



ESTATE TAX ADVISORY INITIATIVE

Estate Planning After the Tax Cuts and Jobs Act: *A Time to Amend?*

The Tax Cuts and Jobs Act (TCJA) passed by Congress in December made one particularly significant change to the federal estate and gift tax exemption regime: beginning in 2018, the gift and estate tax exemption amount was increased from \$5.6 million to \$11.18 million per taxpayer, with adjustments for future inflation. The legislation increasing the exemption amount will expire on December 31, 2025 (if not modified by a future Congress before then), but it presents the opportunity for legacy preservation through prudent estate planning now.

REGRETTABLE RESULTS OF THE UNWANTED FAMILY TRUST
Upon Death of Grantor Spouse
Family Trust Must be Established
Assets Must be Retitled
Assets Must be Appraised
Disclosures to All Beneficiaries Required
During Life of Surviving Spouse
Limited Access to Principal
Fiduciary Accountings
Fiduciary Fees
Fiduciary Income Tax Compliance
Prudent Investor Standard Imposed
Upon Death of Surviving Spouse
Decedent Controls Final Distribution
Capital Gains Tax Liability (Loss of Step-up in Basis)

While the doubling of the exemption amount is surely good news for the wealthiest Americans, we are advising our affluent (but less than \$11.2 million) married clients to review their estate planning documents, perhaps established years ago under much lower estate tax exemption thresholds, to determine whether they should be modified to eliminate the tax-centered formula provisions in their wills and trusts for one of the many reasons set forth below.

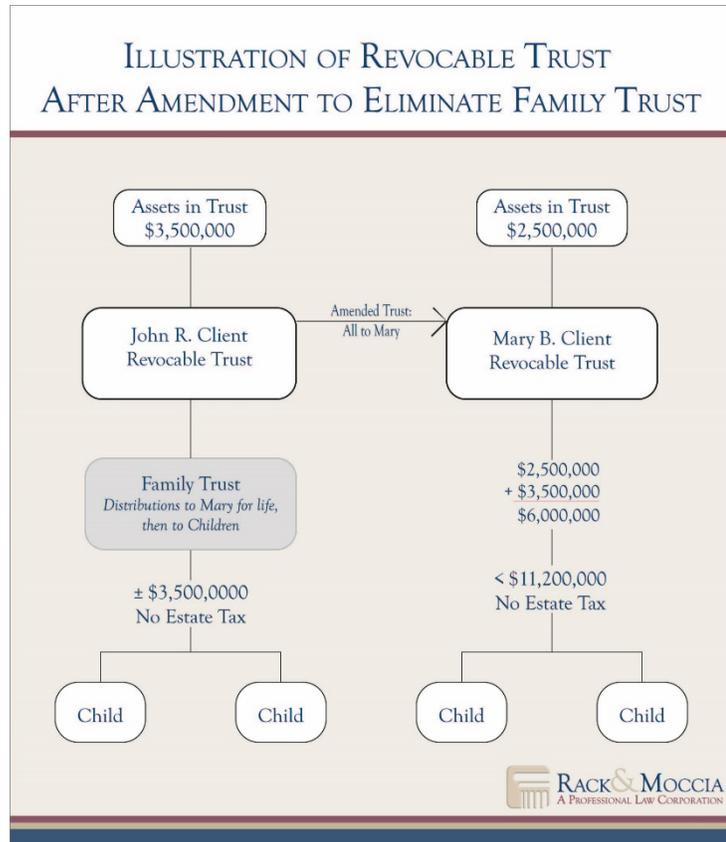
Over the last thirty years, many married couples established estate plans based upon revocable “living” trusts with reciprocal terms for each, in which assets held in the trust created by the first spouse to die are allocated to a “Family Trust” for the benefit of the surviving spouse. This technique allows those assets to be “sheltered” from potential estate taxation in the estate of the survivor. However, most of these estate plans were created to take advantage of a much lower exemption amount, which stagnated at \$600,000 from 1986 until 1997. The dramatic increase to nearly \$11.2 million this year means that most of these Family Trusts are now unnecessary from an estate tax perspective. Unfortunately, the terms of these trusts (which become irrevocable at the first death) *require* that the Family Trust be established for the benefit of the surviving spouse, no matter the size of the estate.

Needless to say, an irrevocable Family Trust that: (i) no longer serves the intended estate tax purpose, (ii) names a third party as trustee, (iii) limits spousal access to formerly marital assets, and (iv) incurs annual costs for fiduciary administration and tax compliance, will not be popular

with the surviving spouse. While it is possible under the Virginia Uniform Trust Code to unravel the funded Family Trust, survivors will incur legal expenses and may encounter familial entanglements as they labor to meet these statutory requirements for terminating an irrevocable trust.

The most prudent solution to the post-mortem mandate of the Family Trust is to remove them before that fateful day: all competent grantors may amend and restate the existing, funded revocable trust, thereby eliminating the estate tax formula language in favor of the more traditional bequests directly to spouse and family. Note that it is neither necessary nor advisable to revoke one's current trust, since there are many non-tax benefits of the revocable trust which are worth preserving, such as the avoidance of probate, the preservation of legacies for children and grandchildren in blended families, and the protection of resources for special needs beneficiaries.

Family and financial circumstances are unique to each client, so there is no standard formula for the simplification of existing trusts by way of restatement. The first step is to compile updated asset information and estate planning documents for evaluation by legal counsel under the new estate tax legislation. The next steps will involve making informed decisions regarding your intentions for your legacy and the selection of fiduciaries to give effect to your estate plan.



In an effort to facilitate the first step, we developed a streamlined client questionnaire which we call the *Estate Tax Advisory Client Essential Information Survey*© which can be downloaded, printed, and completed for discussion with our estate planning counsel. Even if you have not been a client of the Firm, we encourage you to contact your attorney or, if you prefer, to consult with one of ours, if your estate plan includes an unwanted Family Trust.