# A Look Ahead: Estate Planners Relieved by Legislative Limbo, Hesitant Treasury

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By Jonathan Curry

It's been nearly three years since President Biden took office, but the legislative and regulatory reckoning that many estate planners feared has yet to materialize.

And 2024 looks to be no different. A risk-averse Treasury and a divided Congress — in an election year, no less — means wealthy individuals and families shouldn't expect significant changes in the estate planning advice they receive next year, observers say.

Although Congress is prone to gridlock, the big surprise has been Treasury, which at one point seemed to be brimming with potential to upend the estate planning landscape. "One would need a heart of stone not to weep with pity" for the progressive bloc of four senators who wrote Treasury Secretary Janet Yellen on October 2, pleading with her to take long overdue administrative action to curb tax avoidance by the wealthy, Austin Bramwell of Milbank LLP told *Tax Notes*.

No serious action has been forthcoming, however, and the Biden administration's tax agenda laid out in Treasury's fiscal 2024 green book paints a picture of an administration content to punt responsibility to Congress. "If the Treasury were run by officials intending to sabotage a progressive tax agenda, possibly even to mock its proponents, you would get pretty much the same results," Bramwell said.

For instance, the green book solicits Congress's help to obtain authority to restrict formula clauses in gift tax planning, but according to Bramwell, the Ninth Circuit gave Treasury permission a dozen years ago in *Petter v. Commissioner* to do so if it simply revised its regulations.

Treasury is also asking for congressional authority to obtain data on domestic trusts, but Bramwell argues that all Treasury and the IRS have to do is add questions to their tax returns and be done with it.

Beth Shapiro Kaufman of Lowenstein Sandler LLP also noted that the current IRS and Treasury priority guidance plan contains fairly mundane estate and gift tax items and said it's unlikely there's a sleeper project in the works that hasn't been telegraphed. The government typically doesn't devote much time to projects that aren't on the guidance plan unless there's newly enacted legislation that takes priority, she said.

"I think that Treasury just has higher priorities than the estate and gift tax," said Kaufman, a former Treasury associate tax legislative counsel.

The sole exception in 2023 was the guidance on grantor trusts in Rev. Rul. 2023-2, 2023-16 IRB 658, but even that simply confirmed an IRS position that was already well established and virtually no one disagreed with. "In short, it accomplished almost nothing," Bramwell said.

By these actions and inactions, Treasury has clearly signaled that it "has no intention, at least not in this administration, of curtailing planning opportunities that have been made available to wealthy taxpayers," Bramwell concluded.

## Clean Up

With few dramatic events on tap for 2024, it's an ideal time for estate planners and their clients to consider "your basic blocking and tackling" of estate tax planning, suggested Laura Hinson of Deloitte Tax LLP. And right now, that starts with making gifts.

The Tax Cuts and Jobs Act doubled the estate, gift, and generation-skipping transfer basic exclusion amount, but that provision automatically sunsets December 31, 2025, and reverts to the baseline exclusion of $5 million per individual and $10 million per married couple, though the inflation adjustments will remain.

In the meantime, the exemption amounts keep growing, thanks to those inflation adjustments. They now shield an amount of wealth that is "not just large, but for the vast majority of Americans, simply stupendous," according to Bramwell. For 2024 the individual exemption amount will be $13.61 million and $27.22 million for married couples, along with an $18,000 annual gift tax exclusion — the highest amount ever.

During a November 20 American Law Institute webinar, the speakers agreed that while lawmakers consistently tend to extend or increase the estate and gift tax exemption — even during periods in which Democrats controlled the White House and Congress — there's no guarantee the next Congress will continue that trend.

"We need to treat it like there's a strong likelihood that the exemption is going down," Katie Lynagh of Milbank LLP said. "It's really our obligation to help our clients make gifts that they'd like to make before that expires."

Todd Angkatavanich of McDermott Will & Emery LLP similarly advised on the webinar that "it's incumbent upon us as practitioners to plan with flexibility but also plan with the presumption that the sunset is going to happen."

That's the approach Hinson is taking. "What I'm really trying to impress on people is, if they don't use that increased exemption, it's lost forever," she said. Adding that bit of urgency could help avoid a repeat of 2012, when many taxpayers waited until the last minute and then found themselves in a rush to get their tax planning done before the end of that year, she said. The estate and gift tax exemption was scheduled to drop from $5 million to $1 million at the end of 2012, and Congress didn't intervene until January 1, 2013, when it passed legislation to maintain the higher exemption amount.

Hinson also noted that the number of gift tax returns her team filed in 2012 "tripled or quadrupled" in response to concerns that the exemption amount would drop, and that kind of volume spike can be tricky to manage.

Taxpayers who put off making gifts that they're otherwise interested in making run the risk of not being able to find an attorney with the bandwidth to properly and thoughtfully draft new trust documents as the sunset nears, Hinson warned. "Most of the trusts that are set up for estate tax planning purposes are dynasty trusts, and they're intended to last for multiple generations," she said.

"A lot of people want to basically be able to control from the grave," Hinson continued. "But that might be too rigid 56 years down the road when that trust is still outstanding," she said. Doing so requires careful thought and balancing flexibility with administrability, which takes time.

Waiting too long to make a gift may also present challenges in finding an available qualified appraiser to do a valuation of a hard-to-value asset, Hinson added.

## See You in Court

As quiet as 2024 generally looks, the Supreme Court could make it an interesting year.

The Court recently heard oral arguments in *Moore v. United States*, No. 22-800, which could affect any effort to enact a wealth tax or similar proposal, Kaufman observed. For instance, the Biden administration's green book proposes a 25 percent minimum tax on total income that would be generally inclusive of unrealized capital gains on taxpayers with wealth in excess of $100 million.

Bramwell noted that, depending on how the Court rules in *Moore*, similar proposals like the revised Billionaires Income Tax Act (S. 3367) introduced by Senate Finance Committee Chair Ron Wyden, D-Ore., could also be at risk. "It does raise the stakes in *Moore*," he said of that proposal.

Observers generally predict that the Court will take a narrow approach to avoid blowing up other portions of the tax code. Kaufman noted there were many amici briefs outlining the potential collateral consequences, and based on the lines of questioning from the justices, "I feel like they understand that," she said.

The Court also recently announced it will hear *Connelly v. United States*, No. 23-146, regarding the valuation of a closely held business for estate tax purposes when life insurance proceeds are involved. Unlike *Moore*, it is doubtful the case will lead to anything groundbreaking. "It's not something that comes up every day," Kaufman said.

That case presents a split in the circuit courts between *Connelly* and *Estate of Blount v. Commissioner*, 428 F.3d 1338 (2005).

According to Justin Miller of Evercore Wealth Management, if the Court follows the Ninth Circuit's reasoning in *Connelly*, it could result in a greater focus on partners using insurance to buy out a

deceased partner in a buy-sell agreement instead of the company that owns the insurance doing the redemption.

That might not have the potentially far-reaching consequences at play in *Moore*, but "any time the Supreme Court grants cert on a tax case, it's a big deal," Miller said.