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DYING AFTER 12/31/2010 UNDER NEW ESTATE TAX LAW by Randy Spiro

Dying after 12/31/10 under new estate tax law

On December 17, 2010, President Obama signed a new tax law. It is really a two year patch because it expires in 2013 and for persons dying 1/1/13 and after the estate tax exemption will be \$1,000,000 and the top estate tax rate will be 55%.

For persons dying 1/1/11-12/31/12, the estate tax exemption and the generation skipping transfer tax exemption is \$5,000,000 and the estate tax rate is 35%. For persons dying 1/1/11-12/31/12, the first spouse to die will be able to transfer his or her unused estate tax exemption to the surviving spouse by election made on the estate tax return of the first spouse to die.

I have previously discussed the disclaimer trust as a way to create flexibility in a married couple's trust. It says that the entire trust remains revocable when one spouse dies, but the surviving spouse has an option of disclaiming (refusing to accept) all or any portion of the first spouse to die's assets. The survivor does not forfeit the disclaimed assets, but rather, they pass into an irrevocable trust for the use of the surviving spouse.

This option allows the couple to wait until the first spouse's death so that the surviving spouse can consider the size of the estate, the size of the estate tax exemption and his or her life expectancy in determining whether or not to protect the first spouse to die's exemption. If no disclaimer is made, the first spouse to die's exemption is lost, but there are no restrictions on the spouse, and if the survivor believes that his or her own exemption is big enough (for persons dying in 2011 and 2012 that exemption will now be \$5,000,000), there may be no need for an irrevocable trust to protect the first spouse to die's exemption.

Under the new law, for persons dying 1/1/11-12/31/12, there is a new reason to consider re-stating (globally amending) an A/B or QTIP trust into a disclaimer trust. For first spouses to die dying in that two year period, that spouse's exemption can be protected even if his or her assets do not pass to an irrevocable trust. Stated differently, for first spouses to die who die in 2011 or 2012 their exemption can be protected even if the first spouse to die's share of the assets passes outright to the surviving spouse. If an A/B or QTIP Trust is re-stated to a disclaimer trust, and if the first spouse dies in 2011 or 2012, there will be no need for a disclaimer because the first spouse to die's representative can elect to transfer that spouse's exemption to the surviving spouse.