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Minimizing Flexibility with Disclaimer Trust Drafting

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MAXIMIZING FLEXIBILITY WITH DISCLAIMER TRUST DRAFTING

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I. Introduction – Flexibility is the Key.

Estate planners live in a dynamic world. As recently as five years ago, the prospect of repeal of the Estate Tax appeared ludicrous. Rather amazing and somewhat unanticipated economic surpluses (and forecasts), historic political alignments and victories, and a brilliant marketing campaign demonizing the “Death Tax” enabled the passage of legislation which repeals the federal estate tax. The Economic Growth and Relief Reconciliation Act of 2001 (P.L. 107-16, June 7, 2001) (“EGTRRA”), increases the federal estate tax exemption to \$1 million in 2002, \$1.5 million in 2004, \$2 million in 2006, and \$3.5 million in 2009. The federal estate tax is repealed in 2010, but unless the sunset provisions that effect EGTRRA are extended or eliminated, in 2011 the exemption amount will return to \$1 million.

Nearly two years after the passage of EGTRRA, it seems that our world has completely changed. The economy now sputters. Consumer confidence is low. Rather than the anticipated surpluses which drove the passage of EGTRRA, we now have mounting deficits. The geopolitical environment also continues to present challenges. The continued fight against terrorism after September 11th, the war in Iraq, and the unstable “wild-card” that is North Korea makes one long for the days Presidential scandals and impeachment.

For purposes of our practice, what the above underscores is the need for flexibility in our estate planning documents. The estate planning practice is one of uncertainty anyway. The potential variables present when executing an estate plan are quite staggering. When will the client die? Will the client still be married? Will the client have additional children? Will the client become estranged from their children? What will be the makeup and value of the client’s estate? Add to these variables almost complete uncertainty as to the future of the federal estate tax. The only certainty that exists is that there will be substantial changes to EGTRRA in its current form.

The purpose of this article is to generally explore the use of disclaimers in the estate planning practice and how they add flexibility to our clients plans. Disclaimers are certainly nothing new. For many years we have been used them to repair our clients messes. In light of the new law however, the use of disclaimer planning and other similar techniques, has taken on a whole new light

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