# Tax Act Impact on Estate Planning

The “Tax Cuts and Jobs Act of 2017” (the Tax Act) was signed into law on December 22, 2017, with most changes taking effect on or after 1/1/18. It included changes that significantly affected estate and gift taxes. These changes are easy to describe, but the impact on people varies widely.

The gift and estate tax exemption doubled, along with the GST exemption. The current exemption amounts (adjusted to inflation) are: $12.92 million per person or $25.84 million per couple. This means each individual should be able to shelter nearly $13 million before any estate, gift, and generation-skipping taxes apply. The changes in the law have also caused dramatic changes to estate planning in ways advisors and their clients may not yet realize. The doubling of the exemptions to current levels is a temporary benefit – it “sunsets” after 2025; the exemption will return to around $6 million (inflation adjusted) at that time unless further action is taken by Congress. The Maine exemption is $6.41 million. The step-up of income tax basis to fair market value on death remains unchanged, as does the annual exclusion gifting amount at $17,000 per year per person. None of the estate, gift, or generation-skipping taxes were repealed by the new tax law; tax rates for these remain at 40%.

**Estate Planning Considerations: What has changed and what has not**

Before this law was passed, “Typical” plans often included a deferral of estate taxes until the death of the second spouse. While this might still be okay for you, but it is possible that the new tax law, when applied to your existing documents, will create a problem. Traditionally, estate plans called for the creation of two trusts, which were designed to take advantage of both husband’s and wife’s exemption. Often the plan involved creating a “family trust” or “credit shelter trust” at the death of the first spouse. A formula was often used to fund it with the maximum amount of assets while still making the federal estate tax be zero. Anything left over would pass outright to the surviving spouse or to a trust for that spouse. Using this kind of trust planning might result in the following:

*In 2002, if your federally taxable estate was $2 million, that plan would result in $1*

*million passing to the family trust and $1 million passing to the surviving spouse. In 2023, that same arrangement would result in $2 million passing to the credit shelter trust and nothing passing to the surviving spouse.* **This is the unintended consequence of not updating your estate planning documents.**

The Act left portability unchanged. If a person dies without using up all of his or her lifetime gift and estate tax exemptions, the decedent's Personal Representative can make an election such that the unused exemption is credited (or "ported") to the surviving spouse for use during life or at death. The decedent's unused amount can be combined with the survivor's own estate tax exemption to offset any estate tax liability in the survivor's estate. Thus, for some married couples, an "all to the other" approach with a portability election may still be preferable. This approach may carry additional complications, however, as Maine does not permit portability between spouses for its estate tax.

Clients may want to use as much of the new exemption as possible while they can, but at this point, the result of making gifts of large amounts is unknown. The regulations surrounding the Tax Act haven't been written and the result of making gifts above the sunset exemption amount is still unknown. For example:

*If you make a gift of $8 million in 2023 (under current Tax Act law) but die in 2026 (after the Tax Act sunsets), will the excess amount over the 2026 exemption amount be taxed?* **There is no certainty regarding this issue at this point.**

**The key to estate planning after the Tax Act is flexibility.** While we used to write estate plans giving specific directions about what and how to give assets at death, now (for tax planning) we need to give flexible instructions to the Personal Representative or Trustee to consider the needs / age / health of beneficiaries, the specific assets involved, and the tax law in place at the time of death to determine the best distribution plan to benefit the surviving family. Estate plans will differ depending on factors like age, marital status, health, assets, and family needs.

Some things haven't changed – it is important to have an updated plan. There are many non-tax reasons to structure your estate the way it needs to be. In addition to wills and trusts, it is important to have Powers of Attorney (both financial and medical). Consult with an attorney, accountant or other estate planner — they can

help advise and guide you to know how to craft your estate plan first, then draft the proper documents.

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