

“Repeal the Estate Tax!” And Other Sound Bites

By: [Timothy J. Kay](#) and [Steffi Gascón Hafen](#)

Next up on the agenda – tax reform. Long the battle cry of the Republican Party, repealing the estate tax has been at the forefront of the battle. With a Republican controlled Congress and White House, what will this mean?

The Much Discussed, but Rarely Applicable, Estate Tax

- *Is Estate Tax as American as Apple Pie?* The modern estate tax was enacted in 1916, repealed for deaths in 2010, but came back to life in 2011. Gift tax was enacted in 1924 (and repealed in 1926, and reintroduced in 1932).
- *99.8% of Estates Are Unaffected.* Today’s estate tax exemption shelters the first \$5.49 Million of a person’s estate from the 40% “death tax” (\$10.98 Million for married couples). After accounting for deductions, credits, and advanced planning techniques, very few estates are affected. The Tax Policy Center predicts that in 2017, 11,020 estates will have to file a Federal estate tax return (of the 2.7 million estates). Of that, 5,190 will owe federal tax. Of the estates that owe tax, the average estate tax rate is estimated at 17%.

Planning That Still Works Amid Uncertainty

- *Annual Exclusion Gifts.* The annual exclusion allows a donor to gift \$14,000 to as many donees as he/she chooses each year (\$28,000 if a spouse joins in the gift) without triggering the gift tax. Use of “Crummey Trusts” allow those gifts to be invested and compounded over time for the beneficiary.
- *Grantor Retained Annuity Trusts.* These trusts allow a trustor to effectively make a low interest loan of investment assets for the benefit of beneficiaries, with all appreciation and earnings in excess of the interest rate passing to the beneficiaries transfer-tax-free. Supercharge this by utilizing valuation discounts on the investment assets contributed to the GRAT.
- *Estate Freeze Installment Sales.* This has the grantor sell assets to a “grantor trust”, a trust which is treated as owned by the grantor for income tax but not transfer tax purposes. Again, all appreciation on the assets will pass via the trust to his/her beneficiaries. Supercharge this by utilizing valuation discounts on the assets and have the donor(s) pay the income tax on the earnings of the grantor trust.
- *Charitable Remainder Trusts.* The grantor contributes highly appreciated assets to a trust exempt from income tax, retaining an income

stream for life, with the remainder going to charity at the donor’s death or the end of the term. The sale of the highly appreciated assets by the CRT is income-tax-free so that 100% of the sales proceeds can be invested to produce a larger income stream for the donor.

“Tax reform. Long the battle cry of the Republican Party, repealing the estate tax has been at the forefront of the battle. With a Republican controlled Congress and White House, what will this mean?”

Much Ado About Nothing?

- *If Estate Tax is Repealed, Other Taxes May Fill the Void.* If the estate tax is repealed, the gift tax may remain in place. President Trump has floated the elimination of the “step up” in income tax basis at death, instead applying a capital gains tax at death. The gift tax would serve as a backstop to eliminate death bed transfers to avoid capital gains tax. Under this scenario, it is critical that irrevocable trusts be flexible and the grantors retain the ability to swap low and high basis assets.
- *Any Relief May be Short-Lived.* The Senate does not have 60 Republican votes so it is not filibuster proof. This means that tax legislation may need to be passed as a Reconciliation Bill which requires only 51 votes and cannot be filibustered. However, a Reconciliation Bill can be in effect for no more than 10 years.
- *Bottom Line.* No one knows what will happen. Effective planning depends upon flexibility. A check-up with your estate planner is advised to take advantage of the laws available to you today and ensure flexibility for future changes.

For more information about Wealth Strategies, please visit www.swlaw.com/services/private-client-services.



Timothy J. Kay is a Certified Specialist in Estate Planning, Trust and Probate Law, California Board of Legal Specialization and is a partner in the Orange County office of Snell & Wilmer. His practice is concentrated in tax, trust and estate matters with emphasis in estate planning, trust and probate administration, estate and gift taxation and trust and estate litigation. Reach Tim at 714.427.7400 or tkay@swlaw.com.



Steffi Gascón Hafen is a member of the firm’s Private Client Services and General Federal Tax practice groups and works in the Orange County and Los Angeles offices. Steffi’s practice is concentrated in tax, trust, and estate matters with emphasis in estate planning, trust and probate administration, and estate and gift taxation. Reach Steffi at 714.427.7076 or shafen@swlaw.com.

[Timothy J. Kay](#) | 714.427.7400 | tkay@swlaw.com

[Steffi Gascón Hafen](#) | 714.427.7076 | shafen@swlaw.com

Plaza Tower | 600 Anton Boulevard | Suite 1400 | Costa Mesa, CA 92626

Denver | Las Vegas | Los Angeles | Los Cabos | [Orange County](#) | Phoenix | Reno | Salt Lake City | Tucson

Snell & Wilmer
LAW OFFICES
www.swlaw.com