The Estate Planner

By Lewis J. Saret

Post-ATRA Estate Planning–Part IV: Planning for Married Couples After ATRA

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I. Introduction

A. Generally

On January 1, 2013, Congress passed the American Taxpayer Relief Act of 2012[1] (ATRA), and on January 2, 2013, President Obama signed ATRA into law. ATRA makes permanent, with certain modifications, the transfer tax provisions of the so-called Bush tax cuts, originally enacted as part of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA).[2]

ATRA also made permanent certain transfer tax changes that Congress enacted as part of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010[3] (TRA 2010).

One of the key changes made by TRA 2010—and the subject of the second column in this four-part series—was the enactment of the so-called portability of the applicable exclusion amount between spouses.[4] That column discussed in detail the so-called "portability" rules, which allow a surviving spouse to use the unused applicable exclusion amount[5] of the first spouse to die.

The first column in this series discussed the changes made by ATRA that directly impact transfer taxes and summarized some other key tax changes that indirectly impact estate planning.[6]

The third part of this series began to discuss planning under the new rules for married couples and, in particular, how the new tax provisions change the analysis and recommendations involved in typical estate plans. This, the final part in the series, continues and concludes that discussion.

II. Credit Shelter Trust Plan Compared with Portability-Based Plan

A. Complexity/Simplicity

Many lay people believe that portability is "simple" in part because the underlying purpose of the legislation enacting portability is intended to achieve a rough parity with a credit shelter trust based plan, but without the necessity of actually using a credit shelter trust. However, portability has its own level of complexity due to the requirement that an estate tax return must be filed in order to make the portability election, even if an estate tax return would not otherwise be required. Therefore, the complexity associated with portability must be compared with the complexity associated with credit shelter trusts, which among other things, involves the following:

- Preparation of fiduciary income tax returns (*e.g.,* Form 1041) on an annual basis
- Prudent management of trust assets by the trustee in order to avoid fiduciary liability, *etc.*

Caution. One additional level of complexity should be mentioned. Specifically, planners must analyze the difference between a credit shelter trust based estate plan and a portability-based estate plan, and explain their analysis to their clients. Prudence dictates that the basis of any recommendations be memorialized in writing to avoid any liability exposure on the part of the advisor. The author believes that, for many clients, it will be difficult for advisors to communicate this analysis to clients in a way that allows them to fully grasp the issues that impact such clients. This is likely to be one of the most difficult challenges that portability poses.

B. Asset Protection/Protection from Spousal Claims

A significant disadvantage of a portability-based estate plan using a sweetheart will (*i.e.,* an outright distribution of the First Spouse's estate to the surviving spouse rather than using a trust) is the lack of any asset protection benefits for the surviving spouse and the First Spouse's descendants.

Example 1. Andy and Bea are married and have one son, Opie. They have sweetheart wills that leave their assets outright at their deaths to each other. Andy dies in 2013, and his assets, consisting of a $5 million brokerage account, pass to Bea under his will. Andy's executor makes the portability election on a timely filed estate tax return.

Bea has $3 million of assets of her own. Two years after Andy's death, Bea, who is a physician, is sued for malpractice, and a $10 million judgment is entered against her. Here, the entire $8 million of assets owned by Bea is subject to the judgment.

Example 2. Same facts as Example 1, except that (1) Bea is not sued for malpractice, but (2) remarries Barney five years after Andy's death. Bea and Barney orally agree that at their deaths their assets will go to their own children by prior marriages (*i.e.,* for Bea—Opie, and for Barney—Floyd). Consistent with this oral agreement, Bea's will leaves her entire estate, which totals $8 million, to Opie. However, after Bea's death, Barney decides that, despite his oral agreement with Bea, he would like some of Bea's assets, so he elects against Bea's will. Under applicable state law, Barney may recover 50 percent of Bea's estate, which equals $4 million. Here, if Andy had left his estate in trust for Bea, the maximum amount that Barney could receive by electing against Bea's will would be $1.5 million (*i.e.,* 50 percent of $3 million of Bea's separate property), leaving $2.5 million more (*i.e.,* a total of $6.5 million rather $4 million) that Opie would have received under the portability-based sweetheart will. In addition, if Bea and Barney had executed a prenuptial agreement before their marriage, the prenuptial agreement could have precluded Barney from electing against Bea's will. This would have protected the full $8 million of assets for Opie.

Planning Pointer. Planners may obtain some of the best of both of worlds by using a QTIP marital trust and making the portability election. This would accomplish the following:

- The assets in the QTIP marital trust would be protected from creditors, depending on state law.
- The remainder beneficiaries of the QTIP marital trust could get a step up in basis on the death of the surviving spouse if the executor of First Spouse's estate makes the portability election.

Example 3. Same facts as Example 1 except that Andy's will gives his entire estate to a QTIP marital trust for Bea's benefit. Here, although Bea's $3 million of personal assets are subject to the claims of judgment creditors, the assets in the QTIP marital trust are protected for the benefit of Bea and, upon Bea's death, Opie. Therefore, the assets in the QTIP marital trust are not lost due to the $10 million malpractice judgment.

Caution. One downside of using a QTIP marital trust is that the surviving spouse is the sole beneficiary during the lifetime of the surviving spouse. This results in the QTIP marital trust's assets not being directly available to minor children of the First Spouse and the surviving spouse. If the surviving spouse becomes incapacitated, this may result in a serious issue because the QTIP assets would not be directly available to support the minor children of the couple.

Planning Pointer. One approach used by some planners to mitigate the unavailability of the QTIP trust assets to dependents of the surviving spouse is to leave the First Spouse's estate to a QTIP trust and include a provision that allows the surviving spouse or an agent of the surviving spouse under the surviving spouse's durable power of attorney to disclaim from the QTIP trust to a credit shelter trust that includes the surviving spouse's dependents as beneficiaries. This approach has its own flaws, including the possibility that the surviving spouse may become incapacitated after the period during with he/she may disclaim has passed, and certain restrictions (*e.g.,* limits on the ability of the surviving spouse to exercise a limited power of appointment over the credit shelter trust), which would have to be included in the credit shelter trust to avoid it being included in the surviving spouse's estate.

C. State Estate Taxes

1. Generally. Approximately 20 states have their own state estate taxes.[7] Many of these states have exemption amounts that are less than the federal applicable exclusion amount. To illustrate, the District of Columbia, Maryland and New York have exemption amounts of $1 million, and New Jersey has an exemption amount of $675,000. This requires that advisors with clients domiciled in such states or with real property located in such states take such taxes into consideration. Portability impacts this planning, as discussed below.

Most married couples prefer to not pay any estate tax at the death of the First Spouse. As a result, most estate plans are designed to avoid the imposition of any estate tax at the First Spouse's death. In this regard, because a traditional formula clause that funds a credit shelter trust to the maximum amount of the federal applicable exclusion amount would trigger state estate tax upon the death of the First Spouse, most advisors modify estate plans using such formula clauses in states with state estate tax. Under these circumstances, most planners use one of the following plans for married couples domiciled in states with state estate taxes, which are discussed in more detail below.

- Disclaimer-based approach
- Credit shelter trust combined with QTIP marital trust, relying on a state-only QTIP election
- Credit shelter trust combined with QTIP marital trust, relying on Rev. Proc. 2001-38
- Credit shelter trust combined with QTIP marital trust, relying on portability election

2. Disclaimer-Based Approach.[8] One approach many planners use in states with state estate taxes that are decoupled from the federal transfer tax system, especially for smaller estates, is a disclaimer-based approach. This approach relies on a qualified disclaimer to succeed. Therefore, a brief discussion of disclaimers is in order before describing how this approach works.

A disclaimer is a refusal or renunciation by an estate beneficiary or a donee of a gift of a transfer to the beneficiary during life or at death, by will, trust or otherwise.

Federal tax law distinguishes between "qualified" and "nonqualified" disclaimers. If a disclaimer is a nonqualified disclaimer, the disclaimant is treated as having received the disclaimed property, interest or power from the original transferor and then having transferred that property right or interest, or released such power, to the person who takes it as a result of the disclaimer.[9] Therefore, if the transfer is gratuitous, there may be estate, gift or GST tax consequences arising from the disclaimer. If the disclaimer is for consideration, income and capital gains tax consequences must be considered.

If a disclaimer is a qualified disclaimer, then for federal transfer tax purposes, the disclaimed property interest is treated as passing directly from the original transferor to the persons entitled to receive the property as a result of the disclaimer.[10]

Therefore, a qualified disclaimer causes the following results:

- There is no gift being made by the disclaimant to the recipient of the disclaimed property interest for federal gift tax purposes.[11]
- For testamentary transfers, there is no transfer of the disclaimed property interest from the decedent to the disclaimant for federal estate tax purposes.[12]
- The GST tax will apply with respect to a property interest transferred under a qualified disclaimer as if the interest had never been transferred to the person making the disclaimer.[13]
- The disclaimer of a general power of appointment will not be treated as a lapse of that power under Code Sec. 2041.[14]
- The federal transfer taxes will be imposed as though the property interest had passed directly from the original transferor to the persons receiving the property interest as a consequence of the disclaimer.

To constitute a "qualified" disclaimer, the disclaimer must be an irrevocable and unqualified refusal to accept an interest in property, which satisfies the following requirements:

- The disclaimer is in writing.[15]
- The disclaimer is made and delivered within nine months of the creation of the interest.[16]
- There has been no acceptance of the interest or benefits.[17]
- As a result of the disclaimer, the interest passes to the surviving spouse or to a person other than the disclaimant without any direction on the part of the disclaimant.[18]

With the foregoing discussion as background, under a typical disclaimer-based approach, all of the First Spouse's residuary estate passes to the surviving spouse. This part of the disclaimer-based approach is very similar to a so-called sweetheart will, which provides that the First Spouse's estate passes outright to the surviving spouse. However, unlike a sweetheart will, in a disclaimer-based approach, the First Spouse's estate plan provides that if the surviving spouse disclaims his/her interest, it then passes to a backup disclaimer credit shelter trust. Exhibit 1 reflects graphically this dispository scheme.

The benefit of this approach is that it builds in flexibility, which allows the surviving spouse to make decisions taking into account changes in legal and financial circumstances after the documents are executed and the First Spouse has passed away.

The disadvantages of this approach include the following. First, in order to constitute a qualified disclaimer, there must be no acceptance of the interest or benefits from the interest. Second, the surviving spouse must proactively execute a disclaimer within nine months of the date of death. Because it is very easy to fail one or both of these requirements, the disclaimer approach is less than ideal.

Example 4. Jed and Jane are married and have two children, Jethro and Ellie. Jane owns JJ Farm. Jane dies on January 1, 2013, and leaves JJ Farm to Jed *via* a will that includes a backup disclaimer credit shelter trust.

Jed pledges JJ Farm as security for a short-term loan on March 1, 2013, which he repays on May 1, 2013. On June 1, 2013, Jed disclaims his interest in JJ Farm.

Here, Jed's disclaimer is not a qualified disclaimer because he has "accepted" JJ Farm for tax purposes, thus disqualifying the disclaimer.[19] As a result, the farm is treated as passing from Jane to Jed, and then from Jed to the backup disclaimer credit shelter trust.

Example 5. Same facts as Example 4 except that (1) Jed does not pledge JJ Farm for a loan, and (2) Jed does not disclaim his interest in JJ Farm until December 1, 2013. Here, although the disclaimer may be valid under applicable state law, because Jed did not make the disclaimer within nine months of Jane's death, it is not a "qualified" disclaimer for federal transfer tax purposes. As a result, the farm is treated as passing from Jane to Jed, and then from Jed to the backup disclaimer credit shelter trust.

3. State-Only QTIP Election Approach. Some states, such as Illinois,[20] Maryland,[21] Rhode Island[22] and Washington,[23] allow a state-only QTIP election.

Generally, a state-only QTIP election allows the personal representative of th e First Spouse's estate to qualify a portion of a marital trust (which generally must be structured/drafted to be able to satisfy the requirements of a QTIP trust under federal law under Code Sec. 2056(b)(7)) for the state estate tax marital deduction but not the federal estate tax deduction. This contrasts with most jurisdictions, such as the District of Columbia, which generally requires consistency between the federal and state estate tax marital deduction.

Exhibit 1. Estate Plan for Married Couple Using Disclaimer Credit Shelter Trust

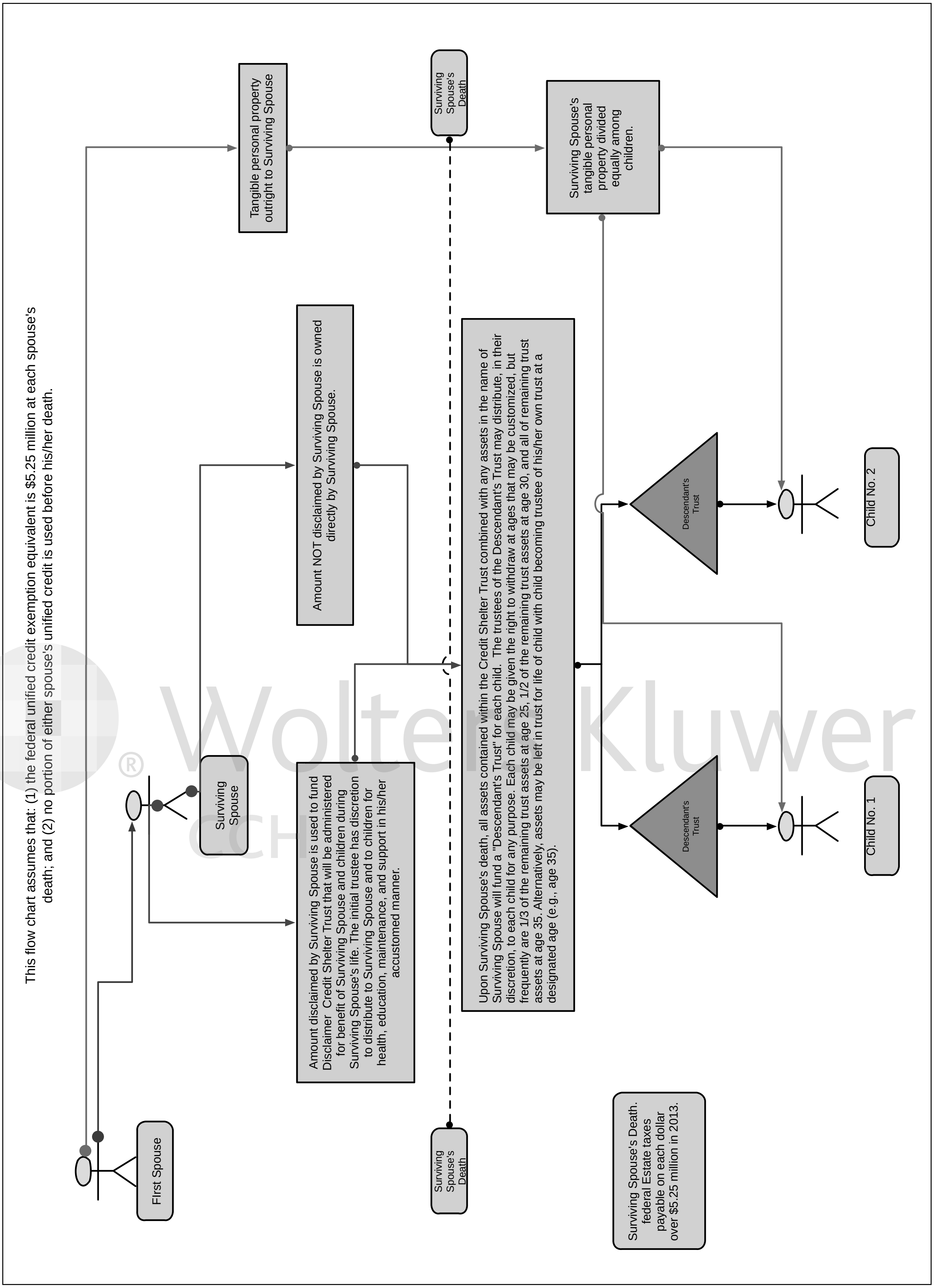
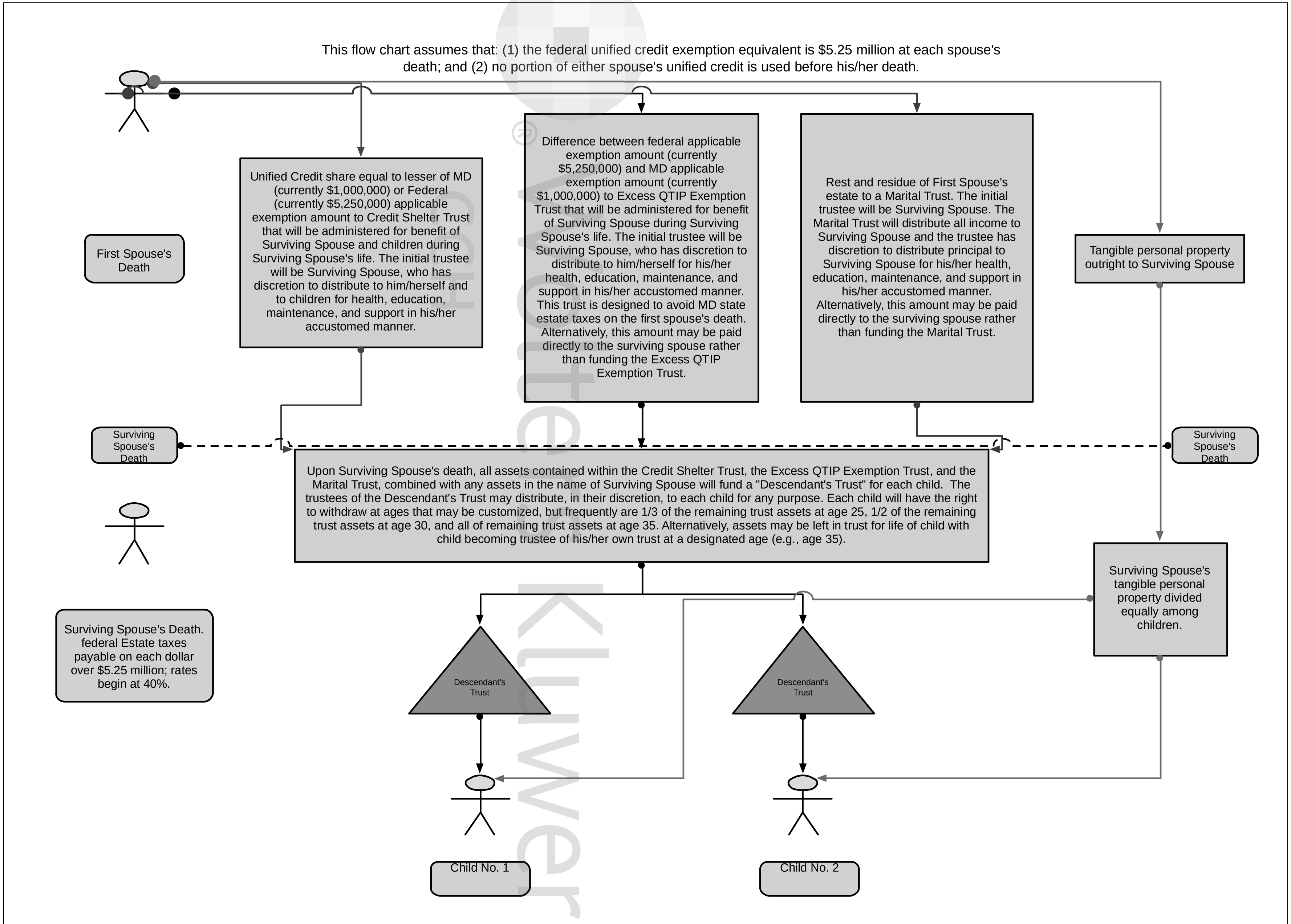


Exhibit 2. Estate Plan for Married Couple Using Credit Shelter Trust, State Only QTIP Trust, and Marital Deduction Trust



The effect of a state only QTIP election is that it allows the full federal estate tax applicable exclusion amount (*e.g.,* $5.25 million per person during 2013) to be used while deferring all of the state estate taxes until the surviving spouse's death.

See Exhibit 2 for a flowchart of a typical estate plan that incorporates a state only QTIP.

Example 6. Fred and Ginger are married and live in Maryland, which has a state estate tax with a $1 million applicable exclusion amount and allows state-only QTIP elections. They have two children, Gene and Kelly.

Fred, worth $10 million, dies on January 1, 2013. Ginger, whose net worth on January 1, 2013, was $0, dies on December 31, 2013.

Fred's estate plan provides the following:

- The lesser of the federal applicable exclusion amount (*i.e.,* $5.25 million) or the state applicable exclusion amount (*i.e.,* $1.0 million) funds a credit shelter trust for the benefit of Ginger, Gene and Kelly.
- The difference between the federal and state applicable exclusion amounts of $4.25 million (*i.e.,* $5.25 million – $1.00 million = $4.25 million) passes into an excess exemption QTIP trust.
- The remainder of Fred's estate of $4.75 million (*i.e.,* $10 million (Fred's gross estate) – $1.00 million (amount passing into the credit shelter trust) – $4.25 million (amount passing into the excess exemption QTIP trust) = $4.75 million) passes into a marital QTIP trust.

For federal estate tax purposes, the personal representative of Fred's estate ("PR") makes the QTIP election under Code Sec. 2056(b)(7) for the marital trust, which results in an estate tax marital deduction for that trust for both federal and Maryland state estate tax purposes. As a result, at Ginger's death, the marital trust must be included in Ginger's estate for federal estate tax purposes. The remainder of Fred's estate, which totals $5.25 million of value, is included in Fred's estate for estate tax purposes. However, this amount is offset by Fred's applicable exclusion amount of $5.25 million. Therefore, no federal estate tax is imposed on Fred's estate.

Table 1.

Description	Federal	State
Gross Estate	+ $10,000,000	+ $10,000,000
Estate Tax Marital Deduction: Excess Exemption QTIP Trust	- $0	-$4,250,000
Estate Tax Marital Deduction: Marital QTIP Trust	-$4,750,000	-$4,750,000
Taxable estate at death of Fred	$5,250,000	$1,000,000
Amount of estate offset by Maryland applicable exclusion amount		-$1,000,000
Amount of estate offset by federal applicable exclusion amount	-$5,250,000	
Net estate subject to estate tax	$0	$0

Table 2.

Description	Federal	State
Gross Estate	+ $4,750,000[1]	+ $9,000,000[2]
Taxable estate at death of Fred	$4,750,000	$9,000,000
Amount of estate offset by Maryland applicable exclusion amount		-$1,000,000
Amount of estate offset by federal applicable exclusion amount	-$4,750,000	
Net estate subject to estate tax	$0	$8,000,000

[1] This amount equals the amount in the Marital QTIP trust, which is includible in Ginger's estate for federal estate tax purposes.

[2] This amount equals the amount in the Marital QTIP trust and the excess exemption QTIP trust, which are includible in Ginger's estate for Maryland estate tax purposes.

For Maryland estate tax purposes, Fred's PR makes a state-only QTIP election for the excess exemption QTIP trust. This results in an estate tax marital deduction for Maryland estate tax purposes but not for federal estate tax purposes. As a result, Fred's taxable estate equals $1 million [$10 million (gross estate) – $4.25 million (marital deduction for excess exemption QTIP trust) – $4.75 million (marital deduction for marital QTIP trust)], which is offset by the Maryland applicable exclusion amount.

The estate tax consequences are shown in Table 1. Upon Ginger's death, the result would be as shown in Table 2.

4. Portability Approach. For states without a state-only QTIP election, using portability may allow estates to accomplish a similar result as if the decedent's state of domicile did in fact allow a state-only QTIP.

Example 7. Same facts as Example 6, except that two months before Fred's death, Fred and Ginger move to the District of Columbia, which has a state estate tax with a $1 million applicable exclusion amount but which does not provide for a state-only QTIP election. Assume also that Fred's estate plan remains the same as in Example 17 (*i.e.,* it provides for a credit shelter trust, an excess exemption QTIP trust and a marital QTIP trust).

For federal estate tax purposes, PR makes the QTIP election for both the marital QTIP trust and the excess exemption QTIP trust. PR also makes the portability election for the excess exemption QTIP trust. The result of this is as follows:

- There is no federal or D.C. estate tax due at Fred's death.
- The credit shelter trust is excluded from Ginger's estate at her death.
- Both the marital QTIP and excess exemption QTIP trusts are included in Ginger's estate for federal and D.C. estate tax purposes.
- Ginger's applicable exclusion amount includes both her basic applicable exclusion amount (*i.e.,* $5.25 million) plus the DSUE from Fred's estate (*i.e.,* $4.25 million for the amount in the excess exemption trust).

The estate tax consequences are as illustrated in Table 3.

Upon Ginger's death, the result would be as shown in Table 4.

Table 3.

Description	Federal	State
Gross Estate	+ $10,000,000	+ $10,000,000
Estate Tax Marital Deduction: Excess Exemption QTIP Trust	-$4,250,000	-$4,250,000
Estate Tax Marital Deduction: Marital QTIP Trust	-$4,750,000	-$4,750,000
Taxable estate at death of Fred	$1,000,000	$1,000,000
Amount of estate offset by District of Columbia applicable exclusion amount		-$1,000,000
Amount of estate offset by federal applicable exclusion amount	$1,000,000	
Net estate subject to estate tax	$0	$0

Table 4.

Description	Federal	State
Gross Estate	+ $9,000,000[1]	+ $9,000,000[2]
Taxable estate at death of Fred	$9,000,000	$9,000,000
Amount of estate offset by District of Columbia applicable exclusion amount		-$1,000,000
Amount of estate offset by Ginger's basic applicable exclusion amount	-$5,250,000	
Amount of estate offset by Ginger's DSUE amount from Fred	-$4,570,000	
Net estate subject to estate tax	$0	$8,000,000

[1] This amount equals the amount in the Marital QTIP trust and the excess exemption QTIP trust, which is includible in Ginger's estate for federal estate tax purposes.

[2] This amount equals the amount in the Marital QTIP trust and the excess exemption QTIP trust, which are includible in Ginger's estate for District of Columbia estate tax purposes.

III. Recommendations for Certain Common Profiles of Married Couples

A. Generally

Estate planners and commentators are still struggling with how to structure estate plans for married couples so as to best accomplish the tax and nontax objectives of such couples. Based on conversations with other estate planners, it appears that many if not most estate planners are continuing to use either credit shelter trust based estate plans or disclaimer backup credit shelter trust based estate plans for married couples.

This section first discusses some common estate planning objectives of married couples and then presents some thoughts on how to structure estate plans for certain common profiles of married couples. These thoughts are presented with the caveat that our views on this subject are still evolving.

B. Estate Planning Objectives of Married Couples

1. Generally. If you asked 10 different couples what their estate planning objectives are, you would probably receive 10 different answers. However, upon deeper probing, you would discover that most married couples share the same basic estate planning objectives, which this section discusses.

2. Provide for Loved Ones. The most important estate planning objective for most married couples is to ensure that their loved ones are provided for if one or both spouses become incapacitated or pass away. All other objectives are subservient to this objective.

The loved ones that most spouses want to ensure are provided for include the surviving spouse, children—and especially minor children—and more remote descendants, such as grandchildren and great grandchildren, parents, nieces and nephews, and pets.

3. Minimize Taxes. Another key estate planning goal of married couples is to minimize taxes. Here, the primary goal of married couples is to maximize the amount of assets going to loved ones and, by minimizing the amount of their assets paid in the form of taxes, they are able to accomplish this objective.

The taxes that married couples and their advisors should consider include the following:

- Federal estate taxes
- State estate taxes
- Federal income taxes
- States income taxes

4. Protect Assets Passing to Surviving Spouses/Heirs. Generally, married couples want to protect assets going to their surviving spouses and their children from creditors and especially from future spouses.

5. Simple and Inexpensive. Ideally, couples would like their estate plans to be as simple and cheap as possible. Were it not for the other factors (*e.g.,* protection of assets from future spouses and creditors, *etc.*) many couples would strongly prefer sweetheart wills. On the other hand, however, most couples prefer that their estate plans balance all of their objectives rather than allow simplicity to trump all other marital estate planning objectives. Therefore, well-crafted estate plans will almost always involve at least a minimal level of complexity.

> **Planning Pointer.** To accomplish a couple's estate planning objectives in a cost-effective manner inherently requires that future expenses be taken into consideration as well as the cost and time spent implementing the estate plan. Therefore, the plan that is most cost effective for a married couple may not be the least expensive plan in terms of the immediate costs to implement. Here, the old maxim that one should not be penny-wise and pound-foolish applies.

6. Privacy. Many couples prefer estate plans that maintain their privacy when given the choice. However, this tends to not be a dominant issue with most couples. Having said this, we have also witnessed a significant increase in elderly individuals being the targets of fraudulent schemes and borderline fraudulent solicitations. As a result, we believe that to the extent than an estate plan can protect a married couple's privacy especially as they age, that this may help protect the surviving spouse from being targeted by such schemes.

7. Control over Assets. One objective of married couples is to maintain control over their assets to the maximum extent possible; usually until death do us part (*i.e.,* until death parts the owner from his/her assets).

All other things being equal, married couples typically also prefer to give their children control of assets passing to those children. Typically, clients will express this as not wanting their children to "have to go to some stranger to ask for money." On the other hand, however, this desire must be balanced against the couples' desire to protect assets passing to the surviving spouse/child against claims of creditors or future spouses.

> **Note.** Some couples, especially couples with significant amounts of wealth that they have created themselves rather than have inherited, express concern about the impact of such wealth on their children and more remote descendants. For a discussion of such issues, the author recommends the following books:

- James E. Hughes, Jr., FAMILY WEALTH—KEEPING IT IN THE FAMILY: HOW FAMILY MEMBERS AND THEIR ADVISERS PRESERVE HUMAN, INTELLECTUAL, AND FINANCIAL ASSETS FOR GENERATIONS (2004)
- Lewis D. Solomon & Janet Stern Solomon, BRAT-PROOFING YOUR CHILDREN: HOW TO RAISE SOCIALLY AND FINANCIALLY RESPONSIBLE KIDS (2008).
- Charles W. Collier, WEALTH IN FAMILIES (3d ed. 2012).

8. Incapacity. Although many couples, when thinking about estate planning, think primarily of death, dealing with incapacity is also critically important to virtually all married couples. This planning, at its most basic level, takes the form of durable financial powers of attorney and advance medical directives. However, a more sophisticated plan would also include insurance planning and, in the case of business owners, business succession planning.

9. Asset Management. For many couples, one or both spouses are especially skilled at managing assets. Generally, these same individuals have a particularly strong appreciation for asset management. As a result, when planning estates for such individuals, they will desire to put in place systems to attempt to replace their management when they are no longer capable of managing the family's assets.

10. Summary. In sum, most married individuals, motivated by love and affection for their spouses and families, engage in estate planning to ensure their loved ones are provided for if and when they become incapacitated and/or pass away. This in turn results in several subsidiary objectives, such as protecting assets passing to surviving spouses and to descendants from creditors and future spouses, retaining control over their assets for as long as possible, preserving the value of their assets, *etc.*

C. Married with No Children

For clients with no children, two possible structures come easily to mind.

The preferred structure would be to use a QTIP trust for the benefit of the surviving spouse. The reason for this is that this structure will protect the assets from claims of creditors of the surviving spouse and will ensure that upon the surviving spouse's death, the assets in the trust will pass to the beneficiaries designated by the First Spouse.

The personal representative may either make a portability election or make a partial QTIP election, to ensure that the applicable exclusion amount of the First Spouse is not wasted. Using a QTIP trust gives the First Spouse's personal representative a significant amount of flexibility on how to proceed after the death of the First Spouse.

An alternate structure, which is less ideal, would be to have assets of the First Spouse pass outright to the surviving spouse and have the personal representative of the First Spouse make a portability election. This structure is simpler than using a QTIP trust, which will be very important for some clients, who will strongly dislike using a trust. On the other hand, this structure leaves the assets passing from the First Spouse to the surviving spouse exposed to claims of creditors of the surviving spouse as well as potential claims of a new spouse.

D. Married with Minor Children

For clients with minor children, a credit shelter based estate plan combined with a marital QTIP trust would seem to make the most sense. The benefits of this approach are as follows:

- This structure is generally tax-efficient, with the exception that (1) the credit shelter trust will not allow for a second step up in basis on the death of the surviving spouse, and (2) if income is not distributed to beneficiaries, the trust will be subject to income tax at the trust level with a compressed trust income tax rate schedule.
- This structure protects the assets from claims of the surviving spouse's creditors and from any new spouse, so that upon the death of the surviving spouse, the assets in the credit shelter trust and marital QTIP trust will pass either to or for the benefit of the children.
- If the surviving spouse should become incapacitated, the minor children (or their guardian) could have access to assets contained within the credit shelter trust. In contrast, the only allowable beneficiary of a QTIP trust is the surviving spouse, during the surviving spouse's lifetime.

E. Married with Adult/Independent Children

For clients with adult/independent children, an estate plan that leaves the entire estate of the First Spouse to a marital QTIP trust, with authority to divide that trust into two or more separate trusts in order to make a partial QTIP election if that becomes desirable, would seem to make the most sense. The benefits/detriments of this approach are as follows:

- This structure involves one fewer trust than a credit shelter/marital QTIP based estate plan, which is a bit simpler and, therefore, more desirable for most married couples.
- This structure protects the assets from claims of the surviving spouse's creditors and from any new spouse, so that upon the death of the surviving spouse, the assets in the credit shelter trust and marital QTIP trust will pass either to or for the benefit of the children.
- This structure lacks the ability of the children to directly access the assets in the QTIP trust should

the surviving spouse become incapacitated, but if the children are adult and independent, then this should be less of an issue.

F. Children with Adult/Dependent Children

Generally, this estate plan should be similar to that for married couples with minor children.

IV. Conclusion

On January 1, 2013, Congress passed ATRA, which President Obama signed on January 2, 2013. By making certain tax changes permanent, it significantly changes estate planning. Although some of the changes—most notably estate tax portability—are designed to make estate planning simpler, in fact it makes the estate planning analysis much more complicated for most married couples.

This series of columns has attempted to discuss the impact of ATRA on estate planning. In particular, in Part I, we discussed the key transfer tax provisions of ATRA.[24] In Part II, we discussed the estate tax portability provisions of ATRA in some detail.[25] In Part III and in this Part IV, we discussed planning for married couples after ATRA.[26]

Endnotes

1 American Taxpayer Relief Act of 2012 (P.L. 112-240).
2 P.L. 107-16 (2001).
3 P.L. 111-312 (124 Stat. 3296, 3302).
4 ATRA also made conforming amendments to Code Secs. 2505(a), 2631(c) and 6018(a)(1). In addition, Section 303 of TRA 2010 directs the Secretary to issue such regulations as may be necessary or appropriate to carry out section 303(a) of TRA 2010.
5 The applicable exclusion amount is the amount sheltered from estate tax by the unified credit provided under Code Sec. 2010.
6 Lewis J. Saret, The Estate Planner, *Post-ATRA Estate Planning – Part I: Key Transfer Tax Provisions of the American Tax Relief Act of 2012,* Taxes, July 2013, at 29.
7 For a list of states with state estate taxes, which is updated periodically, *see* Charles D. Fox IV, ACTEC State Death Tax Chart (Rev. July 24, 2013), available online at *www.actec.org/public/Documents/Studies/Fox_StDeathTxLegis_07_24_2013.pdf.*
8 For a detailed discussion of disclaimers, *see* Nancy G. Henderson, Thank You But No Thank You: Advanced Issues in Disclaimer Planning, Estate Planning in Depth (ALI-ABA 2009); Adam J. Hirsch, *The Code Breakers: How States are Modifying the Uniform Disclaimer of Property Interests Act,* 46 Real Prop. Tr. & Est. L. J. 325 (Fall 2011); Paul N. Frimmer, Disclaimers, Advanced Estate Planning Techniques (ALI-ABA Mar. 2011).
9 Reg. §25.2518-1(b).
10 Code Sec. 2518(a).
11 Reg. §25.2518-1(b).
12 Reg. §20.2046-1.
13 Code Secs. 2654(c), 2518(a).
14 Reg. §20.2041-3(d)(6); *see also* LTR 9236018 (June 5, 1992).
15 Code Sec. 2518(b)(1); Reg. §25.2518-2(b).
16 Code Sec. 2518(b)(2); Reg. §§25.2518-2(b)(2); 25.2518-2(c).
17 Code Sec. 2518(b)(3).
18 Code Sec. 2518(b)(4)(A) and (B); Reg. §25.2518-2(e).
19 Reg. §25.2518-2(d)(4), Example 5.
20 35 ILCS 405/2 (b-1).
21 MD Code Ann. [Tax General] Sec. 7-309.
22 Rhode Island State Tax Division Ruling Request No. 2003-03.
23 Wa. St. Section 83.100.047.
24 *Supra* note 6.
25 Lewis J. Saret, The Estate Planner, *Post-ATRA Estate Planning, Part II: Estate Tax Portability,* Taxes, September 2013, at 17.
26 *Id.,* at 25.