



Will Power

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CONTINUATION OF LIFETIME GIFTING PROGRAMS

“Louise” makes gifts to each of her children and grandchildren each year. “It makes me happy,” she says, “to see them benefit now rather than waiting until I’m gone. I can help the grandchildren with their college educations, and my son and daughter can always use an extra dollar or two.”

Fortunately, Louise has the wherewithal to make gifts to her family. It’s been my observation that her family has become somewhat dependent upon the expectation of annual amounts. Louise usually keeps the dollar amounts transferred to less than the \$12,000 gift tax free limit per recipient. When she happens to exceed that amount, she dutifully informs her CPA and the proper amounts are reported on federal gift tax return form 709. To the extent that Louise has not consumed her lifetime annual gift tax exemption of \$1 million, she pays no gift tax, although a portion of the estate tax exemption is consumed.

When Louise asked me what happens if she becomes incapacitated, we reviewed her revocable living trust and durable power of attorney to determine whether her lifetime gifting program could continue. Her documents were drafted some time ago, and they did not contain any powers for the trustee or the attorney-in-fact (this refers to the person who holds her durable power of attorney – not her personal or trust lawyer) to continue her gifting program. The net result of this could have been an immediate cessation of the gifts should Louise become incompetent and not able to make the transfers herself.

I suggested that Louise give the trustee of her trust the power to make annual gifts to her children and grandchildren, even if Louise is no longer serving as her trustee. Otherwise, the IRS would dispute the gifts and include those amounts in her estate for federal estate tax purposes. Louise thought that including this power in her trust document and in her durable power of attorney was a good idea.

We next discussed exactly what powers the trustee and attorney-in-fact would have in her newly amended documents. Could they make gifts to family members only? Must the family members who receive gifts be blood line descendants? What about spouses of family members? Are the gifts that are to be made limited to the annual exclusion amount? Can there be more transfers if a family member needs money for health concerns? Must those gifts be made directly to the medical service provider so they won’t be counted towards the

annual gift tax exclusion amount? What about tuition payments – which if made directly to the financial institution do not count toward the annual exclusion amount?

Must the gifts “even out” among family members or can one family member receive larger amounts over time? Must the gifts be consistent with past gifts, in which case Louise should prepare a history of prior gifts, or may a trustee initiate a new gifting program? What if Louise’s successor trustee is also a gift recipient, can the trustee/beneficiary make gifts to themselves from Louise’s funds with these powers – knowing that there is a potential conflict of interest or should an independent trustee be required to make gifts to a trustee/beneficiary. If Louise has made charitable gifts, can or should those be continued if Louise can’t make those gifts of her own and in what amount? Do the gifts have to somehow benefit Louise’s estate by reducing her estate for federal estate tax purposes – in other words, if the estate tax is abolished and there is no estate tax reason for Louise’s trustee to make the gifts, can or should the gifts continue?

These are all serious questions that should be addressed in Louise’s documents and Louise should sign an amendment to her documents ratifying what she wants to have happen. Louise should carefully consider who she names to have the authority to make gifts.

I have seen some family members who are also acting as trustee make questionable gifts once they have the keys to the vault. For instance, a son of one of my clients, once vested with the authority to make gifts upon that client’s incapacity, decided to purchase new cars for his children, the grandchildren of my client. While he had the authority to make gifts “for whatever purpose” as my client didn’t want to handcuff his son, I knew the client to be fairly frugal and was surprised when the son took the liberties that he took.

When the potential exists for a trustee who is also a beneficiary to take advantage of the situation, it is advised that the client consider naming an independent trustee to make gifting decisions, or at least have the independent trustee as a co-trustee able to veto bad decisions by an interested party.

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