

## 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 5,340,000 in 2014.

### Past Estate Tax Exemption Amounts:

1987-1997	\$ 600,000	2006, 2007 & 2008	\$ 2,000,000
1998	\$ 625,000	2009	\$ 3,500,000
1999	\$ 650,000	2010	No Estate Tax
2000-2001	\$ 675,000	2011	\$ 5,000,000
2002-2003	\$ 1,000,000	2012	\$ 5,120,000
2004-2005	\$ 1,500,000	2013	\$ 5,250,000

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) have the following rights in the deceased spouse's trust share:

- (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 each year, noncumulative.
- (4) Special Power to Appoint Principal to Third Parties (i.e., Adult Children, Grandchildren).

A Third Party (usually an Adult Child) could also have a Special Power to Appoint Principal to Surviving Spouse. As long as there was a close relationship to child, surviving spouse could always access additional principal through child.

This type of trust is no longer needed for married couples whose estates will not exceed the estate tax exemption currently \$5,340,000.

For couples with estates above \$5,340,000, up to \$10,680,000, we have a new estate tax law called **Portability** which allows a surviving spouse to claim a deceased spouse's unused estate tax exemption (\$5,340,000) 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 control of 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 trust income tax returns.

Please note:

(1) Portability Election does not apply to **Generation Skipping Trusts** (i.e., trusts which provide net income to children for life and upon death property goes to grandchildren and is taxed in grandchild's estate.

(2) Portability Election only applies to last deceased spouse

(i.e., a second deceased spouse requires a new election).  
(3) Portability Election must be made on a timely filed estate tax return (i.e., 9 months after death).

**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 in 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 have no obligation to pay estate creditors and creditors have great difficulty in locating such accounts and beneficiaries.
- (3) No one relative is asked to settle your estate as successor trustee and bear the associated risks of mismanagement.
- (4) TOD or POD beneficiaries have no interest until death of all account holders.

**Who still needs a Revocable Trust and cannot use Beneficiary Provisions?**

- (1) People who have beneficiaries who cannot manage money, which could include spouses and children.
- (2) People who have beneficiaries who have financial problems from divorce or other circumstances (possible bankruptcy).
- (3) People who have minor children or disabled children.
- (4) People who have real property other than their home or who own small businesses.
- (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, etc.).

**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 is added where you do not have competent beneficiaries, where you own a business, where you own real property other than your home, or where you fear a will contest. **Note** real property owned in different states must go through probate in each state where real property is located unless real property is owned by a Revocable Trust.

**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 the property unilaterally, with remainder interest to third party (usually children) is not recommended because placing additional names in chain of title will impact the ability to obtain title insurance.

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

**Gift**ing to avoid probate is not recommended since owner loses control of property. Also donee acquires owner's tax basis and may have to pay capital gain on sale. If property is acquired at death, recipient receives 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. Amounts in excess of \$14,000 must be reported on a gift tax return and reduce your **Estate Tax Exemption**. Spouses 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 (**Homestead**), 2 motor vehicles going to children (**Exempt Property**), and **\$75,000** of other property, it qualifies for **Summary Administration**. This type of probate requires only petitions and orders which are submitted together. The probate is complete within 30 - 60 days, more or less. No personal representative is appointed, no advertising for creditors is required, 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 completely protected from creditors. A home passing under a Revocable Trust is not protected since a revocable trust requires all creditors be paid. In some situations where the estate size is modest, it may be better that the home pass through probate rather than through a Revocable Trust. For the same reason, it is also usually better for accounts to pass by beneficiary designation rather than through a Revocable Trust.

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

A Revocable Trust also provides management of trust property during an incapacity by appointing a Successor Trustee. A **Durable Power of Attorney** can provide the same management of property during an incapacity. The Durable Power can and should 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** (a trust created in your will) offers some creditor protection over a Revocable Trust. Since a Testamentary Trust is a beneficiary of your will, it has no obligation to pay your creditors at death. A Testamentary Trust can be made the beneficiary of qualified accounts (death benefits) such as life insurance, annuities, IRAs, 401(k)s, pension and profit-sharing plans. A Testamentary Trust cannot own assets or be the beneficiary of non-qualified accounts (bank accounts).

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

Some states and foreign countries do have **Asset Protection Trust (APT)** statutes which allow the Spendthrift provision to apply to the Grantor. Such trusts can be set aside in bankruptcy if established within 10 years of filing and made with the actual intent to hinder, delay, or defraud any present or future creditor.

**Gregg G. Heckley** is Board Certified in Wills, Trusts & Estates Law and Consumer Bankruptcy Law. Six percent (6%) of Florida lawyers are Board Certified. Board Certification requires passing a certification exam, advanced and on-going continuing education (125 hours every 5 years for Wills, Trusts & Estates Law) (60 hours every 5 years for Consumer Bankruptcy Law). Fortunately, continuing legal education is mostly accepted to maintain CPA license although an 24 additional hours are required in accounting ethics and auditing every two years.

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