



WHAT ARE THE BENEFITS OF MAKING A GIFT OF A RESIDENCE IN TRUST VERSUS OUTRIGHT?

The benefits of making a gift in trust is if the donor is married, he or she can retain indirect use of the real estate, because the spouse, as beneficiary of the trust, would be entitled to use the property rent-free. Normally, if a donor makes a gift of a residence, the only way he or she can still use the property is if he or she pays fair market rent. Otherwise, the IRS would likely argue that the donor retained use of the property and seek to include the property in the donor's estate under the retained life estate provisions of Internal Revenue Code section 2036.

However, if the spouse dies or they become divorced and the grantor desires to continue to use the property, or, if the donor does not have a spouse, he or she would need to rent from the trust. This can actually be a positive planning technique, since if the trust is structured as a "grantor trust," the payment of rent will not be considered income for the trust and the payment of rent becomes, in essence, an additional gift tax free gift to the trust.

Making a gift of the real estate in trust versus outright is also a way to protect and preserve the real estate for the intended beneficiaries. If a gift is made outright to a beneficiary and the beneficiary dies, gets divorced or has creditor problems, the real estate would be disposed of in accordance with the beneficiary's estate plan or may be subject to divorce or bankruptcy proceedings. Retaining the real estate in a properly drafted creditor protection trust can keep the property protected from those claims.

The grantor can also set out in the trust agreement exactly how the real estate will be managed. Use of a trust will effectively restrict the transfer of the real estate and keep its use within a class of beneficiaries. The trustee controls how and when the property is used. An important part of putting the real estate in trust is to provide for how the real estate expenses will be made. Will it be expected that the beneficiaries contribute or pay rent? What if some of the beneficiaries use the property and some don't? It may make sense to endow the trust with a sum of money to cover capital expenses and repairs. Even so, it can be difficult for a trustee to manage the divergent interest of the beneficiaries.