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Gifting Provisions in Powers of Attorney

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Wendy began working with students with special needs while at Rice just to earn a few extra dollars. After graduation her career found her working with The Center (serving persons with developmental disabilities), Harris County Mental Health and Mental Retardation Authority, Kansas Elks Training Center for the Handicapped, and the ARC. She worked as an administrator, abuse investigator, community residential program director, and community services developer. After about ten years of working with facilities, persons with developmental disabilities, and their families, Wendy found her way into law. Wendy has continued to support people with developmental disabilities and their families both in her law practice and as an active board member and past Chairperson of the Volunteer Services Council for the Brenham State Supported Living Center. Additionally, Wendy has served as a board member for the Brenham Rotary Club, Washington County Chamber of Commerce, and Washington County Bar Association.

Wendy and her husband, Rob, live in the country near Chappell Hill, Texas, where they enjoy their horses, dogs, and cats and growing hay. Rob and Wendy have also been involved for many years with SIRE, a therapeutic horseback riding program, the Salt Grass Trail Ride, and the Houston Livestock Show and Rodeo's Special Children's Committee. In their free time, they enjoy trail rides across Texas and camping and just spending time with friends on the porch.

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PROVISIONS IN POWERS OF ATTORNEY FOR DIFFERENT LEVELS OF GIFTING

For most people, gifts often conjure thoughts of extreme happiness, wrapped presents, and gratitude. But as estate planning and elder law attorneys, we often associate gifts with trouble and anxiety. Gifting powers in powers of attorney can be like the present you unwrap and then smile politely and say, “Oh, you shouldn’t have.” But gifting powers in powers of attorney, when properly drafted for a client’s particular circumstances, are great tools to facilitate effectuating a client’s goals and objectives while also protecting the client from potential financial abuse and exploitation.

This paper addresses some of the common issues to spot and address in a financial power of attorney related to gifts and discusses some of the ways to make sure the gifting power does what the client wants and needs it to do. References in this paper to the TEC are to the Texas Estates Code as currently amended. References herein to the IRC are to the Internal Revenue Code of 1986, as amended. References herein to POAs are to financial powers of attorney, whether durable, springing, general or limited. References herein to the DPOA Act are to the Texas Durable Powers of Attorney Act as currently amended and found in Subtitle P, Chapters 751 and 752 of the Texas Estate Code. References herein to a principal are to the person executing the POA, and references to an agent are to the person(s) designated as agents by the principal in the POA.

I. REASONS TO INCLUDE SOME GIFTING POWER (OR NOT)

A. Tax Planning

While fewer principals may be concerned with federal transfer tax issues these days because of the high exemptions (\$5.45 million per person in 2016), there are still principals whose estates are close to, or exceed, the federal transfer tax exemptions for estate, gift and generation-skipping transfer taxes. And even if a principal’s estate is not now close to, or over, such exemptions, it could be in the future. A principal who is at all concerned with transfer tax issues likely wants his agent under a POA to be able to make gifts that would minimize potential taxes owed to the IRS.

To minimize potential transfer taxes owed through gifting, the general idea is to give away certain property of the principal while the principal is living so that the value of the principal’s estate is less when the principal dies. When an asset is removed from a principal’s estate, all future appreciation in value of that asset and all future income generated by that asset are, thus, also removed. The lower the value of the principal’s estate when the principal dies, the less estate tax would be owed.

Some common examples of gifts intended to reduce the value of a principal’s estate for federal estate tax purposes include intentional annual gift tax exclusion gifts, gifts of assets expected to significantly appreciate in value prior to the principal’s death, and gifts of part ownership in land or a business entity. A common example of gifts to leverage use of a principal’s GST tax exemption is gifts to trusts for the benefit of the principal’s descendants to which the principal allocates a portion of his GST tax exemption. Cash payments for certain qualified educational and medical expenses pursuant to IRC Section 2503(c) are also examples of common tax-motivated gifts. Most gifts will usually be to or for the benefit of the principal’s spouse and/or other family members.

A related tax-planning type gift includes gifts of cash to life insurance trusts that are part of a principal’s overall estate plan. If a principal has a life insurance trust, the principal likely wants his agent under a POA to be able to continue to make gifts to such trust. The purpose of such gifts is to make sure that the trust has funds to pay the life insurance policy premiums that keep the policy in force and is not to

necessarily remove assets from the principal's estate. However, it is mentioned here because the overall purpose of the life insurance trust is usually tax motivated because the goal is to have the policy and its proceeds excluded from principal's gross estate for federal estate tax purposes.

In addition to transfer tax motivated gifts, a principal may wish to permit his agent under a POA to make gifts that produce an income tax benefit for the principal, such as gifts that result in a charitable deduction.

Beware that the Internal Revenue Service will only recognize a gift by a POA agent as being a gift of the principal's assets if the gift is authorized by and valid under Texas law. See TAM 199944005.

Gifts for tax planning purposes often involve gifts being made not just outright to a person but also to trusts and charities. Gift that exceed federal annual gift tax exclusion amount (\$14,000 per donee in 2016) and that constitute self-dealing transactions where the agent is effectively making gifts of the principal's property to himself are also common.

B. Needs-Based Benefit Planning

A principal who already qualifies for, or may want or need to qualify in the future for, needs-based benefits such as SSI, Medicaid, or certain VA benefits, more often than not wants to give his agent under a POA the power to make gifts in order to facilitate the principal's eligibility to receive those benefits while still preserving assets for a spouse or other family members and to avoid large spend downs. Needs-based benefits are generally understood to be governmental assistance programs or benefits open only to persons who own less than a certain value of certain assets. For example, to be eligible for Texas long term care (nursing home) Medicaid, a single person, in general, cannot own more than \$2,000 of what Medicaid considers to be countable resources. MEPS Handbook Section F-1300.

Gifting to facilitate needs-based benefit eligibility is tricky. Different needs-based programs and benefits have different eligibility rules and different rules related to gifts and other asset transfers. Thus, identifying which programs and benefits a client/principal may wish to plan for is critical in order for the POA to cover all anticipated transactions.

A detailed discussion of all the various gifting strategies that may be successfully used for needs-based benefit planning is beyond the scope of this paper. However, some common examples of gifting strategies for long term care (nursing home) Medicaid that avoid Medicaid transfer penalties include the following from the Medicaid for Elderly and People with Disabilities (MEPS) Handbook by the Texas Health and Human Services Commission:

- Gifting the principal's interest in his homestead to a spouse who lives in the home, a minor child under age 21 or a child who is disabled, a sibling who has an equity interest in the home and has lived there for at least one year prior to the principal's institutionalization in a nursing home, a child who has lived in the home for at least two years before the principal's institutionalization and provided care that prevented the principal's institutionalization, and a transfer to children, siblings, etc. via an enhanced life estate deed (Lady Bird deed) approved by the Medicaid Regional Attorney. Section I-3100.
- Gifting other assets to the principal's spouse or another for the sole benefit of the principal's spouse. Section I-3200.
- Gifting other assets to the principal's child who has a disability. Section I 3200.

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