

# Post-Election: The New World of Estate Planning

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**A KEY ESTATE  
PLANNING GUIDE**

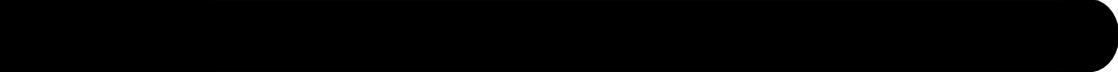
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# **Trump Win: Impact on Estate Planning**

**New Planning  
Environment**



# What President Trump's Victory Means to Estate Planning

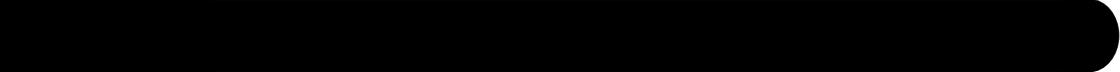
- Had the Democrats swept, everyone anticipated substantial tax increases along the lines of a Senator Warren tax proposal. That seems assured not to occur now, nor for the next four years.
- A Trump victory suggests that it is unlikely that significant new taxes will be imposed on the wealthy.
- If the Republican's also get the House more tax cuts may be possible.
- What does all this mean to estate planning?
- What should practitioners tell clients to consider now?
- How is that advice different then the typical pre-2026 planning that has been the focus of many planning conversations?

# Ultra-Wealthy Clients

- Planning probably should continue as before, flexible and with a long-term view.
- For the ultra-wealthy the elimination of bonus exemption in 2026, or not, is not a critical aspect of planning.
- For the ultra-wealthy it seems unlikely that GRATs, discounts, note sales, and other techniques will be adversely affected during a Trump administration. This all may mean that there is less pressure to complete planning than had there been a Democrat victory, but it would seem imprudent to stop planning because future administrations will pick up the baton of the Widen, Warren, Sanders proposals of the past.

# Congress and Tax Changes

**What Might  
Happen?**



# Political Environment

- The Republicans won the White House, Senate and perhaps although it is not yet clear, the House.
- The Senate is 52 R – 45 D and the House is 212 R – 200 D.
- There is a political trade off for **income tax reductions versus estate tax reductions** and even if there is a republican sweep the Republicans may not determine that it is worthwhile putting the political capital towards maintaining the exemption at the current bonus level. The reduction in the estate tax is already in the law so it doesn't have to change.
- What might happen with tariffs? Might those be presented as covering the costs of extending all 2017 tax breaks and funding the newly promised tax breaks on Social Security, tips and overtime?

# Filibuster

- You can stop a bill if you don't have 60 votes by a filibuster. You can break a filibuster by taking away options to speak in Senate it takes 60 votes to do that. In the House it takes a simple majority.
- The Republicans have 52.
- In the Senate there are two exceptions to the above rule: One is for judicial appointments, the other is for **budget reconciliation** where a simple majority can rule.

# Reconciliation

- In the United States Congress, Reconciliation is a legislative process that allows for the expedited consideration of tax and other fiscal bills. It was enacted as part of the Congressional Budget and Impoundment Control Act of 1974.
- It is a way to quickly pass legislation that meets budget targets. Reconciliation can be quick because there are limits on the amendments that can be added and the time during which the bill can be debated.
- A reconciliation bill can pass the Senate with a simple majority of 51 votes, instead of the 60-vote supermajority required by the Senate's filibuster rules.
- The Republicans control the White House and the Senate. If they also gain control in the House they could use Reconciliation to prevent the estate tax reduction after 2025.

# Byrd Rule

- Byrd Rule is a Senate procedural rule that requires that **any bill that reduces taxes must be eliminated within ten years, unless at least 60 Senators vote otherwise**. That is why the bonus estate tax exemption enacted in 2017 sunsets in 2026. Republicans do not yet, and may not have, that level of control.
- The purpose of the Byrd Rule is to prevent the Reconciliation process described above from permitting the enactment of policy changes that aren't related to the budget.
- The Byrd Rule permits Senators to stop a provision that is extraneous to a bill's main purpose of making budget changes.
- The Byrd Rule limits the House's ability to insist on certain provisions when compromising with the Senate.

# Flexibility for Uncertainty

Consider #4  
Different Planning  
Approaches

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# Infuse Flexibility and the Ability to Unwind Plans

- **#1 Standby Trust** – avoid the crush of 2012 issues and missing planning.
- **#2 QTIP**'able Trust.
  - Create a QTIP'able trust in 2025 (not 2024) and have until October 15, 2026 to determine whether to elect QTIP treatment on the gift tax return (thereby using no exemption in case the bonus exemption is retained) or not electing QTIP if the bonus exemption is eliminated.
- **#3 Disclaimer** provisions in trusts to unravel the trust gift. Name a person who as the primary beneficiary and vest them with the power to disclaim on behalf of the entire trust thereby unwinding gifts made to the trust.
- **#4 Recission** may be used to unwind a transaction in the same tax year.
- Use lifetime powers of appointment to have flexibility to modify the plan/irrevocable trust if the laws change in unanticipated ways or even if the client has remorse after the planning is complete.

# #1 Complete a Standby Plan

- “If the exemption is going to be cut I want to use it. But if not, I don’t want to make a large gift.” There are several solutions for this type of client, the Standby plan, QTIP plan, disclaimer and perhaps recission.
- For many wealthy clients that are not super-wealthy planning to secure the bonus exemption makes sense. The post-election question is whether the bonus exemption will be allowed to sunset in 2026 as the law now provides.
- Set up whatever type of irrevocable trust that fits the plan as if the exemption will be reduced. Perhaps fund it with nominal dollars to create an account. Use a family member or friend as trustee. Give a trust protector the power to change trustees, situs and governing law.
- The trust is thus in “standby” mode. It is simpler and cheaper than going to a trust “friendly” jurisdiction. If it appears that the Republicans can’t or won’t prevent the sunset the client has a trust ready to ACAT securities to at the last minute. If the client is likely to fund the trust with entity interests complete the assignments now but leave them unsigned.

# Complete a Standby Plan

- Use Wandry or King type provisions in the transfer documents for quick transfers as late date transfers will not be likely to have appraisals completed.
- Consider a **two-tier adjustment** mechanism. Adjustment 1 when the appraisal is obtained (probably into mid-2026) and the second would be on gift tax audit as finally determined.
- Clients who **“wait and see”** will likely find that they will be shut out of planning as advisers will be inundated if this becomes a late 2025 development. The cost of creating a simpler, local, “Standby” trust is modest compared to the tax benefits that could be sacrificed if the client chooses to wait and misses out on proper planning.
- If the “standby trust” is funded, later a trust protector can move the trust to a better jurisdiction, name an institutional trustee and decant the trust into a more robust trust.

## #2 QTIP'able Trust Plan

- Make transfers to a trust that will qualify for the marital deduction if a QTIP election is made on a gift tax return by the 2026 extended filing date.
- If the election is not made the assets would pass to a non-qualifying trust for the surviving spouse that would use exemption.

# #3 Disclaimer in Trust – More Detail

- Disclaimer provisions:
- Consider including a disclaimer provisions in any new trusts. This can provide a means of unwinding a transfer to an irrevocable trust.
- Give a person named the **primary beneficiary** the right to disclaim on behalf of the entire trust.
- Create an initial sub-trust for which that person is the only named beneficiary so that the person holding power is the sole, not just designated “primary,” beneficiary.
- **Create a trust for which that person is the only beneficiary and then use powers of appointment in the future to shift value to a different trust.**
- The disclaimer provision should not treat the beneficiary as having predeceased but rather as returning the disclaimed property (reverting) to the donor.

## #4 Rescission – More Detail

- Rescission, the concept of treating a transaction as void ab initio, may have been first discussed as being used for tax purposes in the United States Court of Appeals decision of Penn v. Robertson, but it was in 1980 with Rev. Rul. 80-58 that the IRS provided formal steps to be taken to effectuate a rescission for income tax purposes, stating that a rescission must:
  - Take actions that would end with “restoring the parties to the relative positions that they would have occupied had no contract been made”; and
  - The actions must be taken within the same tax year in which the transaction initially took place.
  - Build in rescission to protect clients from unintended law changes.
  - One does not need the consent of all involved parties to have an effective rescission.
  - Penn involved a rescission due to action taken by a third party and Rev. Rul. 80-58 involved a situation where the parties agreed that, if certain events did not occur, the transaction would be rescinded.

# Rescission – More Detail

- Rescission must be in same tax year.
- Rescissions will be respected if effected in the same year that the underlying transaction took place.
- Penn v. Robertson, 115 F.2d 167 (4th Cir. 1940).
- Rev. Rul. 80-58; 1980-1 C.B. 181; 1980 IRB LEXIS 502.
- Rev. Rul. 80-58 states, “The annual accounting period principle requires the determination of income at the close of the taxable year without regard to subsequent events.”
- Specifically, Rev. Rul. 80-58 comments, “A rescission may be effected by mutual agreement of the parties, by one of the parties declaring a rescission of the contract without the consent of the other if sufficient grounds exist, or by applying to the court for a decree of rescission.”
- Disclaimer vs. Rescission or both?
- One issue to consider is whether a rescission provision in a document renders the transfer incomplete for gift tax purposes.

# Rescission – More Detail

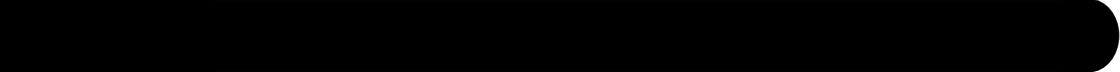
- The most “direct” way to have a transaction ignored for gift tax purposes is by a qualified disclaimer, defined in §2518. But the provision is limited to wealth transfer (e.g., gift and estate) tax purposes, not income tax purposes.
- Does rescission make gift incomplete?
- Treas. Reg. 25.2511-2(b) ....A gift is ... incomplete if and to the extent that a reserved power gives the donor the power [without the consent of an adverse party] to name new beneficiaries or to change the interests of the beneficiaries as between themselves....”
- Perhaps, there is “no harm” in providing that the parties can rescind a transaction, including for wealth transfer tax purposes, but the provision might render the transfer at the time it is made incomplete.
- Allowing only one party (e.g., the donor) to rescind the transaction might, therefore, render the gift incomplete. Although arguably, that the donee would be averse to that, the fact that the donee agreed to allow the donor to rescind might be held to render the donee non-adverse.

# Rescission – Sample Language

- If, during the calendar year in which this Agreement has been signed, legislation is passed in which the Internal Revenue Code is modified which has the effect of causing the [transaction] herein to be considered a recognition event for federal income tax purposes, the Parties agree to take the following actions immediately, and within the same tax year as the Transaction was completed (and if the parties to the transaction have different tax years, the earlier of such years): (a) the Note given by [buyer] to [seller] is thereupon voided, and (b) the assignment and transfer documents [list actual name and date] are deemed void, and (c) any down payment provided by the buyer to the seller [delete for gift] shall be due and payable to the buyer by the seller from the date of the initial transfer bearing interest at the short term applicable federal rate from the date of the initial transfer until repaid in the current tax year. To avoid any doubt, the Parties intend for this provision to effectuate a rescission of the Agreement pursuant to Rev. Rul. 80-58, 1980-1 C.B. 181 and agree to take any actions reasonable and necessary to conform the actions taken under this provision if triggered to complete the rescission, with the same effect as though the transaction had never occurred.”

# More Access

**Lower Estate Tax  
Worries Might  
Warrant Increasing  
Access**



# More Access

- Calculus of how much access to a trust may change if clients are less worried about estate tax issues. Some clients may in the new environment weigh increased access as more important than the incremental estate tax inclusion risk it may bring.
- Reconsider the type of planning with more access perhaps:
  - Hybrid DAPTs
  - DAPTs
  - SPATs
  - instead of SLATs.
- Consider more access instead of less.
- Other access points:
  - Tax reimbursement.
  - Loan provision.
  - Adding charitable beneficiary.
  - Personal use assets.
  - Flexible beneficiary trusts.

# More Access- Personal Use Assets: Vacation Home

- A SLAT could own an interest in a vacation home. And if the grantor's spouse/beneficiary uses the vacation home, the grantor presumably can as part of the spouse's family. Bear in mind if that is to be done with a home in another state, a limited liability company ("LLC") should be formed in the state where the SLAT is governed and administered. That LLC should be authorized to do business in the state where the vacation home is located. That LLC would own the vacation home property and in turn, the trust could own some or all of the interests in the LLC.
- Watch out for Section 2036 and consider that if a home is transferred into the trust if rent should be paid. Spouse of the beneficiary can use home. See *Estate of Allen D. Gutchess v. Comm.* Docket No. 4926-63. 1966-08-9.

# **Other Considerations Should Encourage Continued Planning**

**It's Not Just About  
Estate Taxes**



# Asset Protection

- For most, but not all clients, asset protection is just as important as before the election and tax law changes are not the only benefit, so planning should continue.
- Asset protection benefits the client, not just the client's heirs.
- Assess how planning that is more focused on asset protection may differ from planning presently being done. For example, clients might accept greater risk of estate tax inclusion, for greater access

# Income Tax Benefits of Estate Trust Planning

- Flexible beneficiary trusts.
- State income tax planning and non-grantor trusts.
- Basis planning with GPOAs should continue like giving a senior family member a GPOA over a trust.

# Ancillary Income Tax Planning

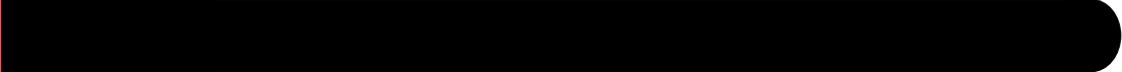
- Income tax planning should continue and receive more emphasis for many clients and even, to the extent appropriate, feasible by estate planners.
- IRA beneficiary planning. Trusts as beneficiaries, Roth conversions. RMD planning.
- CRTs for income tax benefits.
- CLTs (grantor) for income tax benefits.
- Will the SALT deduction come back? How much will it cost.

# Basis Step Up Considerations

- Regular basis step up planning by giving a **GPOA** to an elderly relative with a small estate and excess exemption. But be careful if the exemption is in fact cut in half in 2026.
- **2038 Power** - The trust could give the trustee, or perhaps a third party acting in a non-fiduciary capacity, a power to grant the settlor the right to control the beneficial enjoyment of trust assets. This would cause estate tax inclusion in the settlor's estate under IRC Sec. 2038. A corporate trustee may be unwilling to exercise such a power so it may be advisable to grant the power to an individual. Consider giving the power to a non-fiduciary. This can provide a mechanism to cause estate inclusion and obtain a basis step up on the settlor's death if that proves advantageous under a Trump administration tax law changes. Caution, if the estate tax is repealed, there will presumably be no IRC Sec. 2038, so how the step up in basis would be effected under a repeal regime is uncertain.
- Might you wish to give someone the **power to name the settlor a trustee** to force estate tax inclusion?

# **Review Existing Planning**

**What Can/Should  
be Done**



# Review Existing Planning

- Does a plan you are currently working on, or one that you previously created, still make sense considering the new environment?
- If a trust plan is in process, consider modifications based on the planning ideas suggested in this webinar.
- For existing trusts, if the client is unhappy with the changing environment, evaluate whether powers of appointment, decanting, non-judicial modifications or trust protector actions may effectuate modifications that make the trust plan more comfortable.
- Be certain that the client understands that tax laws might well change again with the next administration, so a long term flexible view may be wiser than abandoning planning or making a sharp pivot.

# **Communicate with Clients**

**Email blasts,  
Newsletters, or  
other Means**

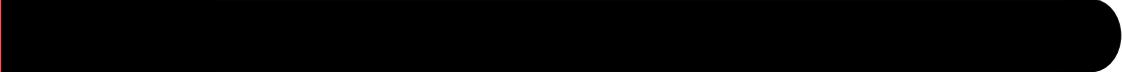
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# Communicate with Clients

- Harsh estate tax changes are unlikely to happen for at least 4 years.
- The bonus exemption may or may not be eliminated.
- None of the above means ignore planning.
- Planning needs to be re-evaluated.
- Asset protection, income tax planning, future estate tax worries all should be planned for.
- Be careful about emphasizing in conversations with clients the following, even if true, That the exemption won't drop as that may not resonate as many clients may view that as remote.
- Horse trading can have odd results, consider all the promises Trump made for tax cuts. Might making good on those promises result in the bonus estate tax exemption not being maintained (i.e., letting it in fact drop by half).

# **Conclusion and Additional Information**

**Sub-Title**



# Conclusion

- Planning should continue.
- Practitioners should always have and should always focus on holistic planning that addresses a wide range of issues. For plans done from that perspective the pivot to the change in the post-election world should be less sharp.
- For those who sold SLAT plans to use exemption without a broader based plan clients are more likely to be reluctant to proceed. But educating the clients about income tax benefits, asset protection advantages, etc. may salvage the plan.
- Consider nuanced changes to planning for clients that are fence-sitting.

# Additional information

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