



# What Is Included in Your Estate?

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**C**omprehensive estate planning includes an analysis of the estate tax liability you may be facing. Whether one of your personal estate planning goals is to minimize estate taxes or not, it is important to understand what taxes may become due as a result of your death so you can define how those taxes will be paid and who will bear the burden of payment. The first step towards determining if you have an estate tax issue is defining what property and assets the IRS will include in your gross estate. This chapter will answer the question: What assets are included in your estate for federal estate tax purposes?<sup>1</sup>

There are generally two broad categories of assets that will be included in your gross estate: 1) property owned by you at the time of your death; and 2) certain property transfers made during your life. The statutory authority for these categories can be found in Internal Revenue Code (IRC) Sections 2033-2044. If an interest in property is not described in IRC Sections 2033-2044, then it will not be included in your gross estate.

## PROPERTY OWNED AT DEATH

The general rule under IRC Section 2033 is that your gross estate includes all property in which you have an interest at death. This language is meant to capture *any* interest you have in any property at your death, even if you do not own title or have complete rights to the property.

### EXAMPLE: JOINT INTERESTS

- a) Assume you are married and you and your spouse own an asset as joint tenants with right of survivorship. If you predecease your spouse, at your death one-half of the value of the asset will be included in your gross estate under IRC Section 2040(b). This principle applies regardless of how the asset was acquired or who paid for the asset in the first place. This is also how any vested community property assets will be treated.
- b) Assume instead that you own the asset with your brother (or anyone other than your spouse) as joint tenants with right of survivorship. If you predecease your brother, the full value of the asset will be included

in your gross estate subject to two exceptions: 1) if you and your brother received the asset by gift or bequest, or 2) your brother furnished a portion of the funds used to acquire the property in the first place.

**EXAMPLE: LIFE INSURANCE & ANNUITIES**

a) Assume you own a life insurance policy payable at your death. The proceeds will generally be included in your gross estate. However, if you do not retain any incidents of ownership in the policy *and* the policy proceeds are not payable to your estate, then the proceeds will not be included in your gross estate.

b) If you own a straight life annuity (an annuity which terminates on your death), the annuity will not be included in your gross estate.

c) If you own an annuity with a term certain or a joint life/survivor annuity, the asset may have value after your death. If so, that value will be included in your gross estate to the extent you contributed to the value remaining to be distributed.

**EXAMPLE: INCOME BENEFICIARY OF TRUST**

a) Assume you are the beneficiary of an irrevocable trust (not established by you) which entitles you to income from the trust for life and leaves you no power of appointment at your death. The underlying assets of this irrevocable trust would typically not be included in your estate at death.

b) Exception: Let's now assume the irrevocable trust is actually a QTIP trust and you became the income beneficiary of the trust upon your spouse's death. If you make an election to take a marital deduction with respect to this trust, then the underlying assets of this trust are included in your gross estate. The trust is designed to allow a couple's assets to avoid estate taxes at the death of the first spouse but not after the death of both.

## PROPERTY TRANSFERRED DURING LIFE

**Gifts Made Within Three Years.** Under current law, certain gifts of life insurance or transfers in trust made within three years of your death may be pulled back into your estate at death. In addition, the amount of any gift tax payable on *any* gift made within three years of your death will also be included in your gross estate.

**EXAMPLE:** Today you make an outright gift to your daughter and pay \$200,000 in gift taxes on that gift. If you die within three years, your gross estate will include the value of the taxes paid (\$200,000).

**Gifts Made With Continued Possession/Enjoyment.** If you transfer property during your lifetime but you (or your legal dependents) retain the right to income

from that asset during your lifetime, the asset will likely be included in your gross estate.

**Gifts Made With Retained Power to Change the Transfer.** If you transfer property but retain the right to change the terms of the gift (e.g., to substitute beneficiaries or to revoke the gift in full), it is likely that the value of the property gifted will be included in your gross estate at your death.

## VALUATION OF INCLUDED ASSETS

In determining the value of assets included in your estate, the fair market value of the assets as determined on the date of your death is typically used. In some cases, your personal representative may make an election to value the property six months after the date of your death.

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1. Not all States that impose an estate tax at death follow the federal definition of the Gross Estate under IRC Section 2031. A state by state analysis of what is included in a gross estate is beyond the scope of this chapter.