

# Changing Environment May Necessitate Trust Revisions

BY: JUSTIN L. STARK, ESQ.

Although death and taxes are certain, the timing of death and the tax environment in effect at one's death are not certain at all. For example, simply within the past twenty years, the federal estate tax exemption has shifted from \$650,000 (in 1999) to \$11,400,000 (in 2019), and will undoubtedly continue to change. The backdrop to this ever-changing estate tax environment has been the stock market rise to record highs and the omnipresent capital gains tax. Accordingly, trustees and beneficiaries of irrevocable trusts are increasingly seeing trusts with significant appreciation and capital gains tax liability while over 99% of estates do not pay estate tax.

When estate tax exemptions were lower, avoiding estate tax by using irrevocable trusts was a valuable strategy; however, the current status of many old trusts requires trustees and beneficiaries to balance paying capital gains tax with diversifying trust investments and raising cash for distributions.

Even after a beneficiary's death, heirs receive assets with the same capital gains tax liabilities because the current beneficiary's estate tax exemption is often "wasted." Many families may save taxes by seeking estate tax inclusion, and the corresponding basis adjustment, rather than continuing to exclude property from estate tax.

Under current law, an irrevocable trust may be modified to give the current beneficiary certain powers over the trust property that will cause appreciated assets to be included in

the beneficiary's estate. Including property in an individual's estate causes the income tax basis of such property to be "stepped-up," or adjusted to its fair market value at the individual's date of death, whether or not estate tax is actually paid.

Upon an asset's basis step-up, the capital gains tax that would otherwise be due upon sale is effectively eliminated, and trustees and remainder beneficiaries then may diversify or raise cash with reduced or eliminated capital gains tax exposure.

Ohio law provides multiple methods to modify irrevocable trusts to insert such powers, including decanting, requesting a judicial modification, and agreeing privately to trust modifications. Each method has distinct advantages and disadvantages, but all may ultimately provide families with ability to leverage the current estate planning environment to optimize the basis of assets inherited or retained in trust.

Modifying irrevocable trusts to cause estate tax inclusion is just one of the tax-savings opportunities that the current estate tax and trust law environment provide, but it can be an invaluable technique for beneficiaries of estate tax-exempt irrevocable trusts created and funded in prior years.

*Justin L. Stark is an associate at Schneider Smeltz Spieth Bell, LLP. Contact him at [jstark@sssb-law.com](mailto:jstark@sssb-law.com)*