

# To Fund or Not to Fund...The Bypass Trust

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## Why This Topic?

- Something many practitioners have encountered, especially over the past ten years – and will continue to encounter so long as the estate tax exemption stays elevated, and portability remains in place.
- Estate Tax Exemption has grown over 2,000% since 1996. An entire generation of Wills and Trusts have provisions no longer needed to save estate tax.
- Different course of action pursued by different attorneys who encounter this. Wide range of responses

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## Estate & Gift Tax – Exemption and Rates

Year	Estate Tax Exemption Amount	Top Estate Tax Rate
1996	\$600,000	55%
2002	\$1,000,000	50%
2004	\$1,500,000	48%
2006	\$2,000,000	46%
2009	\$3,500,000	45%
2010	\$5,000,000 or \$0 *	35% or 0 *
2012	\$5,120,000	35%
2017	\$5,490,000	40%
2018	\$11,180,000	40%
2020	\$11,580,000	40%
2021	\$11,700,000	40%
2022	\$12,060,000	40%
2023	\$12,920,000	40%

\*Estates for decedents who died in 2010 had an option, since there was effectively no estate tax for a period of 10 months, until Congress retroactively revised the estate tax and the exemption amount

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## Some Common Scenarios

- Husband and Wife married for 40 years when Husband dies. Wills from 1996, planning for an exemption of \$600,000 and not \$12,920,000. Total estate is \$3,000,000(including \$950,000 in IRA). If clients had Wills prepared in 2023, they likely would have no tax-driven trust provisions.
- Husband and Wife married for 17 years when Husband dies. Revocable Trust, with Bypass-Marital split, prepared in 2004. Total estate is \$8,000,000, of which \$3,000,000 is in an IRA which passes directly to Wife.
- Husband and Wife married for 20 years when Husband dies. Tax-planned Wills from 2007. Total estate is \$15,500,000, but sometime after Wills were executed, clients moved their financial assets and largest account is now JTWROS.

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## Non-Probate Assets

- Absent the use of a qualified disclaimer, non-probate assets are generally not available to fund a testamentary trust.
  - Retirement Accounts
  - Life Insurance
  - Annuities
  - Transfer on Death Deed
  - Payable-on Death or JTWROS Accounts

## (MOST) Common Scenario

Regardless of provisions in Wills, size of Estate or composition of Estate assets, the common threads are that assets which would have been available to fund the Bypass Trust have been diverted by means of a beneficiary designation and/or the surviving spouse wants to avoid the perceived hassle of funding, administering and maintaining the Bypass Trust.

The surviving spouses wants things to be kept simple.

Simple = Inexpensive?

Easy to Understand and Administer?

Concern over accessing money?

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Title search: To Fund or Not to Fund... The Bypass Trust

Also available as part of the eCourse

[To Fund...or Not to Fund: When Estate Plans Go Awry](#)

First appeared as part of the conference materials for the  
25<sup>th</sup> Annual Estate Planning, Guardianship and Elder Law Conference session  
"To Fund...or Not to Fund: When Plans Go Awry"