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Trust Drafting After the Tax Cuts and Jobs Act of 2017

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These authors have prepared *Estate Planning After the Tax Cuts and Jobs Act of 2017*, which is available now as an e-book, a prepublication proof, from Amazon for the Kindle. We have been granted permission by the authors to reprint an excerpt from their Chapter 5, "Trust Drafting After the Act," which has been modified and expanded upon for our readers.

Although many practitioners and clients have been blinded by the new high exemptions to believe that estate planning is irrelevant for most, it is not irrelevant, only different. The need for comprehensive estate planning, addressing the myriad of non-estate-tax issues (and for ultra-high-net-worth clients estate tax concerns as well), remains. The roles of attorneys, trust officers, and others remain vibrant.

A HOST OF CHANGES made by the Act will affect will and trust drafting and planning, including:

▪ Greater use of non-grantor trusts for clients in high tax states to minimize or avoid high state income taxes on income from passive investment assets (not businesses conducted in that state). Non-grantor trusts can also be used to maximize the state and local tax ("SALT") deduction for property tax as each trust should be entitled to its own $10,000 SALT deduction. Thus, many clients might transfer partial ownership of their homes to non-grantor trusts as each trust will be entitled to a $10,000 property tax deduction. Finally, clients may use non-grantor trusts to hold business interests to maximize the 20% deduction under new Code Section 199A.

▪ Need for moderate wealth clients to access assets in irrevocable trust in order for them to be comfortable making completed gifts. This will make trust drafting and administration more challenging as clients transferring wealth to secure the new large exemption will need more complex mechanisms to facilitate access to that wealth after transfers to non-grantor trusts.

▪ Flexibility in what seems to be the ongoing state of uncertainty and change.

▪ Fewer trust deductions that could result in higher tax born by non-grantor trusts and the need to carefully plan trust distributions.

▪ Need to address basis maximization given the larger dollar values that can be removed from an estate with the doubled exemption amounts.

▪ Increased use of powers of appointment to take advantage of excess exemptions of family members or other close persons with excess exemptions.

▪ Lower tax rates for some beneficiaries, and potentially more costly taxes for others, will increase the need to monitor distributions from non-grantor trusts very carefully, including discretionary distribution standards and a broad class of beneficiaries, may provide valuable flexibility. CPAs and fiduciaries may need to revisit old assumptions about beneficiary tax brackets to properly plan.

Wills and Revocable Trust Drafting

New wills and revocable trusts should consider not only the new exemption levels, but planning for possible changes in both federal and state estate tax laws. How might states with an estate or inheritance tax react to the new exemption? Might states simply repeal their estate taxes because the new high exemptions could result in so many fewer tax filings with the IRS, which the states use to set their own death taxes, that maintaining their estate tax is cost ineffective? On the other hands, might some states decouple from the high exemption to garner more revenue from their death tax systems?

Further, wills and revocable trusts should contemplate the scheduled sunset of the new high exemptions. Many commentators are speculating that a change in the political composition in Washington after the 2020 election may lead to significant tax changes. So, will and revocable trust dispositive schemes should contemplate a possible halving of the exemption, or other changes. Practitioners might use caps on how much in terms of dollars will fund a bypass or other trust to provide parameters to safeguard a client's intent when the law again changes. So, while the Act was initially touted with such words as "simplification" or "reform," nothing of the kind has occurred. Planning for the possibility of moving federal exemption levels, and in some states state exemption levels, leaves planners in a position similar to recent years, namely multipart trust structures to avoid state or federal tax yet preserve whatever exemption levels may be available in the year the client dies. Because the step-up in basis has been retained for all assets (other than the right to income in respect of a decedent such as interests in most pension plans and traditional [non-Roth] IRAs) included in a decedent's gross estate, planning should address facilitating basis step-up under IRC Sec. 1014 where feasible.

Planning Consideration: "The exemption is a multiple of the size of my estate, so why do I need to have a complicated or costly will?" Planners will have to grapple with the likely view of many moderate and lower wealth clients that they simply do not need costly or complex planning. Educating clients to the importance of intelligent and flexible planning will be a prerequisite for many clients to proceed. This may include basis maximization by increasing what is included in the estates of family members who will not face any estate tax. Another planning consideration is addressing the risks of disability. If a client becomes incapacitated prior to the sunset or repeal of the increased exemption, any planning opportunities might be lost. Perhaps, for an elderly client who would benefit from planning but is unwilling to proceed, a minimal step might be to grant someone the power to revoke the client's rights in a funded revocable trust, thereby creating a completed gift in time to take advantage of the new higher exemptions. As noted above several significant income tax planning opportunities may exist for client trust planning. Asset protection planning should receive more attention.

Multi-Part Decoupled Estate Plan: "Prior Law Common Plan—Three-Part Coupled Estate Plan": A common estate plan for a client in a decoupled state in past years has been based on a three-part trust plan. A fourth trust might have been added to utilize any generation-skipping transfer ("GST") exemption in excess of the federal estate tax exclusion amount, but that complexity is not addressed in this discussion. The three-part plan may have been structured as follows:

▪ Fund a bypass trust up to the state exclusion amount.

▪ Fund a "gap" trust with assets equal to the difference between the state estate tax exclusion and the federal exclusion amount. The gap trust's treatment was dependent on state law and client circumstances.

▪ The balance of the estate would have passed in a disposition qualifying for the marital deduction (for federal and state tax purposes), often a qualified terminable interest property (QTIP) trust, or if that trust was likely to be modest, an outright bequest.

Many clients will view the new high exemptions as a reason not to plan, or plan simply. For example, a bequest to a QTIP trust any portion of which could be elected not to be marital (a so-called "one-lung" QTIP), or a QTIP which permits the surviving spouse to disclaim a portion into a credit shelter trust, will be more common. An even simpler plan that is likely to see much greater use is an outright bequest with the right given to the surviving spouse to disclaim into a credit shelter trust. The latter plan suffers from the lack of asset protection afforded to an outright bequest. For more sophisticated plans a variant of the three or four multi-part plan may remain useful given the uncertainty over both state and federal estate tax rules in the future. Practitioners must bear in mind that integrating state estate tax considerations into the planning analysis is subject to uncertainty as states have changed, and may continue to change, their estate and inheritance tax laws. A significant theoretical detriment to bypass trust planning is the possible lack of step-up in income tax basis on the second death. There are a number of steps that might mitigate this consequence. Also, consideration should be given to facilitating distribution of appreciated assets out of the trust.

Achieving this benefit, however, will not always be feasible as a result of constraints in the governing instrument or state law. The language in many trust instruments will not permit the distribution of capital gains to the surviving spouse (or any other person) as a current income beneficiary. This is because most trusts, and most state laws, define capital gains as inuring to corpus. In these events, a distribution of the cash flow generated by a capital gain, even if permitted under the discretion afforded to the trustee, will not distribute the capital gain for tax purposes without more. For existing trusts, if the language cannot be modified by powers granted to a trust protector or other fiduciary, it may be feasible to decant the trust to a new trust with broader provisions permitting inclusion of capital gains in income. With this flexibility, it may be possible to plan gains and losses to be realized by the trust, surviving spouse, and perhaps other bypass trust beneficiaries, in order to minimize current tax costs by making the optimal distributions. Also, consider asset location and other financial decisions to minimize the magnitude of appreciation inside the trust.

Trust Planning the Default

Trusts should be used even more so in light of all of the uncertainty of the Act. While some clients might feel otherwise, the continuing uncertainty suggests that trusts ought to be the default receptacle for every substantial gift and bequest absent a fact-specific and sound reason to the contrary. Because of the costs and dislike for what is viewed as complexity created by trusts, many clients will opt for simply outright gifts and bequests if there is no estate tax incentive justifying a more complex arrangement. It is incumbent upon practitioners to educate clients as to the obvious (to the practitioner but not necessarily to the client) benefits of continued trust planning:

▪ Trusts can provide valuable divorce and asset protection benefits. In the absence of any transfer taxes, this may become the primary goal for many trust plans. With increased longevity, it is possible that the likelihood of remarriage following the death of a prior spouse may increase. The need for trusts on the death of the first spouse to die to protect those assets from deflection away from the family is more important than most realize.

▪ Trusts can provide income tax planning opportunities by permitting the sprinkling of income to whichever beneficiary is in the lowest income tax bracket, changing that distribution pattern each year, and doing so up to 65 days after the calendar year end. Individuals do not have this flexibility. Individual taxpayers are constrained by the assignment of income doctrine, and cannot affect tax consequences after the year end. Trust distributions can carry out income under the distributable net income ("DNI") rules. Even if the beneficiaries are all in the maximum income tax bracket, there still might be significant state income tax differences or the ability to offset a trust gain by a beneficiary loss. Moreover, making charitable donations through a trust may be preferable to having individuals do so. But the trust provides the best choice: if the charitable donation would be better if made by the trust beneficiaries, the trustee can distribute the assets to them who will, in turn, donate them to the charities.

▪ Elder financial abuse is burgeoning. Trusts provide control as the client ages, or as the client's health wanes, through the use of a co-trustee, an institutional or professional trustee or co-trustee, a trust protector and other mechanisms which individual ownership of assets does not afford.

Also, see the comments earlier in this monograph about the benefits of non-grantor trusts.

Trust Clauses and Techniques to Consider

Trust planning and drafting may also need to be modified to reflect the increased exemptions, sunset and continued estate tax uncertainty. However, to accomplish the intended goals, including infusing flexibility into trust structures, the provisions and techniques discussed below warrant consideration in trust planning and drafting. The result will be modern trusts that are more robust than traditional trusts. For existing irrevocable trusts, several options might warrant review to ascertain if they can be modified to infuse the planning below. Not every technique is necessarily appropriate for each client or every plan. Rather, practitioners should select the provisions, trust characteristics, and planning mechanisms appropriate for each client situation. The planning goals will be different then prior to the Act, and less uniform, tailored to a particular client's status after the Act:

▪ In light of the SALT restrictions more ultra-wealthy clients in high tax states might opt for non-grantor (e.g. intentionally non-grantor or "ING" type trusts to avoid state income taxation. These are incomplete non-grantor trusts intended to avoid current state income taxation (although New York state has passed legislation intended to have them not apply to New York income tax).

▪ Other "merely" wealthy clients in high tax states might endeavor to thread the trust planning needle to create accessible non-grantor but completed gift trusts (i.e., not the traditional ING variety above) to accomplish the planning goals of being able to access trust assets, making a completed gift to use the new high exemption, all while maintaining non-grantor status to minimize high tax and now non-deductible state income taxes.

Some portions of the following provisions and some of the sample forms below (and elsewhere in this book) are derived from Wealth Transfer Planning .

Crummey Powers: Powers to annually demand property from a trust so gifts to it qualify for the gift tax annual exclusion (such powers known as "Crummey" powers) have been almost ubiquitous in trust planning. By coupling planned annual gifts to trusts with demand powers taxpayers have created ongoing programs of periodic gifts that would optimize the use of the annual gift exclusions they were entitled to with respect to gifts to family members. While including Crummey powers in trusts, perhaps, should continue for some clients, the planning should change for some. For moderate wealth clients whose exemptions should readily suffice to avoid estate tax, why complicate administration of their trusts with annual gifts and the ritual sending out notices of Crummey powers? Instead, make a larger single gift using part of the now enhanced lifetime exemption to fund future trust needs (e.g., life insurance premium payments) for many years to come. A primary motivator for the annual gift/Crummey power ritual was to preserve more limited lifetime exemption by using annual gift exclusions to fund trust needs. For most merely wealthy clients this will no longer be necessary. Practitioners will have to rethink many traditional planning strategies.

Directed Trusts: Consider using directed trust structures and forming the trust in a state where the laws permit direction as to certain trust matters (A directed trust is one where one trustee or an advisor who is not a trustee directs certain action to be taken by the trust, such as which investments to make or which distributions should be made to certain beneficiaries.) Directed trusts may be necessary for moderate wealth clients to shift additional assets to use the larger exemption as private equity or non-business asset may be necessary to use to fund such transfers. A directed trust will permit the client or the client's designee to control private equity investments. This structure may also facilitate naming an institutional trustee for other trust matters while the client continues to retain control over business interests. There may be another advantage to structuring a directed trust and adding an entity to the plan. Using a family holding company LLC (or limited partnership) can provide additional asset protection, assuming the entity is a multi-member LLC (or partnership). Infusing an LLC or limited partnership may enhance discounts in valuation permitting more efficient estate and gift tax planning as well as asset protection (because the asset is worth less not just for certain tax purposes but also to the client's creditors). Also, for some clients having an intervening entity rather than the trust directly holding title to assets may provide a vehicle through which reasonable compensation can be paid back to a family member providing services, and certain expenses may also be paid and be made deductible for income tax purposes.

Tax Reimbursement Clause: Form the trust in a jurisdiction where an optional income tax reimbursement clause can be included in the discretion of an independent trustee, without exposing the trust assets to claims of creditors of the settlor, so he or she can receive trust funds to pay the income tax on income attributed to the settlor under the grantor trust rules, all as set forth in Rev. Rul. 2004-64. With larger exemptions, larger dollar values will be transferred to irrevocable trusts, so the potential need for a tax reimbursement clause will be greater. The future income tax impact of the sale of assets transferred with a doubled exemption (even more so if the gift of the additional exemption amount is followed by a large sale or other transaction). The trust, however, must not mandate the reimbursement or be administered to imply one and must be located in a state whose laws would not result in this provision making trust assets reachable by the settlor's creditors. If not, the presence of a tax reimbursement clause may result in estate tax inclusion, thus defeating the plan.

Power to Substitute: A common means of achieving grantor trust status is to have the trust provide the settlor (or another person) the power to substitute assets held in trust for non-trust assets of equivalent value. IRC Sec. 675(4)(C). This so called "swap power" has been nearly ubiquitous in estate planning. While the power is valuable to pull low basis assets back into the settlor's estate to obtain a basis step up on death, the power itself will characterize the trust a grantor trust. As discussed in earlier chapters, for some clients, in particular those in high tax states, non-grantor trusts may be a preferable planning approach because the trust can be structured and located in a jurisdiction that will avoid state (or state and local) income tax on the trust income. So, practitioners should be more deliberate in determining whether or not to include a swap power in a particular trust plan. The almost default approach of including such a provision is, following the Act, no longer advisable for all clients. If a swap power is to be included, practitioners should consider whether a substitution power might be treated as an indirect retention of the power to control voting stock the client/settlor transferred to the trust. See IRC Sec. 2036(b) and Rev. Rul. 2008-22 and Rev. Rul. 2011-28. This is important as many plans post-Act will endeavor to use the client's new estate tax exemption prior to sunset or other law change. If the power to swap voting stock were permitted, the power could, according to some commentators, cause the stock in the trust to be included in the client's gross estate for federal estate tax purposes. More particularly, the question is whether a power to substitute that would permit the settlor to reacquire voting stock will be viewed as the equivalent of the retention of the right to vote (directly or indirectly) shares of stock of a controlled corporation within the meaning of this Code Section. Some commentators suggest that this is not an issue because the substitution power would require the settlor to pay full and adequate consideration for the voting stock re-acquired. An abusive application of the power to substitute could occur, for instance, if the settlor were to reacquire the voting stock shortly prior to an important vote, and then return the stock to the trust (in exchange for the original consideration paid) shortly following the vote. This type of abuse could give rise to a challenge that the entire transaction was a sham. But absent such abuse, should the mere power to substitute raise the specter of IRC Sec. 2036(b)? The IRS has explicitly held that a grantor's nonfiduciary substitution power by itself will not cause estate tax inclusion under IRC Sec. 2036(a) or 2038 (which should encompass IRC Sec. 2036(b)). The later ruling expanded the power to substitute in a taxpayer favorable manner by providing that a grantor's retention of a nonfiduciary substitution power with respect to insurance on the grantor's life will not by itself cause estate tax inclusion under IRC Sec. 2042. While IRC Sec. 2042 obviously presents different issues, the rationale and pattern that it seems to infer towards substitution powers seems quite favorable. More than a few commentators believe that extending the concept of an indirect power to vote stock to the power to repurchase voting stock by paying full value for the stock is an unwarranted extension of the plain meaning of the statute. If the client or adviser remains concerned over the possible assertion of an IRC Sec.2036(b) challenge, the trust might restrict the power of substitution to assets other than voting stock described in the section.

Trust Situs: There are many compelling reasons that your irrevocable trust be created in a trust friendly jurisdiction (e.g. Alaska, Delaware, Nevada or South Dakota). Although many other states have enacted favorable trust legislation in recent years, these four states appear to remain the leaders in trust friendly environments. Using any of these, or other appropriate states, will assure that the trust is domiciled in a state with favorable income tax laws that do not tax trust income accumulated for non-resident beneficiaries. This latter factor may be of greater importance to clients in high tax states in light of the SALT restrictions. Those four states also provide other benefits, including directed trust law, enhanced creditor protection as compared to other states (e.g., affording the fewest if any rights to "exception" creditors, such as divorcing spouses), the ability for an appointment back to the settlor spouse without causing estate inclusion, an extended rule against perpetuities (a law limiting how long trusts can last), etc. With the size of the exemption so large, client objections to the cost of using an administrative institutional trustee to establish nexus in a trust friendly jurisdiction should be moot. The costs relative to the $22 million exemption may be viewed as insignificant.

Trustees: Some clients are reluctant to name an institutional trustee because of costs. Relative to the now doubled exemption amounts that issue may be viewed as moot. Using an independent institutional trustee can potentially cure a number of tax issues, possible drafting oversights, and more. Using an institutional trustee can be a relatively inexpensive "insurance policy" for trusts intended to hold significant wealth transfers. If the client does not reside in one of the trust-friendly jurisdictions, naming an institutional trustee in the desired jurisdiction almost always is essential to create sufficient nexus (connection) to take advantage of that state's favorable trust laws, including creditor protector for the trust assets. When planning a significant asset transfer post-Act, the incremental cost of using an institutional trustee in one of these jurisdictions, especially as an administrative trustee for a directed trust, is relatively modest. When planning for transfers of closely held businesses, the benefits of involving an institutional trustee can be more significant. An experienced institutional trustee can help avoid family disputes, add independence to help support the intended tax planning and asset protection results, facilitate succession planning, and more. The business owner/donor may well be the principal officer (president, manager, general partner) of the entity whose interests were given and/or sold to the trust, and be the investment trustee of the trust (subject to the IRC Sec. 2036(b) concerns discussed above). The use of an institutional trustee can provide independence that may be critical to the success of the overall plan.

Defined Value Clause: A defined value clause is a mechanism that endeavors to prevent triggering current taxable gift on a gift or sale of hard-to-value assets, such as interests in a closely held business, to an irrevocable trust (or any donee for that matter). The mechanism is that a specified dollar figure of interests in the closely held business is to be gifted (or sold) to the irrevocable trust. If the value of the business interests is later determined by the IRS to be greater than that determined in the qualified appraisal that the taxpayer has obtained (i.e., the value specified in the defined value clause as being transferred to the trust), the excess value will not be transferred to the trust. Instead, depending on the approach used, the actual transfer could have been limited to the intended dollar figure, or alternatively the excess over the intended transfer will inure to a different person or trust that will not trigger gift tax (e.g., a "zeroed out" GRAT or a marital deduction trust or donor advised fund). The gift tax protection that a defined value clause can offer can be quite valuable in safeguarding transfers of hard-to-value business interests. This is especially useful when interests in closely held business are transferred where valuation issues can abound (e.g., what is the impact of risk of death or disability of the entrepreneur/founder of the business on the valuation). The analysis of when and how to structure these mechanisms for trust transfers after the Act will vary depending on the client circumstances. For some moderate wealth clients, the size of the exemption relative to the value to be transferred may be so large that no defined value mechanism will be necessary because even with a significant revaluation by the IRS there may be no tax due. In other instances, planners may opt for a simpler Wandry approach (e.g., rather than a more robust defined value mechanism with a spill over to a GRAT, a marital deduction trust or donor advised fund or other charity that requires the simultaneous formation of a GRAT to complete the transaction). Yet with the large new exemptions for ultra-high net worth clients, transactions may be so substantial in size that robust defined value mechanisms probably should be used. For example, a wealthy client gifts the additional exemption amount to a new irrevocable trust and later follows that gift with a note sale of interests in a family business. If the practitioner involved subscribes to the mythical minimum 10% seed gift concept, the exposure on any such transaction could still be substantial. A gift of the new $11.18 million exemption could leverage substantial transfers. If a 10:1 ratio was used for a note sale of assets to a trust "seeded" with a $11.18 million gift that would, according to some who subscribe to this theory, suggest a sale of about $110 million in assets, to that trust would be feasible. If those assets were subjected to a 40% discount the undiscounted transfer value could be almost $184 million. That type of exposure would certainly warrant using a defined value mechanism. If the practitioner did not feel constrained by the 10% seed gift theory, the transfer and the exposure would both be greater.

IRC Sec. 2038 Power: Since the Act retains the step up in income tax basis on death, practitioners should consider using techniques to provide trust held assets options to garner a basis step-up. In light of the doubled exemptions provided for under the Act, the opportunity to have additional appreciated assets included in the client's gross estate will be very important Consider adding a power to facilitate estate inclusion to garner a basis step up. The trust could give the trustee, or perhaps a third party acting in a non-fiduciary capacity, a power to grant the grantor the right to control beneficial enjoyment so that would cause estate tax inclusion in the grantor's estate under IRC Sec. 2038. A corporate trustee may be unwilling to exercise such a power so that it may be advisable to grant the power to an individual. It may also be advisable for that person not to act in a fiduciary capacity. When grantor dies a step up in basis for trust assets could be realized if those assets were included in his or her estate under estate tax rules in effect as of date of repeal. Thus, it can be advantageous to create and fund a trust, not have it included under IRC Sec. 2036(a), and structure it so that creditors cannot attach trust assets. If the trustee does not grant the power, no estate tax inclusion will occur. If the trustee does grant the power, there will be estate tax inclusion. It might be advantageous to grant the trustee the right to select which assets to grant this power over. If an asset has declined in value, it may be preferable to avoid changing the basis at death.

Consider permitting a named disinterested person, acting in a non-fiduciary capacity (i.e., not a trustee or trust protector if acting in a fiduciary capacity), in his or her absolute discretion, to give the Grantor one or more powers to control the beneficial enjoyment of trust property such that the subject property would thereby become taxable in the Grantor's gross estate under IRC Sec. 2038. For instance, the Grantor might be given by such person an IRC Sec. 2038 power(s) over all or a specific portion of the trust property (or even specific assets) following a possible repeal of the Federal estate tax and in order to obtain a step-up in basis for appreciated trust property should that be available under the new regime. However, IRC Sec. 2038 will not apply if the grant of the power to the grantor was not anticipated. See Rev. Rul. 84-179 and Skifter v. Commissioner, 468 F.2d 699 (2d Cir. 1972).

Sample Provision: "No Portion of Trust Includible in Gross Estate. It is the Grantor's intent that no portion of any trust hereunder be includible in the Grantor's gross estate or the gross estate of the Grantor's Spouse for Federal estate tax purposes, except by reason of the actual exercise by the Appointer of the power granted to the Appointer below. Accordingly, and notwithstanding any provision herein contained to the contrary, other than by action of the Appointer below, this Trust Agreement shall be construed and the trusts hereunder administered in accordance with and to achieve that intention. Powers of Appointer. The authority of the Appointer shall be limited to the authority described in this Provision. Except as may be otherwise provided herein, the Appointer shall have the sole and absolute authority (acting alone and without the consent or approval of any other person including but limited to the Trustee) in the exercise of sole and absolute discretion, and acting in an individual and non-fiduciary capacity, to grant to the Grantor one or more powers that will allow the Grantor to control the beneficial enjoyment of all, or any portion of, the trust property, such that would cause inclusion of such property in the Grantor's gross estate under IRC Sec. 2038. By way of example, and not limitation, the Appointer may grant to the Grantor the power to appoint the income of any such trust hereunder or income from any specific trust property to any person, other than the Grantor. Any such grant of power(s) by the Appointer shall be made by an acknowledged, written instrument executed by the Appointer and delivered to the Trustee. Multiple Appointers. If two persons are acting as Appointer of any trust hereunder, then decisions of the Appointer shall be made by unanimous vote and if more than two (2) persons are so acting, then by a majority vote. Appointment of Appointer. The Grantor appoints _____________to serve as Appointer hereunder (referred to in this instrument as the "Appointer"). If _____________shall cease to act as Appointer hereunder for any reason, then the Grantor appoints ______________ to serve as successor Appointer hereunder."

Conclusion

Trusts will remain the cornerstone of most estate planning after the Act. For lower wealth clients, trusts will focus on primarily personal and non-tax concerns, but maximizing basis step-ups when feasible will still be valuable. For moderate wealth clients using the enhanced exemptions, which might prove temporary, may be a worthwhile endeavor. The challenge will be assuring flexibility, access to trust assets, and for moderate wealth clients in high tax states endeavoring to create non-grantor completed gift trusts to accomplish both estate tax and income tax planning goals. For the ultra-high net worth client, trust drafting will be similar to past planning with emphasis on flexibility, basis maximization, and possible non-grantor status for those in high tax states.

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