



# JW | Wealth Planning e-Alert

An important wealth planning law update from the law firm of Jackson Walker.

October 01, 2012

## Resources

[JW Wealth Planning Practice Area](#)

[JW Wealth Planning Attorneys](#)

[JW Wealth Planning Publications](#)

[Contact JW](#)

[www.jw.com](http://www.jw.com)

## Offices

### Austin

100 Congress Avenue  
Suite 1100  
Austin, TX 78701

### Dallas

901 Main Street  
Suite 6000  
Dallas, TX 75202

### Fort Worth

777 Main Street  
Suite 2100  
Fort Worth, TX 76102

### Houston

1401 McKinney Street  
Suite 1900  
Houston, TX 77010

### San Angelo

301 W. Beauregard  
Avenue  
Suite 200  
San Angelo, TX 76903

### San Antonio

112 E. Pecan Street  
Suite 2400  
San Antonio, TX 78205

## Time is Running Out on Historic Estate Planning Opportunity

By [Sam K. Hildebrand](#)

**THE OPPORTUNITY:** On December 17, 2010, Congress and President Obama set the exemption from gift tax at \$5 million (adjusted by cost-of-living factors; for 2012, the exemption amount is \$5.12 million). This exemption had never been higher than \$1 million. This historically high gift tax exemption allows you to transfer up to the exemption amount to your intended beneficiaries without triggering gift tax.

**KEY MESSAGE – ACT NOW:** This exemption amount, as well as the exemption amount from estate tax, is set by law to return to \$1 million on January 1, 2013, unless Congress acts. So, if you want to take advantage of this limited time opportunity, you must act now.

**OPTIONS:** You have numerous options, some of which are described here.

Simple Gifts: You can simply identify your intended beneficiaries (often children and more distant descendants) and then transfer the appropriate assets to them. This option might be appropriate if simplicity is important to you and if your intended beneficiaries are mature enough to not let the amount received change them in a detrimental manner.

Gifts In Trust: If you are concerned that your intended beneficiaries are not ready to receive a large amount (or you have other concerns, such as protecting your beneficiaries from creditors or divorce), then you can create a trust or trusts for your intended beneficiaries and design the trust so that the assets are managed in a manner that will provide the appropriate benefit to the beneficiaries, without causing them harm. Also, using a trust to receive and hold the transferred assets can protect the assets from the beneficiary's creditors and from a divorce court allocation of the transferred assets to the beneficiary's ex-spouse.

Gifts to Perpetual Trusts: You may want to design your gift to benefit not only your children, but also grandchildren and perhaps even more distant descendants. The limited-time gifting opportunity is even more dramatic if this is your goal. In addition to setting the gift tax exemption at \$5 million, the 2010 legislation also increased the "GST exemption" to \$5 million (with the same cost-of-living adjustments as the gift tax exemption). If you apply this exemption to a trust which is designed to benefit your children and your more distant descendants, the trust property will be free from the transfer tax system and be available to your descendants, for as long as the trust lasts. Many planning professionals call this type of trust a "dynasty" trust.

Gifts Allowing Some Benefit Back to You: The options described so far involve a complete gift of the transferred property with no retained benefit for the giver. Losing all possible access to the transferred property may cause some hesitation in taking advantage

of the opportunity. There are two ways to address this concern. You can create a trust for your children or more distant descendants, and also authorize the trustee to distribute trust property to your spouse. This technique does not have you retain the right to receive distributions, but perhaps you will be indirectly benefitted by a distribution to your spouse. Of course, this potential benefit would exist only if you remain married to your spouse. Because of this risk, there are several ways to address a potential divorce. Alternatively, you can create a trust and allow the trustee to distribute trust property to you. This technique, however, is not available for Texas trusts. Rather, if naming yourself is required to make you comfortable with a large transfer, then you will need to create the trust in a state that allows such a trust to be considered a completed gift.

**ARE THERE DRAWBACKS?:** When contemplating transferring significant value, there are many non-tax concerns. For example, will you have enough property left to live on the rest of your life? While these concerns are very real and must be addressed, the issue addressed here is a key tax issue – the loss of an income tax basis adjustment at your death. Under current law, when you die, the income tax basis of your property in the hands of your beneficiaries becomes the fair market value on your date of death. This basis adjustment can be very valuable if you acquired assets at a price significantly lower than their value at date of death. The income tax that would be imposed on the unrealized gain when the property is sold is completely avoided, due to the "step up" in income tax basis. This potential valuable basis increase is not allowed when you give property during your lifetime. Instead, your income tax basis in the property given becomes the recipient's income tax basis. This potential tax detriment must be considered when analyzing whether to proceed with a large gift.

**CONCLUSION:** The estate planning opportunities presented by the 2010 legislation deserve careful consideration. Given the set January 1, 2013 expiration date, it is imperative that you act now. It may be that Congress and the President will extend the historically high exemptions. They may even repeal the transfer tax system altogether. But it is at least as likely that this extension or repeal will not occur. Failing to at least consider this now may cause you to miss one of the most important estate planning opportunities that this generation will see.

For questions or assistance, please contact [any member of Jackson Walker's Wealth Planning group](#).

---

*If you wish to be added to this e-Alert listing, please [SIGN UP HERE](#). If you wish to follow the JW Wealth Planning group on Twitter, please [CLICK HERE](#).*

Austin

Dallas

Fort Worth

Houston

San Angelo

San Antonio



*Wealth Planning e-Alert* is published by the law firm of Jackson Walker L.L.P. to inform readers of relevant information in wealth planning law and related areas. It is not intended nor should it be used as a substitute for legal advice or opinion which can be rendered only when related to specific fact situations. The statements contained herein are not intended to and do not constitute an opinion as to any tax or other matter. They are not intended or written to be used, and may not be relied upon, by any person for the purposes of avoiding penalties that may be imposed under any Federal tax law or otherwise. For more information, please call 1.866.922.5559 or visit us at [www.jw.com](http://www.jw.com).

[Click here to unsubscribe your e-mail address](#)  
901 Main Street, Suite 6000 | Dallas, Texas 75202