

## DO YOU STILL NEED YOUR (REVOCABLE) TRUST?

**Estate Tax Exemption** permanently increased to \$5,000,000, plus inflation in 2013. The Estate Tax Exemption is currently \$5,430,000 in 2015.

### Past Estate Tax Exemption Amounts:

1987-1997	\$ 600,000	2010	\$ No Estate Tax
1998	\$ 625,000	2011	\$ 5,000,000
1999	\$ 650,000	2012	\$ 5,120,000
2000-2001	\$ 675,000	2013	\$ 5,250,000
2002-2003	\$ 1,000,000	2014	\$ 5,340,000
2004-2005	\$ 1,500,000	2015	\$ 5,430,000
2006-2008	\$ 2,000,000		
2009	\$ 3,500,000		

The easiest way to avoid estate tax for a married couple was to create a **Revocable Trust with A-B Trust (or Credit Shelter) Provisions**. This trust would divide the estate so that the surviving spouse's estate would not exceed the estate tax exemption. The surviving spouse would (or could depending on the trust provisions) have the following rights in the deceased spouse's trust share (tax exemption amount):

- (1) Net income from the trust (dividends, interest, rents).
- (2) Principal for health, education, maintenance or support.
- (3) Additional principal of \$5,000 or 5% of the principal, whichever is greater, each year, noncumulative.
- (4) Special Power to Appoint Principal to Third Parties (i.e., children, grandchildren).

A third party (usually a child or sibling) could also have a Special Power to Appoint Principal to surviving spouse. As long as there was a close relationship to child or sibling, surviving spouse could always access additional principal through child or sibling.

For couples with estates above the estate tax exemption (\$5,430,000 in 2015) up to double this exemption (\$10,860,000), we have a new estate tax law called **Portability** which allows a surviving spouse to claim the last deceased spouse's unused estate tax exemption on a timely filed estate tax return.

**Portability** election appears preferable to Revocable Trust with A-B Trust (Credit Shelter Trust) Provisions because:

- (1) Surviving spouse has unlimited access to the entire estate.
- (2) Surviving spouse does not have to prepare annual accountings for other trust beneficiaries.
- (3) Surviving spouse does not have to prepare annual trust income tax returns.

**Caveats:**

- (1) **Portability** election does not apply to **Generation Skipping Trusts** (i.e., trusts which provide net income to children for life and upon death goes to grandchildren and is taxed in grandchild's estate).
- (2) **Portability** election only applies to last deceased spouse (i.e., second deceased spouse requires a new election).
- (3) **Portability** election must be made on a timely filed estate tax return (9 months after death) even though estate tax return is not required since deceased spouse's estate does not exceed estate tax exemption (\$5,430,000 for 2015).

**Beneficiary Provisions** (called TOD "Transfer on Death" or POD "Payable on Death") on financial accounts, when appropriate, have in many cases replaced Revocable Trusts as the best way to avoid probate (effective for non-qualified accounts such as bank accounts since 1995).

Advantage of Beneficiary Provisions:

- (1) No attorney fees to create and maintain trust.
- (2) Some creditor protection in that beneficiaries of TOD or POD accounts have no obligation to pay estate creditors and creditors have great difficulty in locating such accounts and beneficiaries.
- (3) No relative is asked to settle your estate as successor trustee and bear potential risk of lawsuit for mismanagement.
- (4) TOD or POD beneficiaries have no interest until death of all account holders, including joint accounts.

Who still needs a **Revocable Trust** and cannot use beneficiary designations.

- (1) People who have beneficiaries who cannot manage money, which could include spouses and children.
- (2) People who have beneficiaries who have financial problems.
- (3) People who have minor or disabled children (although a **Will with Testamentary Trust** may be sufficient).
- (4) People who have second homes, rental property, small businesses that are not publicly traded (LLCs, corporations), and stocks individually held.
- (5) People who desire a complex estate plan (i.e., \$10,000 to A, \$25,000 to B, \$150,000 to C, \$200,000 to D).

Preferred estate plan for most married couples with competent adult children:

- (1) Last Will and Testament
- (2) Durable Power of Attorney
- (3) Living Will Declaration
- (4) Extensive Use of Beneficiary Provisions on all Accounts.

**Revocable Trust** may be added where significant probate assets are present (i.e., second homes, rental property, small businesses that are not publicly traded (LLCs, corporations), stock individually held. **Note: Real Property owned in different states must go through probate in state where real property is located.**

**Ladybird Deed or Enhanced Life Estate Deed** is a deed that allows probate avoidance on real property by gifting property, reserving the right to live and transfer property unilaterally, with remainder interest to third party (usually children). This deed is not recommended placing additional names in chain of title will impact ability to obtain title insurance.

**Joint Ownership with Rights of Survivorship** is a form of ownership that allows probate avoidance. It is not recommended since owner loses control of property and subjects property to co-owner's creditors.

**Gifting** to avoid probate is not recommended since owner (donor) loses control of property. Also donee acquires owner's (donor's) tax basis and may have to pay capital gain on the sale of the property. If property is acquired at death, recipient receives a new tax basis equal to fair market value and does not have to pay capital gain on pre-death appreciation. The **Annual Gift Tax Exclusion** is \$14,000 per person per calendar year. Amounts in excess of the \$14,000 must be reported on a gift tax return and reduce the **Estate Tax Exemption** available at death. Spouse's can elect to gift-split and give \$28,000 even though gift is coming from one spouse's property.

If a probate estate consists of a home going to relatives (**Protected Homestead**) and \$75,000 or less of other probate property, it qualifies for **Summary Administration**. This type of probate requires only petitions and orders which are submitted together. The probate usually is complete within 30 – 60 days. No personal representative is appointed, no advertising for creditors is required, and no inventory or accounting is needed. Because less work is involved, attorney fees and costs are relatively small. My Summary Administration fees and costs are \$1,600.00.

An **important advantage** of Summary Administration over a Revocable Trust is a home passing to relatives in a Summary Administration is protected from creditors. A home passing under a Revocable Trust is not protected since a revocable trust requires that all creditors be paid. This is an issue that may be changed in the future by the courts or the legislature. Already, the legislature has passed a law protecting death benefits which are paid into revocable trusts.

**Homestead Caveat:** Homestead protection is lost in probate if there is a specific provision in the will "to sell the home." Also homestead protection only applies to relatives or heirs as defined by Florida law. Relatives of both spouse (i.e., son-in-law, daughter-in-law) are entitled to Homestead protection if listed as beneficiaries in a will.

A Revocable Trust also provides management of trust property during a incapacity by appointing a Successor Trustee. A **Durable Power of Attorney** can provide the same management of property during incapacity. The **Durable Power of Attorney** can also cover medical decisions. The **Durable Power of Attorney** is superior to a **Designation of Health Care Surrogate** because it is effective immediately. A **Designation of Health Care Surrogate** is effective only during incapacity as verified by two (2) physicians.

A **Testamentary Trust** is a trust created in your will. A **Testamentary Trust** can be made the beneficiary of death benefits such as life insurance, annuities, qualified retirement plans, IRAs, and 401(k)s.

All trust should contain a **Spendthrift provision**. A **Spendthrift provision** prevents the beneficiary from transferring his or her interest in the trust and prevents creditors of a beneficiary from attaching his or her interest in the trust. A **Spendthrift provision** does not apply to a Grantor or Settlor (Creator) of a Revocable Trust. The **Spendthrift provision** protects a third-party beneficiary from his or her creditors. It does not protect a Grantor from his or her creditors.

Some states and foreign countries have **Asset Protection Trust (APT)** statutes which allow the **Spendthrift Trust provision** to apply to the Grantor of a Revocable Trust. Such trusts can be set aside in bankruptcy if established within 10 years of bankruptcy filing and made with the actual intent to hinder, delay, or defraud any present or future creditor. Foreign country **Asset Protection Trust (APT)** have the advantage of not being subject to U.S. laws and requiring the creditor to re-litigate under a foreign law.