

STILL CRUMMEY AFTER ALL THESE YEARS

By Donald O. Jansen, J.D., LL.M.

TABLE OF CONTENTS

	Page
I. SCOPE OF ARTICLE AND INTRODUCTION	1
II. CRUMMEY POWERS AND GIFT TAXES	2
A. GIFT TAX ANNUAL EXCLUSION	2
1. Present Interest v. Future Interest Gifts	2
2. Gifts to Typical Life Insurance and Other Complex Trusts are Future Interests.....	2
3. Crummey Power Can Create Present Interest Gift	2
B. IRS REQUIREMENT OF NOTICE TO BENEFICIARY OF WITHDRAWAL POWER AND OF GIFTS.....	2
1. Notice of Power	2
2. Notice of Gift	2
3. Is Notice Necessary.....	3
4. Requirement and Type of Notice and Who Gives Notice	3
5. Relationship of Gift Transfer, Date of Notice and Lapse of Withdrawal Power	4
6. Notice Can't Be Waived	5
7. Is One Notice Enough.....	5
C. IRS REQUIREMENT OF SUBSTANTIAL FUTURE ECONOMIC BENEFIT—THE CRISTOFANI CASE.....	5
1. The IRS Position Pre-Cristofani	5
2. The Cristofani Case.....	6
3. IRS's Initial Reaction to Cristofani.....	6
4. IRS's Later More Aggressive Prearranged Understanding Response to Cristofani	7
5. Bottom Line	10
D. GIFT TAX CONSEQUENCES FOR POWER HOLDER — SHOULD THE WITHDRAWAL POWER FOR EACH BENEFICIARY BE LIMITED BY THE "5 AND 5" EXCEPTION	11
1. The Gift Tax Annual Exclusion is \$13,000 Per Donee	11
2. Withdrawal Power Is General Power of Appointment	11
3. The 5 and 5 Exception	11

TABLE OF CONTENTS

(continued)

	Page
4. Only One 5 and 5 Exception Each Year	12
5. Impact if power Lapses After Year End	13
6. \$13,000 versus \$5,000 Dilemma	13
E. IS THE ANNUAL EXCLUSION AVAILABLE IF THERE ARE MULTIPLE CRUMMEY POWERS FOR BENEFICIARIES OF A SINGLE TRUST?	15
F. PECULIAR ISSUES FOR IRREVOCABLE LIFE INSURANCE TRUSTS.....	16
1. Is the exclusion available if the only asset in an irrevocable life insurance trust is the policy?	16
2. Deemed or Indirect Gift	17
3. IRS No Ruling Attitude	17
G. MISCELLANEOUS CRUMMEY POWER CONSIDERATIONS.....	17
1. "Revocable" Crummey Powers	17
2. Avoid Intervening Trustee or Other Powers of Disposition	18
3. Amendable Crummey Powers	18
4. Avoid Reciprocal Crummey Powers	18
5. Amount of Withdrawal Power	18
6. Crummey Power Possessed by Minor or Other Incompetent.....	19
7. Trusts Without Express Crummey Powers	19
8. Tiered Crummey Powers	20
III. CRUMMEY POWERS AND INCOME TAXES	20
A. REASON FOR THE POWER.....	20
B. CRUMMEY WITHDRAWAL POWERS BEFORE LAPSE	20
C. LAPSED CRUMMEY POWERS.....	21
D. DIFFERENT RESULT IF THE GRANTOR IS THE "OWNER" — DEFECTIVE TRUSTS	22
IV. CRUMMEY POWERS AND ESTATE TAXES	24
A. POTENTIAL ESTATE TAXES.....	24
1. Unlapsed Powers.....	24
2. Lapsed Powers	25
3. The 5 and 5 Exception	25

TABLE OF CONTENTS

(continued)

	Page
4. Only One 5 and 5 Exception Each Year	25
B. \$13,000 v. \$5,000 DILEMMA	25
V. CRUMMEY POWERS AND GST TAXES.....	26
A. POTENTIAL GST TAXES	26
B. WHO IS THE TRANSFEROR? GRANTOR OR POWER HOLDER?.....	26
1. Background	26
2. Impact of Crummey Withdrawal Powers Upon Who is Transferor	27
C. ALLOCATION OF GST EXEMPTION BY TRANSFEROR	29
1. Lapse Does Not Exceed 5 and 5 Exception	29
2. Lapse Exceeds 5 and 5 Exception but Incomplete Gift	29
3. Hanging Crummey Withdrawal Powers	29
4. Lapse of a Power In Excess of 5 and 5 Exception Which Constitutes a Completed Gift.....	29
D. LAPSE OF CRUMMEY POWER POSSESSED BY A GRANDCHILD OR YOUNGER GENERATION.....	30
1. Nontaxable Gifts	30
2. Grandchild's (or Other Skip Person's) Trust	31
3. Grandchild Trust Gift Which is Partially Nontaxable Gift.....	31
4. Existence of a Grandchild's Withdrawal Powers Does Not Create a Direct Skip	31
E. ETIP RULES AND WITHDRAWAL POWERS.....	32
1. Estate Tax Inclusion Period (ETIP)	32
2. Spousal Crummey Powers	32
VI. SOME THOUGHTS ON SELECTING CRUMMEY WITHDRAWAL CLAUSES.....	32
A. One Generation Trust.....	32
B. Lifetime Beneficiaries.....	33
C. Frontend Load.....	33
D. Hanging Power Solution.....	33

TABLE OF CONTENTS

(continued)

	Page
VII. OTHER CRUMMEY USES AND ISSUES.....	33
A. Creditors and Divorcing Spouse of Beneficiary	33
1. Court Ordered Exercise.....	33
2. Uniform Trust Code.....	33
3. Check State Law	33
4. Possible Protections	34
B. Withdrawal Powers and Secular Trusts	34
1. Deferred Compensation and a Secular Trust	34
2. Secular Trust Must Be an Employee Created Grantor Trust	34
3. Withdrawal Power to the Rescue.....	34
C. Crummey Trusts and S Corporations.....	35
1. Grantor Trust Is a Permitted S Corp Shareholder	35
2. Use of a Crummey Trust to Qualify	35
3. Example	35
4. Caveats.....	35