PANEL_ Republican Victory_ How Estate Planners can Stay Relevant and Keep Practice Momentum

[00:00:00] **Martin Shenkman:** Welcome to the program. My name is Marty Shankman. I'm joined by two friends and colleagues, Jonathan Blattmacher and Robert Keebler, who I'm going to call Bob, but we are going to talk about the state planning after the election and what it means, what practitioners should be saying, what they should be doing, how they should be planning, and what may come about.

[00:00:29] **Martin Shenkman:** Um, we're recording this session. Uh, in order to get this done on Thursday, uh, and that's going to be a bit before plays. So today, as we're recording this Thursday morning, the Senate. Is 52 Republican, 45 Democrat. The house is 205 Republican, 109 Democrat. So by the time this plays, there may be finality on the, uh, status [00:01:00] of the house and whether or not, um, the Republicans control, but it looks like that's going to be the result.

[00:01:07] **Martin Shenkman:** A sweep white house, Senate. And house and has profound implications to all we do as a state planners, and we're starting to ponder because we all have to ponder it before we get started. I'd like to acknowledge our 2 sponsors. We're not doing a PowerPoint because of the quickness in which we try to get this completed peak trust company, which is in Alaska.

[00:01:34] **Martin Shenkman:** And Nevada is a, uh, really a long time administrative trust company and, um, serves as a trustee of trust in two of the top trust friendly jurisdictions. I have one of my own family trust with Peak and I've been with them since 1998. So, um, I'm, I'm, I'm a customer as well as a, uh, [00:02:00] Colleague, uh, and they've provided great service.

[00:02:03] **Martin Shenkman:** Um, the second sponsor is ILS Interactive Legal Systems. Is that right? I always call it ILS, Jonathan. I don't think I've ever said the full name.

[00:02:11] **Jonathan Blattmachr:** Interactive Legal Systems is correct, Marty.

[00:02:14] **Martin Shenkman:** And it's a draft document generation, uh, drafting software program. Um, if you have not transitioned your practice from using in house manual forms to document generation, generally, uh, you should take a look at the process.

[00:02:29] **Martin Shenkman:** It's it's incomparable and A. I. Is going to continue to revolutionize the profession. You need to get on board with with document generation and I. L. S. As an incredibly comprehensive, uh, system. It gives you an incredible array of form. Options planning options, and I can say from my experience, it's revolutionized how we draft and how we plan.

[00:02:56] **Martin Shenkman:** It's not just the drafting efficiency. When [00:03:00] you get involved in using document generation, it changes your thought process with how you approach planning. And I think for practitioners that haven't taken the plunge, it will give you the ability to be much more nimble. And. Our is practitioners being flexible in the new environment, and we have a dramatically new environment with the republicans, uh, victory.

[00:03:23] **Martin Shenkman:** I can't say it's a sweep as of Thursday, but it looks like it's going to be, um, you need to be nimble and drafting software can do that. Um, If you Google ILS or peak trust, you can get either of their contact information. So let me, let me start our discussion with, with a comment that is incredibly obvious, but important, and I'm going to ask Jonathan and Bob to chime in on this, and then we're going to have Jonathan give an overview of some of the political landscape and some of the things that are relevant to what might happen.

[00:03:58] **Martin Shenkman:** In Congress, we need to have an [00:04:00] understanding of that because it will affect what we do. And then we're going to talk about planning. I hear some background noise. I don't know if it's somebody ruffling papers, but we should, we should be careful not to do that. So, to me, key number one, and we don't know all the answers.

[00:04:15] **Martin Shenkman:** We're going to talk about planning. What we think some of them are, but the key step number one, we have to communicate with clients. I think it's imperative that we communicate with clients. And I'm after this webinar, going to draft a communication. Um, and probably an article to send her a paper to send to clients, because the world has changed now, I think it's fairly safe to say that we all 3 generally.

[00:04:42] **Martin Shenkman:** And there's exceptions we're gonna talk about a generally feel that people should proceed with planning. And we're going to talk about what that planning looks like, how it's different, how we present it differently to clients, but we need to explain to clients what this means, because many clients are going to have a very [00:05:00] different feeling about the potential risk of a state tax costs based on the election.

[00:05:08] **Martin Shenkman:** Ed. I don't want a client to be upset with me that I'm on a finished plan that's in process, and they're going to say, why'd you, why'd you do that? There's going to be probably no likelihood, or a small likelihood, that the exemption's going to decline. It'll probably stay where it is with Republican, especially if they sweep.

[00:05:29] **Martin Shenkman:** Um, we need to communicate to clients. That the election has occurred and what the changes mean and hopefully the content of this preliminary discussion will give you all ideas to communicate, and we'll do more webinars as it starts to play out. We start to see more of what's happening in Washington and refine our thinking on it.

[00:05:48] **Martin Shenkman:** Um, Bob, why don't you try next? What, what do you, I'm, What do we say to clients and, and how we communicate with them? And what do you feel about that?

[00:05:59] **Robert Keebler:** Well, I think [00:06:00] totally reasonable that there'll be no changes in the estate tax law for the next, at least four years. Okay. So we're going to have everything I've read is the tax cuts and jobs act, provided we have a Republican house, will be extended and president Trump and the Senate will be able to use a process called reconciliation, and that's Even though they do not have the requisite 60 votes in the U.

[00:06:27] **Robert Keebler:** S. Senate. So they can use reconciliation to do that. But reconciliation has a time frame to it. Okay, that's that 10 year time frame, Marty. So, even if we extend this 10 years from now, we'll be doing the same dance again. Okay, so we have, we kind of have to start there. And, But there's so much else that can be done.

[00:06:48] **Robert Keebler:** We'll talk about that today, but for our largest clients, absolutely nothing has changed because they continue people over [00:07:00] 50 or 60 million. I mean, once you, what will change dramatically. Is people worth 14 million to 30 or 40 million who now can take a deep breath and say, wait a minute, I don't have to do this in the next few, few months or few years, the other thing that would change dramatically, and this is important, I represent a lady who's 90 years old, she has about 30 million of Apple stock that she bought many, many years ago.

[00:07:34] **Robert Keebler:** And she's 97. We do not have to gift that Apple stock away, thread the needle with that low basis stock. We can wait, and perhaps she dies with that, receives a step up, but still has a 14 million dollar exemption. So, the calculus has changed a little bit.

[00:07:56] **Martin Shenkman:** Jonathan, any thoughts on what [00:08:00] advisors and I'm going to use the term broadly, financial advisors, accountants, attorneys, insurance consultants, what should, what should people be telling clients?

[00:08:08] **Martin Shenkman:** And we're going to get into obviously more detail as we go through the implications of all this.

[00:08:12] **Jonathan Blattmachr:** Well, I believe that the republicans will wind up with a sweep, but that doesn't mean they can do whatever they want. The only way they can get tax changes through is through budget reconciliation.

[00:08:25] **Martin Shenkman:** We're gonna, we're gonna come back and let you talk about all that.

[00:08:28] **Martin Shenkman:** I just want to first start with communicating to clients and then I'm going to turn it over to you to explain.

[00:08:33] **Jonathan Blattmachr:** I mean, marty, it's all tied in together, but let me point something out. Let's say you have a client who has 10 million in debt. putting aside whether they have a spouse, but the, the client has 10 million and figures, you know, they're not going to reduce the exemption on golden, but the client will hope that the value of his or her property will go up.

[00:08:55] **Jonathan Blattmachr:** And even if you only make 7 percent on the money, it means the [00:09:00] value will double every 10 years. So his 10 million or her 10 million. Will be 20 million in 10 years and will be, uh, you know, uh, uh, 40 million in 20 years. And today when I was at physical therapy, I held the door for a woman who said, uh, stay young young man.

[00:09:21] **Jonathan Blattmachr:** And I'm almost 80, but it was amusing. And I said, well, how old are you? She said, I'm 90. And I wish I hadn't lived this long. But people continue to live to really great ages. So if you have an 80 year old, someone like me and my wife, and if our money grows at only 7 percent a year, which would be disappointing to me, it means that even if only one of us makes it for about 20 years, Instead of us having 10 million or 20 million, we'd have 40 million.

[00:09:49] **Jonathan Blattmachr:** And keep in mind at that time, the political landscape will change. And as a consequence, do your planning now. And in fact, Marty, I think that [00:10:00] there's a reasonable chance That the exemption will be reduced as current law has it. And let me point out,

[00:10:09] **Martin Shenkman:** we're going to come back. I want to give you time to talk about all that.

[00:10:11] **Martin Shenkman:** But I think the take home message for the 1st topic that we wanted to cover is we need to communicate and. Planning may be different. Like Bob explained, the pressure may be different for some clients, but we're going to talk about a lot of other reasons clients should plan. And that's important to start educating clients about.

[00:10:29] **Martin Shenkman:** So I think communication critical, and we should all start planning to get out some type of, uh, email blast, physical letter, however you communicate with clients, the next thing I wanted to do is turn it over to you, Jonathan, and let you explain the stuff I know you were chomping to get into filibuster.

[00:10:48] **Martin Shenkman:** I mean, Reconciliation. What is what are some of the mechanics that we should understand in Congress that may affect what's done and please specifically [00:11:00] address with some more thought and detail your comment on whether or not and why you think the exemption may or may not actually declined in 2026 because that's really critical.

[00:11:11] **Jonathan Blattmachr:** Well, it is critical Marty and you go back to when George Bush ran George W. Bush ran and won the presidency. in 2000. And he had announced that the repeal of the estate tax was his number one domestic agenda. So he won and I knew and everybody knew that this meant there was an end to the estate tax, but it didn't happen.

[00:11:34] **Jonathan Blattmachr:** And the reason was his advisors said, look, yes, you can repeal the estate tax, but that means you can't give as much income tax. advantage or reduction that you also want to give people who like you have a lot of income. And indeed, he did not have it. They put it in to be repealed, the estate tax to be repealed after 2010.

[00:11:59] **Jonathan Blattmachr:** [00:12:00] And of course, that happened for one year where people were given the choice, either have property in their estate and get the stepped up basis, or not have property in their estate and pay no estate tax. But remember that there is at least a reasonable chance that the political landscape will change in the next four, four years.

[00:12:20] **Jonathan Blattmachr:** So, you know, you may say, well, they're going to reduce the exemption. I don't have to worry because that's, uh, it's never going to happen. Uh, Trump won't let it happen. He may, because he's going to pay a political price for not having it cut in half, which has been on the books. So they've got to make a decision where do they want to spend the money and they may decide that allowing the exemption to be declined because most people aren't going to die in the next four years.

[00:12:49] **Jonathan Blattmachr:** is better than not being able to give more income tax relief to people. So you just can't tell for sure. Again, George Bush said repeal the estate tax is [00:13:00] my number one domestic agenda, but it really didn't happen. So

[00:13:04] **Martin Shenkman:** Jonathan, isn't that also, um, uh, president Trump made a number of, um, promises on. Income tax reductions already, um, social security tips, I think, over time.

[00:13:17] **Martin Shenkman:** So there's, there's going to be a material cost to carrying those through. You think that that might be, uh, enacted and then offset by leaving, letting the exemption decline.

[00:13:28] **Jonathan Blattmachr:** Well, Marty, you know, the Social Security Administration pays out one and a half trillion dollars a year. And, Bob, I don't know if you know, I actually tried to find out how much income tax is paid on Social Security payments, and I couldn't.

[00:13:45] **Jonathan Blattmachr:** But let's say only half is subject to it, so you have 750 million each year subject to income tax. And let's assume that, you know, only the effective rate of tax is only 20%. I think it probably is higher than that. Well, that's [00:14:00] 150 million a year. That's a huge price to pay, putting aside reducing the tax on tips and overtime.

[00:14:08] **Jonathan Blattmachr:** But you know, he can't do it all. I mean, there's a limitation to what people will agree in the government to what kind of debt we can take on. So if he wants to provide some relief with respect to the non income taxation of social security payments and overtime and tips, he's got to have something to offset it.

[00:14:30] **Jonathan Blattmachr:** Now, again, the reduction in the estate tax is already in the law. They don't have to Advertise that. So I think there is a pretty good chance that you will not see the exemption restored back to where it would be, but for the fact that it's going to be cut in half in about a year.

[00:14:52] **Martin Shenkman:** Can you, can you take a couple minutes and just go through some of the mechanics of reconciliation, filibuster, [00:15:00] um, and so on, just to explain how this may play out and affect what, what might be done?

[00:15:06] **Jonathan Blattmachr:** Yeah, the rule in both the House and Senate is as a general matter, once a senator or a congressperson gets the floor, he can only get, he only loses his ability to speak before any vote can be taken.

[00:15:22] **Jonathan Blattmachr:** Okay. If he either or she voluntarily does it, or you have the House or the Senate say you're through speaking. But as a matter of courtesy, they let people talk for as long as they want. That is known as filibustering. And very often in the past, we've had bills that have been up, and some congressman or senator doesn't like it, and he or she will get up, and they will not stop talking.

[00:15:48] **Jonathan Blattmachr:** In fact, I can remember a number of times people would get a telephone book, With 20 or 30, 000 names and when he or she really run out of things today, they'd say, I think, and they go to [00:16:00] page one. I think Mr. Aaron will be on my side. And then they'll go through all the A's and all the B's and stuff. And eventually they say, okay, we're going to take this bill off the docket.

[00:16:13] **Jonathan Blattmachr:** Then it's just not voted upon. And the bill is killed through this, uh, uh, fact that there is this procedure of, of, of basically stalling it to the very end. Um, the, the house can get rid of someone speaking by a simple majority, but the Senate has a rule that you need 60 senators to stop someone from filibustering continue to talk and not yield.

[00:16:39] **Jonathan Blattmachr:** Is positioned in the in the Senate. Now there are two exceptions to that. One is for appointments of federal judges, and that means that if you if you have 60 in favor of someone, they just vote, and that's it. That's in the Senate. The other one is budget reconciliation. You, if you [00:17:00] have, someone can try to lobby, but if you have 60, you don't need the 60 votes to get them off for budget reconciliation.

[00:17:07] **Jonathan Blattmachr:** It's a simple majority. And that's what happened with respect to Barack Obama when he won in 2008. He was able to stop that because he made a lot of these changes, including for Obamacare, which the Republicans really didn't want. But he did it through budget reconciliation. And that's what Trump did back for the 2017 tax act.

[00:17:31] **Jonathan Blattmachr:** So there's a very good chance that the Republicans can get through any tax changes they want. Uh, they can also get judicial appointments through, but not much else. Again, they are not going to have 60 votes in the Senate to stop a filibuster, but they can, they can't do it for, um, uh, anything other than budget reconciliation, which are tax changes.

[00:17:55] **Jonathan Blattmachr:** And again, Trump has to decide, what do I want here? Do I want [00:18:00] income tax reduction? I made promises on no tax on social security, no tax on, uh, uh, Uh, tips and no tax on over time. That's huge. It would be, I'm going to guess several hundred million dollars a year. And I just don't think that he can. You mean

[00:18:20] **Martin Shenkman:** billion, Jonathan.

[00:18:21] **Jonathan Blattmachr:** I'm sorry. You're right. Billions, uh,

[00:18:24] **Martin Shenkman:** hundreds.

[00:18:24] **Jonathan Blattmachr:** We

[00:18:24] **Martin Shenkman:** should only have budget. We're a couple hundred million means something right

[00:18:28] **Jonathan Blattmachr:** as, as, uh, uh, one of the great senators from New York, one said a billion here, a billion there, and eventually adds up to real money. Uh, so I, I just, I just don't think that there's much of a chance that they're going to be able to get everything they want from a tax perspective.

[00:18:49] **Jonathan Blattmachr:** Now, one of the things that Trump is also asking for, and maybe he will get it. And again, they could possibly do it as part of budget reconciliation or tariffs, [00:19:00] because he claims that I'm going to put tariffs on everything coming in from China and from Mexico and other places and will be awash with money.

[00:19:08] **Jonathan Blattmachr:** I don't think that's going to happen and I don't think it's going to happen in budget reconciliation. So, I think they're going to have to give up on getting everything they want from a tax perspective. Well,

[00:19:20] **Martin Shenkman:** Jonathan, couldn't they then use tariffs. To offset the tax cuts that he wants to make.

[00:19:27] **Jonathan Blattmachr:** Well, yes, he could try that.

[00:19:30] **Jonathan Blattmachr:** But you know, that's a very complicated matter on where do you put, you know, where do you put the tariffs on which companies which goods what services it's and they haven't really thought it through. I just don't think that they're going to get the kind of things that happen. Also, there's just no question that when you put tariffs on a tariff.

[00:19:52] **Jonathan Blattmachr:** It means the American consumer winds up paying more for it. So for example, let's say, well, no, we're going [00:20:00] to make people buy American cars. Well, if you take away the competition from foreign car manufacturers, what's going to happen? Lower competition, higher cost of those goods. So there's always an offset here.

[00:20:16] **Jonathan Blattmachr:** And I seriously doubt if they're gonna be able to put in enormous, enormous, uh, uh, tariffs on, on Chinese and Mexican and, Even European goods, which they're talking about. And again, remember, tariffs are very retrogressive in taxation, and people will really feel it at home, and that will cause the cost of goods and services to go up.

[00:20:41] **Jonathan Blattmachr:** And the Republicans really ran on the fact that Biden had allowed inflation to get entirely out of hand. This all, the bottom line is this is all very complicated, but I don't think you can assume there's just no way that we're not going to get back to a 15 [00:21:00] million per person estate tax exemption. I think that would be one of the things that's very easy to give up.

[00:21:06] **Jonathan Blattmachr:** It's already in the law. You don't have to make any change. And you don't have to come up with something to offset it. It's already in again. Go back to what George W. Bush said. And again, he said, My number one domestic agenda is the repeal of the estate tax, and it never happened. And I think that it's probable that the exemptions are going to go down.

[00:21:26] **Jonathan Blattmachr:** And we'll talk later, as you know, Marty, about Well, if you think it might happen, what should you do now?

[00:21:34] **Martin Shenkman:** We're going to pivot in a second to you, Bob, and talk about income tax issues. Um, I want to, I want to make a comment and then address something with you, Bob, before we pivot. So. I mean, the logical answer to me, and I want to give a different, slightly different perspective to emphasize what Jonathan said.

[00:21:53] **Martin Shenkman:** Jonathan has made a case that maybe the exemption won't go down. We can't guesstimate [00:22:00] a likelihood of that happening or not happening, but when you look at the magnitude of wealth that people have. That are doing this planning, what is the cost or downside of the planning? And I think, as Bob said, I'm going to steal his phrase, the calculus.

[00:22:15] **Martin Shenkman:** I think you said the calculus has changed. It's changed here. But think about it. If somebody is worth 20 million and I'm going to throw out a number. Don't get upset if it's too high or too low, depending on how you practice. But let's say it costs 20 million. 25 grand to set up a slab 20 grand, whatever the number is and even estimate high 25 grand relative relative to the wealth that the client involved in doing that planning has relative to the potential tax savings over time that that client may experience if the estate tax is not repealed, the cost of doing the planning is insignificant.

[00:22:59] **Martin Shenkman:** The real [00:23:00] issue is doing the planning smart. And we'll talk very briefly about that. It's not a topic by preserving sufficient access to the assets. It doesn't make sense to me. And it makes even less sense when we talk about other factors like income tax and asset protection, et cetera, that doesn't make sense just even from the potential risk of an estate tax for somebody to defer or not proceed with planning because what Jonathan said earlier is critical.

[00:23:32] **Martin Shenkman:** Whether you even if you get a 7 percent or less than 7%, even if 5 percent think of the compounding over the remaining growing life expectancy of the clients, the cost of doing the planning. So long as they have adequate access to the resources. Is insignificant compared to their wealth. The concern I have, Bob, is, and let's talk about this for a minute, then we'll flip it to income tax, is, is, is a comment you made to me when we were talking last night about this, is [00:24:00] about estate planners remaining relevant.

[00:24:02] **Martin Shenkman:** My worry is, I agree intellectually with what Jonathan said. I think the comment I made about the cost of planning versus the potential benefit, even if it doesn't pan out and the exemption doesn't go down, is not a big investment for somebody to make. It's inconsequential. My concern is, will clients buy that?

[00:24:22] **Martin Shenkman:** I think we start to sound like, um, You know, uh, the little, you know, what, what was the little boy clang that the sky is falling chicken little or whatever it was. Chicken little it's it's. I think clients are going to be loath to be comfortable proceeding with planning that find costly and complicated, even though the cost is inconsequential relative to the wealth and the benefits could be dramatic.

[00:24:45] **Martin Shenkman:** Can you comment on that and talk about generally the relevance of planning and then we'll segue into income tax.

[00:24:53] **Robert Keebler:** Well, I think for the very wealthy. Nothing's changed. Okay. You'll start there and for people worth [00:25:00] less than 14 million, nothing has changed either for the most part. It's for people between 14 and 30 or 40 million where the dynamics have changed, because if I retain my property, I get a step up when I die.

[00:25:17] **Robert Keebler:** So it says not to give it away. Now to Jonathan's point about money doubling every 10 years at 7. 2%. If you have a 65 year old lady who gives away 5 million. She dies at 85, that'll be 20 million. Simple math. We've all seen it in our clients over time. So I think we start there with the planning should not be dead flexibility and keeping.

[00:25:46] **Robert Keebler:** The ability to use some of that money is what's critical. So having husband create a trust for his wife in granting her a GPOA. If she has extra exemption [00:26:00] might be the best of all possible worlds. Okay. Now that. whole idea of then wife turning around and doing a trust for her husband is where it gets complicated and maybe some of that will not be as popular, Marty.

[00:26:14] **Robert Keebler:** So I think that's, that's one thing, but you have to remember a state planning, at least the basics will become, or will continue to be relevant. You just have this tremendous birth curve. Right after the war. Okay. So 80 years ago and, um, gentlemen came home, they met a girl, they got married, they started a family, and now those children born from 1945 through 55 need a lot of estate planning.

[00:26:45] **Robert Keebler:** So there's plenty of work out there. It's just going to look

[00:26:49] **Martin Shenkman:** different. How do you feel about clients reaction? That's what concerns me. We can have an intellectual discussion about why estate planning makes sense. We're going to talk much [00:27:00] more about why it makes sense for asset protection, income tax, and other factors.

[00:27:05] **Martin Shenkman:** I'm concerned that clients The fear of a massive estate tax is what often motivated those clients in the, even from 10 to 50 million in that wealth strata to come in for planning with a Republican, if it turns out to be a sweep, which is Jonathan's prediction, so I'm going to hold him to it and what it looks like with a potential for a Republican sweep or an actual sweep.

[00:27:30] **Martin Shenkman:** Are clients going to be willing to do that? Or are they just going to say, listen, you know what? Let's see what happens. Nothing. We, I think it's highly unlikely. And one of you, I forgot who started our conversation early on by saying it's highly unlikely we're going to see like an Elizabeth Warren or Bernie Sanders type of tax proposal enacted in the next 4 years.

[00:27:50] **Martin Shenkman:** It's just not going to happen.

[00:27:52] **Robert Keebler:** It's not going to happen. Right.

[00:27:53] Highly

[00:27:55] **Martin Shenkman:** motivated clients.

[00:27:57] **Robert Keebler:** Well, one is there's not a hundred percent [00:28:00] certainty that we won't sunset. Okay, so we have to start with that So some people should be still keeping their planning and you want to start with really strong Financial analysis of how much money do my wife and I need to live on because maybe it's going to become Maybe we should be giving things away for a combination of asset protection shifting income into our children There may be a whole, a large number of just family wealth reasons, aside from the estate tax, to do this planning.

[00:28:35] **Robert Keebler:** For most people, though, they, they do not need the urgency of doing something in November or December may be reduced. Okay? Because part of what was driving that before was a concern that if there was a blue wave, that the Elizabeth Warren type bills would become law. Okay? And now that concern is gone.

[00:28:58] **Robert Keebler:** Yeah. That concern is [00:29:00] gone. We don't have to worry about that for four years because again, president Trump would veto anything that was that awful. So I think we continue on the path for wealthy, very wealthy people, but lawyers shouldn't give up. They should just pivot, pivot to doing more IRA work.

[00:29:23] **Robert Keebler:** There's a lot of planning that can be done with IRAs, Roth conversions, taking money out of IRAs by insurance.

[00:29:32] **Martin Shenkman:** Let's just introduce the topic broadly, and then then I'll let you take it away. So, one of the things that's not given as much attention, which should be, because if estate tax, as I've just described, and I agree with him, I, I can't imagine seeing a Bernie Sanders type estate tax proposal getting enacted for the next 4 years and maybe beyond that.

[00:29:53] **Martin Shenkman:** So, that. planning for the exemptio asset protection. It stil [00:30:00] don't think it's going to as strongly with clients.

[00:30:06] **Martin Shenkman:** Always makes sense. And even if they reduce rates, and I'm and I'll quote you, Jonathan, what you said when we were talking also last night, even if there's a rate reduction, it can't be that large. And I think you're probably right because there's been all these promises on on tips and overtime and other things.

[00:30:25] **Martin Shenkman:** If you give all those. Benefits. How can you possibly also reduce the rates materially, but when you take state and federal tax rates, even if there's a reduction, even if it's 5%, which I think is high, there's still going to be a material income tax. So, uh, talk in general and IRA planning is certainly one of it.

[00:30:43] **Martin Shenkman:** Talk about what estate planners can do to pivot and, um, educate clients about income tax planning opportunities. And Jonathan. Then you should think about SLANTS or SALTYSLATS or NONGRANTORTRUST, whichever acronym [00:31:00] or name you want to use. Bob?

[00:31:03] **Robert Keebler:** I think the key for most of my lawyer friends is to identify the techniques where there's already a 60 70 percent overlap with your current skill set.

[00:31:15] **Robert Keebler:** Not, not to go into things that you normally wouldn't do, but there's a lot of good work that can be done in the IRA area, Roth conversions, taking money out of IRAs to get, to make gifts, taking money out of IRAs to buy insurance on the state administration side, there's a lot of income tax work there that is very relevant and lawyers have somewhat drifted away from that in the last five or six years, because they've been very busy with other things, has a sidebar I think the state administration, the portability election may be more relevant than ever because Jonathan, the way I understand it, we're only, we're going to have to [00:32:00] deal with this again in 10 years.

[00:32:01] **Robert Keebler:** If we use reconciliation, the estate tax will come back. The sunset will come back in 10 years.

[00:32:08] **Jonathan Blattmachr:** Well, Bob, of course it can come back even earlier than that because whatever you do, everything that was a tax reduction can be restored. The bird rule in the Senate says, unless you have 60 percent vote otherwise, any law which reduces the receipts of the federal government must expire within 10 years.

[00:32:31] **Jonathan Blattmachr:** That's why the 2000 and one Tax Act, which George W got through, was going to expire in 2000 and 10. And Mitch McConnell, then the head of the Senate and John Boehner. Then the head of the house and Barack Obama got together just before it expired. In fact, they made a change that actually was retroactive to the day before.

[00:32:53] **Jonathan Blattmachr:** Uh, and that could happen again. But if you have the Democrats come back [00:33:00] in 2000, uh uh, in 2000, let's see, it would be 2008. then you can have it go back and be changed right then and there. So it's not a 10 year wait, it's only a four year wait. And it could come back with some very harsh results. The bottom line to me is that do your planning now.

[00:33:21] **Jonathan Blattmachr:** And in fact, Marty, if someone says, okay, I'm willing to do something now, but if this never comes to pass, how can I undo it?

[00:33:32] **Martin Shenkman:** That's an interesting point. And that's the kind of conversation that we had in 2020 and 2021 and did program on it, because some of the concerns were, you know, what if the Democrats then would enact a Bernie Sanders, Elizabeth Warren, uh, uh, Wyden type, you know, really harsh estate tax change, but what if they don't?

[00:33:57] **Martin Shenkman:** So I want to kind of get my planning in place. [00:34:00] But I want to be able to modify it, or even undo it, if in fact, um, the laws don't change. And that's certainly an approach that could be used, although I don't agree with it. We'll talk about why in a minute, um, along the lines of what Jonathan said. Jonathan made a pretty good case as to how you cannot, should not, and clients should not, dismiss the potential that the exemption decline in 2026 may still happen.

[00:34:26] **Martin Shenkman:** There may be more, um, uh, benefit, uh, politically to carrying out income tax reductions than modifying an already existing estate tax law change of the reduction in exemptions. So at that time, we talked about a couple of techniques, I'll mention them, and we, we can talk about a minute or two if you'd GIF.

[00:34:50] **Martin Shenkman:** Gift, sorry, to a Q tippable trust. You make a gift to a trust that can qualify for the marital deduction. And, um, [00:35:00] if, in fact, you decide you want to use your exemption, you have until the gift tax return filing deadline, which is October 15th of 2026, if you do it next year, to make a decision whether or not you're going to elect to have that transfer to this Q tipable trust qualify for the marital deduction.

[00:35:25] **Martin Shenkman:** And if you choose not to elect a Q tip marital deduction for it, then in fact, you've used your exemption. So that seems like a clever approach for fence sitters because they could put assets in a trust and if they find out that, um, uh, by October 15th, 2026, that the exemption has in fact been allowed to decline, and you're certainly going to know before then, then they can not elect the marital deduction and they've used their exemption.

[00:35:55] **Martin Shenkman:** If in fact The, um, uh, [00:36:00] Republicans have sufficient clout and put the political capital on, uh, maintaining or extending the bonus exemption past 2025. Then you could choose to make a Q tip election. So it's qualified for the marital deduction. You've used no exemption and the spouse is a beneficiary can presumably, through distributions, get the assets.

[00:36:25] **Martin Shenkman:** Back over time. Any, any comments on, on that? And then we can talk about some other techniques.

[00:36:34] I

[00:36:34] **Robert Keebler:** think no, that's a solid strategy. You just, you have to watch your deadlines on these estate tax returns because you, if you, and the, and the Q tip there's no get out of jail card free. If you miss an intervivals Q tip election, the IRS can't help you. You miss a testamentary Q tip election, the regs allow the IRS to grant you relief, but there's no relief [00:37:00] on these intervival selections.

[00:37:01] **Robert Keebler:** So if a lawyer is going to do that, he or she really needs to bird dog the filing of those returns. Make sure they happen. That's the type of flexibility we have to build into our planning, Marty. It's just do some things and maybe we undo them if everything works out the way we're anticipating.

[00:37:22] **Martin Shenkman:** You still I think I think it's going to vary, just sorry to interrupt, it's going to vary by client, because different clients are going to have different perceptions and feelings about all this.

[00:37:33] **Martin Shenkman:** So I think a large number of clients understand and appreciate the importance, and we'll talk about this later, of asset protection planning, and they're good planning at their wealth level anyhow. Those that are fence sitters, maybe this is a way to address the potential risk that Jonathan has explained, uh, that You know, there may be in fact, uh, the reduction happening.

[00:37:58] **Martin Shenkman:** Jonathan, any thought? Does that [00:38:00] make sense as a strategy for those fence sitters?

[00:38:02] **Jonathan Blattmachr:** Well, it does, but you know, there are a couple of other things that people can do. One is that if you put assets in trust for the family, um, and in some states that can even include yourself, you can give one of the beneficiaries the opportunity to renounce or disclaim his or her interest in the trust.

[00:38:23] **Jonathan Blattmachr:** And in most jurisdictions, you can structure the trust so that if that particular beneficiary disclaims, the entire amount transferred will be treated as though it was not transferred as a qualified disclaimer. Which means it would go back to the grand tour. In fact, you don't even have to tell the IRS about it because from inception, the transfer was never made for estate and gift tax purposes.

[00:38:50] **Jonathan Blattmachr:** So for someone who says, well, you know, I don't even want my wife in this. You create a trust and you give someone whom you trust. Maybe it's a child. Maybe it's a [00:39:00] grandchild. Maybe it's a sibling with a power to disclaim their interest in the trust and the trust provides that if that person makes a qualified disclaimer, they have 9 months, of course, so the time the transfer is made, so it would take us out to about, you know, September of next year, you can go ahead and have them make the disclaimer and it would all revert back and you don't even have to report any of that to the Internal Revenue Service.

[00:39:26] **Jonathan Blattmachr:** Thank you very much. I mean, I think for a lot of people that probably makes good sense to consider that. The other one is if you don't have Hey, wait!

[00:39:34] **Martin Shenkman:** Don't go on to another one. Let's talk about this one for a minute. This is a perfect segue to plug ILS. So lots of practitioners may say, you know, I've never drafted that kind of disclaimer.

[00:39:46] **Martin Shenkman:** I'm really uncomfortable. I don't know what to do. Where do I get language? Can I get some language? What do I do? If you use, if you use drafting software, all you have to do is where it says. Disclaimer [00:40:00] by primary name, primary beneficiary. And that may not be the exact language, but it's just an item. Watch the following.

[00:40:07] **Martin Shenkman:** Jonathan, you got to watch. You push the button. You click that little dot. You now have the provision. So, this is, but, but all the different things like the, the, the, um, Cutipable trust, the disclaimer provision, and some of the other things that we're talking about. This is why document generation software is so critical to making your practice flexible and efficient.

[00:40:35] **Martin Shenkman:** In terms of billing and everything else, and I think the comment that I said earlier, and I know I interrupted you, Bob, and I apologize. Then I'm apologizing again. But I think different clients have different temperaments. And if you can pick techniques that are comfortable for the particular client, they're going to be happier.

[00:40:53] **Martin Shenkman:** So, some people will like the idea of the Q tipable trust that they can then have until October of [00:41:00] 2026. To decide what to do. So if Jonathan's right, bam, they've used their bonus exemption. If Jonathan turns out to be wrong and the Republicans let the exemption decline, they just don't, don't make the Q tip election.

[00:41:18] **Martin Shenkman:** They, the disclaimer, I think is an interesting concept and I want to suggest at least that practitioners consider the following if a client's going to proceed with planning. I think a lot of people were surprised by the election result, especially the magnitude of the Republican, um, uh, victory. And they're going to be process this for a bit of time.

[00:41:42] **Martin Shenkman:** So if they're unsure and waffling about whether they plan or not, Jonathan, what's the downside of building in the disclaimer provision? So six months after finishing the trust, whenever they do it this year, next year. the client decides that they're uncomfortable. [00:42:00] What's the downside of having that done?

[00:42:04] **Jonathan Blattmachr:** Well, the only reason is, is that maybe the person whom you've given the power to disclaim won't do it. But typically you'll have someone, some child, some grandchild, some brother, some sister, whom you could count on as being willing to make the disclaimer. So I think there's very little downside in it. Uh, I've used it for my family.

[00:42:25] **Jonathan Blattmachr:** In fact, I've never had the disclaimer done, but I built it into trust from my own family because I just wasn't sure as to whether or not we wanted to make it complete. So that's something you can do. Another idea,

[00:42:38] **Martin Shenkman:** which don't go on to another idea yet. I'm not, I'm not letting you get off of this one yet.

[00:42:44] **Martin Shenkman:** Why wouldn't practitioners want to think about doing it? Not just for the client. But for themselves, no practitioner wants an unhappy client. So, even if we explain all the things that Bob talked about that we're talking about now, [00:43:00] why not just build it in, just as a safety valve, so if the client down the road just feels uncomfortable, it's just there.

[00:43:07] **Martin Shenkman:** Might this not be a good thing to protect practitioners from unhappy clients?

[00:43:13] **Jonathan Blattmachr:** Well, I think that's right, Marty, and there's even more that can be done. Um, as you, as you know, uh, by help develop a concept called the Special Power of Appointment Trust.

[00:43:24] **Martin Shenkman:** Jonathan, I'm interrupting you again. You keep wanting to leave the, the disclaimer.

[00:43:27] **Martin Shenkman:** It's such a good idea. I want to bother you another minute. The one downside that I've heard raised on it, then I'll let you go on to SPATs because I know you're just dying to talk about SPATs. I know you love it and it gets you very excited and we're going to let you talk about it. Might including this disclaimer provision.

[00:43:44] **Martin Shenkman:** Make the gift incomplete. Is that a worry?

[00:43:48] **Jonathan Blattmachr:** I don't think so, Marty, because it's not up to you. It's up to the person who is the principal beneficiary who has the power to disclaim or not. So the gift is complete, and the person can make a [00:44:00] disclaimer, and if they make a disclaimer, it will revert back to the grantor if you structure the trust that way, and it will be as though the transfer was never made in the first place.

[00:44:10] **Jonathan Blattmachr:** It doesn't have to even be reported to the Internal Revenue Service. And as long as you have someone in the family that you're confident that if you ask them to do the disclaimer, they would, which means it would come back to the original transfer, or I think you're a okay. And a disclaimer itself, even though I've refused to accept this property, I've disclaimed it.

[00:44:31] **Jonathan Blattmachr:** It's now going to go back to the grantor of the trust. That doesn't mean that the disclaimant has made a gift. That's absolutely clear under section 2519, uh, 2518 of the code.

[00:44:43] **Martin Shenkman:** So before you go on to SPATs, let me just segue. So one of the concepts we've now talked about is building in flexibility. So people that now realize what Jonathan said, maybe there's a chance the exemption still goes down, but they're waffling.

[00:44:58] **Martin Shenkman:** They could do a [00:45:00] gift to a traditional, typical SLAT that is a pot trust, sprinkle trust for family and spouse. With the disclaimer provision, they could do a Q. Typical trust and defer making the election. What about rescission? Jonathan? Is that an option in planning? And then we'll go on to the next concepts.

[00:45:17] **Jonathan Blattmachr:** Well, there are some cases that state that if you have someone. Go in and just basically do a rescission of the transaction. It doesn't count for tax purposes. The law is not anywhere near as well as developed as it is for disclaimers. But there are some cases which say, yes, you can go ahead and do a rescission.

[00:45:42] **Jonathan Blattmachr:** And it will be treated as though the property was never transferred and you are not limited to the 9 months. In fact, there's some law, which says, as long as you do it. In the same tax year. So if you want to use rescission and you say, but I wanna wait until the end of 2025, you [00:46:00] could create the trust in the beginning of 2025 and have the rescission done in 2025 on December 31.

[00:46:08] **Jonathan Blattmachr:** But the, that's a

[00:46:09] **Martin Shenkman:** very important point. Let, let me just emphasize what you just said. Don't do it this year. If the client wants the option for rescission, wait till next year.

[00:46:18] **Jonathan Blattmachr:** Right? But they'd have the same thing with a disclaimer. Because you need to do your disclaimer within nine months, which means if you start this year, you know, it's got to be done before, you know, September of next year.

[00:46:30] **Jonathan Blattmachr:** You can't wait until the end of the year. And as Marty said, if you do something like a Q tipable trust, Uh, where the grantor of the trust can wait. In fact, if he makes the transfer next year, say, in January of 2025, uh, you, you know, you'll have until October of 2026 to decide whether you want it to qualify for the Maryland auction.

[00:46:57] **Jonathan Blattmachr:** And not use your exemption and maybe your spouse [00:47:00] will give it back to you or, you know, you go ahead and you just, uh, haven't qualified for the marital reduction and get it back through your spouse.

[00:47:12] **Martin Shenkman:** Those are ways to build in flexibility and giving the client ways to get around it. I don't think that's necessarily the right approach because to me, from an asset protection perspective, regardless of what happens with the estate tax, this all makes sense. But clients, I think, will like that. And I think for a client that's unhappy, some of these concepts could be very valuable.

[00:47:32] **Martin Shenkman:** Let me now segue back to you, Jonathan, because I know you want to talk about SPATs. But the broader concept is, and I'd like you to first address it in a broad context. Now that we know for four years, we're not going to have a harsher estate tax enactment. I think we can even say it with some finality that we it's not going to happen, but maybe I'm going to use Bob's term again.

[00:47:54] **Martin Shenkman:** Phrase again. The calculus has changed. Do we want to give clients even more [00:48:00] access? To the trust so that they're comfortable doing the planning. So instead of the, the, the doing a slat or non reciprocal slats, what about adapt, hybrid, adapt, or spat to give more access to the client. So they're more comfortable going ahead with the planning because they may not be as worried about the estate taxes.

[00:48:18] **Martin Shenkman:** They were before the election thoughts, comments.

[00:48:22] **Jonathan Blattmachr:** Well, Marty, I think that makes good sense. In fact, as you know, The reason that my brother and I got involved and lobbied in Alaska for the Alaska Trust Act, which allows someone to create a trust for himself or herself. In other words, you create, or as the English say, settle a trust for yourself.

[00:48:42] **Jonathan Blattmachr:** That's known as a self settled trust. Throughout the United States until Alaska passed a law, the law in every state that at least I'm aware of, even if you were a purely discretionary beneficiary, even if you weren't trying to defraud a creditor or arm a creditor, your creditors could always [00:49:00] come in and say, hey, he created this trust or she created this trust because they can get it back.

[00:49:05] **Jonathan Blattmachr:** Creditors can attach it. That was the law throughout the United States. And the reason that I went ahead and pushed for this is that clients would always say, but what if I need the money? How can I get it back? And, you know, I can't create a trust for my own benefit. So, uh, my brother and I tried very, very hard to get the Alaska legislature.

[00:49:26] **Jonathan Blattmachr:** In fact, we spent a week in the rain in Juneau, met with every legislator and the lieutenant governor to try to get it through. And eventually we did. Um, and it allows you to go to Alaska. There are now 22 states that permit it to create. A trust or settle a trust for your own benefit and it will not be subject to the claims of your creditors provided you weren't trying to defraud someone in doing that.

[00:49:51] **Jonathan Blattmachr:** And in fact, after the Alaska Trust Act passed in 1997, I was invited to the annual meeting of the bankruptcy [00:50:00] judges of the United States. And they're all federal judges, and they asked me to talk to them about this law in Alaska. And they said, why did you do that? And I said, well, I didn't do it so people could cheat their creditors.

[00:50:12] **Jonathan Blattmachr:** In fact, the statute says, if you're trying to cheat a creditor, this won't work. It's still going to be subject to your creditors. I did it so people would not be hesitant and making transfers for estate planning purposes. And every judge who made an indication, not all of them did, there were about 60 of them there.

[00:50:30] **Jonathan Blattmachr:** Uh, they said, if you could establish that the reason you did this was for estate tax planning purposes, I wouldn't touch it. You could do it all day long. And indeed, we have a private letter ruling, I think it's 2009 44002, in which the IRS agreed that if someone goes to Alaska, creates a trust for his or her own benefit, that, and it's not subject to the claims of the creditors because they weren't trying to defraud or hinder creditor in creating of the trust, it [00:51:00] will be excluded from that person's estate.

[00:51:02] **Jonathan Blattmachr:** So you can go to one of those jurisdictions, create a trust for your own benefit, and it should be immunized from claims of creditors, which means it should not be includible back in the client's estate. Now, if you do, I recommend you have a corporate and independent corporate fiduciary who will be believed when they can say, look, there was no understanding of any kind that the grantor would definitely get property back if he or she wanted it.

[00:51:30] **Jonathan Blattmachr:** So that's really something you should consider or consider a spat. What's a spat? Not a spat is a special power of appointment trust. The law seems abundantly clear. In fact, if you take a look at the commentary, the Section 505 of the Uniform Trust Code, it says. Yes, if you create a trust for your own benefit and the trustee can give you property back, it's going to be subject to the claims of your creditors [00:52:00] forever, which would bring you back into your estate.

[00:52:01] **Jonathan Blattmachr:** And that's true throughout the United States, except for the 22 states which have passed legislation similar to what Alaska has. So that's what you have, but it also, uh, but, but the, the commentary says it is only going to be subject to the claims of your creditors. This assuming you're not in Alaska or Delaware or Nevada or South Dakota, which permits it, but it's can be used true in all states, provided that it's not a trustee who can give it back to you, but it's some independent person.

[00:52:34] **Jonathan Blattmachr:** Basically, whenever you create a trust, which has a special power of appointment, or it could be decanted to give someone a special power of appointment in an individual capacity, not as a fiduciary, it is not subject to the claims of creditors, even though The person who's got the power of appointment could appoint it back to the grantor.

[00:52:54] **Jonathan Blattmachr:** So the special power of appointment trust works the following way. I create a trust for my [00:53:00] wife, my kids, maybe my brother and sister, whoever it may be. And the trust says the trustee may never give anything to me on a voluntary basis, even decanting. The trustee can never give it back to me. That means that it's not going to be subject to the claims of my creditors in every state in the union.

[00:53:21] **Jonathan Blattmachr:** It doesn't matter. It's and yet that also means that if I give someone a special lifetime power of appointment. Which is not a power that they can appoint to themselves. It means that the assets will not be subject to the claims of my creditors. Uh, so that's, again, take a look at the commentary to Section 505 of the Uniform Trust Code.

[00:53:47] **Jonathan Blattmachr:** So you can create a trust for your family. You will be prohibited from ever getting a discretionary distribution. From the trust in the discretion of the trustee, but you will have anywhere from [00:54:00] 1 to 3 people who can go ahead, who can go ahead and, uh, uh, appoint the property to you. Because the way I do it, I put in, for example, the 1 I did, it said that the, uh, I named 5, I'm sorry, 3 people who have this special power of appointment and they could exercise in favor of any, uh, descendant of my mother.

[00:54:23] **Jonathan Blattmachr:** Now, obviously, I'm a descendant of my mother. And as a consequence, that person or one of those three people could appoint the assets back to me. Uh, there's an article in the February 2019 issue of a state planning magazine by Abby O'Connor, Mitchell Gans and me and Marty and I have discussed and written on this extensively as well about the special power of appointment trust.

[00:54:47] **Jonathan Blattmachr:** And in fact, rather than worry about You know, have I made the trust sufficiently different that the reciprocal trust doctrine isn't going to apply? There's no trust that goes back to the other person. In fact, the [00:55:00] trust says it can never go back to me. But it does say that these people have a special power of appointment which they can exercise in favor of any descendant of my mother.

[00:55:11] **Jonathan Blattmachr:** And as a consequence, if I need it, I can go to them and they can appoint part of the property back to me. While it's in the trust, it's going to be immunized from claims of creditors, and this theoretically should work in every state in the Union, but if you use this, I still recommend you go to one of the states like Alaska or Delaware or South Dakota or Nevada, which permits self settled trusts that can be immunized from the claims of creditors.

[00:55:38] **Martin Shenkman:** Bob, let me, let me, let me ask you to comment because I love and I keep repeating it. You know, the calculus has changed. I think from a client's perspective, the calculus has changed because regardless of what we say, they're not going to have the same fear factor. If they're under the 60 million using your number of net worth that they [00:56:00] did before the election, but it seems to me that if a client is going to say, you know, you know, let me let me wait until three and a half years from now.

[00:56:09] **Martin Shenkman:** We'll see what the climate looks like. Why do the planning now? But it seems to me that the calculus has changed. So client, if you're not as comfortable going ahead and doing that slot that you were planning. How about we give. More access to you. In the trust, because what's the downside if you as long as you have sufficient access, what's the downside?

[00:56:32] **Martin Shenkman:** So if you were going to do non reciprocal slats and now you're hemming and hawing, why don't we do adapt or hybrid dap for one of you in a spat for the other? Now you can both get access in the discretion of the trust. But if you really need the money, the trustee will take care of you. Not with an implied agreement.

[00:56:50] **Martin Shenkman:** Why not just change the nature of the drafting, the planning to have a more robust trust? Does that make any sense? Do you think [00:57:00] that's saleable that that would make clients that are waffling more comfortable proceeding?

[00:57:05] **Robert Keebler:** Well, absolutely. Nobody wants to give up something they worked a lifetime for generally.

[00:57:11] **Robert Keebler:** The other thing. That just hit me has, I was listening to you and Jonathan, you know, if I create the slat for my wife in December of 2024, and she creates a slat for me and. December of 2028, four years between those steps, it's going to be even harder to collapse that. So maybe there's still merit Marty and going through with one of the slats in 2024, and then just seeing how all this plays out, but at least you've moved that large exemption.

[00:57:46] **Robert Keebler:** And I think we can put somebody in the same income tax position if we grant. I do it, trust for my wife. If we grant her a contingent general power appointment, where if she has [00:58:00] exemption left over, we'll get a step up on that property.

[00:58:04] **Jonathan Blattmachr:** Well,

[00:58:05] **Robert Keebler:** that's

[00:58:05] **Jonathan Blattmachr:** something that we really need to look at. The alternative Bob, of course, is to have her trigger the Delaware tax trap.

[00:58:13] **Jonathan Blattmachr:** That's contained in section 20 41, a three of the internal revenue code. And basically, and I'm simplifying it a bit. If someone holds a special non general power of appointment, which means that it's not going to be treated as in their estate when they die, they can exercise that power in a certain way as described in Section 2041A.

[00:58:34] **Jonathan Blattmachr:** 3, so that it is treated as a general power for estate tax purposes, which means it will be in their estate and you will get the stepped up basis. So that's always a possibility that you can consider in, in triggering the trap without having a general power, because normally in most states, if someone has the general power of appointment, it's subject to the claims of their creditors.

[00:58:59] **Jonathan Blattmachr:** This [00:59:00] way, they will never hold general power of appointment. They'll hold a special power, which in all states immunizes it from claims of creditors. And then they can go ahead and exercise it to trigger the trap. To cause it to be subject to a state tax in their estate. So they get the benefit of, uh, you know, uh, asset protection and get the benefit of a state tax inclusion with a stepped up basis without fear that it's going to be subject to the claims of the power holders creditors.

[00:59:29] **Martin Shenkman:** We have

[00:59:30] **Jonathan Blattmachr:** simplistically,

[00:59:31] **Robert Keebler:** go ahead, Marty.

[00:59:32] **Martin Shenkman:** No, no, go on.

[00:59:34] **Robert Keebler:** Simplistically, they would exercise that power to extend the rule against perpetuities. Is it, is it that simple?

[00:59:43] **Jonathan Blattmachr:** Well, it depends upon the state, but basically it says that if your power is exercised in such a manner so that a new rule against perpetuities period commences, then we treat it as though they had a general power and it comes [01:00:00] in their estate.

[01:00:00] **Jonathan Blattmachr:** Let me give you an example. Let's say I have a special power. And I appointed in a trust which gives my son the power to withdraw all the property. He has a general power. So I create my special power to give my son a presently exercisable general power. Well, if someone has a presently exercisable general power, it's as though they own the property.

[01:00:26] **Jonathan Blattmachr:** So section 2041 A three says, and there's a comparable provision under section 25 14. It says, if you exercise the power to commence a new rule against perpetuity period under state law, then you are treated as though you owned it and it will be in your estate when you die. And one of the beauties is you can wait up until the minute before death in order to have the power hold to decide whether or not she wants to have it.

[01:00:56] **Jonathan Blattmachr:** interstate or not. Uh, Jeff Pennell and I came up with this [01:01:00] idea, believe it or not, back in 1988, and it's a bully idea, which I just don't think is considered enough.

[01:01:10] **Martin Shenkman:** Let me give you one more thought, and then we have two topics we have to cover before we sign off. We got to talk about asset protection, which I know everybody on the on the webinar knows about, but we got to talk about it, because I think it's critical to be in the mix of the discussions.

[01:01:23] **Martin Shenkman:** And Jonathan, you got to explain your thoughts on rescission. But before we do that, what if I set up a DAP, Domestic Asset Protection Trust, in Nevada, and I'm a beneficiary, and then I decide, we determine, while I'm, you know, on my deathbed, or before that, that, uh, based on the exemption, my estate, the size of my estate, some of the appreciated assets, that half of that trust, We want to get a basis step up.

[01:01:53] **Martin Shenkman:** What if we bifurcated the trust left half in Nevada and move the other subdivided half of the trust back to [01:02:00] New York gaps are not permitted in New York. Doesn't that create a statement and that will get me a step up on those half of the assets.

[01:02:09] **Jonathan Blattmachr:** Well, Marty, I think it depends on whether or not the fact that you eventually got a power to appoint it to yourself, but indirectly.

[01:02:16] **Jonathan Blattmachr:** Whether that would make it subject to the claims of your creditors. I think there's a risk if you do that, and I would urge someone who really wanted asset protection not to do it, but it's not clear that if I create a trust for my wife, and my wife then creates a trust for me, or the trustee gives me a power, uh, that would otherwise make it a self settled trust and subject to the claims of creditors.

[01:02:39] **Jonathan Blattmachr:** It's just not 100 percent sure that that's going to be in my estate. So, I think that, you know, triggering the Delaware tax trap is a better way to go forward if that's what you

[01:02:50] **Martin Shenkman:** want. So, one of the topics that we didn't talk about, I think we can be quick because it's not really a focus, but it's critical to the discussion of what planning [01:03:00] people should do is to protection.

[01:03:02] **Martin Shenkman:** And I think I can speak for all three of us and say we all agree that People of any, any level of wealth should be taking steps to protect their assets and people with the level of wealth that would have even entertained the thought of doing a SLAD or any other kind of irrevocable trust plan, why wouldn't they do it just to maintain and obtain the asset protection that having assets in an irrevocable trust provides?

[01:03:28] **Martin Shenkman:** And if they're concerned about access, then you go to a one of the 22 states that permits self subtle trust and you do a spat or adapt or a hybrid depth, depending on what you're comfortable with, what level of risk feel you want to take and how you assess those different techniques. But I think.

[01:03:44] **Martin Shenkman:** Delaying or or not doing planning from an asset protection perspective is a significant mistake. I have currently the first client that I can think of in my entire career, very bright, [01:04:00] successful people. They're not concerned about asset protection planning. They do a lot of real estate development. They feel that they've always assessed risks.

[01:04:08] **Martin Shenkman:** They're not uncomfortable with the risks that they have. It's the first client that is seemingly made an informed decision that they don't need asset protection planning. I still think it's a mistake because of the level of wealth that they have. Why wouldn't they still protect a nest egg?

Because the cost and the hassle of doing so is pretty inconsequential, but Jonathan and Bob comment on asset protection, because I think any client that defers planning.

[01:04:34] **Martin Shenkman:** Um, just because the estate tax, uh, environment has changed post election is missing a very vital point. This planning should have always been done for asset protection purposes. Comments? Thoughts?

[01:04:47] **Robert Keebler:** Absolutely true, and we've established That you can still get the step up and basis on some of that property, depending on whether you add the GPOA, go down the Delaware tax trap.

[01:04:58] **Robert Keebler:** I can use a swap power. [01:05:00] You could use a swap power. Um, so there's really no good reason not to look at that asset protection planning, if you have what you perceive to be risk that you can't, you know, just if you, if husband and wife are both school administrators, Their risk is probably covered by an umbrella policy, but if they're a doctor or a dentist, architect, engineer, they have things to worry about.

[01:05:25] **Jonathan Blattmachr:** But, but even if they're a school teachers. They appear to be in an industry where there's no liability. Maybe someone gets killed or injured worse in a car accident, and they come in and the jury awards a 50 million judgment against those people. Uh, that happens, and it happens every month in the United States.

[01:05:47] **Jonathan Blattmachr:** I mean, there, you know, there are 20 million new lawsuits every year filed in the United States. And there are a lot of people who have gone bankrupt on account of that. And you [01:06:00] know, when you think you're losing everything, you know, your kids education isn't or grandkids education isn't going to be taken care of.

[01:06:07] **Jonathan Blattmachr:** It's terribly stressful. I won't give you the name of a client, but I had a client who was a very great businessman. He thought he was fine. And he went into bankruptcy and his company went into bankruptcy, even though he had done nothing wrong. And it wound up basically killing him. He died within 2 years.

[01:06:26] **Jonathan Blattmachr:** Everything in his life fell apart, even though he was a wonderful man, but just things got out of hand in his life. And he basically lost it all, and he wound up dying basically within two years of the lawsuit being filed. Very, very sad. But asset protection is critically important.

But, you know, Marty, you have clients who are very wealthy, but they say, hey, we're protected.

[01:06:51] **Jonathan Blattmachr:** And I won't give you the name of the client again, but I had a client who said, we're completely covered. And his lawyer said, we're completely covered. [01:07:00] Uh, and he owned a lot of real estate, and they had insurance and all sorts of things. Well, the lawyer took me to lunch, and we went to a restaurant in a building that he owned, and I noticed that there was a, uh, a bar that came down at night to prevent people from breaking in.

[01:07:19] **Jonathan Blattmachr:** And that, at that restaurant, that bar was being held up by a broomstick handle. And I said to the lawyer, by the way, who was a Harvard Law School graduate, what would happen? If my shoulder hit that and the broomstick came out and it hit me in the head and I didn't die, I was just crippled terribly. Um, and you know, I had to be taken care of.

[01:07:40] **Jonathan Blattmachr:** And that afternoon they decided that they would start doing real asset protection. It's very, very hard for people because they think, Hey, I'm a nice person. Nobody would sue me. I'm a nice person. I wouldn't intend to hurt anybody, but that's not the way the law works. And you know, if you do good asset protection, it [01:08:00] means you can even have less insurance rather than having a 20 million umbrella policy.

[01:08:05] **Jonathan Blattmachr:** Maybe you only have a 5 million umbrella policy, whatever it is, but you can sleep better at night. If you know that your assets are protected, And the time to do that is when you don't think you have any problem in the world. Do it now,

[01:08:22] **Martin Shenkman:** Jonathan. We've left the most exciting topic for last, and then we can wrap up with some suggestions and comments about rescission.

[01:08:31] **Martin Shenkman:** What is rescission and the proposed regs on rescission have to do with the Republican victory and planning that we might talk about with clients. Can you, maybe I, can you give me a note for a promise, a promise for a note? Well, how does this all change?

[01:08:48] **Jonathan Blattmachr:** Well, you know, people are trying to come up with ways.

[01:08:51] **Jonathan Blattmachr:** This goes back to 2010. How can I use my exemption, but keep the assets? So, uh, uh, one of [01:09:00] my former colleagues, Austin Bramwell, uh, who's a partner at Milbank Tweed, uh, well, I guess it's just Milbank now, they've dropped the other names, where he said, make a promise to make a gift, and that gift will be complete, but so you're using your exemption, yet you will continue to own the assets.

[01:09:20] **Jonathan Blattmachr:** Well, the IRS agreed that that would work, except they came out with Clawback rules that basically if you use your exemption that way, and you do certain things like make a gift by a promise without transferring the assets, or you make certain other transfers, the IRS, the Treasury Department has issued regulations saying, guess what?

[01:09:44] **Jonathan Blattmachr:** It's all going to come back in your estate. You will not have effectively used it. So that is there, and you've got to be very cautious. For example, Steve Brightstone has come up with a great idea on having a defective partnership, where you've made a big [01:10:00] gift equal to the value of what you put in the partnership, but you still own the assets.

[01:10:04] **Jonathan Blattmachr:** You can still get distributions. Well, that would work, and using the exemption, you keep the assets, But it won't work under the Clawback regulations, and it won't work where you make a gift by making a promise. But it appears that if we do not have a reduction in the exemption, those rules on the Clawback won't apply.

[01:10:26] **Jonathan Blattmachr:** So if you say, well, maybe that's what I ought to try to do. I ought to do it. If it doesn't work, it doesn't work. But if they do not reduce the exemption, then I've done a great thing. I've been able to make this huge gift and keep the assets in my own name without worrying about a clawback when I die.

[01:10:46] **Martin Shenkman:** And I think if anyone wants more information on the clawback regs, which goes through all these different techniques, I think the three of us actually did a webinar on the clawback proposed regs. We did. Yes? Very exciting viewing, I may [01:11:00] add.

[01:11:01] Bob,

[01:11:01] **Robert Keebler:** talk to us, wrap up. I think we, I think we need to revisit Jonathan's point.

[01:11:07] **Robert Keebler:** So, let's just look at the Brightstone technique with a partnership. Under section 2701, a partnership, freeze partnership, has to be structured following the statute. And if you fail to follow the statute, you're deemed to gift away. The preferred you, your gift to give away, the preferred you retain, you, you burn up your exemption.

[01:11:33] **Robert Keebler:** This may be a way for people to burn up their exemption. We have to, I think what we have to do, Jonathan, is revisit with no clawback whether there's any techniques out there we're missing where people can keep more of their property and and still have a good estate tax result.

[01:11:53] **Jonathan Blattmachr:** Gift by promises is perhaps the best way.

[01:11:56] **Jonathan Blattmachr:** Now, Austin wrote an article about this. [01:12:00] Mitchell and I considered this even before. You can't make a gift by making a promise except in the state of Pennsylvania. If you make a promise to someone and you want to document it, even though you haven't transferred any property, then you have now made a gift for federal gift tax purposes.

[01:12:21] **Jonathan Blattmachr:** So I go to the trustee and you have questions about valuation, about how much is the promise worth. But I promised to give, you know, uh, my trustee, this trustee 20 million and I have it increase every year by some factors. So even though the transfer won't happen until a later time, you've made a gift today.

[01:12:43] **Jonathan Blattmachr:** So I've now made a gift of 20 million and yet I've retained the assets. So that appears to be the best of all possible worlds. Now the only state where that can happen for sure is Pennsylvania. Although, as Austin discusses in his [01:13:00] article, there are ways in which you can kind of do a defective transfer, but if you were going to do this, and I thought about doing it, and so did Mitchell, we thought about, we go to Pennsylvania where my wife's family lives, and I'd have one of my wife's relatives be the trustee, and I would give that trustee, an enforceable promise under Pennsylvania law for 20 million dollars on a present value basis, and I will have now made a gift of 20 million dollars, and yet I will not have transferred any of my assets.

[01:13:31] **Jonathan Blattmachr:** Now there are questions about, suppose I don't have 20 million today, what happens if I make transfers in the future, but the gift would be complete at the time that I make the promise, and that's something that you can consider for your client. So it's, Again, you can't do it now under the proposed regulations on clawback, which if there's a reduction in the exemption, it doesn't work.

[01:13:55] **Jonathan Blattmachr:** But if it turns out that there is not going to be a reduction in [01:14:00] exemption, you can use this gift by promise technique. Make a gift, you'd report it on a return, and yet you'd keep the assets, which is kind of the best of all possible worlds, except you're missing out on having transfer the assets. I like the clients to transfer the assets because now they're immunized for claims of creditors, not just mine, but of the beneficiaries as well.

[01:14:24] **Jonathan Blattmachr:** by creating a self settled, uh, by creating a spendthrift trust. Very, very important. And keep in mind more money is lost each year to creditor claims. than to estate taxes and to give taxes. So I mean, I've had clients lose it all and because just bad things happen in their lives. So you always, and this is an always rule, want transfers to be made as early in life as possible to use the exemption and to provide asset protection.

[01:14:56] **Jonathan Blattmachr:** Even if you're going to be a beneficiary of the trust, either because it's a [01:15:00] special power of appointment trust, where you're giving someone else in the family the power to appoint it back to any descendant of my mother, which would include me, or because you're using a self settled trust in Alaska, Delaware, or wherever.

[01:15:12] **Jonathan Blattmachr:** But those are some of the things that people need to consider, but it is very, very hard for people to say, Hey, I'm a nice person. Nobody is going to sue me. Well, guess what? There are 20 million new lawsuits commenced every year in the United States. Protect your assets, protect them for your family and protect them for yourselves.

[01:15:34] **Martin Shenkman:** And again, I'm going to use the same. Analysis that I did on, on doing the exemption planning, even if you're not as confident, the exemption is going to go down. If somebody's worth 20, 30, 40 million dollars, even 10 million dollars, the cost of creating, uh, a SPAT adapt, a hybrid adapt, even a SLAT, whatever's appropriate based on their, their, their, the analysis is inconsequential compared to their net worth.[01:16:00]

[01:16:00] **Martin Shenkman:** And I agree with Jonathan on the asset protection worries a thousand percent the stories that we've seen as a state planners over the decades of practice are awful and terrifying. So many people are good, decent people that have been very careful and everything that they've tried to do have gotten nailed.

[01:16:17] **Martin Shenkman:** So, to me, that alone is the reason that planning should continue. Uh, even for the client that I have that. Feels they're not worried about it. I, I think that's a mistake. I can't change their mind, nor do I want to, but I think it's a mistake. Um, Jonathan, one, one quick comment on clawback, then Bob, I'm going to flip it to you to wrap up and conclude for us.

[01:16:37] **Martin Shenkman:** Um, if we think we can now use the proposed clawback regs to come up with techniques to use exemption. If the exemption doesn't go down, the proposed clawback regs are kind of irrelevant and, and they're not binding yet because it's only, I believe, still proposed. I don't think they've ever been finalized unless I'm wrong.

[01:16:59] **Martin Shenkman:** Is that [01:17:00] correct?

[01:17:00] **Jonathan Blattmachr:** I believe that's the case. It's a proposed regulation. Now they say it's going to be retroactive to the date of introduction, but you know, I'm not even sure that's going to happen because you have a new Treasury Department. I mean, you know, I don't know whether, you know, whether Mnuchin is going to come in as the Treasury Secretary.

[01:17:20] **Jonathan Blattmachr:** It's certainly not going to remain to be Janet Yellen. So, uh, you know, I don't know what will happen, but, uh, I, I think there's a good chance that the clawback regs will not be very effective.

[01:17:32] **Martin Shenkman:** But if here, here's the question that I'm going to let Bob wrap up. If the exemption does go down, And I've made a gift of a promise.

[01:17:43] **Martin Shenkman:** Will it really work to have used my exemption? Because it seems like the only way the clawback rules, regs, leaving aside that they're proposed and may not be finalized, but let's assume they were final. If the, if the clawback regs work or apply, [01:18:00] my gift by promise, if clawback regs would, would apply, it won't work.

[01:18:06] **Martin Shenkman:** In other words, it only works if I didn't need it. Because of the reduction in the exemption. In other words, if the exemption is reduced, I didn't need to do it. The exemption is reduced. It doesn't work. So I think it's an interesting theory, but does, does help me.

[01:18:25] Bob, you're muted.

[01:18:27] **Robert Keebler:** We're going to have to explore that Marty on whether any of those techniques can mathematically help us.

[01:18:37] **Martin Shenkman:** I think they're interesting concepts that Jonathan brought up because I think it makes a world of sense for clients that are fence sitters to give them these options. Because it's still a level of planning.

[01:18:49] **Martin Shenkman:** I think Jonathan's point about the lack of asset protection is the most important aspect of it. But I think this also highlights how complicated it is to rethink everything that we [01:19:00] do in light of the recent political development that, you know, I thought we'd be doing a program post election about, you know, what the Harris tax plan would look like.

[01:19:10] **Martin Shenkman:** And. It's not at all the case. So, Bob, why don't you wrap up and Jonathan, if you have any final comments and, uh, we should, we should conclude.

[01:19:21] **Robert Keebler:** I think we can start with the premise that the, the steep demand for slats, which has been driving a lot of planning for the last year, and we thought would drive planning for the next 12 months, is going to be reduced.

[01:19:35] **Robert Keebler:** However, The, the success to keep your momentum in your practice, it's pivot to other things you can bring to the same clients. Can you coach them up on Roth conversions and get someone to study those? Raw, I'm talking to the lawyers. Can you show them how Roth conversion may be efficacious in their situation?

[01:19:55] **Robert Keebler:** Get somebody to run those numbers. If somebody dies, [01:20:00] when you evaluate portability, look at it through the lens of a reduced exemption at some point in time in the future, that is so important. And we just have to continue. People are missing these portability returns all the time on the income tax planning, Marty, we could spend.

[01:20:17] **Robert Keebler:** Hours teaching people how to do charitable lead trusts, grantor and non grantor, how to do charitable ranger trusts, 453 installment sales. There are what I'll call statutorily blessed income tax planning techniques that have no risk, they're black letter law that can be put in place for clients. And for a good estate planning lawyer to learn those techniques is.

[01:20:44] **Robert Keebler:** It's not a big thing. It's not a quantum leap. It's already, you have 80 percent of the knowledge you need. And then finally to what you and Jonathan just wrapped up on, on asset protection planning. Very serious stuff. And we [01:21:00] can still move quite a bit of property, get it into trusts and there's asset protection reasons.

[01:21:06] **Robert Keebler:** So I think with the number of people born between 1945 and 1962 or 63, there's just so much work out there and it's just a matter of changing your skillset a little bit, Jonathan, any final, no,

[01:21:25] **Jonathan Blattmachr:** I thought what Bob said was just about perfect morning,

[01:21:29] **Martin Shenkman:** I think if you go through the comments we've made on the program.

[01:21:32] **Martin Shenkman:** There's a lot of techniques that we kind of have in our toolkit, but maybe they're in the back of the toolkit, maybe brush them off and bring them up because we need to give options to clients because they're going to question, does it make sense to plan? And I think all agree. Yes, it does. But that planning may be a little different.

[01:21:48] **Martin Shenkman:** And hey, client, there's some other ways you may want to, you know, approach it. So, thank you all for joining us, Jonathan. Thank you for joining us. All the usual words of insight and you too as well, Bob. And, [01:22:00] uh, I wish us all good luck and we'll, uh, I'm sure we'll do another program as, uh, as things evolve.

[01:22:06] **Martin Shenkman:** Take care of everyone and good luck planning and communicate with your clients.