

## **The Law and You Gifting Now or Through Your Will?**

Most of us give gifts for birthdays, Christmas, weddings, and for many other occasions.

For major gifts, especially to our children, we can give them during our lifetime or wait until after death. That is, we can leave our property and things to our children through a Will or other testamentary instrument, including a Trust.

A common question, however, is it better to give while living or through a Will?

There are several factors to consider before deciding which manner of gift giving is best for you. First, consider whether the property you intend to give is needed for your care or enjoyment, whether it be real property (*i.e.*, “real estate”) or personal property (all other tangible and intangible property).

Second, consider the tax implications.

If your estate is now greater than \$1.5 Million, if single, or \$3.0 Million if married, your estate will likely be subject to estate taxes after paying all of your medical, funeral, burial, and other expenses. Since the federal estate tax rate is greater than 50%, it may make sense to begin making gifts now to avoid such taxes.

Lawyers often use the term “*inter vivos*” when referring to gifts made during one’s lifetime.

In considering federal estate tax savings, you must also be mindful of other tax implications of an *inter vivos* gift. That is, an *inter vivos* gift carries with it your tax basis. The consequence of this fact is that all appreciation or gain in value of the gift will become taxable when sold by the donee.

Such capital gains tax can be significant when the gift is a home that was purchased decades ago. For example, suppose that you purchased your home in the early 1960s for \$25,000. If you make an *inter vivos* gift of your home to your child or your children, their

tax basis will be \$25,000.

Further suppose that you are still living in the home and they wait until your death before selling it. At that time the home could have a fair market value of \$200,000. When sold, your children would have a capital gain of \$175,000, on which they would have to pay capital gain taxes at the prevailing rates.

If the home you give to your children becomes their residence and they live in the home for at least two years, then they could avoid the capital gain taxes under current tax laws. Also, depending on the size of your estate, the federal estate taxes on such a home, if kept in your estate until your death, could be substantially greater than the capital gain tax rate.

Tax laws and rates are always subject to change. For instance, Congress is and has been wrangling over whether or not to keep the estate taxes or terminate them. Therefore, whatever plans you make now, you should periodically review them for changes in federal and state tax laws.

The alternative to an *inter vivos* gift is a testamentary gift. That is, the property is given after your death through a Will or a trust.

The advantages of making gifts in this manner are (1) the tax basis is stepped up to the fair market value on the date of death; (2) you have full ownership and control of such property during your lifetime; and (3) your intent to make such a gift is revocable, allowing you to change your mind or to make changes in response to changes in the tax laws or changes in family relationships.

If your estate is not large enough to be subject to estate taxes, you should seriously consider the avoidance of capital gain taxes through a testamentary gift, rather than through an *inter vivos* gift.

And remember, adding a child’s name to

your deed is equivalent to giving that child an *inter vivos* gift of ½ of your home. That ½ ownership in your home will subject your child to the capital gain tax discussed above.

It is best to consult with an Elder Law Attorney to assist you in analyzing your options and your particular situation before deciding on which method of giving is best for you and your children or other donees. To locate one, check with the National Academy of Elder Law Attorneys at (520) 325-7925 or at their web site: [www.naela.com](http://www.naela.com), or consult your local Yellow Pages under Elder Law.

**YOUR QUESTIONS:** Do you have a particular question that you would like answered? To better serve the readers of the Utah Spirit, please direct your questions in writing to Michael A. Jensen, Elder Law Attorney, PO Box 571708, Salt Lake City, Utah 84157-1708, or by e-mail at: [mike-spirit@utahattorney.com](mailto:mike-spirit@utahattorney.com). From time to time, I will attempt to answer some of those questions.