



## **POST TRUMP TAX REFORM: PLANNING MISTAKES TO AVOID IN 2018**

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President Trump signed the “Tax Cuts and Jobs Act” (“TCJA”) into law.

Whether you live in the US or are planning to move here, what does this mean for you?

### Individual Tax Rates Reduced

If you are a Small Business Owner operating as an “S” Corporation, LLC., Partnership or Sole Proprietorship, your taxes are reduced from 43% to 35%. (But beware your actual tax rate may depend on eligibility for the 20% small business deduction.)

### Corporate Tax Rate Reduced

If you have a “C” Corporation, your corporate taxes are reduced to 21%. (But beware of double taxation exposure on dividends and additional personal holding company tax on excess accumulated earnings.)

## Estate Taxes Eliminated (for most)

If you are married and your estate is less than \$22 Million, your estate tax exposure is completely eliminated. (But beware as this changes at year-end in 2025 and this change will not benefit those that are US residents, but not domiciled in the US.)

## **KEY POINTS**

### Individual Tax Rates

For 2018 to 2025, tax rates will range from 10% to 37%.

*Note: Small businesses may be eligible for a standard 20% deduction.*

### Standard Deduction

The standard deduction is doubled to \$12,000 for singles (\$24,000 for married couples).

*Note: Many small business owners may no longer have to “itemize” their deductions.*

### Personal Exemptions

Personal exemptions, including for dependent are repealed.

*Note: This is probably due to the fact that your standard deduction is doubled to \$12K for singles (\$24K for married couples).*

### Alternative Minimum Tax

Alternative Minimum Tax (“AMT”) has been retained but exemption amounts are significantly increased.

*Note: Consult with your CPA to see if you may be subject to this tax.*

### Child Tax Credit

Child Tax Credit (“CTC”) has been doubled from \$1,000 to \$2,000.

*Note: This is phased out for high-income taxpayers.*

### Mortgage Interest

The deduction for prior debts is grandfathered; the new law limits the mortgage interest deduction to interest paid on the first \$750,000.

*Note: This is reduced from \$1M.*

### Medical Expense

For 2017 and 2018, the threshold for deducting medical expenses reverts to 7.5% of Adjusted Gross Income.

*Note: Run the number with your CPA as this may still mean “no” eligible deduction for you.*

### Business Tax Provisions

Unlike the individual tax provisions noted above, the key provisions relating to businesses are generally “permanent”.

### Corporate Tax Rates

The corporate tax rate is reduced from 35% to 21%,

### Pass-Through Entities

Under the new law, pass-through entities such as Partnerships, “S” Corporations and Limited Liability Company(ies) (LLC), and sole proprietorships – CAN CLAIM a 20% deduction on earning.

*Note: This is subject to special rules and restrictions. The deduction is not available for high-income personal service providers such as financial advisors, CPAs and Attorneys.*

There are other provisions which you should address with your CPA, such as the new Interest Deduction Luxury Car Rules, Bonus Depreciation, and Section 179 Deductions and Entertainment Deductions.

## **Frequently Asked Questions (FAQ)**

- Should I terminate my “S” Election to avail myself of the 21% corporate income tax rate?
- Do I still need Estate Planning if my estate is less than \$22M (\$11M if single)?

### **ANALYSIS**

**If corporations are taxed at 21%; but not LLC., and “S” Corps, should I terminate my “S” Election and modify my “check the box” Election to be treated as a “C” Corporation for tax purposes, especially since the corporate alternative minimum tax has been completely eliminated?**

This depends on your particular circumstances. We suggest that you consult with your CPA and “run the numbers” before you terminate your “S” Election.

Remember, “C” Corporation may be taxed at 21% rate; dividend will still be taxed to the individual shareholder. This may subject you to double taxation; and if you are thinking of just keeping all the money inside the “C” Corporation to avoid the double taxation, then you may run into the additional tax of 20% for Personal Holding Companies (“PHC”).

**What about my existing Wills & Trusts now that I may not be subject to estate taxes?**

Well, you need to have them reviewed nonetheless. The reason is asset protection. It’s not estate taxes that will consume your estate, its creditors, spendthrift heirs and divorce. Those are the risks that you should be protecting yourself from today to enjoy the fruits of your labor tomorrow. This may be a good time to establish and fully fund asset protection trusts.

## HERE ARE SOME ASSET PROTECTION PLANNING MISTAKES TO AVOID IN 2018

### **FIVE (5) MISTAKES TO AVOID.**

Here are the five (5) basic mistakes that a Small Business owner typically makes when it comes to protecting their assets:

**Mistake 1:** Failure to Establish or Maintain Corporate Records. Many owners of small businesses fail to follow the fundamental steps to properly set up a company and then to at least annually update the corporate records to make sure that you have a valid corporate shield protecting you.

**Mistake 2:** Thinking a Revocable Trust Protects Your Assets. A living revocable trust is an important estate planning tool that every person or family should have to take care of your family if you cannot, avoid probate upon death, avoid court intervention upon incapacity, and keep legal control within your family. These are just some of the many advantages of a living trust. However, a living revocable trust does NOT protect your assets.

**Mistake 3:** Waiting Too Long To Begin Planning. You should plan to protect your assets before legal problems begin. Do not wait for creditors sue you because it may be too late. A transfer deemed fraudulent may be undone. Asset protection planning integrated with your estate planning done in a timely fashion is the most effective, least expensive way to protect your estate.

**Mistake 4:** Transfer to Family Members or Insiders. A common approach is to give someone else control of your assets, such as to family members. This is usually not a wise. There are likely gift tax consequences, you may lose control over your company and personal assets.

**Mistake 5:** Too Much Insurance or Too Little Insurance. Too much insurance makes you an inviting target for potential plaintiff. Too little insurance may also be risky.

### **SEVEN (7) ASSET PROTECTION STRATEGIES.**

Here are seven (7) Asset Protection Strategies every Small Business owner should consider:

**Strategy 1.** Tenancy By The Entireties or (“TBE”). Holding property as TBE has certain benefits for married couples. Upon the death of one spouse, all assets flow to the surviving spouse without the need for probate. Holding property as TBE has significant asset protection benefits: such property cannot be reached by creditors unless both husband and wife are liable. If the property is held as TBE, and the creditor has a judgment against only one spouse, then the creditor cannot attack the TBE property. However, if you divorce or one spouse dies, you lose the protection. If a creditor can sue both of you, there is no protection.

**Strategy 2: A Florida Corporation.** A Florida corporation, properly structured and maintained, can provide a corporate veil over the shareholders and officers. The corporation should keep annual minutes and keep records of the major corporate transactions. However, a creditor has many remedies against a corporation to pierce the corporate veil. For example, a creditor may be able to grab the corporate certificates, demand periodic accountings, and challenge the board of directors. For this reason, the corporate entity of choice in Florida is no longer a corporation; rather take possession of the entity of choice has now become the limited liability company, or LLC.

**Strategy 3. Florida Limited Liability Company.** LLC's are one of the most popular planning tools for protecting your assets. They generally provide more flexible tax planning and are more difficult to penetrate than corporations. Florida law gives creditors limited remedies against an LLC interest. In fact there is only one remedy. Assuming the LLC has a well drafted operating agreement a judgment creditor is limited to a charging order against LLC cash distributions. If the LLC manager (you are usually the manger) decides not to make a distribution, the creditor stands on the sidelines and receives nothing. In addition, the creditor could be liable for taxes on the LLC income even though the creditor receives no distributions. However, an LLC structured as a single member LLC is generally not as strong as a multi-member LLC.

**Strategy 4. Family Limited Partnership.** The FLLLP offers multiple benefits, such as minimizing estate taxes and making gifts to children without giving them cash or any control. However, another major benefit of the FLLLP is asset protection.

**Strategy 5. Domestic Asset Protection Trust** **A. SLAT Spousal Lifetime Access Trust** ("SLAT") protects your assets for your spouse and children as long as your marriage is strong. It is also a proven strategy to take advantage of the \$5.25 million federal gift and estate tax exemption. The SLAT is an irrevocable trust to benefit the grantor's spouse and children. You cannot be a beneficiary of this trust, but you have indirect access to the trust assets through your spouse. Such trusts also provide security for your children by helping to ensure that every dime goes to your children, and not to their spouse or a creditor. **B. Nevada Hybrid Domestic Asset Protection Trust.** Nevada has one of the strongest asset protection laws in the country. A Nevada Domestic Asset Protection is a credible structure for protecting family assets. The Hybrid strategy makes one key change in the traditional DAPT: the grantor or settlor is not an initial discretionary beneficiary, but rather a person who can be added later to the trust as a beneficiary. The Trust can be set up initially for the grantor's spouse and/or children.

**Strategy 6. Nevis Island LLC.** Nevis Island has enacted strong LLC laws similar to our Florida statute. To attack an interest in a Nevis Island LLC, a creditor has to go to a Nevis court to get a charging lien. It is unclear whether a Nevis Court would recognize a Florida judgment. Using a Nevis LLC, you can retain control of your assets as the LLC manager.

**Strategy 7. Cook Islands or Nevis Trust.** In 1984 the Cook Islands ushered in the modern asset protection era, and has remained one of the premier jurisdiction. You may have a combination of a Nevis Island LLC and a Cook Islands Trust. There are numerous other offshore structures and jurisdictions that provide asset protection, but beware to the 10 year claw back provisions under the Bankruptcy Code.

## **TEN (10) ADDITIONAL FACTORS TO CONSIDER.**

Here are ten (10) additional Asset Protection Factors to consider:

**1. Insurance.** If you are sued, liability insurance provides coverage for defense costs whether you win or lose. Often times, defense costs total more than the judgment itself. Insurance can also be used to satisfy a judgment, thereby protecting your assets. When it comes to asset preservation, the importance of proper kinds and amounts of insurance is critical. The following is a non-exhaustive list of insurance that every professional should consider: Malpractice insurance; Personal and/or business liability insurance (including an umbrella); Fiduciary coverage if they are responsible for the funds of others; Directors and officers coverage; Personal automobile insurance; Business non-owned and hired automobile insurance; Landlord/tenant liability insurance; Business worker's compensation insurance; Personal disability income insurance; Business employment practices liability insurance.

**2. Homestead Property.** Florida is often referred to as a "debtor-friendly" state as it offers a number of laws that residents can use to obtain protection against creditor claims. Declaring your primary residence as your homestead is a great asset protection tool. The Florida Constitution provides in relevant part that a person's "homestead" is not subject to a forced sale by a judgment except for the payment of taxes and assessments, obligations contracted for the purchase of the properties, or money owed for improvements or repairs performed on the property. There are six basic requirements that must be met to establish a Florida Homestead: 1. Establishing that you intend to use the property as your permanent residence 2. Meeting the acreage limitation of (a) half an acre of land (or less) if located within a municipality; or (b) 160 acres of land (or less) if located outside of a municipality 3. Establishing that you own the property 4. That the property be located in Florida 5. Establishing proper type of residence requirements (i.e., fee simple title, fractional interests, leaseholds) 6. Establishing the occupancy requirement If you satisfy the above requirements, you may be entitled to obtain unlimited Florida homestead exemption. The exemption is subject to the Bankruptcy Abuse Prevention and Consumer Protection Act (the "BAPCP"). The BAPCP provides that an interest in homestead that is claimable as a state exemption is limited to \$125,000 if the interest was acquired within 1215 days prior to the debtor's bankruptcy filing, unless the homestead was acquired by a family farmer, or the interest in the homestead was purchased with proceeds from a previously owned homestead.

**3. Tenants by the Entirety ("TBE").** As noted above, if you are married, titling your property as TBE can be an effective asset protection tool. Florida recognizes TBE as a form of property ownership for both real and personal property. When property is titled as TBE, husbands and wives are considered "one person," and neither spouse is able to sever the property on his/her own. Because no spouse has a separate interest in the property, a creditor of only one spouse cannot attach the TBE property to satisfy its claim, unless it is the Internal Revenue Service. Also, if one of the spouses passes away, or the spouses divorce, the TBE classification is lost.

**4. Qualified Retirement Plans and IRAs.** Most people have a portion of their assets in some form of retirement plan or individual retirement account ("IRA"). In 1974, Congress overhauled

the pension laws by enacting the Employment Retirement Income and Security Act of 1974 (“ERISA”). ERISA provides creditor protection from both the employer’s and employee’s creditors. The BAPCP Act was also revised so that certain exemptions apply to retirement plans. A retirement plan will be “presumed” to meet the requirements of the BAPCP if the plan (a) has received a favorable determination from the IRS under section 7805 of the I.R.C. and (b) the determination is in effect on the date of the bankruptcy filing. While Florida has opted out of the BAPCP exemption, it did enact Fla. Stat. 222.201 which provides certain rights for a debtor to receive benefits, which include “a payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.” This protection is subject to a 730 day Florida residency requirement.

**5. Annuities.** Florida law provides creditor protection to the “proceeds” of “annuity contracts.” This exemption is subject to the 730-day residency requirement provided in the Bankruptcy Code Section 522(b)(3)(A). Payments from annuity contracts should be segregated from other assets as once these payments are commingled with other assets, they may be subject to creditor attachment.

**6. Life Insurance.** Life insurance is also a good tool for creditor protection as Florida law protects the cash surrender value of certain life insurance policies. Once again, this exemption is subject to the 730-day residency requirement provided in the Bankruptcy Code (“BC”) Section 522(b)(3)(A). Life insurance proceeds also are not subject to probate if a beneficiary is named. However, the proceeds payable to the beneficiary are not protected from that beneficiary’s creditors, unless the proceeds are placed in a trust with a spendthrift provision, such as an Irrevocable Life Insurance Trust.

**7. Irrevocable Trusts.** Assets placed in an irrevocable trust are generally protected so long as the transferor is not a potential beneficiary of the trust. Under an irrevocable trust agreement, the grantor transfer assets to a trustee, directing the trustee to control the trust in accordance with the directions established in the trust document. The most common is the Children’s Irrevocable Trust.

**8. Prenuptial or Postnuptial Agreements.** Any individual with significant assets should consider entering into a prenuptial or postnuptial agreement. Retaining an attorney is one of the most important things you can do to assist you through this process as there are several requirements that need to be met in order to ensure that the prenuptial agreement is enforceable.

**9. 529 Plans and Other College Savings Plans.** Florida Statute Section 222.22 provides that monies paid into or out of the Florida Prepaid College plan are not subject to attachment, garnishment, or legal proceedings in favor of any creditor of the purchaser of the beneficiary of a plan. The statute also provides protection to Educational Savings Accounts, the Uniform Gift to Minors Act and the Uniform Transfers to Minors Act. These vehicles are a means to provide a benefit to your children or grandchildren, and also receive the benefit of creditor protection.

**10. Gifts.** Gifts are protected from creditors as you no longer have possession of the property. In making a gift, you should be concerned with the federal gift tax. Also, if you are concerned about



gifting property to an individual outright, the gift can be placed in a trust, which may or may not be treated as a completed gift for gift tax purposes. But beware the gift is not deemed fraudulent transfer.

### **ARE YOU “REALLY” A FLORIDA RESIDENT/DOMICILIARY?**

Whether you have purchased a residence/apartment in Florida or have relocated to this State, questions often arise whether you have become a Florida resident or are now domiciled in this State. If you are not in fact a resident of Florida, you may not be entitled to the asset protection provisions of the Florida Statutes and Constitution. Although primarily a question of individual intent, that intent is often determined by review of various factors pointing to more contacts or connections with Florida or another state or foreign country.

For non-US citizens, the questions of residency and domiciliary status is of critical importance to their global tax planning strategies and should be carefully reviewed.

*Disclaimer: The only constant with tax law is constant change. This is a brief article and only covers some of the highlights of the new tax law and is a compilation of various other materials and articles. This article does not constitute a Legal Opinion and should not be relied upon by the reader in basing any conclusions as to how the new tax laws or asset protection strategies may affect them. The reader is advised to consult with their CPA and/or professional adviser.*