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Business and Estate Planning

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## How to Pass Assets to Your Surviving Spouse

For married couples, after the first spouse dies, there are two primary methods for transferring your assets to the surviving spouse.

The first option is the disclaimer method, which is the most flexible option, but offers the least asset protection. The second option is the Clayton election, which is less flexible, but offers the most asset protection. There are benefits to each approach and the best option for your family depends on your family's unique needs and goals. We discuss each option below.

### Disclaimer Method

Under this option, upon the death of the first spouse, all of your assets will transfer from your living trust to the surviving spouse in a continuing revocable trust that is controlled by the surviving spouse. This option is the most flexible because there are no restrictions on how the spouse uses any of your assets – the surviving spouse can do whatever he or she wants with them. This means that the survivor can spend all of the assets and leave nothing behind for your children. This also means that the surviving spouse could give away all of your assets or change the beneficiary of your trust to anyone that he or she wants, including a new boyfriend, girlfriend, spouse, caretaker, charity, or anyone else he or she wants (instead of your children or other loved ones your originally agreed upon when setting up your trust).

In addition, because the surviving spouse has unrestricted control over all of the assets, none of the assets are protected from creditors, predators, or future spouses. This means that if the surviving spouse remarries and then divorces, half of the assets could go to the ex-spouse. Also, if the surviving spouse was ever sued, filed for bankruptcy, or was subject to creditor claims or judgments, all of the assets are at risk and could be taken away.

### Clayton Election

Under this option, upon the death of the first spouse, all of your assets are divided into two equal shares and placed in two separate trusts – the survivor's trust and the decedent's trust(s).

The survivor's trust is a revocable trust that is controlled by the surviving spouse without any restrictions – the surviving spouse can do whatever he or she wants with the assets. The survivor's trust is similar to the trust created under the disclaimer method above. The surviving spouse has unrestricted control to spend or give away the assets, but there is no asset protection.

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The decedent's trust is an irrevocable trust, which means that the surviving spouse (or anyone else) cannot change the terms of the trust, including the beneficiaries. This ensures that your children (or anyone else you want) would always be the beneficiaries of your half of the assets. The surviving spouse can still use the assets from the decedent's trust for his or her health, education, maintenance, and support (and any other specific purposes you would like) during his or her lifetime, but the surviving spouse cannot spend the money without restrictions or give away the assets to a new boyfriend, girlfriend, spouse, caretaker, or charity.

In addition, the assets in the decedent's trust are protected from creditors, predators, or future spouses. This means that if the surviving spouse remarries and then divorces, or if the surviving spouse was ever sued, filed for bankruptcy, or was subject to creditor claims or judgments, all of the decedent's assets would be protected.

Spouses can also determine how much control the surviving spouse has over the decedent's trust. For maximum control, the surviving spouse may serve as the sole trustee. This allows the surviving spouse to control the decedent's trust without having to confer with anyone else before taking actions. This creates great flexibility, but you lose oversight over the surviving spouse and can decrease the amount of asset protection. For additional oversight and protection, you can select a co-trustee to serve with the surviving spouse or you can select a third party or independent trustee to serve without the surviving spouse. The benefit of this is that the more removed the spouse is from controlling the trust assets, the more asset protection you get and the better protection you get from spouse improperly spending the assets.

Also, in the event that the surviving spouse gets remarried, you can restrict the surviving spouse's access to the decedent's trust assets, unless he or she gets a valid prenuptial agreement with the new spouse. This gives increased protection from a future divorce or improper use of the money to benefit the new spouse.

There are pros and cons of both the Disclaimer Method and the Clayton Election. Talk with us to decide which option is best for your family.