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GARDNER WILLIS
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December 15, 2011 SUGGESTIONS FOR PRESERVING WEALTH

ESTATE PLANNING FOR 2012

Gardner, Willis, Sweat & Handelman, LLP hopes you find the information in this newsletter helpful. This information is intended to be general in nature and is not a substitute for competent legal advice. Because every issue is unique, we do not recommend that you apply the information in this newsletter without first seeking appropriate legal advice.

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Examples of seminars:

- General Banking Law
- Legal Issues in Agriculture
- Workers' Comp Overview
- Return to Work-Workers' Comp
- Sexual Harassment
- Americans with Disabilities Act
- Family and Medical Leave Act
- Negligent Hiring
- Estate Planning

As many of you already know, the Tax Relief Unemployment Insurance Reauthorization and Job Creation Act of 2010 contains favorable planning opportunities for both life time and testamentary gifts during the remaining one-year window of the Act.

Gift tax provisions of the Act include a 35% highest gift tax rate that has been extended from 2010 and will sunset in 2012. So through the end of next year, an individual can gift up to \$5 million during his or her lifetime without incurring any federal gift tax. If the individual is married, he or she can agree to treat gifts as made together, and up to \$10 million of lifetime cumulative taxable gifts can be made through 2012 without any federal gift taxes being imposed. The \$5 million per person exemption amount is \$5.120 million in 2012, because the Act provides for a cost-of-living increase. Therefore, total cumulative gifts could approach \$10.240 million in the event spouses agree to split gifts as mentioned above. Furthermore, the federal gift tax amounts have been reunified with the federal estate tax amounts, so to the extent an individual uses his or her gift tax exemption during life, there is less available for use to shelter wealth transfers at death.

Unless Congress again acts before the end of 2012, as of January 1, 2013, the highest marginal federal estate tax rate will revert to 55% and the federal gift tax-free amount will decrease to \$1 million (or \$2 million if a husband and wife agree to split gifts). Obviously, there can be no assurance that Congress will extend the favorable tax rates and exemption amounts beyond 2012. Please remember that if an individual fully utilizes his or her \$5 million gift tax exemption during 2011 and 2012 and passes away in 2013 when it is anticipated that only \$1 million can be left federal estate tax free, the \$4 million excess may be subject to federal estate taxes, even though the \$5 million of taxable gifts were transferred without incurring any federal gift tax

liability at the time they were made during 2011 and 2012. This potential “clawback” of estate tax liability, for a decedent passing away in 2013 or later, on 2011 and 2012 tax-free gifts in excess of \$1 million is by no means certain even under existing statutory provisions. Congressional action may be required to address this issue. Until such future legislation is passed, however, a potential clawback estate tax liability could exist.

For 2011 and 2012, the generation-skipping tax rate will be 35% and the GST exemption will be \$5 million. This is slated to increase to \$5.120 million next year. Please note, however, that the generation-skipping tax provisions have not been unified with the federal estate and gift tax provisions mentioned above. Instead, the GST exemption may vary materially from the unused balance of the lifetime federal gift tax exemption or federal estate tax exemptions, even though all of these provisions are set at \$5.120 million for next year. On January 1, 2013, the generation-skipping tax rate is scheduled to revert to 55%, the pre-2001 rate and the GST exemption is scheduled to drop to about \$1.4 million.

A much talked about feature of the Act is portability; i.e., if and to the extent the taxable estate for federal estate tax purposes of the first spouse to die is less than the federal estate tax exemption amount, that first deceased spouse unused portion of the federal estate tax exemption will potentially carry over and be available for use by the surviving spouse’s estate on top of the surviving spouse’s own federal estate tax exemption amount. However, the devil, as they say, is in the details. Under current law, both spouses must die during the 2011 and 2012 time period for the federal estate tax portability provisions to apply under the Act. Although the portability provisions seem to have bipartisan support and may very well be extended beyond 2012, planning on the basis of the portability provisions continuing to apply is fraught with considerable risk and probably should be avoided until Congress makes these provisions permanent. Even if the first spouse dies during 2011 or 2012, what is the likelihood of the second spouse also passing away before the end of 2012?

Please note, however, that the portability provisions under the Act may present unique opportunities to plan for gifting in the event an individual fails to utilize his or her federal estate tax exemption at death. Again, this assumes the individual has unused federal estate tax exemption at his death which occurs during 2011 or 2012. The unused portion of the deceased spouse’s federal estate tax amount will carry over to the surviving spouse and will be added to the surviving spouse’s \$5 million lifetime federal gift tax exemption.

For example, if the spouse dies in 2011, has no assets and has made no taxable gifts during his or her lifetime, none of that spouse’s \$5 million federal estate tax exemption amount would have been used, and the entire \$5 million will be added to the surviving spouse’s \$5 million individual lifetime federal gift tax exemption otherwise available through 2012. As a result, the surviving spouse could make taxable gifts up to \$10 million by the end of 2012 without incurring any federal gift tax liability. Please note that similar consequences may ensue in the event that a spouse with at least \$5 million of assets at the time of death left all of those assets outright to a surviving spouse. Because of the marital deduction, none of the first spouse’s \$5 million federal estate tax exemption would have been used and with this carryover to the surviving spouse.

Given the above, there are unique planning opportunities to exploit prior to the end of next year.

This newsletter was prepared by Glenn Booker. Glenn’s practice centers around estate planning for property transfers and estate/trust administration. He also specializes in appraising closely-held business interests. Glenn advises clients on complex accounting and finance issues, yet his conversational approach enables him to explain such issues in simple and understandable terms. You may contact Glenn at (229) 883-2441 or e-mail him at glenn.booker@gwsh-law.com.

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