

The Crummey trust: Still relevant after all these years

Traditionally, trusts used in estate planning contain "Crummey" withdrawal powers to ensure that contributions qualify for the annual gift tax exclusion. Today, the exclusion allows you to give up to \$14,000 per year (\$28,000 for married couples) to any number of recipients.

Now that the gift and estate tax exemption has reached an inflation-adjusted \$5.45 million, fewer people have to worry about gift and estate taxes. But, for many, the annual exclusion continues to be an important estate planning strategy. Thus, Crummey powers continue to be relevant.

Why make annual exclusion gifts?

Despite the record-high exemption, there are two important reasons to make annual exclusion gifts. First, if your wealth exceeds the exemption amount, an annual gifting program can reduce or even eliminate your liability for gift and estate taxes.

Second, even if your wealth is well within the exemption, annual gifting guarantees that the amounts you give are permanently removed from your taxable estate. If you rely on the exemption, there's no guarantee that Congress won't reduce the amount in the future, exposing your estate to tax liability.

What are Crummey powers?

The annual exclusion is available only for gifts of "present interests." But a contribution to a trust is, by definition, a gift of a *future* interest. To get around this obstacle, trusts typically provide beneficiaries with Crummey withdrawal powers. By giving them the right to withdraw trust contributions for a limited period of time (usually 30 to 60 days), it's possible to convert a future interest into a present interest, even if the withdrawal rights are never exercised.

In order for Crummey powers to work, the trust must give beneficiaries *real* withdrawal rights. Generally, that means you can't have an agreement with your beneficiaries — express or implied — that they won't exercise their withdrawal rights (although it's permissible to discuss with them the advantages of keeping assets in the trust).

It also means that the trust should contain sufficient liquid assets so that beneficiaries can exercise their withdrawal rights if they choose to. Suppose, for example, that you set up an irrevocable life insurance trust and use annual exclusion gifts to cover the life insurance premiums. If contributions are used immediately to pay the premiums, any Crummey powers conferred by the trust are illusory: The trust has no liquid funds with which to satisfy a withdrawal request.

To avoid this problem, it's best to keep sufficient liquid assets in the trust to cover potential withdrawals or to time contributions so that life insurance premiums aren't paid until the Crummey withdrawal period has expired.

In designing a Crummey trust, keep in mind that excessive withdrawal rights can trigger adverse tax consequences for the beneficiaries.

Must beneficiaries know withdrawal rights?

The IRS has long taken the position that a trust contribution isn't a present-interest gift — and, therefore, is ineligible for the annual exclusion — unless beneficiaries receive actual notice of their withdrawal rights and a "reasonable opportunity" to exercise those rights. In at least one case, the U.S. Tax Court ruled that

the notice wasn't required. Nevertheless, to avoid an IRS challenge, it's prudent to provide beneficiaries with written notice of their withdrawal rights, preferably via certified mail.

There's no specific requirement regarding the amount of time that constitutes a "reasonable opportunity." The IRS has indicated in private rulings, however, that 30 days is sufficient, while three days is not. Common practice is to give beneficiaries between 30 and 60 days to exercise their withdrawal rights.

Handle with care

If you wish to make annual exclusion gifts to a trust, be sure the trust provides the beneficiaries with Crummey withdrawal powers. Crummey trusts present several potential traps for the unwary, so be sure your trust is drafted by an experienced attorney.

The Law Office of Eugene Gorrin, LLC

17 Watchung Avenue, Suite 204

Chatham, NJ 07928

973.701.9300

egorrin@gorrinlaw.com

www.gorrinlaw.com