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IRREVOCABLE GIFT TRUST (IGT)

It is generally well known that an individual may make, between January 1 and December 31 of each year, gifts on a gift tax-free basis in cash or property not exceeding $12,000, to as many individuals (recipients) as such individual desires. In other words, you could gift up to $12,000 worth of assets to one thousand different individuals during this year, whereby the total amount of the gifts is $12,000,000, without having to file a federal gift tax return; furthermore, those gifts would not be subject to estate tax upon your death. Exceptions apply if death were to occur within three years of gifting policies of life insurance that insure your life or if you are making a gift of a life estate.

Less well known, but vitally important, is that, with basically two exceptions, only gifts of a present interest will qualify for the $12,000 annual exclusion provided to taxpayers pursuant to the provisions of Section 2503(b) of the Internal Revenue Code of 1986, as amended. Therefore, you generally cannot make gifts to an irrevocable trust that will escape gift tax and estate tax inclusion.

An irrevocable gift trust ("IGT") is an irrevocable trust which is specifically structured so that gifts to that trust will qualify as a gift of a present interest and, therefore, will not be treated as taxable gifts. The trust agreement must provide that one or more beneficiaries of the IGT will have the power to demand a distribution of the assets gifted to the IGT within a reasonable period of time (generally 30 days) after such beneficiary receives notice from the trustee that a gift was made to the IGT. The withdrawal notice provided to the beneficiary generally will lapse after the expiration of such thirty day period. Many tax practitioners refer to the withdrawal power as a "Crummey" power in recognition of the taxpayer who successfully took this technique to the United States Court of Appeals for the Ninth Circuit in 1968 where the strategy was, in effect, approved.

For example, if the creator of an IGT gifts $36,000 to the IGT, and if the terms of the trust agreement creating the IGT require the trustee to provide three beneficiaries of the IGT (such as children or grandchildren of the creator of the IGT) with notice that the gift was made and that each such beneficiary has the power to withdraw up to $12,000 for a period of thirty days from the date each such beneficiary receives notice from the trustee of the gift to the IGT, the gift will qualify as a present interest gift with no estate or gift tax consequences. If none of the beneficiaries exercise their respective withdrawal power, the assets gifted to the IGT will remain in trust and be invested by the trustee for the benefit of the beneficiaries of the IGT. The full $36,000 gift to the IGT will not be subject to gift tax, nor included in the donor's estate when the donor eventually dies, by virtue of the annual exclusion attributable to the three withdrawal beneficiaries, assuming that the donor does not make any other gifts during the calendar year to any of those three individuals.

An important consideration when creating an IGT is determining who will be the trustee. Although the creator of an IGT can serve as the trustee or co-trustee for purposes of administering the IGT, including making decisions relative to the investment of the trust assets, there should also be a co-trustee who can exercise

discretion relative to making distributions during the term of the IGT. Moreover, it is important that the trustee or co-trustee be an individual or corporate entity who has experience in administering trusts and who is likely to maintain adequate records which establish that the written withdrawal notices have been timely furnished to the beneficiaries having the power to demand withdrawals of gifts made to the IGT from time to time. Oftentimes, friends and family members are not diligent in maintaining the necessary records to establish that there has been compliance with the terms of the trust agreement. Therefore, you may wish to consider using a trusted professional advisor or a corporate fiduciary, such as bank trust department or a trust company, as the trustee, or as a co-trustee with a friend or family member. If the IGT becomes the owner of a policy of life insurance, the insured under the life insurance policy should never serve as the trustee or a co-trustee.

What are the drawbacks of an IGT? Irrevocable is irrevocable. The person who gifts assets to an IGT cannot receive those assets back from the IGT for a financial emergency or because the creator later changes his or her mind. The creator of the IGT cannot change the beneficiaries or designate new beneficiaries if the creator of the IGT intends that the assets comprising the IGT will not be includable in the creator's estate for estate tax purposes when the creator dies.

IGTs should be considered by persons who wish to immediately implement an annual gift giving program to individuals including those who may not currently have sufficient maturity, age or inclination, to manage the assets which will be the subject matter of the gift. IGTs should be established by individuals having estates that exceed (or are anticipated to exceed in the future) the amount that can pass free of federal and state estate taxes.

An IGT is generally a more effective estate planning vehicle than an Age 21 Minor's Trust (commonly referred to as a Section 2503(c) trust) or a custodial account created under a state Uniform Gifts to Minors Act or Uniform Transfers to Minors Act. Both custodial accounts and Section 2503(c) trusts require that the funds comprising such custodial accounts or trusts be made available to the beneficiary once the beneficiary attains the age of 21 years, even though such beneficiary may not possess the maturity to make appropriate decisions concerning the use of the funds. Therefore, consider creating an IGT, rather than a custodial account or Section 2503(c) trust when contemplating making gifts to individuals who currently are not ready or able to manage funds.

The foregoing should not be regarded as offering a complete analysis or opinion on any provision of local, state or federal law. The foregoing is distributed with the understanding that the individual author and the law firm of Nash & Kromash, LLP are not rendering legal, accounting or other professional advice or opinions on specific facts or matters, and, accordingly, assume no liability whatsoever in connection with its use. You should not attempt to implement any of the estate and tax planning strategies set forth in this brochure without first obtaining competent, professional advice from qualified persons.

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