Karen S. Gerstner & Associates, P.C.

Estate Planning Insights

January 31, 2024

A New Year and Some New Considerations

Some Updated Tax Numbers for 2024

Various exemption amounts that relate to estate planning and decedents' estates have been updated due to inflation adjustments. Here are some of those amounts for 2024:

Item	2024 Amount	Comment
Estate, Gift and GST Exemption	$13,610,000	This is the $10 million basic exclusion amount per the Tax Cuts and Jobs Act, adjusted for inflation
Annual Gift Tax Exclusion Amount	$18,000 per donor (gift giver) per donee (gift recipient)	This is the $10,000 gift tax annual exclusion amount, adjusted for inflation
Annual Exclusion for Gifts made to a Non Citizen Spouse	$185,000	Only gifts to a spouse who is a US citizen can qualify for the *unlimited* marital deduction for gift (and estate) tax purposes. In the case of lifetime gifts to a spouse who is not a US citizen, there is an annual cap on non reportable gifts to that spouse
Threshold for Reporting Aggregate Amount of Gifts Received from "Non US Persons"	$19,570	A "Non US Person" is basically any person other than a US citizen or resident or a US partnership or corporation
Qualified Charitable Distribution (QCD) Limit from IRAs	$105,000	Individuals age 70½ and older can make QCDs directly from their IRA to one or more "public charities." Note: This is the first year that inflation adjustments apply to the QCD limit, which was previously $100,000.

Here is some information regarding the ordinary income tax brackets for 2024:

Taxpayer	Top bracket (37%) reached when taxable income is over:
Married Filing Jointly/Surviving Spouses	$731,200
Head of Household/Single Individual	$609,350
Estates and Non Grantor Trusts	$15,200

Scheduled Future Drop in Estate/Gift/GST Exemption Amount

Unless the estate, gift and GST tax laws are changed prior to 2026, the basic exclusion amount will drop from $10 million to $5 million on January 1, 2026. The $5 million basic exclusion amount will be adjusted for inflation, with inflation adjustments being calculated from a base year of 2011. Some have *estimated* that the $5 million basic exclusion amount with inflation adjustments will be approximately $7 million in 2026.

The difference between the current $13,610,000 estate and gift tax exemption amount and the *estimated* $7 million estate and gift tax exemption amount that will apply in 2026, which is likely to be over $6 million, is being referred to as the "bonus exemption." Because of the "anti-clawback regulations," donors who make "taxable gifts" (using legitimate estate planning techniques) before January 1, 2026, can use the bonus exemption amount and not be concerned that the bonus exemption they use before 2026 will be brought back into their estate tax base at death. (When people make taxable gifts during life, those gifts are part of their "estate tax base" at death.) But note that taxable gifts do not start using the bonus exemption until the total of all prior taxable gifts reaches the estimated $7 million exemption amount that is likely to apply in 2026.

Because of the upcoming drop in the exemption, many single individuals and married couples are making some taxable gifts now. Estate planning techniques that have become very popular lately include Qualified Personal Residence Trusts (QPRTs), Intentionally Defective Grantor Trusts (IDGTs), Irrevocable Life Insurance Trusts (ILITs), and, in the case of married couples, Spousal Lifetime Access Trusts (SLATs). Warning: It will not be possible for people to wait until the fourth quarter of 2025 (or even the latter half of 2025) to *start* implementing these estate planning techniques! So if you want to explore any of these estate planning techniques, you should look into them now.

Effect of Future Drop in Exemption Amount on Married Couples

Many people casually state that, if the exemption amount is $7 million, then married couples with a combined estate having a total value less than $14 million do not have to "worry about" the estate tax. That is not exactly true. As we have said many times before, married couples do not "automatically" get two exemptions from the estate tax. Married couples who need or want two exemptions must "do something" to obtain more than one exemption per couple. Prior to 2011, the most common way that married couples obtained two exemptions from the estate tax (unless they were willing and able to "disinherit" their spouse and leave the exemption amount of the first spouse to die to persons other than their spouse, such as children) was to include provisions in their Will or Living Trust Agreement for a "Bypass Trust" to be set up and funded on the death of the first spouse (the first spouse to die will sometimes be referred to as the "deceased spouse"). That is still one option. In 2011, as a "temporary" measure, and in 2013, as a "permanent" measure, Congress added a second way for married couples to get two exemptions from the estate tax: the portability election. To obtain two exemptions from the estate tax based on portability, the executor of the estate of the deceased spouse (which is usually—but not always—the surviving spouse), must file a US Estate Tax Return (Form 706) and specifically make the portability election in that return.

Important Note. For married couples, the need to "do something" to avoid estate taxes "kicks in" when the couple has a combined estate that exceeds **one** exemption amount, not two. Thus, couples whose combined estate will likely exceed the *estimated* $7 million exemption amount in

2026 will want to “do something” to obtain two exemptions. Again, the two usual choices in terms of “doing something” are (i) planning to establish a Bypass Trust on the first spouse’s death and (ii) planning to make the portability election on the first spouse’s death (or a combination of the two).

Using a Bypass Trust and making the portability election are not mutually exclusive options. Frequently, married couples use both. The deceased spouse’s community property one-half interest in the “after-tax” assets is set up to go into the Bypass Trust (Note: investment and brokerage accounts *cannot* be titled as JTWROS or have a TOD arrangement on them for this to work), but the deceased spouse’s community property one-half interest in the pre-tax assets, such as pre-tax employee benefit plans and IRAs, is set up to go directly (outright) to the surviving spouse because that provides a much better income tax result for the spouse and, ultimately, the children. Direct (outright) gifts to a surviving spouse who is a US citizen on the deceased spouse’s death result in “wasting” the deceased spouse’s estate tax exemption because of the marital deduction. Therefore, making the portability election is a way of preventing the waste of the deceased spouse’s exemption for those types of transfers.

No one who understands all of the considerations could ever say, in a general way, that one of these methods—Bypass Trust or Portability Election—is always better than the other. In every case, it depends on the particular couple’s facts and circumstances. Both methods have pros and cons. In other words, there is no “one size fits all.” However, most of our surviving spouse/executor clients have been making the portability election on the deceased spouse’s death, whether there is a Bypass Trust or not, because the Bypass Trust is not always “fully funded” (i.e., filled up with assets belonging to the deceased spouse that have a total value equal to the deceased spouse’s exemption amount). *Some* of the considerations relating to these two methods include the following: (i) the importance of creditor protection (protecting the assets from loss due to divorces and other lawsuits); (ii) the type of assets owned by the couple and the importance (or not) of the “adjustment” to tax basis (i.e., the so-called “step up in basis”) on the surviving spouse’s death; (iii) various other income tax issues related to placing assets in trust (or not); (iv) Generation-Skipping Transfer Tax planning (i.e., creating trusts for children and grandchildren when the surviving spouse dies); (v) blended family “control” issues; and (vi) the need for professional management of the assets after the deceased spouse’s death.

Corporate Transparency Act Reporting

In our October 31, 2023 newsletter, we discussed the Corporate Transparency Act (“CTA”) and the need for millions of business entities that are not exempt (“Reporting Companies”) to file reports with the Financial Crimes Enforcement Network (“FinCEN”). A “Reporting Company” is a “domestic” (US) business entity that is or was formed by filing the necessary formation documents with the Secretary of State (or similar office) of the applicable state. Some examples of typical business entities that will be Reporting Companies (if not exempt) include (i) limited partnerships (LPs), (ii) Limited Liability Companies (LLCs), and (iii) corporations (including both “S corporations” and regular “C corporations”). These reports are filed on line by accessing the FinCEN website.

Reporting Companies already in existence prior to January 1, 2024, have until December 31, 2024, to file their required report. These “pre-existing” Reporting Companies only need to report “Company Information” and “Beneficial Ownership” information. New Reporting Companies formed on or after January 1, 2024, and before January 1, 2025, have 90 days from the date the business entity is created to file their required report with FinCEN. (For new Reporting Companies

created after December 31, 2024, the time period for filing the required initial report will drop to 30 days.) In addition to what pre-existing companies have to report, new Reporting Companies must also report "Company Applicant" information.

Important Note. Our firm is not accepting any engagements involving the filing of any required reports pursuant to the CTA. If you are an officer or director of a Reporting Company (or even a Beneficial Owner of a Reporting Company), you may wish to discuss your questions relating to your responsibilities pursuant to the CTA with your CPA. We will point out that Janet Yellen has publicly indicated that she believes Reporting Companies should be able to satisfy their reporting requirements on their own (without the need to hire a CPA or attorney). But many CPAs (and some attorneys) are willing to help their clients with these issues.

A "Heads Up": Section 327 of SECURE 2.0

In our *next* newsletter, we will discuss, in detail, Section 327 of The SECURE 2.0 Act of 2022 ("SECURE 2.0") because that section contains a "trap" for some surviving spouses named as beneficiaries of certain deceased spouses' qualified plans and/or IRAs. We need final regulations to resolve some ambiguities in that section of SECURE 2.0, but just be aware that, if it is not a clear case where the surviving spouse *should* roll over the deceased spouse's plan or IRA to the surviving spouse's own plan or to an IRA in the surviving spouse's name (such as, for example, (i) the case in which the surviving spouse is too young to take distributions from her own plan or IRA without a penalty or (ii) the case in which the deceased spouse died before her "applicable age" and the surviving spouse is much older than the deceased spouse was at the time of her death), the surviving spouse really needs to consider the provisions in Section 327 of SECURE 2.0 so the spouse can take appropriate action in a timely manner.

Contact us:

If you have any questions about the material in this publication, or if we can be of assistance to you or someone you know regarding estate planning or probate matters, feel free to contact us by phone (713-520-5205), fax (713-520-5235) or email sent to:

Karen S. Gerstner*
karen@gerstnerlaw.com

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*Board Certified, Estate Planning & Probate Law, Texas Board of Legal Specialization
Fellow, American College of Trust and Estate Counsel (ACTEC)