Change and uncertainty are the only constants in the planning of estates. Changes of all sorts, in statutes, interpretations, procedures, reactions, and circumstances, beget one another with startling and even increasing frequency. The mere solving of new problems as they occur is not sufficient. Many of the changes, and of the problems that they present, will occur long after a governing instrument irrevocably is in place. Removal and relaxation of limitations upon durations of trusts accentuate this effect. Any real solution requires a change in mindset, from a focus solely upon ad hoc responses to ad hoc problems to a focus additionally upon something much broader and less transient: flexibility.

The sixth edition confronts what apparently is a new period of instability. The new instability follows a relatively short lull after a period of unprecedented instability. During June of 2001, Congress enacted the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). EGTRRA provided for phased increases of exemptions, phased reductions of rates, the repeal in 2010 (more than eight years later) of the estate tax and the generation-skipping tax, and the reversion (known as the sunset of EGTRRA), one year later in 2011, of the taxes, the exemptions, and the rates to status quo ante. The repeal was effective January 1, 2010. Legislation that became effective on December 17, 2010, aborted the repeal of the estate tax, but with an increased exemption and a reduced rate, on an elective basis for 2010. The legislation restored the estate tax and the generation-skipping tax as of the beginning of 2011. Also, the legislation reduced rates and increased exemptions for the gift tax, the estate tax, and the generation-skipping tax. Further, the legislation deferred until the beginning of 2013 the reversion of the exemptions and rates that were in effect before the advent of EGTRRA, and it simultaneously enacted for 2011 and 2012 a system of portability of the unused portion of the estate tax exemption of a predeceasing spouse and provided for it to sunset at the end of 2012.

The American Taxpayer Relief Act of 2012 became law on January 2, 2013. It included a $5 million exemption, indexed for inflation, for the estate and gift taxes, a $5 million exemption, indexed for inflation, for the generation-skipping tax, and a system of portability for the unused portion of the estate tax exemption of a predeceasing spouse. President Donald J. Trump has proposed the repeal of the estate tax and the generation-skipping transfer tax. However, what would happen to the gift tax and adjustments to bases for income tax purposes remains unclear.
Variations of techniques that have appeared in all prior editions of this book are the techniques of choice for the present environment. More than ever, flexibility is the hallmark.

1. First, some documents, particularly for persons whose assets likely will not attract estate tax based upon anticipated exemptions, and who forgo generation-skipping opportunities by leaving their assets outright or in trusts that continue only until children attain stated ages, present few of the issues of uncertainty and instability.

2. Second, consider whether a document should include dispositive provisions that are conditioned upon the United States estate tax being in effect at the death of a taxpayer or upon the generation-skipping tax being, or not being, in effect at the death of a transferor. This style is designed to achieve tax savings, to avoid issues of construction, and to avoid possible skewing of enjoyment according to state statutes that include arbitrary rules of construction. As part of this technique, consider the inclusion rules of construction that resolve whether a tax is in effect “at” the death of a taxpayer or transferor under circumstances in which after the death tax is restored retroactively to include the date of the death.

3. Third, as depicted in many examples (see particularly Chapter 4), Appendix Form #3 and Appendix Form #4, many documents of the writer provide for all property of a predeceasing spouse to pass outright to a surviving spouse or, to any extent that the surviving spouse disclaims, to a QTIP-style trust that can benefit the surviving spouse and that can use exemptions of the predeceasing spouse to shelter the property from estate tax. By means of a disclaimer and a QTIP election (including, if available, a state-only QTIP election), the surviving spouse can minimize United States and state estate tax.

4. Fourth, as an alternative to the type of arrangement that is described in 3, above, consider providing for all property (or at least all property other than tangibles and interests in individual retirement accounts and separate accounts in qualified plans of deferred compensation) to pass to a QTIP-style trust that benefits the surviving spouse, that can use exemptions of the predeceasing spouse to shelter the property from estate tax, and that can permit the surviving spouse to rearrange the plan at his or her death by possessing and exercising a nongeneral power to appoint by will. By means of a QTIP election (including, if available, a state-only QTIP election), the surviving spouse can minimize United States and state estate tax.

5. Fifth, as an alternative to the type of arrangement that is described in 4, above, consider (i) using a formula to split the property upon the death of the predeceasing spouse between (a) a bypass-style trust of the maximum that, assuming no marital deduction, will not generate any liability for estate tax, United States or state, and (b) a separate gift of the excess outright to the surviving spouse, followed,
upon the death of the survivor of the two spouses, by dispositions outright to or in trusts for children for stated ages. This arrangement uses a nonportable state estate tax exemption of the predeceasing spouse, relies in part upon the portable United States estate tax exemption of the predeceasing spouse, and tends not to require any use of GST exemptions.

6. Sixth, as an alternative to the type of arrangement that is described in 5, above, consider using a formula to split the property upon the death of the predeceasing spouse between (i) a bypass-style trust of the maximum that, assuming no marital-deduction election, will not generate any liability for United States estate tax but that, to the extent of an election, will consist of a “Clayton QTIP” that will qualify for the marital deduction and (ii) a separate gift of the excess, either outright or in a trust that will or upon election can qualify for the marital deduction. By means of a QTIP election effective for United States and state purposes with respect to the excess (if the excess is in the format of QTIP), and by means, if available, of a state-only QTIP election with respect to a portion of the bypass-style trust, the surviving spouse can minimize United States and state estate tax.