

Real Estate, Probate and Trust Law

REPORTER

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ESTATE PLANNING DECISIONS

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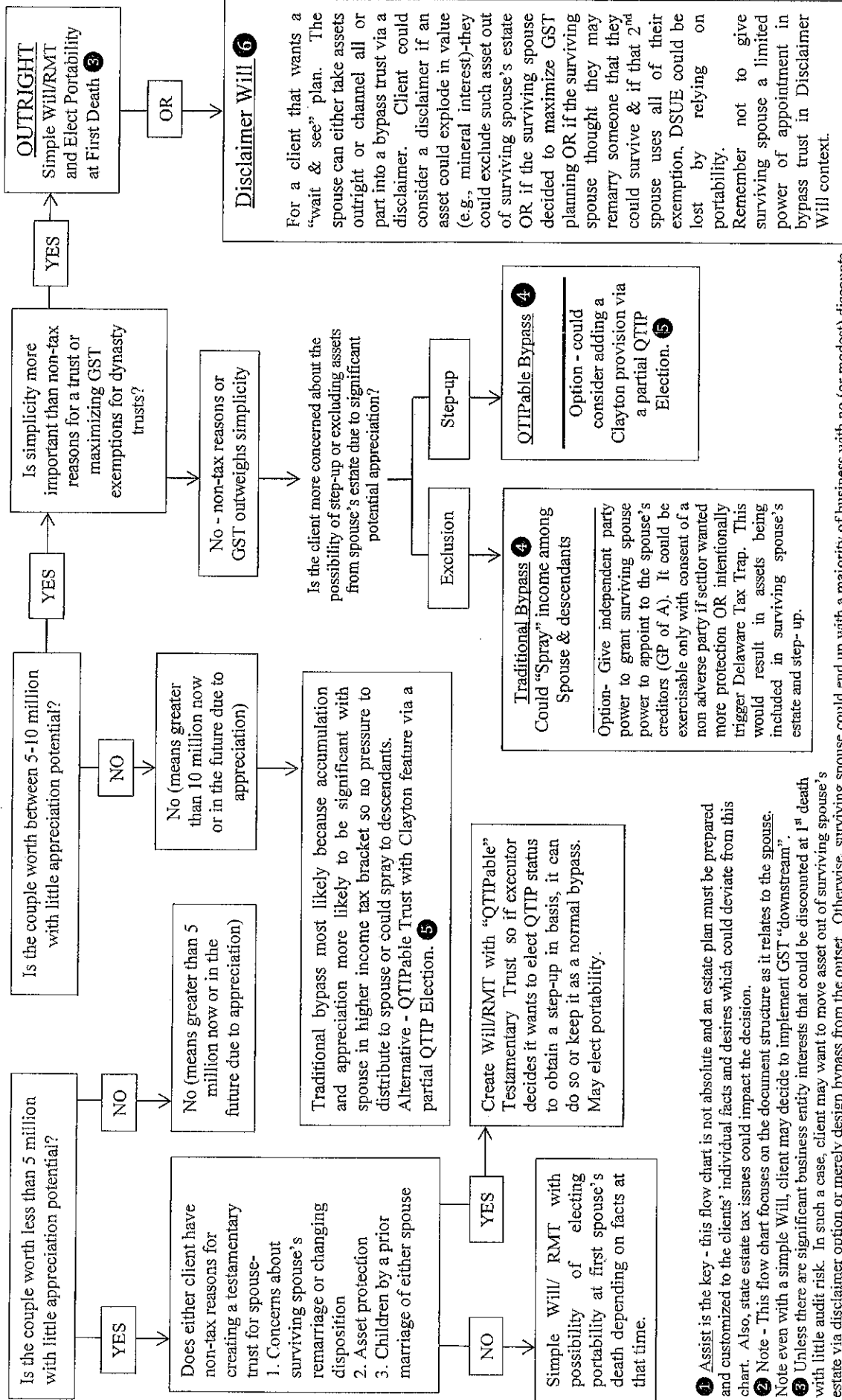
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Flowchart, Questionnaire, and Acknowledgment of Decisions

Prior to ATRA2012, the lines were much clearer as to which estate planning structure to use. While there has always been collateral damage, so to speak, depending on which route the clients chose (e.g., no step-up in basis for a bypass trust), the pros would typically outweigh the cons such that the decisions were easier. Now with a higher exemption, lower estate tax rates, and portability, choices have multiplied, the lines have blurred, and the decisions are not as clear cut as in the past. In a post-ATRA 2012 world, it will be critical for the professional to ascertain and prioritize the clients' major concerns and objectives in order to navigate the choices.

The Questionnaire and the Flow Chart are to be used in conjunction to help the client make an educated decision as to which technique best fits his or her situation. The Acknowledgment is to document that the client considered the major pros and cons so that if the spouse or beneficiaries years later have concerns about the plan that was ultimately implemented, there is documentation that the client made an informed decision based on the facts and knowledge the client had at the time.

Flow Chart to Assist ¹ Attorney as to type of Document As It Relates to Surviving Spouse ² (Post American Taxpayer Relief Act 2012)



¹ Assist is the key - this flow chart is not absolute and an estate plan must be prepared and customized to the clients' individual facts and desires which could deviate from this chart. Also, state estate tax issues could impact the decision.

² Note - This flow chart focuses on the document structure as it relates to the spouse. Note even with a simple Will, client may decide to implement GST "downstream".

³ Unless there are significant business entity interests that could be discounted at 1st death with little audit risk. In such a case, client may want to move asset out of surviving spouse's estate via disclaimer option or merely design bypass from the outset. Otherwise, surviving spouse could end up with a majority of business with no (or modest) discounts.

⁴ If QTIP is elected, most likely portability will be as well. Be aware that abuse could occur if surviving spouse elects QTIP and portability, and he or she does not waive right of reimbursement from QTIP. No such potential abuse exists with a traditional bypass trust. Portability may make sense even with traditional bypass depending on how much exemption is left over after funding bypass trust.

⁵ Warning- Best for surviving spouse not be the Executor making the QTIP election if there is a Clayton provision; otherwise, there could be gift implications.

⁶ There are other variations of the disclaimer approach that are beyond the scope of this flow chart.

Estate Planning Questionnaire for

(each spouse should fill out a separate questionnaire)

Dated _____

In order for us to better assist you, we need to know what your major concerns are vs. minor concerns. The answers may not give us a definitive direction to your plan, but could give us a good start to work from. Please take a moment to answer these few questions. Your attorney will help you address any unanswered questions in your conference:

	NO or Not Concerned					YES or Very Concerned				
1. Do you think the value of your estate will significantly increase in the future (including future inheritances)?	1	2	3	4	5	6	7	8	9	10
2. Are you concerned about your spouse remarrying and changing the estate plan?	1	2	3	4	5	6	7	8	9	10
3. Factoring in family dynamics, are you concerned with beneficiaries at the first spouse's death pestering or harassing (or even suing) the surviving spouse about their future inheritance?	1	2	3	4	5	6	7	8	9	10
4. Are you concerned about your assets ultimately going down to grandchildren once your children die?	1	2	3	4	5	6	7	8	9	10
5. How concerned are you about your assets obtaining a "step-up" in basis at the surviving spouse's death?	1	2	3	4	5	6	7	8	9	10
6. Factoring in the assets your spouse will own and have access to at your passing, are you more concerned about your spouse having access to your assets even if that results in the reduction in assets available to the remainder beneficiaries or is preservation of the core assets for children and/or other relatives a bigger concern?	_____ Spouse					_____ Children				
	_____ Balance									

7. Is it more important to you to keep things simple for the surviving spouse or is it more important to protect the assets from the surviving spouse's potential liability or remarriage?

_____ Simplicity
for spouse

_____ Asset
Protection

8. If you were to use a trust, are you more concerned about your assets not being included in your spouse's estate (i.e., concern that the joint estate will exceed \$5,250,000 indexed for inflation or Congress may lower the estate tax exemption) or are you more concerned that the assets are included in surviving spouse's estate in order to receive a step-up in basis for capital gain tax purposes?

_____ Estate tax
exclusion

_____ "Step-up"*
In basis

QUESTIONS 9-11 SHOULD BE ANSWERED IN CONFERENCE AFTER ATTORNEY EXPLANATION

9. If Portability is elected by your Executor, do you want your estate to pay for the preparation of the Form 706 to make such election or would you prefer your spouse to pay the cost out of his or her own funds?

_____ Estate
will pay

_____ Spouse
will pay

10. Do you want to give full discretion to your Executor whether or not to make a QTIP election and/or a portability election?

_____ Yes

_____ No

11. Do you wish to exculpate your Executor from liability in connection with such discretion?

_____ Yes

_____ No

* If you choose "step-up" and have concerns about your joint estate exceeding your estate exemption, portability should be elected to increase exemptions.

Signed: _____

Dated: _____

This questionnaire is to be used stand alone for estates less than roughly 5 million or in conjunction with Acknowledgment of Estate Planning Decisions for estates greater than 5 million.

Acknowledgment of Questionnaire Planning Decisions
(For couples with a net worth exceeding 5 million)

While in January of 2013 Congress passed American Taxpayer Relief Act 2012 (an extremely favorable estate tax law), the amount of options and their pros and cons can be a bit overwhelming. Without the proverbial "crystal ball," it will be impossible for you or us to design the perfect plan. Hindsight as they say is always 20/20. Nevertheless, by diligent "engineering" on the front end, your plan will have a much greater chance of success. Our responsibility is not to dictate what you should do, but instead make logical recommendations based on your facts and desires so that you can make an educated decision. We have prepared an Estate Planning Questionnaire for you to answer (or one of our attorneys will discuss and record your answers in your conference) so we are aware of your major concerns.

For couples with a net worth exceeding approximately 5 million dollars (or those who feel future growth will approximate that) who desire to utilize both spouses' estate tax exemption amounts (in 2014 \$5,340,000 per taxpayer increased for inflation for future years) to minimize estate taxes, there are two primary vehicles to accomplish this and a "hybrid":

1. Elect Spousal Portability on the IRS Form 706 Estate Tax Return of the first spouse to die (allows the surviving spouse to carryover first spouse's unused exemption).

2. Create a testamentary trust at the first spouse's death (allows first spouse to die to "park" their assets in trust for the benefit of the surviving spouse with such assets plus appreciation passing estate tax free to remainder beneficiaries at the surviving spouse's subsequent death; the testamentary trust can be designed to permit a "QTIP" election, which provides additional flexibility following the first spouse's death).

3. Disclaimer Will (hybrid) , whereby the surviving spouse can EITHER a) take the assets outright or b) disclaim them into a bypass trust for the surviving spouse's benefit.

Unfortunately, each vehicle has distinct advantages and disadvantages; therefore, your facts and desires will most likely dictate your selection.

Are you most concerned about:	Advantage Portability	Advantage Testamentary Trust	Advantage Trust with QTIP Election
1. Simplicity - as to flow of assets.	✓		
2. Expect significant appreciation in the Estate.		✓	
3. Cost of Electing Portability at the death of the first spouse to die.		✓*	
4. Less maintenance going forward after estate is settled.	✓		
5. Obtaining a second step-up in basis for income tax purposes.	✓		✓

* Note in some cases, even if a testamentary trust is used, it may be advisable to elect portability in which case the cost of the election would be incurred in any event.

	Advantage Portability	Advantage Testamentary Trust	Advantage Trust with QTIP Election
6. The ability to protect the assets for multiple generations (GST considerations).		✓	✓
7. Concern that the surviving spouse could remarry and change the testamentary plan at the second death.		✓	✓
8. Concern that children or stepchildren will badger, harass (or even sue) the surviving spouse about their remainder interest if a trust is created.	✓		
9. If the surviving spouse remarries and survives their new spouse and their new spouse utilizes his or her exemption, the surviving spouse could lose the DSUE of the first deceased spouse.		✓	

Many clients will have concerns about many or all 9 items, but neither technique satisfies all the concerns. After a thorough explanation of the advantages and disadvantages, we have chosen:

Date Signature

_____ _____ Simple testamentary plan (i.e., everything to each other) via Will or revocable management trust "RMT" and will elect portability. We understand that the preparation of the Estate Tax Return by my CPA or tax lawyer is a one time cost that could take 40-80 hours to prepare.

_____ _____ Create a testamentary trust at first spouse's death (electing portability could still be an option depending on how much goes into the bypass trust or if a QTIP election is made).*

_____ _____ Hybrid-Disclaimer Will/RMT-Simple on front end (i.e., all to each other) with the ability for surviving spouse to disclaim if he or she feels the testamentary trust is a better fit at that time. This option would only make sense if remarriage is not a concern. A disadvantage of this approach is that if the spouse disclaims, the spouse could not have a testamentary "limited power of appointment" to redirect how the assets would pass among specified beneficiaries at the spouse's subsequent death.

*In some estates that have non-tax reasons for creating a testamentary trust, such trust could be "QTIPable" at first spouse's death so that the surviving spouse could decide the format of the trust - 1) either elect QTIP Trust status which would include assets in surviving spouse's estate and receive a step-up or 2) not elect QTIP status (i.e., nonqualified trust often referred to as a bypass trust) and would not be included in surviving spouse's estate, but would not receive a step-up. In order to elect QTIP status, an IRS Form 706 will need to be prepared and filed and portability most likely would be elected.

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