SmolenPlevy
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# Report From Counsel

**Insights and Developments in the Law** **Spring 2017**

## *What Trumponomics Could Mean for Death and Taxes*

*By Jason Smolen and Dan Ruttenberg*

During his presidential run, Donald Trump promised to introduce a tax overhaul plan that includes a repeal of the federal estate tax in his first 100 days in office. On the surface, this sounds like great news for wealthy individuals hoping to pass on more of their assets to loved ones. In reality, those same people may face a different sort of tax bite.


*Jason Smolen*


*Daniel Ruttenberg*

President Trump's plan calls for a complete repeal of the federal estate tax. Under current law, the estate tax exclusion stands at 5.45 million dollars for individuals, and 10.90 million dollars for married couples. Estates valued in excess of those amounts are subject to a 40% tax rate. However, any appreciation in the assets of the decedent isn't taxed. Heirs are entitled to a "stepped-up" basis, in which an asset held until the deceased person's death is "stepped-up" to the fair market value at the time of the inheritance.

If President Trump gets his way, the "step-up" could be on its way out. He has proposed replacing the estate tax with a capital gains tax for assets valued at more than 10 million dollars. Heirs would pay taxes based on the original cost of the assets. For example, if you sold 100 shares of Exxon stock that your grandfather bought for two dollars a share more than 50 years ago, you will face a very significant capital gains tax, thanks to the tremendous appreciation in the value of those 100 shares. The "carryover" basis would apply to all inherited assets, including stocks, bonds and real estate.

At this point, Trump's proposals are just that, and it remains to be seen which measures will actually be implemented. Amid all of the uncertainty, now may not be the time for rash actions. It could be a big mistake to change estate plans until we see how things play out over the next few months. However, this isn't the time to sit on your hands, either, and clients should consider the implications of potential changes to the tax code, providing themselves with the maximum amount of flexibility.

Regardless of what happens with estate and capital gains taxes, it's critically important to periodically review and update your estate, whether it's large or small. Here are some reasons why:

- **Tax and estate laws change over time:** The estate tax exemption has gone from $3.5 million in 2009 to the current level of $5.45 million.

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## *Accolades*

SmolenPlevy is honored to announce the firm's inclusion in the 2017 "Best Law Firms" list, published by *U.S. News & World Report* and Best Lawyers. SmolenPlevy is recognized for its outstanding work in the areas of family law, business organizations, and trusts and estates. Firms included in "Best Law Firms" are honored for professional excellence with persistently impressive ratings from clients and peers. The "Best Law Firms" ranking complements the 2017 edition of "The Best Lawyers in America," where Jason Smolen, Alan Plevy and Daniel Ruttenberg are recognized. Jason Smolen is honored as Best Lawyers® 2017 Business Organizations "Lawyer of the Year" for Washington, D.C., and Alan Plevy and Daniel Ruttenberg are named Best Lawyers® 2017.

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# Who Gets the Engagement Ring after a Breakup?

Although engagements are typically a time of joy and associated with new beginnings, some engagements come to an unforeseen end. When this happens, a major question on everyone's mind is "Who will get the engagement ring?" The answer is - it depends. Laws vary by state when it comes to engagement rings and how they are viewed.

*Alan Plevy*

**A Diamond is Forever… or is it?**

Some people consider an engagement ring to be a gift and, once given, the recipient can do with it what she or he wishes. A minority of states agree and consider the ring an unconditional gift. If either person breaks off the engagement, the recipient gets to keep the ring.

A few jurisdictions take a slightly different view and consider the ring an "implied gift." This means that ownership of the ring is determined by who calls off the wedding. If the giver breaks it off, he or she is not entitled to the ring, and it becomes a gift to the recipient. If the recipient breaks off the engagement, then the giver can ask for the ring back.

Most states, however, view an engagement ring as a "conditional gift." The ring is given with the understanding that the couple will get married in the future and symbolizes a verbal contract. Ownership of the ring is not fully transferred until the wedding ceremony is completed.

In Virginia, the Commonwealth's Supreme Court just ruled in December 2016 that the giver of an engagement ring can sue for its return when the engagement ends without a marriage. In 2012, Ethan Dockendorf proposed to his fiancée, Julia McGrath, and gave her a two-carat ring worth about $26,000. Dockendorf broke off the engagement a year later, but McGrath kept the ring. Dockendorf sued McGrath for return of the ring. The Fairfax County Circuit Court ordered McGrath to either return the ring or to pay Dockendorf $26,000 because the ring was a conditional gift. McGrath appealed and argued that her former fiancé was prohibited from suing for the ring because Virginia does not permit lawsuits for breaches of promise to marry. The Virginia Supreme Court decided that the lawsuit was not a suit brought because of the breach of the promise to marry, but one seeking the return of a conditional gift and therefore, wasn't barred.

*Kyung (Kathryn) Dickerson*

One way to avoid lengthy litigation regarding an engagement ring is to have a prenuptial or premarital agreement setting forth who is entitled to the ring if the wedding is cancelled, or if you get married but later divorce.

If you have any questions regarding divorce or family law, please contact Alan Plevy at abplevy@smolenplevy.com or Kyung (Kathryn) Dickerson at kndickerson@smolenplevy.com.

# Make Healthcare Decisions While You're Healthy

Estate planning isn't just about what happens to your assets after you die. It's also about protecting yourself and your loved ones. This includes having a plan for who will make critical medical decisions in the event you're unable to make them yourself. And, as with other aspects of your estate plan, the time to act is now while you're healthy. If an illness or injury renders you unconscious or otherwise incapacitated, it will be too late.

Without a plan that expresses your wishes, your family may have to make medical decisions on your behalf or petition a court for a guardianship. Either way, there's no guarantee that these decisions will be made the way you would want or by the person you would choose.

**2 Documents, 2 Purposes**

To ensure that your wishes are carried out, and that your family is spared the burden of guessing — or arguing over — what you would have decided, put those wishes in writing. Generally, that means executing two documents: 1) a living will and 2) a medical/health care power of attorney (HCPA).

Unfortunately, these documents are known by many different names, which can lead to confusion. Living wills are sometimes called "advance directives," or "health care directives." And HCPAs may also be known as "durable powers of attorney for health care" or "health care proxies."

Regardless of terminology, these documents serve two purposes: 1) to guide health care providers in the event you become terminally ill or permanently unconscious, and 2) to appoint someone you trust to make medical decisions on your behalf.

A living will expresses your preferences for the use of life-sustaining medical

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# *Do You Need to File a Gift or Estate Tax Return?*

If you've made substantial gifts to your loved ones or if you're the executor of an estate, it is important to understand the rules surrounding gift and estate tax returns. Determining whether you need to file a return can be confusing, and in some cases it's advisable to file a return even if it's not required.

**Gift taxes**

Generally, a federal gift tax return (Form 709) is required if you:

- Make gifts to or for someone during the year with certain exceptions: for example, gifts to U.S. citizen spouses are excluded that exceed the annual gift tax exclusion (currently, $14,000); there's a separate exclusion for gifts to a noncitizen spouse (currently, $149,000),
- Make gifts of *future* interests, even if they're less than the annual exclusion amount, or
- Split gifts with your spouse, regardless of amount.

The return is due by April 15 of the year after you make the gift, but the deadline may be extended to October 15. Being required to file a form doesn't necessarily mean you owe gift tax. You'll owe tax only if you've already exhausted your lifetime gift and estate tax exemption (currently, 5.49 million dollars).

In some cases, it may be a good idea to file a gift tax return even if you're not required to do so. For example, suppose you give $10,000 worth of closely held stock to each of 10 family members, for a total of $100,000. Each gift is within the annual exclusion amount, so you don't file a gift tax return. However, 10 years later, the IRS determines that the value of each gift was actually $20,000 and assesses penalties for failure to file a gift tax return (plus taxes, penalties and interest if you've exhausted your lifetime exemption).

Had you filed a properly completed gift tax return at the time you made the gifts, it would have triggered the three-year limitations period for auditing your return. Without a return, there's no time limit on how long the IRS can wait to challenge the valuation of your gifts.

**Estate taxes**

If required, a federal estate tax return (Form 706) is due nine months after the date of death. Executors can seek an extension of the filing deadline, an extension of the time to pay, or both, by filing Form 4768. Keeping in mind that the form provides for an *automatic* six-month extension of the filing deadline, but that extending the time to pay (up to one year at a time) is at the IRS's discretion. Executors can file additional requests to extend the filing deadline "for cause" or to obtain additional one-year extensions of time to pay.

Generally, Form 706 is required only if the deceased's gross estate plus adjusted taxable gifts exceed the exemption. A return is required even if there's no estate tax liability after taking all applicable deductions and credits.

Even if an estate tax return isn't required, executors may need to file one to preserve a surviving spouse's portability election. Portability allows a surviving spouse to take advantage of a deceased spouse's unused estate tax exemption amount, but it's not automatic. To take advantage of portability, the deceased's executor must make an election on a timely filed estate tax return that computes the unused exemption amount.

Preparing an estate tax return can be a time-consuming and costly undertaking, so executors should analyze the relative costs and benefits of a portability election. Generally, filing an estate tax return is advisable only if there's a reasonable probability that the surviving spouse will exhaust his or her own exemption amount.

**Handle with care**

Determining whether a gift or estate tax return is necessary or desirable can be complicated. If you have any questions regarding the estate and gift tax, please contact Jason Smolen at jdsmolen@smolenplevy.com or Daniel Ruttenberg at dhruttenberg@smolenplevy.com.

# *Make Healthcare Decisions While You're Healthy*

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procedures, such as artificial feeding and breathing, surgery, invasive diagnostic tests, and pain medication. It also specifies the situations in which these procedures should be withheld.

An HCPA authorizes a surrogate — your spouse, child or another trusted representative — to make medical decisions or consent to medical treatment on your behalf when you're unable to do so. It's broader than a living will, which generally is limited to end-of-life situations.

**Put your plan into action**

No matter how carefully you plan, living wills and HCPAs are effective only if your documents are readily accessible and healthcare providers honor them.

# SmolenPlevy News

## In the Media:

January's divorce filings are 30% more than any other month. SmolenPlevy Principal and family law attorney Kyung (Kathryn) Dickerson appeared on News Channel 8's *Good Morning Washington* to explain why there is an increase in divorces at the start of the new year.

Divorce is difficult for children and their parents any time of the year, but the holidays can be particularly challenging. News Radio WTOP turned to SmolenPlevy co-founding principal Alan Plevy for insight on how divorced or separated parents can reduce tension levels during the holiday season.

## In the Community:

Devotion to Children (DTC) hosted its 14th Annual Red, Heart & Soul Gala on November 10, 2016. SmolenPlevy Principal Dan Ruttenberg, Vice President of DTC, attended and spoke at the event. All proceeds from the gala will go toward providing affordable childcare for economically disadvantaged families. DTC is committed to providing access to high quality educational and childcare programs for children ages six and under from economically disadvantaged families.

SmolenPlevy Principal Scott Taylor spoke about exit planning and business succession at GMU Business Roundtable's "Entrepreneurship - Begin With The End in Mind" panel discussion on November 15, 2016. He joined business owners and other professionals to discuss strategic and structural considerations for selling your businesses, how to position your business for a liquidity event, business valuations and the importance of seller-side due diligence.

Associate Julie Swerbinsky ran the Niagara Falls International Marathon on November 3, 2016 as part of Team Super George for the Cystic Fibrosis Foundation. The marathon began in Buffalo, New York, and ended at the brink of Niagara Falls in Ontario, Canada. She raised over $1,000 for her team, which will go toward finding a cure for cystic fibrosis.

Associate Brandon Chlarson volunteered at the Fairfax Bar Association's "The Chocolate Caper Mock Trial" during the Chocolate Lovers Festival on February 4-5. Chlarson testified as "the spider" in the civil suit brought against the county by Ms. Muffet in a mock trial based on a children's fairy tale to explain the justice system to children and adults.

## Accolades

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*Northern Virginia Magazine* named SmolenPlevy Principals Jason Smolen, Alan Plevy, Daniel Ruttenberg and Kyung (Kathryn) Dickerson to its "Top Lawyers" list for 2016. Nominated by their peers, the award recognizes SmolenPlevy for its excellence in the areas of family law, business organization, and trusts and estates.

# What Trumponomics Could Mean for Death and Taxes

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- **Changes in family situations:** Your spouse or child has died. You get divorced or married. A close family member has become ill or incapacitated. You re-establish a relationship with an estranged relative.
- **Changes in succession planning:** You need to make sure that you are giving people the assets that you want them to have.
- **Changes in the value of your estate:** You receive a large inheritance or you get lucky and win the lottery.
- **Changes in your economic situation:** Your income level or financial requirements change. You retire.
- **Changes in a business interest:** You buy, sell or liquidate a business.
- **Changes in your Executor/Trustee/Guardian:** Your executor dies, or decides to give up the role.

The debate and speculation surrounding the Trump tax proposals have served to remind many people about the importance of planning for the future. People are now taking a closer look at their estates, and focusing on the best ways to preserve their assets for their heirs.

If you have any questions regarding estate planning and probate, please contact Jason Smolen at jdsmolen@smolenplevy.com or Daniel Ruttenberg at dhruttenberg@smolenplevy.com.