

ADVISOR THOUGHTS

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WHAT THE NEW TAX LAW MEANS FOR ESTATE PLANNING

A major goal of estate planning has always been to minimize or avoid the federal estate tax. The federal estate tax is a 40% tax on the value of your gross estate above the exemption amount at your death. The Tax and Jobs Act that was passed in 2017 by Congress raised the exemption on the estate tax from \$5.49M for an individual to \$11.2M. With proper estate planning a couple can now shield double that amount from the estate tax effectively passing \$22.4M down to the next generation. At that level very few people will need to worry about an estate tax.

The question naturally arising for many people is, *“Do I still need an estate plan?”* The answer is that taxes are only one of the reasons for having an estate plan. Many estate planners believe that, for the majority of people, reducing taxes is actually one of the least important reasons to have an estate plan.

An estate plan provides a number of protections for you, your family and your assets. A typical estate plan consists of creating a health care power of attorney, a will, a revocable trust and a financial power of attorney. These documents provide you with the following unique benefits:

Benefits of having a Health Care Power of Attorney

The health care power of attorney is, in our estimation, the most important estate planning document. Without one, doctors are unable to talk to family and friends about your medical condition if you are unable to grant permission. I know one parent whose son had a mental health issue during college; not only was the parent unable to get any information about his medical condition, she was not even able to get information to pay the bill.

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- You have the control of naming the person, known as the “Agent”, who can make your health care decisions if you are unable to do so.
- Your Agent will be able to talk to the doctors about your medical condition if you are in an accident or are struck with a serious illness despite medical privacy laws such as the Health Insurance Portability and Accountability Act (HIPAA).
- You make the decisions about continued nutrition support and medical procedures in advance in order to control your end of life care.
- You state your preferences in advance which can greatly reduce the anguish your family feels when faced with making a major medical decision for you. Having a health care power of attorney and stating your wishes in advance can also reduce family disagreements.
- While your estate planning attorney can draft a health care power of attorney for you, health care power forms are sometimes available at local hospitals.

Benefits of a having a Will

Your will provides for the disposition of assets owned in your individual name and for accounts for which you do not have a beneficiary designation.

- You can nominate the Executor that the Probate Court appoints to manage your estate.
- You can nominate the Guardian of your minor children and provide for judicial oversight of their assets.
- Without a will, assets in your individual name are distributed according to your state’s laws of intestacy, which may not be what you want. This is particularly important if you want to leave assets to an unmarried partner or person who is not a close blood relative.
- Your will provides judicial oversight of your assets, disposition which can be useful if your heirs are prone to disagreement. You can insert a “no contest clause” in your will which penalizes the beneficiaries if they challenge your will.
- At your death you can use a continuing trust in your will, otherwise known as a testamentary trust, but these trusts are subject to judicial oversight and can require complex annual accountings.
- The provisions of a will can be changed any time during your life, provided you are competent, with a simple codicil which amends your will.

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Benefits of a using a Revocable Trust

A revocable trust provides a number of advantages over having a will alone. It is used in tandem with your will and it is often called a “will substitute”. This is because instead of a will controlling the disposition of your assets, your revocable trust controls the disposition of assets held in your trust and the assets passed to your trust from your will at your death.

- You can be the trustee of your trust and continue to control your assets during your life.
- You can name a successor trustee to take over if you are elderly, have health issues or merely no longer want to be bothered with managing your assets. A successor trustee can also help if you should become mentally or physically incapacitated.
- You are able to name a professional trustee or co-trustee to handle your investments and bill-paying functions which can be useful if your family or friends are not experienced handling complex investments or do not have the time to do it properly.
- If you have litigious beneficiaries, or if they merely do not get along, you can insert a “no contest clause” in your trust which penalizes the beneficiaries if they challenge your trust. This reduces the risk of disagreements among beneficiaries and increases the likelihood of your wishes being followed.
- A revocable trust is a private document and not subject to the jurisdiction of the Probate Court which is beneficial if you do not need oversight because you name a trustworthy, competent trustee.
- If all of your assets are titled appropriately during your life, a revocable trust can help you avoid the lengthy time involved with probate process and the costs associated with hiring an attorney to probate your will.
- You can change your revocable trust by a simple amendment at any time during your life while you are competent.

A revocable trust has one important advantage over a will. You can create trusts for beneficiaries that continue after your death that are not subject to the jurisdiction of the probate court. For example, you may want to create a continuing trust for your spouse during his or her life with the remainder going either outright or in trust to your children. A marital trust can be particularly useful in the case of a second marriage with each party having children from a former marriage, although it is frequently used in first marriage situations as well.

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If you choose to have continuing trusts for your children or other beneficiaries you can defer distributions to age appropriate times, enabling your beneficiaries to learn to manage their wealth and giving them future opportunities if they fail to do so. For example in my revocable trust, I have given my children 1/3 of their share at the age of 25, 30, and 35. This gives them a few chances to succeed. I have decided that if they do not have their act together by the age of 35, there is simply no hope for them.

You can create an incentive trust for a beneficiary that promotes certain behaviors. For example, rewarding the beneficiary if they are able to maintain a job and produce W-2 income or supplementing the lifestyle of a beneficiary who chooses to go into a traditionally lower paying, but worthy profession like teaching.

You can also use a continuing trust to prevent a beneficiary from having unlimited access to funds if he or she has a substance abuse problem either currently or in the future.

Inserting a “spendthrift provision” in your trust prohibits the beneficiaries from assigning their interest in the trust and protects the assets from the reach of their creditors. This can be particularly useful if the beneficiary works in a high litigation risk profession or might otherwise be sued for something as simple as a car accident. A spendthrift trust may be used to a limited degree to protect your beneficiary against an overreaching spouse or in the event of a divorce.

If you have a beneficiary who is currently receiving public benefits or might be able to receive them when he or she is elderly, you can establish a trust that will continue to provide for them and not be subject to government interference.

If you are leaving assets to minor beneficiaries or if you leave money to adult children who might pre-decease you and leave minor children, you can create trusts to protect the assets for the minor child. This is important because a minor cannot legally own assets without having an adult custodian or trustee in charge. In a trust, the trustee, rather than the Court, oversees the handling of assets for minors, so it is extremely important to name a responsible and trustworthy individual as successor trustee.

You can also create a continuing trust to provide resources for the care of your companion animals.

Benefits of creating a Durable Power of Attorney for Finances

Even if you have a revocable trust, the trustee only controls assets titled in the name of the trust. You still need a Durable Power of Attorney for Finances to cover your other assets. If you do not have a revocable trust, it is even more important to have a Durable Power of Attorney for Finances. Without one, your assets are frozen if you should become incapacitated and the Probate Court must appoint a conservator or guardian to manage your affairs.

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- You have the control of naming the person, known as the “Agent”, who can assist with your finances and manage your assets if you are unable to do so. The authority of your Agent ends at your death at which point your Executor takes over if you have a will or if not an Administrator will be assigned by the Probate Court.
- The Agent can manage the assets held in your individual name, in a payable or transfer on death account, or accounts that have a beneficiary designation such as an annuity, life insurance or in a retirement vehicle such as an IRA or 401K. The Agent does not control trust assets – the trustee or successor trustee does.
- The Agent can deal with most governmental agencies such as the Post Office, the IRS and the city or town clerk officers who collect taxes, sewer and water bills.
- The Agent can deal with private companies such as your electric, gas, oil or telephone Company.
- You control whether your Agent acts now or in the future by delaying release of the document until you decide, or a trusted advisor such as your estate planning attorney decides, that it is warranted.
- You can create a general power of attorney which covers all situations or a limited power of attorney to be used a single time or for a limited purpose like for a real estate closing or to authorize the signing your bank checks.

Clearly, there are many benefits to creating an estate plan. While federal taxes may not play a critical role for many people today, few people realize the estate tax exemption in the tax act reverts back to \$5.2M in the year 2026. Moreover, the actual exemption amount is like a political football with politicians on both sides of the aisle disagreeing with whether it should be higher or lower. While the amount was stable from 2011 through 2017, in the year 2010, there was no estate tax, and as recently as 2001, the exemption amount was only \$675,000. Anything can happen to the exemption amount in the future.

Moreover, the picture gets even worse when you introduce the fact that many states tax the estates of their residents. For instance, the current estate tax exemption in Vermont is \$2.75M per person and the top rate of the tax is 16%. New Hampshire does not have a state estate tax. If you own real estate in another state, you may be subject to an estate tax over a portion of your assets in that state.

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With the changing landscape in federal taxation exemption amounts and potential state estate taxes, it is still good advice to continue to check in with your estate planning attorney periodically. A good estate planning attorney will try to build flexible estate planning documents for you by anticipating the changes in federal and state estate tax laws and potential changes in your personal situation like the arrival of a new grandchild, but no estate planning attorney is clairvoyant. Moreover, the emotional and financial costs to your loved ones of ignoring estate planning may be a greater risk to their well-being than you think.



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