MOSES & SINGER LLP

Wealth Advisory Winter 2018

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In the Spotlight:

Moses & Singer was named by Best Lawyers a Tier 1 firm in New York City for Trusts and Estates Law and Trusts and Estates Litigation.

Gideon Rothschild was recognized as Private Client-USA Lawyer of the Year by Lawyers Monthly Legal Awards.

Upcoming Events:

Daniel S. Rubin will be presenting "Trust Asset Protection through a Tri-Focal Lens" at the University of Miami's Heckerling Institute in Orlando on January 25th.

Carole M. Bass will be presenting, along with other speakers, "It's Not All About Taxes: How Family Dynamics Can Make a Good Estate Plan Go Bad" on February 1st.

Gideon Rothschild will be presenting "Moving Your Domicile to Florida" for TIGER 21 members on February 14th.

Gideon Rothschild will be presenting on current developments at the 15th Annual NYS Bar/STEP International Estate Planning Conference on March 22nd.

Arlene G. Dubin and **Rebecca A. Provder** will be presenting "Legal Issues in Couples Cases" during the Couples Therapy Training and Education Program on May 4th at the William Alanson White Institute.

Estate Planning Update and Opportunities in Light of Tax Reform

On December 22, 2017, President Trump signed Public Law No. 115-97, more commonly known as the "Tax Cuts and Jobs Act" (the "Act"), into law.

Below we have provided a brief summary of several important changes from the Act that may impact your estate planning. These include:

Temporary Increase of Applicable Exclusion Amount and GST Exemption. While the estate tax was not eliminated, as some had hoped, the Act doubled the amount of wealth that escapes federal transfer taxes. As of January 1, 2018, the new law exempts approximately $11 million dollars for individuals and $22 million dollars for couples (the exact amount depends on an as yet undetermined inflation adjustment) from estate, gift, and generation-skipping tax ("GST"). This means that a married couple can now transfer approximately $22 million dollars during life or upon death, gift, estate and GST tax free. Importantly, however, this aspect of the law sunsets on December 31, 2025, at which time the exemption will revert to prior law ($5.5 million indexed).

Consider Making Lifetime Gifts. If you can afford to do so, you should consider using this additional $5.5 million exemption ($11 million for a married couple) before it is reduced by making outright gifts or, preferably, a gift to an irrevocable "dynasty" trust. A dynasty trust is a generic term for a trust that can last multiple generations through the combined application of the GST exemption and gift tax exemption to transfers to such trust. A gift to a dynasty trust will shift future appreciation and secure the use of the additional applicable exclusion amount and GST exemption notwithstanding the eventual sunset of the new law.[1] Additional leverage of the increased exemption can be utilized by making loans or selling assets to grantor trusts.

Married persons will want to consider designating one's spouse, as well as one's descendants, as beneficiaries of such a trust so as to maintain maximum flexibility. Single clients and some married clients may want to create a self-settled spendthrift trust in states like Delaware in which one can remain a discretionary beneficiary of one's own trust.

In addition, those clients who have existing trusts where GST exemption has not been previously allocated may want to consider making a late allocation up to the increased GST exemption amount without incurring a GST tax.

Given that these significant increases are temporary we urge you to contact us to schedule a timely review of your estate plan.

Basis Opportunities. If your wealth is below the increased exemption amount and you have made gifts of assets that have significant

[1]Note that Connecticut residents should gift with caution as transfers over $2.6 million in 2018 will be subject to gift tax. Since New York does not impose gift tax and currently limits the estate tax exemption to $5.25 million, clients who make lifetime gifts of their full Federal exemption will effectively avoid New York estate tax on twice the state exemption.

appreciation, you may want to consider whether to unravel those gifts in order to obtain a step up in basis at death. But caution is needed since, as noted, the Act sunsets in 2026 when exemptions are set to revert back to 2017 levels.

If you have parents with more modest means, consider gifting low basis assets to them in order to obtain a stepped-up basis upon their deaths.

Need to Review Current Wills. The estate plan of many married couples is often crafted using a formula clause providing that the maximum federal estate tax exemption amount should pass to a "Family Trust" (also known as a "Credit Shelter Trust") upon the death of the first spouse and the balance of the estate should either be distributed outright to the surviving spouse or, alternatively, pass to a "Marital Trust". Such a plan was designed to ensure that no federal estate tax would be due until the death of the second spouse, while at the same time taking maximum advantage of the available federal estate tax exemption. Now that the federal estate tax exemption amount has increased to more than $11 million the formula clause may not work as originally intended.

For example, if your Will uses a formula clause whereby an amount equal to your available federal estate tax exemption passes to a Family Trust for the sole benefit of your children and the balance passes to a marital trust for the sole benefit of your spouse and your entire estate is valued at less than your available federal estate tax exemption amount, the Family Trust for your children would receive your entire estate and your spouse would receive nothing.

In addition, formula clauses tied to the federal estate tax exemption amount could also lead to a significant New York estate tax liability (see next Article).

Clawback. The Act directs the Treasury Secretary to prescribe whatever regulations may be necessary to carry out the purposes of calculating estate tax with respect to differences between the basic exclusion amount in effect at the time of the decedent's death and at the time of any gift made by the decedent. It is not clear at this time whether there will be a "clawback" of the increased applicable exclusion amount or GST exemption if the donor dies after the Act sunsets.

Step-Up Basis is Preserved. The Act continues to permit appreciated property to pass to heirs at death with a "stepped-up" income tax basis.

Income Tax Update

In addition to the gift and estate tax changes and opportunities discussed above, the Act made various changes to the tax code that will have a significant effect on individual taxpayers. Some of the key changes included in the Act are as follows:

Increase the Standard Deduction. The Act will increase the standard deduction to $12,000 for single filers and $24,000 for married couples filing jointly, while simultaneously eliminating the personal exemption for taxpayers and their dependents. In addition, for those with children, the Act will expand the child tax credit from $1,000 to $2,000, while increasing the phase-out to $400,000 for married couples. The first $1,400 of tax credit would be refundable.

Lowering the Top Marginal Income Tax Rate. The Act lowered most of the tax rates where the highest bracket is capped at a 37% marginal tax rate. The Act raises the exemption on the alternative minimum tax from $86,200 dollars to $109,400 dollars for married filers, and increases the phase-out threshold to $1 million dollars.

Limitation of SALT Deduction. For those who live in states with high local taxes (i.e. New York, New Jersey, California), the limitation of the deduction for state and local taxes to $10,000 will be burdensome. Since the limitation applies to trusts as well as individuals you may want to consider moving trusts to a no tax state where possible. The Act also limits the mortgage interest deduction to the first $750,000 in principal value and eliminates interest deductions on home equity loans.

Prenuptial Agreements Impacted. Under the Act, maintenance will no longer be tax deductible with respect to divorce after 2018. Many prenuptial agreements are negotiated on the premise that the payments will be tax deductible. This change may cause some couples to consider divorcing before 2019 or revisit their existing prenuptial agreements to address the law's impact on any future contractual obligations.

Congress's dramatic overhaul of the tax system has changed the tax law in a way that we have not seen in decades. We strongly recommend that you revisit your current estate plan to ensure you are protected against any unintended consequences under the Act. We look forward to hearing from you.

The Impact of Federal Tax Reform on New York Estate Tax

By: Edward Becker

The increased federal estate tax exemption under the Act can have a significant and unintended impact on the taxation of estates at the state level for New York residents.

In 2014, New York significantly amended its estate tax by adopting a new exemption structure designed to match the federal structure then in effect. Accordingly, the current New York exemption of $5.25 million (adjusted annually for

inflation) will continue to apply notwithstanding the change in federal law unless the New York State Legislature enacts an amendment to adopt the now higher federal exemption.

Wills and other dispositive estate planning instruments often contain formula clauses to fund trusts with an amount up to the federal estate tax exemption amount in effect at death. With the doubling of the federal exemption, these trusts may now be funded with significantly larger amounts than what was originally intended and generate an unexpected New York estate tax liability. Moreover, the New York estate tax liability can be especially severe since New York eliminates the benefit of its exemption for taxable estates that exceed the exemption amount by more than 5%.

Consider the following example of a married New York resident that died on January 1, 2018 with a taxable estate of $10 million. The decedent's will included a formula clause to eliminate the imposition of federal estate tax by funding a Family Trust up to the then applicable federal estate tax exemption with the remaining estate passing to the surviving spouse estate tax free by way of the marital deduction. Under the new law the estate would incur a New York estate tax liability of $1,067,600. If the decedent's will instead directed that the credit shelter trust be funded only up to the then applicable New York estate tax exemption, the estate would completely escape both federal and New York estate tax on the first spouse's death. Thus, one small change can result in significant estate tax savings.

Since New York does not impose a gift tax on lifetime gifts one way to insure benefiting from the increased exclusion amount and not lose the benefit of the state exemption is to make lifetime gifts of up to the federal exclusion limits.[1] If you wish us to review your particular situation please contact us.

[1]For decendants dying before January 1, 2019 gifts made within three years of death are taken into account for New York estate tax purposes.

The Surrogate's Court Corner

By: Carole M. Bass

Attempted Lifetime Transfer of Property Where Property Subject to Contract to Make a Testamentary Disposition Deemed a Fraudulent Conveyance

In Schwartz v. Bourque, 2017 NY Slip Op 31621(U) (Surr. Ct. Nassau County, June 14, 2017), the Nassau County Surrogate's Court vacated a deed transferring the decedent's interest in real property to her granddaughter, as a fraudulent conveyance, where the same real property was the subject of a pre-existing contract to make a testamentary disposition in favor of the decedent's daughter.

Contracts to make a testamentary disposition arise in a number of circumstances, most notably in prenuptial and postnuptial agreements. If the parties' intent is that the transferor be permitted during his or her lifetime to dispose of his or her interest in the property subject to the contract to make a testamentary disposition, it is imperative that such intent be included in the contract.

The decedent in the *Schwartz* case, Dorothy Wintersaler, lived in her home with her daughter, Brenda. After the death of Dorothy's husband in 1970, Brenda assumed responsibility for the carrying charges on the home. In 1978, Dorothy and Brenda entered into an agreement providing that Brenda and her husband would pay all of the carrying charges on the property and, in exchange, Brenda and her husband would be permitted to reside in the property for as long as they desire and Dorothy would devise the property to Brenda in her Will.

Thereafter, in 1984, Dorothy and Brenda entered into a second agreement providing that in consideration of Brenda's past payment of the carrying charges and her promise to continue making such payments, Dorothy would convey one-half of her interest in the property to Brenda. Contemporaneously with the execution of the 1984 agreement, Dorothy executed and recorded a deed transferring the property from her name, individually, to Dorothy and Brenda as joint tenants with right of survivorship.

In 2012, Dorothy executed a subsequent deed whereby she purported to transfer her remaining one-half interest in the property to her granddaughter, Christine, thereby severing the joint tenancy between herself and Brenda.

The court determined that the 1978 agreement was not superseded by the 1984 agreement. Since under the 1978 agreement Dorothy was contractually obligated to devise her interest in the subject property to Brenda, Dorothy's attempt to circumvent that obligation by deeding her interest in the property to Christine was a fraudulent conveyance.

Section 275 of the New York Debtor and Creditor Law provides:

> Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditor.

Where, as in this case, a transfer is made without consideration, a rebuttable presumption of fraudulent conveyance arises. In this case, Christine was unable to rebut that presumption.

Section 276 of the New York Debtor and Creditor Law provides:

> "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

New York courts have recognized the difficulty in proving actual fraudulent intent and have, thus, permitted reliance on "badges of fraud" including (i) a close relationship between the parties to the transfer, (ii) inadequate or no consideration, (iii) the transferor's knowledge of the creditor's claim, and (iv) the transferor's retention of the property after the conveyance. In *Schwartz*, the court noted that Dorothy's fraudulent intent was "readily inferable" since Dorothy and Christine had a close family relationship, the conveyance was made with no consideration, Dorothy was aware of Brenda's claim when she made the transfer, and Dorothy continued to reside in the property following the transfer.

View our newly released "What you need to know about Trusts and Estates" video series on our YouTube channel, which include such topics as:

- What is a Will Contest?
- Blended Family Estate Planning
- Planning for Foreign Persons Purchasing/Owning US Real Property
- What is Asset Protection Planning?
- Reasons To Avoid Probate
- Charitable Giving
- Probate and Administration
- Family Offices and Family Business

MOSES & SINGER LLP

Lawyers in Moses & Singer's **Private Client** practice group are internationally recognized for their considerable skill and extensive experience in the fields of estate planning, wealth preservation, and family law. Our lawyers provide a full range of tax and estate planning services to corporate executives, entrepreneurs, family offices, and other high-net-worth individuals. In addition to experience in the traditional areas of will and trust drafting and estate administration, our attorneys excel in the latest techniques to effectively plan for business succession while minimizing taxes and preserving and protecting clients' wealth from potential creditor risks. The client's personal objectives and wealth preservation goals are integrated into the estate planning process. Our attorneys also counsel and represent banks and trust companies regarding fiduciary matters and trust and estate related litigations. Our family law attorneys counsel on prenuptial and postnuptial agreements and collaborative and contentious divorces.

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Since 1919, **Moses & Singer** has provided legal services to diverse types of businesses and high-net-worth individuals. Among the firm's broad array of U.S. and international clients are leaders in banking and finance, entertainment, media, real estate, healthcare, advertising, and the hotel and hospitality industries.

In a world of giant, multi-office law businesses assembled by mergers, built on associate leverage and driven by billable hour quotas, the needs of clients can get lost. Moses & Singer offers a difference. That difference is the attention of leading practitioners-partners in the firm-with the experience and knowledge to provide our clients creative, cost effective, result-oriented representation. The direct involvement of our partners means aggressive, focused problem solving. The firm's attorneys concentrate their practices in the following areas:

- Accounting Law Practice
- Advertising
- Asset Protection
- Banking and Finance
- Business Reorganization, Bankruptcy and Creditors' Rights
- Corporate/M&A
- Employment and Labor
- Entertainment
- Family Office
- Global Outsourcing and Procurement
- Healthcare
- Hospitality, Food Service and Restaurants
- Income Tax
- Intellectual Property
- Internet/Technology
- Legal Ethics and Law Firm Practice
- Litigation
- Matrimonial and Family Law
- Privacy
- Private Funds
- Promotions
- Real Estate
- Securities and Capital Markets
- Securities Litigation
- Trusts and Estates
- White Collar Criminal Defense and Government Investigations