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Estate Tax Uncertainty

President Trump has proposed a repeal of the federal estate tax as part of his campaign promises and his recent tax plan. However, as of today there are no details. For example, it is unclear whether the gift tax or generation-skipping transfer tax would be repealed along with the estate tax. While these three taxes are related, some practitioners believe that even if the estate tax is repealed, the gift tax may remain intact to protect against taxpayers shifting assets in order to reduce or avoid income tax. President Trump's most recent proposal does not mention the gift tax.

Furthermore, since the estate and gift taxes go hand in hand with the income tax, a repeal of the estate tax could come with a corresponding loss of stepped up basis for inherited property. Perhaps inherited assets would take a carry-over basis in the absence of an estate tax (as occurred in 2010, when there was a one year optional repeal of the estate tax). If so, the recipient would recognize capital gains tax only upon later sale of the property, based on the difference between the sale price and decedent's original basis. Alternatively, there could be a capital gains tax imposed at death instead of the estate tax. In this case, the recipient would pay capital gains tax upon receipt of the property on the death of a family member, based on the property's date of death value as compared to the decedent's basis. As a result, families facing a federal estate tax would pay less in taxes, as the capital gains tax rates (15% or 20%) are lower than the estate tax rate (40%). However, this approach may actually be more expensive, tax-wise, for families in other circumstances.

Lastly, it is possible that the current rule that provides for a basis step-up to the date of death value would remain, even with estate tax repeal. Only a very few estates (less than 1%) exceed the federal tax exemption and the total estate tax revenue is a very small portion of the government's total budget. So, the estate tax could be repealed without imposing a corresponding income tax adjustment without much impact because the revenue loss is relatively insignificant.

The administration's proposals are not certain, and the political process is still less so. With the current composition of the Congress, the possibility of a filibuster still looms. To avoid it, a budget that uses the "reconciliation process" could move an estate tax repeal forward, but it would likely not be permanent (similar to the Bush tax cuts, it would require a ten year sunset provision).

Without a crystal ball, it is impossible to know the future of the estate tax. For planning purposes, it is prudent to evaluate all aspects of a proposed transaction that has estate or gift tax consequences and proceed with caution.



What is a MOLST?

If you are helping care for a sick friend or family member, you might hear about a “MOLST” form. MOLST is the acronym for Medical Orders for Life-Sustaining Treatment. An individual with a serious medical condition can work with his or her medical providers to fill out the MOLST form. When completed, the MOLST form provides directions on the goals of medical care and what treatments the individual would, and would not, want provided.

For example, the MOLST form allows the patient to request or refuse resuscitation by CPR, ventilation, artificial nutrition or hydration and even hospitalization. The form must be completed with and signed by a physician, nurse practitioner or physician’s assistant. To make it easily recognizable for EMTs, other emergency responders and members of a care team, and due to the critical nature of its content, the form is typically printed on fluorescent pink paper.

You may think that the MOLST form sounds very similar to a living will. In fact, it addresses the same general topics. However, living wills are not binding in Massachusetts. A living will is a letter of guidance to your family and health care proxy, requesting that they consider your wishes with respect to end of life care. A MOLST form is a much more detailed set of specific directions (“medical orders”) from the patient’s physician, usually when the patient has an advanced illness.

A MOLST form does not take the place of a health care proxy. A health care proxy appoints someone to make medical decisions for you if you are incapacitated. A MOLST form does not give authority for anyone to act for you, but, rather, it spells out certain kinds of life sustaining care you want, and do not want, administered.

If you are looking for further details, the Massachusetts Department of Health and Human Services has an in-depth explanation of the MOLST form on its website.

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One of the largest estate planning firms in New England, our attorneys have been recognized for their exceptional experience in the field. The firm carries the highest professional rating in the national Martindale-Hubbell Law Directory and is listed in the Bar Register of Preeminent Lawyers. Many individual attorneys are listed in the Best Lawyers in America and New England, Massachusetts and Rhode Island Super Lawyer lists.

Please feel free to contact the firm if you would like to discuss the matters highlighted in this newsletter, or any other legal matters.

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