



## ESTATE PLANNING ADVISORY MEMORANDUM FALL 2011

### Estate Tax Planning Continues To Be On Sale, But For A Limited Time Only

Today's even lower interest rates, coupled with the current \$5 million federal estate, gift, and generation-skipping transfer ("GST") tax exemptions and the 35% maximum federal estate, gift and GST tax rates, mean that estate tax planning has never been cheaper. The catch: this opportunity might not last much longer. On January 1, 2013, the exemptions are scheduled to drop to \$1 million and the maximum tax rate is scheduled to increase to 55%.

	2011 – 2012	2013
Estate Tax Exemption (Rate)	\$5 million <sup>1</sup> (35%)	\$1 million (55% <sup>2</sup> )
Gift Tax Exemption (Rate)	\$5 million <sup>1</sup> (35%)	\$1 million (55% <sup>2</sup> )
GST Tax Exemption (Rate)	\$5 million <sup>1</sup> (35%)	\$1 million (55%)

<sup>1</sup> The exemption amounts are indexed for inflation in 2012, but not beyond.

<sup>2</sup> A surcharge tax of an additional 5% may apply to estates and lifetime transfers in excess of \$10,000,000.

### Year-End Planning Opportunities

As we approach the end of the year, we encourage you to revisit your estate plan and consider taking advantage of the opportunities available to minimize your exposure to federal transfer taxes.

**Estate Tax Planning.** Continued depressed property values and the current ultra-low interest rate environment present extraordinary opportunities for advanced estate tax planning. With the IRS applicable federal interest or "hurdle" rates at historic lows this fall, wealth transfer strategies including intra-family loans, grantor retained annuity trusts ("GRATs"), sales to intentionally defective irrevocable trusts ("IDITs"), and charitable lead annuity trusts ("CLATs") are more attractive now than ever before.

**Annual Gifting.** We encourage you to consider making gifts this year if you have not already done so. The "annual exclusion" from gift tax is \$13,000 per recipient for 2011 (\$26,000 per recipient if you file a gift tax return and your spouse elects to "split" the gift with you). Gifts in excess of your annual exclusions will reduce your \$5 million lifetime gift tax exemption. Gifts in excess of your lifetime gift tax exemption currently are subject to a gift tax rate of only 35%. When planning gifts, the estate, gift, GST, and income tax implications should be carefully considered.

**Charitable Contributions from IRAs.** Individuals age 70½ or older may make a direct, tax-free transfer of up to \$100,000 from an individual retirement account (excluding SIMPLE or SEP IRAs) to a qualified charity, and exclude the amount so transferred from their gross income. The transfer will count toward the individual's required minimum distribution ("RMD"). Unless new legislation is enacted, this popular charitable giving technique is available only until December 31, 2011.

## **New Florida Legislation Impacts Estate and Asset Protection Planning**

The most notable estate planning and asset protection related laws enacted during Florida's 2011 legislative session were a complete rewrite of the powers of attorney statute and a clarification of the creditor protection afforded by Florida limited liability companies.

**Powers of Attorney.** A written power of attorney allows an individual to grant authority to an attorney-in-fact to act in that individual's place. New legislation that took effect this October substantially revised the Florida powers of attorney statute. Among other things, the new law imposes certain fiduciary duties on agents, provides that a co-agent may act independently, requires certain powers, such as the power to make gifts, to be specifically granted in the instrument and initialed, and eliminates "springing" durable powers of attorney (those that take effect only when the principal is incapacitated). The new statute exempts existing powers of attorney from these new requirements. Thus, clients who recently executed durable powers of attorney will not be required to update them. Nonetheless, clients with durable powers of attorney executed five or more years ago and those with springing durable powers of attorney are encouraged to contact us to discuss updating their documents.

**Limited Liability Companies.** Many of our clients who hold real estate investments or other assets in a Florida limited liability company ("LLC") were troubled by a 2010 Florida Supreme Court ruling (*Olmstead*) that created uncertainty as to the level of creditor protection afforded by a Florida LLC. In 2011, Florida enacted legislation providing a general rule that a charging order is the "sole and exclusive remedy" by which a judgment creditor of a LLC member may satisfy a judgment from a member's interest in the LLC. For single-member LLCs, however, the general rule is almost swallowed by an exception restricting that protection for single-member LLCs if the creditor can show that distributions under a charging order will not satisfy the judgment within a reasonable time. In that case, a court may order a foreclosure sale of the single-member LLC interest. Consequently, Florida single-member LLC owners concerned about asset protection should reconsider their entity structure and ownership in light of these developments.

If you have any questions regarding the matters discussed in this memorandum or would like any additional information, please contact any of the lawyers listed below.

**Brian C. Sparks**  
[bsparks@hwlaw.com](mailto:bsparks@hwlaw.com)  
(813) 222-8515

**Linda D. Hartley**  
[lhartley@hwlaw.com](mailto:lhartley@hwlaw.com)  
(813) 227-8485

**Chad Callahan**  
[ccallahan@hwlaw.com](mailto:ccallahan@hwlaw.com)  
(813) 227-8401

**David K. Greider**  
[dgreider@hwlaw.com](mailto:dgreider@hwlaw.com)  
(813) 222-3199

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