



February 2, 2021

Tax Planning After the 2020 Election... And 2021 Runoffs

For the first time in a decade, the Democratic party now controls the Senate (narrowly), House, and Presidency. As a result, many believe that we may see significant legislative changes with respect to current estate tax laws.

The extent to which these laws may change is unclear. At times, President Biden has stated his position that the estate tax should revert to pre-2018 levels (\$5.5 million exemption per person, to be used during life or at death) or, alternatively, to pre-2010 levels (\$3.5 million exemption, only \$1 million of which could be used during life).

We do not know how this will all play out, which adds an additional element of uncertainty to estate planning at a time when uncertainty is already high. However, there are a few things we can say with some confidence:

- **The current \$11.7 million tax exemption is going away sooner or later.** Regardless of whether the Biden administration passes legislation reducing the estate tax exemption, much of the law that increased the exemption to its current level is scheduled to be repealed automatically on January 1, 2026, bringing the exemption back to approximately \$5.5 million at that time.
- **Previously used exemption will not be clawed-back.** In November 2019, the IRS issued a Treasury Decision confirming that individuals who used their current exemption amount will not be subject to penalty when the exemption is reduced. Taxpayers who made use of the full exemption in 2020 or earlier can rest easy knowing that the IRS will not attempt to claw back those amounts.
- **It is still possible to use the increased exemption in 2021.** As of the date of this publication, the estate planning exemption remains \$11.7 million (or \$23.4 million for a married couple). We cannot be certain whether a reduction in the exemption would be made retroactive to January 1, 2021, but historically it has not happened often. Below are a few techniques and issues to think about for individuals considering making current gifts.
 - **Spousal Lifetime Access Trusts (SLATs).** SLATs allow married couples to make use of their estate tax exemption while potentially benefiting from funds transferred to trust. In this strategy, one spouse irrevocably transfers property to a trust for the benefit of the other spouse and their descendants. The transferor spouse does not retain control over the trust property; however, funds in the trust can be distributed to the beneficiary spouse if needed. This can be a particularly good technique for a married couple





prepared to transfer \$11.7 million (but not \$23.4 million) currently. If one spouse establishes a SLAT for the other spouse, and funds it with \$11.7 million, they will have locked in the full utilization of the first spouse's exemption, while also ensuring the beneficiary spouse will not have used any of his or her exemption. Anyone funding a SLAT in 2021 does need to be aware of the possibility of a reduction in the estate tax exemption retroactive to the beginning of the year. If this comes to bear, a gift of one spouse's full exemption to a SLAT could trigger the imposition of gift tax.

- **Marital Deduction Trusts.** For married couples concerned with the possibility of retroactive legislation, a marital deduction trust may be worth considering. This technique would involve one spouse making a gift (up to \$11.7 million) to a trust for the sole benefit of the other spouse. Upon the beneficiary spouse's death, the remaining assets could pass to trusts for descendants. Structuring the trust this way would qualify for the marital deduction, and create the flexibility to prevent any gift tax from applying through the use of the exemption and/or marital deduction. Importantly, the decision to apply the marital deduction or not can be made as late as October 15, 2022, at which point we'll have clarity about the level of exemption for gifts made in 2021.
- **Quiet Trusts.** Historically, a fundamental tenet of trust law mandated that trustees provide information to beneficiaries disclosing the holdings of the trust. Some individuals considering gifts to trusts worry that disclosing information on trust assets to their children at too early an age may hinder their children's work ethic or sense of personal financial responsibility. In recent years, certain states, including New Hampshire, have allowed donors to direct trustees not to disclose information about the trust to beneficiaries. This may be an appealing option to donors considering large gifts to trusts.
- **Estate Freeze Techniques.** There are a number of "freeze" techniques worth considering for people who have either (i) already fully utilized their estate tax exemptions, or (ii) don't feel ready to make large gifts of assets currently. The idea behind these techniques is to freeze the donor's estate at its current level, while transferring appreciation to lower generations. This is accomplished by transferring assets with growth potential to a trust for descendants, with the donor taking back either a fixed stream of annuity payments (as in the case of a transfer to a Grantor Retained Annuity Trust (GRAT)) or a promissory note (for a sale to an Intentionally Defective Grantor Trusts (IDGT)). In either case, if the assets transferred to the trust outperform the IRS-proscribed hurdle rate, the overage passes to the trust for descendants without using any tax exemption. Current low interest rates make the hurdle rates lower and these options attractive.
 - For more information on these strategies, see: [COVID-19 and Presidential Election have Significant Effect on Estate Planning](#)





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Although there is much uncertainty in the tax laws at present, there are still opportunities to take advantage of larger tax exemptions while reducing or even eliminating risk of triggering tax.

Additional Resources:

- [2020-2021 Massachusetts Income Tax Charitable Deduction Changes](#)
- [How Do The Election Results Impact Year-End Tax Planning?](#)
- [Election Year Tax Planning](#)
- [Massachusetts Estate Tax Can Now Apply to Out-of-State Trusts](#)

Contact Us

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