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# Estate Tax Changes

*How will you be affected?*

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# Estate Tax Changes

*How will you be affected?*

*Speaker: Jane Higgins Marx*



**Partner**





# The New Estate Tax Law and the Continuing Usefulness of Trusts: Reports of the Death of the Trust for Most Estates are Greatly Exaggerated

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Presented by  
**Jane Higgins Marx**





## New Estate and Gift Tax Law

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- \$5 Million Individual Exclusion (Indexed)
- Applies to both gifts and estates
- 35% flat rate > \$5 Million
- Portability to Surviving Spouse
- Effective for only 2011 and 2012 unless extended by Congress
  - In 2013, reverts to a \$1 Million Exclusion and 55% tax rate



## Portability -- defined

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- A Surviving Spouse may elect to utilize a deceased spouse's unused portion of the \$5 Million Exclusion



# Portability

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- Because of unlimited Marital Deduction, no amount of assets left outright to a Surviving Spouse uses up any of the first spouse's \$5 Million Exclusion, leaving all available for the Surviving Spouse



# Portability

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- If the first Spouse leaves all of his or her assets to the Surviving Spouse, the Surviving Spouse would have both \$5 Million gift or estate tax Exclusions for his/her use (total \$10 Million Exclusion).



# Portability

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- Surviving Spouse loses the inherited \$5 Million Exclusion of his or her predeceased Spouse if the Surviving Spouse remarries and the Second Spouse dies first
  - In that case, the Surviving Spouse can utilize the Second Spouse's \$5 Million Exclusion, but **only** if the Second Spouse has not used it up





# Portability

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- Examples of Loss of Predeceased Spouse's \$5M Exclusion
  - Second Spouse has used up his/her \$5 Million Exclusion through lifetime gifts to the Second Spouse's children
  - Second Spouse leaves his or her assets to his or her children from the first marriage and uses his or her \$5 Million Exclusion to shelter those assets from the estate tax - nothing is left for the Surviving Spouse



# Portability

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- This potential loss of the use of the First Deceased Spouse's \$5 Million Exclusion can be avoided by:
  - The use of a Trust at the First Deceased Spouse's death
  - Surviving Spouse never remarries



# What Does This Tax Change Mean to Me?

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- Review your existing trusts for funding issues
- Don't rely on Portability. Consider adopting a trust to insure the use of both spouse's \$5 Million Exclusion
- Consider gifts before 2013 to take advantage of the current (2011-2012) gift tax \$5 Million Exclusion



# Review Current Trusts

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- Most married couples' trusts use funding language based on the current amount of Exclusion available at the first spouse's death to divide trust assets into two separate funds (Marital & Bypass Trusts)



# Review Current Trusts

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- In first marriage situations, both Marital and Bypass Trusts are typically for the benefit of the surviving spouse, then the children.
  - Often the provisions are slightly different between the two.



# Review Current Trusts

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- Based on the most common funding language, typically the first \$5 Million of assets is allocated to the Bypass Trust, with the remainder to the Marital Trust.
  - After 2013 that amount will be \$1 Million allocated to the Bypass Trust, now it's \$5 Million



# Review Current Trusts

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- Big difference if the provisions or beneficiaries are not the same.
- In second marriage situations, if the Bypass Trust is for the children of the first marriage and the balance was to the Marital Trust for the second spouse.
  - In a \$5 Million estate, with typical funding language, all \$5 Million would go into the Bypass Trust for the children and nothing would go into the Marital Trust for the surviving spouse.



# Adopt a Trust and don't Rely on Portability

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- If the first deceased spouse leaves the first \$5 Million of his/her assets in a Bypass Trust for the surviving spouse, the surviving spouse will not need to shelter these assets from the estate tax in the surviving spouse's estate because the assets of the first spouse are not included in the surviving spouse's estate.
- If surviving spouse remarries, no risk of losing portability
- Only other sure way is to never remarry





# Benefits of a Trust

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## ○ Tax advantages

- Growth of assets of first deceased spouse left in trust after death will never be subject to estate tax
- In certain circumstances, prevention of loss of first deceased's spouse's \$5 Million Exclusion in the case of remarriage by the surviving spouse
- Avoids uncertainty of portability
- Assets left in trust can avoid estate tax for generations



# Benefits of a Trust

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- Protect beneficiaries
  - Affords significant creditor protection (including divorce) for trust beneficiaries
  - Delays the ages at which the trust beneficiaries receive outright distributions of their shares until an age at which their judgment has matured
  - Restricts distributions (e.g. education or health care)
  - Provides for a disabled beneficiary in a way that will not jeopardize eligibility for governmental benefits



# Benefits of a Trust

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- Incent desirable behavior and accomplishments by beneficiaries
- Probate Avoidance



# Contact Information

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# Estate Tax

Q & A