

Giftgiving: A Property Transfer Tool of Estate Planning

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This MontGuide explains how to use laws that allow gifts of real and personal property to reduce federal income taxes, federal gift taxes and potential federal estate taxes. Included are changes resulting from The Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010.

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ONE GOAL OF ESTATE PLANNING FOR SOME

families is to ensure maximum enjoyment of the property while the owners are alive, and then at death transfer it according to their wishes. However, some Montanans believe that they receive the greatest benefits when they transfer property before their death, while they can still guide and affect the outcome. This can be accomplished through an estate planning tool called gifting.

In addition to expressing love and affection, gifts serve other purposes. They can give children an opportunity to participate in the management of a family business, help finance a college education, or pay medical costs.

Gifts are an important estate planning tool for Montanans. Gifts reduce the size of an estate. As a result there may be savings in probate expenses and federal estate taxes. Gifts can also accomplish income tax savings during life by shifting income producing property from one family member to another who is in a lower tax bracket. Gifts can also remove the value of appreciating property from the estate.

Lifetime gifts, however, whether to a spouse, children or others, should be examined very carefully. Those making the gifts should be sure they are not depleting assets to the point they do not have enough for their own support.

What is considered as a gift?

Giving away property may sound simple at first, but the federal gift tax law and changes resulting from the passage of The Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 should be considered. Highlights of the law are summarized throughout this MontGuide.

The federal government levies a gift tax upon transfers of real and/or personal property made during the transferor's lifetime without adequate and full

consideration. In other words, any transfer of value is subject to federal gift taxation if the person making the gift does not receive something of similar value in exchange.

Types of property that can be transferred as a gift include almost any item with a monetary value such as: real estate, stocks, bonds, mutual funds, certificates of deposit, equipment, livestock or cash.

The monetary value of the gift is the fair market value of the property on the date the gift was made, less the fair market value of any property received in return. The IRS definition of fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under compulsion to buy or to sell, and both having reasonable knowledge of all relevant facts.

Example A: If a father gives his son land worth \$100,000, the father has made a \$100,000 gift. If the father sells the same land to his son for \$1,000, he has made a gift of \$99,000 [the difference between the fair market value (\$100,000) and the value received from the son (\$1,000)].

There is no gift until the transfer is complete. The person making the gift must part with the property and control over it (or part of it) before it is considered a gift. This can be accomplished by transferring the title to the property to the name of the person who is receiving the gift.

Example B: A father purchases a section of farmland with his personal funds. He places the title in his name and his daughter's name as joint tenants with right of survivorship. Although the daughter did not contribute towards the purchase price of the farmland, she has a legal and/or tax interest in the property. For this reason, the one-half interest in the farmland is a gift from the father to his daughter.

If the owner maintains any right to the property, such as the ability to receive income from the property or to receive a remainder interest if the donee (the person receiving the gift) should die before the donor, then the gift transfer is not complete.

Example C: A father creates a revocable trust under the terms of which he receives income for life for himself with the principal to his wife upon his passing. Because the father has reserved income for himself and because he can revoke the trust, the assets in the revocable trust are not a completed gift.

Who pays the federal gift tax?

The person liable for the payment of the gift tax is the individual making the gift (donor). If the donor does not pay the gift tax, the receiver (donee) of any gift becomes personally liable for the tax that is due.

The donee is not required to declare the gift amount as income. The donee, however, must pay state and federal income tax on any income produced by the property after the date of the gift.

Example D: A mother gave her adult daughter a check for \$13,000. The gift is not considered as income to the daughter. The daughter placed the money in a certificate of deposit that earned \$130 during the year. The interest earned on the CD is added to the daughter's annual income of \$35,000. The daughter is responsible for state and federal income taxes on her total income of \$35,130 (\$35,000 salary + \$130 interest on the gift of \$13,000 = \$35,130).

Annual gift exclusion

During 2011 federal law permits an annual exclusion of up to \$13,000 on transfers to family members or other persons without payment of the federal gift tax. Thus, a Montanan may give up to \$13,000 a year to as many people as he or she desires.

From 1998-2001, the amount of the annual exclusion was \$10,000; from 2002-2005, \$11,000; from 2006-2008, \$12,000; and beginning in 2009, \$13,000. The annual exclusion has been indexed for inflation since 1998 and by regulation cannot be increased until the increment has reached \$1,000.

Example E: A father could give each of his four children up to \$13,000 in assets annually. No federal gift tax return would be required to be filed. The father could continue gifting \$13,000 for each child for as many years as he desired and reduce his taxable estate by \$52,000 each year. His children would not have to

pay income taxes on the gift amounts they received. However, each child would be responsible for state and federal taxes on any income earned on the gift property following the date of the gift.

A federal gift tax (Form 709) return does not need to be filed with the Internal Revenue Service for gifts lower than the annual exclusion (\$13,000). The annual exclusion is not cumulative and cannot be carried over from one year to the next.

Example F: A mother gifted her daughter \$5,000 in 2011. The annual exclusion is \$13,000. She cannot carry over the remaining \$8,000 to 2012 and have \$21,000 as an annual exclusion. In 2012, only a \$13,000 gift to the daughter would qualify under the annual exclusion (assuming the annual exclusion does not change in 2012).

Gifts by married couples

Each spouse can give up to \$13,000 per person per year, for a total of \$26,000 by a married couple. Gifts made by a married couple from jointly held assets, such as jointly owned real estate, a joint bank account, or a joint investment account, are treated as being made equally by each spouse.

If an asset is titled solely in the name of one spouse, the spouse who doesn't own an interest in the asset can elect to split the gift by making an election on a federal gift tax return. The gift is then treated as being made equally by both spouses.

Example G: A father and mother can give each of their three children up to \$26,000 annually. The parents can continue gifting for as many years as they wish and reduce their taxable estate by \$78,000 each year. Each child will not have to pay a federal gift tax on the \$26,000, but each will have to pay state and federal income taxes on any income earned on the gift following the date of the gift.

If only one spouse is making a gift that exceeds the \$13,000 annual exclusion, the other spouse should sign the federal gift tax return as well as file his or her own return reporting one-half of the gift to elect gift splitting between spouses. This will ensure that the federal gift tax on the first \$26,000 of the gift is eliminated because both the husband and wife have taken advantage of their annual exclusion of \$13,000 each. Alternatively, each parent could write a check for \$13,000 and avoid having to file a federal gift tax return.

Example H: A father owns a small lot in his community valued at \$26,000. The father desires to give the lot to his son, but the value exceeds the \$13,000 annual exclusion. The mother (wife) may consent to split the gift with her husband on a federal gift tax return. The husband and wife will each be treated as having made one-half of the gift of land to the son, or \$13,000 each. Both gifts fall within the annual gift tax exclusion of \$13,000.

Gifts resulting from the transfer of a life insurance policy

Life insurance policies are subject to federal estate taxation if the insured owns the policy at the time of his or her death. Some persons give these ownership rights to another person or a trust while the insured person is alive.

The transfer of ownership of a life insurance policy without retaining incidents of ownership constitutes a gift for federal gift tax purposes. Incidents of ownership include the right to borrow against the policy, cash in the policy, or change beneficiaries.

The value of a gift of life insurance that is paid up at the time of the gift is equal to the cost of replacing the policy. If the policy is not paid up, the amount is approximately equivalent to the cash value. The replacement and cash values may be obtained from the insurance company that issued the insurance policy.

Example I: A father transfers ownership of a paid up life insurance policy to his son. While the son became the new owner, he is still designated as the beneficiary of the life insurance proceeds. The father remains as the insured. The replacement value of the policy is \$31,000. An annual exclusion of \$13,000 is allowed on the transfer. The remaining \$18,000 is subject to federal gift taxation.

The transfer of a life insurance policy may also have federal estate tax consequences. If a person dies within three years of the life insurance policy transfer, the death benefit would be included in the gross estate.

Example J: In 2007, a father transferred ownership of a life insurance policy to his son. If the father died in 2011, the death benefit will not be included in his gross estate upon his death because the father lived beyond three years after the transfer of the life insurance.

Payment of a life insurance premium on a policy owned by another is considered a gift of the amount of the premium. The amount of the gift is reduced by the annual gift tax exclusion of \$13,000.

Deductions and exemptions

The federal gift tax law contains several provisions for deductions and exemptions, including the gift tax marital deduction, the education and medical services exemption, and the charitable deduction.

Gift Tax Marital Deduction

Married people can make gifts of any amount to one another by taking advantage of the *unlimited marital deduction* provision in the federal gift tax law. No gift tax is due and no federal gift tax return is required to be filed for gifts between spouses. The marital deduction is only unlimited, if the spouse is a U.S. citizen.

Example K: Jennifer could place her husband's name as a joint tenant with right of survivorship on a \$200,000 home that she inherited from her mother. Jennifer would not be required to file a federal gift tax return because of the unlimited marital gift tax deduction.

Education and Medical Services Exemptions

Any amounts paid by a donor directly to a qualified educational organization for tuition or directly to a health care provider for medical services are excluded from federal gift taxation.

Example L: Merle's granddaughter is attending an Ivy League university with an anticipated cost of \$50,000 annually. Merle can write a check directly to the University for tuition and fees. The amount is not subject to federal gift taxation because the expenses fall under the education exemption. Merle could also give \$13,000 directly to his granddaughter under the annual gift tax exclusion provision.

Example M: Joe's grandson had a medical condition that was not covered by his parents' medical insurance. Joe can write a check directly to the hospital for \$30,000. He is not required to file a federal gift tax return because the expenses fall under the medical services exemption.

Charitable Deductions

Gifts made to qualified charitable, religious, educational, government agency and numerous IRS qualifying organizations with a tax-exempt status [501(c)(3)] are completely gift tax free.

Example N: A 4-H leader plans to gift land valued at \$250,000 to the Montana 4-H Foundation for a youth camp. The amount would qualify as a charitable deduction because the Montana 4-H Foundation is a qualifying organization with a tax exempt status.

The gift should be made directly to the organization specified. For example, if a gift to a church is to qualify for the gift tax charitable deduction, the check should be made to the church rather than to the minister. If there is any doubt whether an organization is a qualifying charitable organization under 501(c)(3), ask the organization to provide a copy of the IRS determination letter granting the organization exempt status or check on the IRS website www.IRS.gov.

Applicable credit and exclusion

Federal law allows for the deduction of an applicable credit from the tentative gift tax. The federal gift tax applicable credit during 2011 and 2012 is \$1,730,800. This translates into an applicable gift tax exclusion of \$5 million in 2011 and 2012.

The applicable credit is used to offset gift taxes that are due on transfers made during life. However, when the applicable credit is used during life on gifts (exceeding the annual exclusion of \$13,000), the amount of the applicable credit remaining to offset the federal estate tax is reduced. Federal law provides for only one applicable credit for both the federal estate and federal gift tax.

Example O: A rancher with a \$4.5 million estate in 2006 transferred land valued at \$1 million to his daughter. In 2006 the federal gift exclusion amount was \$1 million. The tentative tax on the \$1 million gift was \$345,800 (see Table 1). The rancher did not have pay the tentative tax of \$345,800 because he used his applicable credit. If the rancher dies in 2011 or 2012, his remaining applicable credit is \$1,385,000 (\$1,730,800 applicable credit - \$345,800 of prior applicable credit used = \$1,385,000).

The applicable gift tax credit of \$1,730,800 in 2011 and 2012 translates into an applicable exclusion of \$5 million. This amount is the same as the federal estate tax exclusion of \$5 million. A person does not have two separate applicable credits. There is only one applicable

credit. This means a person can transfer during life, in addition to the annual exclusion of \$13,000, a total of \$5 million in assets and no federal gift tax is due (see Table 1). However, if a person uses up his applicable credit during life for gifting, then there is no applicable credit available for his estate at death.

Federal gift tax rate

The tentative tax on the first \$500,000 of gifts during the years 2011-2012 is \$155,800. Gift amounts of over \$500,000 are taxed at a rate of 35 percent. The same rate applies for the federal estate tax (see Table 2, page 5). For example, the tax on \$15,000 would be \$2,800 [$\$1,800 + \$5,000 (\$15,000 - \$10,000) \times 20\%$].

The tentative gift tax in 2011 and 2012 is reduced by the applicable credit of \$1,730,800. The accumulated lifetime taxable gifts over the \$5 million applicable exclusion amount will create a gift tax liability.

Example P: Bill has a business that is valued at \$5 million. If he gives the business to his son in 2011, there is a gift tax exclusion of \$5 million. No federal gift tax is due on Bill's gift. However, the basis that Bill had in the business of \$100,000 carries over to the son (see **Basis of property after gifting**, page 6).

Example Q: Assume Bill had not gifted his business and that he died in 2011 owning no other assets and having not made any taxable gifts during his lifetime. The business would pass to his son, but there would be no federal estate tax because of the exclusion amount of \$5 million. The basis in the business would be stepped up from \$100,000 to \$5 million at Bill's death.

Whether Bill decides to gift the business to his son while he is alive or bequeath the business after his death may depend on his financial objectives.

Accumulation of gifts

Federal gift tax law requires the value of all taxable gifts given each year to be accumulated before computing each year's gift tax. The applicable credit amount of \$1,730,800 is used to reduce the gift tax payable. When the taxes payable are larger than the unused applicable credit amount, the excess must be paid as a gift tax.

Example R: In 2011, Dan makes a \$30,000 gift to each of his eight children, their spouses, and 16 grandchildren for a total of \$960,000 ($\$30,000 \times 32 = \$960,000$). He is allowed an annual exclusion of \$13,000 for each gift for a total of \$416,000. The tax on the remaining \$544,000 of his gifts will reduce his gift tax applicable exclusion and credit (Chart 1).

TABLE 1. Applicable Exclusions and Credits 2001 - 2012

Federal Estate Tax Exclusions and Credits		
Year of Death	Applicable Exclusion	Applicable Credit
2001	\$ 675,000	\$ 220,550
2002 - 2003	1,000,000	345,800
2004 - 2005	1,500,000	555,800
2006 - 2008	2,000,000	780,000
2009	3,500,000	1,455,800
2010	N/A	N/A
2011 - 2012	\$ 5,000,000	\$ 1,730,800

The tentative federal gift tax on \$544,000 in 2011 is \$171,200 (\$155,800 on the first \$500,000 plus 35 percent of the next \$44,000 = \$171,200). The tentative gift tax (\$171,200) is subtracted from the father's available applicable credit of \$1,730,800. The remaining amount of the father's applicable credit for future gifting while alive or for bequests after his death is \$1,559,600 (\$1,730,800 - \$171,200 = \$1,559,600) (Chart 1).

Gifts within three years of death

Generally, gifts of interests in property otherwise included in the gross estate under the so-called "strings attached" provisions or which would have been included had the interest been retained by the decedent are included in the gross estate, if transferred within three years of death. In

addition, any gift tax paid by the decedent or his or her spouse within three years of death will be included in the gross estate for federal estate tax computation purposes.

Example S: When a father learned he had terminal cancer with an unknown survival time, he gifted his \$5 million ranch to his son. He filed a gift tax return and used up his applicable credit. The father continued to pay property taxes on the property and continued to make business decisions. In this case the IRS ruled that the property value had to be included for federal estate computation purposes because of the "strings attached" provision.

Also, a gift of a life insurance policy made by a decedent within three years of death is included in the decedent's gross estate.

Example T: Assume that a father owned a term life insurance policy with proceeds of \$500,000 payable at his death and that the policy had no current gift tax value. In 2011, he transferred ownership to his daughter, who is also the beneficiary. No other taxable gifts were made by the father.

In the year 2012, the father died owning ranch land valued at \$5 million. The life insurance proceeds (\$500,000) passed directly to his daughter. However, the value was included in the father's gross estate for estate tax computation purposes because he did not live three years after transferring ownership of the policy. The father's gross estate includes the life insurance policy proceeds (\$500,000) and his ranch (\$5 million) for a total value of \$5.5 million. The federal estate tax was \$175,000 (\$1,905,800 tentative tax - \$1,730,800 applicable credit = \$175,000). The father's ownership of the term life insurance policy within three years of his death resulted in his estate owing \$175,000 in federal estate taxes.

Example U: If the father had lived at least three years (dies in 2015 and assuming the federal law doesn't change) after transferring ownership of the policy to his daughter, the \$500,000 in proceeds would not have been included in his estate. The federal estate tax would have been computed on \$5 million instead of \$5.5 million and no federal estate tax would be due because of the \$5 million exclusion.

TABLE 2. Federal Gift and Estate Tax Rates, 2011 and 2012

Taxable Gift or Estate		Tentative Tax	
Column A	Column B	Column C	Column D
From	To	Tax on Column A	Rate on Excess of Column A
\$ 0	\$ 10,000	\$ 0	18%
10,000	20,000	1,800	20%
20,000	40,000	3,800	22%
40,000	60,000	8,200	24%
60,000	80,000	13,000	26%
80,000	100,000	18,200	28%
100,000	150,000	23,800	30%
150,000	250,000	38,800	32%
250,000	500,000	70,800	34%
500,000		155,800	35%

CHART 1. An example of how Dan's gift taxes are calculated as follows (Example R):

A. Total Gifts	\$ 960,000
B. Annual Exclusion for each donee ("A" less "B")	- 416,000
C. Aggregate of all prior and present taxable gifts ("A" plus prior taxable gifts)	\$ 544,000
D. Tentative gift tax on amount in "C" (from current tax table)	\$ 171,200
E. Aggregate of all prior taxable gifts	0
F. Tentative gift tax on amount in tax "E" (current tax table)	0
G. Tentative gift tax on amount of present gift ("D" less "F")	\$ 171,200
H. Gift tax credit for 2011 and 2012	\$ 1,730,800
I. Subtract Aggregate gift tax credit taken for prior post-1976 gifts (but not more than "H")	\$ 171,200
J. Applicable Credit available for future gifts or bequests ("H" less "G" but not more than "H")	\$ 1,559,600

Basis of property after gifting

All property (real estate, stocks, bonds and mutual funds) that a person owns has a basis for income tax purposes. For example, land purchased years ago for \$47,000 has a basis of \$47,000 even though its current market value is \$900,000.

Property received by a donee as a gift from a donor has a carry-over basis. This means that the donee assumes the basis of the donor.

Example V: In 2011, a father gifted land to his daughter that was valued at \$5 million. The father paid \$100,000 for the land. The daughter assumes her father's \$100,000 basis in the property. If she sells the property, she is responsible for the income tax on the capital gains which is the difference between the basis (\$100,000) and the fair market value at the time of the sale (\$5 million). Thus, after the sale the daughter would owe income taxes of \$735,000 on the \$4.9 million capital gain (assuming a capital gains tax rate of 15 percent).

Property that is received from a person who died (decedent) receives stepped-up basis. This means that typically the value is stepped-up to the fair market value at date of the decedent's death or stepped-down if the property is worth less than the decedent paid for it.

Example W: If the father from Example V had died in 2011 and the property passed to his daughter, she would have received a stepped-up basis in the property. This means the value in the land will be stepped-up from \$100,000 to \$5 million. There was no federal estate tax on the property because of the applicable exclusion of \$5 million in 2011. If the daughter sold the property in 2011 for \$5 million after her father's death, there would be no capital gain and thus, no income tax, because she sold the property at the stepped-up basis value.

Federal gift tax return filing requirements

A donor is required to file a federal gift tax return (Form 709) to report gifts amounting to more than \$13,000 (adjusted annually by the consumer price index) to any one donee (other than a spouse) in any one year.

Gifts of future interests (certain gifts in trust) of any amount are required to be listed on a gift tax return. Future interest is a complex legal term that includes reversions, remainders, and other interest or estates that the donee can "enjoy" at some future date. A remainder interest in a trust is an example of a gift of future interest.

Future interest gifts do not qualify for the annual gift exclusion. In other words, a gift of the future remainder interest in an irrevocable trust to grandchildren is fully taxable. The amount is not reduced by \$13,000 for each grandchild. The annual exclusion per donee applies only to gifts of a present interest.

If a federal gift tax return (Form 709) is required, it must be filed by the due date of the donor's income tax return (including extensions) for the calendar year in which the gift was made.

Example X: If a mother makes a taxable gift to her daughter in November 2011, she must file a federal gift tax return by April 15 of the next year just like her regular taxes. By applying for an extension, the mother can file the gift tax return as late as October 15, 2012.

Gifts for my situation?

Gifting is usually combined with other estate planning tools as individuals and families develop and implement their estate plans. Farm and ranch families with family farm partnerships and corporations often make annual gifts of stock or partnership shares to their descendants. This can be a very effective means of making incremental shifts in ownership and control. However, if the number of intended heirs is large, gifts of stock also can result in the corporation having many owners, with each having a small ownership interest.

Cash gifts to intended heirs can be used to pay the premiums of life insurance on the donor. The policy may be owned by the gift recipient. Upon the death of the donor, the life insurance proceeds can be used to pay federal estate taxes, to implement a buy-sell agreement, to pay the remaining balance of a sales contract for land purchased from the donor, or for other similar uses. Life insurance policies owned by beneficiaries are not included in the donor's estate unless the policy was gifted within three years of the donor's death.

Changes are continual in federal gift and estate tax laws. Contact an attorney and/or a certified public accountant to learn what effect these changes may have on your present or future estate planning objective of gift giving particularly in light of the "Temporary Estate Tax Relief" provisions in The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010.

Acknowledgments

Representatives from the following reviewed this MontGuide and recommend its reading by all Montanans.

- Business, Estates, Trusts, Tax and Real Property Section – State Bar of Montana
- Federal Taxation Committee – Montana Society of Certified Public Accountants
- University of Montana – School of Law

MSU Extension Estate Planning MontGuides

MSU Extension has many estate planning MontGuides to educate Montanans about a variety of topics. Copies can be obtained from your local Extension office or printed out at <http://www.msuextension.org/store> or www.montana.edu/estateplanning.

Disclaimer

This publication is not a substitute for legal advice; rather it is designed to help persons become better informed of the basic provisions of the federal gift tax law. There are numerous exceptions and conditions to some of the concepts discussed. Future changes in laws cannot be predicted and statements in the MontGuide are based solely on the laws in force on the date of publication.



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