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Rethinking the Estate Planning Curriculum

Jeffrey A. Cooper*

Estate taxation isn't what it used to be. In the past two decades, the federal estate tax exemption has risen from \$675,000 to over \$11.5 million, while the top rate has declined from 55% to 40%.¹ The number of states imposing a state death tax has fallen from 50 to 17.² Indeed, whereas over 100,000 Federal estate tax returns were filed in 2001, a mere 4,000 or so will be filed this year.³

If far fewer decedents will pay estate tax at death, it logically follows that far fewer current clients need sophisticated estate tax planning.⁴ In response to this new reality, estate planning lawyers have had to alter their practices, exploring new areas of expertise and new sources of revenue.⁵ It seems appropriate that estate planning professors should

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¹ TAX POL'Y CTR., THE TAX POLICY CENTER'S BRIEFING BOOK 317-18 (2018), https://www.taxpolicycenter.org/sites/default/files/briefing-book/bb_full_2018_1.pdf; *Federal Estate and Gift Tax Rates, Exemptions, and Exclusions, 1916-2014*, TAX FOUND. (Feb. 4, 2014), <https://taxfoundation.org/federal-estate-and-gift-tax-rates-exemptions-and-exclusions-1916-2014/> [<https://perma.cc/4DJP-DPED>]; *Estate Tax*, INTERNAL REVENUE SERV. (July 15, 2020), <https://www.irs.gov/businesses/small-businesses-self-employed/estate-tax> [<https://perma.cc/VX5K-LZNQ>].

² Washington, D.C. also imposes such a tax. Ashlea Ebeling, *Where Not To Die In 2020*, FORBES (Jan. 10, 2020, 6:08 PM), <https://www.forbes.com/sites/ashleaebeling/2020/01/10/where-not-to-die-in-2020> [<https://perma.cc/BKM5-DZR5>]; see also Jeffrey A. Cooper, *Interstate Competition and State Death Taxes: A Modern Crisis in Historical Perspective*, 33 PEPP. L. REV. 835, 876-80 (2006) (discussing changes in state estate taxation after 2000).

³ See TAX POL'Y CTR., THE TAX POLICY CENTER'S BRIEFING BOOK 406 (2020), https://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc_briefing_book_2020.pdf.

⁴ See Ryan A. Walsh, *Trusts and Estates Practice After Tax Reform*, 32 PROB. & PROP., Nov./Dec. 2018, at 38, 39 (observing that "avoidance of transfer taxes is no longer a driving force for many clients," while discussing how other areas of estate planning have become increasingly relevant).

⁵ See Jay A. Soled & Mitchell M. Gans, *Asset Preservation and the Evolving Role of Trusts in the Twenty-First Century*, 72 WASH. & LEE L. REV. 257, 260 (2015) ("In the aftermath of the estate tax upheaval, to stay relevant, the estate planning bar is struggling to reinvent itself."); Aeja Dar, *The Trusts and Estates Lawyer at 40*, TR. & EST., Nov. 2018, at 57, 58 ("[T]he lack of necessity in most instances for estate tax planning both reduces the opportunities for our more sophisticated service offerings and puts a crimp on the premium we can generally charge for our services."); Walsh, *supra* note 4 ("Since ATRA 2012 introduced the exemption amount of \$5 million, one could hear screams

engage in an analogous process. If many lawyers will be spending less time acting as estate tax planners and instead deploying different skills and expertise, the professors charged with preparing those entering the field should be rethinking their curricula accordingly.⁶

In this brief article I explore the extent to which that curricular shift is underway. The discussion proceeds in two parts. First, I discuss the curricular changes I have overseen at the law school at which I teach, setting out both the changes made and the assumptions underlying them. Second, relying on a brief survey of other ACTEC Academic Fellows, I explore the extent to which other law schools have been considering similar curricular revisions.

I. ONE LAW SCHOOL'S APPROACH

I have a long personal history with the law school course on “Estate and Gift Taxation.” I took the class as an LL.M student. For several years, I taught the class. But as federal and state tax exemptions rose, and the tax became less widely applicable, I found it increasingly difficult to counsel students, even those aspiring to practice estate planning, to devote 2 credits to studying the tax in intricate detail. In 2016, even before Donald Trump’s election and passage of the Tax Cuts and Jobs Act, I proposed that our law school stop offering the course.⁷ The faculty and administration agreed.

When we cut “Estate and Gift Taxation” from the curriculum, we immediately filled the void, and then some, with other estate-related courses. We brought back a previously-taught course on “Elder Law.” We created a brand new elective called “Financial Planning: Principles and Taxation,” designed to expose students to estate-related subjects such as financial markets, retirement and education planning, insurance, and business succession. We increased the frequency with which we offered our course on “Estate Planning and Drafting,” offering that writing-intensive seminar every year. All of these courses at least touch

from across the estate planning community that the practice will suffer, that there will be no more work to do, that we will have to seek other opportunities. These calls have only become louder since the enactment of the TCJA 2017.”).

⁶ I am not the first to suggest that recent changes in estate tax laws should lead us to reevaluate law school curricular choices. *See, e.g.*, Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN’S L. REV. 683, 706–07 (2011) (observing that “[t]he nature of estate planning is changing” due to increased estate tax exemptions, making client counseling and other skills more important than pure tax planning and citing multiple other discussions of the issue).

⁷ An Act To Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, Public Law 115–97, 131 Stat. 2054, increased the estate tax exemption from \$5,450,000 to \$11,400,000. The provision was effective on January 1, 2018 and is due to sunset, unless extended, on December 31, 2025.

upon the basics of the estate and gift tax, but in a much broader context, and with far less depth, than did the old “Estate and Gift Taxation” course. The benefit is a richer menu of estate-related courses that expose students to more areas relevant to a modern estate planning practice. The cost is elimination of the course most relevant to students who want to take a deep dive into the mechanics of estate and gift taxation.⁸ On balance, I think our students interested in estate planning careers are better off as a result of the changes.

II. A BROADER PERSPECTIVE

The curricular changes discussed above reflect one law school’s view of how to respond to changes in federal estate tax law and policy. In this section, I ask whether other law schools see the landscape similarly and whether they might be implementing similar changes as a result. To explore those questions, I conducted a brief survey of my fellow members of ACTEC’s Legal Education Committee, nearly all of whom are tenured law school professors or long-time adjuncts.⁹ The survey, conducted between July 15, 2020 and July 20, 2020, consisted of two parts. The first asked respondents to indicate the extent to which they agreed or disagreed with several statements relating to recent changes in federal estate laws, national politics, and law school curricular choices. The second part asked about specific course offerings and whether respondents’ law schools were planning to offer those classes more or less frequently than they had in the past.

III. ATTITUDES

Part 1 of the survey asked respondents to use a 5-point scale ranging from “strongly agree” to “strongly disagree” to indicate the extent to which they agreed with four statements that might be relevant to curricular choices.

Two of these statements related to the national political landscape. On these questions, something resembling consensus emerged. Seventy-eight percent of respondents agreed with the statement that they “personally don’t expect the Federal estate tax exemption to go below \$5

⁸ Those students can always pursue this interest in other ways, such as through a faculty-supervised independent study or by enrolling in a writing-based tax elective in which students are free to choose their own paper topics.

⁹ The survey was administered as an online survey through the website www.surveymonkey.com. A copy of the survey is available at <https://www.surveymonkey.com/r/3PC2MVW> [<https://perma.cc/9G9L-W8HN>]. The survey was not intended to be a comprehensive, scientific, study of all of the nation’s law schools and the resulting data should be interpreted accordingly.

million in the foreseeable future,” while none disagreed.¹⁰ When asked whether they “expect Joe Biden to win the 2020 Election,” 53% of respondents agreed while 40% expressed no opinion and only 6% disagreed.¹¹ Taken together, the data suggests that most respondents expect the federal estate tax exemption to remain at an historically high level, \$5 million or above, notwithstanding the fact that they expect 2021 to bring a new occupant to the White House.

The remaining two statements related to respondents’ views on how law schools should respond to this tax and political landscape. The results suggested some preferences but no clear consensus. Sixty percent of respondents agreed that “recent changes in estate tax law have led me/my law school to rethink our course offerings in the area of estate planning and related fields,” with 38% strongly agreeing and 22% agreeing. But others were less convinced. Nine percent were neutral, 25% disagreed and 6% strongly disagreed. Respondents also were somewhat split in their responses to the proposition that “today’s law students interested in estate planning careers should spend less time studying tax planning and more time studying non-tax aspects of the field (such as drafting and client counseling).” A bare majority of respondents agreed with this statement (16% strongly agreeing and 38% agreeing), while 16% percent were neutral, 28% disagreed and 3% strongly disagreed. Taken together, responses to this pair of statements suggest while a majority of respondents believe that law schools should alter their curriculum in response to recent tax law changes, a significant number of other respondents are either unsure or opposed to such changes.¹²

IV. ACTIONS

The survey continued on to explore specific curricular changes law schools have made or might be considering. In this section of the survey, two courses emerged as clear losers. Among respondents from law schools that offer a course on estate and gift taxation, 54% percent indicated that their school would either stop offering that course or offer it less frequently, while 46% predicted a similar fate for their school’s tax-

¹⁰ Responses: 44% “strongly agree,” 34% “agree,” and 22% “neutral.”

¹¹ Responses: 13% “strongly agree,” 41% “agree,” 41% “neutral” or “no opinion,” and 6% “disagree.” Note that two responders included comments that indicating that while the agreed with the statement, they selected “neutral” as their response so as not to “jinx” Mr. Biden’s election chances.

¹² I did not ask respondents to identify whether they were tenured professors or adjuncts. A few respondents volunteered in the “comments” field that they were adjunct professors, and those respondents were more likely to favor continued study and emphasis of estate and gift taxation. This limited data hints at a difference of opinion between tenured faculty and adjuncts, a potentially fertile area for future research.

based estate planning course. The winners were less clear cut, with a handful of respondents suggesting that their law schools might be offering “elder law,” “financial planning,” or “will and trust drafting” more frequently or for the first time.¹³

V. CONCLUSION

The federal estate tax currently impacts a far narrower slice of Americans than it did at the turn of the century. As a result, estate planners must reconsider the nature of services they provide to their clients, and the academic community must rethink how best to prepare students seeking to enter the field. At the law school where I teach, we made a number of curricular changes in response, deemphasizing the deep study of estate and gift taxation while encouraging students to more broadly explore related fields such as elder law and financial planning and to hone their drafting skills. A survey of the members of the ACTEC Legal Education Committee suggests that many other law schools are considering similar changes, with a number of law schools eliminating or reducing their courses devoted to estate and gift taxation and tax-based estate planning.

¹³ A few respondents noted that tight budgets, limited faculty size, or both might impact their schools' ability to offer additional estate-related courses.

