

How Trusts Can Be Used To Counter Tougher Estate Taxes

By **Jeff Stimpson**

IMMINENT ESTATE PLANNING SHOULD BE A WORRY for wealthy clients as the tax landscape changes with the Biden administration.

The estate tax exemption raised by the Tax Cuts and Jobs Act will sunset in five years—possibly sooner, as the new Congress gears up for a Biden tax overhaul. “There are legitimate concerns that the exemption will be ... possibly as low as \$3 million,” said Mike Winn, managing partner, business succession and planning, at Audent Family Wealth Advisors in Los Angeles.

For wealthy clients, planning now requires broader knowledge of trusts, changes in gifting habits and covering the basics in existing plans, advisors said.

“You’re also forced to address topics that are emotional and sometimes painful to discuss, such as facing your death, frailty in old age and sometimes skeletons in the family closet,” said Michelle Clary, CEO and senior wealth advisor with Piton Wealth at Thrivent Advisor Network in Kennewick, Wash.

Clary said her firm has been using bypass trusts funded by disclaimer for the last decade, anticipating that the federal estate tax exemption will one day drop.

“Now’s the time to consider estate and gift planning techniques, such as grantor retained annuity trusts,” said Brent Lipschultz, partner in the National Tax Group and personal wealth advisor for international tax at EisnerAmper in New York. “Spousal limited access trusts (SLATs) should also be considered if a couple is concerned about future cash flow.”

A SLAT is an irrevocable trust where one spouse makes a gift into a trust to benefit the other spouse while retaining limited access to the assets and removing the assets from their combined estates. One spouse may “indirectly benefit” so long as the non-donor spouse remains married to the donor, Lipschultz said.

“If the spouse/beneficiary predeceases the donor spouse or the spouses divorce, this indirect access disappears,” added Karen L. Goldberg, principal-in-charge of the trusts and estates group at EisnerAmper’s New York office. “That’s why

both spouses typically set up SLATs for each other, understanding that the trusts have to be different enough [to] remove the trust property from the donor spouse’s estate.”

Tools to give away more than the estate/gift tax exclusion also include the grantor retained annuity trust (GRAT) and sales to an intentionally defective trust (IDGT). They are “very effective in our historically low interest-rate environment,” Goldberg said. With a GRAT, the client transfers property to a trust in exchange for an annual fixed payment. With a sale to an IDGT, the client sells property to a trust in exchange for a balloon note, she said.

For both 2020 and 2021, the annual gift-tax exclusion is \$15,000 per donor, per recipient. “The relatively simple strategy of aggressive lifetime gifting using the \$15,000 per year exclusion shouldn’t be overlooked,” Clary said. Especially with a large family, this annual aggregate can add up quickly and be an effective way to get money out of a taxable estate, she said.

Brian Corrigan, partner at the New York law firm Farrell Fritz and a specialist in estate litigation, advises clients to have preparers of wills defeat objections to probate ahead of time. Attorneys should document how the attorney-client relationship was formed and how drafts and correspondence were reviewed with the client.

Safeguard the will itself by noting communications, time entries, correspondence or notes to the execution will be sought in discovery, Corrigan said. Other persons with access to the client’s papers could steal or destroy the original.

Review an estate plan at least every five years—sooner if the tax law or family circumstances change, advisors said. The jurisdiction in which the trust is structured can also be key, Winn said. “There are a number of other states where trusts are perpetual. That can be particularly advantageous in a state like Wyoming or Delaware, which not only allows perpetual trusts but has no state income tax,” he said.

A living trust can help avoid the probate of a will and give the assets outright to heirs, Winn said. “Over time, most estate plans become very fragmented,” he added. **FA**