

December, 2011

To Our Clients and Friends:

We are pleased to share some of our thoughts on current issues in estate planning, including the expanded federal estate and gift tax exemptions (at least until the end of 2012), New York State's Marriage Equality Act, and amendments to the New York law regarding the "decanting" of trusts to permit greater flexibility in revising trust provisions to adapt to changing circumstances.

**The \$5 million Federal estate and gift tax exemptions remain at record levels, and the 35% estate and gift tax rate is at an historic low.** As we reported in our December, 2010 client letter (<http://tinyurl.com/GLB2010>), last year the federal estate and gift tax exemption was temporarily raised to \$5 million per individual (\$10 million per couple), and the estate and gift tax rate was temporarily lowered to 35%. This created extraordinary opportunities for wealth transfer, since the gift tax exemption had been fixed at \$1 million for many years. Many of our clients took advantage of this opportunity by making substantial tax free gifts. The exemption has now been adjusted for inflation to \$5,120,000 for transfers made in 2012.

However, this opportunity is scheduled to end after 2012. On January 1, 2013, the estate and gift tax exemption will drop to \$1 million, and the maximum gift and estate tax rate will rise to 55%. We encourage our clients to review their estate plans. If you are in a financial position to transfer significant assets to your children or grandchildren during your lifetime, then **you should act before December 31, 2012**. There are many excellent tools that can be used to make transfers, often at discounted values, including the creation of grantor retained annuity trusts; sales of assets to a "defective grantor trust" for your heirs' benefit, in which the seller continues to be responsible for the income tax consequences of the gift while transferring the equity to the next generation; charitable lead or remainder trusts; family limited partnerships, and more. While we can't predict what will happen after 2012, we strongly suspect that these favorable provisions will be curtailed. (It is also conceivable that change might be effective earlier in 2012, depending on possible Congressional action.)

**State estate taxes remain a significant issue.** New York State did not change its law to conform to federal limits, and only recognizes a \$1 million estate tax exemption. Thus, for many clients, the New York estate tax may be more significant than the Federal estate tax. For example, a person who dies in 2012 with a \$5,120,000 taxable estate (the 2012 federal threshold) would pay no federal estate tax but would pay \$405,000 in NYS estate tax; a \$6 million taxable estate would generate \$171,200 in federal estate tax and \$516,800 in NYS estate tax. However, **New York State does not have a gift tax**. As a result, lifetime gifts which utilize any amount up to the \$5,120,000 federal credit will not generate any NYS tax during your lifetime. New Jersey, Connecticut and other neighboring states also have estate tax limits that are lower than the federal threshold.

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**Annual giving, and education and medical gifts remain an easy and efficient way to transfer assets.** The annual gift exclusion remains at \$13,000 in 2012, which means that a couple can give any person or qualifying trust up to \$26,000 in 2011 or 2012, without utilizing any of the federal gift tax exemption. You may also pay unlimited amounts for qualifying health and educational expenses for any person, provided that the payments are made directly to the provider of these services. These techniques have not changed, and are often the “first line” in a wealth transfer plan.

**New York’s Marriage Equality Act creates both opportunities and pitfalls for same-sex couples.** As we described in our special July, 2011 letter (<http://tinyurl.com/GLB-SSletter>), New York State has fully legalized same-sex marriages. Same-sex married couples now receive full benefits under Domestic Relations Law, NYS income tax, NYS estate tax law, and every other New York law. However, the federal “Defense of Marriage Act” prohibits the US government from recognizing same-sex marriages or granting same-sex married couples any rights under federal law. Same-sex couples cannot file federal income taxes jointly, and are not recognized as spouses for estate tax purposes. The matrimonial rights of same-sex couples under New York law will be substantially reduced by adverse federal tax consequences. For example, transfers of property pursuant to divorce or separation agreement may not be recognized as tax-free exchanges, and same-sex spouses may not be able to transfer inherited retirement assets into an IRA rollover account.

Both the law and planning techniques are still evolving. We have been involved in planning for same-sex couples for years, and are dealing with the issues raised by the dichotomy between Federal and NYS law. Same-sex couples need to do careful estate and financial planning in connection with their marriage to maximize financial benefits while avoiding the tax pitfalls. We believe that many more same-sex couples will need prenuptial agreements than heterosexual couples to clarify their rights and obligations.

**Changes to New York’s “decanting” statute enable many trusts to be modified to react to changed circumstances.** It is not uncommon to discover that an irrevocable trust no longer serves the purposes for which it was initially designed. For example, a beneficiary’s circumstances may have changed and it now might be in that beneficiary’s best interests if the trust could be extended beyond the initial termination date, or there may be a desire to change trustees and the original trust does not provide for the optimal plan. If the trust agreement contains certain powers of invasion for a trust beneficiary, then recent changes to New York law may permit the trustee to distribute (or “decant”) the assets of the trust to a new trust for one or more of the beneficiaries. While the trustee is required to give notice of the new trust provisions, the beneficiary’s consent is not required. The decanting statute provides an important new tool for our clients and we anticipate using it much more frequently on their behalf.

**Charitable giving can be an important part of any plan.** We regularly assist many of our clients in realizing their charitable goals in a tax efficient manner. There are a myriad of techniques, including gifts of appreciated property, use of private foundations or donor advised funds to time gifts, and charitable trusts to provide for both family and charity. One of the most effective techniques is that any person who is over age 70½ may donate up to \$100,000 from his or her IRA directly to a charity. This donation will not be subject to income tax, and can be counted against a person’s “required minimum distribution”. This reduces that income tax burden on the eventual beneficiaries to these plans and enables other assets to pass to these individuals.

**Our firm.** Gerald & Lawrence Blumberg, LLP continued to prosper during 2011. Once again, Larry Blumberg and Lois Tilton were recognized in the Super Lawyers® lists.

Earlier this month, Larry moderated a program in Miami entitled: “The Tie That Binds: Lessons on Effective Philanthropy Through the Generations”, organized by Foundation Source and the American Committee for the Weizmann Institute of Science. Passing philanthropic values to our children and grandchildren is a topic that repeatedly comes up in our discussions with clients, and is an issue that engages us.

As always, we are most gratified by our excellent relationships with our clients, colleagues and friends, and look forward to working with you in the coming year, and helping you to navigate this changing world of estate planning and administration.

With best holiday and New Year’s greetings from all of us at

**Gerald & Lawrence Blumberg, LLP**

P.S. A copy of this letter is also posted on our website: [www.glblumberg.com](http://www.glblumberg.com)

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