

# Is the “Clayton Election” a Good Choice for Your Estate Plan?

## HOW IT WORKS:

A Clayton Election is made at the death of a spouse by the trustee (typically the surviving spouse). Trust assets are allocated between a Survivor's Trust and Marital Trust to which the assets of the deceased spouse are allocated on the surviving spouse's election to treat these assets as QTIP property. As a result, these assets remain in the surviving spouse's estate, which removes capital gains tax that may have been due at the second death from deceased spouse's assets.

## WHO MIGHT BENEFIT:

- Couples with assets that will appreciate.
- Couples in a second marriage with children from prior relationships.

## REVOCABLE LIVING TRUST AGREEMENT

**AT FIRST DEATH:** Full step-up in basis of **both** Trusts, if all assets are community property. Both Trusts remain in surviving spouse's estate, but the Marital Trust is Irrevocable.

### SURVIVOR'S TRUST

Assets considered to be in surviving spouse's estate

### MARTIAL TRUST

Assets considered to be in surviving spouse's estate

**AT SECOND DEATH:** There is **another** full step-up in basis of **both** trusts, as a result of the Clayton Election, since all assets are in the surviving spouse's estate for tax purposes.

Based on your requested distribution scheme, trust assets are divided among children, charities and/or friends. Assets can still be held in further trusts.

The difference here from a traditional split trust, is that the surviving spouse will make a “Clayton Election” at the first death, provided for in the trust document, directing that the deceased spouse's assets be allocated as a QTIP Marital Trust, with the result that the assets of this trust will be included in the surviving spouse's estate for estate tax purposes.

In this option, a Decedent's Trust will not be used; no assets will be considered to be in the deceased spouse's estate at the time of the death of the surviving spouse.

## PROS

- Ensures children of deceased spouse will not be disinherited due to irrevocability of Marital Trust.
- Protection for surviving spouse from attempts to defraud and from any potential new spouse.
- **FULL step-up in basis of all assets at first death, and another full step-up in basis of all assets at the second death, removing the capital gains tax at the second death which may otherwise have been due.**
- If Clayton Election is not made, then a Decedent's Trust is utilized, if couple has a typical A/B or A/B/C split Trust.
- The surviving spouse may have a limited power of appointment over the Marital Trust to individuals or charities.

## CONS

- Administrative tasks with your estate planning attorney are required at the first spouse's death.
- An estate tax return must be filed and *portability* (the ability to “port,” or transfer, the deceased spouse's *unused* tax exemption to the surviving spouse, thus potentially doubling the estate tax exemption for the surviving spouse at the second death) must be elected in the estate tax return by the surviving spouse.