The Estate Planner

By Lewis J. Saret

Post-ATRA Estate Planning—Part III: Planning for Married Couples After ATRA

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I. In General

A. Generally

On January 1, 2013, Congress passed the American Tax Relief Act of 2012[1] (ATRA), and on January 2, 2013, President Obama signed ATRA into law. ATRA makes permanent, with certain modifications, the transfer tax provisions of the so-called Bush tax cuts, originally enacted as part of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA).[2]

ATRA also made permanent certain transfer tax changes that Congress enacted as part of Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010[3] (TRA 2010).

One of the key changes made by TRA 2010, and the subject of the second column in this four-part series, was the enactment of the so-called portability of the applicable exclusion amount between spouses, which was enacted by Section 303 of TRA 2010.[4] That column discussed in detail the so-called "portability" rules, which allow a surviving spouse to use the unused applicable exclusion amount[5] of the first spouse to die.

The first column in this series discussed the changes made by ATRA that directly impact transfer taxes and summarized some other key tax changes that indirectly impact estate planning.[6]

This, the third part of this series, begins to discuss planning under the new rules for married couples and in particular how the new tax provisions changes the analysis and recommendations involved in typical estate plans. The final part of this series will conclude this discussion as well as this series.

II. Summary of Typical Credit Shelter Trust Estate Plan

A. Generally

To understand the impact of ATRA on estate planning for married couples, it helps to understand how estate plans for married couples were typically structured before ATRA. In this regard, prior to ATRA, most estate plans incorporated credit shelter trusts in some fashion. After ATRA, credit shelter trusts will still be important in many estate plans, but their use will be less ubiquitous than before ATRA. This section describes credit shelter trusts in a summarized fashion.

The transfer tax system gives each person a credit that shelters a fixed amount of assets from estate tax, referred to herein as the applicable exclusion amount. For example, under current law, the applicable exclusion amount equaled $5 million per person in 2011, adjusted for inflation from 2011 forward. In 2013, the inflation-adjusted applicable exclusion amount is $5,250,000.

Before 2010, a use-it-or-lose-it regime applied to the federal estate tax applicable exclusion amount. Specifically, if a decedent's estate did not use the available estate tax applicable exclusion amount, it was lost forever.

Example 1. Michelle and her husband, Frank, residents of Virginia, each have an estate of $3.5 million. They have one daughter, Donna. Michelle dies on January 1, 2009, and leaves her entire estate to Frank. Frank dies on December 1, 2009, leaving his entire estate, now consisting of $7 million (*i.e.,* the $3.5 million he originally owned plus the $3.5 million from Michelle) to Donna. Here, Frank's estate incurs an estate tax of $1,575,000 because only Frank's $3.5 million applicable exclusion amount is available to his estate. Michelle's applicable exclusion amount was lost because it was not used at her death.

The standard mechanism to fully utilize the applicable exclusion amount for married couples, in order to avoid the issue illustrated by Example 1, has historically been the credit shelter trust.

The objective of a credit shelter trust is to assure that an amount of property equal to the decedent's remaining applicable exclusion amount (*i.e.,* credit amount) ultimately passes to the next generation without being taxed in the estate of the decedent and, further, without being subsequently included in the gross estate of the surviving spouse upon his/her death.

These objectives are achieved by structuring the credit shelter trust so that the surviving spouse does not have sufficient legal (*i.e.,* property and income) rights with respect to the trust property such that the trust assets must be included in his/her gross estate upon his/her subsequent death. For example, the credit shelter trust can provide for income and corpus distributions to the surviving spouse (subject to an ascertainable standard), with the remaining income distributable to the children, either subject to an ascertainable standard or in the discretion of the trustee. The trust could also provide for discretionary distributions to the surviving spouse for any purpose, assuming the exercise of that discretion is made by an independent party (*i.e.,* not the surviving spouse). Various configurations are available for structuring trust distributions during the period of the spouse's survival. Further, at the time of the surviving spouse's death (or at some later time) the trust could terminate, with the property then being distributed to the children (or, possibly, grandchildren), or could be retained in further trust for these beneficiaries.

Typically, the credit shelter trust is funded with the maximum applicable exclusion amount available at the death of the first spouse to die (the "First Spouse"). The beneficiaries of a credit shelter trust usually include the First Spouse and either the First Spouse's children or descendants, which could include grandchildren and more distant descendants in addition to children. Under the federal transfer tax system, the credit shelter trust is not considered part of the surviving spouse's taxable estate and no federal estate tax will be due at distribution even if the trust assets have appreciated dramatically since the client's death. If GST exemption is allocated to the credit shelter trust, the assets in it would be also excluded from the estates of the descendants of the First Spouse who are trust beneficiaries.

The estate tax savings that would result from a credit shelter trust approximately equal the value of assets in the credit shelter trust at the death of the second spouse to die multiplied by the marginal estate tax rate that applies to the estate of the second spouse to die. To illustrate, the maximum estate tax rate in 2013

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is 40 percent and the credit amount in 2013 is $5.25 million, resulting in maximum possible estate tax savings of approximately $2,100,000 from a credit shelter trust in 2013. From an analytical standpoint, the estimated tax savings should be discounted using a present value analysis.

Planning Pointer. Planners should note that the estate tax savings could be even higher because the amount excluded from the estate tax would be the amount at the death of the surviving spouse, which would include any appreciation in the assets contained in the credit shelter trust. To illustrate, if the First Spouse died in 2013 and fully funded the credit shelter trust with $5.25 million of stock in a closely held business that is subsequently sold for $20 million, the full $20 million would be excluded from the surviving spouse's estate. If the surviving spouse had a taxable estate, the tax savings would be $8 million (*i.e.,* $20 million x 40% estate tax rate).

Usually, credit shelter trusts are contained within an individual's Will or Revocable Trust and are funded with assets owned by the individual's estate or his revocable trust. Therefore, it is important for married couples to ensure that each spouse owns enough assets in their own names to fund their credit shelter trust or at least to consider the consequences of funding or not funding their respective credit shelter trusts.

Planning Pointer. Credit shelter trusts can also be created during the First Spouse's lifetime, as an *inter vivos* trust. Such a trust would lock in any appreciation occurring post-gift to the credit shelter trust but before the date of the first spouse's death. To illustrate, if a wife owned a business that she anticipated selling or taking public in the future, by making a gift to a credit shelter trust, she could lock in the pre-sale value by making the gift to an *inter vivos* trust before the sale/IPO. On the other hand, using an *inter vivos* credit shelter trust results in the loss of the step up in basis of the credit shelter trust assets upon the death of the surviving spouse.

Caution. It is important to balance the tax savings from credit shelter trusts with other objectives of the family. Although important, tax planning should not override all other objectives, such as asset protection and objectives that relate to prenuptial agreements.

Finally, it should be noted that jointly owned assets that pass by operation of law at death (*e.g.,* joint property with the right of survivorship, or real estate owned by spouses as tenants by the entirety) generally cannot be used to fund a credit shelter trust. The reason for this is that, at the moment of the first spouse's death, the second spouse becomes the outright owner of the property that was formerly jointly owned. As a result, that property will be unavailable to fund the credit shelter trust.

Example 2. Same facts as Example 1, except that Michelle's will provides that her estate funds a credit shelter trust to the extent of her available federal estate tax applicable exclusion amount, which in the case of Michelle's estate, is $3.5 million. Michelle's will provides that Frank is the trustee of this trust and that any distributions must be pursuant to an ascertainable standard, and that Frank and Donna are the beneficiaries of the credit shelter trust. Here, when Frank dies on December 1, his estate now consists of $3.5 million because he does not have an ownership interest in the assets owned by the credit shelter trust, even though (1) as trustee he is able to exercise a significant amount of control over those assets, and (2) he is a beneficiary of that trust. As a result, Frank's estate incurs no estate tax. Therefore, the credit shelter trust results in an estate tax savings of $1,575,000.

Example 3. Laura, an OBGYN, and George, a neurologist, are married. Each has his/her own medical practice. Their net worth consists of a home, which is worth $3 million, and which they currently own jointly as tenants by the entirety. Laura has a 401(k) with $100,000 in it, and George has a 401(k) with $100,000 in it. Here, to enable Laura and George to have sufficient assets to fund their respective credit shelter trusts at their deaths, their attorney recommends that they partition their home and re-title their home as tenants in common. This way, each would own a one-half interest in the home, worth $1.5 million, which they could use to fund their credit shelter trust at

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death. The disadvantage of this recommendation is that in some states they lose the asset protection benefits of owning their home as tenants by the entirety, and each spouse's one-half interest in the home becomes exposed to any creditors of that spouse, including any judgment creditors arising from any malpractice claims.

Example 4. Quynh and Charles enter into a prenuptial agreement before their wedding at a time when Quynh's net worth is $10 million and Charles' net worth is $200,000. Their prenuptial agreement provides that neither has any interest in the other spouse's pre-marital property. Here, although Quynh and Charles could reduce their family's overall estate tax burden by re-titling some assets from Quynh to Charles, doing so would negate the prenuptial agreement.

B. QTIP Trust

i. Generally. Credit shelter trusts are often paired with a Qualified Terminal Interest Property (QTIP) marital trust (QTIP Trusts). Such a QTIP trust will generally be most beneficial in terms of accomplishing important nontax objectives; however, QTIP trusts also enable some tax benefits.

See Exhibit 1 for a diagram illustrating a typical dispository scheme using a credit shelter trust and marital trust, with funding via a formula clause.

ii. Advantages of QTIP Trust. The key advantages of a QTIP Trust are as follows:

- The QTIP election of the first decedent spouse (or donor spouse in the case of an *inter vivos* QTIP trust) effectively uses the applicable exclusion amount of the surviving spouse.[7] Similarly, it allows the First Spouse to effectively use the GST exemption of the second spouse.
- QTIP Trusts assure that the property is preserved for ultimate disposition to the family members that the First Spouse prefers. The surviving spouse need only receive income from the trust, although distributions of principal may be given to the surviving spouse. The remaining trust principal can be retained for the benefit of other family members, such as the children or descendants of the First Spouse. This is especially important in second marriages where the First Spouse wants his property to benefit the new spouse during his/her life but then for the principal to go to the children of the First Spouse from a prior marriage.
- The surviving spouse may be given a limited power of appointment over the remainder beneficiaries of the QTIP Trust.
- The surviving spouse may serve as trustee. Typically, to accomplish the objectives of the First Spouse, such spouse may want to limit the authority of the surviving spouse. Otherwise, by giving too much authority to the surviving spouse the arrangement will effectively undermine the nontax objectives of the First Spouse.
- For First Spouses who are married multiple times, such spouses may create separate QTIP trusts or each donee/surviving spouse.
- QTIP Trusts offer asset protection that protects the trust principal from creditor claims against the surviving spouse and remainder beneficiaries. This is a substantial benefit when compared against an outright distribution to a surviving spouse.
- QTIP Trusts may reduce state estate taxes in states that have their own estate tax regime.
- QTIP Trusts may facilitate valuation discounts over various assets.

iii. Disadvantages of QTIP Trust. The key disadvantages to a QTIP Trust are as follows:

- If the overriding goal of the QTIP Trust is to get assets to the remainder beneficiaries as opposed to the donee spouse and to take advantage of the donee spouse's applicable exclusion amount, the remainder beneficiaries will be unable to benefit from the trust until the death of the donee spouse. For spouses of similar age, this is unlikely to be an issue, but where there is a large age disparity, this may be an issue. In addition, the QTIP Trust must pay all income to the donee spouse.
- Estate taxes imposed on the QTIP Trust at the death of the surviving spouse may be paid out of the QTIP Trust. This may, depending on the net worth of the clients and their situation, significantly reduce the amount of assets passing to the remainder beneficiaries. If the surviving spouse has few assets or if the remainder beneficiaries are the children of both spouses, this is less likely to be an issue.
- QTIP trusts are trusts, so inherently they are more complex than an outright gift and involve some administrative costs, such as the cost of annual tax returns, *etc.*

iv. Requirements for Marital Trust to Qualify as QTIP. In order to qualify for the QTIP marital deduction, the QTIP Trust must satisfy the following requirements:

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- The surviving spouse must have the lifetime right to all of the income from the QTIP.[8]
- All income must be payable to the beneficiary spouse annually or more frequently.[9]
- Nobody, including the beneficiary/spouse, may appoint the principal or income during the donee spouse's lifetime to anyone other than the beneficiary/spouse.[10]
- The grantor/spouse makes the QTIP election to all or a "specific portion."[11]

III. Overview of Portability Rules and Simple Portability Based Plan[12]

A. Generally

Portability allows the first spouse to die to transfer his/her unused estate tax applicable exclusion amount to the surviving spouse, who can then use it for his/her gift or estate tax purposes.[13] The first spouse's unused estate tax applicable exclusion amount is the "deceased spouse's unused exemption" (DSUE).

B. Applicable Exclusion Amount Taking into Account Portability

If the estate of the first spouse to die makes the appropriate portability election, the surviving spouse's applicable exclusion amount may be calculated as follows:

+	Surviving spouse's basic applicable exclusion amount.
+	Aggregate DSUE amount.[14]
=	Applicable exclusion amount[15]

Example 5. Hercule and Jane are married. Hercule dies in 2011, and his estate makes the portability election. Assume the DSUE amount from Hercule's estate is \$4 million. In 2013, when the basic applicable exclusion amount equals \$5.25 million, Jane dies. Here, the applicable exclusion amount available to Jane's estate equals \$9.25 million, which is calculated as follows:

+	\$5,250,000	Surviving spouse's basic applicable exclusion amount.
+	\$4,000,000	Aggregate DSUE amount.[16]
=	\$9,250,000	Applicable exclusion amount[17]

Any applicable exclusion amount of the first spouse to die that is used to reduce the estate tax liability of that spouse's estate tax reduces the amount of the excess applicable exclusion amount that carries over to the surviving spouse in the form of the "deceased spousal unused exclusion amount" or DSUE amount.

In this regard, the DSUE equals the lesser of the following two items:

1. The basic exclusion amount[18]
2. The excess of (a) the applicable exclusion amount of the last such deceased spouse, over (b) the amount with respect to which the tentative tax is determined under Code Sec. 2001(b)(1) on the estate of that deceased spouse.[19]

C. Simple Portability-Based Estate Plan

i. Overview. The ability to use portability may, as a practical matter, arise in two basic ways.

First, the First Spouse may own fewer assets at death than the applicable exclusion amount.

Second, the First Spouse may own more assets than the applicable exclusion amount but may transfer sufficient assets to the surviving spouse, which qualify for the estate tax marital deduction, such that the First Spouse's remaining assets are less than the applicable exclusion amount. In turn, the assets passing to the surviving spouse in this scenario may either pass outright to the surviving spouse or may pass into a QTIP trust, which qualifies for the estate tax marital deduction.

These possibilities are set forth in the diagram in Exhibit 3, captioned "How Portability May Arise."

ii. Decedent's Assets Pass Outright to Surviving Spouse. Under the simplest portability estate plan, the decedent leaves his/her assets directly to the surviving spouse outright (*i.e.,* not in a trust). Some professionals refer to a will that uses such a plan as a "sweetheart will." The decedent's executor would then file an estate tax return (*i.e.,* Form 706) making the portability election. When clients think of a simple portability estate plan, this is generally what they have in mind, but often without understanding that a Form 706 must be filed in order to make the portability election.

There are several advantages and disadvantages to this type of plan, which are discussed below. *See* Exhibit 2 for a diagram illustrating a simple portability-based estate plan for married couple using outright disposition to surviving spouse.

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iii. Decedent's Assets Pass to QTIP Trust. An alternative, when using a portability-based estate plan, to having assets go outright to the surviving spouse is to have the assets of the first spouse to die pass to a QTIP Trust. This would allow the portability election to be made and would provide the benefits that are associated with trusts, such as asset protection provided to the surviving spouse, protecting the assets in the QTIP Trust from any new spouse of the surviving spouse should the surviving spouse marry again, *etc.*

iv. Decedent's Assets Pass Outright to Surviving Spouse with Backup Disclaimer QTIP Trust. A third alternative is a combination of the two prior alternatives. Specifically, the decedent could leave his/her assets outright to the surviving spouse but provide for a backup disclaimer QTIP or credit shelter trust. Under this alternative if the surviving spouse does nothing, the First Spouse's assets pass outright to the surviving spouse. However, this plan gives the surviving spouse the ability to disclaim his/her interest and cause it to pass into either a QTIP trust or a credit shelter trust.

This plan builds in additional flexibility. However, this plan is also disadvantages in that the surviving spouse must proactively take action after the First Spouse's death in order for the plan to work properly. In addition, the surviving must not accept any benefits from the assts to be disclaimed before making the disclaimer, which increases the risk of the plan failing.

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IV. Credit Shelter Trust Plan Compared with Portability-Based Estate Plan

A. Generally

One of the most significant implications of estate tax portability is that it adds an additional level of complexity to estate planning. Before portability, most estate plans for married couples fell into a well-defined pattern, which typically included (a) a credit shelter trust, and (b) either a QTIP Trust or an outright distribution to the surviving spouse, either *via* a formula clause or a disclaimer-based plan. Now, with portability, planning is significantly more complicated because there are more options available to married couples, which impacts married couples in significantly different ways depending on their fact situation.

As a result of the foregoing, it is very important for planners to evaluate the facts of married couples to determine what makes the most sense for those couples.

Caution. Even before portability was enacted, it was often difficult to communicate the essentials of a credit shelter trust based plan to clients in such a way that clients fully understood the options available to them and the implications to their families. With the increased complexity of portability, it will become much more difficult, in the author's opinion, to communicate with clients in a way that they understand and fully appreciate the planning options available to them and the implications of the choices they make.

The remainder of this section will discuss the advantages and disadvantages of portability-based estate plans and credit shelter-based estate plans.

B. Basis Step up

i. Overview. One of the key advantages of a portability-based estate plan over a credit shelter trust-based estate plan is that portability allows the married couple to obtain a second step up in basis upon the death of the second spouse.[20] In contrast, in a credit shelter based estate plan, the married couple gets a step up in basis upon the death of the first spouse to die but does not get a second step up in basis upon the death of the second spouse.

Example 6. Jerry and Elaine are married and have one child, George. They live in Virginia, which has no state estate tax. Jerry's net worth equals $20 million, which consists entirely of J Inc. stock, with a basis of $0 and a fair market value $20 million, and Elaine's net worth equals $0.

Jerry dies on January 15, 2013. His estate plan consists of a Will that uses a formula clause that places $5.25 million into a credit shelter trust and the remainder of Jerry's estate, $14.75 million outright to Elaine. There is no estate tax due at this point.

Elaine dies on December 31, 2013, and her entire estate passes to George. When Elaine dies, the value of the stock in the credit shelter trust is $10.5 million and the value of the stock in Elaine's name equals $29,500,000. This generates an estate tax of $9,700,000 upon Elaine's death, leaving $19,800,000 after estate tax in Elaine's estate.

On January 1, 2015, J Inc. is sold to a third party for $30,300,000.

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Here, the stock in the credit shelter trust is excluded from Elaine's estate but retains the basis of $5.25 million. The stock in Elaine's name is subject to estate tax but is able to take advantage of Elaine's $5.25 million applicable exclusion amount, and it gets a step up in basis.

Therefore, when the J Inc. stock is sold on January 1, 2015, George recognizes a gain of $0 on the stock that he inherited from Elaine. This amount is calculated as follows:

+	$19,800,000	Sales proceeds of J Inc. stock owned by George.
-	$19,800,000	Basis of J Inc. stock owned by George.
=	$0	Gain/Loss on sale of J Inc. Stock.

In addition, when the J Inc. stock is sold on January 1, 2015, the credit shelter trust recognizes a gain of $5,250,000, which is calculated as follows:

+	$10,500,000	Sales proceeds of J Inc. stock owned by George.
-	$5,250,000	Basis of J Inc. stock owned by George.
=	$5,250,000	Gain/Loss on sale of J Inc. Stock.

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If you assume a 20-percent capital gains rate on the sale of the stock, this would translate into a $1,050,000 capital gain tax.

Therefore, after taxes, $29,250,000 in value passes to the family of Elaine and Jerry, which is calculated as follows:

+ $19,800,000	J Inc. stock proceeds owned by Elaine's estate
+ $10,500,000	J Inc. stock proceeds owned by credit shelter trust
−$1,050,000	Capital gain tax on sale of J Inc. stock held by credit shelter trust.
=$29,250,000	Net assets after tax owned by family of Elaine and Jerry

Example 7. Same facts as Example 6, except that Jerry leaves his estate outright to Elaine and his executor makes the portability election.

Here, when Elaine dies, she will own stock worth $40 million. The applicable exclusion amount available to her will be $10.50 million, leaving $29.5 million subject to a 40-percent estate tax equal to $11.8 million. This leaves $28.2 million of assets after estate tax.

George will take a basis in the J Inc. stock at Elaine's death of $28 million. Therefore, when George sells the J Inc. stock on January 1, 2015 for $28 million, he will recognize no gain or loss and therefore will have no capital gain on the sale of the J Inc. stock.

Therefore, to sum up, using a credit shelter under these circumstances results in George receiving $1,050,000 more of assets than using a portability-based plan. However, this will not always be the case.

Example 8. Same facts as Example 6 except that the value of J Inc. stock at Jerry's death equals $5 million and passes entirely into a credit shelter trust for the benefit of Elaine and George, and that J Inc. increases in value to $8 million at the date of Elaine's death and is sold for $8 million on January 1, 2015.

Here, there will not be any estate tax because J Inc. stock is under the applicable exclusion amount at Jerry's death and is not included in Elaine's estate. However, when the J Inc. stock is sold for $8 million, there is a capital gain of $3 million (*i.e.,* sale price of $8 million less basis of $5 million), which assuming a 20-percent capital gain rate equals $600,000.

Example 9. Same facts as Example 8, except that Jerry leaves the J Inc. stock to Elaine and his estate makes a portability election. Here, there is no estate tax when Elaine dies because her available applicable exclusion amount equals $10.5 million (*i.e.,* Jerry's DSUE of $5.25 million and her own applicable exclusion amount of $5.25 million), which exceeds the assets in her estate. In addition, because Elaine's estate gets a second step up in basis at her death, when George sells the J Inc. stock there is no capital gain. Therefore, under this plan, George receives $600,000 more assets after taxes than under the credit shelter trust plan in Example 8.

ii. IRD Property. Generally, portability works better for property that has associated income in respect to a decedent (IRD) with it than a credit shelter does. This results because if a credit shelter trust is funded with IRS property, the income taxes on the IRD will erode the wealth that ultimately passes to the remainder beneficiaries at the death of the surviving spouse. The result of this is that part of the applicable exclusion amount that was used to fund the credit shelter trust is wasted because it must be used to pay taxes. In contrast, the DSUE is fixed as of the date of death of the first spouse. Therefore, IRD property does not waste the applicable exclusion amount as it does for IRD property.

iii. Market Declines. One disadvantage of a credit shelter trust is that the amount of the credit of the first spouse to die is fixed when spouse one dies. If the value of assets that goes into the credit shelter trust decreases in value after the death of the first spouse then the applicable exclusion amount is wasted to that extent. In contrast, the DSUE amount is not reduced if the assets inherited from the first spouse decline in value.

Example 10. Rachel and Ross are married and have one child, Chandler. Rachel dies on January 15, 2013, and owns $5 million of X corporation stock, which goes into her credit shelter trust under her will. Ross dies on December 31, 2013, owning $10 million of assets. On November 1, 2013, X corporation ceases operations and goes out of business and liquidates, resulting in zero assets in the Rachel's credit shelter trust as of December 31, 2013.

Here, the estate tax imposed on Ross's estate is $1,900,000.[21]

Example 11. Same facts as Example 10, except that instead of using a credit shelter trust Rachel leaves the X corporation stock outright to Ross and her executor makes a portability election.

Here, the estate tax imposed on Ross's estate is $0, which results an estate tax savings of $1,900,000.[22]

Endnotes

1 American Taxpayer Relief Act of 2012 (P.L. 112-240).

2 P.L. 107-16 (2001).

3 P.L. 111-312 (124 Stat. 3296, 3302).

4 ATRA also made conforming amendments to Code Secs. 2505(a), 2631(c) and 6018(a)(1). In addition, Section 303 of TRA 2010 directs the Secretary to issue such regulations as may be necessary or appropriate to carry out section 303(a) of TRA 2010.

5 The applicable exclusion amount is the amount sheltered from estate tax by the unified credit provided under Code Sec. 2010.

6 Lewis J. Saret, The Estate Planner, *Post-ATRA Estate Planning—Part I: Key Transfer Tax Provisions of the American Tax Relief Act of 2012,* Taxes, July 2013, at 7.

7 Code Sec. 2044.

8 Code Sec. 2056(b)(7)(B).

9 *Id.*

10 *Id.*

11 *Id.*

12 Because the portability rules were discussed in detail in part two of this series of columns, Lewis J. Saret, The Estate Planner, *Post-ATRA Estate Planning—Part II: Estate Tax Portability,* Taxes, Sept. 2013, at 17, the technical portability rules are only summarized here.

13 For detailed discussion of the portability rules, *see* Lewis J. Saret, The Estate Planner, *Post-ATRA Estate Planning—Part II: Estate Tax Portability,* Taxes, Sept. 2013, at 17.

14 Code Sec. 2010(c)(2).

15 Code Sec. 2010(c)(2).

16 Code Secs. 2010(c)(2)(A), 2010(c)(3).

17 Code Sec. 2010(c).

18 Code Sec. 2010(c)(4)(A).

19 Code Sec. 2010(c)(4)(B).

20 Code Sec. 1014(a)(1).

21 This amount equals $10,000,000 – $5,250,000 = $4,750,000 x 40% = $1,900,000.

22 This amount equals $10,000,000 – $10,500,000 = $0 x 40% = $0.

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Exhibit 1. Estate Plan for Married Couples Using Credit Shelter Trust and Marital Deduction Trust

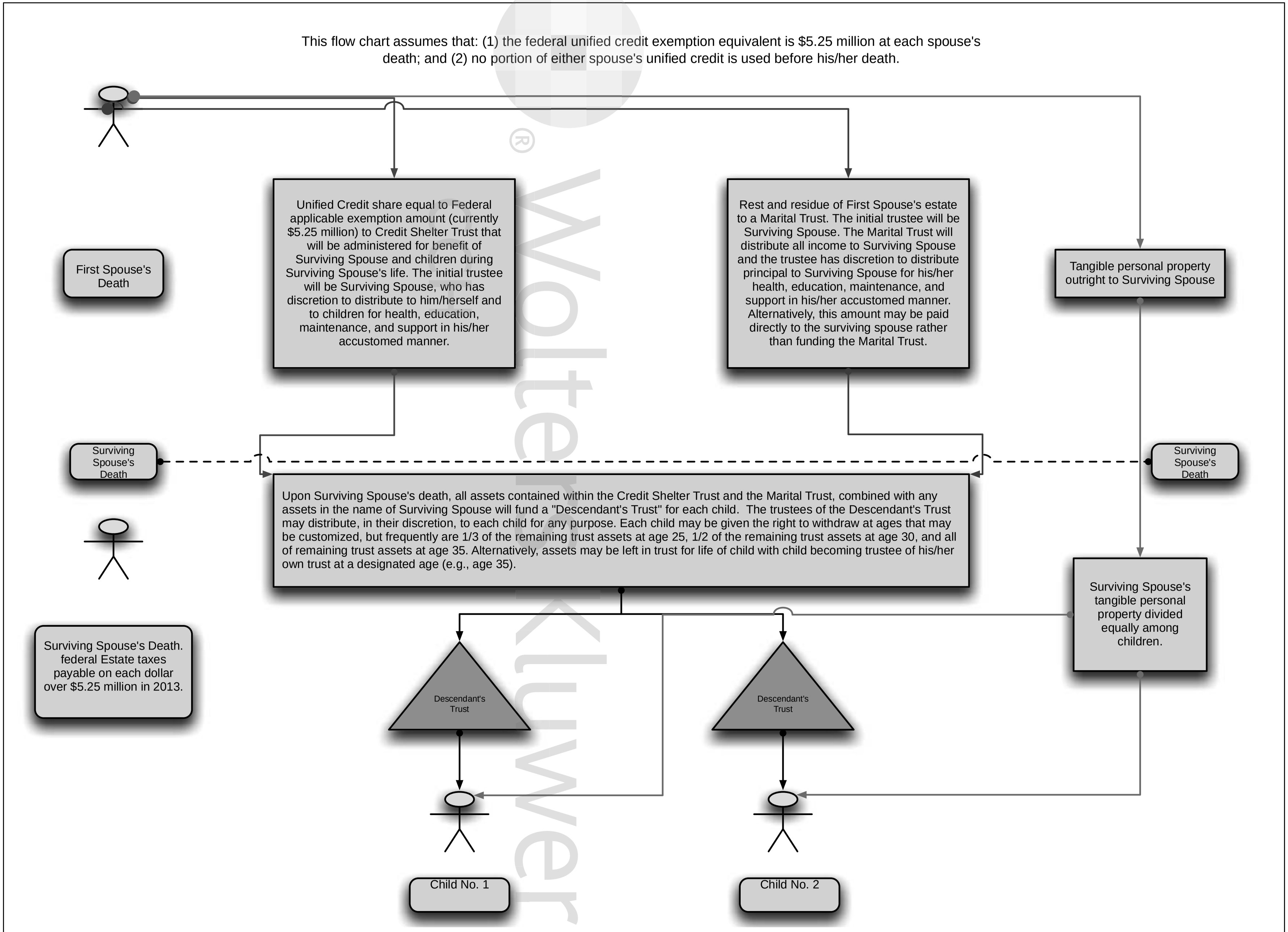

Exhibit 2. Simple Portability-Based Estate Plan for Married Couple Using Outright Disposition to Surviving Spouse

This flow chart assumes that: (1) the federal unified credit exemption equivalent is $5.25 million at each spouse's death; and (2) no portion of either spouse's unified credit is used before his/her death.

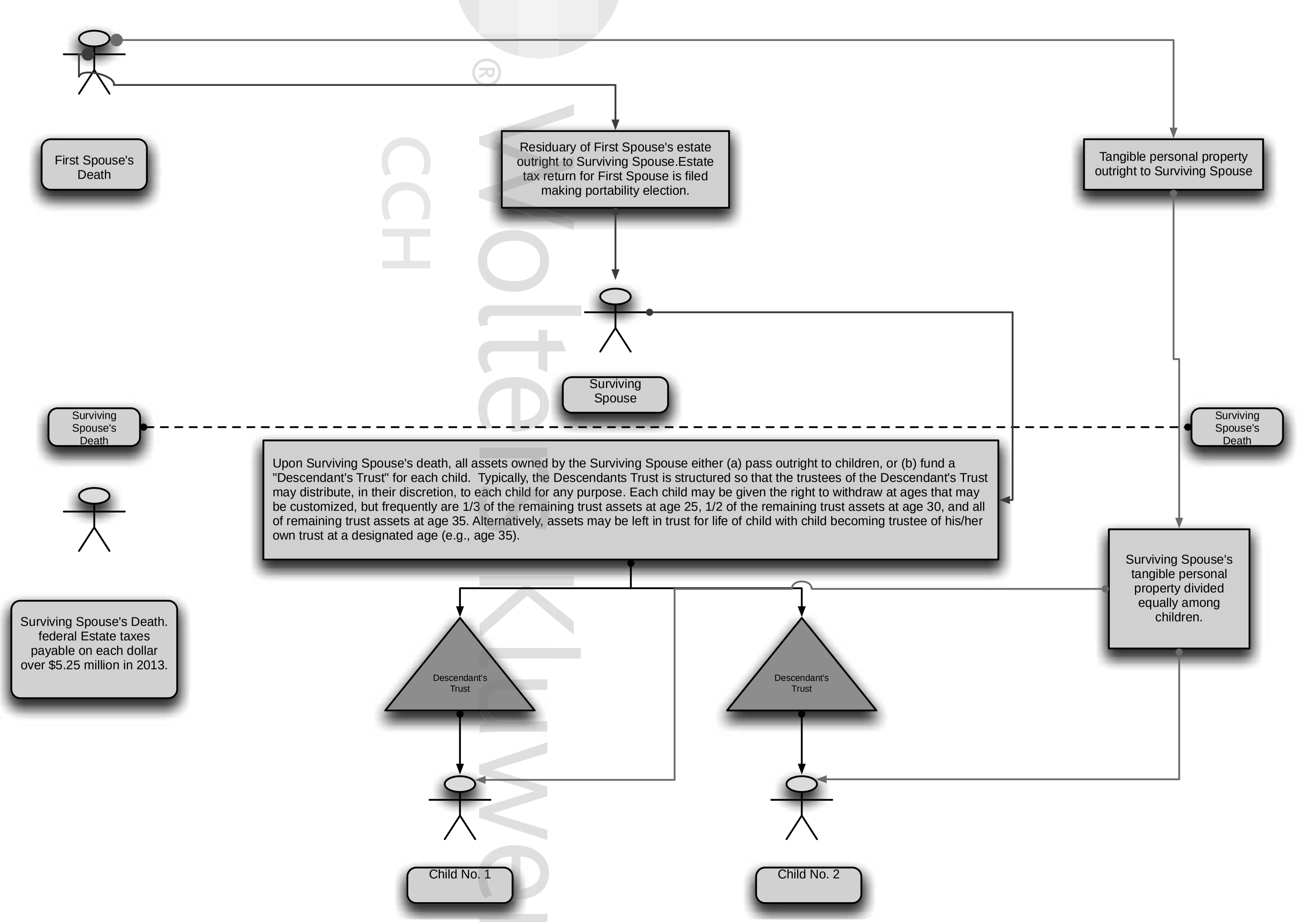

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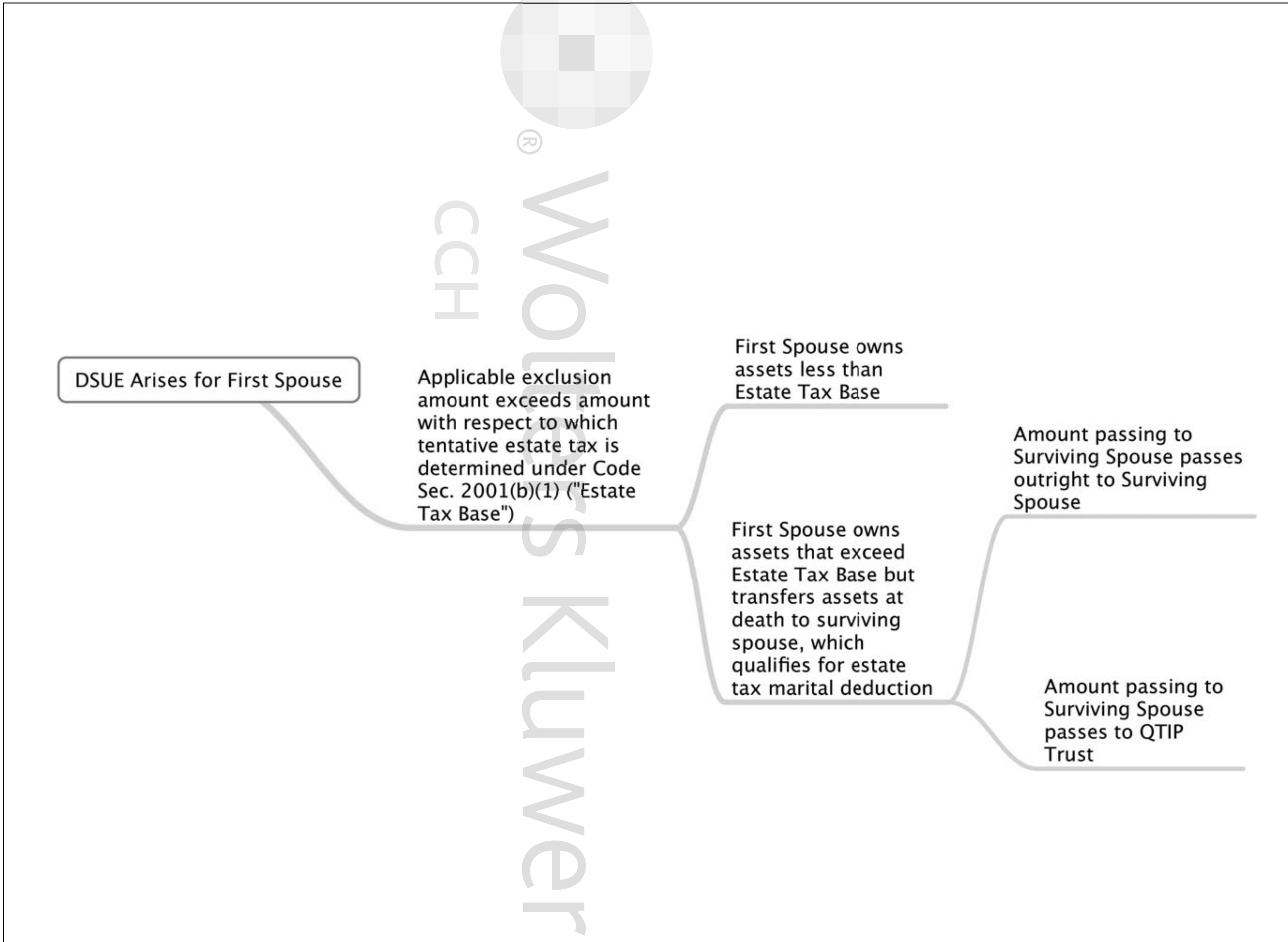
Exhibit 3. How Portability May Arise



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