

Thinking of making a large gift? Now is the time to do it. By: Steven M. Goldberg

The clock is ticking on what may be a unique estate planning opportunity. As you may know, Congress increased the estate and gift tax exemptions to \$5,000,000 at the end of 2010, effective for two years. As presently enacted, that will be the law until December 31, 2012. If no action is taken by Congress at that time, then, commencing January 1, 2013, the total exemption will revert to \$1,000,000 (or so), including both lifetime gifts and assets passing at death. Additionally, the tax rate on any amount over \$1,000,000 will increase from the present 35% to 55%. Since the gift tax exemption was indexed for inflation, the 2012 limit is actually \$5,120,000.

At this juncture, no one knows what Congress and the President will do. Much will obviously depend on which political party controls one or both houses of Congress as well as the Presidency. Many observers believe that Congress will reduce the estate tax exemption to \$3,500,000 to match what existed in 2009. Even if Congress makes this change, it is not clear whether the gift tax exemption would also be set at \$3,500,000 or if Congress will set the gift tax exemption back at \$1,000,000, which was the law in 2009. Further, it is not clear if Congress will act this year or next or at all. In short, anyone's guess is as good as ours as to what may be done.

If you are in a position to make gifts to your heirs, 2012 is the year to do it. This is especially true for higher net worth clients. No one should make gifts that leave them in an economically compromised position. However, if you are in a position to be able to make a gift, this is probably the best year to do it. For married couples, we can implement planning that allows at least one spouse's exemption to be used and still allow the other spouse to be able to benefit from the assets used to make the exemption. Also, any appreciation or income the transferred asset generates is not subject to estate tax.

It is important to begin thinking and planning the gift as soon as possible. We expect many of our clients to decide to use their exemptions, and we are concerned that waiting until the last half of the year will unnecessarily hurry the planning process and possibly eliminate some of the options that might otherwise be available. If you wait too late in the year, there simply may not be enough time to use the higher exemption.

Given these circumstances, we suggest you consider exploring your options in the first quarter of this year.

Two other factors should also be considered

First, we understand that many clients who can and want to make gifts will not be able to use the entire exemption or even a majority of it. However, if you are considering making a substantial gift, 2012 may still be the best time to do it. A gift made this year that is significantly less than \$5,120,000 will have a very substantial buffer against actually having to pay a gift tax. Since the gift tax exemption could be dramatically reduced, that buffer may not be available next year. This could be very important, for example, if a gift would consist of real property, where valuation could be an issue.

Second, many clients are concerned that making an outright gift to heirs would expose assets to potential problems in the future, either from creditors of the recipient or because the recipient may not manage the property well. To protect against this concern, we generally recommend using a trust when making a substantial gift. Trusts generally provide significant protection from creditors and the assets can be managed by almost any third party. Thus, assets can be protected both for current and future generations.