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Estate Planning - Estate Tax Marital Deduction

First, an explanation about why this letter discusses the estate tax marital deduction at all. Technically, the estate tax marital deduction is no longer available for 2010 because there is no estate tax, period, currently on the books for 2010. Consensus, however, is that this interim 2010 period with no estate tax will be repealed by Congress retroactively, to January 1, 2010. In its place, the estate tax will be revived and the estate tax marital deduction once again becomes critical. What's more, the estate tax for 2011 and later years is very much currently on the books and must be considered in every existing will and estate plan now constructed as a result.

Although you can leave everything you own to your spouse free of estate tax, doing so can actually increase estate tax costs at your spouse's death. The reason for this is that each person can leave up to an estate tax "exclusion amount" to children or other non-spouse beneficiaries without any federal estate tax liability. This "exclusion amount" was \$3.5 million in 2009 and, according to the latest discussions on Capitol Hill, will be made the permanent at that level for 2010 and later year. exclusion amount. By leaving everything to your spouse, however, you will waste this exclusion amount. Coordinating the tax breaks and both spouse's estates is a cornerstone of successful estate planning.

As an example, say the husband has \$4 million and the wife has \$250,000. The husband could leave everything to the wife without owing any estate tax. However, the wife's estate would owe tax on \$750,000 of the \$4.25 million (ignoring any growth in value for simplicity). She could leave \$3.5 million to the children (or anyone else) free of estate tax, but the husband's \$3.5 million exemption would be lost forever. That could cost the family over \$500,000.

This tax could be avoided by leaving \$3.5 million to the children and the rest to the wife. The first estate would still owe little if no tax. And the wife's estate also would owe little if no estate tax on her remaining share.

If the concern is that a total of \$750,000 would not be enough for the wife, it's possible to also leave the income from the other funds to her for her life, using what is called a credit shelter trust. The husband's estate would be able to shelter the \$3.5 million that ultimately will go to the children, and that amount won't be subject to tax in the wife's estate.

Of course, if the spouse owning few assets dies first, he or she could lose the opportunity to transfer \$3.5 million to the children free of tax. This may be dealt with relatively easily by having the wealthier spouse transfer funds tax-free during life to the other spouse. Such transfers are tax free, with neither gift tax nor estate tax consequences.

There also are situations in which the marital deduction can be used to save tax and at the same time address non-tax concerns. For example, there are circumstances in which leaving all the funds outright to a spouse may not be desirable. Typically, one or both spouses may be concerned about the management of the property, or may want to make sure that particular beneficiaries ultimately get the property. That last concern probably arises most often when there are children of a prior marriage.

In any of these situations, individuals often use what is technically called a QTIP trust. While various requirements must be met to qualify as a QTIP, the most important thing is that your

estate can qualify for the marital deduction without your leaving the property outright to your spouse. You only need give the income from the property for the spouse's life.

As you can see, the marital deduction is a powerful and flexible tool that can yield great benefits when properly coordinated. However, careful planning, including taking into account income tax considerations and practical considerations is necessary. If you have any questions, please do not hesitate to call. 1-866-657-0246 or jwaage@strategiclawgroup.com