# Tax law uncertainty requires an estate plan that can roll with the changes

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Events of the last decade have taught us that taxes are anything but certain. Case in point: Congress is mulling abolishing gift and estate taxes as part of tax reform. So how can people who hope to still have long lifespans ahead of them plan their estates when the tax landscape may look dramatically different 20, 30 or 40 years from now? The answer is by taking a flexible approach that allows you to hedge your bets.

**Conflicting strategies**

Many traditional estate planning techniques evolved during a time when the gift and estate tax exemption was relatively low and the top estate tax rate was substantially higher than the top income tax rate. Under those circumstances, it usually made sense to remove assets from the estate early to shield future asset appreciation from estate taxes.

Today, the exemption has climbed to $5.49 million and the top gift and estate tax rate (40%) is roughly the same as the top income tax rate (39.6%). If your estate's worth is within the exemption amount, federal estate tax isn't a concern and there's no federal gift and estate tax benefit to making lifetime gifts.

But under current law there's a big *income tax* advantage to *keeping* assets in your estate: The basis of assets transferred at your death is stepped up to their current fair market value, so beneficiaries can turn around and sell them without generating capital gains tax liability. Assets you transfer by gift, however, retain your basis, so beneficiaries who sell appreciated assets face a significant tax bill.

**Flexibility is key**

A carefully designed trust can make it possible to remove assets from your estate now, while giving the trustee the authority to force the assets back into your estate if that turns out to be the better strategy. This allows you to shield decades of appreciation from estate tax while retaining the option to include the assets in your estate should income tax savings become a priority (assuming the step-up in basis remains, which is also uncertain).

For the technique to work, the trust must be irrevocable, the grantor (you) must retain no control over the trust assets (including the ability to remove and replace the trustee) and the trustee should have absolute discretion over distributions. If estate inclusion becomes desirable, the trustee should have the authority to cause such inclusion by, for example, naming you as successor trustee or giving you a general power of appointment over the trust assets.

In determining whether to exercise this option, the trustee should consider several factors, including potential estate tax liability, if any, the beneficiaries' potential liability for federal and state capital gains taxes, and whether the beneficiaries plan to sell or hold onto the assets.

**Consider the risk**

This trust type offers welcome flexibility, but it's not risk-free. Please contact us for additional information.



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