

Seasickness and Estate Taxes

Is Navigating the Changing Currents of Estate Tax Law Making You Queasy?

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Have you noticed how much estate tax law has been changing over the past few years? It is amazing that law so strategically important to such a large number of U.S. citizens can change so much.

We certainly have noticed, and so have estate-planning attorneys and a number of trust clients. Especially perplexed are married couples who have combined assets that hover near the threshold where they would be subject to estate tax. An increasing number are finding that their estate plans shelter exemption amounts nicely at present, but their plans may not serve them efficiently when scheduled changes in the current law take effect over the next several years.

As you may recall, each U.S. citizen can shelter up to \$2 million from estate taxes under the law in 2007 and 2008. That threshold amount is in a great deal of flux. In 2009, it will be \$3.5 million. In 2010, the estate tax will be temporarily repealed. And in 2011, it will settle back to \$1

million. That is, unless Congress steps in before 2011 with another package of changes.

Longstanding advice has been to have each spouse create separate estate plans that, as a pair, allow both husband and wife to utilize their exemption amounts. That way, a couple can shelter up to \$4 million this year, and \$7 million in 2009, but only \$2 million in 2011. They do so using the now-standard pair of living trusts that provide for sheltering the exemption amount of the first to die and effecting a deduction for the balance that benefits the surviving spouse.

Facing the forthcoming roller coaster pattern of exemptions, however, some are wondering how effective their traditional two-trust estate plans will be. They may have gone to some lengths to divide their assets in order to make their plans work in relation to the existing estate-tax exemption – and then find they have not actually sheltered enough.

Here is an example: John and Mary have \$3 million in assets. They divide their assets so that each has title to \$1.5 million. That way, if either dies in 2007 or 2008, they will have accomplished

a sheltering of half of their assets, but not as efficiently as possible. If they could have predicted the first death, that spouse would have arranged to have \$2 million of the assets. Suppose John dies in 2007. Yes, his trust will serve to shelter his \$1.5 million. But wait. Then, Mary – who will have been left with \$1.5 million – dies in 2011, having control over that \$1.5 million and having an exemption of only \$1 million available, leaving \$500,000 exposed to estate taxes. This example does not even factor in the likely growth of assets, which would amplify the estate tax consequence in the second estate.

The estate-planning community has been thinking long and hard about this problem ever since the 2001 estate-tax law changed the comparatively steady currents planners have been navigating for more than fifty years.



Thanks to a recent pair of IRS technical papers, legal shipwrights have come up with a vessel that better accommodates those whose plans

would have run into shoals like those discussed above. The IRS issuances have changed the physics of estate-tax planning. For reasons of brevity, we won't get into them here. Suffice it to say that the IRS has provided clarity on some legal principals involving *joint* trusts that had not previously been regarded as strong enough to bear the weight of estate-tax planning needs.

As a result, a joint trust can now meet critical estate-tax planning needs of married couples.

For couples with estates that clearly will not be subject to estate taxation, the **Basic Joint Trust** provides a way with just one document to avoid both asset splitting and probate.

For those couples where the prospect of incurring estate tax is uncertain, a **Disclaimer Joint Trust** will now save estate taxes if needed.

If it is likely that a married couple will need to use both of their exemptions, or if they are concerned about second marriages, the **Tax Plan Joint Trust** is available.

It is now apparent that a broad range of joint trust designs allows us to achieve tax objectives in a relatively simple manner while allowing most couples to treat their assets as common property available to both and to the survivor of them.

We plan on describing joint trusts in more detail in our next issue of the newsletter. If you would like more information sooner, please feel free to contact us.