

Do Not Forget the Importance of Gift Provisions in a Power of Attorney

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Gift provisions in a power of attorney can limit both agents and guardians, and restrict their ability to make gifts if a need arises. For this reason, powers of attorney should be carefully drafted to include appropriate gifting authority. A recent New Jersey Appellate Division case underscores the importance of including gift authority in a power of attorney and the impact any restrictions can have on gift planning.

In this case, the Court appointed several family members as guardians for their aunt who had about \$3,000,000 in assets. In 2018, the guardians sought Court approval for \$450,000 gifts which had been made by the guardians from their aunt's assets between 2015 and 2017. Even though the application was unopposed, and the aunt's income substantially exceeded her expenses throughout this period, the Court partially denied the request. One of the major factors cited by the Court was a restriction found in the aunt's 2006 power of attorney. This restriction limited the amount of the gifts to the federal gift tax annual exclusion (then \$14,000 per person per year).

To understand the importance of this restriction, an understanding of the basic gift tax rules is necessary. Annual exclusion gifts are transfers of assets or cash that do not exceed the annual gift tax exclusion – currently \$15,000 per recipient per year. Thus, most married couples can give up to \$30,000 per recipient in this calendar year. Depending on the circumstances, many annual exclusion gifts do not require a Federal Gift Tax Return (Form 709) and are not considered taxable gifts. Annual exclusion gifts reduce the overall value of the donor's estate but do not reduce the Federal Estate Tax Exemption of the person making the gift.

Gifts in excess of the annual exclusion amount still avoid Gift Taxes if the person making the gift applies his or her Gift Tax Exemption by filing IRS Form 709. The Gift Tax Exemption is unified with the Estate Tax Exemption at \$11.58 million for 2020. Gifts in excess of the annual exclusion (\$15,000 per person currently) reduce the \$11.58 million exemption for purposes of both the Gift Tax and the Estate Tax.

Management of the Gift and Estate Tax Exemptions is important given the uncertainty over future exemptions and tax rates. If no legislative action is taken, the current Estate and Gift Tax Exemptions will conclude at the end 2025 and return to the 2010 Exemption amount of \$5.0 million, plus indexing. The upcoming election and changes in law may result in a reduction of the Gift and Estate

Exemptions before 2025. For some New Jersey residents, the New Jersey Inheritance Tax may also be an issue to consider. Gifts made more than three years before death may avoid New Jersey Inheritance Taxes, resulting in substantial savings in tax at the state level.

Proper use of these exemptions is important, particularly given future uncertainties. If a parent or donor becomes disabled or incapacitated, the disability may compromise his or her ability to make gifts. To address this issue before a problem arises, a power of attorney with appropriate gift provisions should be in place. Failure to draft these provisions properly may result in undesirable limitations. Similarly, if you are a guardian or an agent under a power of attorney, it is important that all gifts be made in accordance with the gift provisions found in the power of attorney as well as any Court restrictions that may apply.

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