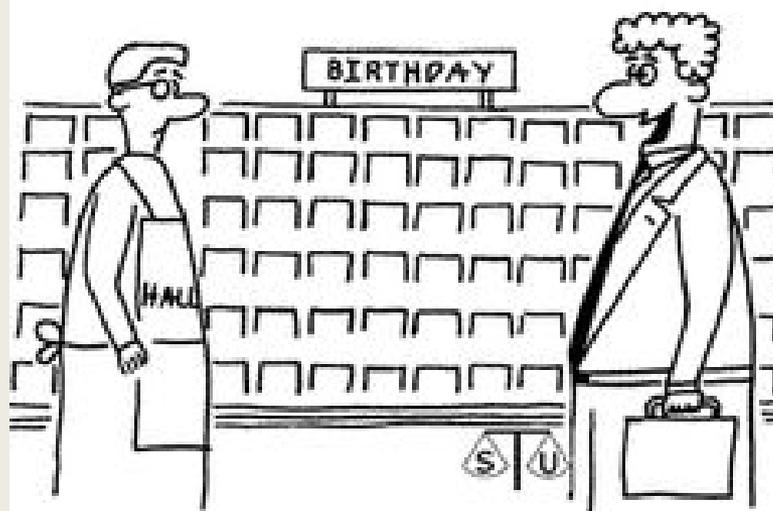


- Need to advise (and remind) clients of the income tax effects of their estate plan
 - Client transmittal letter should explain income tax and basis planning
 - File memo of client's choices on income tax options
 - Risks to advisors of failure to do so
- Some things to consider in advising clients
 - Options that can provide flexibility in new plans to meet changes in the law and asset values in the future
 - Strategies to address plans for persons who are deceased



Stu's Views

© 2002 Stu All Rights Reserved www.stus.com



Do you have an "I'm Sorry" card
that stops short of admitting liability?

Planning Considerations While Clients Are Living



Planning Considerations: Outright to Surviving Spouse



- **Income tax issues:**
 - New basis (“step-up” and “step-down”) in assets included in surviving spouse’s estate
 - Surviving spouse receives all of the income from decedent’s assets
 - Can’t spray income to beneficiaries in lower brackets
- **Other planning issues:**
 - Lose potential valuation discounts
 - No GST planning available
 - No non-tax advantages of a trust (asset protection, keep in bloodline, incapacity planning, avoid probate)
 - Rely on portability; no credit shelter planning

Planning Considerations: Traditional AB Trust



- Income tax issues:
 - No new basis (“step-up” and “step-down”) in assets included in the Family Trust at the surviving spouse’s death
 - Can spray income of the Family Trust to beneficiaries in lower brackets
- Other planning issues:
 - Less reliance on portability
 - No estate tax return if no elections to make
 - GST planning available
 - Provides non-tax advantages of a trust (asset protection, keep in bloodline, incapacity planning, avoid probate)

Planning Considerations: All to Marital Trust with Disclaimer to Family Trust



- Income tax issues:
 - New basis (“step-up” and “step-down”) in assets included in surviving spouse’s estate
 - Mandatory income distribution to surviving spouse
 - Can’t spray income to beneficiaries in lower brackets
- Other planning issues:
 - QTIP marital trust vs GPOA marital trust
 - Greater reliance on portability
 - QTIP marital trust and portability require filing 706 and elections
 - Can disclaim to Family Trust; rigid deadline and disclaimer rules
 - Provides non-tax advantages (asset protection, keep in bloodline, incapacity planning, avoid probate)
 - GST planning available

Planning Considerations: AB Trust with Formula GPOA over the Family Trust



- Consider using a formula testamentary general power of appointment with a cap and ordering rules
 - To enable a step up in basis for assets with $FMV > \text{basis}$;
 - To prevent a step down in basis for assets with $FMV < \text{basis}$; and
 - Without incurring an estate tax.
- Why a GPOA?
 - A general power of appointment is a power to appoint property to yourself, your estate, or creditors of either.
 - It can be lifetime or testamentary power.
 - The property subject to a GPOA will be included in the power holder's estate.
 - GPOAs can be narrowly drafted to prevent unwanted exercise

Planning Considerations: For All Clients



- Include trust provisions for “decanting” and trust combinations
- Consider use of special trustee or trust protector for certain trust revisions and the scope of their power
- Carefully consider powers to modify trusts granted to agents in powers of attorney, and the scope of their powers

Modifying Plans of Deceased Clients



- For “credit shelter” or other irrevocable trusts:
 - Does the trust provide for decanting or a trust combination
 - Statutory trust modifications or “decanting” options
 - Judicial modification or reformations
 - Powers that might result in property being included in estate of surviving spouse, and exercise of those powers
 - Family settlement agreements
 - Trust terminations, with or without a family settlement agreement

Reading the Will



Questions

