



Estate & Gift Planning

Why is Now the Perfect Time to Act?

The current environment for estate planning and gifting is about as favorable as it has ever been in U.S. history. But this “golden age” is not likely to last. In the near future, estate tax laws are almost certain to become less favorable.

This makes a compelling case for taking action sooner rather than later to reduce tax liabilities for many estates.

At the end of the first year of Donald Trump’s presidency, the Tax Cuts and Jobs Act (TCJA) doubled the exemption from \$5.6 million to \$11.2 million per individual. As of 2022, the exemption has risen to \$12.06 million per individual (\$24.12 million for married couples) and is expected to rise to around \$12.9 million (\$25.8 million for married couples) in 2023 due to inflationary adjustments to the estate tax provisions of the TCJA. Unless Congress acts to extend this provision of the TCJA prior to the sunset of this provision at the end of 2025, the estate tax exemption will automatically drop to pre-TCJA levels, or approximately \$6.4 million per individual after adjusting for inflation.

Although Congress did not pass any major estate tax legislation in 2021 or 2022 as was previously expected, the possibility still remains that progressive estate tax reform could still be forthcoming. However, with much of the political capital spent and with mid-term elections looming, the political will for any significant legislation has diminished considerably. Experts on both sides of the aisle predict that the incumbent Democratic Party is unlikely to retain control over both the House of Representatives and the Senate after the mid-term elections in 2022. Any shift in the balance of power away from the incumbent party would greatly reduce the possibility any progressive tax reform under the current administration. As such, the main question is whether the estate tax provisions of the TCJA will be allowed to expire or not at the end of 2025.

Why Consider Planning Now

In addition to the current estate tax laws being about as favorable as they will ever be until these laws sunset in 2025, other factors that have contributed to creating a perfect storm for estate and gift planning in the current environment are as follows:

- With the end of year planning and tax season now behind us, estate planning professionals are much more available to work closely with clients to implement carefully and well-thought out estate plans. However, as we get closer to the end of 2025, planning professionals will no doubt become far busier and less accessible to clients. This

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may result in plans that are less than perfect (or worse) due the lack of sufficient time available to fine tune the details. This was certainly the case at the end of 2012 when many planners were scrambling to make last minute planning decisions before a feared sunset of favorable federal estate, gift and generation-skipping tax exemption limits. However, at the final hour, Congress passed The American Taxpayer Relief Act, a compromise bill not unfavorable to taxpayers.

- The inflationary pressure reflected in rising prices throughout a large portion of the economy and realized across many industries will soon be reflected in fees charged by service providers, which will likely be further exacerbated by labor shortages along with increased demand. Thus, the fees charged by estate planning professionals will inevitably increase over the next few years, particularly when there is a need to deliver quality services under short time constraints and when demand is usually high. This will likely be the case the closer we get to sun-setting the current estate tax regime in 2025.
- As a result of the ongoing Russia-Ukraine conflict and rising interest rates, values of many types of investments, such as publicly traded securities commonly held by wealthier estates, are lower than they have been since the early part of the COVID-19 pandemic. However, these depressed valuations may surge after the war ends and markets stabilize. Gifting these types of assets now would allow for the transfer of a greater portion of the estate within the gift tax exemption limit.
- Starting the planning process early will also ensure that there is ample time to put together the right team of estate planning professionals. Depending on the nature of the assets of the estate and the complexity of the estate plan, the “right” team might include some combination of estate attorneys, tax accountants, financial planners, trust administrators and valuation professionals.

What this Means for Estate Tax Liabilities

Since the current estate/gift tax exemption may turn out to be a “use it or lose it” proposition, estates that hold significant assets that are expected to increase over time should seriously consider taking advantage of as much of the full lifetime gift tax exemption as possible while this window of opportunity remains. A simplistic example of the potential estate tax savings to the estate of an individual (unmarried) is as follows:

What Gifting Techniques to Consider in the Current Environment

Many of the tried and true techniques described below still remain optimal for most wealthy estates. Strategies that involve maximizing gifting within the allowable lifetime estate tax exemption limits using assets that are expected to appreciate remain relevant.

Annual Gifting. As of 2022, anyone can gift of up to \$16,000 annually individually (\$32,000 as a married couple) to any number of family and friends without tax consequences. Payments for a family member’s education or health care expenses are also exempt from the gift tax. This is the least complicated way to gift, but has obvious limitations.

Gifting of Interests in a Privately Held Family Business. If there is a family business that is expected to grow in value, consider gifting interests in this business to family members. This can also help ensure family succession in the governance of the business.

Gifting of Interests in an LLC or Family Limited Partnership that holds Valuable Assets. Consider moving assets (such as real estate, marketable securities and/or the family business) into an LLC or a Family Limited Partnership and gifting minority or limited partner interests. Minority or limited partner interests will typically lack control, and are also considered less marketable and therefore less valuable than controlling interests. As such a gift of this type of interest could be valued and transferred at a considerable discount to the net value of the underlying assets. Minority interests in privately held operating entities can be similarly discounted.

Defined Dollar Value Formula Transfers. One way to gift hard-to-value property interests, such as privately held interests is with the use of a defined dollar value gift. Instead of identifying the gift as a number of units

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or shares in the subject property, the gift is a defined dollar amount of those units or shares. The object is to tie the dollar amount to the donor's available gift tax exemption amount. This will allow for precision gifting without having to wait for asset or business appraisals to be completed in advance.

Intrafamily Loans. An intrafamily loan is a loan from one family member to another. If correctly drafted and administered, this type of loan can be a powerful tool for transferring wealth, free of gift and estate tax, from one generation to the next. Every intrafamily loan should be governed by a loan note that details the loan arrangement. The specifics can include, but are not limited to, whether the loan is a term or demand note, the length of the note, the applicable interest rate, the amount borrowed and the frequency of payments.

Trusts. Trusts are a common vehicle used for estate planning and are often used in combination with techniques described above. The world of trusts is not a one-size-fits-all proposition and is subject to ever-changing federal and state-specific laws, and certain types of trusts may fall in and out of favor at times depending on the degree to which they are subject to IRS scrutiny. The type of trust used as part of an estate plan should also reflect the unique wishes for how a donor's assets are handled. There are four main types of trusts: **inter-vivos, testamentary, revocable and irrevocable**, the structure of which depends on the needs of the donor to receive an income stream and/or retain control while alive and can also provide assurances of how the funds will be distributed and used after the donor's passing. Larger estates that are more complex and for which greater asset protection is needed will likely be advised to utilize irrevocable trusts such as a **Spousal Lifetime Access Trust (SLAT), Grantor Retained Annuity Trust (GRAT)** and **Intentionally Defective Grantor Trust (IDGT)**. For philanthropic purposes, other trust types, such as a **Charitable Remainder Trust (CRT)** or a **Charitable Lead Trust (CLT)**, should be considered.

We note that the IRS recently proposed revisions to 2019 anti-clawback regulations regarding transfers that, if enacted, could limit the effectiveness of certain gifting strategies particularly those for which the donor retains significant control over the assets involved. Practitioners should carefully evaluate how these proposed regulations might impact their estate plans and make adjustments if necessary.

Final Thoughts

The ideas described above are just a selection of available strategies, none of which will be appropriate in every case. Consulting an estate planning attorney and other tax professionals with experience in estate planning is critical for crafting a plan that fits the unique needs of each client and that will remain sufficiently adaptable to future legal changes, since tax regimes are never truly permanent.

Estate planning can be an emotional exercise for many people, and political uncertainty makes decision making more complicated. However, given that the estate and gift tax environment is as favorable as it is likely ever going to be and the tax laws are reasonably transparent for this year, planners, individuals and families are advised to make the most of the current situation and move forward without hesitation to plan and execute estate and gift tax strategies.

"My advice is, never do to-morrow what you can do today. Procrastination is the thief of time. Collar him!"

– Charles Dickens, *David Copperfield*

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