PLANNING FOR MARRIED COUPLES

THE NEW PARADIGM

Asset Protection, Second Step Up In Basis, and Portability

PHILIP H. MONDSCHEIN, ESQ.

10691 N. KENDALL DRIVE
SUITE 205
MIAMI, FLORIDA 33176

THE ELDER LAW CENTER OF
MONDSCHEIN *and* MONDSCHEIN, P.A.

TABLE OF CONTENTS

Introduction

I. Asset Protection Strategies

II. Building Flexibility into the Estate Plan – Formula Clauses

III. Comparison of Trust Design Options for Married Couples

IV. Flow Chart: Trust Design Options for Combined Estates Under the Applicable Exclusion Amount

V. Flow Chart: Trust Design Options for Combined Estates Over the Applicable Exclusion Amount

INTRODUCTION

TRADITIONAL ESTATE PLANNING

Prior to the enactment of the Economic Growth and Tax Reconciliation Act of 2001, the federal estate and gift tax exemption was $675,000. The maximum federal estate and gift tax rate was 55%, the capital gains tax rate was 20%, and portability did not exist. Since the estate tax rates were significantly higher than the income tax rates, avoidance of federal estate taxes usually took precedence over asset protection planning and a potential loss of income tax savings from a second step up in basis at the death of the surviving spouse on appreciated property. (1)

Traditional estate planning focused on preserving each spouse's exemption by dividing a couple's assets. At the death of the first spouse, an amount equal to the deceased spouse's remaining exemption was placed in a bypass or credit shelter trust for the benefit of the surviving spouse. The balance, if any, was distributed outright to the surviving spouse or placed in a marital trust.

THE NEW PARADIGM

The passage of the American Taxpayer Relief Act of 2012, which raised the federal estate, gift, and generation-skipping tax exemptions, presently referred to as the "Applicable Exclusion Amount" to $5.45 million for 2016, coupled with the permanent enactment of "portability," has dramatically changed our estate planning perspective. For most of our clients, the focus will now shift from avoiding federal estate taxes to a myriad of other concerns that must be addressed in implementing their estate plan, including: (2)

1. Portability.
2. Loss of the deceased spousal unused exclusion amount.
3. Loss of "step up" in basis due to lifetime transfers of appreciated property.
4. Preservation of a second "step up" in basis at the death of the surviving spouse.
5. Asset protection at the death of first and second spouse.
6. Avoiding probate at the death of each spouse.
7. Planning for remarriage and blended families.
8. Planning for children with disabilities.
9. Planning to avoid fractional interest discounts for non-taxable estates.

ASSET PROTECTION STRATEGIES

I. HOLDING PROPERTY AS TENANTS BY THE ENTIRETIES IN FLORIDA:

In Florida, when property is held by a husband and wife, as tenants by the entireties, only the creditors of both spouses, jointly, may attach the tenancy by the entireties property. The property is not divisible on behalf of one spouse alone, and cannot be reached to satisfy the obligations of only one spouse.

Under common law, there are six unities which are required to establish ownership of property as a tenancy by the entireties. These include (1) unity of possession (joint ownership and control), (2) unity of interest (the interests in the property must be identical), (3) unity of title (the interest must have originated in the same instrument), (4) unity of time (the interest must have commenced simultaneously), (5) survivorship, and (6) unity of marriage (the parties must be married at the time the property became titled in their joint names).

Where one spouse originally owned property and conveyed the property to the name of both spouses, it was not clear whether the unity of time (the interests must have commenced simultaneously) and the unity of title (the interests must have originated in the same instrument) were present. Therefore, it was common to use a straw man to create such an interest. (1)

REAL PROPERTY:

Section 689.11 of the Florida Statutes now provides that one spouse can create a tenancy by the entireties in real property by deeding the property into the names of both spouses. There is no longer the necessity of using a straw man to effect the conveyance and an intent to hold real property, as a tenancy by the entireties is presumed. The statute applies to both homestead and non-homestead property.

BANK ACCOUNTS:

Probably the most important case in Florida involving tenancies by the entireties in bank accounts is Beal Bank, SSB v. Almand and Associates, 780 So. 2d 45 (Fla. 2001). In Beal Bank, a number of bank accounts were jointly titled in the name of husband and wife. Some of the accounts specified no particular form of joint ownership, and others specified they were owned as joint tenants with rights of survivorship.

In an attempt to bring some clarity to this area of the law, the Florida Supreme Court held “that as between the debtor and a third-party creditor (other than the financial institution into which the deposits were made), if the signature card of the account does not expressly disclaim the tenancy by the entireties form of ownership, a presumption arises that a bank account titled in the names of both spouses is held as a tenancy by the entireties as long as the account is established by husband and wife in accordance with the unities of possession, interest, title, time and with right of survivorship.”

The presumption adopted shifts the burden of proof to the creditor to prove by a preponderance of the evidence that a tenancy by the entireties was not created.

WHAT CONSTITUTES AN EXPRESS DISCLAIMER:

In Beal Bank, the Court held that an express disclaimer of an intent not to hold the account as a tenancy by the entireties arises if there is either (1) "an express statement signed by the depositor that a tenancy by the entireties was not intended, coupled with an express designation of another form of legal ownership," or (2) "if the financial institution affirmatively provides the depositors with the option on the signature card to select a tenancy by the entireties among other options, and the depositors expressly select another form of ownership option of either a joint tenancy with right of survivorship or a tenancy in common."

However, if the debtor establishes that the financial institution did not offer a tenancy by the entireties form of account ownership, or expressly precluded that form of ownership, then the debtor may prove by other evidence an intent that the debtor and his or her spouse held the account as tenants by the entireties. In this situation, the debtor has the burden of establishing a tenancy by the entireties by a preponderance of the evidence.

SECTION 655.79 OF THE FLORIDA STATUTES:

In conformance with the Supreme Court's recommendation in Beal Bank, Section 655.79(1) of the Florida Statutes was modified on October 1, 2008 to provide "any deposit or account made in the name of two persons who are husband and wife shall be considered a tenancy by the entirety unless otherwise specified in writing." The statute further provides that the presumption created may be overcome only by proof of fraud or undue influence or clear and convincing proof of a contrary intent.

It appears clear from the statute that where a husband and wife fail to designate a particular form of ownership, a tenancy by the entireties will be presumed. However, it is still unclear whether a creditor is precluded from showing that the account was not established with the six common law unities of possession, interest, title, time, survivorship, and marriage and, therefore, a tenancy by the entireties does not exist. (2)

Notwithstanding the above, the Real Property, Probate and Trust Law Section of the Florida Bar White Paper on Proposed Enactment of Florida Statutes Section 689.151 takes the position that Section 655.79(1) of the Florida Statutes overrides the requirement of the common law unities of time and title.

The proposed legislation would enact new Florida Statutes Section 689.151 to provide that tenancies by the entireties can be created in personal property without regard to the unities of time and title required by common law. The proposed statute would also provide that any personal property held in the name of married persons is tenants by the entireties property unless there is a writing to the contrary. However, application of the statute will be prospective only, and therefore, previously created bank and brokerage accounts will be examined under existing law.

NEW AND EXISTING BANK ACCOUNTS:

In opening a new bank account, a husband and wife should review the signature card to ensure the account is clearly designated as a tenancy by the entireties. With respect to an existing bank account, short of using a straw man, where the account was originally opened in the name of one spouse alone, a new account should be opened in the name of both spouses as tenants by the entireties, and the funds in the existing bank account should be transferred to the new account.

MARKETABLE SECURITIES:

In Cacciatore v. Fisherman's Wharf Realty Limited Partnership, 821 So. 2d 1251 (Fla. 4th DCA 2002) a stock certificate was designated "Philip F. Cacciatore, Jr. and Elaine Cacciatore, his wife," as owner. The Court concluded that as between debtor and creditor, the holding and rational of Beal Bank should be extended to create a presumption of tenancy by the entireties in the stock certificate, although no particular form of ownership was designated. The Court stated that "the presumption arises from taking title in the spouses' joint names." The creditor then has the burden to prove by the preponderance of the evidence that one of the necessary unities did not exist at the time the certificate was acquired.

HOW TO CREATE A TENANCY BY THE ENTIRETIES IN MARKETABLE SECURITIES AND BROKERAGE ACCOUNTS. AND WHAT NOT TO DO!

In footnote 2 to Beal Bank, the Court stated that "We do not address the Merrill Lynch account established by Almand, III, which was later amended to include the name of his wife, as a co-owner." The Fifth District Court unanimously held that the Merrill Lynch brokerage account was subject to garnishment since the account lacked the unities of time and title when the account was opened.

Therefore, adding a spouse's name to an existing stock certificate may not create a tenancy by the entireties, but canceling a stock certificate in the name of one spouse and issuing a new certificate in the name of both spouses, as husband and wife, or in the name of both spouses, as tenants by the entireties, should be sufficient to create a Tenants by the Entireties in the security.(3)

With respect to a brokerage account, where the account was originally opened in the name of one spouse alone, a new account should be opened in the name of both spouses as Tenants by the Entireties, and the securities in the existing account should be transferred to the new account. (3)

Notwithstanding the above, if enough money is involved, absent a specific statute, a creditor may still argue that the only way to effectively create a tenancy by the entireties in Florida is through the use of a "straw man."

WHEN THE MUSIC STOPS:

In Florida, holding property as tenants by the entireties is a quick and effective means of asset protection for a married couple. However, this protection is only effective while the individuals are married. Upon divorce, the assets are subject to the creditors of each spouse. Moreover, at the death of the first spouse, all the assets are subject to the creditors of the surviving spouse.

For those individuals in high-risk professions, more creative asset protection strategies may be required. Similarly, for high-net worth individuals, dividing a couple's assets, along with discount planning, may offer greater reduction in federal estate taxes.

II. INTER VIVOS (LIFETIME) QTIP TRUSTS

For married couples who are concerned with asset protection, non reciprocal inter vivos QTIP trusts may be considered. Using this planning technique, each spouse creates and funds an inter vivos QTIP trust for the benefit of the other spouse. At the death of the first spouse, assets remaining in his or her QTIP trust pass to a credit shelter trust for the benefit of the surviving spouse (the original donor of the QTIP trust) up to the applicable exclusion amount. The balance, if any, may pass either outright or to a testamentary QTIP trust for the surviving spouse. (4)

During the lifetime of each spouse, assets placed in an irrevocable (QTIP) trust by one spouse for the benefit of the other spouse are exempt from the creditors of the donor and donee spouse, as long as at the time the inter vivos QTIP trusts are created the transfers are not considered a fraudulent conveyance. See Section 726.105 of the Florida Statutes.

Moreover, under Section 736.0505(3) of the Florida Statutes, at the death of the first spouse, assets placed in trust for the benefit of the surviving spouse are deemed to be contributed by the deceased spouse (the beneficiary of the inter vivos QTIP trust), and not the surviving spouse who originally created the trust. This, in effect, allows the lifetime beneficiary of the QTIP trust to create a spendthrift trust for the benefit of his or her surviving spouse with funds initially contributed by the surviving spouse.

In this way, we can fully utilize each spouse's applicable exclusion amount, as well as provide creditor protection during the couple's joint lifetimes, which will continue throughout the lifetime of the surviving spouse.

COUPLES WITH NON-TAXABLE ESTATES:

With the advent of portability, for estates that are not expected to exceed twice the applicable exclusion amount at the death of the surviving spouse, it may be preferable for the assets in the lifetime QTIP trust to pass to a testamentary QTIP trust for the benefit of the surviving spouse. In this way, assets placed in a testamentary QTIP trust will be included in the estate of the surviving spouse, resulting in a second step up in basis at the death of the surviving spouse.

COUPLES WITH TAXABLE ESTATES:

For couples whose combined estates are expected to exceed twice the applicable exclusion amount at the death of the surviving spouse, it may be preferable to forego a second step up in basis, and permit the assets to pass to a credit shelter trust to avoid any additional federal estate taxes should the property appreciate in value prior to the death of the surviving spouse. Moreover, additional income and estate tax benefits may be achieved by structuring both the inter vivos QTIP trust and the credit shelter trust as grantor trusts for federal income tax purposes. (5)

BUILDING FLEXIBILITY INTO THE ESTATE PLAN - FORMULA CLAUSES

In developing an estate plan for a married couple, we may direct that all assets pass to the surviving spouse, place assets in a Marital Trust or Credit Shelter Trust for the benefit of the surviving spouse, or a combination thereof.

In the past, this decision was usually made at the time the will or trust was drafted. However, with the advent of "portability" and the creative use of formula clauses, a final decision can be postponed until after the death of the first spouse.

A. The most common marital trusts include the "General Power of Appointment Martial Trust" and the "Qualified Terminal Interest Property (QTIP) Trust."

GENERAL POWER OF APPOINTMENT MARITAL TRUST:

Prior to 1981 when the qualified terminable interest property (QTIP) trust was introduced into the law, the general power of appointment trust was the most widely used means of securing the marital deduction for property placed in trust.

To qualify for the marital deduction under Section 2056(b)(5) of the Code, a trust must provide that:

1. All trust income must be payable to the surviving spouse at least annually for life.

2. No person other than the surviving spouse may be a beneficiary of the trust during the lifetime of the surviving spouse.

3. The surviving spouse must be granted a general power of appointment, which permits the surviving spouse to appoint trust property to the surviving spouse or to his or her estate.

4. There may be no substantive restrictions, conditions, or limitations placed on the surviving spouse's ability to exercise the power of appointment. (1)

5. Unlike a QTIP trust, which requires an election by the personal representative to qualify for the marital deduction, property placed in a GPOA marital trust automatically qualifies for the marital deduction, and it is not necessary to file Form 706 to obtain a second step up in basis at the death of the surviving spouse. (2)

QUALIFIED TERMINABLE INTEREST PROPERTY (QTIP) TRUST:

The concept of the QTIP trust was originally created to allow a spouse, with children from a prior marriage, to provide for his or her surviving spouse, without giving the surviving spouse full control over the property in the marital trust. At the death of the surviving spouse, the remaining assets in the martial trust pass to the children from the prior marriage.

As long as the trust meets the requirements for a QTIP trust, the bequest to the trust will qualify for the marital deduction at the death of the first spouse and will be included in the estate of the surviving spouse. To qualify for QTIP treatment under Section 2056(b)(7) of the Code:

1. The property must pass from the decedent.
2. The surviving spouse must receive all the income from the trust at least annually for life.
3. The surviving spouse must have the right to make non-income producing property productive.
4. During the term of the trust, no distributions may be made to any person other than the surviving spouse.
5. The QTIP election must be made on the last estate tax return filed by the executor on or before the due date of the return, including extensions or, if a timely return is not filed, the first estate tax return filed by the executor after the due date. In effect, nine (9) months after the date of death plus a six month extension, if requested. Treas. Reg. 20.2056(b)-7(b)(4)(i).

To increase flexibility:

6. The trust may permit distributions of principal to the surviving spouse limited by an ascertainable standard.
7. The surviving spouse may be given a limited testamentary power of appointment.
8. The surviving spouse may serve as Trustee of the QTIP trust.

PARTIAL QTIP ELECTION:

If authorized by the trust or governing law, the personal representative may elect to qualify only a portion of the QTIP trust for the marital deduction. If a partial QTIP election is made, the trust will be divided into two identical trusts, one that qualifies for the marital deduction and one that does not qualify for the marital deduction. To avoid estate taxes, property placed in the non-elected portion should not exceed the decedent's remaining applicable exclusion. Treas. Reg. 20.2056(b)-7(b)(2)(ii)(A)

The primary disadvantage to the partial QTIP election is that all trust income must be distributed to the surviving spouse, unlike the traditional credit shelter trust, which may distribute income and principal among the spouse and children. (3)

B. The most flexible trusts include the "Disclaimer Funded Credit Shelter Trust" and the "Clayton Trust." The discussion below explains the benefits of each trust.

DISCLAIMER FUNDED CREDIT SHELTER TRUST:

With a disclaimer funded Credit Shelter Trust, the entire estate is left to either a GPOA or QTIP Marital Trust for the benefit of the surviving spouse, who may disclaim all or a portion of his or her interest in the trust to a modified Credit Shelter Trust. For a disclaimer to be considered a "qualified disclaimer" under Section 2518 of the Internal Revenue Code:

1. The disclaimer must be in writing.

2. The individual must not have accepted the interest or any of the benefits of the property disclaimed.

3. The disclaimer must be received by the transferor, legal representative or holder of title to the property no more than nine months after the creation of the interest (usually the date of death) or age 21, whichever comes later.

4. The interest must pass, without any direction on the part of the person making the disclaimer.

5. The person may disclaim all or a partial interest in the property.

6. There are no extensions of time permitted to make the disclaimer, even if an extension of time to file the estate tax return is granted.

Where the disclaimed property passes to a Credit Shelter Trust, the surviving spouse may:

1. Receive all or a portion of the income from the trust, along with the children, to minimize current income taxes, as well as reduce future estate taxes of the surviving spouse.

2. Serve as Trustee, as long as the power to make distributions is limited by an ascertainable standard. Treas. Reg. 25.2518-2(e)(1)(i)

3. May not hold a power of appointment over trust property. Treas. Reg. 25.2518-2(e)(2)

Pros and Cons:

Disclaimer planning offers the surviving spouse the ability at the death of the first spouse to transfer all or part of the assets in the Marital Trust outright to another individual or to a non-marital trust, but the surviving spouse must act fast, not have accepted the benefits, and may have to file an estate tax return.

CLAYTON TRUST:

The "Clayton trust" incorporates the benefits of disclaimer planning, coupled with a partial QTIP election, but without some of the disadvantages associated with disclaimer planning.(3)

In a Clayton trust, the will or trust provides that all or a portion of the assets will pass to a QTIP trust for the benefit of the surviving spouse, to the extent a QTIP election is made. However, to the extent a QTIP election is not made, the non-elected portion passes to a non-marital trust similar in terms to the traditional credit shelter trust. (4)

1. With a Clayton trust, the non-marital trust may distribute income and principal to the surviving spouse and children, limited by an ascertainable standard.

2. The surviving spouse may be given a limited testamentary power of appointment over the marital and non-marital trusts.

3. An independent Personal Representative should be appointed to make (or not make) the Clayton election.

4. The surviving spouse may serve as Trustee of the marital and non-marital trusts.

5. Where the property has depreciated in value after the death of the first spouse, the Personal Representative may preserve the higher basis by permitting the property to pass to the Credit Shelter Trust and not make the QTIP election.

6. There is no danger of accepting the benefits, as with disclaimer planning.

7. With a Clayton trust, the period to make the QTIP election is governed by the same rules as the normal QTIP election. That is, the election must be made on the last estate tax return filed by the executor on or before the due date of the return, including extensions or, if a timely return is not filed, the first estate tax return filed by the executor after the due date. In effect, nine (9) months after the date of death plus a six month extension, if requested.

C. Coming Full Circle

POWER OF APPOINTMENT CREDIT SHELTER TRUST - "A FINAL BITE AT THE APPLE" OR "MAYBE NOT READY FOR PRIME TIME."

With the increase of the applicable exclusion amount to $5.45 million in 2016, and the enactment of portability, on the surface it appears reasonable to abandon the traditional marital/credit shelter trust design in favor of a portability type estate plan, which could involve either an outright transfer to the surviving spouse or a QTIP marital trust design as discussed above. However, each plan has its pros and cons.

OUTRIGHT TRANSFER TO SURVIVING SPOUSE (TENANTS BY THE ENTIRETIES):

Where husband and wife hold property as tenants by the entireties, this offers the couple maximum asset protection while both are alive, as well as a second step up in basis at the death of the surviving spouse. The downside to this arrangement is that at the death of the first spouse, all the assets are exposed to the creditors of the surviving spouse, and depending on the size of the combined estates, a "portability election" may still be required to preserve the DSUE amount.

QTIP MARITAL TRUST:

With this approach, at the death of the first spouse, his or her assets pour into a QTIP trust for the benefit of the surviving spouse. The advantage of this arrangement is that assets held in the QTIP trust are exempt from the creditors of the surviving spouse and receive a second step up in basis at the death of the surviving spouse. The disadvantage to this plan is that an estate tax return is required to be filed to make the QTIP election, and like an outright transfer, income is taxed to the surviving spouse.

CREDIT SHELTER TRUST:

Although the present sentiment appears to have shifted toward a "portability type plan," the simplicity and flexibility of the traditional credit shelter trust may still appeal to many couples. With a credit shelter trust:

1. There is no need to file an estate tax return if the decedent's estate does not exceed his or her remaining applicable exclusion amount.

2. The surviving spouse may serve as sole trustee or co-trustee.

3. Income may be distributed among the spouse and children to reduce current income taxes, as well as future estate taxes at the death of the surviving spouse.

4. The original stepped up basis is preserved at the death of the surviving spouse, should the property decrease in value after the death of the first spouse.

5. For couples with combined estates close to $10.90 million in 2016, any future appreciation in value of assets held in the credit shelter trust will not be included in the estate of the surviving spouse.

6. Assets held in the credit shelter trust are exempt from the creditors of the surviving spouse.

DOWNSIDE TO THE CREDIT SHELTER TRUST:

The main downside to the credit shelter trust is that there is no second step up in basis on appreciated assets at the death of the surviving spouse. This may or may not be of concern to the family, depending on the type of assets placed in the trust and whether they are managed to produce annual income or growth in the portfolio.

POWER OF APPOINTMENT CREDIT SHELTER TRUST:

Over the last five years, the higher applicable exclusion amount has significantly decreased the number of taxable estates and increased the number of instances where the value of the surviving spouse's estate is well below his or her remaining applicable exclusion amount.

In this situation, a number of authors have proposed various alternatives to assure assets held in the credit shelter trust receive a second step up in basis, but not a step down in basis, at the death of the surviving spouse. In effect, it's the best of all words! Some of the more workable proposals include:

1. Giving an independent trustee discretion to distribute assets from the credit shelter trust to the surviving spouse. This approach allows the trustee to distribute appreciated assets to the surviving spouse while retaining depreciated assets in the trust to prevent a step down in basis.

2. Giving an independent trustee or trust protector the authority to grant the surviving spouse a general power of appointment over specific appreciated assets held in the trust.(2), (5)

The drawback to these approaches is that the independent trustee may fail to act, the surviving spouse may die unexpectedly, or the surviving spouse may have creditors.

Two of the more problematic approaches include:

1. Giving the surviving spouse a contingent general power of appointment.

2. Giving the surviving spouse a limited power of appointment over trust assets that the spouse can exercise in such a way as to trigger the Delaware Tax Trap under Section 2041(a)(3) of the Code.

COMPARISON OF TRUST DESIGN OPTIONS FOR MARRIED COUPLES

The following chart compares the Credit Shelter trust, the QTIP trust, and the GPOA martial trust, to jointly owned property with respect to:

1. Asset protection
2. Avoiding probate
3. Stepped up basis
4. Estate taxes and portability election
5. Generation-skipping tax exemption
6. Remarriage
7. Fractional interest discounts
8. Simultaneous death and balancing of estates

(1) This chart was modeled after the chart created by Edwin P. Morrow, III, in his article “The Optimal Basis Increase and Income Tax Efficiency Trust (2013).” Please view the chart on the next page.

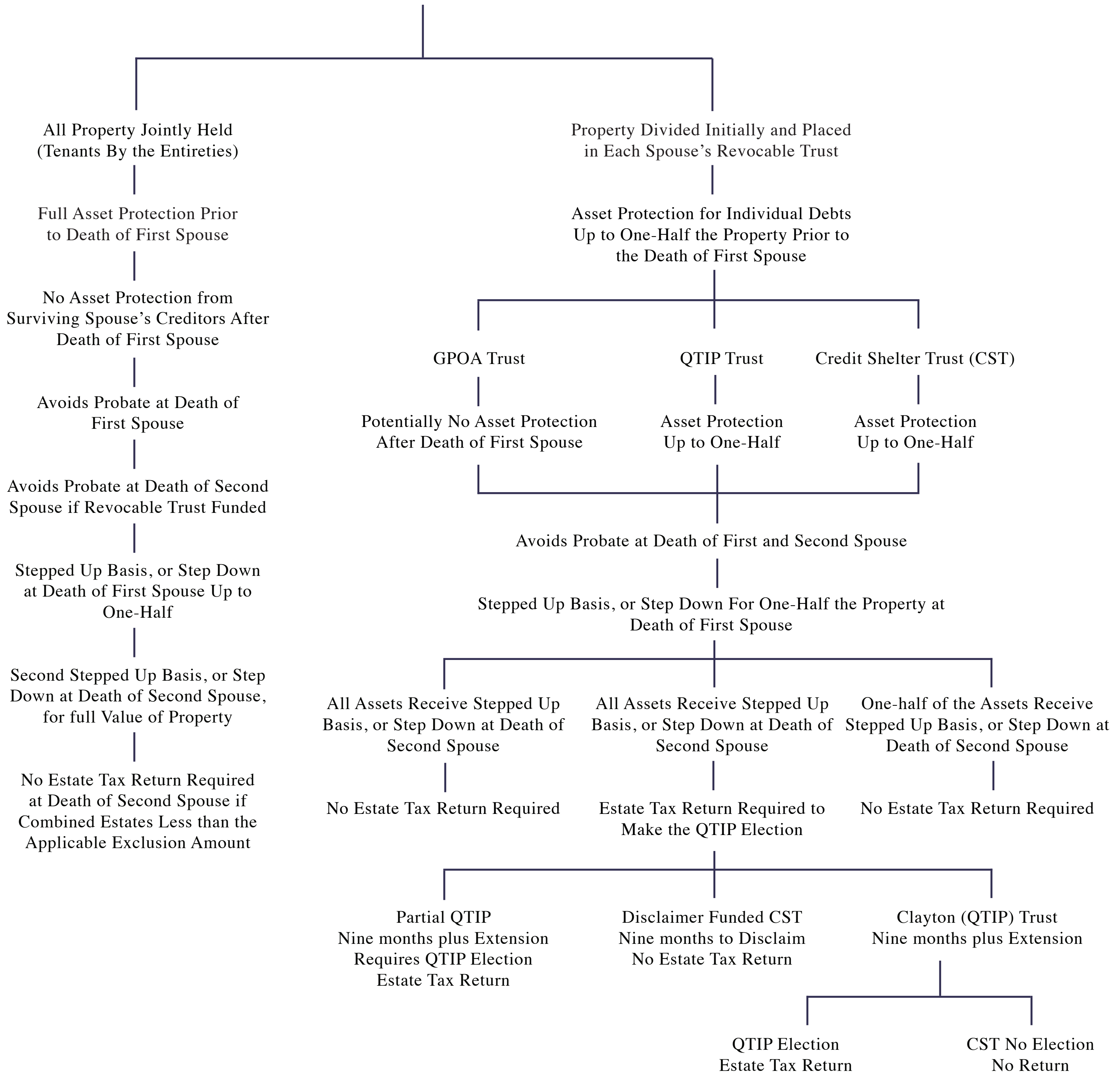
	OUTRIGHT TENANTS BY THE ENTIRETIES	CREDIT SHELTER TRUST	QTIP TRUST	GPOA MARITAL TRUST
ASSET PROTECTION **PRIOR** TO DEATH OF FIRST SPOUSE				
1. Husband and wife hold property jointly as tenants by the entireties	FULL	N/A	N/A	N/A
2. Property initially divided between revocable living trusts for each spouse.	N/A	HALF	HALF	HALF
ASSET PROTECTION **AFTER** THE DEATH OF FIRST SPOUSE				
3. Surviving spouse holds all assets if previously jointly held.	NONE	N/A	N/A	N/A
4. One-half the property held in trust for surviving spouse and one-half held in surviving spouse's revocable trust.	N/A	HALF	HALF	POTENTIALLY AVAILABLE TO CREDITORS
AVOIDS PROBATE AT THE DEATH OF FIRST SPOUSE				
5. Surviving spouse holds all assets if previously jointly held, or one-half the property held in trust for surviving spouse and one-half held in surviving spouse's revocable trust.	YES	YES	YES	YES
AVOIDS PROBATE AT THE DEATH OF SECOND SPOUSE				
6. Surviving spouse holds all assets if previously jointly held, or one-half the property held in trust for surviving spouse and one-half held in surviving spouse's revocable trust.	MAYBE YES (IF SURVIVING SPOUSE FUNDS HIS/HER REVOCABLE TRUST)	YES	YES	YES
BASIS TREATMENT AT DEATH OF FIRST SPOUSE				
7. Stepped up basis at death of first spouse to the extent of one-half the jointly owned property, and property placed in a Marital or Credit Shelter Trust.	YES	YES	YES	YES
8. Potential lesser basis step up when fractional interests (LLC, PTSHP, etc) fund the QTIP, GPOA, or Credit Shelter trust at death of first spouse. We may wish to dissolve the LLC, et. or amend it's terms to avoid discounts in the future.	N/A	YES	YES	YES
BASIS TREATMENT AT DEATH OF SURVIVING SPOUSE				
9. Second stepped up basis at death of surviving spouse for property that has appreciated in value. (QTIP has potential denial of the QTIP election under Revenue Ruling 2001-38 and the loss of the second stepped up basis in estates under the applicable exclusion amount). See also PLR 201603004 released January 15, 2016.	YES	NO	PROBABLY YES	YES

	OUTRIGHT TENANTS BY THE ENTIRETIES	CREDIT SHELTER TRUST	QTIP TRUST	GPOA MARITAL TRUST
BASIS TREATMENT AT DEATH OF SURVIVING SPOUSE				
10. "Step down" in basis at death of surviving spouse for property that has depreciated in value. The original stepped up basis in preserved should the property decrease in value if held in a credit shelter trust.	YES	NO	YES	YES
11. Potential lesser basis step up when fractional interests (LLC, PTSHP, etc) fund surviving spouse's revocable trust at death of surviving spouse. (For non-taxable estates, discounting will save no estate tax and will reduce the stepped up basis to the heirs).	N/A	YES	YES	NO
ESTATE TAX RETURN FOR COMBINED ESTATES UNDER THE APPLICABLE EXCLUSION AMOUNT OF $5.45 MILLION FOR 2016				
12. No Estate Tax Return (Form 706) is required to be filed where the value of the combined estates will not exceed the Applicable Exclusion Amount at the death of the surviving spouse.	YES	YES	NO 12(a).	YES
12(a). An Estate Tax Return is required to be filed to make the QTIP election in the estate of the first spouse to die.				
12(b). Where assets are close to the Applicable Exclusion Amount, or the surviving spouse may inherit additional assets, "portability" requires the surviving spouse to timely file an Estate Tax Return to preserve the "deceased spousal unused exclusion amount" (referred to as the "DSUE amount").	YES	YES NO 12(c).	YES	YES 12(d).
12(c). Where the Credit Shelter Trust is almost fully funded up to the Applicable Exclusion Amount, there may be no need to file an Estate Tax Return to preserve the DSUE amount.				
12(d). The GPOA Marital Trust does not require the Trustee to file an Estate Tax Return to obtain a stepped basis at the death of either spouse, but will require an estate tax return to preserve the DSUE amount, where the combined estates are expected to exceed the Applicable Exclusion Amount.				
12(e). There is a simplified reporting procedure when filing Form 706, just to preserve the DSUE amount.				

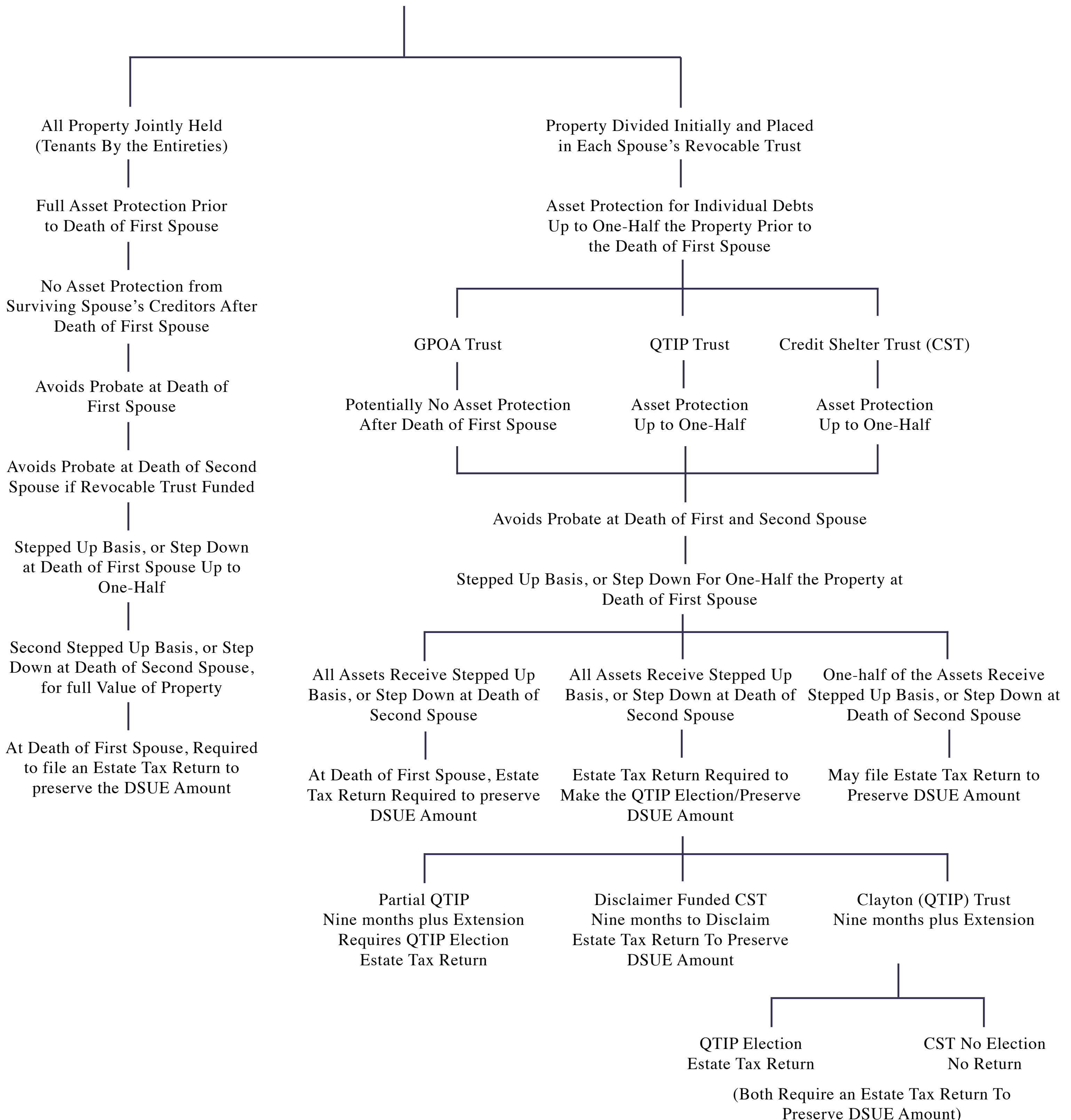
	OUTRIGHT TENANTS BY THE ENTIRETIES	CREDIT SHELTER TRUST	QTIP TRUST	GPOA MARITAL TRUST
ESTATE TAX RETURN FOR COMBINED ESTATES OVER THE APPLICABLE EXCLUSION AMOUNT OF $5.45 MILLION FOR 2016 13. Where the combined assets exceed the Applicable Exclusion Amount, “portability” requires the surviving spouse to timely file an Estate Tax Return Form (706), to preserve the “decreased spousal unused exclusion amount.” 13(a). Where the Credit Shelter Trust is almost fully funded up to the Applicable Exclusion Amount, there may be no need to file an Estate Tax Return to preserve the DSUE amount. 13(b). There is a simplified reporting procedure when filing Form 706 just to preserve the DSUE amount. 13(c). For Estates close to $10.90 million in 2016, holding appreciating assets, it may be preferable to fund the Credit Shelter Trust and forego a second step up in basis, so the growth in value is not subject to estate tax at the death of the surviving spouse. This assumes the estate tax rate exceeds the capital gains tax rate.	YES	YES NO 13(a). MAYBE NOT NEEDED	YES	YES
THE DOWNSIDE TO PORTABILITY LOSS OF GENERATION SKIPPING TAX EXEMPTION 14. There is no portability of the GST exemption. For couples with wealthy children who wish to leave everything to their grandchildren, the Credit Shelter Trust is preferable to a GPOA marital trust or outright devise to the surviving spouse. Loss of one spouse’s GST exemption is rarely of concern to most families.	YES	NO	NO (REVERSE QTIP)	YES
REMARRIAGE 15. If the surviving spouse remarries and the new spouse predeceases the surviving spouse, the deceased spousal unused exclusion amount from the first marriage is lost if the property is distributed outright to the surviving spouse. 15(a). Prior to, or at the time the surviving spouse remarries, the surviving spouse may create a preferred “freeze” partnership, use all or a part of his or her deceased spouses unused exclusion amount, and still retain the right to the income from the property for life. Any transfers made by the surviving spouse are first covered by the deceased spouse’s unused exclusion amount. 15(b). The above would not be necessary if the surviving spouse was able to use his or her second spouse’s Application Exclusion Amount.	YES 15(a).	NO	YES	YES

	OUTRIGHT TENANTS BY THE ENTIRETIES	CREDIT SHELTER TRUST	QTIP TRUST	GPOA MARITAL TRUST
SIMULTANEOUS DEATH: LOSS OF APPLICABLE EXCLUSION OF LESS WEALTHY SPOUSE 16. Where property is held in individual names and the estate of one spouse exceeds the Applicable Exclusion Amount, if the couple die simultaneously, there is no surviving spouse, and therefore, no portability election may be made. 16(a). If the Will or Trust had a simultaneous death clause that provided that the wealthier spouse is considered to have predeceased the less wealthy spouse, any amount above the Applicable Exclusion Amount would be added to the estate of the less wealthy spouse so as to use his or her remaining exemption.	N/A	YES 16(a).	YES 16(a).	YES 16(a).

FLOW CHART: TRUST DESIGN OPTIONS FOR COMBINED ESTATES UNDER THE APPLICABLE EXCLUSION AMOUNT



FLOW CHART: TRUST DESIGN OPTIONS FOR COMBINED ESTATES OVER THE APPLICABLE EXCLUSION AMOUNT



REFERENCES

INTRODUCTION

1. Paul S. Lee, Venn Diagrams: The Intersection of Estate & Income Tax (Planning in the ATRA-Math), Bernstein Global Wealth Management, New York, NY (October, 2014)

2. Steve R. Akers, Estate Planning: Current Developments and Hot Topics, Bessemer Trust, Dallas, Texas (June, 2014), page 10

I. ASSET PROTECTION STRATEGIES

1. Anne Buzby-Walt, Are Florida Laws on Tenancy by the Entireties in Personalty as Clear as We Think? The Florida Bar Journal September/October, 2011

2. Matthew Triggs and Jessica Zietz, So You Think You Know Joint Accounts: A Primer On The Law in Florida, ActionLine, The Florida Bar Real Property, Probate & Trust Law Section, Spring 2015

3. Alan S. Gassman and Erica G. Pless, Florida Supreme Court Cases Confirm Tenancy by Entireties in Personal Property, November, 2011

4. Barry A. Nelson, Asset Protection & Estate Planning - Why Not Have Both?, Chapter 15, pages 4-19, 46th Annual Heckerling Institute on Estate Planning, January, 2012

5. Mitchell M. Gans, Jonathan G. Blattmachr, and Diana S.C. Zeydel, Supercharged Credit Shelter Trust, 21 Probate & Property 52-64 (July/August 2007)

II. BUILDING FLEXIBILITY INTO THE ESTATE PLAN-FORMULA CLAUSES

1. Jeffrey N. Pennell, Tax Management portfolio series, Estate Tax Marital Deduction, 843-3rd T.M. Estates, Gifts, and Trusts at page A-59 (2013)

2. Edwin P. Morrow, III, The Optimal Basis Increase and Income Tax Efficiency Trust (2013), page 10

3. Barbara A. Sloan, Spousal Transfers - During Life, at Death and Beyond, Chapter 12, pages 39-63, 47th Annual Heckerling Institute on Estate Planning, January, 2013

4. Barbara A. Sloan, Variations on Traditional Marital/Credit Shelter Funding Techniques after EGTRRA, Chapter 9, pages 24-36, 38th Annual Heckerling Institute on Estate Planning, January, 2004

5. Howard M. Zaritsky and Lester Law, Basis-Banal? Basic? Benign? Bewildering?, Fundamentals Program Materials, Chapter 1, pages 75-94, 49th Annual Heckerling Institute on Estate Planning, January, 2015

III. COMPARISON OF TRUST DESIGN OPTIONS FOR MARRIED COUPLES

1. Edwin P. Morrow, III, The Optimal Basis Increase and Income Tax Efficiency Trust (2013),

IV. FLOW CHART: TRUST DESIGN OPTIONS FOR COMBINED ESTATES UNDER THE APPLICABLE EXCLUSION AMOUNT

V. FLOW CHART: TRUST DESIGN OPTIONS FOR COMBINED ESTATES OVER THE APPLICABLE EXCLUSION AMOUNT