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## Do Powers of Attorney Need New Gifting Rules?

It is one of the most common of all legal documents: The power of attorney form, in which an individual appoints an agent to handle financial, legal and tax matters. It's typically so routine nothing more than boilerplate is needed.

Yet changes in federal estate-tax laws in recent years mean that an advisor can help many clients by taking a fresh look at the details of their powers of attorney.

At an annual review, an advisor should ask a client to bring in a copy of an existing power of attorney and review the most important tax provision in this document: the right of the client's agent to make gifts. Most powers of attorney include specific provisions giving the agent the right to make annual exclusion gifts. This used to make sense; now, it often does not.

**STAY ACTIVE.**

### ESTATE-TAX ISSUE

The first consideration is whether a client is subject to the estate tax. When most power of attorney forms were created, the estate-tax exemption was much lower than today. As a result, making annual gifts was vital to reduce estate-tax costs.

Now, only 0.2% of taxpayers will incur a federal estate tax. Therefore, the gift power is at best useless — and in some cases, the gifting power has become a spigot to be exploited. Elder financial abuse has become a growing problem in recent years.

If your client has a net worth of less than \$5.43 million in 2015, heirs would face no federal estate tax. Unless your client lives in a state where the state estate tax has been decoupled from the federal tax, it could be advisable to have a power of attorney that expressly prohibits gifts.

Removing an agent's power to make gifts might be the most important financial move those clients ever make.

For very wealthy clients who will be subject to the estate tax, an agent's right to make gifts under the client's power of attorney is vital. Even here, however, a change is probably needed.

Boilerplate language that's almost ubiquitous permits annual gifts of a mere \$14,000 per person — which is insignificant from a planning perspective. What might be needed for such clients is a much broader gift provision.

### GIFTING MORE

Some wealthy clients, meanwhile, should actually be giving away more. Even extraordinarily prosperous clients may defer large estate planning transfers for fear of running short of funds (even if your projections assure them otherwise). If these clients become incapacitated without making such moves, tremendous opportunities could be lost.

For wealthy clients who have not used much of their \$5.43 million estate- tax exemption, an advisor should have a frank discussion about the desirability of authorizing an agent to gift their unused exemption.

Many clients are hesitant to permit such large gifts because they are worried about where the agent might direct those gifts. But for clients who already have irrevocable trusts in place, it is quite simple to direct the agent to make larger gifts to those existing trusts.

There are a couple of significant reasons such large gifts are important. For starters, if your client lives in a state that has decoupled from the federal estate-tax system, making gifts before death may reduce or eliminate any state estate tax. For example, New Jersey has a low estate-tax exemption — \$675,000 — but no gift tax. If the agent can gift away significant assets before the client dies, the New Jersey estate tax can be reduced substantially.

A second consideration: While the recent estate-tax law changes made a high exemption amount permanent, they also made permanent a 40% estate-tax rate. For wealthy clients whose estates might exceed the exemption, a larger gift program might avoid any tax.

Let's say your clients have already set up irrevocable grantor trusts — trusts that are outside the estate, but for which the client remains liable for income tax on trust earnings. This is perhaps the most common template for structuring trusts for very wealthy clients.

If the agent makes a large gift to this type of trust, the growth outside the estate and the income tax paid on trust income might suffice to keep the client's taxable estate below the exemption threshold and avoid any tax.

## ADJUSTING FOR INFLATION

The estate-tax exemption is also inflation adjusted. Since 2010, when the exemption was raised to \$5 million, adjustments have pushed the exemption upward by \$430,000. That is a lot of tax benefit to be left on the table by a gift provision that is too narrowly written. If a wealthy client were to become incapacitated, having an agent who may use the annual inflation adjustments to the gift exemption could be vital to reducing overall estate-tax costs.

In 2012, it was feared that the exemption would drop from \$5 million to \$1 million in 2013. While that drop never happened, many wealthy clients jumped on that planning opportunity. For those clients, permitting the use of the annual inflation adjustments may be especially important.

To identify these clients, check to see which have 2012 irrevocable trusts. Suggest that they return to their estate planning attorney to update the gift provisions in their powers of attorney to permit the agent to make gifts of any unused estate-tax exemption, which will encompass the annual increases.

A quick review of the gift provision of every client's power of attorney is likely to lead to specific, value-added planning recommendations. Advisors should be proactive in looking at client documents and encouraging the many clients who will benefit to update those forms.

*Martin M. Shenkman, PFS, CPA, JD, is a Financial Planning contributing writer and an estate planner in Paramus, N.J.*

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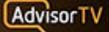
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