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Bringing back the bypass trust

According to some people, the bypass trust (sometimes referred to as a credit shelter trust) has gone the way of the dodo bird in the current estate tax environment. However, this "dinosaur" of a technique for married couples is far from extinct. In fact, it may return to prominence as a scheduled estate tax law change looms in the near future. (See "Prepare for a potentially lower exemption" below.)

Taking the bypass route

As the name implies, a bypass trust allows the trust's funds to bypass your spouse's estate and go straight to the trust's beneficiaries, such as your children. Because the trust effectively uses the full federal gift and estate tax exemption for each spouse, it may enable a married couple to transfer millions of dollars estate-tax-free.

Typically, each spouse includes a provision in his or her will that sets up a bypass trust for the surviving spouse's benefit, and funds it with the equivalent of the deceased spouse's exemption amount. The exemption amount is the amount that's sheltered from estate tax in addition to the marital deduction for transfers between spouses.

When the first spouse dies, the assets are transferred to the trust. After the surviving spouse dies, the remaining assets go to the beneficiaries. If the trust is properly structured, this arrangement could avoid estate tax by using the estate tax exemptions of both spouses. That was often the primary motive behind bypass trusts.

A brief history lesson

Estate tax planning took a dramatic turn in 2001 when the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) became law. Previously, the estate tax exemption amount was a relatively paltry $675,000. The EGTRRA gradually raised it from $1 million to $3.5 million. Under EGTRRA, the estate tax was completely repealed — but for 2010 only — before it returned in 2011 with a $1 million exemption.

Prepare for a potentially lower exemption

Under the Tax Cuts and Jobs Act, the federal gift and estate tax exemption is scheduled to revert to $5 million, indexed for inflation, after 2025. If this becomes reality after 2025, a bypass trust will become more relevant for a greater number of families.

Of course, Congress could act before then, by extending or preserving the higher exemption amount or otherwise modifying the estate tax laws. Much depends on the outcomes of the elections this fall.

Best approach: Develop an estate plan based on current laws that's flexible enough to accommodate changes.

A subsequent tax law allowed for the "portability" of the unused exemption amount of the first spouse to die. In other words, if there was a $1 million exemption amount remaining in the estate of the spouse who died, that amount could be added to the estate tax exemption of the surviving spouse. This essentially doubled the exemption amount for some families. Accordingly, the need for using a bypass trust for estate tax purposes was reduced.

In addition, the exemption amount was hiked to $5 million and ultimately preserved until the Tax Cuts and Jobs Act (TCJA). And that's when things really got interesting.

For starters, the TCJA doubled the $5 million exemption to $10 million, and added inflation indexing through 2025. The exemption amount for 2024 is $13.61 million. Thus, the maximum current tax shelter for a couple is a staggering $27.22 million. Only the wealthiest of families would exceed this amount.

Other benefits

Nevertheless, there are several other reasons why you might consider a bypass trust. Normally, assets that are owned individually by a surviving spouse are fair game for creditors. To add insult to injury for other family members, assets might be siphoned off to help pay the debts of someone who marries the surviving spouse. However, a bypass trust protects the assets from the clutches of creditors, while protecting them from lawsuits.

If children are named as successor beneficiaries in the respective wills of a married couple, that could change, especially if a surviving spouse eventually remarries. There's no guarantee that the children of the initial marriage will receive their inheritance after the surviving spouse dies. With a bypass trust, you can guarantee assets pass to your children, regardless of any future marriages.

Furthermore, assets can be squandered through irrational spending by beneficiaries. If this is a concern, consider adding a spendthrift provision to your bypass trust. It can guard against frivolous spending while allowing the assets to be used in a reasonable manner.

A bypass trust can also provide flexibility by granting a power of appointment to the surviving spouse. This gives the surviving spouse the ability to access trust assets for specific reasons, such as health care or education-related expenses. Instead of granting a broad, "general power" of appointment, consider using a "limited power" of appointment. Here, the person holding the power of appointment can give assets to a select group of people who've specifically been identified by the deceased.

Finally, some states impose state estate tax with a lower estate tax exemption amount than the federal exemption. A bypass trust may be a viable solution for minimizing state tax.

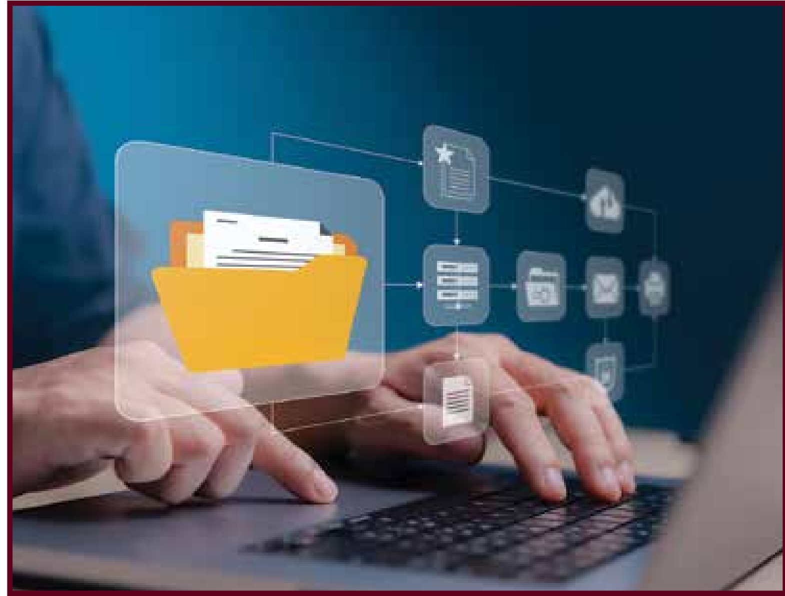
Right for your plan?

Does a bypass trust make sense for your estate plan? It depends on your personal situation. Although the current record-high federal gift and estate tax exemption amount may make a bypass trust less useful, these arrangements can still serve a useful purpose for many married couples. After all, the estate tax "certainty" under current law is only temporary. Therefore, the benefits of a bypass trust should be valuable for years to come. •

Digital assets

Properly account for these assets in your estate plan

In 2024, it's fair to say that most people have some form of digital assets. This asset type can include digital photos, video and music collections; social media accounts; online banking and brokerage accounts; or cryptocurrency. The question is: How many people have properly accounted for their digital assets in their estate plans?



If you've failed to address your digital assets in your plan, your loved ones may not be able to access them without going to court and, in some cases, may not even know the assets exist.

Inventory your digital assets

Begin by compiling a comprehensive list of all your digital assets, together with website addresses, usernames, passwords and account numbers. For those stored on computers, external hard drives, smartphones, tablets or other devices, be sure to provide instructions for accessing them, particularly if they're password protected. Store the list in a secure location and be sure your family knows where to find it. Consider using an online password management solution to simplify the process.

Keep in mind that many sites use two-factor authentication for added security. To log on to these sites, in addition to username and password, users will need a one-time code sent via text, email or an authentication app. To ensure your representatives have access to these sites, you'll also need to be sure they have any passwords or personal ID numbers needed to obtain one-time codes.

Provide legal consent

Providing your representatives with login credentials to access your digital assets is critical, but it's not enough. They'll also need legal consent to gain entrance to and manage your accounts.

Absent such consent, they may violate federal or state data privacy laws or, in the case of financial accounts, may even be guilty of theft or misappropriation. It's unlikely that the authorities would prosecute your representatives for unauthorized access to your accounts, but it's advisable to ensure they have explicit authority rather than rely on their possession of your login credentials.

Understanding the Revised Uniform Fiduciary Access to Digital Assets Act

For digital assets that you own, such as cryptocurrency or bank and investment accounts, your estate plan can provide for the transfer of assets to your heirs. But many types of digital assets — including email and social media accounts, as well as certain music and book collections — are licensed rather than owned. These assets generally are governed by terms of service agreements (TOSAs), which typically provide that the license is nontransferable and terminates on your death.

Fortunately, there are laws that govern access to digital assets in the event of your death or incapacity. Most states have adopted the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), which provides a three-tier framework for accessing and managing your digital assets:

1. The act gives priority to providers' online tools for managing the accounts of customers who die or become incapacitated. For example, Google offers an "inactive account manager," which allows you to designate someone to access and manage your account. Similarly, Facebook allows users to determine whether their accounts will be deleted or memorialized when they die and to designate a "legacy contact" to maintain their memorial pages.

2. If the online provider doesn't offer such tools, or if you don't use them, then access to digital assets is governed by provisions in your will, trust, power of attorney or other estate planning document.

3. If you don't grant authority to your representatives in your estate plan, then access to digital assets is governed by the provider's TOSA.

To ensure that your loved ones have access to your digital assets, use providers' online tools or include explicit authority in your estate plan.

Addressing who'll receive the assets

In addition to identifying digital assets and giving family members access to them, your estate plan must address ownership issues involving these assets. Consider working with your estate planning advisor to create a digital asset protection trust (sometimes called a digital asset revocable trust). This trust, which typically is revocable, allows you to transfer ownership of digital assets to the trust or, in the case of licenses, grant authority to the trustee to access and manage the assets. •

A difficult decision

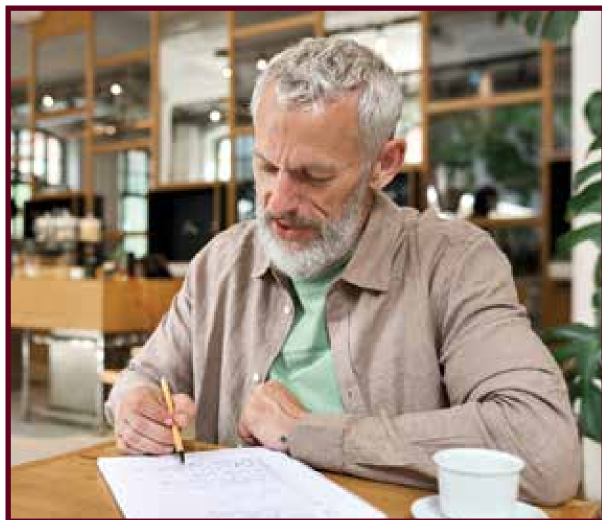
Choosing the right person to be your estate's executor

The executor of your estate acts as the quarterback of your estate plan. This person calls the shots for your estate and passes it through probate. Just like a football team scouting a quarterback, the decision about who to "draft" for this position is a critical one and requires much forethought.

Responsibilities of an executor

In a nutshell, an executor shepherds the will through the probate process. Most assets must

pass through probate before they can be distributed to beneficiaries. (Assets transferred to a living trust are exempt from probate.) When the will is offered for probate, the executor will obtain a "letter of testamentary" from the court, authorizing him or her to act on the estate's behalf.



It's the executor's responsibility to locate, manage and disburse the estate's assets. In addition, he or she must determine the value of property, such as real estate, artwork and other collectibles. Depending on the situation, assets may have to be liquidated to pay the estate's debts and any taxes due.

If funeral and burial expenses weren't prepaid, the executor can use estate funds. The executor will obtain copies of the death certificate, which will be needed for several purposes, including closing financial accounts, canceling certain benefit payments and filing tax returns.

The executor also must manage the estate's assets until they can be distributed. Typically, this involves supervision of brokerage and other investment accounts.

Note that every state has its own laws applicable to estates and the eligibility requirements for executors. These should also be considered.

Strengths and weaknesses

The executor plays a crucial role in the administration of your estate. Who should you choose to fill the role? It can be a relative — such as a spouse, adult child, a parent or other family member — or a trusted friend. You can also choose a professional, such as an attorney or financial planner.

Sometimes, the choice may be obvious. For example, if your spouse is immersed in all your financial activities, is proficient in the types of duties required and is "ready, able and willing" to take on the responsibilities, he or she may be the logical person to designate as the executor. Similarly, an adult child may immediately leap to your mind as the perfect person. In many cases, however, the decision isn't so easy.

> *The executor plays a crucial role in the administration of your estate.*

Given the enormity of the situation, you should delve deeper into potential candidates relating to the following aspects:

Familiarity. Usually, it's best to choose an executor who is well aware of your circumstances and is familiar with you and your family. This person would know the significance of carrying out your expressed wishes.

Organizational skills. The responsibilities of an executor are wide and varied. It makes sense to rely on someone with strong organizational skills.

Financial and legal acumen. Having a finance or legal background is a definite plus, but not required. Indeed, an executor can hire professional advisors for guidance.

Stability. Your executor may need to keep an even keel through some trials and tribulations. Choose someone who is level-headed and won't be easily drawn into family conflicts.

Don't forget to name a backup

Regardless of the choice you make, be sure to name a successor executor if, for any reason, the initial executor is unable to perform the duties. In some cases, you might name co-executors, especially if one is a layperson and the other is a professional. This is a common approach, though it can slow the process when two parties must coordinate actions.

Make the right choice

No matter how much effort you put into planning your estate, the plan won't work smoothly if you hastily choose the wrong executor. Turn to your estate planning advisor for guidance in making this weighty decision. •

ESTATE PLANNING PITFALL

You haven't informed your family about your estate plan

There's no question that creating an estate plan can be a major undertaking. But finally putting all the pieces of your plan together can bring peace of mind. However, it's beneficial to take the next step and talk to your family about your final wishes.

Indeed, one of the biggest estate planning concerns is the potential for family discord. Frequently, this occurs when there's little or no discussion of the estate plan among family members. The last thing you want to happen is to have loved ones "blindsided" by the terms of your will after your death.

This may occur if you give most of your estate to just one person (who may or may not be aware of your intentions). Others may resent your final decisions. Ultimately, this could lead to legal challenges.

Fortunately, there's a relatively simple solution to these issues: Discuss your intentions with family members before you finalize your plan.

This could result in squabbles and dissension, especially if the conversations involve sensitive matters, but it's better to clear the air now so there aren't surprises later.

Try to be open and frank in these discussions, and don't keep any secrets. By and large, family members will appreciate your efforts and will be more likely to act harmoniously. You may even receive some input that could affect your plan.

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