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Giving $5 Million In 26 Days

By ELIZABETH ODY

The last moves to make as the golden age of gift-tax exemptions comes to an end.

It's showtime. If you've been waiting for a kick in the pants to start moving on this year's unparalleled gifting opportunities, consider yourself kicked. Barring an 11th-hour compromise by Congress, the lifetime gift-tax exemption will fall to $1 million, from $5.12 million, on Jan. 1, and the top tax rate on gifts will rise to 55% from 35%. Even if a compromise is reached, with President Obama backing a gift-tax exemption of $3.5 million, there's no telling if the going will ever be this good again. So don't delay any further -- after all, you don't want to spend New Year's Eve plotting your family's financial future on LegalZoom.com. Consider these last-minute ideas.

CASH FOR KIDDIES. Outright gifts of cash or securities are your simplest and speediest options. But your funds will go furthest if you can pass along appreciating assets -- such as a share in the family business -- within a structure that will be excluded from your heirs' estates. The trouble is, some assets, such as private-equity interests and real estate, can take time to transfer; plus, few appraisers will grant you the time of day between now and the end of the year. "The valuation experts are completely swamped at this point," says Robert Weylandt, a wealth advisor with the JPMorgan Chase private bank in Houston. Beat the clock by drafting a trust that affords you, the donor, the right to swap in and out assets of equal value, and fund it with cash or registered securities this year. Once the time-crunch has subsided next year and you can obtain an appraisal, you can substitute in the assets you'd really like to give.

Don't hold enough in liquid assets to make this strategy work? Weylandt says he's assisting clients as they obtain loans for as low as two percentage points, helping them to push through cash gifts. Or, if taking out a loan isn't an appealing option, you can always simply promise the money. You can do so by creating a promissory note for the amount you'd like to give and using that note to fund a trust this year. Unfortunately, that strategy only works in Pennsylvania, which alone considers the promise to make a gift to be an enforceable

obligation. So, if you're not a resident of the Keystone State, you'll generally need to use a trustee legitimately permitted to establish a trust governed by Pennsylvania law.

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A BAUBLE FOR YOUR BETTER HALF. For married couples, a popular strategy is for each spouse to create a trust that will ultimately provide for heirs, but that also names the other spouse as a beneficiary. The advantages are clear: Couples can move as much as $10.24 million out of their combined estate, while retaining rights to draw income if they need to. The one hurdle is that the Internal Revenue Service could void your careful planning if you and your spouse create trusts that are too similar. This poses particular problems for procrastinators, since creating the two trusts in rapid succession heightens the risk of raising IRS eyebrows. "The less time you have, the more conservative you need to be about making them very, very different," says Diana Zeydel, national chair of the trusts and estates department of Greenberg Traurig in Miami.

Two strategies offer simple fixes. Cutting one spouse out of the picture -- so that, for example, your husband is a beneficiary of the trust you create, but the trust your husband funds only benefits heirs -- generally leaves no basis for judging the two trusts to be equivalent, says Zeydel. If leaving one spouse with no rights to income is too large a pill to swallow, consider arranging it so that one spouse becomes a beneficiary only after a significant gap of time, such as 10 years.

GOODIES FOR THE GRANDKIDS. Perhaps your children would like to make use of their gift-tax exemptions this year, but haven't yet achieved the means to do so on their own. You can loan your kids the money for them to pass along to their children, at rates as low as 2.4% for loans of 10 years or more, according to current minimum interest rates on intra-family loans published by the IRS.

Or, if you've already used up your $5.12 million exemption making outright gifts to your kids, and your wallet still feels rather heavy, don't forget you also have a $5.12 million generation-skipping transfer-tax exemption you can put to work. Using the election feature of qualified terminable interest property (QTIP) trusts, cleverly gives you the chance to both use up that exemption and play the wait-and-see game.

Here's how: Fund a trust this year that will ultimately benefit your grandchildren, and make sure that it meets the necessary requirements of a QTIP trust, including that the trust pays all investment income to your spouse for the rest of his or her lifetime. When you file your 2012 tax return (an extension gives you until October 2013), you get to decide whether to leave the trust as is, or to make a QTIP election.

If laws have changed in that time, and you'd like to undo the gift, you can elect for QTIP treatment, in which case the trust will become part of your spouse's taxable estate and, as far as the IRS is concerned, no gift will have been made. If, come October, you'd still like to make the gift to grandkids, you can forgo the election and allocate your generation-skipping transfer -tax exemption to the trust. In that case, the trust must continue to pay income to your spouse over his or her lifetime; the grandchildren start receiving distributions after your spouse's death.

"Its fate for gift-tax purposes isn't decided until you either make that election or don't make that election," says Joe McDonald, a principal with McDonald & Kanyuk in Concord, N.H.

TREAT YOURSELF TO A TRUST. When it comes to having your cake and eating it, too, self-settled trusts are hardly topped. The defining feature: You, the donor, can be a beneficiary in some dire circumstances, while at the same time moving assets out of your taxable estate (and not to mention, out of the reach of future creditors). Caution here is called for; since there haven't been a lot of IRS challenges that clearly establish the acceptable circumstances for such trusts, some attorneys are wary of using them.

Also, if you don't live in one of the 13 states that permit self-settled trusts—the list includes Delaware, New Hampshire, and Nevada -- you'll probably need to use a trustee based in one of those states. "It's one strategy for people who are nervous about potential donor's remorse," says McDonald.

Fund the trust only with assets that you truly don't expect to need, since tapping it for a distribution should be a last resort. But hey, just because you want to provide generously for heirs doesn't mean you need to risk spending your golden years in a granny's shack.

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