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ESTATE PLANNING REPORT

Orange Bank & Trust Company • Trust Services Division

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PLANNING THOUGHTS

2025 could be a major year for estate planning

The year 2025 was destined to be one in which the federal estate tax was reviewed by Congress, given the looming expiration of the doubled exempt amount from 2017's Tax Cuts and Jobs Act. Most assumed that the debate would be whether to extend the current exemption of $13.99 million per person. Instead, the debate may become whether to keep the federal estate tax at all!

Could the federal estate tax be repealed?

On February 13, 2025, the Death Tax Repeal Act was introduced by Republicans in the House and Senate, with more than 200 supporters. The bill would entirely eliminate both the federal estate tax and the generation-skipping transfer tax. In the current draft, the federal gift tax would be retained and the current lifetime exclusion extended, so as to limit the opportunity for income shifting within a family. The gift tax rate would fall to 35%. Step-up in basis at death would be retained.

Despite the significant support for repeal in Congress, the prospects for the legislation are very uncertain. Federal transfer taxes do not raise much net revenue, but repeal would have to be seen as a "tax break for the rich." It would have to be evaluated in the context of additional tax measures under consideration. Many questions are yet to be resolved, including:

- Would death be a realization moment for capital gains?
- What effect would repeal have on existing formula clauses in marital and charitable bequests? Could surviving spouses be inadvertently disinherited?
- What effect would repeal have on existing QDOT and QTIP trusts?
- What happens to dynasty trusts?

The largest imponderable in repealing the federal estate tax might be projecting what happens if a future Congress decides to bring the estate tax back.

An intermediate step

The Republican Chairman of the House Budget Committee, Rep. Jodey Arrington, has introduced the Estate Tax Reduction Act, which would cut the tax rate for the estate and gift tax in half, to 20%. Given the other tax cut promises made by President Trump during his campaign, might this approach be a useful compromise?

Heckerling notes

At the 59th Annual Heckerling Institute on Estate Planning in January, much attention was given to techniques for "locking in" today's larger federal transfer tax exemption before it drops in half at the end of the year, as repeal of the estate tax was not on the radar. Getting clients motivated to take action is a challenge, given that planners have advocated lock-in transfer strategies in the past, only to have Congress cancel a previously legislated drop in the exemption. The result in some cases was regret for making transfers that turned out to be unnecessary for tax savings.

The flip side of that coin is the possibility of a rush by clients to implement wealth management strategies at year-end. Early action could alleviate last-minute time crunches. However, if the possibility of estate tax repeal gets some traction, clients may be forgiven for wanting to wait for the dust to settle before making major wealth moves.

The least popular element of estate planning

A new topic at Heckerling this year was "Planning to Meet One's Maker: The Intersection of Religious Beliefs and Estate Planning."

Until the late 19th century, burial was the only legal method for handling dead bodies. Cremation was then legalized, and it has slowly but steadily gained in popularity, reaching an estimated 62% of dispositions of remains in 2024.

Law professors Tanya Marsh and Quincey Pyatt conducted a survey in March 2024 to learn how much the general public knows about the choices that are now available. These are:

Cremation, in which the dead body is placed in a chamber and heated to a very high temperature until it is reduced to ashes.

Casket burial, the placement of the dead body in specially designed box called a casket, which is either buried in the ground or kept in a mausoleum.

Donation to science, in which the dead body is given to a medical school or other organization that uses the body for medical research or education. When that usage is complete, the body is cremated and the ashes are returned to the family.

Green burial is the burial of the dead body without treatment with chemicals (embalming) either directly in the ground or in a biodegradable container in the ground.

Natural organic reduction, sometimes called "human composting," places the dead body in a container filled with natural materials and microorganisms that break down the tissues into soil. (The presenters emphasized that the process does *not* involve worms.)

Water cremation, or more formally, alkaline hydrolysis, places the dead body in a chamber with a mixture of water and chemicals, which is then heated and pressurized until the body is reduced to liquid and powder called "ashes."

More than 90% of the respondents had heard of the first three options. More than 40% were open to considering any of the newer choices.

Respondents were then asked to rank their preferences for these disposition approaches. Some 62% ranked cremation as a first or second choice, while only 38% identified casket burial that way. Casket burial was the first choice of only 16.7% of those ages 60-78 in the survey, and it was not much higher for younger respondents. Interest in green burial was strong, with roughly 60% of those under age 60 saying they would consider it (only 46% of those over 60 felt that way).

CASES AND RULINGS

Attempted amendment of a revocable trust by the holder of a durable power of attorney is held void.

Garner v. University of Texas at Austin, 317 A.3d 333 (D.C. 2024)

John Garner executed a revocable trust and a durable power of attorney in 2001. He named his nephew, Patrick Garner, as successor trustee in the event of John's incapacity, and as attorney-in-fact. The durable power of attorney was very broad and purported to absolve the power holder from claims of breach of fiduciary duty. Oddly, John never told Patrick about any of this, perhaps because Patrick was still in college at the time. The two were not close, only exchanging occasional notes or Christmas cards.

John fell in the summer of 2020 and was taken to the hospital. As his health deteriorated, and he was found to be incapacitated, the hospital petitioned for appointment of a healthcare guardian. The trial court denied the request because Patrick had already been granted that power. Patrick was contacted about taking responsibility for his uncle, and he said that it was "surprising" that he had been given this role.

In December 2020, John suffered a stroke and was admitted to the hospital again. On December 23, 2020, Patrick executed an amendment of the trust. Originally, the remainder was to be divided among three named charities. Patrick substituted himself as the sole remainder beneficiary of the trust, then worth $3 million. He did not discuss this with John beforehand.

This action violated Patrick's fiduciary duty to John, the court holds. It was not in accordance with John's expectations or his best interest. This duty was not waivable, regardless of the language in the durable power of attorney. Given this decision, the court did not need to reach the question of whether Patrick had violated a fiduciary duty to the charities.

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E-mails insufficient to amend a revocable trust.

Trotter v. Van Dyck, 322 Cal. Rptr. 3d 622 (Cal. Ct. App. 2024)

Jerry and Mary Trotter established a revocable trust in 2011. They acted as trustees, and their son, Timothy, was the successor trustee. After the deaths of the trustors, certain stock was to be distributed to Timothy, and the balance of the trust assets was to be divided equally among several children, including Jerry's daughter from his prior marriage, Van Dyck.

Jerry died first. Mary then had second thoughts about the inheritance for Van Dyck, who had already inherited from her mother. Mary was scheduled for surgery on July 1, 2020, and so began a series of e-mail contacts with her estate planning attorney about amending her testamentary plans. She executed a client questionnaire in anticipation of a meeting with the attorney, in which she stated about Van Dyck: "No contact—would prefer to drop from will—if possible."

The surgery led to complications, and Mary died before meeting with the attorney. As executor of her estate, Timothy asked the probate court whether the e-mails were sufficient to have amended the trust and terminate Van Dyck's interest. They were not, the probate court held, and the California Court of Appeals affirmed. The state's electronic signature provisions did not apply to the e-mails because they were not "transactions" within the meaning of that law. What's more, the series of e-mails showed that Mary was only at the beginning stages of amending her testamentary plans, and that she realized a meeting with the attorney would be required to formalize the changes.

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Undue influence must be proved by a preponderance of the evidence.

Traylor v. Kraft, 552 P.3d 351 (Wyo. 2024)

Donald "Doc" Traylor was a chiropractic doctor in Casper, Wyoming. He had one son and two grandchildren, but he was estranged from them. Doc last saw his grandchildren in 2007, and his final face-to-face meeting with his son, Chadwick, lasted for about an hour in 2007. The nature of subsequent contacts, if any, is not mentioned in the decision.

Doc retired in 2006. He divided his time between Casper and a home in Florida. He befriended his Florida neighbors, the Whites, and in 2019 he asked them for suggestions for his estate plan. They referred him to their lawyer, who had Doc execute a revocable trust. Chadwick and Shannon White were named as successor trustees, and the remainder beneficiaries were primarily Chadwick and his children.

In June, the Whites drove Doc from Florida back to his Casper home. They enlisted a neighbor, the Greens, to help care for Doc's dog and to visit him regularly. About this time, Doc became friends with a handyman, Mr. Dandurand. He drove Doc to Florida in October 2019, and flew to Florida to drive Doc back to Casper in June 2020.

Visiting Doc in August 2020, Mrs. Green discovered he had fallen and could not get up. A visit to the hospital revealed that Doc had prostate cancer. Upon his release, Doc engaged Mel's Helping Hands to provide 24/7 care as he recuperated, owned by Melody and Kevin Kraft. The service was satisfactory.

Doc decided his Florida estate plan was no longer satisfactory, and asked the Krafts for help in getting it revised. Among the changes in the Second Amended Trust, Kevin Kraft was named successor trustee for a $150,000 fee, Mr. Dandurand was left $200,000 and a 21.6% residual interest in the trust, and Mrs. Green was named trustee of a pet trust and also received a residual trust interest. The remainder interest for Chadwick and his children was reduced to 10.58% each.

One of the nurses at Mel's Helping Hands became concerned that Doc was being exploited for his money. She resigned her position and filed a police report. A police investigation found no exploitation, that Doc was "very well taken care of, articulate, and aware of what he was doing and how his funds were being used."

Doc died in August 2021, leaving an estate worth $4 million. In January 2022, Chadwick filed a lawsuit against Kraft, the Greens, and Dandurand alleging undue influence, seeking to have the second trust set aside. After hearing the evidence, the lower court held that there had been no undue influence. What's more, the second trust had included a very clear no-contest clause, which operated to remove Chadwick as a trust beneficiary because he had challenged the testamentary plan. Finally, the court ordered Chadwick to pay the defendant's lawyer's fees.

The appellate court clarified that the standard of proof for under influence was a preponderance of the evidence, not clear and convincing evidence, and that Chadwick had not met that standard. The defendants had indeed had an opportunity to exert undue influence, but they had not done so. The lower court decision was affirmed.

WASHINGTON TALK

Current law or current policy? How should the baseline for the federal budget be defined? The Congressional Budget Office uses a current law analysis, which assumes that the Tax Cuts and Jobs Act provisions that expire at the end of the year will evaporate on schedule. To repeal all those expirations would cost $4.6 trillion over ten years.

Republicans in Congress are instead using a current policy approach. Continuing the current policy is neither a tax increase nor tax decrease. Treasury Secretary Scott Bessent supports this view. "I don't know why we're calling this 'extending the tax cuts'; it is the current tax policy," he said at an event hosted by the Economic Club of New York. "CBO scoring makes Enron look conservative." He called for quick extension of the TCJA provisions.

Ways and Means Republicans will start work on drafting the legislation in March.

Elon Musk has reported that there are 20.8 million centenarians in the Social Security database who are not marked as deceased. This is actually not a new problem, according to an analysis by Justin Fox published by wealthmanagement.com (https://www.wealthmanagement.com/retirement/the-truth-about-social-security-and-dead-people). The Inspector General has been trying to make certain that dead people are not on the benefit rolls for more than a decade. Earlier audits have found a small number of inappropriate benefit payouts, but for the most part, the millions of persons not marked as dead are not collecting benefits. Hence, the cost of updating the records is hard to justify when it won't have a material effect on the benefits being paid.

However, Fox noted that there is a different cost to not updating records properly. The Social Security numbers of inactive accounts are available to enable identity theft. "Between 2006 and 2011, 66,920 of the Social Security numbers registered to people born in 1901 or earlier had wages, tips, and self-employment income associated with them—meaning that people born a lot more recently than that, and probably lacking in authorization to work in the U.S., had used them to get jobs. Between 2016 and 2020, 139,211 of the Social Security numbers registered to people born in 1920 or earlier also did," Fox stated. These folks reported $11.6 billion in taxable income, which implies that they paid roughly $1.4 billion in payroll taxes. That is a windfall for the Social Security Trust Funds, as those numbers will never trigger benefit payments.

The 2019 and 2020 tax return information of President Trump and Elon Musk was stolen from the IRS and leaked to *ProPublica*, which published the information. A lengthy investigation eventually determined that the thief was not an IRS employee but a contractor

for the Service, Charles Littlejohn. At the time of his trial, the government believed that the tax returns of about 18,000 individuals and 70,000 businesses had been illegally transferred to *ProPublica*.

Despite the magnitude of the crime, Littlejohn was only charged with a single count of unauthorized disclosure of income tax returns in his plea agreement. He was sentenced to five years in prison, the maximum for a single disclosure. The minimal charge was controversial at the time.

In February, acting Commissioner Douglas O'Donnell confirmed that, upon further review, the IRS determined that Littlejohn had transferred 405,427 taxpayers' data to *ProPublica*!

The enormous scope of the data breach has upset Republicans. Ways and Means Committee Chair Jason Smith posted to X (formerly Twitter): "If we are to prevent activist IRS employees, like Mr. Littlejohn, from weaponizing taxpayer data, the IRS needs a complete and total overhaul."

New faces. IRS Chief Operating Officer Melanie Krause is taking over as acting Commissioner of the IRS, following the retirement of Douglas O'Donnell. President Trump's nominee for IRS Commissioner, Billy Long, is still awaiting confirmation in the Senate, so a new acting Commissioner is needed.

Direct File is an IRS-run, free online tax filing service, funded by the Inflation Reduction Act. The program was developed by the United States Digital Service (USDS) and the General Services Administration's 18F team, and it was launched in 25 states in January 2024.

The USDS has been integrated into the Department of Government Efficiency (DOGE). A group of 21 USDS staffers resigned jointly on February 25. In their letter of resignation, the signers said they were not willing "to dismantle critical public services," a possible reference to the Direct File initiative.

On the one hand, Treasury Secretary Scott Bessent promised the Senate Finance Committee that Direct File would be kept running for the 2025 tax filing season. On the other hand, Elon Musk has reportedly already "deleted" the 18F group. Whether that move was intended to shutter Direct File is not yet clear.

The federal budget deficit came to $1.1 trillion in the first five months of the fiscal year, according to the Congressional Budget Office. Revenue was up by $37 billion compared to the year-earlier period, a 2% increase. Spending rose by $356 billion, a 13% jump. About one-third of the increased spending was higher Medicare outlays, and the cost of debt service rose by $44 billion.