

Estate Planning With Marital Trusts Post-ATRA: Optimizing Basis Step-Up and Leveraging AB and QTIP Trusts

WEDNESDAY, SEPTEMBER 30, 2015

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Mitchell R. Miller, Attorney, Beverly Hills, Calif.

Edwin P. Morrow, III, Esq., Senior Wealth Specialist, **Key Private Bank**
Wealth Advisory Services, Dayton, Ohio

Edward P. Schlesier, Director & Shareholder, **Blanchard Krasner & French**, La Jolla, Calif.

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 10.**

NOTE: If you are seeking CPE credit, you must listen via your computer – phone listening is no longer permitted.

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-961-9091** and enter your PIN when prompted. Otherwise, please **send us a chat** or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

NOTE: If you are seeking CPE credit, you must listen via your computer – phone listening is no longer permitted.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For CPE credits, attendees must participate until the end of the Q&A session and respond to five prompts during the program plus a single verification code. In addition, you must confirm your participation by completing and submitting an Attendance Affirmation/Evaluation after the webinar and include the final verification code on the Affirmation of Attendance portion of the form.

For additional information about continuing education, call us at 1-800-926-7926 ext. 35.

Program Materials

FOR LIVE EVENT ONLY

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

Estate Planning With Marital Trusts Post-ATRA: Optimizing Basis Step-Up and Leveraging AB and QTIP Trusts

Presented by: Edwin Morrow III, JD, LL.M., CFP®

edwin_p_morrow@keybank.com

Mitchell R. Miller, Esq.

mitchmiller@mrmillerlaw.com

Edward P. Schlesier, Esq.

eschlesier@bkflaw.com

9/30/2015

Strafford Teleconference CLE/CPE

Agenda

- I. ATRA, portability effect on planning overview
- II. Types of marital deduction trusts
- III. Step-up basis and capital gains
- IV. Formula general powers of appointment
- V. Delaware tax trap and using limited powers
- VI. Pre-Mortem - evaluating and updating revocable estate plans
- VII. Post-Mortem - evaluating and updating irrevocable AB trusts
- VIII. Roundtable, Q&A

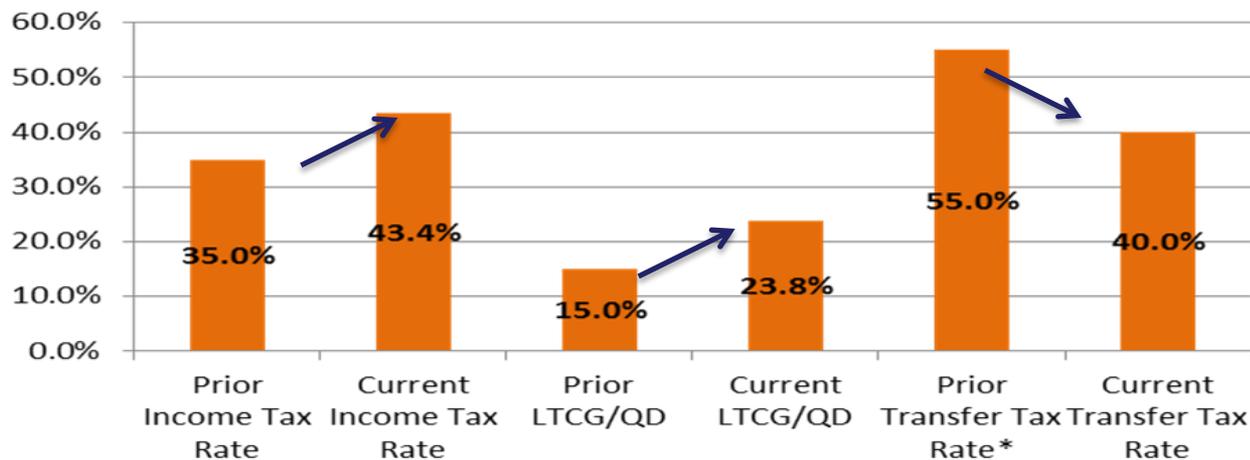
What's New in Estate *Tax* Planning?

- “Permanent” \$5 million estate/gift/GST, adjusted for inflation (\$5.43 million in 2015), with deceased spousal unused exclusion amount (aka “portability”)
- In most recent tax reform/budget talks, estate/gift tax was not even “on the table”. In recent Republican repeal proposal, **the gift tax is left intact**. No realistic prospect of either repeal or reversion to Obama’s Greenbook proposal of \$3.5 million exclusion either.

Income Tax Planning for Estates?

- **Why you want a higher valuation and inclusion in estate at death *if* it does not cost a 40% estate tax:**
 - For depreciable property, more basis = less ordinary income tax. For sales of property, more basis = less long-term capital gains tax upon sale (23.8%, or 31.8% rate for collectible, 28.8% recapture, **plus** <13.3% state)

Federal Tax Rate Changes



Portability?

Advantages of portability include:

- Simplicity
- It can create a better tax deferral result than attempting to fund a credit shelter portion with an IRD asset such as an IRA
- It provides protection for the poorer spouse being able to use the full AEA if that spouse dies first without having to give the poorer spouse enough assets to fully use that spouse's AEA, which the wealthier spouse may not want to do
(no need for intervivos QTIPs to equalize, *unless to exploit GST or avoid simultaneous death anomalies*)
- Portability may better optimize basis for mildly appreciating assets (although not necessarily if the surviving spouse lives for a long time after the death of the first spouse).

Portability?

Disadvantages of portability include:

- Not indexed like the Basic Exclusion Amount - it is **fixed**
- Does **not** apply to the GST tax, so the use of portability will cause the loss of the GST tax exemption of the first spouse to die (example: H dies w/\$5 million to W, who dies leaving \$10 million to only son, who then dies. Son's estate may pay **\$2-4 million more estate tax (depending on other assets, deductions), that could have been easily avoided if portability had been shunned or reverse QTIP used**)
- Outright bequests to the surviving spouse could cause the assets to pass in a manner other than what the first spouse to die wanted, which could be a **killer** in blended families
- Outright bequests to a surviving spouse **expose** the assets to the creditors of the surviving spouse and, potentially, a new spouse

Portability?

Disadvantages of portability include (cont.):

- A surviving spouse will **lose** the first-passing spouse's DSUEA if he or she remarries and the new spouse predeceases him or her (you cannot avoid this potential \$2 million trap with prenup)
- Does **not** apply, at least at present, to state death tax, which can cost a lot of state death tax at the death of the surviving spouse
- Appreciation during the surviving spouse's overlife is included in the surviving spouse's estate, which could be **substantial** if the surviving spouse lives for a long time and the assets are properly invested (see Gassman's article, *\$28 million mistake*)
- Expense of filing **timely** Form 706 estate tax return
- Statute of limitations remains **open** as to the DSUEA until the surviving spouse's death

Portability?

Disadvantages of portability include (cont.):

- A bypass trust locks in the value of the AEA and can result in even **more** wealth transfer if the surviving spouse remarries and gift splits or harvests a DSUEA from the subsequent spouse
- Tax Apportionment (IRC 2207A plus ORC 2113.86 or other state statute) with QTIP/ portability hurts first to die's kids and favors the step-kids (e.g. – H leaves \$10 million to QTIP, W has \$10 million – ***who pays the approximate \$4 million tax?!***)
- Portability only works with a *surviving* spouse, so a **simultaneous** death could be disastrous (example:
W has \$10 million, marries H with \$0 – plane disappears)

Bottom line: Portability has its benefits and its place, but don't overuse it - there might be **better** options to harvest basis adjustments at or prior to the surviving spouse's death, and better options to mitigate ongoing income tax as well

II. Marital Trusts – Simple Solutions?

- GPOA marital trust
- QTIP marital trust
- “ABC” Trust planning
- Preserving Post-Mortem Flexibility
- Disclaiming from QTIP Into Bypass
- Disclaiming from Bypass into QTIP

See Mitchell Miller’s separate outline for more detail on these points that he will cover.

Also see Part II of Ed Morrow’s separate outline for additional treatment of marital trust issues.

III. Basis Adjustment on Death (IRC §1014)

Overview:

- A. General Rule**
- B. Numerous Exceptions**
- C. Alternate Valuation Date**
- D. Fair Market Value**
- E. New Basis Consistency Laws and Reporting Requirements**

Basis Adjustment on Death (IRC §1014)

- A. **General Rule**: The basis of property in the hands of a person acquiring property from a decedent or to whom the property passed from a decedent after death is the *fair market value* of the property at the date of the decedent's death.

Basis Adjustment on Death (IRC §1014)

- A. General Rule: The basis of property in the hands of a person acquiring property from a decedent or to whom the property passed from a decedent after death is the *fair market value* of the property at the date of the decedent's death.
- B. Numerous Exceptions, including:
- i. Carry over basis election (IRC §1022 Election) for decedent's who died in 2010;
 - ii. Property purchased **FROM** the estate;
 - iii. Property purchased **BY** the estate under a contract made by decedent before death;

Basis Adjustment on Death (IRC §1014)

- A. **General Rule:** The basis of property in the hands of a person acquiring property from a decedent or to whom the property passed from a decedent after death is the *fair market value* of the property at the date of the decedent's death.
- B. **Numerous Exceptions**, including:
- i. Carry over basis election (IRC §1022 Election) for decedent's who died in 2010;
 - ii. Property purchased **FROM** the estate;
 - iii. Property purchased **BY** the estate under a contract made by decedent before death;
 - iv. Corporate assets. Basis adjusts to fair market value for the decedent's stock only.
 - v. Partnership assets can have a basis adjustment with IRC §754 election or after October 22, 2004 if partnership has substantial built-in loss immediately after passing of partnership interest.

Basis Adjustment on Death (IRC §1014)

C. Alternate Valuation Date (IRC §2032):

- If the alternate valuation date is elected, any property disposed of during the six months after date of death is generally valued as of the date of disposition.
- The alternate valuation date may only be elected if the value of the gross estate at the alternate valuation date is less than its value as of the date of death.
- The purpose of the alternate valuation election is to provide relief where the value of property declines during administration of the estate and thus reduces estate tax liability.
- Alternate valuation generally cannot be used to increase the overall basis of property of the estate. The election must be made within one year after the date the estate tax return is due (including extensions) and is irrevocable.

Basis Adjustment on Death (IRC §1014)

D. Fair Market Value:

- Generally determined by the facts and circumstances.

E. New Basis Consistency Laws and Reporting Requirements:

- Effective August 1, 2015, new IRC §1014(f) generally requires a beneficiary to use the basis reported on decedent's estate tax return (subject to audit adjustment, etc.)
- New reporting requirements under IRC §6035 require the executor of an estate required to file an estate tax return to report a statement of the value of such property as reported on the estate tax return to the IRS and each person receiving an interest in decedent's property.
- Deadline to file is within 30 days after the return is filed (or required to be filed).
- As of the date this outline is being prepared, the IRS has not released the form to make the above report. The IRS has extended the deadline to file until February 29, 2016 (see Notice 2015-57) to allow the IRS to issue guidance to implement the new reporting requirements.

III. Capital Gains (IRC §1221)

Overview:

- A. Preferential Tax Rates**
- B. Capital Asset**
- C. Avails Installment Sale Treatment**
- D. Avails Recognition Deferral by Exchange**
- E. Calculation of Capital Gain (or Loss)**

Capital Gains (IRC §1221)

A. Preferential Tax Rates on sale of capital assets.

Capital Gains (IRC §1221)

- A. Preferential Tax Rates on sale of capital assets.
- B. **Capital Asset**: Defined in the negative as all property except property enumerated in IRC §1221. Typically investment and personal property such as stocks, bonds, artwork, personal residences, and investment real estate.
 - Inventory or depreciable personal property or real property used in ordinary course of taxpayer's trade or business are not capital assets.

Capital Gains (IRC §1221)

- A. Preferential Tax Rates on sale of capital assets.
- B. Capital Asset: Defined in the negative as all property except property enumerated in IRC §1221. Typically investment and personal property such as stocks, bonds, artwork, personal residences, and investment real estate. Inventory or depreciable personal property or real property used in ordinary course of taxpayer's trade or business are not capital assets.
- C. Avails Installment Sale Treatment on capital assets.
- D. Avails recognition deferral by exchange (i.e. IRC §1031) on capital assets.

Capital Gains (IRC §1221)

- A. Preferential Tax Rates on sale of capital assets.
- B. Capital Asset: Defined in the negative as all property except property enumerated in IRC §1221. Typically investment and personal property such as stocks, bonds, artwork, personal residences, and investment real estate. Inventory or depreciable personal property or real property used in ordinary course of taxpayer's trade or business are not capital assets.
- C. Avails Installment Sale Treatment on capital assets.
- D. Avails recognition deferral by exchange (i.e. IRC §1031) on capital assets.
- E. Calculation of capital gain (or loss) is generally the difference between the selling price of the capital asset and the **BASIS**. Thus, the higher the basis the lower the gain (or greater the loss) generally reducing the amount of tax due on sale of the capital asset.

IV. Understanding Powers of Appointment

- Powers of Appointment (POA) have TREMENDOUS income tax planning potential for both stepping up basis and spraying income
- “GPOA” (general power of appointment) – power to appoint to yourself, your estate, or creditors of either – can be lifetime, or testamentary (only effective at death) – triggers gift tax/estate inclusion 2041/2514
- “LPOA” (limited powers of appointment) – power to appoint that excludes power to appoint to self, estate, or creditors or either – usually does NOT trigger gift tax or estate inclusion, except special circumstance (e.g. Delaware Tax Trap)

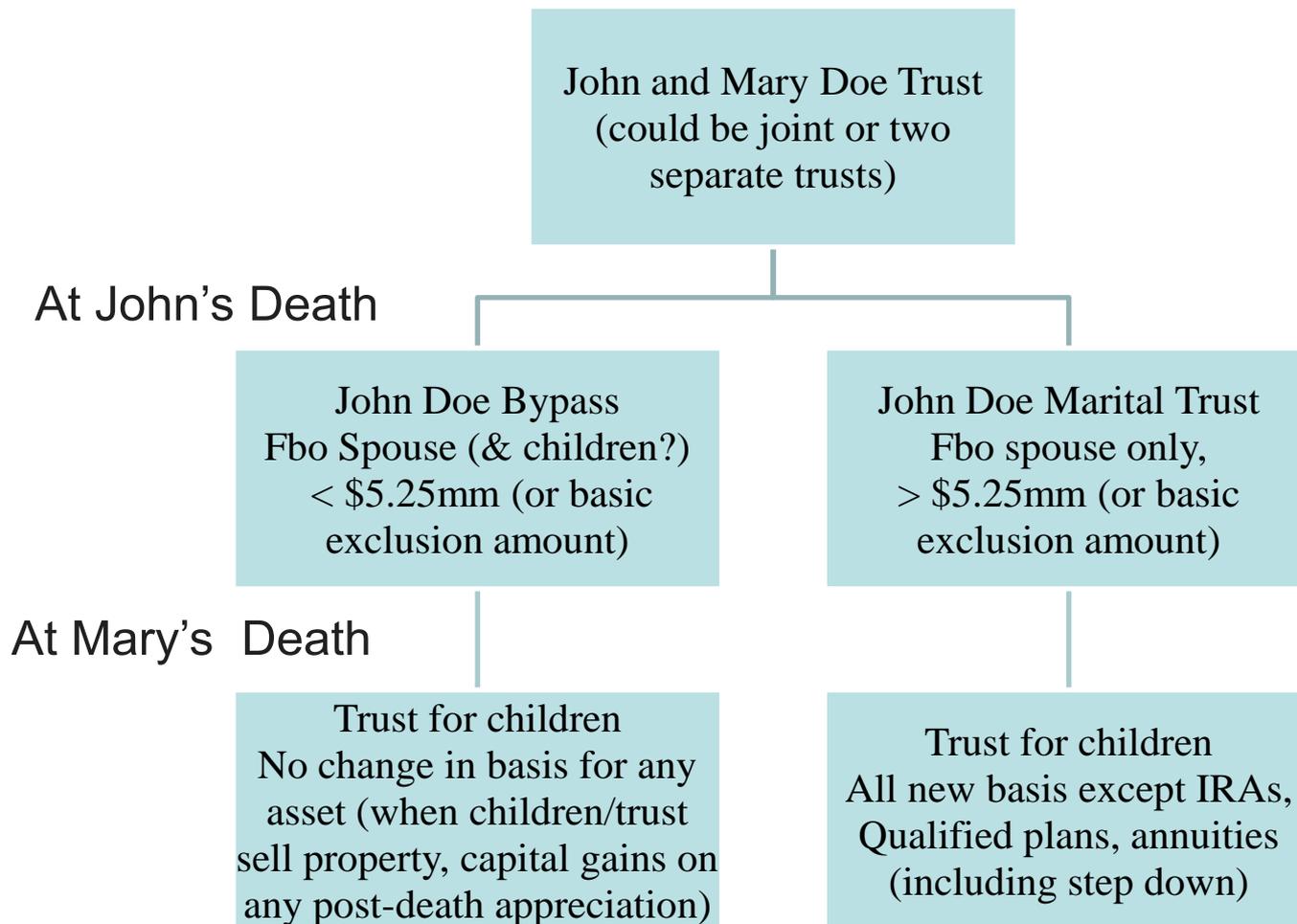
IV. Formula General Powers of Appointment

Just as we have formula powers for AB trusts, GST/non-GST splits, disclaimers, etc blessed by IRS/tax court, we can equally have formula general powers of appointment that cap any such inclusion.

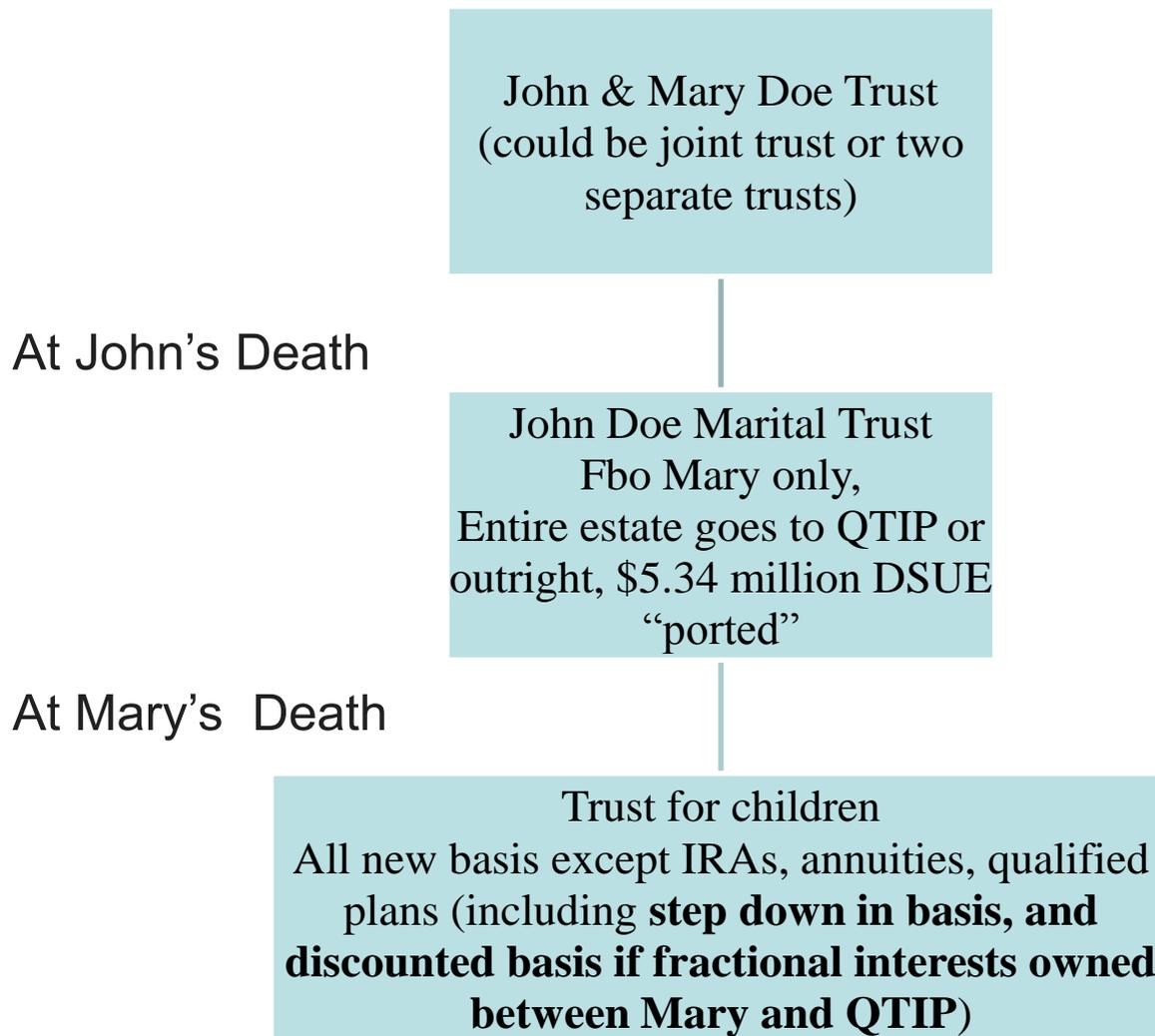
Unlike with marital trusts, which bring 100% of assets into the surviving spouse's taxable estate, whether the basis is higher or lower than FMV, a formula power can be limited to **only those assets that would benefit from an increase in basis under Section 1014.**

See Part III of CLE outline – **Optimal Basis Increase Trust**

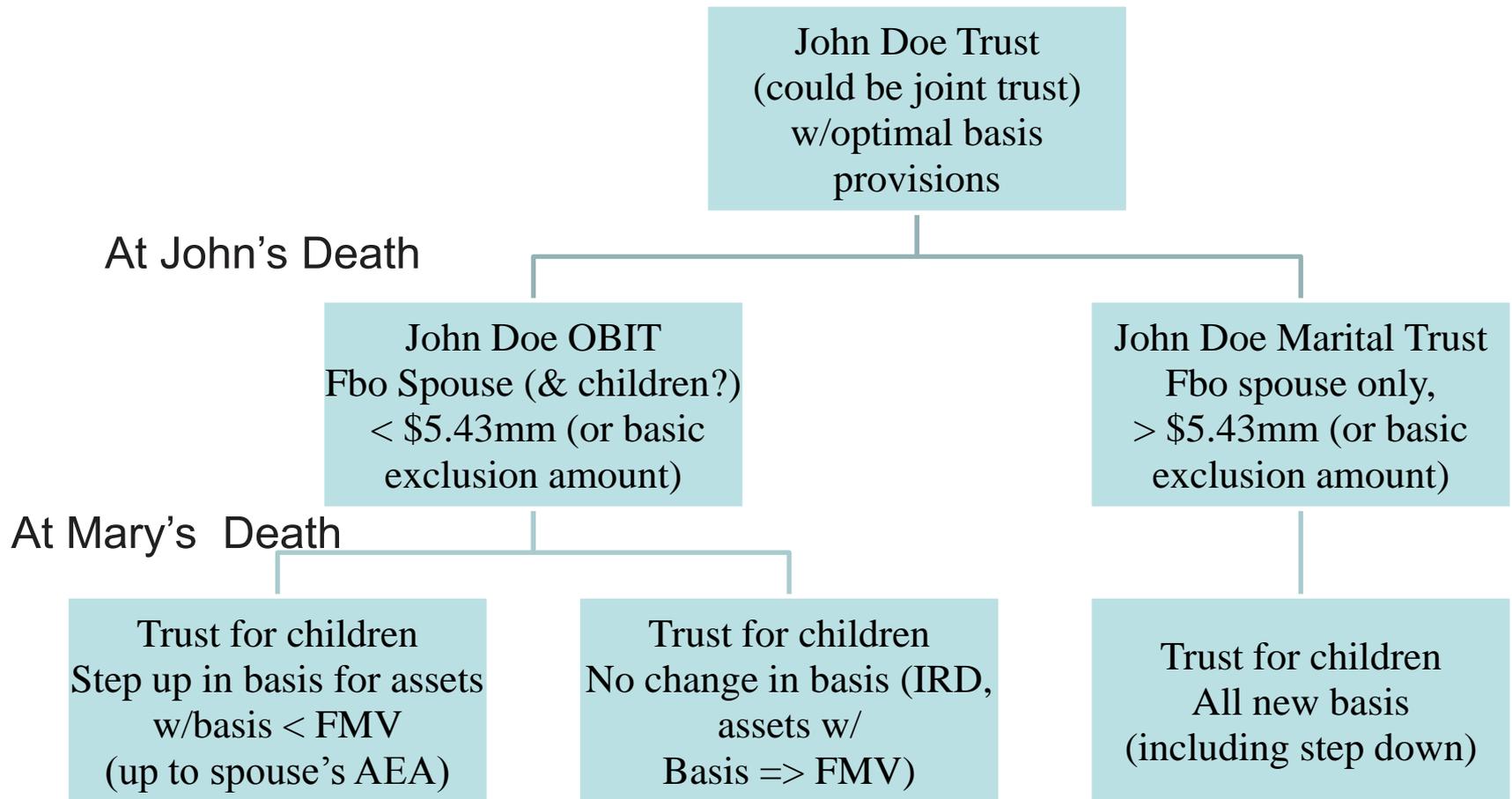
Traditional AB Trust - Basis Effect



Marital (QTIP) Trust – Basis Effect



Optimal Basis Increase Trust – Basis Effect



Uses GPOA or LPOA, Section 2041

To trigger estate inclusion and 1014 step up

Optimal Basis Increase Trust

- See page 17 of CLE example, a simplified list and columns of assets in bypass trust from \$2 million left to spouse in bypass trust, 8 years later:

<i>Traditional deductible IRA</i>	<i>basis \$0, FMV \$700,000</i>
Total “IRD” Property	basis \$0 FMV \$700,000
Apple Stock (the iPhone 9 flopped),	basis \$500,000, FMV \$200,000
Condo in Florida (hurricane depresses value),	basis \$1,000,000, FMV \$600,000
LT Bond portfolio (inflation depressed value)	basis \$400,000 FMV \$300,000
Various stocks that have decreased in value	basis \$150,000, FMV \$100,000
Total “loss” property	basis \$2,050,000, FMV \$1,200,000
Rental Real Estate	basis \$200,000, FMV \$600,000
Various stocks that have increased in value	basis \$400,000, FMV \$900,000
<i>ST Bond Portfolio, Money market, Cash</i>	<i>basis \$400,000, FMV \$400,000</i>
Gold	basis \$100,000 FMV \$200,000
Total “gain” property	basis \$1,100,000 FMV \$2,100,000
Total at Jane’s death	basis \$3,150,000 FMV \$4,000,000

- Ideally, clients want a step up for appreciated assets that would benefit from basis increase, and keep existing basis on assets that would otherwise be “stepped down” if in the estate

See page 17-19 of CLE outline

Optimal Basis Increase Trust

- Differing Basis Results at surviving spouse's death under three planning structures:

New Basis at Surviving Spouse's Death if using:	Ordinary Bypass	QTIP/outright	OBIT
<i>Traditional deductible IRA</i>	\$0	\$0	\$0
Apple Stock (the iPhone 9 flopped),	\$500,000	\$200,000	\$500,000
Condo in Florida (hurricane depresses value),	\$1,000,000	\$600,000	\$1,000,000
LT Bond portfolio (inflation depressed value)	\$400,000	\$300,000	\$400,000
Various stocks that have decreased in value	\$150,000	\$100,000	\$150,000
Rental Real Estate	\$200,000	\$600,000	\$600,000
Various stocks that have increased in value	\$400,000	\$900,000	\$900,000
<i>ST Bond Portfolio, Money market, Cash</i>	<i>\$400,000</i>	<i>\$400,000</i>	<i>\$400,000</i>
Gold	\$100,000	\$200,000	\$200,000
Total Basis for Beneficiaries at Jane's death	\$3,150,000	\$3,300,000	\$4,150,000

Capping Inclusion/GPOA to Soak Up AEA

- Adding/drafting GPOAs is easy when both spouses have estates under \$5.43 million (one AEA)
- Just as we do with “AB” splits, we want to cap the amount of the GPOA, as we typically cap the amount going to a marital trust, to optimize tax benefits.
- Trickier - Which assets do we want to soak up the “coupon” if the available exclusion amount is limited, and can we have assets chosen at the trustee’s discretion, the powerholder’s discretion? Could this force pro-rata inclusion? Do we want a \$500,000 block of stock with \$490,000 basis to soak up the same “coupon” as a \$500,000 building with basis of \$180,000? Only matters for mid-size/larger estates.

See page 21-23 of CLE outline

Crafting GPOAs For Fidelity/Protection

- GPOAs in marital trusts must be very narrow
 - However, all other GPOAs can be narrowly crafted to prevent any unwanted exercise as a practical matter
 - Can be conditioned on consent from a “non-adverse” party, essentially, a non-beneficiary – can even be a trustee!!! (though I personally would not use trustee)
 - Testamentary GPOA not necessarily subject to powerholder’s estate’s creditors (except e.g. CA, note a difference in uniform act draft, 2nd/3rd restatements)
- See page 28-30 of CLE outline, and sample clauses for getting around issues like CA or UPOAA Art 5

V. Using the Delaware Tax Trap

- What the heck is the Delaware Tax Trap (DTT)?
Contrary to myth, it has nothing to do with Delaware, other than history of provision – it effects trusts in every state potentially – you don't need to move your trust to Delaware to exploit (but you may want to)
- IRC § 2041(a)(3) – *complicated* – extending rule against perpetuities via LPOA – if you appoint to a trust granting a powerholder a POA, can this new power be *exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power*

V. Using the Delaware Tax Trap

- Nutshell - in apparently all states, unless you have a savings clause preventing it, if you exercise a LIMITED power of appointment to appoint to a trust which grants a beneficiary a PRESENTLY EXERCISABLE GPOA, it will trigger the DTT- 2041(a)(3), hence trigger estate inclusion, hence trigger a step up in basis.
- In Arizona and Delaware, it is possible to “opt-in” to triggering the DTT by appointing to a trust with only an LPOA, but most states have closed this possibility to prevent inadvertent taxation – states should consider an “opt-in” state RAP statute that would enable this for better income tax planning for residents. Attorneys with Texas, Florida and Colorado bar assn committees have drafted legislation for consideration in those states.

See page 32-33 of CLE outline

V. Using the Delaware Tax Trap

- So, similar to the formula GPOA discussion, why not simply use a LPOA to appoint assets for which a basis increase/estate inclusion is desired, to a “Delaware Tax Trapping Trust” (sounds complicated, but you have all drafted these before without knowing it – it’s easy)
- Similarly, any IRD/cash/assets with basis higher than FMV might go to beneficiary and/or ordinary trust avoiding DTT
- Spouse can later pick and choose, amending the exercise, to choose assets children are most likely to sell first
- Chief drawback of “PEG” power is reduced asset protection, flexibility, increased estate inclusion for children – but, consider ideas in outline to mitigate these risks (5/5 lapse, non-adverse party consent, power over only remainder, using DAPT, etc), or decant/change situs to AZ/DE

See page 53-58 of CLE outline for extensive comparison

VI. Pre-Mortem – Updating AB Trusts

- A. If estate is unquestionably over any imaginable inflation-adjusted exclusion, do you still need these provisions?
- B. Which type of disclaimer will you use? Note that disclaimer must provide a specific disposition for the disclaimed property
- C. Will directive language work? (Note that an executor or administrator trumps the trustee's right to make a portability or other election)
- D. Will precatory language help?
- E. Will general language permitting the trustee to construe or modify the trust to conform with the tax law or carry out the settlors' intentions be sufficient?

VII. Trust Reformation: Irrevocable Trusts

Overview:

A. Uniform Trust Code

- Modification by Consent (§411)
- Modification due to Unexpected Circumstances (§412)
- Reformation to Correct Mistakes (§415)

B. California

- Modification by All Beneficiaries (PC §15403)
- Modification by Settlor and All Beneficiaries (PC §15404)
- Modification in Changed Circumstances (PC §15409)

VII. Trust Reformation: Irrevocable Trusts

A. Uniform Trust Code

i. Modification by Consent (§411)

- a. A noncharitable irrevocable trust may be modified upon consent of the settlor and all beneficiaries, even if the modification is inconsistent with a material purpose of the trust.

VII. Trust Reformation: Irrevocable Trusts

A. Uniform Trust Code

- i. Modification by Consent (§411)
 - a. A noncharitable irrevocable trust may be modified upon consent of the settlor and all beneficiaries, even if the modification is inconsistent with a material purpose of the trust.
 - b. A noncharitable irrevocable trust may be modified upon the consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust

VII. Trust Reformation: Irrevocable Trusts

A. Uniform Trust Code

i. Modification by Consent (§411)

- a. A noncharitable irrevocable trust may be modified upon consent of the settlor and all beneficiaries, even if the modification is inconsistent with a material purpose of the trust.
- b. A noncharitable irrevocable trust may be modified upon the consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust
- c. If not all beneficiaries consent to a proposed modification, the modification may be approved by the court if the court is satisfied that (1) if all of the beneficiaries had consented, the trust could have been modified under this section; and (2) the interests of a beneficiary who does not consent will be adequately protected.

VII. Trust Reformation: Irrevocable Trusts

A. Uniform Trust Code

- ii. Modification because of Unanticipated Circumstances (§412)
 - a. The court may modify the administrative or dispositive terms of a trust if, because of circumstances not anticipated by the settlor, modification will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

VII. Trust Reformation: Irrevocable Trusts

A. Uniform Trust Code

- ii. Modification because of Unanticipated Circumstances (§412)
 - a. The court may modify the administrative or dispositive terms of a trust if, because of circumstances not anticipated by the settlor, modification will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.
 - b. The court may modify the administrative terms if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

VII. Trust Reformation: Irrevocable Trusts

A. Uniform Trust Code

iii. Reformation to Correct Mistakes (§415)

The court may reform the terms of a trust, *even if unambiguous*, to conform the terms to the settlor's intention if it is proved by *clear and convincing evidence* what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

VII. Trust Reformation: Irrevocable Trusts

B. California

- i. Modification by All Beneficiaries (PC§15403)
(Similar to UTC §411b)
 - a. If all beneficiaries of an irrevocable trust consent, they may compel modification or termination of the trust upon petition to the court.
 - b. If the continuance of the trust is necessary to carry out a *material purpose* of the trust, the trust cannot be modified or terminated unless the court, in its discretion, determines that the reason for doing so under the circumstances outweighs the interest in accomplishing a material purpose of the trust.

VII. Trust Reformation: Irrevocable Trusts

B. California

- i. Modification by All Beneficiaries (PC§15403)
(Similar to UTC §411b)
 - a. If all beneficiaries of an irrevocable trust consent, they may compel modification or termination of the trust upon petition to the court.
 - b. If the continuance of the trust is necessary to carry out a *material purpose* of the trust, the trust cannot be modified or terminated unless the court, in its discretion, determines that the reason for doing so under the circumstances outweighs the interest in accomplishing a material purpose of the trust.
 - c. All beneficiaries means ALL including successors in interest (PC §24). Minors, unascertained, and unborn persons may be represented by a guardian ad litem to provide consent (PC §15405).

VII. Trust Reformation: Irrevocable Trusts

B. California

- ii. Modification by Settlor and All Beneficiaries (PC§15404)
(Similar to UTC §411a)
 - a. If the settlor and all beneficiaries of a trust consent, they may compel the modification or termination of a trust.
NOTE: COURT CONSENT IS NOT REQUIRED IF ALL SETTLORS AND BENEFICIARIES CONSENT!

VII. Trust Reformation: Irrevocable Trusts

B. California

- ii. Modification by Settlor and All Beneficiaries (PC§15404)
(Similar to UTC §411a)
 - a. If the settlor and all beneficiaries of a trust consent, they may compel the modification or termination of a trust. **NOTE: COURT CONSENT IS NOT REQUIRED IF ALL SETTLORS AND BENEFICIARIES CONSENT!**
 - b. If any beneficiary does not consent to the modification or termination of the trust, upon petition to the court, the other beneficiaries, with the consent of the settlor, may compel a modification or a partial termination of the trust if the interests of the beneficiaries who do not consent are not substantially impaired.

VII. Trust Reformation: Irrevocable Trusts

B. California

- ii. Modification by Settlor and All Beneficiaries (PC§15404)
(Similar to UTC §411a)
 - a. If the settlor and all beneficiaries of a trust consent, they may compel the modification or termination of a trust. **NOTE: COURT CONSENT IS NOT REQUIRED IF ALL SETTLORS AND BENEFICIARIES CONSENT!**
 - b. If any beneficiary does not consent to the modification or termination of the trust, upon petition to the court, the other beneficiaries, with the consent of the settlor, may compel a modification or a partial termination of the trust if the interests of the beneficiaries who do not consent are not substantially impaired.
 - c. If there is a disposition of principal to a class of persons (e.g. issue), the court may limit the class of beneficiaries whose consent is needed to compel the modification or termination of the trust to the beneficiaries who are reasonably likely to take under the circumstances.

VII. Trust Reformation: Irrevocable Trusts

B. California

- iii. Modification in Changed Circumstances (PC§15409)
(Similar to UTC §412)
 - a. Circumstance not known or anticipated by settlor
 - b. Defeat or substantially impair purpose of the trust

VII. Trust Reformation: Irrevocable Trusts

B. California

iii. Modification in Changed Circumstances (PC§15409) (Similar to UTC §412)

The court may modify the administrative or dispositive provisions of the trust or terminate the trust if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust. **In this case, if necessary to carry out the purposes of the trust, the court may order the trustee to do acts that are not authorized or are forbidden by the trust instrument.**

QUERY:

***ARE THERE FACT PATTERNS WHERE THE
PASSAGE OF ATRA IS SUFFICIENT TO
TRIGGER THE ABILITY TO REFORM A
TRADITIONAL A-B TRUST POST-MORTEM?***

VII. Trust Reformation: Irrevocable Trusts

QUERY:

ARE THERE FACT PATTERNS WHERE THE PASSAGE OF ATRA IS SUFFICIENT TO TRIGGER THE ABILITY TO REFORM A TRADITIONAL A-B TRUST POST-MORTEM?

FACT PATTERN:

Husband and Wife established a traditional A-B trust many years ago when the estate tax exclusion amount was \$600,000 for the sole purpose of utilizing both spouses' estate tax credit. The settlors' never amended the terms of the trust and were not aware of the new portability laws under ATRA (and TRA 2010). First spouse dies and the surviving spouse would like to reform the trust to utilize portability and optimize basis step-up rather than using a traditional A-B trust.

QUERY:

*WHAT ABOUT AFTER BOTH SPOUSES
ARE DECEASED?*

VIII. Roundtable Questions (and Answers?)

- Might a trustee and/or his/her counsel be liable if he/she/they guessed wrong about whether, and how much, and for what assets, they used portability, or conversely, a bypass trust?
- Would a trustee have a duty to beneficiaries to consider or discuss ways to achieve better basis increases for remaindermen at the primary beneficiary's death?
- Are the now common clauses that permit a trust protector or trustee to add or modify a power of appointment, and the various decanting, UTC and other statutes which allow the same, merely putting more pressure on advisors and trustees to consider such strategies?
- Should the wide power to amend/decant irrevocable trusts be curbed to prevent potential abuse of settlor intent?
- Should attorneys and trustees be terminating B trusts if there are less drastic means to get a step up that protects remaindermen?

Questions? Contact Information

Mitchell R. Miller
Attorney at Law
9100 Wilshire Boulevard
Suite 225E
Beverly Hills, CA 90212
Tel: (310) 277-1848
www.MRMillerLaw.com

Edward P. Schlesier, Esq.
Blanchard, Krasner & French
800 Silverado Street, Second Floor
La Jolla, CA 92037
(858) 551-2440
eschlesier@bkflaw.com
www.bkflaw.com

Edwin P. Morrow III
edwin_p_morrow@keybank.com
edwin.morrow3@gmail.com
(937) 422-8330