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Proposed Tax Legislation Could Have Significant Consequences

In our last newsletter, we forecast potential changes to estate taxes due to the majority maintained by the Democrats in the House of Representatives and the slight advantage the Democrats have in the Senate because Vice President Harris, a Democrat, casts the tie-breaking vote. The President recently released his American Family Plan (AFP) which includes a number of proposed changes that will impact taxes on our readers' estates.

If passed, the AFP would, at death, impose a tax on unrealized capital gains exceeding \$1 million. Also, the capital gain would be taxed as ordinary income. How do these changes affect you? Presently, appreciated assets are taxed only upon their sale. Assume you had purchased stock for \$100,000.00 ten years ago which has

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Spring Cleaning — Time To Review and Renew

Tax season is over! Spring has FINALLY sprung! It's time to "review and renew." Each spring, we at Berwitz & DiTata LLP encourage our clients, friends and "would be" friends to focus on estate planning, refresh those resolutions and stop procrastinating. We call it our annual "Review and Renew" program.

If you have never created an estate plan, now is the time. Although estate planning is rarely a topic people look forward to addressing, we are dedicated to helping clients identify and implement their estate planning objectives with ease and efficiency. We believe that our success is founded on this fundamental commitment to communicate with our clients in a caring and responsive manner. Those who have met with us in a one-on-one consultation know that we believe that everyone can benefit from estate planning regardless of personal income or net worth. Everyone has concerns regarding the future. For instance: How can I avoid probate or the dissipation of my assets to estate taxes? How can I avoid losing control of my assets if I become disabled? How do I protect myself and my family from devastating nursing home costs? Can assets still be protected if a loved one is already in a nursing home? How can I protect my minor children? How can I protect my disabled child or the assets that he or she may one day inherit? In designing strategies to effectuate our clients' goals, we offer detailed advice and a high level of technical expertise. Now



is the time to achieve estate planning peace of mind! Ask those questions, explore the options, get it done!

If you created your estate plan or reviewed it last more than 3 years ago - now is the time. Are your documents up to date? Have there been changes in the law or in your life that should now be considered? The documents that address the needs of a single person are frequently insufficient when he or she marries. If a couple has children, the appointment of a guardian should be a key factor in estate planning. Those documents that were created when the kids were small may no longer reflect their parents' wishes now that the kids have grown and flown. Indeed, once your child reaches the age of 18, he or she should have a valid and enforceable Health Care Proxy empowering you or another to make health care decisions. The "sandwich generation" is discovering that the joy and responsibility of raising children is all too fre-

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quently overshadowed by the illness of parents. The need for estate planning takes on new meaning as one approaches retirement and, if illness threatens, timing becomes more critical. Lifetime changes affect estate

planning. Even if you can't conceive that the changes in your life may have an impact on your estate planning documents, an estate planning review is a vital element to ensuring that your wishes will be accomplished.

Because Berwitz & DiTata LLP understands the importance of keeping the plan current, we offer our clients a unique value-added component: a complimentary three-year review. For those who have not yet retained our services, there is a nominal fee to review your plan. Let us help you realize your estate planning objectives.

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grown in value to \$500,000.00. If that stock were sold today, you would realize a capital gain of \$400,000.00. It would be taxed as a long term capital gain because you owned it for more than one year. As a result, you would be taxed at a special lower tax rate of 20%, resulting in a tax bill of \$80,000.00. Under the AFP, the capital gain on this sale will be treated as ordinary income and be taxed at a much higher rate: as high as 43.4% (39.6% ordinary income tax plus 3.8% investment income tax) or \$175,600, an increase of over \$95,000.00.

The “basis” of an asset is the value used to determine the capital gain. With stock, the basis is the purchase price, \$100,000.00 in the example used above. For homes or other real property, the basis is the purchase price *plus* the cost of capital improvements. Capital improvements include adding an in-ground pool or an extension on the property, finishing a basement that was unfinished, upgrading a kitchen or bathroom and replacing windows. Appliances purchased for the new kitchen would not be considered a capital improvement. Currently, capital gains tax is due when the property is sold. That does not change under the AFP. However, what if you gift the appreciated stock to a child or some other person?

Under the current rules, the recipient's basis for the gift is the *lower* of the fair market value or the gift-giver's basis. So, in the example above, the child receiving the appreciated stock would stand in the shoes of the stock-giving parent and have the same basis — \$100,000.00. If the child sells the stock, the child owes capital gains tax on the appreciation of \$400,000.00.

Under the AFP as currently proposed, the mere transfer of the appreciated asset will result in capital gains tax whether or not the asset is sold. This means that if the AFP passes, the child receiving the \$500,000.00 gift of stock will owe tax of more than \$95,000.00 immediately, even if none of the stock has been liquidated! Fortunately, most readers will not be affected by this potential immediate tax because the AFP only imposes the tax on unrealized capital gains worth over \$1 million.

Currently, persons who hold on to their appreciated assets until death receive a “tax gift” from the government. The basis of their appreciated assets step-up to their fair market value as of the date of death of the owner. Assume that the stock discussed above is retained by the parent, continues to appreciate in value and is worth \$600,000.00 at the parent's death. That becomes the new

basis. If the stock had been sold the day before death, the capital gain would be \$500,000.00 and the parent would have been liable for \$100,000.00 in capital gains tax. However, no tax would be due if the stock is sold for \$600,000.00 after the parent's death because the new stepped-up basis is \$600,000.00 and there would be no taxable gain realized from the sale (sales price of \$600,000.00 less stepped-up basis of \$600,000.00 equals zero profit). This saves the family \$100,000.00. For this reason, under current law, a much more favorable tax treatment results if the appreciated asset passes as the result of the owner's death.

Unfortunately, the AFP also includes a drastic change to the “step-up in basis” rules. The AFP delivers a triple whammy. It eliminates the step-up in basis, the death of parent results in a transfer of the asset that will cause a tax to be due, and the appreciation will be treated as ordinary income. So, the stock worth \$600,000.00 that had a basis of \$100,000.00 could result in a taxable gain of \$500,000.00 and be taxed as high as 43.4% resulting in a tax of \$217,000.00.

The change in the step-up in basis rules under the AFP also creates an administrative nightmare. How many

of us retain the records that prove the basis of our appreciated assets? Stocks may be purchased over a period of time at different price points. Companies whose stock we own could have been taken over by other companies and new shares issued. We may have purchased the stock through one brokerage house but later transferred the account to a new brokerage. How do we identify the dates and purchase prices of each of the shares owned? What if a child must calculate the basis because he or she is handling the affairs of an incapacitated parent? How will that child identify the purchase date for these stocks? Under the existing law, maintaining accurate and complete records relating to the purchase of appreciated assets was less important if the appreciated assets received an automatic step-up in basis at the death of the owner. The basis at death is readily ascertainable — it is the fair market value as of the date of death.

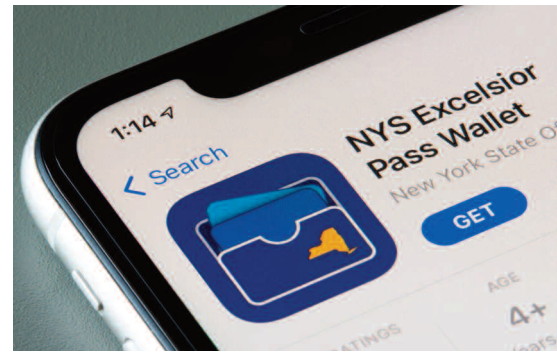
A further issue concerns the fact that the AFP does not specify an effective date in the proposal. It is possible that the changes could be retroactive to January 1, 2021. This would cause transactions that had no tax implications when made to result in a significant unforeseen tax.

As disturbing as these issues seem, passage of the AFP in its current form is questionable because the balance of power in the Senate is so tenuous and the Senate Republicans are opposed to the AFP. No doubt, there will be more to follow. In the meantime, this is an excellent reason to schedule a meeting with us to review your estate plan to ensure that your wishes are incorporated or, if you have not implemented a plan, to put one in place for your peace of mind and the protection of your loved ones.

New York State Excelsior Pass

Now that the CDC has relaxed rules for vaccinated individuals, and many businesses have fully reopened in New York State, it may become necessary for individuals to provide proof of a COVID19 vaccination. The New York State Excelsior Pass provides digital proof of vaccination. It is a free, fast and secure way to provide proof when mandated and participation in the program is voluntary. If you choose not to participate, you may show alternate proof such as your paper vaccination card.

The pass can be obtained online 15 days or more after you have received your final vaccination. You can obtain your pass by accessing the Excelsior Pass website at <https://epass.ny.gov>, from your smart phone if you prefer digital access or your computer if you prefer a



printed pass. The steps are simple and the prompts are easy to follow. Have your vaccination card handy. When you finish, your pass will be displayed.

If you have a digital wallet on your phone, you can easily download the pass to your digital wallet. Otherwise, you can print a paper copy and carry it with you or download an “Excelsior Pass Wallet” to your phone from the Apple App Store or Google Play Store. You will now be able to easily access and provide proof of vaccination when necessary.

The New Power of Attorney Law

On December 15, 2020, Governor Cuomo signed into law changes to the New York State Power of Attorney. Changes will take effect on June 13, 2021 and the new forms *cannot* be executed before that date. This also means that the old form should not be executed on or after that date.

There are a number of changes effected by the new statute. The law now allows the principal, the one who is appointing an agent, to direct a third party to sign the Power of Attorney on his or her behalf. As a result, a competent adult who is disabled may implement a Power of Attorney — something which was not clear under the old law. The form has been simplified. The Statutory Gifts Rider,

which was extremely complicated and difficult to properly execute, has been eliminated. The new law imposes sanctions on financial institutions which unreasonably refuse to accept a valid Power of Attorney and includes a “safe harbor” provision for third parties who do accept a Power of Attorney in good faith.

It is important to note that the new law does not affect the validity of Powers of Attorney that were validly executed prior to June 13, 2021. Not only will they remain effective, but all Powers of Attorney executed prior to June 13, 2021 will have the protection from the new law which allows damages against third parties who unreasonably refuse to honor the Power of Attorney.



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In the News...

As part of our goal to keep you informed, we provide the following updates:

Coffee with Kristi

Join us for Coffee with Kristi. Our monthly series will feature attorney Kristi DiPaolo who will answer your estate planning questions. The next programs will take place on the following dates, from 8:00 a.m. to 9:00 a.m., via Zoom:

June 29, 2021

July 27, 2021

August 31, 2021

To register, please check our website (www.berwitz-ditata.com) or Facebook page ([www.facebook.com](https://www.facebook.com/berwitzditata)

[/berwitzditata](https://www.berwitzditata.com)) or call Arlene at (516) 747-3200. Our website and Facebook page will be updated during the first week of each month for sign-up links.

We want your feedback! If you have topics of interest that you would like Kristi to discuss in future programs, please contact us through our website, email arlene@berwitz-ditata.com or call Arlene at (516) 747-3200.

Changes to Medicaid Home Care Rules

As we reported in our last issue, changes to the rules for eligibility for Medicaid home care benefits were to be implemented as part of the Governor's 2021 budget. Originally, changes were to take effect on

October 1, 2020 and require a 30 month look-back for home care applications with a penalty period for transfers made after October 1, 2020. However, protections afforded by the FFCRA Families First Cares Act prohibit New York State from restricting Medicaid eligibility during the pandemic. The New York State Department of Health has requested that implementation be further delayed to January 1, 2022. This means there is still time to make transfers and apply for Medicaid home care benefits without penalty provided that the application is submitted before implementation of the new rules. If you are considering applying for Medicaid home care for yourself or a loved one, now is the time to act! Berwitz & DiTata LLP can assist you.

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