WILLIAMS MULLEN
Where Every Client is a Partner®

March 2009

Fiduciary Law Alert

Recent Estate and Gift Tax Developments

BY HEATHER H. SZAJDA

Several recent developments in the estate and gift tax area are important for fiduciaries to keep in mind while administering ongoing trusts or when counseling clients. Given the state of the economy, we will likely see more developments throughout the year that will have an impact on fiduciary management decisions and individual planning goals.

1. *Estate Tax.* The exemption amount for estate tax is $3.5 million for decedents dying in 2009, 75 percent higher than last year and 133 percent higher than it was in 2007. The number of estates that will be subject to estate tax this year is expected to decrease significantly due to the higher exemption amount and the decreased value of assets included in the gross estate. Given the revenue generation needs of the federal government, it is likely that Congress will focus on decreasing the exemption amount for 2010 and beyond.

2. *Gift Tax.* The gift tax annual exemption was indexed for inflation in 2009 and is now $13,000 per year. A married couple may give $26,000 if they are gift-splitting. This will affect the amount that may be contributed to a *Crummey* gifting trust or to an Irrevocable Life Insurance Trust ("ILIT"). A fiduciary preparing a "*Crummey*" notice for a trust may want to update the annual notice forms to reflect the new amount.

3. *H. R. 436.* Rep. Pomeroy (D-ND) introduced H. R. 436 on Jan. 11, 2009. The bill's provisions include: (1) eliminating the sunset provision that would have erased all estate taxes for decedents dying in 2010; (2) freezing the estate tax exemption amount at $3.5 million; (3) freezing the estate tax rate at 45 percent (with a 5 percent surcharge for estates valued between $10 million and $41 million); (4) limiting valuation discounts for transfers of interests in entities that are not actively traded or that have non-business assets; and (5) prohibiting minority discounts for lack of control if the transferee is a member of the transferor's family or if the transferee and members of the transferee's family have collective control of the entity.

Other legislative initiatives are expected. Commentators have suggested changes concerning the portability of the estate tax exemption, elimination of the deduction for state death taxes, extension of the qualified severance rules for generation skipping tax, and other possible restrictions on valuation discounts. There is significant uncertainty as to whether any of these changes will become law. Staying current with all legislative initiatives will be key to providing clients with proper counseling.

4. *Minimum Distributions for Retirement Plans.* The Worker, Retiree and Employer Recovery Act ("WRERA"), passed in December 2008, provides temporary relief to individuals who are required to take retirement plan distributions for 2009. This includes distributions from defined contribution plans, such as a 401(k) or profit sharing plan, and from IRAs. (It is important to note that 2008 distributions may be postponed but will have to be taken by April 2, 2009.) If a plan participant dies in 2009, the required distribution depends on whether the participant died before

Williams Mullen
Fiduciary Law Alert

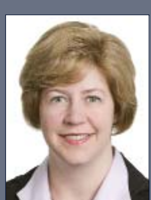
Editorial inquiries should be directed to Linda F. Rigsby, 804.783.6404 or lrigsby@williamsmullen.com or Heather H. Szajda, 804.783.6477 or szajda@williamsmullen.com

his or her required beginning date ("RBD"). If the participant died before his RBD, and if there was no designated beneficiary, then the benefits must be paid out over five years. The WRERA provides that the five year period shall be determined "without regard to calendar year 2009," resulting in a six-year payout period. If the decedent named a beneficiary, the distribution period does not change, but the required minimum distribution does not have to be made for 2009.

5. *Inheritance Tax:* Virginia and Massachussetts still collect an inheritance tax on certain trusts created by a decedent dying before 1980. Virginia's inheritance tax provisions provide for a tax on the ultimate recipient of the trust assets following the death of a life beneficiary. The tax depends on the value of the assets received and the degree of relationship of the remainder beneficiary to the testator. The closer the relationship (a spouse, a child, a niece or a stranger), the lower the tax rate and the higher the exemption amount.

Many estates could not pay the inheritance tax in full until the death of the life beneficiary, when the identity of the remaindermen is ascertained. The tax owed on these assets is commonly referred to as an "in-remainder tax." A computation of prior principal distributions during the term of the trust and a current valuation of the assets held in trust will be required. Identification of the remainder beneficiaries and a determination of their relationship to the decedent will also be required to calculate the inheritance tax owed to the Commonwealth of Virginia. Failure to determine whether the trust owes inheritance tax before distributing the assets to the remaindermen will subject the trustee to personal liability for the taxes due. Both the Commonwealth of the Virginia and the Commonwealth of Massachusetts have levied significant taxes against bank fiduciaries for failure to pay the inheritance tax in-remainder amounts owed.

About the Author



Heather Szajda focuses her practice on estate planning, family wealth transfers, including such devices as revocable and irrevocable trusts, generation-skipping arrangements, family partnerships and assists clients with planned charitable giving. Ms. Szajda also has experience counseling clients on the formation of tax-exempt organizations and the application of tax-exempt status with the Internal Revenue Service. Ms. Szajda is a member of the Estate Planning Council of Richmond.

About our Practice

For over 50 years, Williams Mullen has been privileged to represent bank trust departments and trust companies, as well as individual executors, administrators and trustees regarding both complex and routine issues arising in the context of fiduciary relationships. Our practice comprises leading attorneys in estate planning and fiduciary law, and ten of our attorneys are fellows in the prestigious American College of Trust and Estate Counsel. Our partners and associates alike are frequent speakers on the Uniform Trust Code and other aspects of fiduciary law. We regularly advise clients on best practices to avoid litigation in connection with fiduciary responsibilities. If litigation is unavoidable, we have decades of experience in successful representation of individual and corporate fiduciaries and beneficiaries throughout the mid-Atlantic and Southeast.

Fiduciary Law Team

David D. Addison
804.783.6483
daddison@williamsmullen.com

Farhad Aghdami
804.783.6440
aghdami@williamsmullen.com

Stephen E. Baril
804.783.6423
sbaril@williamsmullen.com

Kevin W. Benedict
919.981.4044
kbenedict@williamsmullen.com

Robert H. Burger
757.473.5307
rburger@williamsmullen.com

Donald H. Clark
757.473.5301
dclark@williamsmullen.com

Joseph A. Di Julio
757.473.5360
jdijulio@williamsmullen.com

Robert E. Eicher
804.783.6407
reicher@williamsmullen.com

James Philip Head
703.760.5231
jhead@williamsmullen.com

Elizabeth Mason Horsley
804.783.6453
ehorsley@williamsmullen.com

M. Keith Kapp
919.981.4024
kkapp@williamsmullen.com

Montgomery Knight, Jr.
757.629.0622
mknight@williamsmullen.com

Linda S. Laibstain
757.629.0609
llaibstain@williamsmullen.com

Monica McCarroll
804.783.6444
mmccarroll@williamsmullen.com

Nathan R. Olansen
757.473.5315
nolansen@williamsmullen.com

W. Benjamin Pace
804.783.6932
wpace@williamsmullen.com

Linda F. Rigsby *(of counsel)*
804.783.6404
lrigsby@williamsmullen.com

Robert L. Samuel, Jr.
757.473.5322
rsamuel@williamsmullen.com

Elizabeth Davenport Scott
919.981.4004
escott@williamsmullen.com

Charles L. Steel, IV
919.981.4005
csteel@williamsmullen.com

Heather Hoch Szajda
804.783.6477
hszajda@williamsmullen.com

John L. Walker, III
804.783.6463
jwalker@williamsmullen.com

Fielding L. Williams, Jr.
804.783.6410
fwilliams@williamsmullen.com