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## UNCERTAIN ESTATE TAXES PLUS UNCERTAIN TRUSTS EQUALS TROUBLE by Randy Spiro

It is easy to find articles documenting the uncertainty surrounding the Federal Estate Tax Law. But when this uncertainty is compounded by uncertainty about the terms of a married couple's existing estate plan, the result is trouble.

It is too late to change the terms of a Will or a Trust once one of the spouses has died or become incapacitated. Many estate plans have been constructed based on attempting to minimize the federal estate tax, and some of these plans were created at a time when the estate tax kicked in on the portion of an estate in excess of \$600,000.

As the amount that can be given away at death free of estate tax has increased by federal legislation, the percentage of couples whose estates will be subject to that tax has dropped. Many married couples have chosen A/B or QTIP Trusts under which all or a portion of the first spouse to die's share of the assets becomes irrevocable when one spouse dies. Although the surviving spouse is often given certain rights in the assets, that surviving spouse when he or she becomes aware of how that estate plan works, may believe that the restrictions are a form of over-kill, if the reasons for protecting the first spouse to die's estate tax exemption no longer exist.

But the married couple may be uncertain about what type of trust they previously chose or about the nature of the restrictions imposed on the surviving spouse. Therefore, as the estate tax exemption has steadily increased, the couple often leaves their old estate planning documents in place because they do not understand why changes in the estate tax law would warrant them changing their estate plan.

Suppose the couple had children by different marriages and that their trust provides that when one of them dies, the amount which that spouse can give away free of estate tax immediately passes to the first spouse to die's children. That amount will be the first spouse to die's entire estate if the first spouse to die's death occurs in 2010, but that amount will only be \$1,000,000 if the first spouse to die's death occurs in 2011. That trust provision can be changed by an amendment to which can place a ceiling on the amount the children inherit in 2010 or a floor on what they inherit in 2011.

Consider a couple with children by the same marriage who have an estate of less than \$1,000,000. If they previously chose a trust that restricted the surviving spouse but only because their goal was to save estate taxes, they may wish to amend the Trust to remove those restrictions now that estate taxes are no longer relevant to them because of the increased exemption.

What about a couple with children by the same marriage who have an estate of \$3,000,000. They may face an estate tax problem if the exemption drops to \$1,000,000 in 2011 (as it is now scheduled to do) but not if currently pending federal legislation is passed to increase the exemption to \$3,500,000 or \$5,000,000. They may want to re-state (globally amend) their A/B Trust or QTIP Trust so it is changed to a Disclaimer Trust. This trust would give the surviving spouse an option of refusing assets when one spouse dies. At that point, the refused assets would pass to an irrevocable trust for the surviving spouse's use which would have the effect of preserving the first spouse to die's estate tax exemption.

By not understanding what happens to their Trust when one spouse dies, a married couple prevents themselves from seeing the urgent need to update their estate plan in light of changes in the estate tax law while they are both still able to do so.