Introduction

Without a doubt, tax-driven estate planning is a double-edged sword. Assets held until death generally qualify for a “step-up” in basis for income tax purposes, but the date-of-death value of those assets may be subject to estate tax. On the other hand, the post-transfer appreciation of assets transferred during life should avoid estate tax, but barring some fortuitous and highly specialized additional lifetime planning, will not receive a basis step-up upon the death of the transferor. For decades, high estate tax rates, coupled with relatively low capital gain tax rates, tended strongly to favor the latter strategy of transferring assets during life, thereby foregoing the income tax benefit of a basis step-up at death in order to avoid a punitive estate tax on post-transfer growth. But times have changed.

Modifications brought about by recent tax legislation—most notably the American Taxpayer Relief Act of 2012 (ATRA) and the Tax Cuts and Jobs Act of 2017 (TCJA)—have altered the face of estate planning considerably. For example, the top marginal federal estate tax rate has settled at 40 percent—well below the 55 percent marginal threshold that once prevailed—while capital gain tax rates have risen dramatically. Further, the basic exclusion amount that each person may shelter from federal gift and estate tax was scheduled to revert to a fixed $1 million effective January 1, 2013. Instead, ATRA established a $5 million exclusion that is indexed for inflation; TCJA “doubled-down” on that increase. Today, the basic exclusion stands at an inflation-adjusted $11.58 million per person, $23.16 million for a married couple. As a result, it is estimated that fewer than one in 1,000 families currently have enough wealth to need tax-driven estate planning. If estate taxes are likely to affect only those few, what should the other 999 families do?

For these reasons, estate planning professionals need to re-think how they advise most of their clients. First and foremost, very few families now need plans that are driven exclusively by reduction or elimination of the estate tax, which should allow most plans to be based upon income tax saving considerations and non-tax-related goals. But it’s not always clear on which side of the line a particular family may fall. For example, there are couples who currently have considerably less than the combined basic exclusion amount of $23.16 million who absolutely should do transfer-tax-driven planning because it’s likely, due to anticipated estate growth and potential “sunset” of the current exclusion
amount, that they will pay at least some estate tax at the second death if they don’t plan. On the other hand, there are couples with much larger estates who are likely to “spend their way out” of their estate tax problem during their lifetimes. In addition to future tax law changes, the key drivers are time horizon, projected returns on investment, and future spending coupled with inflation. But as a practical matter, how does one determine which strategy—hold or transfer—is likely to work best in a given case?

**To Transfer or Not to Transfer: Doing the Math**

Consider the following example:

Mom has a sizable estate, which includes $2 million of a publicly traded stock that has an income tax basis of zero. Assume that she doesn’t need the stock or the dividends it produces, so she’d like to give that stock to her daughter as a lifetime gift. Further assume that mom lives in Florida, where there is no state-level estate or inheritance tax, but that her daughter lives in California, where she “enjoys” the highest marginal state income tax rate in the country—13.3 percent.

The benefit of a lifetime gift is that all future appreciation in the value of the stock will avoid a 40 percent estate tax. But we also know that with a lifetime gift, the donee “inherits” the donor’s income tax basis in the stock, which in this case is zero. Under this set of circumstances, mom would be transferring to her daughter an asset that has a built-in income tax liability of as much as $732,000; at the highest marginal bracket, the combined federal and California long-term capital gain tax rate is 36.6 percent. And the transfer tax laws give a donor no “credit” in the form of a valuation discount for that built-in income tax liability. In other words, the transfer tax laws treat a lifetime transfer of $2 million of cash exactly the same as a transfer of $2 million of property that is subject to a $732,000 tax liability. Under these circumstances, is a gift of appreciated stock from mom to daughter a good idea?

Well, if mom were to die tomorrow without having made this gift, her estate would receive a step-up in basis and her daughter could receive the stock through her mom’s testamentary estate plan with no built-in income tax liability. But if mom made the gift today and she were to die tomorrow, her daughter would pay a lot of additional income tax due to the loss of the step-up—if and when she sells the stock. In either case, the estate tax outcome would be substantially the same; but the income tax result would be vastly different in these two cases.

Here’s the key: When someone wants to transfer an appreciated asset to a family member (or to any person or entity other than a charity), there is a built-in income tax liability that must be “burned off” before the donee can realize a financial benefit. The transfer tax benefit of a lifetime gift takes time to manifest. The key drivers include the donor’s time horizon, the “tax gap”—that is, the difference between the donor’s estate tax rate and the donee’s effective income tax rate—,
the donor’s basis, and the asset’s prospects for future growth. Keep in mind that the tax gap depends on multiple factors, including the tax domiciles of the donor and donee, the donee’s expected income tax bracket at the time of sale, whether the subject matter of the gift is a capital asset or something else, and many other circumstances.

Note, too, that a proper assessment of this problem is not based upon estate tax consequences alone; both estate and income tax consequences of lifetime wealth transfer strategies must be taken into account. In this particular example, life insurance, if employed, would be used primarily to hedge the income-tax risk of a lifetime gift—that is, the potential loss of a step-up in basis sooner than expected as a result of the donor’s early death. Historically, most planners have viewed life insurance exclusively as an estate tax hedge, not as a way to mitigate income tax exposure. ATRA and TCJA provide an opportunity to change that mindset.18

Even families who are prodigous spenders may have an estate tax problem now; for them, strategies like grantor retained annuity trusts (GRATs)19 can work well. Hedging GRAT mortality risk with term life insurance (or insurance that acts much like term, such as universal life insurance with a “secondary no-lapse guarantee”) is advisable in many such cases. And when dealing with a married couple whose marriage is very secure, having one spouse make the other a permissible beneficiary of an inter vivos irrevocable trust—a so-called spousal lifetime access trust (SLAT)20—can be an attractive option. An insurance policy on the life of the beneficiary spouse held in a separate irrevocable life insurance trust of which the grantor spouse is a permissible beneficiary can provide continuing access to wealth that otherwise would be cut off by the untimely death of the spousal beneficiary of the SLAT.21 There is no single or easy answer for these families; flexible planning that can adapt to changed circumstances is the key.

Aside from today’s unexpectedly high basic exclusion amount, another factor that has evolved is the relatively greater importance of income tax planning. Until ATRA came along, we all thought that estate tax rates were going to revert to 55 percent. But that didn’t happen; under current laws, the federal transfer tax rate is just 40 percent—still quite high, but not as bad as it could have been. At the same time, the federal long-term capital gain tax rate is as high as 23.8 percent for passive investments.22 The income tax rate is even higher than that for collectibles, and higher still for short-term capital gains and ordinary income. Some states, like California, New York, and Minnesota, among others, have very high income tax rates on top of those higher federal rates—and TCJA limits the federal deduction for state and local taxes paid to $10,000 per taxpayer per year. As a result of all this, the “gap” between transfer tax and income tax rates has closed considerably for many families. In some odd cases—like when families own, say, depreciated real estate23—the cost to the family of losing a step-up in basis at death actually may be greater than if mom had simply kept the asset on her balance sheet, paid the estate tax, and gotten a basis step-up. Sometimes, the best gift that a parent can make to her children may be no gift at all.
ATRA also made “portability” of a deceased spouse’s remaining exclusion amount a permanent feature of the federal tax law. Portability is the notion that for a married couple, the remaining exclusion of the first spouse to die can be ported over to the survivor by making an election on the deceased spouse’s federal estate tax return. As a result, a couple in a common law jurisdiction may not need to split up assets and adopt an estate plan that creates a credit shelter trust upon the death of the first spouse to die. Instead, the estate plan can provide that each spouse will leave all of his or her assets to the survivor, and the executor of the first spouse to die can elect to port that spouse’s remaining exclusion to the survivor. When the dust settles after the first death, in a typical case under current law, the surviving spouse has all of the couple’s assets and a combined applicable exclusion amount of up to $23.16 million. Aside from simplicity, one benefit of this method is that the entire estate will get a step-up in basis at the second death. That may be much more difficult to achieve in an estate plan that calls for a credit shelter trust to be established at the first death. And portability seems ideally suited to situations where the first spouse to die has substantial assets in a qualified retirement plan or individual retirement account. Before portability, couples faced a real dilemma: Whether to leave such benefits outright to the surviving spouse and get potentially great income tax treatment but no estate tax relief at the second death, or to leave those assets in a credit shelter trust to avoid estate taxes but with potentially lousy income tax treatment due to acceleration of required minimum distributions. With portability, leaving qualified plan benefits to a surviving spouse provides the best available income tax treatment and enhances the survivor’s ability to shelter those assets from estate tax at the second death.

Portability is helpful, but it’s not perfect. For one, the portability election must be made on a federal estate tax return, regardless of the possibility that the value of the estate of the first spouse to die may be well below the filing threshold for Form 706—and there is no such thing as “Form 706-EZ.” Further, while the surviving spouse’s basic exclusion is indexed for inflation, the deceased spousal unused exclusion—or DSUE—amount is not. As a result, the longer the surviving spouse sits on the DSUE, the less purchasing power that DSUE will have upon her death. And only the remaining estate tax exclusion is portable; the GST exemption for federal generation-skipping transfer tax purposes is not. While it’s possible to do GST tax planning with portability, it’s messy and inefficient.

We live in a complicated world, and ATRA and TCJA have only added to that complexity. The questions that clients face are not always easy to answer. Are they actually going to avoid estate tax? Is a step-up in income tax basis likely to be more valuable to the family than avoidance of estate tax? What role will state income and death taxes play in the overall plan? How much does future spending matter? What role, if any, should life insurance play? As a result of this complexity, it’s important for all of the key advisors—the estate planning attorney, CPA, investment advisors, insurance professional, valuation experts, and others—to talk about these issues openly and get on the same page by developing an integrated plan.
Basis Creation: Ways to Get “Free” Basis

Based upon these considerations, income tax planning has taken on greater prominence in many estate plans, but how can we harness the provisions of the Internal Revenue Code (Code) to achieve the maximum advantage for our clients? To start, consider how an asset’s income tax basis is determined.

In most cases, the initial basis of an asset is its acquisition cost—that is, the fair market value of cash or other consideration paid by the taxpayer. But in the typical case of an asset acquired for cash, new basis is not really created; instead, basis effectively is “transferred” from the cash consideration paid to the asset being acquired in the transaction. Aside from paying cash consideration, how can a taxpayer “get” basis? And importantly, can a taxpayer get basis for “free”? Can we construct a transaction so that the taxpayer gets something—basis—for nothing?

In musing over these questions, five potential ways to create free basis come immediately to mind—although the first two of these methods are not particularly pleasant:

1. **Death.** Holding an appreciated asset (other than income in respect of a decedent (IRD)) until death results in a step-up in basis to its fair market value—not a pleasant way to get basis, but effective. To the extent that the decedent has sufficient applicable exclusion available at death, or qualifies for the estate tax marital or charitable deduction, the estate gets that step-up in basis for free.

   Generally, a decedent’s fractional interest in property that is owned jointly with his surviving spouse receives a basis step-up, but in Texas and other community property jurisdictions, the entire community property interests of both the decedent and the surviving spouse are stepped-up at the first death.

2. **Schedule K-1 income.** When a pass-through entity, like an S corporation or partnership, realizes income during a taxable year, it allocates that income ratably to each owner on a Schedule K-1. That income allocation, in turn, results in a step-up to the basis of each owner’s interest in the entity, sometimes referred to as “outside” basis. To the extent that the entity does not distribute its profits to the owners, new basis is thereby created—the outside basis of each owner generally is increased by the excess of the income allocation over any amount distributed. Like death, being allocated Schedule K-1 income without an offsetting distribution from the entity is unpleasant, but it does create free basis—at least to
the extent that the amount of income so allocated exceeds the owner’s unreimbursed share of the entity’s income tax liability.

3. **Debt.** Professionals who are not steeped in income tax issues on a daily basis sometimes forget that a taxpayer who incurs debt may get free basis. Consider the following hypothetical:

Assume that I have an investment account with $10 million of securities. (Now you *know* that this example is truly hypothetical!) For the sake of argument, further assume that those assets have a cost basis of exactly $10 million. While driving through Boca Raton one afternoon, I spot the residence of my dreams. The asking price happens to be $10 million, and I am willing to pay that price. I call my financial advisor, liquidate my securities account, and buy the residence. After the closing, I will still have $10 million on my balance sheet—albeit in the form of real estate, rather than securities—and I will still have $10 million of cost basis.

But by and large, people don’t behave in this way. Instead, assume that I liquidate just $1 million of my $10 million of securities and borrow the remaining $9 million from my local bank. I then use the aggregate proceeds to buy the $10 million home of my dreams. Upon closing, I will still have $10 million of net value on my balance sheet: $9 million of securities plus $10 million of real estate, offset by $9 million of mortgage debt. But my total income tax basis is no longer $10 million; I now have $19 million of basis. In this example, $9 million of free basis was created by borrowing a portion of the cash consideration used to acquire the real estate.37

In some cases, it may be advisable to use assets acquired with borrowed capital to fund a lifetime wealth transfer strategy. For example, the grantor of an irrevocable (“intentionally defective”) grantor trust (IGT) could acquire additional assets using borrowed funds. Those new assets should have a cost basis equal to their fair market value upon the date of acquisition. She could then “swap” those newly acquired, high-basis assets in exchange for low-basis assets currently held in the IGT. If the grantor were to die while owning the reacquired low-basis assets, (i) those assets should qualify for a fair market value step-up in basis, assuming that they are not IRD; and (ii) the high-basis assets in the IGT arguably should retain that high basis when grantor trust status terminates as a result of the grantor’s death.38

Debt-for-basis strategies are fraught with traps for the unwary, so research these issues carefully before implementing these tax-driven strategies on behalf of your clients.39

4. **Partnership income tax rules.** Subchapter K of the Code applies to an eligible business entity that elects to be treated as a partnership for federal income tax
purposes. Those rules create numerous income tax planning opportunities—
separate and apart from the transfer tax valuation discounts with which estate
planners are familiar. In many cases, the income tax rules for partnerships will
be more favorable than those that govern corporations.

For example, taxable income generated by a Subchapter C corporation generally
results in the imposition of two levels of income tax—a corporate-level tax,
followed by a shareholder-level tax if and to the extent that net profits are
distributed in the form of a dividend. Although a Subchapter S corporation
avoids the problem of a corporate-level tax because the entity’s income is
allocated and taxed directly to its shareholders, there are problems in Subchapter
S that are avoided in Subchapter K. For example, distribution of appreciated
assets from an S corporation to its shareholders in complete liquidation of the
corporation generally triggers recognition of the built-in gain; in many cases,
such gain recognition upon distribution is avoided under Subchapter K. And
when a shareholder of an S corporation dies, there is no way to translate the
outside basis step-up accorded to the decedent’s shares to the basis of the assets
held by the corporation—sometimes called “inside” basis; under Subchapter K,
that outside basis step-up can be applied to the entity’s assets by having the
partnership make a tax election under Code Section 754. For these and other
reasons, wealth accumulation in an entity taxed as a partnership under Subchapter
K may produce superior after-tax results compared to accumulated wealth that is
“trapped” inside a Subchapter C or Subchapter S corporation.

5. **Qualified small business stock (QSBS).** Many technology companies and other
businesses are organized as C corporations, at least partly to allow investors to
avoid taxable gain in a future sale of the company under Code Section 1202,
which provides that a taxpayer other than a corporation “shall not include [in
gross income any] gain from the sale or exchange of [QSBS] held for more than 5
years.” Sidestepping several technical details, QSBS is stock of a C corporation
that meets the statutory requirements of a “qualified small business” and that
conducts an active trade or business. The QSBS must have been “acquired by
the taxpayer at its original issue . . . in exchange for money or other property (not
including stock), or . . . as compensation for services.”

In effect, Code Section 1202 creates free basis as of the fifth anniversary of a
taxpayer’s acquisition of QSBS. Thereafter, that free basis grows as the stock’s
value grows, although the total amount of eligible gain that may be excluded from
gross income will be capped in most cases at $10 million per taxpayer, absent
some specialized tax planning.

Holders of QSBS can multiply the benefits of Code Section 1202 by making
lifetime gifts to individuals (perhaps including one’s spouse) and to nongrantor
trusts. If those gifts are properly structured, each such transferee, whether
individual or trust, will be treated as having received its portion of the transferred
QSBS in the same manner as the transferor and will succeed to the transferor’s
holding period. With great care and meticulous planning, a family consisting of multiple eligible taxpayers may be able to exclude many tens of millions of dollars of taxable gain when their QSBS ultimately is sold.

The key question for modern business owners is this: Do the potential benefits of Code Section 1202, along with all the other provisions of Subchapter C, “trump” the long-standing benefits of having one’s business taxed as a partnership under Subchapter K? The two choices are mutually exclusive: A partnership’s annual income is taxed only once—to the partners at their individual rates—and a partner’s estate may benefit from an “inside” basis step-up at death if a Code Section 754 election is in place, but Code Section 1202’s potential benefits are available only to owners of C corporation stock. Conversely, a C corporation’s annual income is subject to double-taxation—at the corporate level and, to the extent distributed as a dividend, at the shareholder level—and the entity cannot make a Code Section 754 election, but the company’s shareholders may be able to reap a huge reward upon sale of the company, if all technical requirements of Code Section 1202 are met.

So which form of ownership is better? Well, TCJA certainly made the debate a lot more interesting, by “permanently” reducing the C corporation income tax rate from 35 percent to 21 percent, effective as of 2018. Code Section 199A, a temporary addition to the Code under TCJA, provides a 20 percent deduction for “qualified business income” (QBI) from a partnership, S corporation, or proprietorship, but not from a C corporation. This new deduction could be a game-changer, as those who qualify pay tax at an effective rate of no more than 29.6 percent (rather than 37 percent) on QBI, but business owners who have few employees and little depreciable property won’t benefit much, if at all, from this new provision. With the former burden of double-taxation pretty much swept away by TCJA as a meaningful factor in the choice-of-entity analysis, business owners must decide whether the availability of an “inside” basis step-up at death and other basis-shifting opportunities under Subchapter K of the Code are worth forgoing the possibility of gain exclusion under Code Section 1202.

But consider this: By its terms, Code Section 1202 applies only to “gain from the sale or exchange of [QSBS].” What if a future purchaser wants to buy corporate assets, not stock? Should a business owner forgo the benefits of Subchapter K of the Code based upon a hope—or prayer—that the sale of the company in five years will be a stock deal, not an asset deal? Some commentators have suggested that, following an asset deal, distributions in complete liquidation of the corporation will qualify as a “sale or exchange” within the meaning of Code Section 1202. On its face, the language of Code Section 331(a) seems to support this conclusion: “Amounts received by a shareholder in a distribution in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock.” But did Congress intend to confer the benefits of Code Section 1202 upon the shareholders of a corporation that simply has existed for more than five years and is now liquidating? Is a liquidation, which under Code Section 331(a) is
“treated as in full payment in exchange,” an actual “sale or exchange,” which Code Section 1202 seems to require? The answers to these questions are unclear. The potential benefits of Code Section 1202 are impressive, but will they be available to the business owner in five years? On balance, I tend to prefer the relative certainty of Subchapter K to the baggage and potential murkiness of Subchapter C.57

The New Kid in Town: Qualified Opportunity Fund (QOF)

New tax legislation is always a bit of a puzzle. Reading it takes both time—which few of us have in large quantities—and focus—which becomes more challenging as I get older and add more apps to my cell phone. After TCJA was enacted in December 2017, I read much of the statute and several commentaries, focusing most of my energy and attention on the transfer tax provisions and the new Code Section 199A deduction for QBI. Somehow, I missed something very interesting: A sixth way to create free basis! I discovered this provision, Code Section 1400Z-2,58 only by accident, a full six months after TCJA became effective.59

The language of Code Section 1400Z-2 is disarmingly simple. It provides: “In the case of gain from the sale to, or exchange with, an unrelated person of any property held by the taxpayer, at the election of the taxpayer . . . gross income for the taxable year shall not include so much of such gain as does not exceed the aggregate amount invested by the taxpayer in a [QOF] during the 180-day period beginning on the date of such sale or exchange.”60 Eventually, this deferred gain must be recognized—upon the first to occur of (i) sale or exchange of the taxpayer’s interest in the QOF; and (ii) December 31, 2026.61

Upon investment in the QOF, the taxpayer’s initial basis is zero,62 so how is free basis obtained? Well, if the taxpayer’s investment in the QOF is held for at least five years, the taxpayer’s basis is increased to 10 percent of the amount of gain previously deferred.63 (Free basis!) If held for at least seven years, the taxpayer’s basis is increased by an additional five percent of such deferred gain.64 (More free basis!) And if held for at least 10 years, the taxpayer’s basis “shall be equal to the fair market value of [the QOF] on the date that the investment is sold or exchanged.”65 (Still more free basis!) All this seems a lot better than death66—and at least a little better than getting a Schedule K-1, or incurring debt, or dancing around the edges of Subchapter K or Section 1202—as a way to get free basis.

So what’s the catch? For now, the key legal issue is whether the taxpayer’s investment will qualify—and will continue to qualify for at least 10 years—as an investment in a QOF.67 Among other requirements, at least 90 percent of a QOF’s assets must be invested, directly or indirectly, in tangible assets (e.g., real estate improvements, machinery, and equipment) acquired after December 31, 2017, and used in a trade or business in a qualified opportunity zone,68 as defined in Code Section 1400Z-1.69 The 90-percent-tangible-asset requirement is tested twice each year—on June 30 and December 31 for a calendar year company. Proposed regulations70 have gone a long way to clear up
some details and uncertainties around the sweeping language of the statute, but many, many questions remain unanswered. Until those questions are addressed, QOFs are likely to remain an intriguing, but unsatisfying, way to acquire free basis. A case study later in this article explores some of the financial (as opposed to legal) challenges that QOF investors currently face.

**Case Study: Using Free Basis to Improve an Already Exceptional Estate Plan**

How can we use these free basis principles—step-up at death; pass-through-entity income allocation; debt; and the favorable rules Subchapter K—to improve the advice we give to clients? Consider the following real-life example, which played out over the latter half of 2015:

A prospective client approached me—in my current role as a “recovering” estate planning attorney, now serving as an analyst for an investment firm—and asked, “What do you think of my estate plan?” She provided me with copies of her estate planning documents, which (unfortunately) consisted of hundreds of pages of trust documents, partnership agreements, tax returns, memoranda, and account statements—all of which needed to be reviewed and understood. My attempt to summarize the essential elements of her plan on a single page is shown on Figure 1:

![Figure 1: Current Business Structure](image)

Basically, the client’s plan boiled down to this: In 2008—near the bottom of financial crisis—she sold a 99 percent, nonvoting interest in her business, consisting of three entities, to an IGT established for the benefit of her descendants in exchange for a promissory note bearing a face amount of approximately $10 million. Since then, her business has been wildly successful. She has taken a reasonable annual salary, and the trustee of the IGT has used its ratable share of annual income distributions from the business to retire all but the last $1 million or so of principal, with interest, of its debt to the grantor/client. In turn, the client has used virtually every dollar of that debt repayment to satisfy her obligation to pay annual income taxes as “deemed owner” of the 99 percent
business interest now owned by the IGT, pursuant to the so-called “grantor trust rules.” 72 Today, the business may be worth $35 million or more to a third-party purchaser. If these numbers are correct, over $25 million of appreciation has escaped estate tax—with the potential for much more transfer tax avoidance as the business continues to grow and the client continues to pay grantor trust income taxes. Because the client currently is domiciled in a jurisdiction that has a state-level death tax, her effective estate tax rate—taking into account the federal deduction for state taxes—would be nearly 50 percent, 73 so the transfer tax savings already realized exceeds $12 million.

In the meeting that followed with the client and her professional advisors, I told her that, by just about any measure of traditional estate planning, her plan has been a “grand slam home run.” She accomplished transfer tax savings that many families can only dream about; she got great advice; she executed the plan; and her timing was just about perfect. . . . But, I added, “There is a problem.”

Look again at Figure 1. Note that the operating business entity, represented by the circle in the center of the page, is an S corporation. Most of the astounding growth in the value of this particular business has accumulated inside that entity, for which no Section 754 election is possible in the year of the client’s death. 74 Further, note the small amount of rent that the S corporation is paying each month to two affiliated real estate partnerships (each structured as limited liability company (LLC) and taxed as a partnership), represented by the triangles above and below the S corporation in Figure 1. 75 Importantly, there is an opportunity here to shift value from a tax-inefficient entity (the S corporation) to two tax-efficient entities (the real estate partnerships), but the business is being operated in a manner that produces the opposite result!

Can the client and her advisors use the free basis ideas discussed previously to improve upon this situation? As shown in Figure 2, I recommended four possible steps—some with a bit more enthusiasm than others—that might improve this already exceptional estate plan:
i. Increase the rent. During my discussions with the client and her professional advisors, I learned that the amount of monthly rent being paid by the S corporation to the two real estate partnerships may be well below fair rental value for the region in which those properties are located. I proposed increasing the monthly rent to the higher end of the fair value spectrum, so that more wealth would begin to accumulate in the two partnerships and less wealth would be “trapped” inside the S corporation, where an inside basis step-up upon the client’s death will be difficult or impossible to achieve. Note that each entity currently is owned by a combination of the client and an IGT of which she is the deemed owner for federal income tax purposes; therefore, increasing the rent should not create any additional tax burden under the present structure.

ii. New partnership for business assets. The client’s business makes money by purchasing creative works and selling those works at a profit. Rather than have the S corporation continue to acquire those assets for resale, I proposed that a new LLC (Newco) be established to acquire and sell such assets in the future. Because sales of inventory are taxed at ordinary, rather than capital gain, tax rates, achieving a basis step-up at the client’s death for unsold inventory may be critically important. But if those assets continue to be acquired and sold by the S corporation, such an inside basis step-up for inventory on hand at death will be difficult or impossible to achieve. If in the future, those assets instead were to be bought and sold by Newco—an entity that is structured as a partnership for income tax purposes—an inside basis step-up at death would be possible if a Section 754 election were made in the year of the client’s death. Even if the client initially were to own only one percent of the outstanding member interests of Newco, she subsequently could reacquire additional ownership interests from the IGT—possibly using borrowed capital—and hold them from time to time on her own balance sheet. If she were to die while holding those additional interests, Section 754 should apply, if elected, and an enhanced inside basis step-up for Newco’s inventory should be available.

iii. Convert the S corporation from a dealer to a service provider. Rather than have the S corporation continue to buy and sell inventory, that entity could render management services to Newco in exchange for a reasonable fee; in turn, Newco, an LLC that is taxed as a partnership, would buy and sell inventory based upon the advice that it receives pursuant to the management agreement. In addition, the S corporation could continue to rent real estate from the two real estate partnerships, safeguard and insure inventory, pay employees, and fulfill all other current functions of the operating company. The twin actions of (a) increasing monthly rental payments to the real estate partnerships and
(b) shifting profits on future sales of inventory from the S corporation to Newco may help promote income tax efficiency by “shrinking” the S corporation and shifting growth to the more tax-efficient entities. If Newco, like the existing entities, is owned by any combination of the client and an IGT (or multiple IGTs) of which the client is the deemed owner, then these adjustments should not result in any additional income tax burden.

iv. **Partially eliminate grantor trust status.** Like most well-drafted IGTs, this client’s plan provides an avenue to eliminate, in whole or in part, the “power of substitution” that causes her to be deemed owner for income tax purposes of assets in the IGT under the grantor trust rules. Eliminating that power would cause the income tax burden associated with the business interests held in the IGT to shift from the client to the trust and its beneficiaries. While this step may seem counterproductive from an estate planning perspective—after all, continued payment of income taxes by the deemed owner of a grantor trust on behalf of the trust and its beneficiaries constitutes a gift-tax-free gift to the trust—such a shift in income tax liability may be beneficial in this case, primarily for two reasons. First, the client pays federal income tax at the highest marginal bracket and resides in a very high income tax jurisdiction. In contrast, the trust beneficiaries are in lower federal income tax brackets and one lives in a state that has very low income tax rates. If the client were to at least partially release her power of substitution and if the trustee were aggressively to distribute trust accounting income each year, substantial income tax savings may be realized. In addition, based upon a financial analysis that I ran for this client (who is still young—she is in her 70s), she faces the very real prospect of running out of money prior to her death—despite a quite sizable balance sheet today. That risk is primarily due to ongoing grantor trust income tax obligations, not lifestyle spending. Although paying income taxes as deemed owner of the IGT has produced substantial transfer tax savings for her family, she may need to preserve more of her existing capital for herself. There may be other ways to protect her balance sheet (e.g., increase her salary; retain 100 percent ownership of Newco, at least initially, etc.), but the possibility of systematically eliminating the administrative power that causes her to be deemed owner of the IGT’s assets for income tax purposes should at least be part of the discussion.

**Conclusion**

This article merely scratches the surface of income tax planning possibilities that are or may be available to estate planners in the current environment. Planners successfully persuaded many clients to engage in aggressive wealth transfer strategies prior to 2013 that have generated tremendous transfer tax savings due to the run-up in asset values in
the subsequent seven-plus years. Now is the time to ask: “Can even more savings be realized?” In many cases, the answer to that question may lie in the income tax provisions of the Code. Don’t be afraid to revisit the plans you prepared for your clients in 2011 and 2012, and to propose improvements that take advantage of the free basis principles discussed in this article. With careful research and perseverance, your clients can reap substantial additional benefits.

1 See generally Section 1014(b) of the Internal Revenue Code of 1986, as amended [hereinafter, “Code” or “I.R.C.”]. Although this article consistently refers to the basis adjustment accorded to property that is “acquired from or [having] passed from the decedent” as a “step-up” in basis, such basis is stepped up or down to its fair market value on the date of the decedent’s death, or in the case of a proper election under Code Section 2032, on the date which is six months after the date of the decedent’s death. See I.R.C. §§ 1014(a)(1)-(2), 2032(a)(2). Alternate valuation, if elected, must reduce both the value of the decedent’s gross estate and the amount of estate tax imposed; otherwise, basis generally equals date-of-death value. I.R.C. § 2032(c).

2 As a general matter, property that is (a) acquired from a decedent prior to the decedent’s death and (b) not includable in the decedent’s gross estate for federal estate tax purposes does not qualify for a basis step-up under Code Section 1014(b). For a contrarian view, see Jonathan G. Blattmachr, Mitchell M. Gans & Hugh H. Jacobson, “Income Tax Effects of Termination of Grantor Status by Reason of the Grantor’s Death,” 97 J. Tax’n 149 (Sep. 2002).


4 Pub. L. 115-87 (2017), available at https://www.congress.gov/115/bills/hr1/BILLS-115hr1enr.pdf. The Senate parliamentarian determined that the short title “Tax Cuts and Jobs Act” violates the so-called Byrd rule, so that title was dropped from the final version of the legislation. This article is not subject to the Byrd rule, so at least for now, I choose to identify Public Law 115-87 as “TCJA.”

5 See I.R.C. § 2001(c). Although lower marginal rates still exist, the extremely high applicable exclusion amount results in the imposition of federal estate tax at a “flat” 40% rate.

6 For individuals, trusts, and estates, the highest marginal federal brackets are 37% for ordinary income and 20% for long-term capital gain income. See I.R.C. § 1(a)-(e), (h). For passive “net investment income” in excess of specified thresholds, an additional 3.8% federal surtax applies. See I.R.C. § 1411(a)(1).


9 Other recent developments have dramatically changed certain aspects of estate planning, most notably, the Supreme Court’s decision in United States v. Windsor, 570 U.S. 744 (2013), which establishes the validity of same-sex marriages for all federal tax purposes. ATRA and TCJA are noteworthy in that their far-reaching provisions affect virtually everyone who engages in estate planning.


11 For a convenient summary of the highest marginal income tax rates for all 51 U.S. jurisdictions, see https://www.taxfoundation.org/20180212905539/Tax-Foundation-FF571-1.pdf.

12 See I.R.C. § 1015(a). There is an exception for gifts of depreciated property; in such a case, the basis for purposes of determining a loss is its fair market value on the date of the gift. Id.

13 See 2018 Instructions for Form 8960, Net Investment Income Tax—Individuals, Estates, and Trusts, at 14 (instructions for Line 9b—State, Local, and Foreign Income Tax), available at https://www.irs.gov/pub/irs-pdf/f8960.pdf. Specifically, state and local income taxes paid that are attributable to net investment income reduce the tax base against which the 3.8% federal surtax is computed, notwithstanding TCJA’s $10,000 “cap” on deductibility of state and local taxes. See I.R.C. § 164(b)(6)(B). Taxpayers in states that impose the highest income tax rates benefit the most from this “hidden” deduction.

14 Fair market value is based upon the price that a hypothetical willing buyer would pay a hypothetical willing seller for the asset in question, with neither party being under a compulsion to buy or sell, and both parties reasonably aware of all relevant facts. See Rev. Rul. 59-60, 1959-1 C.B. 237. In such a purchase and sale, the purchaser would take a cost basis pursuant to Code Section 1012(a); thus, the adjusted basis of the
seller immediately prior to the sale would be irrelevant to the purchaser. But in the case of a gratuitous lifetime transfer, the adjusted basis of the donor is incredibly important to the donee, as that basis “carries over” to the donee pursuant to Code Section 1015(a). Since the “willing buyer-willing seller” test is based upon a hypothetical sale rather than a transfer by gift, that test creates a distortion that estate planners must account for when advising clients about which assets are the best candidates for lifetime wealth transfer.  

If mom were to retain the asset and die tomorrow, her estate would be subject to estate tax based upon the asset’s date-of-death fair market value (assuming no alternate valuation under Code Section 2032), but her estate could apply applicable exclusion to offset the amount of estate tax owed. If she instead transferred the asset to her daughter today and died tomorrow, she would use applicable exclusion equal to today’s date-of-gift value, but her gross estate would be reduced by the fair market value of the asset tomorrow. The only difference in the estate tax consequence would be based upon the appreciation or depreciation in the value of the asset during the 24-hour period between her gift today and her death tomorrow. In almost every case, the economic detriment to the donee of a loss of the step-up in basis that would result from a lifetime transfer would greatly exceed any estate tax savings realized from the potential growth in the asset over a one-day period. For highly appreciated asset, it may take years, not days, to overcome that hurdle. Note, however, that if mom lived in a jurisdiction that imposed a state death tax, but not a state gift tax, a lifetime wealth transfer may reduce the overall transfer tax profoundly; careful analysis is required in such a case.

A step-up in basis may be irrelevant if (a) the donee intends to hold the donated asset until death; and (b) the asset is not expected to generate depletion, depreciation, or amortization deductions during the donee’s lifetime. But a client’s “I-will-never-sell” assertions should be taken with several large doses of salt.


A SLAT may be particularly useful for married clients who want to engage in lifetime wealth transfer, but may not be confident enough to relinquish permanently access to the assets being transferred. In the simplest case, one spouse, as grantor, transfers assets to an irrevocable trust, of which the other spouse is a permissible beneficiary. If the couple runs short of money in the future—due to a downturn in the markets, unexpected health care expenses, or otherwise—the trustee can make a discretionary distribution to the beneficiary spouse that meets the standard for distribution under the trust instrument. If carefully drafted and implemented, the date of death value of the assets in the SLAT should avoid estate tax upon the deaths of both the grantor spouse and the beneficiary spouse. Each spouse may be able to establish a separate SLAT for the benefit of the other, assuming that those trusts do not violate the so-called “reciprocal trust doctrine” established in United States v. Estate of Grace, 395 U.S. 316 (1969). For further commentary, see Mark Merric, “Can Husband Create Irrevocable Trust for Benefit of His Wife and Vice Versa?” available at http://internationalcounselor.com/Merric%20Law%20-%20Documents/reciprocaltrust5.pdf. Legal technicalities aside, two things can really mess up a SLAT: (i) divorce and (ii) death of the beneficiary spouse—so proceed with caution when implementing this strategy.

Care should be taken to ensure that the insured does not retain “incidents of ownership” over the life insurance policy within the meaning of Code Section 2042; otherwise, the life insurance proceeds may be subject to estate tax upon the insured’s death.

With respect to certain real estate placed in service prior to 1986 for which accelerated depreciation was allowable, those deductions are recaptured at ordinary rates under Code Section 1245. Thereafter, straight-line depreciation generally is required; those deductions are recaptured at the 25% (rather than 20%) rate on “unrecaptured section 1250 gain.” See I.R.C. § 11(h)(1)(E). For an excellent discussion of lifetime wealth transfer applications for unique asset classes, see Paul S. Lee, “Venn Diagrams: The Intersection of Estate & Income Tax (Planning in the ATRA-Math),” 48th Annual Heckerling Institute on Estate Planning (Jan. 2014), at 24-39 [hereinafter, Lee, “Venn Diagrams”].

The amount for which portability may be elected is called the “deceased spousal unused exclusion” (DSUE) amount, and equals the lesser of (a) the basic exclusion amount; and (b) the deceased spouse’s applicable exclusion amount, reduced by the sum of that spouse’s taxable estate and any adjusted taxable gifts. See I.R.C. §2010(c)(4). In turn, the deceased spouse’s applicable exclusion amount equals the sum of the basic exclusion amount and any DSUE amount that spouse may have acquired. See I.R.C. §2010(c)(2).
Talk about an algebraic labyrinth! In a somewhat feeble attempt at simplification, for purposes of this article, I have chosen to refer to the DSUE amount as the deceased spouse’s “remaining exclusion.”

25 See I.R.C. § 2010(c)(4)-(6).
26 For a concise summary of the rules contrasting required minimum distributions to spouses as compared to others, see https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-required-minimum-distributions-rmds).
28 See supra, note 24.
29 In addition, states generally do not recognize portability for state death tax purposes, with two current exceptions: Maryland (retroactive to 2011) and Hawaii. See Md. Code, Tax-Gen. § 7-309(b)(9); Haw. Rev. Stat. tit. 14, § 236E-3.
30 I.R.C. § 1012(a).
31 See I.R.C. §§ 691(a) (definition of IRD), 1014(c) (denial of basis step-up for IRD). IRD includes items not properly includable in the decedent’s gross income upon or prior to the decedent’s death; examples include qualified plan and IRA benefits, lottery winnings, income receivable under installment obligations, and the like.
32 See supra, note 1.
33 Non-U.S. situs property owned at death by a nonresident alien (NRA) also receives a free step-up in basis, even though that property is not subject to U.S. estate tax. See I.R.C. § 1014(a), (b).
34 See I.R.C. § 1014(b)(6).
35 See I.R.C. §§ 702(a), 1366(a)(1).
36 See I.R.C. §§ 705(a)(1), 1367(a)(1).
37 There is nothing magical about debt in this example; it simply illustrates a hypothetical case whereby I use the bank’s money to acquire a cost basis in the residence.
38 Although not entirely free from doubt, most practitioners with whom I have spoken believe that the newly acquired, high-basis assets now residing in the IGT would be treated as if they were donated to the trust by the grantor during her lifetime. As such, those assets should have the same “carryover” basis as they had in the hands of the donor pursuant to Code Section 1015(a). Under this theory of the transaction, the “swap” of high-basis for low-basis assets would be disregarded for income tax purposes; the only circumstance that matters is what the grantor and IGT, respectively, own at the time when grantor trust status terminates—in this case, as of the grantor’s death. This theory of the proper income tax treatment seems reasonable based upon a fair reading of Rev. Rul. 85-13, 1985-1 C.B. 184.
39 For insightful commentary on debt-driven basis strategies, see Lee, “Venn Diagrams,” supra note 23, at 61-64.
40 See Treas. Reg. § 301.7701-3(a). By default, an entity that otherwise would be classified as a partnership for federal income tax purposes, but fails to so elect, nevertheless is treated as a partnership for those purposes. Treas. Reg. § 301.7701-3(b)(1).
41 In fact, valuation discounts may operate to impair income tax planning by reducing the step-up in basis that a decedent’s estate otherwise might receive with respect to its ownership interest in a family entity—and in certain cases, may even result in a step-down in basis.
42 See I.R.C. § 11(a). TCJA reduced the federal corporate income tax rate from 35% to just 21%. See I.R.C. § 11(b). This rate reduction may tempt some entrepreneurs to elect C corporation status for new or existing businesses, but in many cases, such an election to (a) pay two levels of income tax on distributions and (b) forgo a potential inside basis step-up at death may be counterproductive.
43 See I.R.C. § 61(a)(7). The top marginal federal income tax rate on “qualified dividend income” received by an individual, trust, or estate is 23.8%. See I.R.C. §§ 1(h)(1)(D), 11(B) (20% rate on qualified dividends); and I.R.C. § 1411(a)(1) (additional 3.8% surtax on net investment income). Thus, assuming highest marginal federal brackets and no state income tax, a C corporation that has $1.00 of marginal pretax income would pay a 21¢ corporate-level tax, leaving 79¢ available for distribution; a shareholder receiving that 79¢ qualified dividend would pay a second-level tax of 18.8¢ (= 23.8% of 79¢), leaving 60.2¢ of the original $1.00 of corporate profit to the shareholder after all taxes. Thus, the “blended” federal income tax rate on C corporate dividends is 39.2%. By contrast, a shareholder of an S corporation or partner of a partnership is taxed directly on entity-level income at a top-marginal individual rate of 37%—reduced to as little as 29.6% if all such income qualifies for the 20% deduction described in Code Section 199A.
44 See generally I.R.C. § 1366(a)(1).
may be minimal . . . or not, depending upon the circumstances.

I.R.C. § 1042(a)(2), (c)(3). Because the basis of “replacement period” that brackets the date of sale.

See qualified replacement property is reduced by any gain not recognized by the seller, see I.R.C. § 1042(d),

immediately after issuance of the QSBS.

I.R.C. § 1202(a)(4), (c)(1). To qualify, aggregate gross assets of the corporation exchange of that stock.

See cannot have exceeded $50 million upon or after the enactment of RRA 2003, or at any time before or date of enactment of” CSBJA 2010 to qualify for complete exclusion of eligible gain upon the sale or qualify as QSBS, and as mentioned previously, must have been “acquired after [September 27, 2010,] the date of enactment. See I.R.C. § 1202(a)(1), (4).

For married couples who file jointly, gains qualifying for exclusion in prior years are allocated equally between the spouses in subsequent years. See I.R.C. § 1202(b)(3)(B). This provision would seem to permit one spouse to exclude nearly $20 million of eligible gain in a series of transactions, half the value of which would be attributed in subsequent years to her spouse. In appropriate cases, it arguably would be preferable simply to give QSBS to one’s spouse or to a nongrantor trust for the spouse’s primary benefit, then have each taxpayer sell or exchange the QSBS in one or more taxable transactions. See Lee, “Big Bang,” supra note 52, at 2-28.

A gift or other transfer to a grantor trust presumably would be ignored for all income tax purposes, including Code Section 1202. See Rev. Rul. 85-13, 1985-1 C.B. 184. A transfer at death also may be used to multiply the number of taxpayers entitled to exclusion of gain upon a sale or exchange of QSBS, see I.R.C. §1202(b)(2)(B), but since property acquired from a decedent already receives a step-up in basis under Code Section 1014(b), any additional benefits under Code Section 1202 may be minimal . . . or not, depending upon the circumstances.

Section 1202 isn’t the only potential advantage that a business owner may gain by electing to operate as a C corporation. For example, holders of “qualified securities” in a C corporation may elect to avoid recognition of long-term capital gain income by selling to an employee stock ownership plan (ESOP) or eligible worker-owned cooperative. See I.R.C. § 1042(a), (b)(1), (c)(1)(A). Among other statutory requirements, sellers must invest the sale proceeds in “qualified replacement property” within a 15-month “replacement period” that brackets the date of sale. See I.R.C. § 1042(a)(2), (c)(3). Because the basis of qualified replacement property is reduced by any gain not recognized by the seller, see I.R.C. § 1042(d),
the sale of C corporation stock to an ESOP is merely a deferral strategy, not a way to get free basis. Thus, sadly, Code Section 1042 is relegated to this brief mention in a footnote. Nevertheless, the potential for tax deferral by establishing and ultimately selling one’s stock to an ESOP might be enough to throw the balance in favor of a C corporation in a given case.  

58 I have been telling audiences around the country, “The first indication you have that the drafters of this statute have no clue how the Internal Revenue Code is organized is the section number—‘fourteen hundred cap Z dash two.’ Thank you, Rand Paul.”  

59 A case study later in this article reveals how and why I made that discovery.  

60 I.R.C. § 1400Z-2(a)(1)(A). Although the statutory text (disregarding headings) refers only to “gain,” proposed regulations take the position that only capital gain is eligible for deferral. See Prop. Treas. Reg. § 1.1400Z-2(a)-1(b)(2)(i)(A).  

61 See I.R.C. § 1400Z-2(a)(1)(B), (b)(1). Note that miscellaneous itemized deductions, which temporarily were eliminated by TCJA, return after 2025. Thus, the statute creates an opportunity to defer income into a year when those deductions come roaring back—along with elimination of the annual $10,000 per taxpayer “cap” on the deduction for state and local taxes.  


65 See I.R.C. § 1400Z-2(c).  

66 The statute treats a taxpayer’s investment in a QOF as IRD, and thus (presumably) not entitled to a basis step-up at death. See I.R.C. § 1400Z-2(e)(3). This interpretation, if correct, makes sense, as it presents a taxpayer who incurred a capital gain within the previous 180 days from making a deathbed investment in a QOF as a means of avoiding (rather than merely deferring) the original gain.  

67 There is also a financial “catch,” developed in a case study that appears later in this article.  

68 See I.R.C. § 1400Z-2(d).  

69 “The term ‘qualified opportunity zone’ means a population census tract that is a low-income community that is designated as a qualified opportunity zone.” I.R.C. § 1400Z-1(a). For an interactive map of all qualified opportunity zones in the U.S., see https://www._enterprisecommunity.org/opportunity360/opportunity-zone-eligibility-tool.  

70 See REG-115420-18, https://www.irs.gov/pub/irs-drop/reg-115420-18.pdf (Oct. 29, 2018) and REG-120186-18, https://www.irs.gov/pub/irs-drop/reg-120186-18.pdf (Apr. 17, 2019), which are among the most taxpayer-friendly regulations I have ever seen. For example, as a technical matter, qualified opportunity zone designations under Code Section 1400Z-1(f) expire after December 31, 2028, and if a taxpayer were to invest in a QOF in 2019 and were to hold her investment for 10 years to attain the full benefit of the statute, she would sell at a time when the business no longer was operating in a qualified opportunity zone. The proposed regulations resolve this dilemma by modestly extending the deadline by which a taxpayer must dispose of her QOF investment . . . to December 31, 2042! See Prop. Treas. Reg. § 1.1400Z-2(c)-1(b). On the other hand, the proposed regulations take the absurd position that a taxpayer’s disposition of an interest in a QOF by gift (including a gift to charity) is an “inclusion event” (i.e., a deemed sale or exchange, within the meaning of Code Section 1400Z-2(b)(1)(A)), thus triggering an immediate recognition by the taxpayer of the previously deferred gain. See Prop. Treas. Reg. § 1.1400Z2(b)-1(c)(3) (relying upon the phrase “disposed of” in the legislative history, rather than the text of the statute itself). This interpretation seems unlikely to survive the comment period, where it will undoubtedly be lambasted—rightly so—from all sides.  

71 Final regulations under Code Section 1400Z-2 were released on December 22, 2019. See Treas. Dec. 9889, https://www.irs.gov/pub/irs-drop/td-9889.pdf. Due to a tight publication deadline, comments in this article do not reflect those final regulations, so proceed with due caution before implementing any investment strategy on behalf of yourself or a client.  

72 See generally I.R.C. §§ 671-679. In this case, the prospective client retained the power, in a nonfiduciary capacity, “to reacquire the trust corpus by substituting other property of an equivalent value.” See I.R.C. § 675(4)(C). Such a retained power causes the grantor to be “deemed owner” for income tax purposes of the portion of the trust to which the power relates—in this case, the entire corpus of the IGT. See I.R.C. § 671. As a result, while that power exists, the client is required to report the IGT’s “items of income, deductions, and credits” on her own income tax return. See id. When and to the extent that her retained power of substitution expires—due to her death or otherwise—her obligation to report those items also expires, and the trust and its beneficiaries thereafter will bear the income tax burden. For guidance on how the IRS

73 The top marginal estate tax rate in the prospective client’s state of domicile is 16%, but Code Section 2058 allows a federal estate tax deduction for state death taxes paid. In this case, the resulting top marginal “blended” federal and state death tax rate is 49.6%, which equals the 16% effective state estate tax rate, plus the 40% federal estate tax rate “discounted” by 16% to reflect the state death tax deduction.

74 Although the prospective client owns only one percent of the three business entities currently, she could reacquire interests in those entities from the IGT prior to her death for purposes of achieving a step-up in basis with respect to those ownership interests; she may even use borrowed capital to finance that reacquisition. See supra, note 36, and accompanying text. But such an outside basis step-up cannot be translated to the inside basis of the assets held in an S corporation because Subchapter S of the Code has no counterpart to Code Section 754.

75 Those two partnerships own a showroom and retail store, respectively, where the operating company conducts its primary businesses.

76 See supra, note 47.


78 If grantor trust status were terminated, in whole or in part, with respect to ownership interests in the S corporation, the trust would need to elect to be treated and to qualify as either (a) an “electing small business trust,” defined in Code Section 1361(e); or (b) a “qualified subchapter S trust,” defined in Code Section 1361(d). Each of these trusts has characteristics that may be viewed unfavorably by the client or her professional advisors. For these and other reasons, “turning off” grantor trust status is not something that I would typically recommend.