

Since 2018, a taxpayer has been able to transfer up to \$10mm of assets free of federal gift or estate tax. That exempt amount has been indexed to inflation each year since inception and is \$12,920,000 as of 2023. If you are married, you and your spouse have a combined exemption of \$25,840,000, meaning you can leave almost \$26 million to your beneficiaries free of federal estate tax (with anything above that being taxed at a flat 40% rate). However, unless Congress and the President act, that exemption is set to be cut in half on January 1, 2026. As a result, individuals with a net worth of around \$6.5 million or greater and married couples with a net worth of around \$13 million or greater need to consider whether they should engage in estate tax planning to minimize the tax burden that their beneficiaries will bear.

For example, if a married couple has a net worth of \$15 million, they will not currently owe any estate tax when they have both passed away. However, if the current exemption amount is cut in half, as it is set to automatically happen on January 1, 2026, they will owe an estate tax of approximately \$832,000. Other individuals and couples will likewise see an increase in estate tax liability:

Married Couple – Estate Tax Before/After January 1, 2026		
<u>Net Worth</u>	<u>Before January 1, 2026</u>	<u>After January 1, 2026</u>
\$15 million	No Estate Tax	\$832,000
\$18 million	No Estate Tax	\$2,032,000
\$20 million	No Estate Tax	\$2,832,000
\$25 million	No Estate Tax	\$4,832,000
\$30 million	\$1,664,000	\$6,832,000
\$35 million	\$3,664,000	\$8,832,000

Individuals – Estate Tax Before/After January 1, 2026		
<u>Net Worth</u>	<u>Before January 1, 2026</u>	<u>After January 1, 2026</u>
\$7 million	No Estate Tax	\$216,000
\$10 million	No Estate Tax	\$1,416,000
\$12 million	No Estate Tax	\$2,216,000
\$15 million	\$832,000	\$3,416,000
\$20 million	\$2,832,000	\$5,416,000
\$25 million	\$4,832,000	\$7,416,000

However, any gifts that are made before January 1, 2026 will be grandfathered in under the current exemption amount. So, that married couple that has \$15 million could give away their \$15 million today and not pay any estate tax when they have both passed away, no matter what happens on January 1, 2026.

There are a few gifting strategies that can be used **right now** to avoid the coming estate tax wave:

1. Continuing to use various estate planning strategies to minimize the amount subject to the estate tax at death, such as Grantor Retained Annuity Trusts, Qualified Personal Residence Trusts, and giving away minority interests in closely-held businesses (which can qualify for a valuation discount when gifted). These strategies can allow you to leverage your exemption, removing more value from the estate tax than the amount of exemption used.
2. Making gifts to a Spousal Lifetime Access Trust. This is a trust where your spouse is named as the beneficiary, meaning they can still receive distributions, as needed, from the trust to support themselves, while allowing the remaining assets to pass to your beneficiaries at your

spouse's death free of estate tax. A diagram, explaining how such a trust can be used, follows this Article.

3. Having one spouse do all the gifting. Suppose a married couple only wishes to use part of their current estate tax exemption. They are worth \$15 million, but only want to use about half of their current exemption. If they each give away \$6.5 million, their gifts will be grandfathered in, but they will still have \$2 million and no estate tax exemption remaining after it is reduced on January 1, 2026. That will result in an \$800,000 estate tax liability. However, if only one of them gives away about \$13 million, the gift will be grandfathered in, they will have about \$2 million left, and the non-gifting spouse will still have about a \$6.5 million estate tax exemption, meaning they will not owe any estate tax.
4. Filing portability returns for deceased spouses. The IRS allows a surviving spouse to use any estate tax exemption left over by their deceased spouse, as long as a federal estate tax return was filed for the deceased spouse and the proper election was made on that return. The IRS announced that, if the deceased spouse was not required to file an estate tax return when they passed away due to insufficient assets, they will accept a return that is filed within **5 years** of the deceased spouse's date of death. So, if a spouse passed away on December 31, 2018, and was not required to file an estate tax return at that time, an estate tax return can still be filed until December 31, 2023, allowing the surviving spouse to receive any unused estate tax exemption.

Whether the estate tax exemption will be automatically cut in half on January 1, 2026 will most certainly rely on the results of the 2024 Congressional and Presidential elections. For that reason, some clients may wish to wait until closer to January 1, 2026 to incorporate changes. However, there are things that you can do **now** to make sure you are ready to prepare your estate plan for any upcoming changes to the estate tax exemption:

1. Have the necessary trusts prepared and signed, but hold off on making any gifts to them until closer to the end of 2025.
2. Establish an LLC to hold any assets that you may want to give away. If you are married, you and your spouse should each establish a separate LLC. You can then make gifts with just the stroke of a pen, by assigning your interest in your LLC. This can be done as late as 11:59 pm on December 31, 2025 and still be effective against any change in the estate tax exemption on January 1, 2026. In addition, we can include language in an assignment to cap the amount being gifted, meaning that a gift tax will not be inadvertently triggered if market values fluctuate.
3. Go ahead with any planned gifting, such as Grantor Retained Annuity Trusts and Qualified Personal Residence Trusts, which rely on the passage of time to provide estate tax savings.

The biggest hurdle clients face in making this gifting is waiting until it is too late to act. Financial institutions will need time to open accounts and transfer assets, just as attorneys will need time to meet with you and prepare the necessary documents. As such, it is important to not wait if you think you may want to take advantage of the higher estate tax exemption before it is cut in half on January 1, 2026, as our office anticipates delays in preparing such documents due to the potential demand in late 2025. Getting the necessary infrastructure put in place today will allow you to avoid any of those headaches at the end of 2025 and provide you with peace of mind that you can put a plan into action with the stroke of a pen all the way until 11:59pm on December 31, 2025, giving you the most flexibility possible.

Please do not hesitate to contact one of our experienced estate planning attorneys, and we can assist you in making sure that you are ready for any coming changes.

NOTE TO OUR READERS This Client Alert is intended to convey to you the principal considerations of certain estate planning techniques as they apply to common situations. For that reason, we have deliberately simplified technical aspects of the tax law in the interest of clear communication. Under no circumstances should you rely solely on the contents of this Alert for technical advice or reach any decisions with respect to these techniques without further discussion and consultation with Wilson & Johnson and your other tax advisors. IRS Circular 230 Disclaimer: To ensure compliance with IRS Circular 230, any U.S. federal tax advice provided in this communication is not intended or written to be used, and it cannot be used by the recipient or any other taxpayer (i) for the purpose of avoiding tax penalties that may be imposed on the recipient or any other taxpayer, or (ii) in promoting, marketing or recommending to another party, any investment plan, arrangement, or other transaction addressed herein.