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ALERT MEMORANDUM

Overview of Lifetime Gift and GST Tax Planning

January 30, 2023

This memorandum provides a broad overview of lifetime estate planning and is divided into six parts, as follows:

- Section I discusses the annual exclusion from gift tax and other "tax-free" gifts.
- Section II discusses the benefits of making early use of the gift and GST tax exemptions.
- Section III discusses techniques for making large gifts in light of the significant current gift tax exemption, including ways for the donor or the donor's spouse to retain an interest in the property transferred.
- Section IV discusses ways to enhance lifetime gifts.
- Section V discusses techniques designed to shift the appreciation on assets to lower generations with no or minimal gift tax consequences.
- Section VI discusses the potential benefits of making taxable gifts in excess of the Federal gift tax exemption even though such gifts will result in the imposition of a Federal gift tax.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or any member of the Private Clients Practice Group Team listed below.

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I. Annual Exclusion Gifts and Other Tax-Free Gifts

Making annual exclusion gifts and paying education and medical expenses are simple yet effective ways to transfer assets without a gift tax and without use of the donor's Federal gift or GST tax exemptions.

Annual exclusion gifts

In 2023, each individual may make annual exclusion gifts of up to $17,000 per donee (or $34,000 for married couples who elect to split gifts) without gift or GST tax consequences. We recommend that annual exclusion gifts be made early in each calendar year.

Annual exclusion gifts may be made directly to the individual donee, to a custodian under the Uniform Transfers to Minors Act or to a specially designed trust.

529 Plans

Annual exclusion gifts may also be made to a 529 Plan, which is an income-tax-advantaged college savings account. Up to $10,000 per year may also be used from a 529 Plan to pay for elementary and secondary school expenses.

Depending on applicable state law, contributions to a 529 Plan may be at least partially deductible by the donor for state income tax purposes. Both the income in the 529 Plan and distributions from the 529 Plan for tuition, fees, books and supplies and room and board are free of Federal and state income taxes. Moreover, a donor may elect on his or her gift tax return to pre-pay up to five years of annual exclusion gifts to a 529 Plan.

A gift to a 529 Plan may not be the most efficient use of a donor's annual exclusion, however, since such a gift uses the donor's available annual exclusion with respect to the beneficiary of the 529 Plan, even though a separate exclusion would be available if the donor pays tuition directly. In addition, accumulated earnings that are distributed and are not used for educational purposes are subject to income taxes and a ten percent (10%) Federal withdrawal penalty.

Payment of education and medical expenses

In addition to annual exclusion gifts, payments of another person's medical expenses, health insurance premiums and tuition are exempt from transfer taxes. In order to qualify for these exclusions, payments must be made directly to the qualifying educational institution, medical provider or insurance company.

II. Early use of Federal Gift and GST Tax Exemptions

Gift Tax Exemption

Each individual may make "taxable" gifts (that is, gifts that do not qualify for an exclusion from the gift tax) during his or her life up to the Federal gift tax exemption without generating a gift tax. In 2023, the Federal gift tax exemption is $12.92 million per individual (or $25.84 million for married couples who elect to split gifts).

Thereafter, the exemption will be adjusted for inflation until 2026, when the exemption is scheduled to be reduced to $5 million, indexed for inflation from 2010.

Federal Gift Tax Exemption

2023	**$12.92 million** **($25.84 million per couple)**
2024 & 2025	**Same as above, indexed for inflation**
2026	**$5 million*** **($10 million per couple)***
	**indexed for inflation from 2010*

The gift tax rate for taxable gifts in excess of the gift tax exemption is 40%.

The Federal gift and estate tax exemptions are "unified" in that the use of the Federal gift tax exemption reduces the taxpayer's Federal estate tax exemption available at death. Even though the Federal estate tax exemption is available to the extent that the Federal gift tax exemption is not used, there are benefits to making early use of the Federal gift tax

exemption:

— *Scheduled reduction of Federal gift and estate tax exemptions*. Because the Federal gift and estate tax exemptions are scheduled under current law to be reduced by roughly half in 2026 to $5 million, indexed for inflation from 2010, many clients may wish to fully utilize their exemptions prior to 2026.

— *Removal of investment return from estate tax*. Early use of the Federal gift tax exemption results in the removal of the investment return on the transferred property from the donor's estate tax base, thereby avoiding an estate tax on the increased value of the property.

— *Avoidance of New York state transfer taxes*. New York does not impose a gift tax but does impose an estate tax. Thus, taxable lifetime gifts may avoid entirely a state transfer tax on the transferred property.[1]

Unlike clients in New York and New Jersey, a Connecticut client desiring to make a gift of the full Federal gift tax exemption prior to 2023 would have paid a Connecticut gift tax. However, as of January 1, 2023, the Connecticut gift tax exemption is increased to match the Federal gift tax exemption of $12.92 million and will match the Federal exemption going forward.

GST Tax Exemption

With certain exceptions, gifts to grandchildren and more remote issue are subject not only to a Federal gift tax but also to a Federal GST tax. Further, if a donor creates a trust for the benefit of a child and the child's issue, a GST tax will generally be imposed during the life of the child if distributions are made to grandchildren or more remote issue, as well as upon the child's death if the trust continues for the benefit of grandchildren or more remote issue or if distributions are made at that time to grandchildren or more remote issue. The tax is imposed at the top estate tax rate, which is currently 40%.

The imposition of the Federal GST tax can be avoided, however, to the extent that the donor allocates GST tax exemption to a direct gift to a grandchild or more remote issue or to a multi-generational trust (a "GST-exempt trust"). Like the gift tax exemption, the GST tax exemption in 2023 is $12.92 million per individual (or $25.84 million for married couples who elect to split gifts).

Thereafter, the exemption will be adjusted for inflation until 2026, when the exemption is scheduled to be reduced to $5 million, indexed for inflation from 2010.

Federal GST Tax Exemption

2023	**$12.92 million** **($25.84 million per couple)**
2024 & 2025	**Same as above, indexed for inflation**
2026	**$5 million*** **($10 million per couple)***

**indexed for inflation from 2010*

The property transferred to a GST-exempt trust and the total return on the transferred property are removed from the estate and GST tax base not only of the donor but also of the donor's children and more remote issue, and may, as a result, pass to future generations without an estate or GST tax. An individual who is interested in making early use of his or her Federal gift tax exemption should therefore consider establishing a trust for multiple generations and allocating GST tax exemption to that trust.[2] Further, if a GST-exempt

[1] Under current New York law, taxable gifts made by a New York resident will be subject to New York estate tax on the taxpayer's death if the taxpayer dies within three years of making the gift. Because the New York estate tax on such gifts may not be deductible for Federal estate tax purposes, there is a potential Federal tax cost associated with gifts made by New York residents who die within three years of making a gift. Avoiding this three-year clawback is another reason to make early use of the gift tax exemption.

[2] A donor may also allocate GST tax exemption to existing trusts that are not already exempt from the GST tax. By way of example, a trust that was funded on the termination

trust is set up in Delaware, New Jersey, Florida, Connecticut or another jurisdiction that has either abolished the rule against perpetuities or adopted a very long perpetuities period, under current law, the trust may continue indefinitely or for centuries without the imposition of Federal estate or GST taxes.

III. Strategies for Large Gifts

The scheduled decrease in the Federal gift, estate and GST tax exemptions will create an incentive to use the gift and GST tax exemptions prior to 2026. However, many taxpayers will not be comfortable making gifts of the full gift tax exemption. This section discusses some techniques that take advantage of the current gift tax exemption while allowing the donor or the donor's spouse potential access to the transferred property.

Use of only one exemption by a married couple

If married clients are not comfortable making a gift of the full $25.84 million available in 2023 but wish to give away up to $12.92 million, it would be beneficial for only one spouse to make the gift. In that way, up to one full exemption will have been used and, even if the exemptions are reduced in 2026, the family will have locked in the use of all or a portion of one spouse's increased exemption.

Spousal lifetime access trusts

A gift can be made by one spouse to a trust that includes the other spouse as a permissible beneficiary (a "spousal lifetime access trust" or "SLAT"). A SLAT may be appropriate if the family wishes to make sure that funds are available to at least one of the two spouses. With careful planning, each spouse could create a SLAT for the other spouse, but such trusts need to be structured to avoid characterization as "reciprocal" trusts by varying the terms and timing of the creation of the trusts. Trusts that are deemed to be reciprocal can be "uncrossed" by the IRS, potentially resulting in estate tax inclusion.

Asset protection trusts

Another technique to use part or all of the increased gift and GST tax exemptions is to make a gift to a so-called "asset protection" trust in an asset protection jurisdiction such as Delaware, Connecticut or Florida. If established and administered correctly, it is possible for a donor to be a permissible beneficiary of such a trust without having the trust included in his or her estate at death. These trusts are typically grantor trusts for income tax purposes, and it is therefore important that the donor retain sufficient assets to pay trust income taxes.

In order to minimize the risk that trust assets will be included in the donor's estate for estate tax purposes, there should be no understanding between the donor and the Trustee that the Trustee would make distributions to the donor at his or her request. Further, ideally, distributions from an asset protection trust to the donor would not be made unless the donor has no alternative source of funds.

Gift of residence

Some taxpayers may feel more comfortable giving away illiquid non-income-producing assets and retaining their liquid assets. For such taxpayers, consideration can be given to making a gift of a residence, although, as discussed below, giving away a residence while retaining its use involves certain tax risks. As discussed in Section IV below, the gift of a residence is a less attractive alternative if the residence has a low cost basis.

— *Qualified Personal Residence Trusts*.[3] The use of a qualified personal residence trust ("QPRT"), whereby the donor retains the right to reside in a residence for a term of years (the "QPRT term") and makes a gift of the remainder interest, allows the donor to make use of the gift tax exemption while retaining the use of the property, although the donor will be required to pay rent after the end

of a GRAT or QPRT, discussed in Section V, would not typically be GST exempt, unless an allocation of GST tax exemption was made at the end of the GRAT or QPRT term. A "late" allocation of GST tax exemption may be made to such a nonexempt trust at any time after the donor's interest in the trust terminates.

[3] See Section V for a more detailed discussion of QPRTs.

of the QPRT term. The value of the donor's gift is discounted to take into account the term of retained use. The donor's GST exemption may be allocated to the gift, but not until the end of the QPRT term.

— *Gift and lease back of residence*. A somewhat more straightforward approach than the QPRT, a gift of a residence to a grantor trust is another option for making a gift of a non-income-producing asset. The donor would give the residence to the trust and then rent it back at fair rental value. Because the donor's GST exemption can be allocated to this gift immediately (rather than at the end of the term, as with a QPRT), this approach may be preferable for individuals wishing to make immediate use of their Federal GST tax exemption. Further, because the trust would be structured as a grantor trust,[4] the rental payments would not be subject to income taxes and they thus provide a tax-free way to transfer wealth to the trust beneficiaries. This technique, however, does not provide the leverage that is available with the discounts associated with a QPRT.

— *Risks and administrative issues associated with QPRTs and gifts of residences*.

- As noted above, at the end of a QPRT term, or immediately after the gift of a residence, if the donor wishes to continue to use the property, the donor must rent the property. The rent must be set at the fair market rate: if the rent is less than fair rental value, all or a portion of the residence could be subject to estate tax on the donor's death; conversely, if the rent is more than fair rental value, the donor would be making additional taxable gifts. It is thus important to obtain, and periodically update, an appraisal to determine fair rental value.
- If the gift is not made to a grantor trust but is made instead outright to children or to a non-grantor trust (or grantor trust status ceases at some point), the payment of rent will result in taxable income for the trust.[5]
- Care should also be taken to ensure that expenses are paid by the appropriate party to avoid inadvertent gifts or unintended trust distributions. For example, if the donor of the gift makes capital improvements to the property, the payments would be treated as an additional gift.

IV. Strategies to Enhance Lifetime Gifts

High basis assets

To the extent possible, lifetime gifts should be made with cash or other assets in which the donor has a high income tax basis. While an asset passing at death generally benefits from a "step up" in the asset's income tax basis to its fair market value at the time of death, an asset transferred by lifetime gift retains the donor's basis (a so called "carryover basis").[6] Thus, a lifetime gift of low-basis assets may result in capital gains taxes being payable by the donee on the subsequent sale of the transferred asset, thereby potentially reducing the value of the gift. However, if a gift of low-basis assets is made to a so-called "grantor trust," as discussed below, the donor will pay the capital gains tax on the sale of the assets, including the capital gains tax associated with pre-gift appreciation, so long as the sale occurs during the donor's lifetime. Furthermore, a gift of a low-basis asset may make sense if there is an intention to keep the asset in the family and not to sell it.

[4] See Section V for a discussion of grantor trusts.
[5] The trust's taxable income may be offset in part by depreciation and other deductions.
[6] If, however, the donor's basis is greater than the fair market value of the asset at the time of the gift (so that a sale of an asset would generate a loss), for purposes of determining a loss in the hands of the donee, the donee's basis will be the fair market value at the time of the gift. This exception to the carryover basis rules (which does not apply to transfers to a spouse) has the effect of preventing a donor from transferring losses to a donee.

Grantor trusts

A gift to a trust can be enhanced by structuring the trust as a grantor trust. For income tax purposes, a grantor trust is ignored as a separate entity and the assets held in the grantor trust are treated as being owned by the donor. As a result, all trust income is reported on the donor's income tax return. Because the donor pays the income taxes on trust income, trust assets grow free of income taxes during the donor's lifetime, and the donor is able to provide a gift-tax-free benefit to the trust beneficiaries.

In addition, because a grantor trust is ignored for income tax purposes, transactions between the donor and the trust, such as rental of trust assets, sales and loans, are disregarded for income tax purposes, providing additional estate planning opportunities.

One downside to any gift of appreciated assets is the loss of the step-up in basis on the taxpayer's death. With a grantor trust, however, there is an opportunity to avoid this tax cost by having the grantor "swap" the low basis assets in the trust for cash or high basis assets prior to death.[7] Because of the grantor trust status, the transaction is ignored for income tax purposes and does not result in a capital gains tax. Once the donor owns the appreciated assets, they will receive a step-up in basis at the donor's death.

State income tax planning

If a trust is not a grantor trust but rather a separate income tax payer, many states, including New York and New Jersey, impose a state income tax on the trust's accumulated income and capital gains if the trust was created by a resident of that state.[8] However, it may be possible, depending on the residence of the donor at the time the trust is created, to avoid the payment of state income taxes on trust income.

For example, in both New York and New Jersey, a trust established by a resident of the state will be exempt from paying New York or New Jersey income taxes (an "exempt resident trust") if the trust (i) does not hold any property located in the state, (ii) has no trustees who are residents of the state and (iii) has no income "sourced" to the state (for example a trade or business located in the state). Assuming that the exempt resident trust is not subject to an income tax in another state,[9] the trust will be subject only to Federal income taxes on the trust's capital gains and accumulated income.

For exempt resident trusts created by New York residents, however, New York will impose a state income tax on ordinary income that has been accumulated in the trust if that income is subsequently distributed to a New York resident beneficiary (with an offsetting credit for taxes paid in another jurisdiction, if any). Nonetheless, such a trust provides a deferral of the imposition of New York income taxes on ordinary income eventually distributed to a New York beneficiary, and avoids a New York income tax altogether on capital gains and on accumulated income that is eventually distributed to a beneficiary who resides in another state.

Discount entities

A gift of an interest in a closely held corporation, limited partnership or limited liability company (or similar type of entity) may allow a donor to transfer significant wealth with the benefit of a valuation discount for gift tax purposes to reflect restrictions on transferability and lack of control. In order to take advantage of these discounts, it is important that the entity have a business purpose. It is also important to have a contemporaneous appraisal of the entity, documenting the basis for the valuation discount.

[7] Note, however, that this strategy would not be available for a residence given to a QPRT.

[8] Connecticut also imposes a state income tax on a trust created by a Connecticut resident, but if the trust is created by a trust agreement (rather than under a Will), the tax is based on the proportion of current beneficiaries who are Connecticut residents.

[9] Some states impose an income tax on trust income regardless of the residence of the donor if, for example, a Trustee resides in that state or the trust is administered in that state.

V. Techniques Designed to Shift Appreciation to Lower Generations

The following techniques are designed to pass the future investment return on assets to children or more remote issue with minimal or no transfer taxes.

Intra-family loans

A low-interest loan may be made to family members or to a trust for family members. The IRS issues the "applicable federal rate" ("AFR") monthly, which is the lowest rate that may be used for intra-family loans without gift tax consequences. The AFR for a particular loan will depend on the month the loan is made and the term of the loan.

AFR for February 2023	
Short term AFR *(term of 3 years or less)*	**4.47%**
Mid term AFR *(term of more than 3 years but not more than 9 years)*	**3.82%**
Long term AFR *(term of more than 9 years)*	**3.86%**

If a loan is made to a trust, the trust should have sufficient additional assets to provide equity coverage for the note in order for the transaction to be respected as a loan and to thereby avoid certain potential adverse tax consequences. If the trust is structured as a grantor trust, the loan by the donor to the trust will have no income tax consequences during the donor's lifetime. Therefore, the donor will not report the interest received as income and the trust will not deduct the interest paid. Furthermore, the donor will pay the income taxes on any income earned on the loan proceeds, thereby allowing the trust investments to grow income-tax-free.

To the extent that the total return on the investments made with the loan proceeds exceeds the interest payable on the note, wealth will have been shifted to the borrower free of transfer taxes.

Sales to grantor trusts for a note

A variation on the loan to a grantor trust is the sale of an interest in a closely held corporation, limited partnership or limited liability company (or similar type of entity) in exchange for a note bearing interest at the AFR. The sale of an interest in such an entity can be particularly effective if the interest purchased is valued with a marketability and minority discount. Because the sale is made to a grantor trust, no gain or loss occurs as a result of the sale[10] and there are no income tax consequences associated with the payment of interest. The valuation discount and any total return on the asset sold to the trust exceeding the interest rate on the note will shift wealth to lower generations, free of transfer taxes. As with any loan to a trust, the trust should have sufficient assets to provide equity coverage for the note.

Grantor retained annuity trusts ("GRATs")

A GRAT may be used to transfer to children (or trusts for children), on a gift-tax-free basis, the total return on assets transferred to the GRAT in excess of a benchmark interest rate. A GRAT is a trust in which the donor retains the right to receive a fixed annuity for a term of years that is designed to return to the donor virtually the entire amount of the initial gift, plus interest at the benchmark rate. The benchmark rate for a GRAT is approximately 120% of the mid-term AFR in the month the GRAT is established (4.6% for February 2023). At the end of the GRAT term, if the total return on the trust property exceeds the benchmark rate, any remaining property in the trust passes to children or to trusts for their benefit, without the imposition of a gift tax. Because a GRAT is a grantor trust, the donor pays the income taxes on trust

[10] However, it is possible that on the cessation of grantor trust status, including by reason of the death of the donor, a realization event will be deemed to occur, resulting in the imposition of a capital gains tax if the note is outstanding at that time. Because of this risk, it is preferable to sell a high-basis asset and to endeavor to repay the note prior to the cessation of grantor trust status.

income, with the result that the trust grows income-tax-free.

If the total return on the trust property is equal to or less than the benchmark rate, all of the trust property will be returned to the donor, but at no tax cost to the donor. If the donor dies before the end of the GRAT term, the trust property is includible in the donor's taxable estate, and therefore there will generally be no tax benefit (or tax cost) associated with the GRAT.

The present value of the remainder interest in the GRAT is a taxable gift. The value of the gift equals the value of the assets transferred to the trust less the present value of the donor's retained annuity. The annuity is set so that its present value absorbs almost the entire value of the property given to the GRAT. As a result, the present value of the remainder interest, and, thus, the taxable gift, is close to zero. Further, because the annuity is typically stated as a percentage of the value of the assets transferred to the GRAT, if the value of those assets is increased on an audit of the gift tax return, the donor's retained annuity will also increase, and the taxable gift will still be minimal. This self-adjustment mechanism is particularly valuable if the asset transferred to the GRAT is difficult to value.[11]

Qualified personal residence trusts ("QPRTs")

A QPRT may be used to transfer a primary or secondary personal residence to children (or trusts for children) at a discounted value for gift tax purposes. To create a QPRT, the donor transfers a residence, or a fractional interest in a residence, to the QPRT while retaining the right to occupy the residence, and the obligation to pay expenses on the residence, for a term of years. After the termination of the QPRT term, the residence is typically held in further trust for a spouse or children. If the donor wishes to continue to use the residence after the end of the QPRT term, he or she will be required to enter into a lease with the trust and pay fair market rent, as determined by regular appraisals.

The present value of the remainder interest in the QPRT, valued at the time of funding, is a taxable gift. The present value of the remainder interest is calculated by reducing the value of the residence (i) by the present value of the donor's retained interest and (ii) to account for the possibility that the donor will die during the term, in which case the residence will revert to the donor's estate. As a result, the longer the QPRT term, the smaller the taxable gift. On the other hand, a longer term increases the risk that the donor will die prior to the termination of the QPRT term, which would result in an inclusion of the residence in the donor's taxable estate and a possible "clawback" of previously used gift tax exemption.[12]

The value of the residence may also be discounted if a fractional interest in the residence is given to the QPRT. In addition, as with any lifetime gift, if the value of the residence appreciates over time, the appreciation is also removed from the donor's transfer tax base without gift taxes if the donor survives the QPRT term.

Because a QPRT is a grantor trust, if the residence is sold during the QPRT term, the donor will pay the capital gains taxes imposed as a result of the sale. On the sale of the residence during the QPRT term, the QPRT will typically either invest in a new residence or convert to an annuity trust for the donor.

QPRTs are generally more effective if the residence transferred to the trust has a high income tax basis at

[11] The use of a GRAT for a difficult to value asset could, however, create other issues, including, if the asset is illiquid, having a source of cash to pay the annual annuity or, if the annuity is to be paid in kind by transferring interests in the asset back to the donor, annual appraisals.

[12] Under proposed regulations, if a QPRT donor dies during the retained term (and the residence is therefore brought back into the donor's estate) during a time when the estate tax exemption is lower than the gift tax exemption that was used by the donor on the gift, the donor will not get the benefit of the higher gift tax exemption. In other words, under these regulations and the scheduled reduction in the estate tax exemption, the use of the currently high gift tax exemption will not be "locked in" if the QPRT term extends beyond 2025 and the donor does not survive the QPRT term.

the time of the transfer[13] and if it is anticipated that the residence will not be sold during the QPRT term.

Charitable Lead Annuity Trusts ("CLATs")

For the charitably inclined, a CLAT is an effective means of passing to children the total return on assets in excess of a benchmark rate. A CLAT operates in a similar manner to a GRAT, except that the annuity is paid to charity instead of to the donor. The annuity may take the place of part or all of the donor's regular charitable gifts.

As with a GRAT, the CLAT annuity is stated as a percentage of the initial value of the property transferred to the CLAT and is fixed as of the date that the CLAT is created. Like the annuity payable to the donor of a GRAT, the charitable annuity for a CLAT is set by a formula designed so that its present value absorbs almost the entire value of the property given to the CLAT. Charity will receive over the CLAT term the entire amount of the initial gift to the CLAT, plus interest at a benchmark rate of approximately 120% of the mid-term AFR in effect in the month of the gift to the CLAT or in either of the two months preceding the gift to the CLAT.

A CLAT can transfer significant assets to children without a gift tax cost. If the total return on trust investments during the charitable term exceeds the benchmark rate, the excess return passes to children at the end of the term, free of Federal gift tax.

A CLAT may be structured as a grantor trust. In that event, the donor will receive an income tax deduction in the year the CLAT is created equal to the present value of the annuity payable to charity over the CLAT term (which, as noted above, will equal almost the entire value of the initial gift to the trust). During the term of the CLAT, however, the donor will pay income taxes on trust income with no offsetting charitable deduction. As with other grantor trusts, a CLAT structured as a grantor trust will grow income-tax-free because the donor pays the income taxes on the trust income.

A CLAT may also be structured as a non-grantor trust, in which case the donor does not benefit from an up-front charitable deduction from income tax. Instead, a non-grantor CLAT receives a charitable deduction each year for the charitable annuity, with the result that it may pay minimal income taxes over the CLAT term.

VI. Taxable Gifts in Excess of the Federal Gift Tax Exemption

Lifetime taxable gifts in excess of the Federal gift tax exemption are subject to a Federal gift tax at a 40% rate, which is the same as the estate tax rate.

However, because of a difference in how the estate tax and the gift tax are calculated, the payment of a gift tax (in lieu of an estate tax) can reduce overall transfer taxes. A gift tax is imposed only on the amount of property received by the donee (a "tax exclusive" tax), whereas the estate tax is imposed on the entire estate, including both the property received by the heirs and the property used to pay the estate tax (a "tax inclusive" tax). Note, however, that if the donor of a gift dies within three (3) years of making the gift, the gift tax will be brought back into the donor's estate, thereby eliminating the tax benefit associated with the tax exclusive nature of a gift tax.

Moreover, as discussed above, in a number of states, including New York, there is no state gift tax but there is a state estate tax, and therefore lifetime gifts (including those in excess of the gift tax exemption) may escape state transfer taxes.[14]

If you have any questions regarding this alert memorandum or your estate plan, please contact any of the attorneys in the Private Clients Practice Group.

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[13] See discussion in Section IV regarding the benefit of making gifts of high basis assets.

[14] See also footnote 1 regarding the potential transfer tax cost in New York of a gift if a New York resident donor dies within three years of making a gift.