

# **ESTATE PLANNING – TIME FOR A REVIEW**

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We are in the midst of some of the most radical changes in estate planning since federal estate taxes were reenacted for the fourth time in 1916. Until recent years, estate planning has been largely dominated by techniques designed to minimize a confiscatory federal estate tax. On December 22, 2017, the Tax Cuts and Jobs Act of 2017 (TCJA) was enacted into law. TCJA will affect almost every individual and business in the United States. Generally, the new law goes into effect in 2018, with many of the provisions relating to individuals expiring at the end of 2025.

TCJA included significant transfer tax changes (effective until January 1, 2026), including:

- Estate, gift and generation skipping exemptions of \$11,180,000 (in 2018) with an inflation increase in future years – effectively a married couple can exclude up to \$22,360,000 of gifts or bequests from taxation. It is estimated that of the roughly 2.6 million US residents who will die on 2018, only 1,800 of them will have a taxable estate.
- A flat 37% transfer tax rate above the exemptions.

In addition, the annual exclusion has increased to \$15,000 per donee, per year. Taxpayers can also make direct payments of tuition and medical costs to the providers of the services, without using a part of their \$15,000 annual exclusion or their gift tax exemption. Married taxpayers can elect to “gift-split” their gifts, so that one spouse can fund the gift, while the other spouse is treated as though they funded half of the gift. To make the election, the couple must file a gift tax return.

For most moderately wealthy taxpayers, estate and gift taxes no longer impact their planning decisions. However, the new confiscation tax is the income tax. Much of the planning of an estate will focus on reducing the state and federal income taxes of the decedent, the estate and the heirs and/or increasing the tax basis of assets passing to heirs. There are lots of traps and opportunities in this new planning environment.

**Planning for Your Legacy.** Similar to the changes in the tax code in 2012, TCJA has made the estate planning decision process more complex than it was before we had before reform. But for many clients, it can substantially simplify their planning and how they own their assets. Some of the changing perspectives include:

- The fundamental purpose of estate planning is being reevaluated by many clients and their advisors. The pivotal reality is that estate planning is not fundamentally about taxes – or even about the assets clients intend to pass. It is about how clients deal with their inevitable death and potential incapacity. It is about clients trying to make the right decisions about their own mortality, the consequences of their passing and how to leave a positive **LEGACY** for their heirs. This perspective starts with understanding that estate planning does not start with **THINGS** or the taxes imposed upon them. It starts with **PEOPLE**: Who clients were and are and who their families are and may become. Instead of wrapping the estate plan around the tax issues, clients are increasingly starting with the family issues and then wrapping the tax issues around the family goals and needs.
- For years, married clients were advised to “equalize” their taxable estates so that each spouse's estate exemption was used to eliminate estate taxes. Depending upon the particular facts, this approach may no longer be necessary. Assets can be disproportionately titled or assets may be held in a manner that automatically pass the assets to the surviving spouse, without having to probate the first to die spouse's Will. It is still important to have a Will in this event so that the order of death does not pass all assets solely to the surviving spouse's family under intestacy laws.
- Most married clients who have significant assets have provided for trusts at the first death to minimize estate taxes. By-Pass Exemption Trusts have been used to reduce the taxes on the combined estate. With transfer tax portability, such trusts may no longer be necessary. However, in situations in which a client has been previously married and has children from a prior marriage, By-Pass Exemption Trusts and Marital Trusts may still be advisable.
- The tax planning component of estate planning for most US residents is shifting from a focus on federal transfer tax avoidance to a focus on state and federal income tax avoidance and state death tax minimization in those states which still impose a death tax.
- Asset and divorce protection for heirs is an increasing part of the planning, particularly when TCJA permanently

eliminates the alimony deduction in 2019.

- An increased focus on estate planning that is designed to minimize conflicts which so often occur when someone passes away, including:
  - Naming decision makers whose judgment you trust, while providing mechanisms to remove and replace them.
  - Providing Personal Property disposition lists so families are not fighting over who gets the family grandfather clock.
  - Passing a family business in a manner that reduces conflicts between those who will run the business and those who are just "investors."

**Failure to Have a Will.** It is amazing how many people either do not have a Will or do not know their prior Will was revoked. Failure to have a Will can result in significant problems, including for example:

- In many states, each child and the surviving spouse will inherit an equal percentage (with the surviving spouse inheriting some minimum amount). For example, in Georgia a deceased husband with no Will and two children from a prior marriage may only convey 33.3% of his estate to his surviving wife. Because a trust is not established by a Will, any children may be entitled to receive assets by age 18 - before they may be mature enough to handle the money. Ex-spouses may have control of the inheritance until the children reach age 18.
- If a couple with no children was injured in the same accident and one spouse survived the other by five minutes and then died, that spouse's relatives could inherit all of the couple's joint estate with the other spouse's family receiving no assets.
- The courts will have no insights into your choice of guardian for minor children. In the absence of a declaration from you, the courts will have to make an independent judgment, based upon the family members who request guardianship.
- The courts will have to decide on the person(s) to manage your assets for any minor children. Do you really want that brother-in-law who has been bankrupt twice to manage the funds? If you do not leave a Will making such a designation, he could be given control.
- The failure to have a Will can significantly increase both the income taxes and estate taxes payable by your family.
- In many states, the estate taxes are an expense of the probate estate. However, if assets flow outside the probate estate, the taxes on those assets may still be due from the probate estate - in effect one set of heirs may receive the assets (e.g., beneficiaries of a life insurance policy or retirement plan), while the probate heirs pay their estate taxes. A Will can dictate how taxes are paid.

There are few situations in which a Will (or a "Will substitute" such as a Revocable Living Trust) is unnecessary. Review your existing estate plan at least every 2-3 years. If you do not have a Will, discuss the implications with your accountant or attorney.

**Personal Property Dispositions List.** One of the most challenging aspects of estate planning is figuring out who gets all your personal items. The antique furniture that belonged to your father, your grandmother's engagement ring, and other keepsakes have emotional value to you and your family members. You want to make sure these items go to someone who will appreciate them. A well-rounded estate plan will include a Personal Property Disposition List. A Personal Property Disposition List is document that designates who will receive these personal and family items. The List is a separate document from your Will, but the List can be incorporated automatically into your Will. You are able to complete the List on your own time and will not need to delay the drafting or signing of your Will because you have not decided which family member or friend will receive which items. If you change your mind in the future and decide you want someone else to receive an item included on the List, you will not have to re-execute your Will. Instead, you would update the items and recipients on your Personal Property Disposition List. Personal Property Disposition schedules for married and single taxpayers can be found at [www.scrogginlaw.com](http://www.scrogginlaw.com).

**Planning for your Incapacity.** Every adult (of any age) should have a Medical Directive which authorizes someone to make medical decisions (including withdrawal of life support) if they become incapacitated. Georgia revised its Medical Directive statutes in 2007 and combined the Living Will with the Health Care Power of Attorney. The new form is much more comprehensive.

A well drafted, comprehensive General Power of Attorney is also advisable for every adult. Under Georgia law, the General Power of Attorney can provide that is only operative upon the signer's incapacity. Make sure your adult children and your parents have Medical Directives and General Powers of Attorney in place. Please note that the Georgia statutes governing General Powers of Attorney were changed as of July 1, 2017, and a new statutory form for General Powers of Attorney was created. If you have a Georgia General Power of Attorney that was signed before June 30, 2017, you should consider signing a new form that complies with current law.

**Providing Basic Information to Your Family.** Perhaps the most frustrating and time-consuming aspect of dealing with the disability or death of a family member is the lack of necessary information. The author has developed and provides to clients as a part of the estate plan a form (completed by the client) which provides information the family needs if the client become disabled or dies. See [www.familyloveletter.com](http://www.familyloveletter.com) for a copy of this “Family Love Letter.”® If you do not use something like a Family Love Letter, then create a notebook containing copies of important insurance, asset, estate and family documents, including the name, address and phone numbers of advisors. Make sure your family knows the pass codes to your computer and other vital information sources.

**Beneficiary Designations.** To save income taxes and make expected dispositions, it is equally important to make sure you have made proper beneficiary designations for life insurance, IRAs and retirement plans - particularly after a divorce. Many people believe that the beneficiary designation of a former spouse was terminated by the divorce decree. This is normally not the case. A new beneficiary designation is normally needed. How you designate the beneficiaries of your IRAs and retirement accounts can have a tremendous tax impact on your heirs.

**Tax Domicile.** In 2009, the National Association of Homebuilders estimated that there were 6.9 million homes that qualify as non-rental second homes. An increasing issue for clients, particularly retiring baby boomers, is designating their proper tax domicile. While you may have multiple residences, you can only have one tax domicile. That choice of domicile can have a significant impact on the disposal of your estate (e.g., a second or third spouse may have elective claims against your estate) and the imposition of state income taxes and death taxes. Clients should carefully review the relevant state statutes on domicile (i.e., they vary widely), consult with an expert on the issue and take affirmative steps to create the facts supporting the tax domicile that offers the best results. See the “*Declaring your State of Tax Domicile*” article at [www.scrogginlaw.com](http://www.scrogginlaw.com).

**Finding an Estate Planning Advisor.** How do you locate a competent advisor? Go to [www.naepc.org](http://www.naepc.org) to find a local advisor who specializes in estate planning. Another website, [www.martindale.com](http://www.martindale.com) not only will allow you to locate an attorney, but it also allows you to see how other attorneys rate the attorney for competence and integrity. See also: [www.Superlawyers.com](http://www.Superlawyers.com) and [www.AVVO.com](http://www.AVVO.com).

**THIS ARTICLE IS NOT INTENDED TO PROVIDE SPECIFIC LEGAL ADVICE. YOUR PARTICULAR CIRCUMSTANCES OR LOCAL LAW MAY SIGNIFICANTLY CHANGE THE RECOMMENDATIONS. AS WITH ANY PLANNING APPROACHES, YOU WILL WANT TO DISCUSS ANY APPROACHES WITH COMPETENT COUNSEL BEFORE IMPLEMENTING THE APPROACH.**