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Avoiding a GSTT Asteroid[*]
Revisiting a Dangerous Adversary: The Generation-Skipping Transfer Tax

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> It hit with the force of 10,000 nuclear weapons. A trillion tons of dirt and rock hurtled into the atmosphere, creating a suffocating blanket of dust the sun was powerless to penetrate for a thousand years. It happened before. It will happen again. It's just a question of when.[1]

The odds that an estate will run afoul of the generation-skipping transfer tax (GSTT) may be slim nowadays, but estate planners must never let down their guard against this virulent adversary. The GSTT sneaks up without warning and packs a powerful punch. Just the convoluted process of calculating this tax can send an estate planning professional into a black hole of despair.

This article will review GSTT rules and strategies. First, however, to set the GSTT in proper context, we must travel back through the time-space continuum to a more innocent time, before the GSTT existed, when the estate tax was the primary opponent for estate planning.

I. THE KENNEDY FORTUNE

Joseph P. Kennedy (1888–1969) was the president of a bank at age twenty-five.[2] Before the Securities and Exchange Commission began regulating the stock market, Mr. Kennedy boldly invested during the Roaring Twenties by mastering stock market manipulation and insider trading.[3] By thirty, he was a millionaire; he protected his wealth about a decade later when he instinctively sold his stocks before the Great Crash of 1929.[4] Then he used short sales to make huge profits during the Great Depression.[5]

Additionally, Mr. Kennedy made fortunes in Hollywood and in real estate.[6] The net result was arguably one of America's great fortunes. By 1935, he had amassed $180 million, the equivalent of $2.8 billion today.[7]

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1. ARMAGEDDON (Paramount Pictures 1998) (a motion picture starring Bruce Willis, in which an asteroid heads toward planet Earth). On April 13, 2029, the asteroid Apophis, which is the size of a 25-story building, will swing past Earth and has a 1 in 45,000 chance of hitting our planet. Reminder: Party like it's 2028.

2. DORIS KEARNS GOODWIN, THE FITZGERALDS AND THE KENNEDYS 256 (1987).

3. *Id.* at 299, 335–38. Ironically, Kennedy became the first Chairman of the Securities and Exchange Commission. *Id.* at 448.

4. *Id.* at 339.

5. *Id.* at 421.

6. *Id.* at 339–418. However, rumors that he had a bootlegging operation may have been exaggerated considering Kennedy's foresight to corner the market on importing legitimate pre-Prohibition alcohol. *Id.* at 442–44.

7. *See* S. Morgan Freidman, *The Inflation Calculator*, http://www.westegg.com/inflation (last visited Feb. 22, 2012).

II. PRE-GSTT PLANNING

Between the years of Joseph Kennedy's peak wealth and his death in 1969, the estate tax had a top rate ranging from 70% to 77%.[8] The estate tax was a harsh gatekeeper that applied to every generation.[9] From 1941 until 1986, the top rate of 77% applied to assets exceeding $10 million.[10] If Joseph Kennedy's estate had been taxed at that rate when he died then taxed again one generation later, the Kennedy fortune could have been erased. Kennedy saw the wisdom of avoiding the estate tax.[11]

By passing wealth directly to his grandchildren, he skipped an entire layer of estate taxation.[12] For example, trusts that Joseph Kennedy established for John F. Kennedy (JFK) provided JFK with income for life and the right to withdraw up to 5% of the principal in any year.[13] While JFK was President, his trust funds paid him an estimated $500,000 in annual income.[14] Because Joseph Kennedy gave his son, JFK, only a life estate in the assets, they were not subject to the estate tax at JFK's death.[15] Thus, the government taxed the assets only once, in Joseph P. Kennedy's estate, before they reached Joseph's grandchildren, John F. Kennedy, Jr. and Caroline Kennedy Schlossberg.[16]

The Kennedy estate plan demonstrates that when assets are unencumbered by transfer taxes or the need to benefit one particular generation, a family can productively invest those assets in long-term pursuits. As a result of Joseph Kennedy's estate planning, the Kennedy trusts held assets ranging from businesses to real estate.[17] The family holding company, Joseph P. Kennedy Enterprises, held the Merchandise Mart in Chicago, which Joseph Kennedy

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8. *See generally Top U.S. Federal Income Tax Rates on Regular Income and Capital Gains*, DATA 360.COM, http://www.data360.org/dsg.aspx?Data_Set_Group_Id=475 (last visited Mar. 20, 2012) (providing a graph of the average federal income tax rates from 1916 through 2015).

9. *See id.*

10. *Id.*

11. *See Historical Look at Estate and Gift Tax Rates*, CCH.COM, http://www.cch.com/wbot2011/032estategifttax.asp?fr=print (last visited Feb. 6, 2012) (stating that the highest tax rate in 1941 was 77%).

12. *See generally*, Gregory D. Merrill, *Dynasty Trusts*, SHERIDAN LARSON, PLLC (Feb. 6, 2012, 5:28 PM) http://www.sheridanlarson.com/index.php?option=com_content&view=article&id=55&Itemid=59 (stating that by using trusts and giving their children a life estate they could disinherit the IRS because the children would not be deemed the transferees).

13. Gerald Posner, *Who Gets Teddy's Millions?*, THEDAILYBEAST.COM (Aug. 27, 2009, 4:44 PM), http://www.thedailybeast.com/articles/2009/08/27/who-gets-teddys-millions.html.

14. Matthew Murray & Daniel Heim, *In the Newest Congress, the Rich Get Richer*, ROLL CALL.COM (Sept. 7, 2007, 1:42 PM), http://www.rollcall.com/features/Guide-to-Congress_2007/guide/-19877-1.html?type=printer_frien. However, JFK only received approximately 20% of the income after taxes and other costs associated with his trust. *Id.*

15. *See generally*, Scott Blakesley, *What is GST and Why Do I Care?*, PLANNED GIVING DESIGN CTR (May 12, 1999), http://www.pgdc.com/pgdc/what-gst-and-why-do-i-care (stating that a GST providing life estate to a child will not be taxed at the child's death and that it passes to a grandchild).

16. *Id.*

17. *Kennedy's Wealth Exceeded Tens of Millions*, CBSNEWS.COM (Sept. 3, 2009, 7:06 AM), http://www.cbsnews.com/2100-250_162-5276294.html.

purchased in 1945 for $12.5 million and the trustee eventually sold for approximately $600 million.[18]

III. THE NEXT GENERATION: CAMELOT

At the time of his assassination in 1963, President John F. Kennedy left a 1954 will that made no provision for his children.[19] If he had lived, he might have adopted his father's multigenerational trust approach.[20]

Similarly, the President's widow, Jacqueline Kennedy Onassis, chose to direct her wealth to her grandchildren.[21] She attempted to coordinate her GSTT strategy with a charitable lead trust (CLT) to reduce taxes and maintain privacy.[22] Unfortunately, despite receiving $34.4 million from a 1996 Sotheby's auction of the Kennedy family's personal property, the Onassis estate fell short of its $100-$200 million projected value.[23] Consequently, the acclaimed arrangement between the CLT and GSTT strategy may have resulted in too much GSTT after all.[24] The estate's executors ultimately decided not to fund the trusts, which demonstrated the flexibility of the Onassis estate plan.[25]

IV. DEEP IMPACT: THE FIRST GSTT

An entire generation of estate planners has never known a time when the GSTT did not exist. Travel back thirty-five years to a pre-GSTT age of innocence when Congress first began to sow the seeds of change.

It is the summer of 1976, a bicentennial time of tall ships and fireworks. In North Carolina, 5'8" Larry Jordan is beating his little brother Michael in one-on-one basketball in the backyard.[26] On Wall Street, the Kohlberg Kravis Roberts and Drexel Burnham Lambert companies form the foundation for the future era of hostile takeovers and junk bond deals.[27] Silicon Valley does not

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18. *Id.*

19. *See Last Will and Testament of John F. Kennedy*, RONGOLINI.COM, http://www.rongolini.com/jfk.htm (last visited Mar. 20, 2012).

20. Posner, *supra* note 15.

21. *See* Marty McKeever, *Planning With the Dynasty Trust & Charity*, PLANNED GIVING DESIGN CTR, (Jan. 4, 2000), http://www.pgdc.com/pgdc/planning-dynasty-trust-charity.

22. *Id.*

23. *Id.*

24. *Id.*

25. William D. Zabel, THE RICH DIE RICHER AND YOU CAN TOO 161–62 (1995). Ironically, the public identifies the Onassis estate with the use of CLTs. *See generally* McKeever, *supra* note 21.

26. Manali Oak, *Michael Jordan's Childhood*, BUZZLE.COM, http://www.buzzle.com/articles/michael-jordans-childhood.html (last updated Jan. 21, 2012).

27. *Stars of the Junkyard*, ECONOMIST.COM (Oct. 21, 2010), http://www.economist.com/node/17306419. *See also Company History*, KKR.COM, http://www.kkr.com/company/history/index.php (last visited Mar. 20, 2012).

exist.[28] Steve Jobs, a twenty-one-year-old college dropout, is starting Apple Computers in a garage a year after nineteen-year-old college dropout, Bill Gates, founded Microsoft.[29] A typical estate planning lawyer is musing over the latest Clifford trust techniques[30] and pecking out letters on an IBM Selectric typewriter.[31]

Suddenly, "[a] screaming comes across the sky."[32] It is October, and the Tax Reform Act of 1976 has reached President Gerald Ford's desk.[33] Suddenly, a meteor shower of tax changes unifies estate and gift taxes, increases the marital deduction, provides throwback rules for accumulation distributions from trusts, and makes other profound changes in the transfer tax system giving birth to a new tax: the first GSTT.[34]

V. A FALLIBLE AUTHORITY

Congress makes mistakes, tax experiments go awry, and lawyers took for granted the value of stepped-up basis for assets held at death under section 1014 of the Internal Revenue Code.[35] Nevertheless, in 1976, Congress attempted to impose carryover basis at death, then postponed it, and ultimately repealed it quietly and retroactively in the Crude Oil Windfall Profit Tax Act of 1980.[36]

Problems soon became apparent with the first GSTT under the Tax reform Act of 1976.[37] For example, instead of imposing a flat tax rate of 55% on the transferee's estate, Congress imposed the tax rate of the deemed transferor—the grantor's child or some other member of the generation that was skipped—on the transferee's estate.[38] To calculate the tax rate, the tax return preparer had to

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28. Rudolf Richter, *The Silicon Valley Story: Scene, Characters, Plot, and Moral of the Tale*, UNIVERSITAT DES SAARLANDES, 1–2, http://www.uni-saarland.de/fak1/fr12/richter/institut/Silicon_Valley.PDF (last visited Mar. 20, 2012).

29. *Id.*

30. *See* Jonathan G. Blattmachr and F. Ladson Boyle , *Chapter 4: Grantor Trusts*, PRACTISING LAW INST., 4-6, http://www.pli.edu/product_files/booksamples/10318_sample4.pdf (last visited Mar. 20, 2012).

31. Ed Brill, *The Selectric Typewriter*, IBM.COM, http://www.ibm.com/ibm100/us/en/icons/selectric/ (last visited Feb. 6, 2012). The IBM Selectric was the most popular typewriter for nearly twenty-five years, which means it was likely the most commonly used typewriter by lawyers in 1976 (prior to the widespread use of personal computers in the 1980's). *Id.*

32. Thomas Pynchon, GRAVITY'S RAINBOW 3 (Penguin Books 1973). The opening sentence to the book is, "A screaming comes across the sky." *Id.*

33. *See generally* Laurence N. Woodworth, *General Explanation of the Tax Reform Act of 1976*, JCS-33-76, http://www.section6694penalty.com/pdf/pl94_455.pdf (last visited Mar. 20, 2012).

34. *Id.*

35. *See* I.R.C. § 1014 (West 1980).

36. *See* David E. Kinnan, *An Introduction To The Crude Oil Windfall Profit Tax Act of 1980*, 3 W. NEW ENG. L. REV. 645, 645 n.1 (1981) (describing how the repeal of the carryover basis rules were buried in a subsequent Title of the Act).

37. *See Generation-Skipping Transfers*, MONEY-EDUCATION.COM, http://www.money-education.com/documents/Estates-SamplePages5thEd.pdf (last visited Feb. 4, 2012).

38. *See generally id.*

know the size of the deemed transferor's taxable estate, including any prior adjusted taxable gifts.[39] This proved to be highly infeasible.[40]

The original GSTT had numerous other problems.[41] As a result, Congress initially postponed the 1976 GSTT, attempted to amend it three times, and ultimately repealed it retroactively ten years later in the Crude Oil Windfall Profit Tax Act of 1980.[42] It was as if the whole messy chapter had been erased, like the 1985 bad "dream season" of *Dallas*.[43]

In 1986, Congress introduced an entirely new law: the second GSTT.[44] The 1986 version of the GSTT had five main components:

1. Congress eliminated a progressive rate schedule and imposed the tax on nonexempt property at a flat 55% rate instead.[45]
2. Each person had a $1 million GSTT exemption, subject to adjustment for inflation.[46]
3. A gift or bequest skips a generation when assets pass to an individual who is two or more generations below the transferor,[47] but gifts to grandchildren (directly or in trust) that only benefitted the parents were subject to the tax.[48]
4. For GSTT purposes, each generation is twenty-five years.[49]
5. However, in cases of unrelated individuals, a transfer generation skips if assets pass to an individual who is more than thirty-seven and a half - years younger than the transferor.[50]

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39. *See* CAROL A. HARINGTON, A PLAINE, HOWARD M. ZARITSKY & JULIE K. KWON, GENERATION-SKIPPING TRANSFER TAX ¶ 5.08, at 5 (Warren, Gorham & Lamont 2011) (This source is a tax treatise available on Westlaw at 2001 WL 1486351).

40. *See generally id.*

41. *Id.*

42. *See Generation-Skipping Transfers*, *supra* note 37. *See also* Kinnan, *supra* note 36.

43. *See Dallas: Season Seven*, ULTIMATEDALLAS.COM (last visited Feb. 4, 2012), http://www.ultimatedallas.com/episodeguide/dreamzonefaq.htm. Some tax laws mysteriously disappear like the seventh season of *Dallas*, when Bobby Ewing died, J.R. pursued nefarious international deals with Angelica Nero, and Ray Krebs's wife took up social issues. *Id.* After ratings fell and Patrick Duffy's movie career stalled, the season was written off as a bad dream. *Id.* Congress also tends to rewrite its script. For example, *Carryover Basis*, was published only ten months after the 1976 tax law. *See generally* THOMAS J. MCGRATH & JONATHAN G. BLATTMACHR, CARRYOVER BASIS UNDER THE 1976 TAX REFORM ACT: A WORKING GUIDE, WITH FORMS, TO ESTATE PLANNING AND ADMINISTRATION (1977).

44. *See generally* HARINGTON, PLAINE, ZARITSKY & KWON, *supra* note 39, at ¶ 1.02, 1 (This source is also available on Westlaw at 1999 WL 1017405.). *See also* I.R.C. §§ 2601–63 (2006).

45. *See generally* Gary L. Brit, CPA, J.D., *The Generation-Skipping Transfer Tax: A Quick Guide*, ATLANTA ESTATE PLANNING LAWYER BLOG (Oct. 25, 2009, 7:07 PM), http://www.atlantaestateplanninglawyer.info/2009/10/generation-skipping-transfer-tax-quick.html.

46. *See generally* Miller, Monson, Peshel, Polacek & Hoshaw, *Abbreviated Legislative History of U.S. Transfer Taxes*, ESTATE-PLAN.COM (2002), http://www.estate-plan.com/pdf/Art_History_Tax.pdf.

47. *See generally The GST Tax Exemption: A Tool to Generate Future Tax* Savings, CZEPIGALAW.COM (Jul./Aug. 2011), http://www.czepigalaw.com/files/july-august2011.pdf.

48. *See* Brit, *supra* note 45.

49. I.R.C. § 2651(d)(3) (2006).

50. *Id.* at § 2651(d)(2).

Forgetting the previous lessons, Congress attempted to dabble with carryover basis again in 2010; then it cleaned up the mess with a retroactive wipe down of its fingerprints.[51] The current version of the GSTT is similar to the second GSTT, but it has an exemption of $5 million and a tax rate of 35%.[52] If only it were this simple.

VI. THE X FILES

Just to keep things interesting, there are several distinct types of generation-skipping transfers subject to the GSTT, each with its own horrendous and paranormal tax implications.[53] For example, a transfer in trust may not result in immediate GSTT.[54] As circumstances unfold, however, a taxable termination or distribution in the future may involve "skip persons," which may trigger GSTT without triggering additional gift or estate taxes.[55] By comparison, direct skips arise in a more straightforward fashion, such as when a direct transfer to a skip person triggers gift or estate taxes and the GSTT.[56]

A. Taxable Terminations

Assume that a testamentary trust provides a life interest for Son with the remainder to Grandchild. At Son's death, his intervening trust interest ends and the only remaining trust beneficiary is a skip person, Grandchild. This results in GSTT liability to be paid by the trustee out of the transferred assets.[57] Considering the 35% estate tax that Grandparent's estate paid, the additional GSTT on the remaining assets brings the effective tax rate on the gift to Grandchild up to about 58%.[58]

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51. *See* Jeff Marshall, *IRS Answers Estate, Gift, and Generation-Skipping Transfer Tax Questions*, MARSHALL ELDER AND ESTATE PLANNING BLOG (Feb. 21, 2011), http://marshallelder.blogspot.com/2011/02/irs-answers-estate-gift-and-generation.html (stating that the "2010 Tax Relief Act retroactively reinstates the GST Tax for transfers made in 2010").

52. Hani Sarji, *New Year, Different Rules: Estate Tax, Gift Tax, & GST Tax Rules for* 2011, FORBES (Jan. 2, 2011, 9:10 AM), http://www.forbes.com/sites/hanisarji/2011/01/02/new-year-different-rules-2011-estate-tax-gift-tax-gst-tax-rules/.

53. Layne T. Rushforth, *Tax–Related Estate Planning: Reducing Federal Transfer Tax*, RUSHFORTH.COM (Feb. 6, 2012), http://rushforth.net/advintro.html.

54. *See generally* Mark E. Powell, Esq., *The Generation-Skipping Transfer Tax: A Quick Guide* (Mar. 2009), http://www.journalofaccountancy.com/issues/2009/oct/20091804.htm.

55. *See* I.R.C. § 2612(a)(1)(A)–(B) (2006). For purposes of this article, "skip persons" are individuals who are receiving the gift because another individual or individuals were "skipped" for estate planning purposes.

56. *See generally Generation-Skipping Transfer Tax: General Discussion*, FOREFIELD, INC. (2003), http://www.heritagewealthmgrs.com/wp/Generation%20Skipping%20Transfer%20Tax.pdf.

57. *See* I.R.C. § 2612(a)(1), 2603(a)(2).

58. *See id. See also* I.R.C. § 2515 (2006) (stating that the amount of a taxable gift shall be increased by the amount of any tax imposed on the transferor).

B. Taxable Distributions

A testamentary trustee's discretionary distribution from a spray trust to a skip person results in GSTT liability that is to be paid by the skip person and effectively reduces the transferred amount.[59] Treasury Regulation § 26.2612-1(C)(1) treats the trustee's payment of GSTT as a taxable transfer subject to additional GSTT.[60] What happens if the transferor also pays that tax? Will there be a gift tax on a GSTT tax after an initial estate tax?[61] With higher rates in the past, this resulted in confiscatory tax rates exceeding 100%.[62] Nowadays, with lower rates, the impact is merely brutal, exceeding 75%.[63]

C. Direct Skips with Tax Payment

Consider a different scenario: Grandma makes a direct transfer to Grandson. It is a taxable gift with no exclusions. Grandma pays the gift tax.[64] Grandma also pays the GSTT. Grandma's payment of the GSTT is treated as an additional taxable gift.[65] One transfer, three tax hits.[66]

D. Adding to GSTT-Exempt Trusts

A lawyer should never add to GSTT-Exempt trusts. A trust that is otherwise exempt from GSTT consequences can become exposed to GSTT consequences if it receives a generation skipping transfer.[67] However, separating trusts into GSTT-exempt and non-exempt is an effective strategy for avoiding additional tax liabilities.[68]

VII. GSTT STRATEGIES

There are additional options for clients and lawyers who are interested in creating an estate plan that effectively avoids GSTT. Using these strategies can

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59. *See* I.R.C. § 2603(a)(1) (2006).

60. Treas. Reg. § 26.2612-1(C)(1) (1996).

61. Michael D. Mulligan, *Final GST Tax Regulations Make Important Changes*, 23 EST. PLANNING 241, 244 (1996).

62. *See generally* Mark Gimein, *The Great Compression: How War and Taxes Made Us All Middle Class, And Why That's Changed*, BUSINESSWEEK (Dec. 14, 2011, 8:30 AM), http://www.businessweek.com/finance/occupy-wall-street/archives/2011/12/the_great_compression_how_war_and_ taxes _made_us_all_middle_class--and_why_thats_changed.html (providing background information and graphical data on why the confiscatory tax rates were so high in the past).

63. *See generally id.*

64. *See id.*

65. *Id.*

66. *Id.*

67. David E. Fowler, *How to Prevent Inadvertent Skips That Cause GST*, 18 EST. PLAN. 337, 337 (Nov. 1991).

68. *Generation-Skipping Transfers*, *supra* note 37.

help the client and attorney plan a strategy for avoiding the unpredictable future of the GSTT.

A. Reverse QTIPs

Clients and their lawyers should not overlook the option of using the grantor's GSTT exemption by transferring all assets to a surviving spouse.[69] If a "reverse" QTIP election is made under section 2652 of the Internal Revenue Code, those assets will remain in the deceased spouse's estate for purposes of claiming the $5 million GSTT exemption.[70] Because that election applies to an entire QTIP, a client should use two separate QTIP trusts to make the reverse QTIP election for one of the trusts and use the grantor's GSTT exemption, while the other QTIP remains in the surviving spouse's estate for GSTT purposes.[71] That way, the surviving spouse's GSTT exemption can also be used by the resulting alignment of three trusts:[72]

> Trust #1: A credit shelter trust for grantor's executor to allocate the GSTT exemption.[73]
>
> Trust #2: A separate QTIP trust to which the grantor's executor allocates the grantor's GSTT exemption remaining after allocation of the exemption to the credit shelter trust and with respect to which the executor makes a reverse QTIP election.[74]
>
> Trust #3: Remaining assets in a standard QTIP trust to which the surviving spouse's GSTT exemption will be allocated at his or her death.[75]

B. Anti-GSTT Approaches

A client should use intervening generations when appropriate.[76] If the client exhausts his or her GSTT exemption and plans to skip a generation by leaving assets to a grandchild, this will actually produce a higher tax.[77] The client should consider the alternative of not skipping a generation and leaving

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69. *See, e.g.*, Fowler, *supra* note 67 (suggesting that a father's trust providing all assets to his wife who predeceases their son may trigger a generation-skipping transfer).

70. *See* Pam H. Schneider, *General Considerations in Structuring GST Exempt Trusts*, 31-3 U. MIAMI L. CTR ON EST. PLAN. 301, 301.3 (2011). *See also* I.R.C. § 26.2632(1)(c) (2006).

71. *See* Fowler, *supra* note 67, at 338.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *See* Natalie B. Choate, *The Disclaimer-Activated Generation Skipping Trust: A Useful Strategy*, 23 EST. PLANNING 210, 218 (June 1996).

77. *See* Michael S. Kutzin, *2001 Amendments To Generation-Skipping Transfer Tax Provisions Necessitates Trust Reviews*, SENIOR LAW, http://www.seniorlaw.com/gst-amendments.htm (last visited Mar. 20, 2012).

assets to a child, in whose hands the assets will be taxed.[78] This may result in a lower overall transfer tax rate.[79] For future flexibility, clients should consider a power of appointment that will allow the child to treat a transfer to a skip person as a taxable gift rather than a distribution subject to the GSTT.[80]

C. Leveraging

The most effective estate plan is implemented long before death.[81] This is especially true of multigenerational living trusts.[82] A client can apply his or her $5 million GSTT exemption to assets that appreciate by 100% by the time of death, thereby being as valuable as two exemptions.[83] When a client pursues a lifetime generation-skipping gift, he or she should use assets that are most likely to appreciate rapidly.[84]

D. Disclaimer Trusts

When a client plans outright gifts to his or her children, the client can establish unfunded multigenerational trusts.[85] These trusts will only be activated if the children, seeing an opportunity to take advantage of unused GSTT exemption, disclaim inherited assets or powers of appointment and thereby fund the trusts.[86]

VIII. LET'S ALL SKIP

As long as a client skips one generation, why not skip more for the price of one?[87] Take Kennedy's estate plan concept as a guide. A client could create a trust that is a perpetual source of revenue that would avoid transfer taxes

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78. *Id.*
79. *Id.*
80. *See Generation-Skipping and Dynasty Trusts: Selected Issues in Planning, Drafting and Administration*, WELLSFARGO.COM, https://www.wellsfargo.com/downloads/pdf/familywealth/Generation-SkippingAndDynastyTrusts.pdf (last visited Mar. 20, 2012).
81. *See* Joseph R. Oliver & Charles A. Granstaff, *Postmortem Estate Planning*, J. OF ACCOUNTANCY (July 1998), http://www.journalofaccountancy.com/Issues/1998/Jul/oliver.htm.
82. *See* GERRY W. BEYER, TEACHING MATERIALS ON ESTATE PLANNING 215 (2d. ed. West 2000).
83. *Id.*
84. See Daniel G. Worthington & Daniel D. Mielnicki, *In Defense of Multi-generational Trusts*, TRUSTS & ESTATES (Jan. 1, 2011, 12:00 PM), http://subscribers.trustsandestates.com/topics/generation-skipping-transfers/estate_defense_multigenerational_trusts/wall.html?return=http://subscribers.trustsandestates.com/topics/generation-skipping-transfers/estate_defense_multigenerational_trusts/index.html.
85. *Id.*
86. *Id.*
87. *See* Laura Sanders, *Dynasty Trusts Under Attack*, WALL STREET JOURNAL (Mar. 5, 2011), http://online.wsj.com/article/SB10001424052748703752404576179031767463642.html. *See also Dynasty Trust States*, OSHINS.COM, http://www.oshins.com/dynastytruststates.html (last visited Mar. 20, 2012).

forever and would serve as a family bank to finance his or her descendants.[88] Skipping additional generations does not add to the GSTT bill for direct skips—that is, outright transfers—but see Internal Revenue Code section 2653 for multiple skips held in trust.[89]

IX. THE GSTT'S THIRD INCARNATION

With its fate tied to the Federal estate tax, the GSTT had a $3.5 million exemption and a 45% top rate in 2009.[90] It was then terminated in 2010 but was later reinstated retroactively for 2010 with a zero tax rate and a $5 million exemption.[91] Why an exemption for a zero tax rate?[92] Avoiding a paradox in the event of "chrono-synclastic infundibulum"[93] time travel has not yet been confirmed as the intent of Congress, but the truth is out there.[94]

A. The GSTT's Current State

For the moment, the GSTT will have a 35% top rate and a $5 million exemption for 2011 and 2012. Likely, the new GSTT will ride along with the reunited estate and gift tax when it is revised in the next major wave of tax reforms.[95]

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88. *See generally Dynasty Trust States*, *supra* note 87. Although the common law rule against perpetuities imposes a time limit—a life in being plus twenty-one years can reach about 100 to 120 years—true dynasty trusts can be established, with various limitations, in a growing number of perpetuity havens. *Id.* Delaware, Idaho, Ohio, New Hampshire, South Dakota, and Wisconsin now permit perpetual trusts, while Alaska, Colorado, Utah and Wyoming provide for 1,000-year trusts. *Id.* Nevada and Florida also provide trusts lasting 365 years and 360 years, respectively. *See generally* I.R.C. § 2653 (2006).

89. *Dynasty Trust States*, *supra* note 87. Any arrangements like these can skip a lot of generational transfer taxation. *Id.* Arizona, Illinois, Maine, New Jersey, Rhode Island, and Virginia have also abrogated their perpetuity rules. *Id.* Most of these states joined the trend in or after 1994. *Id.* Other states have also included modifications by adopting the Uniform Statutory Rule Against Perpetuities. *Id.* This approach extends the waiting period to ninety years after creation of the interest. *Id.* There is some uncertainty, however, about how the GSTT would apply to statutory perpetuity periods that have simply been extended, as opposed to those in jurisdictions in which the rule has simply been abrogated or where exceptions are created for certain types of trusts. *Id.*

90. *Understanding the 2010 Estate Tax Repeal*, ANNEX WEALTH MANAGEMENT, LLC, http://annexadvisors.com/2010_estate_tax_repeal.html (last visited Mar. 20, 2012).

91. *Id.*; Matthew J. Aheam and Brian M. Malec, *Form 8939 Guidance Concerning the Generation-Skipping Transfer (GST) Tax*, FLORIDA TRUSTS & ESTATES BLOG (Aug. 10, 2011), http://www.floridatrustsestatesblog.com/estate-gift-gst-tax/form-8939-guidance-concerning-the/.

92. *See id.*

93. *See* KURT VONNEGUT, THE SIRENS OF TITAN: A NOVEL 13 (Dial Press Trade Paperback 1959). According to Vonnegut, a "chrono-synclastic infundibulum" is a type of wormhole in which all types of truths exist together. *Id.* at 13–15.

94. THE X FILES (Twentieth Century Fox Film Corp. & Ten Thirteen Productions 1998).

95. *See* G. Raye Jones, *An Overview of the Estate Tax Law Changes*, MARTIN WREN, P.C., ATTORNEYS AT LAW (Feb. 24, 2011), http://martinwrenlaw.com/wordpress/2011/02/an-overview-of-the-estate-tax-law-changes/.

B. No GSTT Portability

Notably, the new estate tax exclusion's portability rule for married couples does not apply to the GSTT.[96] For example, if Rocky leaves his $10 million estate to his wife, Ramona, and Rocky's timely estate tax return elects to transfer his unused estate tax exclusion to Ramona,[97] then at Ramona's death, she has her full $5 million exclusion available, as well as the $5 million from Rocky.[98] Ramona leaves $10 million to her grandson. Her $10 million exclusion shields her estate from estate tax on that transfer; however, only $5 million of the transfer is exempt for generation-skipping transfer tax purposes.[99]

X. CONCLUSION

GSTT is not quite the nightmare it once was—with combined taxes exceeding 100%. But even with $5 million in exclusions and a 35% tax rate, the combined impact is still a force to be reckoned with that will rock an estate backwards. With care and planning, a lawyer can avoid a GSTT asteroid. Keep watching the night skies,[100] and may the force be with you.[101]

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96. *Id.*
97. *Id.*
98. *Id.*
99. *See id.*
100. *See* THE THING FROM ANOTHER WORLD (Winchester Pictures Corp. 1951).
101. STAR WARS: EPISODE 1 – THE PHANTOM MENACE (Lucasfilm 1999).