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White Paper

Bypass Trust

(Aka B Trust or Credit Shelter Trust)

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Bypass Trust (aka B Trust or Credit Shelter Trust)

What is it?

A bypass trust is used to minimize federal estate tax on the combined estates of a married couple

A bypass trust (also called a B trust or a credit shelter trust) is a trust that can be used by married couples in conjunction with a marital trust to minimize federal estate tax that will be due on their combined estates. Assets will be transferred from the estate of the first spouse to die into the bypass trust such that his or her federal applicable exclusion amount (formerly known as the unified credit) of \$3.5 million (in 2009) is fully used. The remainder of the assets of the first spouse to die will then be transferred into the marital trust. To prevent inclusion of the bypass trust in the estate of the surviving spouse, he or she can be given only certain rights and limited control over the assets in the bypass trust. He or she may receive income from the trust or may be given the right to invade the trust principal for his or her health, education, maintenance, or support. The surviving spouse may also be given a limited power of appointment over the assets in the bypass trust. A limited power of appointment permits the power holder to direct that the assets in the trust ultimately pass to a limited class of beneficiaries that does not include himself or herself, his or her estate, his or her creditors, or the creditors of his or her estate.

Caution: This may not be the proper strategy for some married couples. A tax law passed in 2001 replaced the state death credit with a deduction starting in 2005. As a result, many of the states that imposed a death tax equal to the credit, decoupled their tax systems, imposing a stand-alone death tax. Many of these states allow an exemption that is less than the federal exemption. This may leave some couples vulnerable to higher state death taxation. See your financial professional for more information.

A bypass trust typically is used by a married couple with assets in excess of the applicable exclusion amount

Typically, both a bypass trust and a marital trust will be used by married couples who expect to have assets in excess of the applicable exclusion amount at the death of the first spouse. A married couple will set up both a bypass trust and a marital trust so that the applicable exclusion amount of the first spouse to die can be used to exempt the bypass trust from estate tax while the surviving spouse's applicable exclusion amount can be applied to exempt some or all of the assets in the marital trust from estate tax. The assets in the bypass trust will not be included in the taxable estate of the surviving spouse. By using the two trusts, a married couple could protect up to \$7 million (in 2009) from estate taxes.

Ownership of marital assets should be divided between the husband and the wife

A married couple who wish to set up a bypass and marital trust should first divide up ownership of their assets. After the division, each spouse should own in his or her own name an equal share of the couple's total assets. If one spouse owns all the assets alone or all their assets are owned jointly, the couple may not be able to fully use the applicable exclusion amount of each spouse. If one spouse owns all the assets alone, and the other spouse dies first, the applicable exclusion amount of the first spouse to die will be wasted as there will be no assets in the estate to which it can be applied. Correspondingly, the estate of the surviving spouse may be overqualified (i.e., have more than the applicable exclusion amount in the estate). Similarly, if both spouses own all assets jointly, when one spouse dies, the other spouse automatically owns all of the assets. When the surviving spouse then dies, his or her estate may be overqualified. If ownership of their assets is split up between the married couple, each individual will have assets to which his or her applicable exclusion amount can be applied.

Assets not transferred into the bypass trust will fund a marital trust

The assets that are not transferred into the bypass trust will fund the marital trust. In almost all cases, the marital trust will be set up as a qualified terminable interest property (QTIP) trust. With a QTIP trust, the surviving spouse must receive all income (at least annually) for life from the trust, but the grantor (creator) of the trust can designate where the assets pass when the surviving spouse dies. The assets in the marital trust will be included in the estate of the surviving spouse. However, that spouse can use his or her applicable exclusion amount to shelter some or all of the assets from estate tax. Because of the unlimited marital deduction, the assets transferred to the marital trust will not be taxed at the death of the first spouse. Therefore, the estate tax will be postponed until the second spouse dies.

When can it be used?

A married couple should expect to have assets in excess of the applicable exclusion amount at the death of the first spouse before setting up a bypass trust

Generally, only couples who expect to have assets in excess of the applicable exclusion amount should incur the expense and trouble to set up both a bypass and a marital trust. Many married couples who have assets below the applicable exclusion amount will have joint wills, in which all of their assets are left to one another outright, or they may own all assets jointly with right of survivorship. Either way, the surviving spouse will receive all of the assets after the death of the first spouse tax free due to application of the unlimited marital deduction. Since the total amount of the assets owned by the surviving spouse will be below the applicable exclusion amount upon his or her death, the surviving spouse's estate will not incur estate taxes.

Example(s): Say you and your spouse have net assets of over \$7 million in 2009. Both you and your spouse would like to minimize the estate taxes due on your combined estates. Your estate planning attorney suggests setting up bypass and marital trusts. When the first spouse dies, sufficient assets will be transferred to the bypass trust to fully use his or her applicable exclusion amount. The remaining assets will go to the marital trust. Because of the unlimited marital deduction, the assets in the marital trust (if it is properly structured) will not be taxed in the estate of the first spouse to die. The assets in the marital trust will, however, be included in the taxable estate of the surviving spouse. The surviving spouse can use his or her applicable exclusion amount to shelter assets in the marital trust for his or her benefit from estate tax that would otherwise be incurred as a result of his or her death. By using the two trusts, all or almost all of your assets should be able to pass to your heirs free from estate tax.

The assets of a husband and wife should be equalized before setting up bypass and marital trusts

If a married couple expect that their combined estates will be above the applicable exclusion amount when the first spouse dies, they should divide up ownership of their assets so that each spouse owns approximately one-half of the assets. You do not want one of the spouses to own all the assets, and you do not want the spouses to own all of the assets jointly. If one spouse owns all of the assets and the other spouse dies first, the applicable exclusion amount of the first spouse to die will be wasted as there will be no assets in his or her estate to which it can be applied. The surviving spouse's estate may also be overqualified (i.e., have assets in excess of the applicable exclusion amount). Similarly, if the spouses hold all of the assets jointly, when one spouse dies, the other spouse will automatically own all of the assets, which will pass to him or her free from estate tax due to application of the unlimited marital deduction. Again, the applicable exclusion amount of the first spouse to die will be wasted because there will be no assets in his or her estate to which the exclusion can apply.

Example(s): Say you expect that you and your spouse would have assets in excess of \$7 million if one spouse were to die in 2009. You and your spouse currently own all of your assets jointly. Your estate planning attorney recommends that you divide up the ownership of the assets so that you and your spouse each own approximately one-half of the assets. If the assets are split evenly (\$3.5 million to each spouse), then at the death of the first spouse, an amount equal to the applicable exclusion amount of that spouse can be transferred to the bypass trust, and the remaining assets can be transferred to the marital trust. The assets in the marital trust will be included in the surviving spouse's taxable estate. However, the surviving spouse can use his or her applicable exclusion amount to avoid the federal estate tax due (partially or fully) on these assets at his or her death. By splitting up your assets and using a bypass trust and a marital trust, you may each be able to fully use your applicable exclusion amounts, maximizing the amount that you can leave to your heirs free from estate tax.

A marital trust is not necessary to minimize federal estate taxes

It is not necessary to use a marital trust in conjunction with a bypass trust to minimize the federal estate taxes of both spouses. Rather than using a marital trust, assets from the estate of the first spouse to die could be transferred to a bypass trust such that his or her applicable exclusion amount was fully used. The remainder of the assets could be left outright to his or her surviving spouse. The surviving spouse could then use his or her applicable exclusion amount to shelter the assets from estate tax at his or her death. A married couple may want to use a marital trust (usually a qualified terminable interest property (QTIP) trust) if they have children and are concerned that the surviving spouse will remarry or where there is a second marriage and one or both spouses are concerned about the surviving spouse "cutting out" children from a first marriage in favor of their own family members or children. With a QTIP marital trust, the surviving spouse must receive all income from the trust for life. However, you can designate in the QTIP trust who will receive the assets at the death of the surviving spouse.

Example(s): Say you and your spouse have been married for 10 years and have three children. You have net assets in excess of your combined applicable exclusion amounts, and both you and your spouse would like all of your assets to eventually go to your three children. You should first divide ownership of the assets and then set up both a bypass trust and a QTIP marital trust. At the death of the first spouse, sufficient assets could be transferred to the bypass trust to fully use that spouse's applicable exclusion amount. The remaining assets could then be transferred to the QTIP marital trust, and the surviving spouse would receive all of the income from that trust for his or her lifetime. When the surviving spouse dies, all of the assets from both trusts could then pass to the children. If you and your spouse did not have children, or you were not concerned about the assets passing to the children, you might not want to incur the expense to set up the QTIP marital trust. Any assets remaining after funding the bypass trust could simply be left to the surviving spouse.

Strengths

Use of both bypass and marital trusts allows married couple to have full benefit of wealth while minimizing estate taxes

The main reason for using both bypass and marital trusts is to allow the surviving spouse to benefit from family wealth during his or her lifetime while minimizing the federal estate tax that may be incurred on the couple's combined estates. The use of these two trusts in conjunction is an especially effective estate planning strategy when the married couple would like some or all of their assets to pass to their children or others when the surviving spouse dies. Although the surviving spouse must receive all income from a qualified terminable interest property (QTIP) marital trust, the grantor of the trust may designate to whom the assets in the trust pass upon the surviving spouse's death. You can thus prevent your assets from eventually ending up in the hands of the new spouse if your spouse remarries, or you can ensure that your assets pass to your children from a previous marriage rather than to your second spouse's relatives. The use of the bypass and the marital trusts can also minimize the federal estate tax

incurred in each spouse's estate by allowing each spouse to fully use his or her applicable exclusion amount.

Example(s): Say you and your spouse expect to have a taxable estate in excess of your combined applicable exclusion amounts at the death of the first spouse. You have three minor children, and you would like your children to inherit all of your assets when the surviving spouse dies. On the advice of your estate planning attorney, you have equally divided the ownership of your assets between you and your spouse (to prevent wasting of the applicable exclusion amount of the first spouse to die and possibly overloading the surviving spouse's estate). Your attorney has drafted both a bypass trust and a QTIP marital trust. At the death of the first spouse, sufficient assets are transferred to the bypass trust to fully use that spouse's applicable exclusion amount. The remainder of the assets is transferred to the QTIP trust. The surviving spouse receives all income from the QTIP trust for life, and your children are named as the remainderpersons of the trust. At the death of the surviving spouse, all of the assets in the QTIP trust will pass to your children. Although the assets in the QTIP trust will be included in the surviving spouse's taxable estate, the surviving spouse can use his or her applicable exclusion amount to protect some or all of these assets from federal estate tax. By using the bypass trust and the marital trust, you have permitted the surviving spouse to benefit from family wealth (through lifetime income), minimized the federal estate taxes incurred at the deaths of both you and your spouse, and ensured that your children will inherit the bulk of your assets upon the death of the survivor of you and your spouse.

Use of a bypass trust can provide professional management of assets to surviving spouse and beneficiaries

Another advantage of using a bypass trust is that you can name a professional trustee to manage the assets in the trust. If you are concerned that your spouse lacks the sophistication and experience to wisely manage your assets, you can appoint a bank trust department or professional fiduciary to be the trustee of the bypass trust. Once the trust is funded (either during your lifetime or at your death), the professional trustee can then manage the assets for the benefit of the beneficiary. You may even designate that the professional management of the trust continue past the death of the surviving spouse if you think that your children may be too young or too irresponsible at that time to handle the assets themselves.

Use of a bypass trust will allow assets to avoid probate

If you fund a bypass trust while you are alive, those assets will avoid probate at your death. Assets held in a trust do not have to be probated. There are two main disadvantages to probating an estate.

The first disadvantage to probating an estate is the time delay between the death of the decedent and the distribution of the assets. In almost all states, the heirs may have to wait six months to two years before they receive their assets. With a trust, the assets can be distributed immediately upon the death of the grantor. A second disadvantage is that the probate process is public. Anyone can go down to the

probate court and obtain a copy of your will to see what assets you owned and how those assets will be distributed. A trust is a private instrument that allows your assets and the distribution of those assets to remain private.

Both the bypass and the marital trust may be used to maximize use of each spouse's exemption from the generation-skipping transfer tax exemption of both spouses

In recent years, many estate planning attorneys have designed both the bypass and the marital trust to maximize use of each spouse's exemption from the generation-skipping transfer tax (GSTT). The GSTT applies to a transfer from one individual to another individual (called a skip person) who is two generations or more below the transferor. The GSTT rate is 45 percent on transfers made during 2009. This tax is in addition to any other gift or estate tax that may be assessed on the transfer. Each individual has a lifetime exemption from the GSTT (\$3.5 million in 2009). The exemption may be allocated between the bypass trust and the marital trust. The surviving spouse's GSTT exemption can also be allocated to the marital trust, making it more likely that both the husband and wife can fully use their respective GSTT exemptions. By using this method, up to \$4 million can be left to skip persons without incurring the GSTT.

Tip: The GSTT rate is same as the maximum estate tax rate, and, for tax years after 2003, the GSTT exemption is the same amount as the estate tax applicable exclusion amount.

Tradeoffs

Attorney should be hired to draft the bypass trust

You should hire a competent and experienced estate planning attorney to draft the bypass trust. Your attorney should also advise you on the estate and tax implications of setting up a bypass trust. As noted before, a bypass trust is typically used in conjunction with some type of marital trust. Because this strategy involves fairly sophisticated estate planning, you should have your estate planning attorney review your entire estate plan. Furthermore, in many cases, the ownership of assets will have to be split up, and the trusts may even be funded during your lifetime. You will need an attorney to retitle assets and to transfer assets into the various trusts. This level of estate planning can be quite expensive, with legal fees running possibly into the thousands of dollars.

Trustee will be needed for the bypass trust

You will need to appoint a trustee for the bypass trust. Depending on the size of the trust, you may want to hire a professional trustee for the trust. Many people hire a bank trust department or a private trust company, or even an individual who is a professional fiduciary, to be the trustee of the bypass trust. A professional trustee will have to be compensated for his or her services. Typically, he or she receives a percentage (usually 1 percent or more) of the assets under management.

Surviving spouse will not have full control over the assets in the bypass trust

Another tradeoff to using a bypass trust is that the surviving spouse will not have complete control over the assets in the bypass trust. If the spouse does have complete control over the assets, then the assets in the trust would be included in his or her taxable estate when he or she dies and might therefore be subject to estate tax. This outcome would completely defeat the purpose of using a bypass trust, which is to use the applicable exclusion amount (formerly known as the unified credit) of the first spouse to die to allow the assets in the bypass trust to pass to the remainder beneficiaries tax free.

Unfortunately, your spouse may not relish the idea of having no control over assets that you may have spent your lifetimes accumulating. Of course, the surviving spouse can be given some limited rights in the bypass trust. He or she can receive all of the trust's income for life, or he or she can be given trust principal to pay for health, education, maintenance, and support. An independent trustee can give unlimited amounts of trust principal to the surviving spouse at the trustee's discretion. The surviving spouse can have a limited power of appointment over trust assets to make lifetime or testamentary gifts to children or grandchildren, or anyone except himself or herself, his or her estate, and his or her creditors. Finally, the surviving spouse can be given the noncumulative right to withdraw each year the greater of \$5,000 or 5 percent of the value of trust assets.

How to do it

Hire competent and experienced estate planning attorney to draft the bypass trust

Setting up a bypass trust (usually in conjunction with a marital trust) is a fairly complex estate planning strategy. You should seek the advice of a capable estate planning attorney to determine if setting up a bypass trust would be beneficial in your situation. If you decide to set up a bypass trust, a competent and experienced estate planning attorney should be hired to draft the trust. Furthermore, if you fund the trust during your lifetime, you may also need your attorney to transfer assets into the trust.

Choose an individual or institution to be the trustee of the bypass trust

If your estate is large, you should consider hiring a professional trustee, either a corporate trustee (such as a bank trust department or a private trust company) or an individual who is a professional fiduciary. Your estate planning attorney should be able to recommend several qualified trustees to you. The trustee has two primary responsibilities. First, the trustee must manage and invest the trust assets to generate income for the beneficiaries. Second, the trustee must attempt to preserve the corpus of the trust assets for the remainderpersons--the individuals who will ultimately inherit the trust assets (usually your children). If you have substantial assets, you should hire an individual or institution that has experience in managing these types of trusts.

You must choose beneficiaries and remainderpersons for the bypass trust

You must choose the beneficiaries and remainderpersons for the bypass trust. In almost all cases, the beneficiary will be the surviving spouse. Typically, the surviving spouse will be given at least all income from the trust. He or she may also be given access to the trust principal (for health, education, maintenance, or support). The individuals who will ultimately inherit the assets in the trust when the income beneficiary dies may be anyone you choose.

In community property state, one-half of property accumulated by married couple automatically belongs to surviving spouse

In a community property state, one-half of the property accumulated by a married couple during the marriage automatically belongs to the surviving spouse. This property is not subject to the provisions of the will of the first spouse to die. This fact can cause complications for estate planning purposes. The first spouse to die can specify that he or she wants all of the community property to be subject to the provisions of his or her will, but the surviving spouse must affirmatively acquiesce to this instruction before it will be effective as to the surviving spouse's share of such property. If you live in a community property state or own property in a community property state, you should hire an experienced attorney in that state to assist you with your estate planning.

Marital deduction rules apply to community property states

The marital deduction rules apply to community property states. By taking advantage of the unlimited marital deduction a married couple in a community property state can defer payment of federal estate taxes until the death of the surviving spouse. Some or all of the assets of the first spouse to die can be transferred into a bypass trust that may be shielded from federal estate tax by the applicable exclusion amount. The remainder of the assets of the first spouse to die can then be left to the surviving spouse, either outright or in a marital trust that will qualify for the unlimited marital deduction.

Tax considerations

Income Tax

Income from assets transferred to a revocable living trust will be taxed to the grantor of trust

If you transfer assets into a revocable bypass trust while you are alive, you will still be subject to income tax on any income generated by those assets. Since the transfers of assets are not irrevocable transfers into the trust, you are still considered the owner of the assets for income tax purposes. After your death, the income from the trust will be taxed to either the beneficiary (usually the surviving spouse) or the trust, depending on whether the income is paid out to the beneficiary or retained by the trust.

Example(s): Say you set up a revocable bypass trust during your lifetime and transfer \$500,000 to the trust. The trust generates \$20,000 per year of income. You must include this amount in your taxable income each year. After you die, the beneficiary of the trust (usually your spouse) will then be taxed on this income if it is distributed to him or her. If the trust retains the income, it will be taxed on the income.

Gift and Estate Tax

No gift tax due for transfers into a revocable living trust

Since you retain the right to terminate a revocable living trust, no gift tax is due at the time of the transfer into the trust. Those assets, however, will be included in your gross taxable estate when you die.

Gift tax may be due on transfers into an irrevocable trust

A gift tax may be due if you make transfers into an irrevocable trust during your lifetime. Any gift tax due may be offset by your \$1 million gift tax applicable exclusion amount, if it is available.

Caution: Keep in mind that the applicable exclusion amount for gift tax purposes is \$1 million while the applicable exclusion amount for estate tax purposes increases to \$3.5 million in 2009. Any portion of your gift tax applicable exclusion amount you use during your lifetime effectively reduces your estate tax applicable exclusion amount that will be available at your death.

Assets transferred into a testamentary bypass trust are included in the taxable estate of the grantor

Any assets that are transferred into the bypass trust at your death will be included in your taxable estate. However, you can use your applicable exclusion amount to shelter these assets from the federal estate tax. Most people using the bypass trust authorize their executor to transfer just enough assets into the bypass trust to fully use their applicable exclusion amounts then available. The remaining assets will then either be left directly to the surviving spouse or transferred into a marital trust. These assets will qualify for the unlimited marital deduction, and no estate tax will be due at the death of the first spouse. In some rare instances, however, you may want to give your executor the discretion to overfund the bypass trust so your estate has to pay some estate tax at your death. Since the estate tax is graduated, it may make sense to incur estate tax at a lower rate at your death rather than overload the surviving spouse's estate, where the marginal estate tax rate may be much higher.

Generation-skipping transfer tax will apply to transfers to beneficiaries two generations or more below grantor

The generation-skipping transfer tax (GSTT) may apply to distributions from a trust in which there are beneficiaries (known as skip persons) who are two or more generations below the grantor. See the discussion above.

Caution: The GSTT is a very complicated and onerous tax. If you think that you have any beneficiaries that may be skip persons, you should consult a competent and experienced estate planning attorney about the best ways to avoid the GSTT.

Questions & Answers

What size estate should a married couple have before they consider using a bypass trust?

Most married couples will not need to set up a bypass trust if their combined assets are below the applicable exclusion amount. Couples with larger combined estates can use a bypass trust in conjunction with a qualified terminable interest property trust to take maximum advantage of the applicable exclusion amounts of both spouses. Most couples who have assets below the applicable exclusion amount can either hold all of the assets in joint name or have simple wills in which each spouse leaves all of his or her assets to the other spouse. If assets are held jointly, then upon the death of one joint owner, the other owner automatically owns all of the assets. If the value of the assets in the surviving spouse's estate (including any assets transferred to the surviving spouse as a result of the death of the first spouse to die) is below his or her available applicable exclusion amount, no federal estate taxes will be due upon his or her death. A similar result would ensue if both spouses simply left all of their assets to each other. A trust may be desirable if one or both spouses would like his or her assets to pass to specific individuals upon the surviving spouse's death. If so, it may make sense to set up a trust whereby the surviving spouse receives the income from the trust for life with the principal to pass to these specific individuals (possibly the couple's children) at the death of the surviving spouse.

Should a married couple with assets in excess of the applicable exclusion amount hold their assets jointly?

No. In general, a married couple who expect to have assets in excess of the applicable exclusion amount should not hold their assets in joint name. If the assets are held jointly, then upon the death of the first spouse, the other spouse would automatically own all of the assets that would pass to that spouse tax free due to application of the unlimited marital deduction. The applicable exclusion amount of the first spouse to die would then be wasted, as there would be no assets taxable in his or her estate to which the exclusion can be applied. The surviving spouse's estate may then be overqualified (i.e., have assets in excess of the applicable exclusion amount) due to inclusion of the joint assets. The married couple should divide up the ownership of the assets so that each one owns approximately an equal amount.

Can life insurance be used in conjunction with a bypass trust?

Yes. Many people use a revocable trust to hold life insurance in conjunction with a bypass trust (and sometimes a marital trust). One way to use a life insurance trust in conjunction with a bypass trust is to take out a life insurance policy on your life and then name the trustee of the revocable life insurance trust to be the beneficiary of the policy. Upon your death, the proceeds from the life insurance policy flow directly into the trust. The residue from your estate (i.e., what is left over after specific bequests, taxes, debts, and expenses) will also flow into the trust. The trust document will then authorize the

trustee to divide the assets in the trust into both the bypass trust and the marital trusts. The trustee can decide at the time of your death how to best divide the assets to minimize taxes and to provide for your family.

Does it ever make sense for a married couple to pay estate taxes at the death of the first spouse?

Yes. There may be situations in which a couple with substantial assets will actually be better off paying some estate taxes at the death of the first spouse. If the estate of the first spouse to die would be taxed at a lower marginal rate, it may make sense to cause some assets to be included in his or her estate thereby incurring federal estate taxes at the lower marginal rate applicable to that estate. These assets will then not be included in the surviving spouse's taxable estate, where the marginal estate tax rates may be much higher.

Can a bypass trust be set up in your will?

Yes. The bypass trust would then be known as a testamentary trust. At your death, the assets in from your estate will fund the trust. One tradeoff to setting up a testamentary trust is that the trust cannot be funded until your estate has been probated. The probate of an estate can take from six months to two years. In contrast, an inter vivos trust may be funded during your lifetime. A testamentary trust may also be subject to supervision by the court making it more expensive to administer than an inter vivos trust.

Disclosures

This material does not constitute the rendering of investment, legal, tax or insurance advice or services. It is intended for informational use only and is not a substitute for investment, legal, tax, and insurance advice.

State, national and international laws vary, as do individual circumstances; so always consult a qualified investment advisor, attorney, CPA, or insurance agent on all investment, legal, tax, or insurance matters.

The effectiveness of any of the strategies described will depend on your individual situation and on a number of other factors. After reviewing your personal situation, we may recommend that you not use any strategy in this document but instead consider various other strategies available through our practice.

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