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ESTATE
PLANNER

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Legislature Allows “Springing” Durable Powers of Attorney

Michael A. Dribin

The 2001 session of the Florida legislature has enacted a significant, highly desirable change to the Florida Durable Power of Attorney statute. This statute generally permits one to grant broad authority to another individual to deal with the financial, tax and other economic affairs of the Grantor (the person giving the authority). It is one of the more standard documents prepared as part of an estate plan.

A common concern of clients was the fact that the documents become effective upon execution.

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COVER STORY

Does New Estate and Gift Tax Act Offer Relief?

**Kenneth Edelman
Carl Rosen**

“The new tax law doesn’t make planning unnecessary, it just makes it impossible.”

Albert Crenshaw, Washington Post, June 3, 2001.

Both Houses of the United States Congress recently passed historic tax legislation (the “Tax Act”), also called “RELIEF”, which was signed into law by President George Bush.

The Tax Act makes significant changes to many tax areas, particularly income taxes, estate, gift, and generation-skipping transfer (“GST”) taxes, and pension plans.

GIFT TAX ACT continued on page 2

GIFT TAX ACT *continued from cover*

The full impact of this new legislation, particularly in the estate, gift and GST tax area, will not be known for many years due to “sunset provisions” which do away with the legislation in ten years. In 2010, the new legislation repeals the federal estate and GST tax. However, in 2011, the Tax Act is itself repealed, and like Dracula, the federal estate and GST tax springs back into life based on today’s law! The following are the major changes relating to these taxes.

Gift Tax

The Tax Act provides that in 2002 the gift tax exemption will be increased from its current amount of \$675,000 to \$1,000,000. The Tax Act provides for no additional increases to this amount. Accordingly, the estate tax and gift tax will no longer be a “unified” system.

Tax Rates

The Tax Act also reduces the maximum estate, gift and GST tax rates. The maximum rate is reduced from a current rate of

Tax Act, the step-up in basis rules are partially repealed. Under the new law, beginning in 2010 only \$1.3 million of assets are eligible for the step-up in basis, as well as an addition \$3 million for assets passing to a surviving spouse. This can create significant bookkeeping burdens, as the basis allocation is elected on an asset-by-asset basis. In addition, the basis step-up is not available for non-U.S. citizens.

Summary and Conclusion

The chart on page 3 details the changes in the gift, estate, and GST tax rates and exemptions:

As you can see, instead of simplifying the estate planning process, the Tax Act actually makes it more complicated. Not only are there now difficult basis rules to deal with, there are additional significant differences in the tax law depending on which year an individual dies and whether the individual makes lifetime or deathtime transfers. Unfortunately, this will create a need for additional planning for most individuals. Estate plans and estate planning documents will need to be much more flexible to be able to deal with the various tax rules effective for given years. We recommend that you call one of the estate planning and tax attorneys at Broad and Cassel so that we can review the various tax law changes with you, and create a plan that best suits your needs.

This memo addresses only the transfer tax changes brought about by the Tax Act. The Tax Act also makes many significant (and beneficial) changes regarding IRAs, college tuition plans, pensions and other areas that we would be glad to discuss with you. **BC**

“INSTEAD OF SIMPLIFYING THE ESTATE PLANNING PROCESS, THE TAX ACT ACTUALLY MAKES IT MORE COMPLICATED.”

Estate Tax Exemption

Current law provides that in 2001 an individual has a unified credit exemption of \$675,000 to make tax-free lifetime gifts or transfers at death to non-spouse beneficiaries. The Tax Act changes the estate tax exemption (and GST exemption) to \$1,000,000 in 2002 and 2003, \$1,500,000 in 2004 and 2005, \$2,000,000 in 2006, 2007 and 2008, and \$3,500,000 in 2009. In 2010, the estate tax is eliminated, and in 2011 the estate tax is reinstated with a unified credit exemption at death equal to \$1,000,000. These amounts are more clearly shown on the chart on page 3.

55% in 2001 to 50% in 2002, with gradual reduction to 45% in 2009.

Income Tax Basis of Transferred Assets

Finally, the Tax Act significantly changes the way the income tax “basis” of assets is determined on transfers at death. Under current law, for income tax purposes, on an individual’s death, his or her beneficiaries generally receive a “stepped-up” cost basis in the inherited assets. This means that the assets, for purposes of determining the gain on resale, are generally eligible for a cost-basis increase to the value of the assets as of the date of death. Under the

In other words, if the power of attorney were delivered to the person to whom the power was granted (referred to as the “Attorney-in-Fact”), that Attorney-in-Fact has the legal authority to immediately use the power that is reflected in the power of attorney. Previously, use of the power of attorney could not be conditioned upon a future event, such as the Grantor becoming incapacitated.

The new legislation, which becomes effective January 1, 2002, permits an individual to condition the authority to use the power of attorney on the existence of an inability on the part of the Grantor to “manage property”. This is defined as the inability to take those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits, and income.

The statute imposes a requirement that an affidavit be executed by the primary physician for the Grantor (the physician who has



the responsibility for the treatment and care of the Grantor) that the Grantor’s inability to manage property has arisen.

The power to have this condition arise before the Durable Power of Attorney is effective, known as a “springing” power, is a reason to reconsider existing Durable Powers of Attorney for potential revision.

We recommend that each of our clients who has a Durable Power of Attorney, but who wants

to specifically have the power “spring” into existence only in the event of an inability to manage property, consider whether he or she desires a new springing power of attorney. It should be noted that, as of this writing, it is unclear whether a power of attorney executed before January 1, 2002, containing the “springing” wording, but not used until after January 1, 2002, will be effective. The power of attorney may need to be executed after January 1, 2001 to be effective. **BC**

CHANGES IN THE GIFT, ESTATE, AND GST TAX RATES AND EXEMPTIONS

YEAR	ESTATE AND GST EXEMPTION	GIFT TAX EXEMPTION	MAXIMUM ESTATE AND GIFT TAX RATES
2002	\$1 million	\$1 million	50%
2003	\$1 million	\$1 million	49%
2004	\$1.5 million	\$1 million	48%
2005	\$1.5 million	\$1 million	47%
2006	\$2 million	\$1 million	46%
2007	\$2 million	\$1 million	45%
2008	\$2 million	\$1 million	45%
2009	\$3.5 million	\$1 million	45%
2010	N/A (taxes are repealed)	\$1 million	top individual rate (gift tax only)
2011 and after	\$1 million	\$1 million	55%

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Legislature Increased Intangible Tax Exemptions

Michael A. Dribin

The 2001 Florida legislature has modified the Florida intangible tax, effective January 1, 2002, to provide that every natural person is entitled to an exemption of the first \$250,000 of intangible assets (an increase from the current \$20,000 exemption). A husband and wife filing jointly will have an exemption of \$500,000 (up from \$40,000) and every taxpayer that is not a natural person is entitled to an exemption of the first \$250,000 of intangible property (there was no such exemption under prior law). **BC**

<p>If you have any questions, contact any of the following attorneys or your attorney at Broad and Cassel:</p>	
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