

Options for Updates to Federal Estate Tax Planning

In years past, many individuals (couples) were more likely to be affected by federal estate taxes. Over the years, the federal estate tax threshold varied widely, the effect of which was to subject a large variety of persons to federal estate taxes. The federal estate tax rate varied from time to time, but often was said to start at an effective rate of about 37% then graduated to approximately 50% as one's assets were considerably larger.

A standard plan for federal estate tax engineering was to often place approximately half of a couple's assets under the husband's control, and appropriately the same amount under the wife's control. Each spouse would then create something known as a Residuary/Bypass Trust, to take full advantage of the credit against federal estate taxes while passing any excess assets to or for the benefit of the surviving spouse. Maintaining such a plan after the death of the first spouse took some "care and feeding", namely the Trust had to be set up, it had to be administered by Trustees (sometimes family members) and usually state and fiduciary income tax returns had to be prepared.

All of that was worthwhile to reduce or in many cases eliminate federal estate taxes.

Upon the death of the first spouse, when the Residuary/Bypass Trust was created that assured the security of the surviving spouse (but not any subsequent spouse) and essentially assured that the assets in the Trust created upon the death of the first spouse would ultimately pass to beneficiaries chosen by both spouses, normally children and grandchildren.

Because of the revisions to the federal estate tax law and the expansion of the threshold (currently about \$5.5 million dollars for decedents who die in 2017) the above mentioned federal estate tax planning often is not necessary. People sometimes opt for what is known as the "portability" provisions, so that any unused federal estate tax exemption, upon the death of the first spouse, becomes "portable" and can be used by the second spouse.

If the older and what had been a customary version of federal estate taxes no longer is necessary, what are the ramifications and options:

- A. The couples could eliminate the federal estate tax planning and eliminate the Residuary/Bypass Trusts and place most of their assets in joint names, or in Tenants by the Entirety (a survivorship feature) with the other. That is a simple technique. When the first spouse dies, just with a death certificate the surviving spouse usually has control of all assets. There are no Pennsylvania inheritance taxes in that instance as well. With portability, both spouses can transmit nearly \$11 million dollars' worth of assets to non-charitable beneficiaries (customarily children and grandchildren) without incurring any federal estate tax. That plan, however, does not provide the assurance that the former federal estate tax plan did provide, namely that some of the assets would customarily be guaranteed to be received by the children on the death of the second spouse. With this

“simple plan”, with all assets passing to the control or ownership of the surviving spouse, should the surviving spouse become remarried or make improvident decisions, the legacy to the children and/or grandchildren may be disturbed.

- B. An alternative which some couples consider is to create a Revocable Trust, namely a joint Revocable Trust, in which both husband and wife would be the “Creators/Settlers” of the Trust. Most of the assets would either be owned by the Revocable Trust or by beneficiary designation would pass to the Revocable Trust upon the death of the first spouse.

While both spouses are alive they have full authority to amend, revoke, or cancel the Trust and remove assets from the Trust at any time. When the first spouse dies however, the Trust becomes Irrevocable and the provisions are typically included to provide for the full security of the surviving spouse (but not subsequent spouses). That generally assures that the legacy plan developed by both the husband and wife would be followed, and agreed upon beneficiaries, typically children and grandchildren, would become the ultimate beneficiaries.

For those not subject to federal estate taxes, the technique of creating a Revocable Trust, which becomes Irrevocable upon the death of the first spouse, is often viewed as an asset protection technique. That is not to say that a Trust such as this would protect assets against healthcare expenses or nursing home expenses. That is not the case. A separate Trust known as an “Elder Asset Protection Trust”, otherwise known as a “Medicaid Qualifying Trust” are available for those purposes particularly for those individuals who do not have sufficient income to cover skilled nursing home expenses (and a variety of other elder care services) or, will not have purchased long-term care insurance.

As with many concepts in the law, there are a number of changes by way of legislation, by way of administrative or court decisions, and or factual circumstances which will affect this and other types of planning techniques and therefore periodic updates and reviews are prudent.

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