UNITED STATES & NEW YORK STATE ESTATE AND GIFT TAX REFERENCE GUIDE

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By:
Francis L. Riviezzo, CPA

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1) **Every person is allowed a Lifetime Federal Estate and Gift Exemption of $11,400,000 for 2019**[1] that can be gifted during their lifetime or after death.

2) **A married couple can therefore give $22,800,000** during or after their lifetimes free from Federal Estate or Gift Tax[1].

3) **Spouses can transfer unlimited amounts to one another** free of any Gift or Estate Tax.

4) **Each spouse can utilize a pre-deceased spouse's unused lifetime exemption** referred to as "Portability" allowed in Federal Law.

5) **Annual Exclusion "tax-free" gifts are $15,000 per donee for 2019,** therefore a married couple could gift $30,000 to an unlimited number of donees. For example, if grandparents have 2 children and four grandchildren, they could give $180,000 annually this way, (see Gift Tax Planning Guide). Note that "tax-free" gifts of $15,000 or less do not have to be reported on a Gift Tax Return, however, if a donor is Gifting substantial amounts of excluded tax-free gifts or if there is a question as to the fair market value of the gifts it is highly advisable to file Federal gift tax returns to ensure the 3-year Statute of Limitations starts.

6) **The Federal Estate and Gift Tax Rate** for amounts exceeding these exemptions is **40%**.

7) **Beware of Tax Cost Basis When Considering Making Gifts of Appreciated Assets**.

   It is very important to understand the very significant difference between making gifts during lifetime vs. after death.

   Assets gifted during lifetime: The tax cost basis of the donor transfers to the donee of the gift.

   Assets bequeathed/devised after death: The tax coast basis is increased (or "stepped up") to the fair market value of the asset(s) on the date of death.

   For example, let's assume an individual (U.S. Citizen) with assets of $10 million and a tax cost basis of $5 million.

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[1] This exemption is set to expire on December 31, 2025 and if not made permanent by Congress the exemption will revert to approximately $6.0 million per person or $12.0 for married couples in 2026.

[2] The U.S. Treasury recently issued Proposed Regulations which confirm that gifts before December 31, 2025 up to the $11,400,000 amount will not be "clawed back" for estate tax purposes if the exemption goes back down after year 2025.

Based on the current United States Estate and Git Tax Law this person can Gift these assets during their lifetime before December 31, 2025 and not be subject to any U.S. Estate or Gift Tax.

The significant difference between gifting during lifetime or bequest after death is **if the assets were gifted during lifetime and the beneficiaries sell the assets for $10 million the beneficiaries would be subject to Capital Gains taxes on the $5,000,000 difference** between the donor's tax cost basis and the sale price which in this example result in at least $1,250,000 of Capital Gains Taxes or as high as $1,750,000 in Capital Gains Taxes depending on what State/City they live in.

If the assets were instead held to death and sold for the same $10 million there would be no capital gain taxes due because the appreciated assets get a "stepped up" tax cost basis measured on the decedent's date of death.

8) **Important Notes:**

If Congress does not make the exemptions permanent before December 31, 2025 the exemptions will revert to the pre-2018 levels (indexed for inflation) which would be approximately $6,000,000 per person/$12,000,000 for married couples.

If an individual holds on to their assets until death and they die after 2025 and Congress allows the exemptions to revert to the $6.0/$12.0 million amounts the estate of $10 million in the example above could owe approximately $1,600,000 of Federal Estate Tax ($10 million - $6 million) x 40%.

Also note that the example above does not consider potential appreciation in value. For example, one of the significant benefits derived from lifetime gifting is that any appreciation in value and income from the date of the gift is not included in the decedent's estate. Also, lifetime gifting of partial ownership of assets are usually valued at a lower value for gift tax valuation purposes because gifts of partial ownership interests to a donee are valued in the hands of the donee who often will own a minority ownership interest and as a discount because of lack of marketability. Note that for estate tax valuation purposes, assets are valued in the hands of the decedent who often owns a majority ownership interest resulting in less of a valuation discount.

Although the United States Estate and Gift Tax Exemption has never gone down in the past and temporary laws such as this one have gone down to the wire before being made permanent, we live in very politically polarized times and depending on the state of the nation in 2025 it is very possible Congress may allow the exemptions to revert to the $6,000,000 for individual/$12,000,000 for married couples amount. This suggests that families with assets over $6.0/12.0 million now consider lifetime gifting before December 31, 2025 to ensure the current exemptions are locked in. Again, as with all planning decisions careful analysis as to the appropriateness of making substantial gifts, tax cost basis and other planning factors should be given.

9) Individuals/couples with significantly more than the $11,400,000/$22,800,000 exemptions who have not yet utilized these exemptions should consider significant gifting because if Congress allows the law to revert to the $6.0/$12.0 million exemption they will have lost the opportunity to transfer these amounts free of estate or gift tax.

New York State Estate Tax Law:

1) **Very important to note is that New York State does not impose a Gift Tax therefore an unlimited amount can be gifted during lifetime which can be tempting to avoid the 16% maximum NY State Estate Tax Rate. Once again, when gifting assets beware of tax cost basis which could wind up costing much more in capital gains taxes than the 16% NYS Estate Tax Savings if appreciated assets are sold. It is also important to note that the 2019-2020 New York State Executive Budget includes a proposal to subject gifts to estate taxes depending on when the gifts are made and when the decent dies.**

2) The NY State **Estate Tax Exemption for 2019 is $5,740,000** per person.

3) **The NY State exemption is NOT portable to a surviving spouse under NY State Tax Law as opposed to Federal Law and therefore any unused exemption of the pre-deceased spouse cannot be used by the second to die spouse**. Therefore, careful estate planning such as dividing spousal asset ownership and/or the use of "Credit Shelter Trusts" is very important to maximize each spouse's $5,740,000 exemption.

4) **If the decedent's taxable estate exceeds the $5,740,000 the exemption is quickly eliminated**. This provision of the law is a poorly designed part of a hastily signed New York State Tax Law with a counter intuitive Estate Tax Provision. **For example, a taxable estate of $5,740,000 will owe zero NY State estate tax while an estate with $100,000 more of assets or $5,840,000 will owe $238,231 New York Estate Taxes and an estate of $5,940,000 would owe $420,213 which is absurd a 200% incremental tax rate**. Therefore, if a client's assets are hovering around the $5,740,000 million exemption clients are advised to consider gifting prior to death to keep below the $5,740,0000 exemption and to preferably make these gifts in cash or assets with a high tax cost basis.

5) Because the New York State Tax Exemption is $5,740,000 per person families below this amount have little need to be concerned about either New York State or Federal Estate Taxes.

6) **Families with assets less than the $5,740,000 who are considering gifting assets to qualify for Medicaid should be very cautious if any of the assets have significantly increased in value since acquisition because any gifts of highly appreciated assets that may be sold in the foreseeable future may result in very significant Capital Gains Taxes potentially negating Medicaid planning**. For example, assume a person's family is considering gifting $2,000,000 of assets with a low tax cost basis of, say $500,000. If the $2,000,000 of assets is ultimately sold there would be about approximately $300,000 of capital gains taxes ($2,000,000 - $500,000 times a 20% Federal Capital Gains Tax Rate) and if the beneficiaries are in a higher Federal tax bracket and/or live in high tax states, the capital gains taxes could be over $500,000. To qualify for Medicaid there are many arcane rules, but one basic rule is the 5 year "look back period" during which Medicaid will not pay for nursing home care. Therefore, in this example the family who wishes

to protect their assets by gifting is in effect going to have to wait 5 years before receiving Medicaid assistance for Long Term Nursing Home Care and if Capital Gains Taxes were also to result from sale of such assets this creates, in effect, a few more years of a waiting period because the Capital Gains taxes could have paid for a few years for quality nursing homes that cost at least $120,000 a year. This is not to mention the financial vulnerability an elder person may feel by gifting their assets and impoverishing themselves. Also, if the family wants to ensure their loved one gets accepted to a high-quality facility most of these facilities will require proof that at least the first few years can be paid privately at full cost.

RYNKAR
VAIL & BARRETT LLP
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Since 1947

22 Jericho Turnpike, Suite 100
Mineola, NY 11501
516-747-0110

275 Madison Avenue, 33rd Fl.
New York, NY 10016
212-785-1800