
Why is My Excellent Attorney Issuing a Crummy Notice?

By Robert D. Kaplow, Esq.

In meeting with your estate planning attorney, your attorney may have said that he or she was going to issue a Crummey notice. No, the notice is not crummy or bad, it is based on a 1968 case, *Crummey v. Commissioner*. Before I can answer why the Crummey notice is being issued, some background information is required.

The Internal Revenue Code provides for estates and gifts to be taxed once the assets gifted, or the estate, or the combination thereof, is greater than \$5,450,000 (in 2016). However, the gift tax rules allow for an “annual exclusion” which currently is \$14,000 per donee per year. Gifts that qualify for the annual exclusion do not reduce the \$5,450,000 exemption. In order for the annual exclusion to apply, the gift must be a “present interest”. Thus, if you give your daughter \$14,000 in cash, that is a present interest since your daughter can take that money and do with it as she pleases (theoretically). However, a gift into a trust, where the beneficiary may not receive the use of that money for years and years, is not a present interest. Thus, the gift into a trust would not qualify for the annual exclusion. However, the attorneys for Dr. Crummey wanted to come up with a way to qualify the gift to the trust as a present interest in order to qualify for the annual exclusion. They suggested that the beneficiaries be given a limited period of time in which to withdraw the money contributed to the trust. They also provided that the beneficiary would receive notice that he or she has the right to withdraw that money. Thus, because the beneficiary had the right to withdraw the gift to the trust (even though only for a limited time period), they believed that the gift qualified as a present interest.

While the Internal Revenue Service argued that such a withdrawal right was not a present interest, the court held that such a provision is a present interest which qualifies for the annual exclusion. Because the beneficiaries had the right to withdraw trust corpus, and the trustee was legally obligated to respect that withdrawal right, the court held that each beneficiary had a present interest, even though their present interest only existed for 30 days.

Thus, the notices to the beneficiaries are sometimes referred to as “Crummey” notices based on the case of the same name.

However, what happens if the notice is not sent? Does that mean that the annual exclusion is no longer available? While you might think that would be the case, the courts have been liberal in allowing the present interest annual exclusion to apply even where the notice has not been given. For example, various rulings have approved the annual exclusion where the Internal Revenue Service was satisfied that the beneficiary had actual notice and knowledge of the demand right.

However, the taxpayer bears the burden of proof in demonstrating the beneficiary’s actual knowledge of the demand right. In addition, where the beneficiary was the spouse of the grantor and also served as trustee, no written notice was required because the Internal Revenue Service determined that the beneficiary (who was also the trustee) had actual knowledge of the demand right since the trustee is deemed to know the provisions of the trust.

A recent case further expanded the ability to qualify for the annual exclusion without delivery of the notice. In *Turner v. Commissioner*, TC Memo 2011-209 (2011), the Tax Court held that the annual exclusion was applicable even where no notice had been given of the right of withdrawal. The court held that the test was whether the beneficiary had the **legal right** to demand the withdrawal, even in a situation where they did not know they had the right. Thus, in *Turner*, the annual exclusion was allowed even though the beneficiaries were not even aware of their withdrawal rights because the trust gave them the legal, enforceable right of withdrawal. Of course, the best way to avoid issues with the withdrawal right is to have the trustee of the trust send out a notice to the beneficiaries of their withdrawal right promptly upon receipt of the gift to the trust.

If you would like to discuss some of the ramifications of the Crummey notices, please contact one of our [estate planning](#) attorneys.