

**NEW JERSEY INSTITUTE FOR  
CONTINUING LEGAL EDUCATION**

**70<sup>TH</sup> SEMI-ANNUAL  
TAX & ESTATE PLANNING FORUM**

**“I’LL BE DAMNED IF YOU ARE GOING TO SURVIVE ME  
AND LEAVE EVERYTHING TO YOUR NEXT SPOUSE”**

**Wednesday, December 11, 2013**

**Renaissance Woodbridge Hotel**

**Presented by:**

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**“I’LL BE DAMNED IF YOU ARE GOING TO SURVIVE ME AND LEAVE  
EVERYTHING TO YOUR NEXT SPOUSE”**

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I. MARITAL DEDUCTION TRUSTS BEFORE 1982

A. Prior to 1982 only 50% of the assets passing to the surviving spouse qualified for the Marital Deduction

1. Therefore, the estate of the predeceased spouse would likely be subject to federal estate tax if the predeceased spouse’s estate was valued greater than twice the Applicable Exclusion Amount

2. In 1981 the Applicable Exclusion Amount was \$175,000

B. Prior to 1982 there were only two types of Marital Trusts which would qualify for the Marital Deduction

1. The I.R.C. Section 2056(b)(5) Power of Appointment Trust (See the Statute at Exhibit A)

a. Spouse is only beneficiary of income and principal

b. Income needs to be distributed to the spouse annually

c. The spouse has an inter vivos or testamentary general Power of Appointment over the assets in the Trust

d. Spouse has a right to convert non-income producing property to income producing property

e. The I.R.C. Section 2056(b)(5) Trust was the most popular Marital Trust before the 1981 enactment of I.R.C. Section 2056(b)(7) discussed below

2. The Estate Trust

a. At death of spouse the assets in Estate Trust pass to the surviving spouse’s estate and are distributed pursuant to the terms of surviving spouse’s Will

b. Spouse is the only beneficiary of income and principal

- c. Income and principal can be accumulated because the remainder passes to the surviving spouse's estate at the death of the surviving spouse
  - d. Surviving spouse does have right to convert non-income producing property to income producing property
  - e. The Estate Trust qualifies for the Marital Deduction because it is not a terminable interest. It passes to the surviving spouse's estate at the death of the surviving spouse
- C. The primary advantages of the pre-1982 Marital Trusts are that:
- 1. The testator could make certain that the inherited assets are preserved during the life of a spendthrift surviving spouse
  - 2. The testator could make certain that the inherited assets are preserved during the lifetime of a financially unsophisticated surviving spouse
- D. The primary disadvantages of pre-1982 Marital Trusts are that:
- 1. Although the testator could control the assets of the Marital Trust during the life of the surviving spouse, the surviving spouse had control as to the ultimate disposition of the assets at the surviving spouse's death
  - 2. The assets in the Marital Trust are included in the taxable estate of the surviving spouse at the surviving spouse's date of death value

## II. MARITAL DEDUCTION TRUSTS AFTER 1981

- A. In 1981 the federal estate tax was significantly changed by the enactment, among other things, of the unlimited Marital Deduction. Everything left to the surviving spouse is deductible in computing the Taxable Estate commencing with deaths on or after January 1, 1982
- B. The new law created an incentive to leave everything but the Applicable Exclusion Amount outright to the surviving spouse
- 1. Congress realized, however, that everything may be too much
  - 2. The Power of Appointment Marital Trust and the Estate Marital Trust were not an attractive option for many wealthy families

because the Testator did not control how the assets would ultimately pass

- C. Therefore, the I.R.C. Section 2056(b)(7) Qualified Terminable Interest Trust was introduced as part of the 1981 legislation (See the Statute at Exhibit B). By technical correction, it was soon renamed the Qualified Terminable Interest Property Trust (QTIP)
1. All income must be paid to spouse annually during life of spouse
  2. Only spouse is beneficiary of corpus distribution during the life of the spouse
  3. The testator can control who will be the ultimate beneficiaries of the QTIP Trust at the death of the surviving spouse
  4. The surviving spouse has the right to convert non income producing property to income producing property
  5. The Executor must elect to qualify the QTIP Trust for the Marital Deduction (See Schedule M of Form 706 at Exhibit C)

### III. THE QTIP TRUST HAS PROVEN TO BE EXTREMELY POPULAR

- A. Assets passing to a proper QTIP Trust qualify for the Marital Deduction
- B. To protect assets from a spendthrift and/or financially unsophisticated spouse and assure that the assets ultimately pass to the persons desired by the Testator
- C. Assures that the principal of the Trust will not be available to the surviving spouse's next spouse (and the next spouse's children)
- D. Assures that the principal of the Trust will pass to the children of the Testator, not the next spouse or the children of the next spouse
- E. Potential conflict of interest in representing husband and wife in context of estate planning (See Engagement Letter Conflict of Interest language at Exhibit D)
- F. Absent a Pre-Nuptial Agreement, the surviving spouse, who will be the beneficiary of a QTIP Trust, could possibly elect against the Will (See N.J.S.A. 3B:8-17 at Exhibit E with respect to the valuation of a trust in which the spouse has an interest for elective share purposes)

**IRC § 2056(b)(5)****(5) Life estate with power of appointment in surviving spouse.**

In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse-

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a) , be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1)(A) , be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

**IRC § 2056(b)(7)****(7) Election with respect to life estate for surviving spouse.**

(A) In general. In the case of qualified terminable interest property-

(i) for purposes of subsection (a) , such property shall be treated as passing to the surviving spouse, and

(ii) for purposes of paragraph (1)(A) , no part of such property shall be treated as passing to any person other than the surviving spouse.

(B) Qualified terminable interest property defined. For purposes of this paragraph -

(i) In general. The term "qualified terminable interest property" means property-

(I) which passes from the decedent,

(II) in which the surviving spouse has a qualifying income interest for life, and

(III) to which an election under this paragraph applies.

(ii) Qualifying income interest for life. The surviving spouse has a qualifying income interest for life if-

(I) the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property, and

(II) no person has a power to appoint any part of the property to any person other than the surviving spouse.

Subclause (II) shall not apply to a power exercisable only at or after the death of the surviving spouse. To the extent provided in regulations, an annuity shall be treated in a manner similar to an income interest in property (regardless of whether the property from which the annuity is payable can be separately identified).

(iii) Property includes interest therein. The term "property" includes an interest in property.

(iv) Specific portion treated as separate property. A specific portion of property shall be treated as separate property.

(v) Election. An election under this paragraph with respect to any property shall be made by the executor on the return of tax imposed by section 2001 . Such an election, once made, shall be irrevocable.

(C) Treatment of survivor annuities. In the case of an annuity included in the gross estate of the decedent under section 2039 (or, in the case of an interest in an annuity arising under the community property laws of a State, included in the gross estate of the decedent under section 2033 ) where only the surviving spouse has the right to receive payments before the death of such surviving spouse-

(i) the interest of such surviving spouse shall be treated as a qualifying income interest for life, and

(ii) the executor shall be treated as having made an election under this subsection with respect to such annuity unless the executor otherwise elects on the return of tax imposed by section 2001 .

An election under clause (ii) , once made, shall be irrevocable.

Decedent's social security number

Estate of:

**SCHEDULE M—Bequests, etc., to Surviving Spouse**

**Note.** If the value of the gross estate, together with the amount of adjusted taxable gifts, is less than the basic exclusion amount and the Form 706 is being filed solely to elect portability of the DSUE amount, consideration should be given as to whether you are required to report the value of assets eligible for the marital or charitable deduction on this schedule. See the instructions and Reg. section 20.2010-2T (a)(7)(ii) for more information. If you are not required to report the value of an asset, identify the property but make no entry in the last column.

	Yes	No
<b>1</b> Did any property pass to the surviving spouse as a result of a qualified disclaimer? . . . . .		
If "Yes," attach a copy of the written disclaimer required by section 2518(b).		
<b>2a</b> In what country was the surviving spouse born? _____		
<b>b</b> What is the surviving spouse's date of birth? _____		
<b>c</b> Is the surviving spouse a U.S. citizen? . . . . .		
<b>d</b> If the surviving spouse is a naturalized citizen, when did the surviving spouse acquire citizenship? _____		
<b>e</b> If the surviving spouse is not a U.S. citizen, of what country is the surviving spouse a citizen? _____		
<b>3</b> <b>Election Out of QTIP Treatment of Annuities.</b> Do you elect under section 2056(b)(7)(C)(ii) not to treat as qualified terminable interest property any joint and survivor annuities that are included in the gross estate and would otherwise be treated as qualified terminable interest property under section 2056(b)(7)(C)? (see instructions) . . . . .		

Item number	Description of property interests passing to surviving spouse. For securities, give CUSIP number. If trust, partnership, or closely held entity, give EIN	Amount
QTIP property:		
A1		
All other property:		
B1		
Total from continuation schedules (or additional statements) attached to this schedule . . . . .		
<b>4</b>	Total amount of property interests listed on Schedule M . . . . .	<b>4</b>
<b>5a</b>	Federal estate taxes payable out of property interests listed on Schedule M . . . . .	<b>5a</b>
<b>b</b>	Other death taxes payable out of property interests listed on Schedule M . . . . .	<b>5b</b>
<b>c</b>	Federal and state GST taxes payable out of property interests listed on Schedule M . . . . .	<b>5c</b>
<b>d</b>	Add items 5a, 5b, and 5c . . . . .	<b>5d</b>
<b>6</b>	Net amount of property interests listed on Schedule M (subtract 5d from 4). Also enter on Part 5—Recapitulation, page 3, at item 21 . . . . .	<b>6</b>

(If more space is needed, attach the continuation schedule from the end of this package or additional statements of the same size.)



(d) Conflict of Interest: At your request, we will be representing both of you in connection with your tax and estate plan. We believe this is the best way to ensure a well-coordinated plan for you as a married couple. This approach is also more convenient than having each of you obtain separate counsel. Notwithstanding the above, it is important to note that because you will both be clients of this firm, we may be unable to maintain a confidence with one of you that is withheld from the other. In other words, the rule of confidentiality does not apply regarding our communications with each of you. This is particularly important in this matter since H has children from a prior marriage and, as a result, there is an increased possibility of a conflict of interest. You must, therefore, agree to the full disclosure to each of you of all your communications to us. Additionally, although a conflict of interest may not exist at this time (and we, therefore, believe that we can represent both of you without impairing the rights of the other), a conflict of interest may arise in the future. In the event that a conflict arises which will prevent us from properly fulfilling our obligation to both of you, we would be required to withdraw as your joint attorneys and advise each of you to obtain separate counsel. You may also wish to consider seeking independent counsel before executing this letter.

§ 3B:8-17. Value of surviving spouse's or domestic partner's interest in any life estate

In an action for an elective share, the electing spouse's or domestic partner's total or proportional beneficial interest in any life estate in real or personal property or in any trust shall be valued at one-half of the total value of the property or trust or of the portion of the property or trust subject to the life estate.

**HISTORY:** L. 1981, c. 405, § 3B:8-17, eff. May 1, 1982; amended 2005, c. 331, § 20, eff. Jan. 12, 2006.