

Legal Assistance Practice Points: The Credit Shelter Option to Avoid Estate Taxes: Part 2

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by Yosefi Seltzer

In the last issue, I introduced the concern about estate tax liability. This article will conclude the discussion of this subject with a description of how to prepare a Credit Shelter Disclaimer option.

The easiest way to preserve the unified credit of each spouse is to include a “credit shelter trust option”. The way this works is in the Will, the spouse (Brad) creates the option for the surviving spouse (Angelina) to “disclaim” any amount of the estate Angelina chooses following Brad’s death. If Angelina disclaims any portion of the estate she would have otherwise inherited from Brad, that property and assets are diverted into a “credit shelter trust”. Brad could designate in his will that Angelina is the trustee and the sole beneficiary. Thus, Angelina would have exclusive control over the credit shelter trust for her sole personal benefit. She is permitted to invade any amount or all of the assets and property for “health, education, support or maintenance” at any time. In other words, for normal living expenses (food, clothing, shelter, health care, education). Moreover, Angelina may also invade the principal once each year for \$5000 or five percent of the value of the trust principal, whichever is greater, for any purpose. So Angelina has the authority to withdraw these additional monies for non-living expense purposes, such as a Hawaiian vacation, constructing a swimming pool or attending the Super Bowl. Any assets remaining in the credit shelter trust at the time of Angelina’s subsequent death will pass to their children (or whomever Angelina designates as her beneficiaries) without consuming Angelina’s unified credit. Thus, if Angelina dies in 2011, Angelina can pass \$1 million to her children using her own unified credit and Brad provided for his children by enabling Angelina to disclaim an additional \$1 million into the credit shelter trust that will also pass to the children without an estate tax assessment assuming Angelina has not consumed the credit shelter trust assets. For this reason, surviving spouses are routinely advised to use assets they receive and own outright and only invade the credit shelter trust as a last resort. Angelina can also insert the credit shelter trust option into her will in the event that she dies before Brad, giving him the same option.

The key here is that if a spouse dies without the credit shelter trust option, the surviving spouse cannot disclaim anything into a credit shelter trust. Moreover, the assets must be held individually by Brad or Angelina. Thus, with few exceptions, if Brad and Angelina hold all of their assets jointly, Angelina cannot disclaim what she already owns even though Brad died. Thus, couples will need to discuss how to divide ownership of various assets to create a relative balance so that whomever dies first enables the surviving spouse to maximize the use of the credit shelter trust option. Houses can be disclaimed if they are carefully titled and carefully handled at the time the disclaimer into the credit shelter trust occurs, even if both spouses have a property interest in them.

There truly isn’t a downside to inserting the credit shelter trust option into both spouses wills: the surviving spouse is not required to disclaim anything into it and the surviving spouse has nine months after the death of the first spouse to make a decision with regard to what amount, if any, to disclaim. The absence of the credit shelter option means the surviving spouse will not have the ability to preserve the first-spouse’s ability to pass property to children in an estate tax-exempt fashion.

Utilizing the credit shelter trust option is an easy, risk-free way to maximize the amount of property and assets a couple can pass to their children or other beneficiaries while minimizing estate tax consequences. To decide whether the credit shelter trust option would be beneficial to your family, schedule an appointment with a legal assistance attorney to discuss the details of your estate plan. To schedule an appointment with the Fort Meade Office of Legal Assistance, call: 301-677-9536.

Yosefi Seltzer is a Department of the Army civilian attorney in the Legal Assistance Branch of the Office of the Staff Judge Advocate at Fort George G. Meade. He is a former Active Duty Army Judge Advocate and is currently a Major in the Individual Ready Reserve. The views expressed herein are his own. He may be reached at: Yosefi.Seltzer@us.army.mil.