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Gliding Over the Cliff: The Permanent Federal
Estate, Gift and Generation Skipping Tax

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A. Does Credit Shelter Planning still make sense in light of Portability

1. The New Federal Estate Tax, Federal Gift Tax and Federal Generation Skipping Transfer Tax under the American Taxpayer Relief Act of 2012, signed January 2, 2013 (the "2012 Tax Act")
 - a. In 2013, each individual has an applicable exclusion amount for federal gift, estate and GST purposes in the amount of \$5,250,000, pursuant to the 2012 Tax Act. The exclusion amount increased from 2001 until it reached \$3,500,000 in 2009 and then \$5,000,000 in 2010 and 2011 and \$5,120,000 for 2012 as a result of the Tax Act signed on December 17, 2010. The 2012 Tax Act extends the \$5,000,000, indexed for inflation from 2011, permanently (or until Congress changes it again).
 - b. The following chart shows the phase-in of the applicable exclusion amount and tax rates, historically, currently and as presently stated in the law for the next few years, unless they are further tinkered with by Congress, as the 2012 Tax Act made the changes permanent, meaning no current expiration date:

Year	Minimum tax rate	Top Federal Estate Tax, GST Tax and Gift Tax Rate	FET Exemption Amount	GST Exemption	Gift Tax Exemption
2001	37%	55% + 5% on large estates	\$ 675,000	\$1,060,000	\$ 675,000
2002	41%	50%	\$1,000,000	\$1,100,000	\$1,000,000
2003	41%	49%	\$1,000,000	\$1,120,000	\$1,000,000
2004	45%	48%	\$1,500,000	\$1,500,000	\$1,000,000
2005	45%	47%	\$1,500,000	\$1,500,000	\$1,000,000
2006	45%	46%	\$2,000,000	\$2,000,000	\$1,000,000
2007	45%	45%	\$2,000,000	\$2,000,000	\$1,000,000
2008	45%	45%	\$2,000,000	\$2,000,000	\$1,000,000
2009	45%	45%	\$3,500,000	\$3,500,000	\$1,000,000
2010	35%	35%	\$5,000,000	\$5,000,000	\$1,000,000
2011	35%	35%	\$5,000,000	\$5,000,000	\$5,000,000
2012	35%	35%	\$5,120,000	\$5,120,000	\$5,120,000
2013	40%	40%	\$5,250,000	\$5,250,000	\$5,250,000
After 2013	40%	40%	Indexed for inflation from the \$5m of 2011	Indexed for inflation from the \$5m of 2011	Indexed for inflation from the \$5m of 2011

- c. The re-unification of the gift, estate and GST applicable exclusions make our planning much easier. However, keep in mind that the gift tax and GST exemptions may be used differently, causing a different amount remaining after gifts during life. For example, with the irrevocable life insurance trust or ILIT, you can have the premiums fully sheltered for gift tax purposes by the annual exclusion but need to allocate GST exemption to the premiums paid to make the trust exempt from GST, and other gifts to children in excess of the annual exclusion may use gift tax exemption while not using any GST exemption.
 - d. Note: the annual exclusion from federal gift tax is now \$14,000 per donor per donee per year, as a result of inflation.
 - e. Note: those clients who used their full \$5,120,000 gift tax exemption in 2012 have another \$130,000 of gift tax exemption available in 2013, as a result of the adjustment of the applicable exclusion amount for inflation.
2. Portability. §2010(c)(4) and (5) of the Internal Revenue Code (“Code”)
- a. Portability was enacted with the 2010 Tax Act for the years 2011 and 2012 only.
 - b. Pursuant to the 2012 Tax Act, portability was made permanent.
 - c. Portability means that if when the first spouse dies, the decedent does not use decedent’s entire applicable exclusion amount, then the deceased spouse’s unused applicable exclusion (“deceased spousal unused exclusion amount” or “DSUE”) is added onto the surviving spouse’s applicable exclusion amount for use by the surviving spouse for lifetime gifts and in the spouse’s estate.
 - d. Portability does not apply to the GST even though it does apply to both gift and estate tax.
 - e. There is no NJ portability concept for either NJ inheritance or estate tax.
 - f. Portability applies only if an election is made under §2010(c)(5)(A) of the Code on a timely filed Federal Estate Tax return Form 706 in spouse #1’s estate, and for first spouse decedents who die on or after 1/1/11.
 - g. Even if the decedent’s estate does not otherwise have to file a Form 706 based on the applicable exclusion amount, the estate must file the Form 706 to elect portability.
 - h. DSUE: the unused applicable exclusion of the last deceased spouse – need to be careful when a surviving spouse remarries and the potential loss of the DSUE from deceased spouse #1 if spouse #2 dies before surviving spouse with a smaller DSUE available for surviving spouse.
 - i. DSUE can be used for gifts as well as for the surviving spouse’s estate so if a surviving spouse remarries or plans to remarry, consider using some or all of the DSUE from deceased spouse #1 for lifetime gifts so that even if spouse #2 dies before surviving spouse, the DSUE from spouse #1 is not lost.
 - j. If surviving spouse dies before spouse #2, spouse #2 can inherit surviving spouse’s DSUE, which could potentially be all of surviving spouse’s applicable exclusion amount if the DSUE from deceased spouse #1 was sufficient to cover all of surviving spouse’s assets on death.
 - k. Portability is more of a post-mortem cure than a planning tool due to its complexity, its potential loss resulting from a remarriage, and for the following reasons in ¶3 and ¶4 below.
3. Tax reasons to continue credit shelter planning:
- a. The amount that goes into the credit shelter share and any growth thereon is not subject to federal or NJ estate tax in the estate of the surviving spouse – (ie

- appreciation on the assets is kept outside of the taxable estate of the surviving spouse) – whereas,
- b. The amount that passes outright to a surviving spouse is taxable in the spouse's estate, including the growth.
 - c. Ability to capture income that is not needed by surviving spouse in the trust for the benefit of surviving spouse in the future and/or remainder beneficiaries – prevent leakage from the exemption share.
 - d. Portability is not applicable to GST so not using a credit shelter trust means that all or part of decedent's GST exemption may be wasted – decedent's GST exemption can be applied to the credit shelter trust but not to assets left outright to the surviving spouse.
 - e. Leverage abilities with fractional interests to enhance the use of the credit shelter trust in the first estate and minimize the estate tax on the second death putting decedent's share of assets in trust, keeping them separate from surviving spouse's interest in same assets – ie tenants in common assets, LLC, LP, etc.
4. Non-Tax reasons to continue credit shelter planning:
- a. Creditor protection may be provided by the credit shelter trust, which is not available for the outright to spouse bequest – including accidents, professional liability, divorce, etc. – protect spouse from him/herself.
 - b. Protecting the assets for the deceased spouse's preferred remainder beneficiaries (ie deceased spouse's descendants) and against the surviving spouse's new spouse, new spouse's descendants, any other con-men (or women), waste, improper use or gifts as a result of aging or dementia, etc. – protect assets from bad people or bad acts.
 - c. Forced professional management for the surviving spouse and remainder beneficiaries.
 - d. Ability to require a co-trustee to assist the surviving spouse, especially as surviving spouse ages and may become less capable.
5. Other uses of credit shelter amount:
- a. The credit shelter amount does not have to be held in a trust just for the surviving spouse.
 - b. The credit shelter amount can be used for bequests to or for people other than the spouse without incurring federal or NJ estate tax – but remember you could be creating New Jersey Inheritance Tax depending on the identity of the beneficiary and relationship to decedent.
 - c. Decedent may want different remainder beneficiaries of different portions of decedent's estate and this is one way to divide the estate.
 - d. In the situation of older clients:
 - i. If the surviving spouse is not likely to need the credit shelter amount, due to the size of the marital share and/or surviving spouse's assets outside the trust, the credit shelter portion can be given to or held for decedent's descendants, without having to wait for the death of the surviving spouse.
 - ii. This trust can be a pot trust for surviving spouse and descendants.
 - iii. This trust can be a generation skipping trust for decedent's grandchildren and their descendants, within the GST exemption amount.

- e. In the situation of multiple marriage client:
 - i. Decedent may want to use the credit shelter amount to provide assets to or for the children by the first marriage so they do not have to wait for the much younger surviving spouse to die to receive anything.
 - ii. Keep the children of other marriages separated from the surviving spouse and/or the children of the current marriage.

B. How planning for and the administration of the New Jersey Estate Tax is impacted by the Permanent Estate, Gift and Generation Skipping Tax Law

1. New Jersey Estate Tax

- a. Even if there is no NJ Inheritance Tax (and maybe no Federal Estate Tax), there may be a NJ Estate Tax if the estate exceeds \$675,000.
- b. The amount of the NJ Estate Tax had been the amount of the state death tax credit allowable against the Federal Estate Tax reduced by any Transfer Inheritance Tax paid to New Jersey and death taxes paid to other states. This credit was reduced as of 1/1/02 and over the years 2002 through 2004 by 25% per year, until the credit was eliminated and replaced with a deduction starting with deaths in 2005. This elimination of the state death tax credit would have had serious impact on New Jersey revenue from this source. As a result, what New Jersey did in June of 2002 was to freeze the New Jersey estate tax to the credit amount that would have been available if the decedent died in 2001 (namely only a \$675,000 exemption and full state death tax credit).
- c. The New Jersey Estate Tax rates run from 4.8% to 16%, so the tax is not insignificant as the estate gets larger.

\$1,000,000 estate	approximately \$33,200
\$1,500,000 estate	approximately \$67,000
\$2,000,000 estate	approximately \$99,000
\$3,500,000 estate	approximately \$230,000
\$5,120,000 estate	approximately \$400,000
\$5,250,000 estate	approximately \$420,800

2. New Jersey Inheritance Tax

- a. There is currently no inheritance tax on assets passing to spouses, parents, grandparents, lineal descendants, and step-children of the decedent.
- b. For siblings and spouses of children of the decedent, there is a \$25,000 exemption and then tax rates of 11% to 16%.
- c. For all others there are tax rates of 15% to 16%, with no exemption, unless the total bequest is under \$500 – this includes descendants of a step-child.
- d. Real estate held by spouses as tenants by the entireties, qualified plan benefits payable to the spouse and life insurance payable to anyone or any trust but not the estate are exempt from the New Jersey Inheritance Tax.

3. How to plan for spouses with a New Jersey Estate Tax exemption of \$675,000 and Federal Estate Tax exemption of \$5,250,000+

- a. The consistency rule is the key problem in planning for spouses: NJ requires consistency between the position taken on the Form 706 and Form IT-Estate, at least when it suits them. This applies to taking the marital deduction on QTIP trusts, alternate valuation to reduce the estate tax, and similar.

- i. There is no NJ only QTIP election so the marital deduction elected on the Form 706 and Form IT-Estate must be the same.
- ii. There have been recent attempts by the New Jersey Inheritance Tax Branch to re-value assets for New Jersey Estate Tax purposes even though the NJ statute is clearly a mere calculation based on the IRS result (or what it would have been had the decedent died on 12/31/01)
- b. The large difference between the NJ and federal exemption emphasizes the need for reviewing and revising wills/trusts for married clients.
 - i. If the marital/exemption division is based on the Federal Estate Tax applicable exclusion, you are forcing the first estate to pay a substantial amount of New Jersey Estate Tax if the exemption share cannot qualify for the marital deduction (see chart above).
 - ii. If the marital/exemption division is based solely on the state exemption, with the excess outright to the surviving spouse, you may be wasting some substantial tax and non-tax benefits to trust planning, above.
 - iii. Note that the increased and increasing Federal Estate Tax exemption could cause a major skewing of testator's plan which could be a significant issue if the remainder beneficiaries of the two shares are different
 - (1) Example: If the marital share is the minimum amount necessary to reduce the Federal Estate Tax to zero (or the exemption share is the maximum amount that can pass free of Federal Estate Tax) and the estate is less than \$5,250,000, you may have disinherited the spouse
 - (2) Consider a formula that sets a minimum amount for the marital share (or maximum amount for the exemption share) to be certain both shares still exist to the extent desired, especially where the current and/or remainder beneficiaries of the two shares are different, for example:

There shall be deposited in Trust "A" (the marital share) that amount of property of the assets of this trust equal to the larger of the following: (i) that amount which (when added to the value for Federal Estate Tax purposes of all property passing to the Grantor's spouse under other provisions of the Grantor's Will or this agreement, by right of survivorship with respect to jointly owned property, under settlement arrangements relating to life insurance or otherwise than under the provisions of this agreement, but only to the extent that such property shall be allowed and qualify for the marital deduction) is the minimum amount necessary to reduce the Grantor's Federal Estate Tax to zero or as close thereto as possible by utilizing the marital deduction available under the Federal Estate Tax law after taking into account all credits, exclusions and deductions available to the Grantor's estate for Federal Estate Tax purposes; provided, however, in determining the amount to be deposited in Trust "A", the applicable credit available pursuant to §2010 of the Code, the state death tax credit under §2011 of the Code and the deduction available for death taxes paid to any state pursuant to §2058 of the Code, or any similar deduction or credit with respect to state death taxes shall be taken into account to the extent such credit or deduction does not result in an increase in the aggregate of all federal and state death taxes payable by the Grantor's estate, which limitation could result in less than the federal applicable exclusion amount remaining at the date of the Grantor's death being allocated to Trust "B"

(the exemption share) hereunder; provided further, that if the Grantor's spouse disclaims all or any part of Trust "A", such disclaimed amount shall be added to Trust "B", as defined below, to be administered and distributed as a part thereof, which disclaimer could result in federal or state death taxes being payable by the Grantor's estate, and (ii) Fifty Percent (50%) of the Grantor's gross estate as determined for Federal Estate Tax purposes as reduced by the expenses of administration, indebtedness and taxes, other than estate and inheritance taxes, of the Grantor's estate as defined in §2053 of the Code. The Grantor directs that the devise of Trust "A" shall be deemed to be a pecuniary devise and shall not be deemed to be a fractional share of this trust.

If my spouse shall survive me, Trust "B" of my residuary estate shall consist of the balance of my residuary estate after the setting apart of Trust "A" as aforesaid, and after the payment of all estate and other death taxes as provided in Paragraph FIRST of my Will.

- iv. Consider death-bed gifts to reduce the NJ estate tax, even though they might not reduce the Federal Estate Tax, since they could be considered adjusted taxable gifts for Federal Estate Tax purposes but not for New Jersey Estate Tax purposes.
- c. When we have an Internal Revenue Code §2056(b)(7) QTIP trust for the benefit of the spouse, the New Jersey Inheritance Tax is determined as follows:
 - i. Determine the age and sex of the surviving spouse
 - ii. Determine the life estate factor using the tables published by the Division of Taxation
 - iii. Multiply the total in the trust by the life estate factor
 - iv. The remainder passing to the remainder beneficiaries is the total in the trust reduced by the value of spouse's life estate
 - v. If all remainder beneficiaries are Class A, explain that there is no compromise tax since all beneficiaries are Class A
 - vi. If there are beneficiaries who are not Class A, explain the highest and lowest and most likely tax and then make a compromise tax offer

Example: QTIP trust for wife age 72, remainder to descendants, per stirpes, with 3 children and 7 grandchildren:

Pursuant to the terms of the decedent's Last Will and Testament, the residue of decedent's estate, after certain specific bequests and after the personal property passes to decedent's spouse, will pass to a trust for the benefit of decedent's spouse and descendants. Decedent's spouse has a life estate in the said trust. Upon the death of the decedent's spouse, the balance of the trust then remaining will be divided into equal shares, one share for each child of the decedent then surviving and one share for each of decedent's children who is then deceased leaving descendants then surviving, per stirpes. The decedent has 3 children and 7 grandchildren. As a result, the likelihood that decedent's estate will pass to a beneficiary who is not a Class A beneficiary is too remote to warrant a contingent tax assessment or a compromise tax.

Total in trust		\$500,000
Female age 72	Life estate factor	.51520
Value of wife's life estate	\$500,000 x .51520	\$257,600
Remainder	\$500,000 - \$257,600	\$242,400
Each child	\$242,400 ÷ 3	\$80,800

Example: QTIP trust for wife age 72, remainder to descendants of siblings, per stirpes, with 3 nieces/nephew and 7 grandnieces/nephews:

Pursuant to the terms of the decedent's Last Will and Testament, the residue of decedent's estate, after certain specific bequests and after the personal property passes to decedent's spouse, will pass to a trust for the benefit of decedent's spouse and descendants. Decedent's spouse has a life estate in the said trust. Upon the death of the decedent's spouse, the balance of the trust then remaining will be divided into equal shares, one share for each niece/nephew then surviving and one share for each of the descendants of a deceased niece/nephew then surviving, per stirpes. The decedent has 3 nieces/nephews and they have 7 children.

Total in trust		\$500,000
Female age 72	Life estate factor	.51520
Value of wife's life estate	\$500,000 x .51520	\$257,600
Remainder	\$500,000 - \$257,600	\$242,400
Each niece/nephew	\$242,400 ÷ 3	\$80,800

In the proposal of the compromise tax in this estate, particular attention must be given to the following factors:

1. If the principal is exhausted for the benefit of the surviving spouse, then there is no tax due.
2. Surviving spouse has little assets of her own and has significant health issues, which increase the likelihood she will need some or all of the principal of the trust.
3. Surviving spouse's life expectancy is 13.99 years.
4. The maximum tax is 15% on \$242,400 or \$36,360. \$36,360 present valued for 14 years at 6% is \$16,082 (discount factor .442301)
5. The minimum tax is 15% on 0 or \$0
6. The most probable contingent tax will result from a distribution of the principal of the trust to decedent's wife of 2/3 of the trust, which results in a tax with a present value of \$5,361 (242,400 x 1/3 x 15% x .442301).
7. After reviewing the present values of the possible and probable contingent taxes and considering the most probable contingent tax, we propose a compromise tax in the amount of \$4,000.

The New Jersey Inheritance Tax is not the problem with QTIPs – it is the New Jersey Estate Tax.

- d. **HERE IS THE OTHER PART AND THE HEART OF THE PROBLEM:** The consistency rule as it applies to QTIP trusts:
- i. NJ requires consistency between the position taken on the 706 and IT-Estate, whenever a Form 706 is filed, for any reason
 - ii. This applies to taking the marital deduction on QTIP trusts
 - iii. There is no NJ only QTIP election so the marital deduction elected on the 706 and IT-Estate must be the same
 - iv. This means that if you are filing the 706 solely to obtain the benefit of the portability election, you must make the same marital deduction election on both returns and there is an argument that a marital deduction election cannot be made on the 706 if it cannot reduce the tax making it not possible to make the QTIP election for New Jersey Estate Tax purposes even though if you do not file a 706, the QTIP election could be made
 - v. This makes the outright bequest to spouse and §2056(b)(5) power of appointment trust, which get the same treatment whether you file a 706 or note different than the QTIP for New Jersey Estate Tax purposes which is not fair
 - vi. Exception to the consistency rule: N.J.A.C. 18:26-3A.8(e) allows the marital deduction for New Jersey Estate Tax purposes for a surviving civil union partner even though it is not permitted for Federal Estate Tax purposes.
- e. Another important aspect to estate administration in NJ: Any trust can be divided into further separate trusts in NJ under N.J.S.A. 3B:14-23r.(2) (Branigan statute):
1. to better use the marital deduction and exemption, especially with a single QTIP plan or marital/exemption plan to better utilize the Federal Estate Tax exemption when the exemption share is initially the state estate tax exemption
 2. to better utilize the GST exemption, ie where know there will be a generation skip in one part of the family and not likely in another
 3. to have separate shares with different tax attributes to make wiser investment and distribution decisions during the trust administration
- f. Applicable Exclusion or Marital Deduction share in a taxable estate can be reduced by various factors
- i. When this occurs:
 - a. non-probate assets passing to someone other than the spouse;
 - b. bequests to someone other than the spouse,
 - c. adjusted taxable gifts, or
 - d. state death taxes use up the unified credit or applicable exclusion amount and possibly more, causing estate tax to be paid, even if the residue passes to the spouse or to a marital trust
 - ii. CHECK THE TAX CLAUSE
 - a. taxes payable from the residue could cause real problem
 - (1) Taxes are paid first, then residue passes to or for spouse, creating a tax on a tax
 - (2) Marital deduction is available only for assets actually passing to or for spouse, not to pay administration expenses or taxes. IRC §2056(a).

- b. apportion taxes to beneficiaries receiving assets under will and non-probate assets
 - (1) spouse pays no tax since spouse's share of estate generates no tax
 - (2) same for charitable bequests
- 4. How to plan for single individuals with a New Jersey Estate Tax exemption of \$675,000 and Federal Estate Tax exemption of \$5,250,000+
 - a. Keep the New Jersey Inheritance Tax in mind since the single person does not have a spouse and may not have any descendants so that there are Class C and D beneficiaries generating New Jersey Inheritance Tax
 - b. Keep in mind the single person who is a civil union partner is treated as having a spouse for New Jersey Inheritance Tax and New Jersey Estate Tax, property law of inheritance and many other rights of married people, but not for Federal Estate Tax and Federal Gift Tax so that the estate could have Federal Estate Tax but no New Jersey Estate Tax and no New Jersey Inheritance Tax. N.J.S.A. 37:1-28 et seq.; N.J.A.C. 18:26-3A.8(e).
- 5. Recent developments in New Jersey Estate Tax:
 - a. The New Jersey Estate Tax does not apply to out of state real property so when calculating the tax as the old state death tax credit, it is calculated as if the out of state property is not part of the gross estate and it generated its own estate tax in that state.
 - b. A QTIP trust includable in the estate of the second spouse for federal estate tax purposes is not taxable if the first spouse died a resident of a state other than New Jersey.
 - c. Note: there is no New Jersey Estate Tax on a person who is not a resident of NJ even if decedent owns real property in NJ.
 - d. The tax waiver requirement to transfer or deal with decedent's assets does not apply if the assets were owned in decedent's revocable living trust at the time of death, which strongly encourages the use of funded revocable living trusts, especially for older clients.
 - e. Remember that the Form L-8 Affidavit of Waiver can only be used where the asset passes by title, beneficiary designation or will to a Class a beneficiary, only outright (not in trust) and only if the gross estate is less than \$675,000. Otherwise, the IT-R and/or IT-Estate must be filed to obtain the tax waiver for assets outside the living trust, subject to the following:
 - f. When the decedent does have assets outside the revocable living trust, or if the decedent's estate exceeds \$675,000, the blanket waiver of N.J.A.C. 18:26-11.16 allows the executor/joint owner to obtain half of the assets immediately, and the balance after the NJ estate and inheritance tax returns are filed and approved and tax waivers issued by the NJ Inheritance Tax Branch.
 - g. Recent case Stephenson causes great concern in the way the New Jersey Estate Tax is calculated in certain circumstances requiring great care in providing for the payment of taxes under the terms of the will/trust
- 6. Note: the New Jersey Inheritance Tax is not impacted at all by the New Jersey Estate Tax or Federal Estate Tax exemptions

C. **FET and NJ Estate Tax Return Filing Requirements.**

1. Gross Estate Less Than \$675,000
 - a. No Form 706 is required to be filed with the Internal Revenue Service, unless the preservation of the decedent's federal estate tax exemption (DSUE) under portability is desired.
 - b. No Form IT-Estate needs to be filed with the New Jersey Estate Tax Branch because the gross estate is less than \$675,000

2. Gross Estate between \$675,000 and \$5,250,000 (2013 deaths)
 - a. No Form 706 is required to be filed unless the preservation of the decedent's federal estate tax exemption under portability is desired
 - b. Form IT-Estate (New Jersey Estate Tax Return) must be filed
 - c. Estates have option to complete the simplified Form IT-Estate which also requires a Form IT-R to be filed or file a deemed December 31, 2001 Form 706 (U.S. Estate tax Return) with Form IT-Estate.
 - d. Because Form 706 is not required to be filed with the IRS, the estate can make any election which will reduce New Jersey Estate Tax, even though no such election is made for federal estate tax purposes since inconsistent positions are not taken. **NOTE:** The New Jersey Division of Taxation has made it clear that filing a federal estate tax return for the sole purpose of preserving a deceased spouse's unused federal exemption (DSUE) means that consistent positions must be taken, which is the problem with the new portability Regs requiring a regular Form 706 to make that election

QUERY: Does the benefit of inconsistent positions outweigh the benefit of preserving the deceased spouse's unused exemption?
 - e. If no Form 706 is filed, the Alternative Valuation Date election pursuant to IRC §2032 can be made for New Jersey Estate Tax purposes. Such election should have no impact upon tax basis determination for federal income tax purposes since the federal rule is date of death value and the NJ income tax rule is that the tax basis for NJ is the same as for federal income tax purposes.
 - f. If no Form 706 is filed, administrative expenses can be deducted pursuant to IRC §2053 on Form IT-Estate even though such expenses are taken on Form 1041 (U.S. Fiduciary Income Tax Return) pursuant to IRC §642(g) for federal income tax purposes.

3. Gross Estate in Excess of \$5,250,000 (2013 deaths)
 - a. Both a Form 706 and a Form IT-Estate are required to be filed
 - b. The New Jersey Estate Tax Branch has announced that tax elections on the Form 706 and the deemed December 31, 2001 Form 706 must be consistent. If both federal and New Jersey estate tax is due and owing, a reduction in valuation, or administrative expense deduction will reduce both death taxes
 - c. The New Jersey Estate Tax Branch will not allow inconsistent positions with respect to the deduction of administrative expenses. Accordingly, if administrative expenses are deducted on Form 1041 (U.S. Fiduciary

Income Tax Return) pursuant to IRC §642 (g) for federal income tax purposes, those expenses cannot be deducted on Form IT-Estate.

- d. The consistency rule also means that the same treatment for marital deduction purposes must be taken on both returns.
4. Remember what is included in the estate for estate tax purposes when determining the above:
 - a. all probate assets, ie assets in decedent's name alone without beneficiary designation, other than estate
 - b. life insurance owned by the decedent or in which decedent has incidents of ownership, (even though pass by beneficiary designation),
 - c. joint assets owned with right of survivorship:
 - i. half of assets owned with spouse (exception: Gallenstein pre 1976 assets)
 - ii. contribution rule for joint assets owned with anyone other than spouse
 - d. decedent's share of any assets owned as tenants in common with another person,
 - e. IRA, §401(k), qualified plan benefits, annuities for which decedent is the participant or owner (even though pass by beneficiary designation)
 - f. assets in decedent's name with a "payable on death", "in trust for", or similar beneficiary (even though pass by beneficiary designation)

D. **New Jersey Inheritance Tax Return Filing Requirements**

1. Everything passes outright to Class A beneficiaries: no return required, regardless of size of estate, so that you could have Form 706 and Form IT-Estate filings and no Form IT-R. The tax waivers are either Form L-8 (total estate less than \$675,000) or tax waivers are issued after the Form IT-Estate is filed and approved.
2. Anything passes to anyone other than a Class A beneficiary, including charity: return must be filed.
3. If there is a trust, even though all beneficiaries are Class A, a return must be filed regardless of size.
4. The blanket waiver is available to obtain half of all assets while waiting for the tax waivers from NJ.

****Disclaimer** Required by IRS Circular 230**

Unless otherwise expressly approved in advance by the undersigned, any discussion of federal tax matters herein is not intended and cannot be used 1) to avoid penalties under the Federal tax laws, or 2) to promote, market or recommend to another party any transaction or tax-related matter addressed.

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