

QTIP Elections: How and When to Make QTIP, Partial, Clayton, and Reverse Elections

WEDNESDAY, OCTOBER 19, 2022, 1:00-2:50 pm Eastern

IMPORTANT INFORMATION FOR THE LIVE PROGRAM

This program is approved for 2 CPE credit hours. To earn credit you must:

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WHO TO CONTACT DURING THE LIVE PROGRAM

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EXAMPLE #1-

IRS Form 709 Presentation

FACTS

S1 and S2 are married and have multiple descendants. Neither have made any prior year taxable gifts. In calendar 2021, S1 makes the following gifts:

(a) \$15,000 worth of jewelry given to S2.

(b) \$12 million to an irrevocable inter vivos trust for the sole benefit of S2 during S2's lifetime and upon S2's death, the remaining principal is to be distributed to S1's descendants, per stirpes. The trust provides that all income is to be paid out semi-annually to S2, but no distributions of principal are to be made from the trust. S1 intends to make a QTIP election for the transfer to the trust.

PRESENTATION ON SCHEDULE A PART 1 AND 2 OF IRS FORM 709

(1) The outright gift of jewelry to S2 will be reflected on IRS Form 709, Schedule A, Part 1 (Gifts Only Subject to Gift Tax). This will be item 1 on Schedule A

(2) The transfer for the benefit of S2 will be reflected on the IRS Form 709, Schedule A on Part 3 (Indirect Skips and Other Transfers In Transfers in Trust). This will be item 2 on Schedule A.

Please see attached Schedule A, Part 4 For Reconciliation Presentation

Part 4 - Taxable Gift Reconciliation

1	Total value of gifts of donor. Add totals from column H of Parts 1, 2, and 3	1	12,015,000.
2	Total annual exclusions for gifts listed on line 1 (see instructions)	2	15,000.
3	Total included amount of gifts. Subtract line 2 from line 1	3	12,000,000.
Deductions (see instructions)			
4	Gifts of interests to spouse for which a marital deduction will be claimed, based on item numbers <u>See Statement 1</u> of Schedule A	4	12,000,000.
5	Exclusions attributable to gifts on line 4	5	0.
6	Marital deduction. Subtract line 5 from line 4	6	12,000,000.
7	Charitable deduction, based on item numbers _____ less exclusions	7	
8	Total deductions. Add lines 6 and 7	8	12,000,000.
9	Subtract line 8 from line 3	9	0.
10	Generation-skipping transfer taxes payable with this Form 709 (from Schedule D, Part 3, col. G, total)	10	
11	Taxable gifts. Add lines 9 and 10. Enter here and on page 1, Part 2 - Tax Computation, line 1	11	0.

Terminable Interest (QTIP) Marital Deduction. (See instructions for Schedule A, Part 4, line 4.)

If a trust (or other property) meets the requirements of qualified terminable interest property under section 2523(f), and:

- a. The trust (or other property) is listed on Schedule A; and
- b. The value of the trust (or other property) is entered in whole or in part as a deduction on Schedule A, Part 4, line 4, then the donor shall be deemed to have made an election to have such trust (or other property) treated as qualified terminable interest property under section 2523(f).

If less than the entire value of the trust (or other property) that the donor has included in Parts 1 and 3 of Schedule A is entered as a deduction on line 4, the donor shall be considered to have made an election only as to a fraction of the trust (or other property). The numerator of this fraction is equal to the amount of the trust (or other property) deducted on Schedule A, Part 4, line 6. The denominator is equal to the total value of the trust (or other property) listed in Parts 1 and 3 of Schedule A.

If you make the QTIP election, the terminable interest property involved will be included in your spouse's gross estate upon his or her death (section 2044). See instructions for line 4 of Schedule A. If your spouse disposes (by gift or otherwise) of all or part of the qualifying life income interest, he or she will be considered to have made a transfer of the entire property that is subject to the gift tax. See *Transfer of Certain Life Estates Received From Spouse* in the instructions.

12 Election Out of QTIP Treatment of Annuities

Check here if you elect under section 2523(f)(6) not to treat as qualified terminable interest property any joint and survivor annuities that are reported on Schedule A and would otherwise be treated as qualified terminable interest property under section 2523(f). See instructions. Enter the item numbers from Schedule A for the annuities for which you are making this election

SCHEDULE B Gifts From Prior Periods

If you answered "Yes" on line 11a of page 1, Part 1, see the instructions for completing Schedule B. If you answered "No," skip to the Tax Computation on page 1 (or Schedule C or D, if applicable). Complete Schedule A before beginning Schedule B. See instructions for recalculation of the column C amounts. Attach calculations.

A	B	C	D	E
Calendar year or calendar quarter (see instructions)	Internal Revenue office where prior return was filed	Amount of applicable credit (unified credit) against gift tax for periods after December 31, 1976	Amount of specific exemption for prior periods ending before January 1, 1977	Amount of taxable gifts
1	Totals for prior periods	1		
2	Amount, if any, by which total specific exemption, line 1, column D, is more than \$30,000		2	
3	Total amount of taxable gifts for prior periods. Add amount on line 1, column E, and amount, if any, on line 2. Enter here and on page 1, Part 2 - Tax Computation, line 2		3	

(If more space is needed, attach additional statements.)

Estate of: John Sample 2

Decedent's social security number

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 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 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 |
|---|-----|----|
| 1 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). | | X |
| 2a In what country was the surviving spouse born? _____ | | |
| b What is the surviving spouse's date of birth? _____ | | |
| c Is the surviving spouse a U.S. citizen? | X | |
| d If the surviving spouse is a naturalized citizen, when and where did the surviving spouse acquire citizenship?
_____ | | |
| e If the surviving spouse is not a U.S. citizen, of what country is the surviving spouse a citizen? _____ | | |
| 3 Election Out of QTIP Treatment of Annuities. 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 | | X |

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	Marital Trust Created Under LW&T	12,000,000.
All other property:		
B1		
Total from continuation schedules (or additional statements) attached to this schedule		0.
4	Total amount of property interests listed on Schedule M	12,000,000.
5a	Federal estate taxes payable out of property interests listed on Schedule M	0.
b	Other death taxes payable out of property interests listed on Schedule M	0.
c	Federal and state GST taxes payable out of property interests listed on Schedule M	0.
d	Add items 5a, 5b, and 5c	0.
6	Net amount of property interests listed on Schedule M (subtract item 5d from item 4). Also enter on Part 5 — Recapitulation, page 3, at item 21	12,000,000.

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

EXAMPLE #2-
IRS Form 706 Presentation (Schedule M Only)

FACTS

S1 and S2 are married and have multiple living descendants. S1 has exhausted his/her entire Exemption Equivalent Amount during S1's lifetime. S1's LW&T provides for S1's unused exemption equivalent to be distributed to a credit shelter trust and the balance is to pass to a trust ("Marital Trust") for the sole benefit of S2 that satisfies all of the QTIP requirements as contained in IRC Section 2056(b)(7). S1 dies in 2021 with a net residuary estate worth \$12 million after satisfaction of all debts and administration expenses.

Please See Attached Schedule M to IRS Form 706

EXAMPLE #3
The Partial Election QTIP Trust

FACTS

S1 and S2 are married.. S1 has living descendants by a prior marriage while S2 has no living descendants. S1 has \$14 million of liquid non-retirement assets while S2 has \$1 million of liquid non-retirement assets. S1 has made \$60,000 of taxable gifts in calendar year 2016 (which was reported on a timely filed IRS Form 709 and were not gift-split with S2). S-1 dies in 2022. S1's estate plan provides for S1's entire residuary estate to pass to a Marital Trust for the sole benefit of S2. The trust complies with all QTIP Requirements. The following represents how a partial QTIP election could produce the optimal result:

SOLUTION

Step #1: Divide the Marital Trust into two fractional shares which will be held in separate trusts which shall be distributed as follows:

- (a) One share ("Share A") will consist of 6/7 of S1's assets valued as of the date of funding (date of death value of \$12 million which is S1's unused Exemption Amount)
- (b) One share ("Share B") will consist of 1/7 of S1's assets as of the date of funding (date of death value of \$2 million which represents the excess of S's net residuary estate in excess of the Exemption Amount).

Step #2: Presentation on IRS Form 709

- (a) The Executor of S1's estate **will not make a** QTIP election for Share A, which will pass into a "Non-Elected QTIP Trust". Consequently property in this trust will not be presented on Schedule M of the IRS Form 706 ("Non-Elected QTIP Trust").
- (b) The Executor **will make** a QTIP election for Share B which will pass into an "Elected QTIP Trust". Property in this trust will be presented on Schedule M Line 3, Item A on Schedule M of the IRS Form 706 ("Elected Marital Trust")

EXAMPLE #4
The Clayton QTIP Election

FACTS

S1 and S2 are married. S1 has living descendants by a prior marriage while S2 has no living descendants. S1 has \$14 million of liquid non-retirement assets while S2 has \$1 million of liquid non-retirement assets. S1 has made \$60,000 of taxable gifts in calendar year 2016 (which was reported on a timely filed IRS Form 709 and were not gift-split with S2). S-1 dies in 2022. S1's LW&T/Revocable Trust provides that the net residuary estate will pass to the single QTIP eligible trust for the benefit of S-2, but if the Executor of S1's estate shall make a QTIP election over less than all of the property held in trust, the non-elected QTIP portion will pass to a "Sprinkle Trust" for the benefit of S2 and S1's descendants. If S1's Executor decides to follow a tax efficient strategy by making a QTIP election over the amount in excess of S1's unused Exemption Equivalent Amount, the following will result

SOLUTION

- (a) \$2 million (as presented on the IRS Form 706) will pass to the Elected QTIP Trust for the sole benefit of the surviving spouse. This will result in this trust being presented on Schedule M line 3, Item A on the IRS Form 706 ("Elected Marital Trust")
- (b) \$12 million (as presented on the IRS Form 706) will pass to the Sprinkle Trust. This will not be presented on Schedule M of the IRS Form 706.

EXAMPLE #5

The GSTT Exemption and The Non-QTIP Marital Deduction

FACTS

S1 dies in 2022 survived by S2 and their living descendants. S1 made inter vivos taxable gifts to children in the amount of \$2,060,000. S1 dies with a residuary estate of \$12 million. S1's LW&T or Revocable Trust contains a formula directing that S1's remaining Federal Exemption Amount is to be placed into a credit shelter trust while any amount above the Exemption Amount is to be gifted to S2 outright. The following will result:

SOLUTION

- (a) S1's credit shelter trust will be funded with \$10 million (\$12,060,000 Exemption Amount less the \$2,060,000 that S1 utilized for lifetime gifts).
- (b) The remaining \$2 million will be distributed to S2 outright.
- (c) S1's Executor will allocate \$10 million of S1's GSTT Exemption Amount to the credit shelter trust.
- (d) The remaining \$2.06 million of S1's GSTT Exemption (\$12,060,000 GSTT Exemption less \$10,000,000 allocated to the credit shelter trust) is permanently lost (GSTT Exemption cannot be ported).

Please note that the same result would apply if the decedent's estate plan had used an Estate Trust or General Power of Appointment Trust as the vehicle for the Marital Deduction.

EXAMPLE #6

The GSTT Exemption and The QTIP Marital Deduction (Utilizing The Reverse QTIP Election)

FACTS

S1 dies in 2022 survived by S2 and their living descendants. S1 made inter vivos taxable gifts to children in the amount of \$2,060,000. S1 dies with a residuary estate of \$12 million. S1's LW&T or Revocable Trust contains a formula directing that S1's remaining Federal Exemption Amount is to be placed into a credit shelter trust while any amount in excess of S1's available Estate Tax Exemption Amount is to be distributed to a Marital Trust for the sole benefit of S2 that qualifies as a QTIP Trust. Assuming that S1's Executor makes a full QTIP election for the Marital Trust, and makes the Reverse QTIP election on Schedule R (more on this below), the following will result:

SOLUTION

- (a) S1's credit shelter trust will be funded with \$10 million (\$12,060,000 Exemption Amount less the \$2,060,000 that S1 utilized for lifetime gifts).
- (b) The remaining \$2 million will be distributed to Marital Trust.
- (c) S1's Executor will make a QTIP election for the full amount passing to the Marital Trust.
- (d) S1's Executor will allocate \$10 million of S1's GSTT Exemption Amount to the credit shelter trust on Schedule R of the IRS Form 706.
- (e) S1's Executor will make a Reverse QTIP Election in the amount of \$2.06 million of S1's GSTT Exemption on Schedule R of the IRS Form 706.

Please note that QTIP is the only form of Marital Deduction transfer that will qualify the Executor to utilize a decedent's unused GSTT Exemption. As discussed above one cannot port a decedent's unused GSTT Exemption.

EXAMPLE #7

The QTIP and Reverse QTIP Election Presentation on IRS Form 706

FACTS

S1 (age 87) and S2 (age 80) are married and have three healthy living adult children and six healthy living grandchildren. S1 and S2 have combined wealth of \$30 million (S1 has \$24 million in assets and S2 has \$6 million), S1 and S2 have each made \$6 million of outright taxable gifts to their children (\$2 million per child).

S1 dies in 2022. S1's estate plan (as expressed in S1's LW&T/Revocable Trust) provides for the funding of a credit shelter trust using S1's and any amount in excess is to be held in a QTIP eligible trust for the benefit of S2 for life. Upon the death of the surviving spouse, property is to be distributed to descendants per stirpes with any share set aside for the benefit of a descendant to be held in trust for such descendant's sole benefit for life.

The Executor/Personal Representative of S1's estate does not wish to pay Federal Estate Tax in S1's estate. Furthermore S2 has emphatically indicated that he/she does not want to give up any of his/her beneficial interest in S1's estate.

ISSUE

How should the Marital Trust be presented on the IRS Form 706? Assume that administration expenses and debts are \$1 million in total. Ignore all other elections.

Please see attached Schedules M and R for IRS Form 706

Please Note> The presentation has been made using an IRS Form 706 for decedents dying in calendar year 2021. IRS Form 706 Schedules M and R for decedents dying in 2022 should not be materially different from calendar year 2021.

Example #7- Schedules M and R
IRS Form 706

Total Residuary Estate	24,000,000.00
Less: Admin & Debts	<u>-1,000,000.00</u>

Equals Net Residuary Estate	23,000,000.00
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Available Estate Tax Exemption Amount

2022 Total Available	12,060,000.00
Less: Used On Lifetime Gifts	<u>-6,000,000.00</u>
Equals Total Available For Credit Shelter	6,060,000.00

Marital Deduction Amount

\$23,000,000 -6,060,000	<u>16,940,000.00</u>
To Marital Trust (100% QTIP Election)	

GSTT Reconciliation

2022 Exemption Amount	12,060,000.00
Less: Used on Lifetime Gifts	0.00
Less: Allocated To Credit Shelter Trust	<u>-6,060,000.00</u>

Equals Remaining Available GSTT Exemption	6,000,000.00
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QTIP Trust Division

GSTT Exempt Elected QTIP	6,000,000.00
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Non-GSTT Exempt QTIP	<u>10,940,000.00</u>
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Total Marital Deduction	<u>16,940,000.00</u>
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Decedent's social security number

Estate of: John Sample 1

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 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 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.

1	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).	1	<input type="checkbox"/>	<input checked="" type="checkbox"/>
2a	In what country was the surviving spouse born? _____			
b	What is the surviving spouse's date of birth? _____			
c	Is the surviving spouse a U.S. citizen?	2c	<input checked="" type="checkbox"/>	
d	If the surviving spouse is a naturalized citizen, when and where did the surviving spouse acquire citizenship? _____			
e	If the surviving spouse is not a U.S. citizen, of what country is the surviving spouse a citizen? _____			
3	Election Out of QTIP Treatment of Annuities. 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	3		<input checked="" type="checkbox"/>

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	GSTT Exempt Marital Trust	6,000,000.
A2	GSTT Non Exempt Marital Trust*	10,940,000.
* Or as much as shall be necessary to produce a zero estate tax liability		
All other property:		
B1		
Total from continuation schedules (or additional statements) attached to this schedule		0.
4	Total amount of property interests listed on Schedule M	4 16,940,000.
5a	Federal estate taxes payable out of property interests listed on Schedule M	5a 0.
b	Other death taxes payable out of property interests listed on Schedule M	5b 0.
c	Federal and state GST taxes payable out of property interests listed on Schedule M	5c 0.
d	Add items 5a, 5b, and 5c	5d 0.
6	Net amount of property interests listed on Schedule M (subtract item 5d from item 4). Also enter on Part 5 — Recapitulation, page 3, at item 21	6 16,940,000.

Estate of: John Sample 1

Decedent's social security number

SCHEDULE R—Generation-Skipping Transfer Tax

Note: To avoid application of the deemed allocation rules, Form 706 and Schedule R should be filed to allocate the GST exemption to trusts that may later have taxable terminations or distributions under section 2612 even if the form is not required to be filed to report estate or GST tax.

The GST tax is imposed on taxable transfers of interests in property located outside the United States as well as property located inside the United States. See instructions.

Part 1. GST Exemption Reconciliation (Section 2631) and Special QTIP Election (Section 2652(a)(3))

You no longer need to check a box to make a section 2652(a)(3) (special QTIP) election. If you list qualifying property in Part 1, line 9, below, you will be considered to have made this election. See instructions for details.

1	Maximum allowable GST exemption	1	12,060,000.
2	Total GST exemption allocated by the decedent against decedent's lifetime transfers	2	0.
3	Total GST exemption allocated by the executor, using Form 709, against decedent's lifetime transfers	3	0.
4	GST exemption allocated on line 6 of Schedule R, Part 2	4	0.
5	GST exemption allocated on line 6 of Schedule R, Part 3	5	0.
6	Total GST exemption allocated on line 4 of Schedule(s) R-1	6	0.
7	Total GST exemption allocated to inter vivos transfers and direct skips (add lines 2-6)	7	0.
8	GST exemption available to allocate to trusts and section 2032A interests (subtract line 7 from line 1)	8	12,060,000.

9 Allocation of GST exemption to trusts (as defined for GST tax purposes):

A Name of trust	B Trust's EIN (if any)	C GST exemption allocated on lines 2-6, above (see instructions)	D Additional GST exemption allocated (see instructions)	E Trust's inclusion ratio (optional) (see instructions)
Credit Shelter Trust	Applied For		6,060,000.	0.000
GSTT Exempt Marital Trust *	Applied For	0.	6,000,000.	0.000
*Or as much exemption as shall be necessary to produce an inclusion ratio of zero				

9D Total. May not exceed line 8 above 9D 12,060,000.

10 GST exemption available to allocate to section 2032A interests received by individual beneficiaries (subtract line 9D from line 8). You must attach special-use allocation statement. See instructions. . . 10

QTIP ELECTIONS
Strafford September 14, 2022

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I. INTRODUCTION: ORGANIZATION OF THIS WEBINAR

- A. Part I- Brief Review- How To Qualify For the Marital Deduction (including Overview of Marital Deduction Techniques)**
- B. Part II- QTIP Trusts As An Effective Estate Planning Technique**
- C. Part III- How To Qualify For QTIP Treatment**
- D. Part IV- The QTIP Election**
- E. PART V- QTIP Trusts And the Non-Citizen Spouse**
- F. Part VI- Other Uses of QTIP Trusts**
- G. Part VII- QTIP Presentation on IRS Form 706**
- H. Conclusion And Questions**

II. PART I- HOW TO QUALIFY FOR THE MARITAL DEDUCTION

- A. Basic Review of The Marital Deduction "Tax Deferral"**
 - (1) Under the Internal Revenue Code of 1986, as amended ("IRC"), spouses are generally treated as one economic unit for tax purposes.
 - (a) This "one economic unit" concept is quite evident in the individual income tax area, where spouses who elect to file jointly are taxed on both spouse's incomes regardless of the source.¹
 - (b) The same concept applies in the Federal Estate and Gift Tax system. Transfers between spouses are generally exempt from Gift, Estate and Generation Skipping Transfer ("GST") Taxes (collectively referred to as "wealth transfer taxes"). This

¹ See IRC Section 1(a) as modified by IRC Section 1(j). Contrasted with Married Filing Separate Returns under See IRC Section 1(d); both as modified by IRC Section 1(j).

one economic unit concept is expressed in the form of the "Marital Deduction" for wealth transfers made by a taxpayer to his/her spouse.²

- (c) However any property that is transferred between spouses will potentially be subject to Federal Gift or Estate Tax when the transferee spouse transfers such property to a third party.³
 - (d) In essence, the Marital Deduction essentially enables spouses to "defer" the date that the transferred wealth is subjected to wealth transfer tax until the transferee spouses transfers the property to non-spouse third parties. Consequently, the Marital Deduction should be regarded as a tax deferral technique.
 - (e) The Marital Deduction is "unlimited" in amount. A donor/decedent spouse may leave his or her entire estate to a U.S. citizen spouse and not incur any gift/estate tax liability on the transfer. However, depending upon the facts and circumstances, this could result in the stacking of estates and loss of potential wealth transfer tax savings.⁴
- (2) Please also note that some U.S. state jurisdictions that have their own estate tax systems usually follow the Federal Estate Tax law. Consequently the Marital Deduction is an available technique for potentially minimizing or deferring state estate taxes as well.⁵

B. Marital Deduction Requirements⁶

- (1) Property must be includible in the Gross Estate of the decedent. (the "Inclusion Rule")⁷
- (2) Property must pass directly to or for the benefit of the surviving spouse without the direction of any third person (the "Passing Requirement Rule").⁸
- (3) The interest of the surviving spouse in the property may not be defeated by a subsequent event such as death or remarriage (the "Terminable Interest Rule").⁹

² See IRC Sections 2056 (Estate Tax Marital Deduction), 2523 (Gift Tax Marital Deduction)

³ For purposes of this paragraph, the author assumes that: (a) the transferee spouse does not spend all of the property transferred to him/her during his/her lifetime; and (b) the transferee does not remarry and leave the transferred property to his/her new spouse.

⁴ Admittedly the estate and gift tax consequences of stacking can be eliminated through proper use of the Deceased Spouse's Unused Exclusion Amount ("DSUE") under IRC Section 2010(c)(4), which provides for the portability of a deceased spouse's unused exclusion amount. However, it should be noted that the DSUE is not available to port a deceased spouse's unused GST Tax Exemption

⁵ It should also be noted that the Pennsylvania Inheritance Tax system also recognizes the use of the marital deduction, which in large part follows the federal system. See 72 P.S. Section 9113.

⁶ See IRC Section 2056.

⁷ See IRC Section 2056(a).

⁸ It should be pointed out that exceptions exist for an Executor who utilizes such property to administer the decedent's estate (in which event the Marital Deduction amount may be potentially be reduced) or property that passes to the surviving spouse as a result of a third party qualified disclaimer under IRC Section 2518.

⁹ See IRC Section 2056(b)(1). But note that IRC Section 2056(b)(3)(A) provides that a transfer to a spouse that is conditioned on spouse surviving decedent for a period not exceeding 6 months will not trigger the terminable interest rule. We will see a major exception to the terminable interest rule when we examine QTIP property below.

- (4) The property must be either includible in the surviving spouse's Gross Estate or subject to Gift Tax upon the surviving spouse's gift transfer of the same.

B. Overview of Marital Deduction Techniques

(1) Outright Marital Devise/Bequest/Gift (outright wealth transfer between spouses)

- (a) As the technique implies, property that is distributable outright to the surviving spouse qualifies for the Marital Deduction.

(b) Advantages

- (i) Simple to draft and administer.
- (ii) No ongoing costs associated with trust administration.

(c) Disadvantages

- (i) Surviving spouse has control over ultimate disposition of property.
- (ii) Surviving spouse's predators and creditors may potentially levy against the property.
- (iii) Intra- spousal wealth transfers to non-citizen surviving spouse may not qualify for the Marital Deduction.¹⁰

(2) Estate Trust¹¹

- (a) Under this technique, the trust governing instrument must contain the following provisions:

- (i) Income may either be accumulated or distributed to the surviving spouse (but no other party).
- (ii) Upon the surviving spouse's death, the remaining trust property must be distributed to the surviving spouse's estate.
- (iii) The surviving spouse need not be given the power to compel the Trustee to invest principal in income producing property that produces an adequate rate of return.

(b) Advantages

¹⁰ More on this below when we discuss Qualified Domestic Trusts.

¹¹ See Treas. Reg. Section 20.2056(c)-2(b)(1)(iii).

- (i) Trust property does not need to be invested in income producing property (e.g. art or antiques or closely held business interests that do not produce cash flow).
- (ii) No income needs to be distributed to the surviving spouse during his or her lifetime, thereby negating the need for the spouse receiving money.

(c) Disadvantages

- (i) Surviving spouse has power to determine the ultimate disposition of property since the trust principal will become part of his or her probate estate.¹²
- (ii) To the extent that income is not distributed to the surviving spouse, the Estate Trust will pay top Federal Income Tax marginal rate when taxable income exceeds \$13,500.¹³

(d) Observation

- (i) The estate trust was a more popular technique for income splitting purposes when trust income tax rates were the same as those of individuals. Since the passage of the Omnibus Budget Reconciliation of 1993 ("OBRA 1993") which compressed trust income tax rates, this technique has decreased in popularity.

(3) General Power of Appointment Trust¹⁴

- (a) Under this technique, the trust governing instrument must contain the following provisions:
 - (i) All trust income must be payable to the surviving spouse at least annually.
 - (ii) No other person can be a trust beneficiary during the surviving spouse's lifetime.
 - (iii) The spouse must be given the power to compel the Trustee to make the trust property income producing.
 - (iv) The surviving spouse must have power to appoint the property to the surviving spouse (intervivos power) or the surviving spouse's estate (testamentary power).¹⁵

¹² It should be noted that the IRS held in Rev. Rul. 75-128 (that an estate trust that grants the spouse a general power of appointment rather than requiring that the property be distributed to the spouse's probate estate did not qualify as an estate trust.

¹³ The top marginal rate being 40.38% (consisting of top marginal income tax rate of 37% plus 3.8% net investment tax). See IRS instructions for preparation of Fiduciary Income Tax Returns (IRS Form 1041) at <https://www.irs.gov/pub/irs-pdf/i1041.pdf>.

¹⁴ See IRC Section 2056(b)(5).

¹⁵ But see Rev. Rul. 75-154 (1972-1 C.B. 310) where a trust will be deemed to have met this requirement where Trustee is granted the power to distribute principal to persons other than surviving spouse if Trustee must obtain surviving spouse's permission. Similarly the surviving spouse may be granted a power to appoint property to third persons. But please note that a spouse's power to appoint the trust property to his or her creditors, while sufficient to cause estate tax inclusion in his or her estate under IRC Section 2041 will not be sufficient to qualify the trust for the Marital Deduction under IRC Section 2056(b)(5).

(b) Advantages

- (i) The trust automatically qualifies for the Marital Deduction without the need for an election by personal representative of the decedent's estate on an estate or gift tax return.¹⁶
- (ii) The surviving spouse or the Trustee (with the spouse's permission) can be given the power to appoint property to third parties during the trust term or at death.¹⁷

(c) Disadvantages

- (i) Surviving Spouse hold the power to ultimately dispose of the trust property.
- (ii) Because the trust qualifies for the Marital Deduction, post-mortem planning options will require the surviving spouse's cooperation (i.e. disclaimer).

(4) Charitable Remainder Trust ("CRT")

- (a) IRC Sections 2056(b)(8) and 2523(g) specifically provide that a transfer to a CRT under which the spouse holds the only non-charitable unitrust or annuity trust interest will qualify for the Marital Deduction.

(b) The author has very rarely used the CRT as a Marital Deduction technique.

(5) Qualified Terminable Interest ("QTIP") Trust

- (a) The subject of this outline. More on this below.

III. Part II- QTIP Trusts As An Effective Estate Planning Technique

A. The "Workhorse" Marital Deduction Technique.

- (1) This technique is probably the most popular Marital Trust technique among practitioners and is considered the "workhorse" of Marital Deduction.
- (2) Normally when one considers utilizing a Estate and Gift Tax Marital Deduction Trust in an estate plan, QTIP is usually the first item in the toolbox.

B. The Advantages of QTIP Trusts That Make It So Effective

- (1) It is the only Marital Deduction technique that allows the transferor spouse to control the ultimate disposition of property following the surviving spouse's death.

¹⁶ See Section 2056(b)(7). This can be advantageous in a situation involving an irrevocable life insurance trust in which the three year rule of IRC Section 2035 may be applicable (for transfers of existing life insurance policies to the trust).

¹⁷ See footnote 14 above.

- (2) QTIP Trust is the only technique that allows the Executor, independent of action or input by the surviving spouse, to determine how much Federal Estate and Gift Tax Marital Deduction one wants to claim on the transferor spouse's IRS Form 706 and IRS Form 709.¹⁸
- (3) QTIP Trust is the only technique that comports well and synchronize with Federal Generation Skipping Transfer Tax ("GSTT") planning.¹⁹
- (4) A QTIP Trust may also be potentially used as a technique for equalizing estates where one spouse is very wealthy and the other spouse has very little property in his or her name.
 - (a) The wealthy spouse could set up an *intervivos* QTIP for the benefit of the non-wealthy spouse, which could be used to take advantage of the non-wealthy spouse's Federal Estate Tax Exemption and GSTT Exemption.
 - (b) Upon the non-wealthy spouse's death, the trust could then be administered for the benefit of the wealthy spouse during his or her lifetime and then pass to descendants without inclusion in the wealthy spouse's taxable estate.²⁰
- (5) QTIP Trusts also comport well with many state estate tax systems where a "State QTIP Election" is permitted.²¹

C. Disadvantages of QTIP

- (1) Election and presentation requirements on proper tax return.
- (2) Irrevocability- once the election is made (or not made), it generally cannot be revoked (or changed).²²

¹⁸ Under all other Marital Deduction techniques, the surviving spouse controls the ultimate disposition of the property. It should be noted that the taxpayer or his or her representative may make a QTIP election for the full amount of the trust or over a portion of the trust ("Partial QTIP election"). It should also be noted that since the QTIP election must be affirmatively made on a timely filed IRS Form 706 (due 9 months after decedent's date of death) or a timely filed IRS Form 709 (due by April 15 of the tax year subsequent to the year of the gift), both returns which may be automatically extended, the personal representative of a decedent's estate actually has 15 months from the decedent's date of death to make the election for Federal estate purposes or until October 15 of subsequent tax year to make the election for Federal Gift tax purposes.

¹⁹ See the GSTT Discussion In This Outline Below.

²⁰ See IRC Section 2523(f)(5)(A)(i) and (ii). But be careful- if the trust can be punctured by the wealthy spouse's creditors or predators (because of the self-settled trust doctrine), the trust assets might be includible in the wealthy spouse's taxable estate under IRC Section 2036(a). To avoid this issue, it makes sense to create the trust in a domestic asset protection state (such as AL, DE, NH, NV or SD). Please also note that some non-domestic asset protection states, such as Florida, have enacted statutes to negate the self-settled trust doctrine. See §736.0505(3), Florida Statutes.

²¹ Examples of states that permit state QTIP elections include Maine (see 36 M.R.S. Section 4102.6) and Massachusetts (see M.G.L. c. 65C Section 3 A). See more on this below.

²² There is one option available for revoking a QTIP election. Generally, it involves seeking relief under Treas. Reg. §§301.9100 through 301.9103 (commonly referred to as "9100 Relief"). There is also a 1985 IRS Technical Advice Memorandum ("TAM") which grants an IRS Agent the power to grant to cure a defective QTIP election in a closing agreement with the taxpayer, if the Executor, Trustee and all affected remainder beneficiaries consent to the agreement. See Pennell, BNA Portfolio No. 843-3d, Section F4(b).

IV. PART III- How To Qualify For QTIP Treatment

A. Step #1: The Governing Instrument Requirement

- (1) The trust governing instrument (LW&T or Trust Agreement) must contain all of the following provisions:
 - (a) All income must be paid at least annually to the surviving spouse for his or her life.²³ (the "All Income Requirement").
 - (b) The surviving spouse must be given the power to compel the Trustee to make the trust property income producing (the "Income Producing Requirement")
 - (c) During the surviving spouse's lifetime, no other beneficiary may have beneficial interest in the trust during the surviving spouse's lifetime.²⁴ (the "Exclusivity Requirement").
 - (d) The donor spouse or the personal representative of the decedent spouse's estate must make a timely election ("QTIP Election") on the decedent/donor spouse's timely filed Federal Gift Tax Return ("IRS Form 709") or Estate Tax Return ("IRS Form 706).²⁵ (the "Election Requirement").

2. Please note that a QTIP eligible disposition need not be in a trust.

- (a) Legal Life Estate: The IRS has ruled that a legal life estate may qualify for QTIP treatment if the rights conferred under state law grant the surviving spouse sole and exclusive right to occupy the property and profit from the property (e.g. right to rental income if spouse does not live on the property) during the spouse's lifetime.²⁶
- (b) Usufructs²⁷ (Louisiana): Provided that the surviving spouse's right to use the usufruct property does not terminate until the spouse's death.²⁸

²³ Note that there is no requirement that trust principal (corpus) be paid out to the surviving spouse during his/her lifetime. But if the governing instrument authorizes distributions of principal during the surviving spouse's lifetime, the Trustee must be directed to pay it to the spouse (and to no other third party beneficiary)

²⁴ Please note that the governing instrument need not include provisions that any principal distributions be made to the surviving spouse during lifetime. But if principal distributions are authorized, then the governing instrument must contain a provision that the distributions can only be made to the spouse..

²⁵ It should be noted that a partial QTIP election for a portion of such a trust is valid.

²⁶ See TAM 894002 and PLR 9046031. But a scrivener should be very careful in drafting for creation of the life estate to ensure that the spouse has sole exclusive benefit during his/her lifetime.

²⁷ Usufructs are Napoleonic Code creations (actual French term is "Usufruit") that are analogous to life estates under English common law. Essentially spouse is entitled to the use of the fruit (current enjoyment) of the tree (property). The duration can be contingent upon the happening of an event (e.g. remarriage) which will not qualify for the Marital Deduction or for the spouse's lifetime (which will qualify for the Marital Deduction).

²⁸ See TAM 9223006

(c) Qualified Joint Survivor Annuities: will also qualify for QTIP Treatment.²⁹

B. Step #2: Election and Presentation of the QTIP Trust on the Requisite Tax Return

(1) Presentation on IRS Form 709 (Gift Tax Return)

(a) Schedule A, Part 4 (Taxable Gift Reconciliation) lines 4 through 6 is where Marital Deduction is presented on the return.

(b) Return Presentation Points

(i) The first step is to present on line 4, all property interests that will pass to the spouse (with a cross reference to item numbers presented on Schedule A, Parts 1, 2 and 3 of the Return).

(ii) The second step is to present on line 5 the annual exclusion for any gift transfers to the surviving spouse.³⁰

(iii) The difference between the line 4 amount (item (i) above) and the line 5 annual exclusion amount (item (ii) above) is the amount of the Marital Deduction to be claimed on the return.

(c) The IRS Form 709 instructions specifically state that a QTIP is "presumed" merely by listing the QTIP Property on line 4 of Part 4.³¹ However it is not detrimental to also include an election statement (especially if a partial QTIP election is being made).

(2) Presentation of IRS Form 706 (Estate Tax Return)

(a) Unlike the IRS Form 709 presentation, property qualifying for the Marital Deduction must be listed on Schedule M (Bequests, etc., to Surviving Spouse)

(b) All QTIP elected property is presented on line 3, item A1 of Schedule M. The QTIP election is presumed by the presentation on the schedule.³²

(c) Please also note that, if applicable, Schedule M, item 3 (relating to QTIP election of survivor annuities) must also be answered (yes or no) for QTIP election purposes.³³

(3) Optional Thought

²⁹ It should be noted that under IRC Section 2056(b)(7)(C)(ii), QTIP election is automatic. It up to the taxpayer (Executor) to affirmatively opt out of QTIP treatment. See IRS Form 706, Schedule M, line 3.

³⁰ See Treas. Reg. Section 25.2503

³¹ See 2021 Instructions for Form 709 Page 12.

³² See IRS Form 706 (Rev. August 2019), Schedule M.

³³ Ibid

- (a) When making a Schedule M presentation, the author generally adds a "protective election" statement indicating that the amount being claimed as a QTIP is the actual dollar amount presented or "such amount as shall be necessary to reduce the decedent's Federal Estate Tax liability to zero".

C. Examples

- (1) Example #1: IRS Form 709 Presentation. S1 and S2 are married and have multiple descendants. Neither have made any prior year taxable gifts. In calendar 2021, S1 makes the following gifts:

- (a) \$15,000 worth of jewelry given to S2.

- (b) \$12 million to an irrevocable intervivos trust for the sole benefit of S2 during S2's lifetime and upon S2's death, the remaining principal is to be distributed to S1's descendants, per stirpes. The trust provides that all income is to be paid out semi-annually to S2, but no distributions of principal are to be made from the trust. S1 intends to make a QTIP election for the transfer to the trust.

- (i) The outright gift of jewelry to S2 will be reflected on IRS Form 709, Schedule A, Part 1 (Gifts Only Subject to Gift Tax). This will be item 1 on Schedule A

- (ii) The transfer for the benefit of S2 will be reflected on the IRS Form 709, Schedule A on Part 3 (Indirect Skips and Other Transfers In Transfers in Trust).³⁴ This will be item 2 on Schedule A.

See the attached IRS Form 709 Schedule B, Part 4

- (2) Example #2: IRS Form 706 Presentation. S1 and S2 are married and have multiple living descendants. S1 has exhausted his/her entire Exemption Equivalent Amount during S1's lifetime. S1's LW&T provides for S1's unused exemption equivalent to be distributed to a credit shelter trust and the balance is to pass to a trust ("Marital Trust") for the sole benefit of S2 that satisfies all of the QTIP requirements as contained in IRC Section 2056(b)(7). S1 dies in 2021 with a net residuary estate worth \$12 million after satisfaction of all debts and administration expenses.

See the attached IRS Form 706 Schedule M

³⁴ Please note that a S1 will need to make a decision as to whether S1 wishes to allocate GSTT Exemption to the transfer on Schedule D of the IRS Form 709 or rely on S2 to make such an allocation on S2's IRS Form 706. If S1 elects against allocation, the author recommends filing an election statement to opt out of the automatic GSTT allocation rules.

V. PART IV- ELECTIONS (QTIP ELECTIONS AND THE WEALTH TRANSFER TAX SYSTEM)

A. Introduction

- (1) As experienced practitioners are well aware, The Marital Deduction does not operate in a vacuum within the Federal wealth transfer tax system.
- (2) To be effective, it needs to be coordinated with other available options and techniques.
- (3) As briefly discussed above, the QTIP Trust provides for the maximum flexibility in using the Marital Deduction. This portion of the outline will focus on how it provides that flexibility.

B. The QTIP Trust and The Deceased Spouse Unused Exemption Amount ("DSUE")

- (1) For decedent's dying on or after January 1, 2011, the Executor has the power to elect to transfer any of the decedent's unused Federal Estate Tax Exemption amount (current maximum exemption amount is \$12,060,00 for decedents dying in calendar year 2022) to the decedent's surviving spouse who may then use this exemption for lifetime or death wealth transfers.³⁵
 - (a) The transferred exemption is often referred to as the "Deceased Spouse Unused Exemption Amount" or "DSUE".
 - (b) This technique of transferring ("porting") the unused exemption amount is referred to as "Portability" or the "Portability Election".
- (2) The porting of the DSUE may only be accomplished by electing and presenting the DSUE on the decedent spouse's IRS Form 706.
 - (a) Until recently, the election had to be made on a "timely filed" IRS Form 706 (which normally had to be filed within 9 months following the decedent spouse's date of death or 15 months if the Executor/Personal Representative elected to claim an automatic extension of time to file).³⁶
 - (i) For a decedent whose taxable estate plus adjusted taxable gifts exceeded the Federal Estate Tax Exemption Amount this was not an issue.
 - (ii) However, for a decedent whose taxable estate plus adjusted taxable gifts did not exceed the Federal Estate Tax Exemption Amount, this did present an issue. Many Executors/Personal Representatives of such decedent's estate usually missed the 9 month filing or extension application deadline.

³⁵ See IRC Section 2010(c)(4).

³⁶ See IRC Section 2010(c)(5)(A).

- (b) The IRS was inundated with taxpayer requests for relief for Executors of non-taxable estates who missed the 9 month and 15 month deadlines. The taxpayer request for relief was based on IRC Section 301.9100, et. seq. ("administrative relief) and the treasury regulations thereunder (referred to as "9100 Relief").³⁷
- (c) In response the IRS issued Rev. Proc. 2017-34³⁸ which granted an extension of 2 years from decedent's date of death for an Executor to file and elect portability.
- (d) In April 2022, the IRS issued Rev. Proc. 2022-32³⁹ which grants Executors of decedent's estates that are not required to file an IRS Form 706, 5 years from the decedent spouse's date of death to make the portability election.

Practice Point: Consider reviewing your estate files for all decedents who died in 2017 and later years who were not required to file an IRS Form 706 and for whom Executor did not file an IRS Form 706.. Consider filing an IRS Form 706 to make the Portability election.

(3) The Limits of Portability

- (a) Unlike a living taxpayer whose Federal Estate & Gift Tax Exemption Amount is indexed for inflation, the DSUE is "frozen" at the final amount as determined on the deceased spouse's IRS Form 706.
 - (b) The DSUE is only available for porting the decedent spouse's unused Federal Estate and Gift Tax Exemption. *A decedent's unused GSTT exemption may not be ported.*
- (4) Because it combines both flexibility with the centralization of authority for electing how much Marital Deduction is to be claimed as a deduction, QTIP is the best technique for being able to take advantage of the DSUE.
- (a) To take advantage of this option, the decedent spouse's LW&T or Revocable Trust Agreement should provide for the entire residue to be distributed to a trust for the sole benefit of the surviving spouse that would meet all of the QTIP eligibility requirements.⁴⁰
 - (b) The Executor can then make the decision to elect full QTIP (preserving full portability), no portability or a partial QTIP election (more on this concept below).

(5) Factors To Consider In Electing Portability

- (a) Factor #1: Wasted GSTT Exemption

³⁷ This relief was only available to decedent's estates that were not required to file an IRS Form 706 under IRC Section 6018(a).

³⁸ 2017-26 I.R.B. 1282 (6/26/2017)

³⁹ 2022-30 I.R.B. 101

⁴⁰ See Part IV.A. of this outline for the requirements.

- (i) Since the GSTT Exemption cannot be ported, what will be the impact on decedent and decedent spouse's estate plan, if one or more non-skip persons should predecease the surviving spouse.
- (ii) Can this loss of GSTT Exemption be offset by other post mortem planning techniques contained in the governing instrument ?⁴¹

(b) Factor #2: Income Tax Basis

- (i) If a QTIP election is made on the decedent spouse's IRS Form 706, then the trust property will be includible in the surviving spouse's Gross Estate.⁴² This will result in an income tax free basis step up on QTIP trust assets on the surviving spouse's death.⁴³
- (ii) If a QTIP election is not made on the decedent spouse's IRS Form 706, then there will not be an income tax free basis step-up on trust property upon surviving spouse's death.
- (iii) The issue boils down to what will be the potential growth rate of the QTIP Trust assets.

(c) Factor #3: The Frozen DSUE

- (i) As discussed above, if a QTIP election is not made, the decedent spouse's DSUE will remain frozen at the amount that is claimed on the decedent spouse's IRS Form 706.
- (ii) if the DSUE is not claimed and exemption is allocated to the QTIP Trust, then any growth on assets between the death of the decedent spouse and surviving spouse will be sheltered from being included in the surviving spouse's Gross Estate. However there will not be any basis step-up on the surviving spouse's death.

- (6) Ultimately the decision to elect Portability will be a case by case basis that will come down to "running the numbers" on various scenarios

C. The Partial QTIP Election

- (1) As discussed earlier in this outline, one of the key advantages of a QTIP Trust is that it provides the Executor/Personal Representative of a decedent's estate to decide how much Marital Deduction is to be claimed on the IRS Form 706.⁴⁴

⁴¹ For example, the use of testamentary general powers of appointment. See IRC Section 2041.

⁴² See IRC Section 2044.

⁴³ See IRC Section 1014.

⁴⁴ It will also apply to situations where a decedent dies in a US jurisdiction that has an estate tax regime in place and permits a decedent's estate to elect a QTIP election for estate tax purposes. More on this below.

(2) Example #3: S1 and S2 are married.. S1 has living descendants by a prior marriage while S2 has no living descendants. S1 has \$14 million of liquid non-retirement assets while S2 has \$1 million of liquid non-retirement assets. S1 has made \$60,000 of taxable gifts in calendar year 2016 (which was reported on a timely filed IRS Form 709 and were not gift-split with S2). S-1 dies in 2022. S1's estate plan provides for S1's entire residuary estate to pass to a Marital Trust for the sole benefit of S2. The trust complies with all QTIP Requirements. The following represents how a partial QTIP election could produce the optimal result:

- (a) Divide the Marital Trust into two fractional shares which will be held in separate trusts⁴⁵.
 - (i) One share ("Share A") will consist of 6/7 of S1's assets valued as of the date of funding (date of death value of \$12 million which is S1's unused Exemption Amount)
 - (ii) One share ("Share B") will consist of 1/7 of S1's assets as of the date of funding (date of death value of \$2 million which represents the excess of S's net residuary estate in excess of the Exemption Amount).
- (b) The Executor of S1's estate **will not make a QTIP election** for Share A, which will pass into a "Non-Elected QTIP Trust". Consequently property in this trust will not be presented on Schedule M of the IRS Form 706 ("Non-Elected Marital Trust").
- (c) The Executor **will make a QTIP election** for Share B which will pass into an "Elected Marital Trust".⁴⁶

D. The Clayton QTIP Election ("Contingent QTIP Election")

(1) This election finds its origin in the case of Estate of Clayton v. Commissioner,⁴⁷ and its progeny. It essentially allows for the Executor/Personal Representative of a decedent's estate to essentially divide a QTIP Trust into a QTIP eligible trust (for the sole benefit of the surviving spouse that meets all QTIP Trust requirements) and a non-QTIP eligible trust (which can be administered for the benefit of persons other than the spouse).

- (a) In essence the disposition of the decedent's estate is "contingent" upon the Executor's QTIP election (and for this reason it is usually best to authorize a disinterested Executor and not a beneficiary to make the election).

⁴⁵ This analysis assumes that the division of a trust into separate trusts is either authorized by the governing instrument or by state law (See Uniform Trust Code §417 which grants power to divide trusts). Also see Treas. Reg. 20.2056(b)-7(b)(ii).

⁴⁶ And will subsequently included in S2's Gross Estate under IRC Section 2044.

⁴⁷ See 976 F.2d 1486 (5th Circ. 1992) rev'g 97 TC 327 (1991). The IRS challenged this case result in multiple other Federal Circuit courts without any success. Therefore Treasury conceded the point by promulgating Treas. Reg. 20.2056(b)-7(d)(3)(ii) which validates the use of this contingent QTIP election.

- (b) Contrast this technique with a partial QTIP election (discussed in Paragraph C above).
- (i) With a Partial QTIP election, the portion of the trust over which the Executor does not make a QTIP election (the "Non-Elected QTIP Property") remains in trust ("Non-Elected QTIP Trust") for the spouse's sole benefit during lifetime and only upon death will vest in the deceased spouse's descendants.
 - (ii) With a Clayton (Contingent) QTIP Election the Non-Elected QTIP Property will pass to a trust from which the spouse may have a significantly reduced benefit.
- (2) Example #4: Assume the same facts in Example #3 above except instead of providing for the unconditional creation of one single QTIP eligible trust, S1's LW&T or Revocable Trust Agreement provides that the net residuary estate will pass to the single QTIP eligible trust for the benefit of S-2, but if the Executor of S1's estate shall make a QTIP election over less than all of the property held in trust, the non-elected QTIP portion will pass to a "Sprinkle Trust"⁴⁸ for the benefit of S2 and S1's descendants. If S1's Executor decides to follow a tax efficient strategy by making a QTIP election over the amount in excess of S1's unused Exemption Equivalent Amount, the following will result:
- (a) \$2 million (as presented on the IRS Form 706) will pass to the Elected QTIP Trust for the sole benefit of the surviving spouse. This will result in this trust being presented on Schedule M line 3, Item A on the IRS Form 706 ("Elected Marital Trust")
 - (b) \$12 million (as presented on the IRS Form 706) will pass to the Sprinkle Trust. This will not be presented on Schedule M of the IRS Form 706.
- (3) Clayton (Contingent QTIP) Election Concerns
- (a) Breach of Fiduciary Duty: The Fiduciary (Executor/Trustee) owes a fiduciary duty to all trust/estate beneficiaries. Exercising the Clayton power may expose the Fiduciary to liability for breach.
 - (b) Spousal Elective Share Claims: Depending upon US state law, a Clayton QTIP election which results in a decreased beneficial interest for the surviving spouse could cause the spouse to elect against the decedent's estate plan thereby potentially eviscerating the decedent's estate plan.⁴⁹

⁴⁸ Sprinkle Trust being defined to be a trust for the benefit of multiple concurrent beneficiaries under which the Trustee is granted discretionary power to make distributions of income and principal among those beneficiaries in whatever proportion the Trustee deems appropriate (may be limited by ascertainable standard).

⁴⁹ For example under New Jersey's Elective Share law, a trust that provides for the mandatory payment of income to the surviving spouse will count towards satisfying the Elective Share (under such a scenario, the trust will be valued at ½ the value of the trust principal for computing the satisfaction amount). See N.J.S.A. 3B:8-1 et. seq. Please note that Elective Share laws will vary by jurisdiction.

- (c) Potential Adverse State Estate Tax Consequences: For Decedent's domiciled in states which recognize a "State QTIP Election" Failure to elect QTIP could trigger a state estate tax liability. More on all of this below.

E. Reverse QTIP Elections

- (1) The Internal Revenue Code mandates an additional tax for wealth transfers that are made to persons who are two or more generations below the generation of the donor/decedent.⁵⁰
 - (a) The person making the wealth transfer is referred to in the IRC as the "Transferor"
 - (b) The persons (or trust) who are two or more generations below the Transferor are referred to as "Skip Persons"
- (2) The GSTT was created for the sole purpose of ensuring that each family generation pays its fair share of Federal Estate and Gift Tax liability. It is a "Piggy Back" tax that rides on the back of any transfer that is subject to Gift or Estate Tax.
 - (a) Consequently the "Transferor" for GSTT purposes (Chapter 13 Tax purposes) will generally be the decedent making a testamentary donor of a gift (Chapter 12 Tax purposes) or
- (3) Like the Federal Estate and Gift Tax systems, the GSTT system provides for an exemption amount which is equal to Federal Estate & Gift Tax Exemption amounts that are granted under IRC Section 2010 (\$12,060,000 in 2022).
- (4) However, unlike the Federal Estate and Gift Tax Exemption, the transferor (or the personal representative of the transferor's estate) has the power to allocate his or her GSTT Exemption Amount on a transfer by transfer basis.
- (5) This allocation must be made on a filed US Gift Tax Return ("IRS Form 709") or US Estate Tax Return ("IRS Form 706").
- (6) Overview of the GSTT
 - (a) The GSTT will potentially apply to a Transferor's transfer to a Skip Person (emphasis added).
 - (b) The amount of the GSTT liability is equal to the taxable amount multiplied by the Applicable Rate (emphasis added).
 - (i) The Taxable Amount will depend upon the type of transfer that is being made (i.e. a direct skip, taxable distribution or taxable termination).

⁵⁰ Please note that this outline will not discuss some of the finer points of the GSTT system such as the predeceased ancestor rule, which can affect generational assignments for purposes of determining who is a "Skip Person".

- (ii) The Applicable Rate is the Maximum Federal Estate Tax Rate multiplied by the Inclusion Ratio (emphasis added).
- (iii) The current Maximum Federal Estate Tax Rate is currently 40%.
- (iv) The Inclusion Ratio is defined to be 1 reduced by the applicable fraction (which is determined to be the amount of GSTT Exemption allocated to the transfer divided by the value of the property transferred reduced by any Federal and State Estate Tax actually recovered from the property and any charitable deduction). The formula may be expressed algebraically as follows:

$$\text{GSTT liability} = \text{Amount of Transfer} \cdot \{4\% (1 - \text{Applicable Fraction})\}$$

Where Applicable Fraction =

Amount of Exemption Allocated To Transfer/Value of Property Transfer
(reduced by Federal and State Death Tax Paid From Property and any
charitable deduction allowed under IRC Sections 2055 and 2522).

- (7) For transfers to trusts, one determines the generation assignments by looking through the trust to determine who are the current permissible beneficiaries.
 - (a) Direct Skip: If all of the current beneficiaries are Skip Persons (i.e. persons who are 2 or more generations below the Transferor) then the trust is a "Skip Person" for GSTT purposes. This is an example of a "Direct Skip".⁵¹
 - (b) Indirect Skip: If there is at least 1 Non-Skip Person who is a current permissible beneficiary (i.e. person who is 1 generation or less below the Transferor, then the trust is a "Non-Skip Person". However if the trust terminates in favor of Skip Persons (a "Taxable Termination")⁵² or the Trustee makes a distribution to a Skip Person during the trust term (a "Taxable Distribution")⁵³, GSTT Tax liability may accrue.
- (8) To maximize one's Exemption (and thereby save imposition of the GSTT tax), it makes sense to allocate a client's GSTT Exemption at the time that an inter vivos or testamentary transfer is made to an irrevocable trust.
- (9) In many instances practitioners may confront the situation where a decedent spouse's available Federal GSTT Exemption Amount may exceed the decedent spouse's unused Estate Tax Exemption Amount.⁵⁴

⁵¹ See IRC Section 2612(c).

⁵² See IRC Section 2612(a).

⁵³ See IRC Section 2612(b).

⁵⁴ This typically occurs where a decedent makes lifetime outright taxable gifts to Non-Skip Persons (e.g. children). The gifts would reduce the decedent's Gift & Estate Exemption Amount while not affecting the decedent's GSTT Exemption Amount.

(10) Since the GSTT is a "Piggy Back Tax" that is imposed on a Transferor who has made a gift tax transfer (donor) or a Transferor who has made a testamentary transfer (decedent), any transfer to a spouse (whether outright or in trust) could result in the permanent loss of the decedent spouse's unused GSTT Exemption Amount.

(a) Example #5: S1 dies in 2022 survived by S2 and their living descendants. S1 made inter vivos taxable gifts to children in the amount of \$2,060,000. S1 dies with a residuary estate of \$12 million. S1's LW&T or Revocable Trust contains a formula directing that S1's remaining Federal Exemption Amount is to be placed into a credit shelter trust while any amount above the Exemption Amount is to be gifted to S2 outright. The following will result:

(i) S1's credit shelter trust will be funded with \$10 million (\$12,060,000 Exemption Amount less the \$2,060,000 that S1 utilized for lifetime gifts).

(ii) The remaining \$2 million will be distributed to S2 outright.

(iii) S1's Executor will allocate \$10 million of S1's GSTT Exemption Amount to the credit shelter trust.

(iv) The remaining \$2.06 million of S1's GSTT Exemption (\$12,060,000 GSTT Exemption less \$10,000,000 allocated to the credit shelter trust) is permanently lost.

(11) IRC Section 2652(a)(3) provides relief for this type of situation in the form of a "Reverse QTIP" election that can be made on the donor/decedent spouse's IRS Form 706 or 709. The election must be affirmatively and timely made on the IRS Form 706 or 709.

(a) Example #6: Same facts as in Example #5 except any amount in excess of S1's available Estate Tax Exemption Amount is to be distributed to a Marital Trust for the sole benefit of S2 that qualifies as a QTIP Trust. Assuming that S1's Executor makes a full QTIP election for the Marital Trust, and makes the Reverse QTIP election on Schedule R (more on this below), the following will result:

(i) S1's credit shelter trust will be funded with \$10 million (\$12,060,000 Exemption Amount less the \$2,060,000 that S1 utilized for lifetime gifts).

(ii) The remaining \$2 million will be distributed to Marital Trust.

(iii) S1's Executor will make a QTIP election for the full amount passing to the Marital Trust.

(iv) S1's Executor will allocate \$10 million of S1's GSTT Exemption Amount to the credit shelter trust on Schedule R of the IRS Form 706.

(iv) S1's Executor will make a Reverse QTIP Election in the amount of \$2.06 million of S1's GSTT Exemption on Schedule R of the IRS Form 706.

(12) **Please note that QTIP is the only form of Marital Deduction transfer that will qualify the Executor to utilize a decedent's unused GSTT Exemption. As discussed above one cannot port a decedent's unused GSTT Exemption.**

VI. PART V- QTIP TRUSTS AND THE NON-CITIZEN SPOUSE

A. The Non-U.S. Citizen Surviving Spouse

(1) Introduction

(a) Prior to 1989, non-U.S. citizen spouses represented a very challenging issue for the enforcement of the estate tax. The issue would normally arise when a U.S. citizen spouse would claim the Marital Deduction for transfers to a non-U.S. citizen permanent resident (alien) surviving spouse⁵⁵. The U.S. citizen spouse would claim the Marital Deduction for the full amount of the transfer on his or her IRS Form 706 or 709. The alien spouse would then surrender his or her U.S. residency permit (green card), return to his or her country of origin and eventually die there without incurring any U.S. Estate Tax liability. Consequently, the government was "whipsawed" by this loop hole.

(b) The Technical and Miscellaneous Revenue Act of 1988 ("TAMRA") amended the Internal Revenue Code to include IRC Section 2056A, which denies the Marital Deduction for testamentary transfers to non-U.S. citizen spouses unless the transfer is in the form of a "Qualified Domestic Trust" or "QDOT". The Treasury eventually promulgated regulations to address the QDOT requirements.⁵⁶

(c) Although the US currently has estate tax treaties with approximately 16 other countries, the QDOT rules will generally prevail over the terms of the treaty (except where the spouse is a citizen of Canada, France or Germany).

(2) Please note that the QDOT rules only apply to *testamentary transfers to the non U.S. citizenship spouse*. The transfer may be made under a decedent's Last Will and Testament ("LW&T") or Revocable Trust.

(a) QDOT treatment is not available for *intervivos* transfers (gifts) made to a trust for the benefit of a non-U.S. citizen spouse.⁵⁷

⁵⁵ Persons who have permanent resident alien status are popularly categorized as having a "green card" (known for the original color the card that was issued to them at the time such status was conferred). Interestingly enough, such a spouse is taxed like a U.S. citizen for both income and estate tax purposes.

⁵⁶ See 58 Fed. Reg. 305 (1993).

⁵⁷ See IRC Section 2523(i)(1).

- (b) To partially compensate for this loss of the QDOT safe harbor, IRC Section 2523(i)(2) provides for a "super-charged" annual exclusion for transfers to a non-U.S. citizen spouse (\$159,000 for gift transfers made in 2021).⁵⁸
- (3) The QDOT Requirements (governing instrument requirements)- See IRC Section 2056A.
- (a) The trust must qualify for the Marital Deduction as an Estate Trust, General Power of Appointment Trust or QTIP Trust (and thus must meet all of the requirements for such eligibility).⁵⁹
- (b) The trust must be subject to the jurisdiction of a U.S. state court.
- (c) At least one Trustee of the trust must be an individual who is a U.S. citizen or a U.S. domestic corporation (the "U.S. Trustee" requirement).
- (i) Please note that if the QDOT is classified as a "Large QDOT" (i.e. total assets in excess of \$2 million as determined in the Federal Estate Tax proceeding), an individual U.S. citizen Trustee will be required to post a bond or obtain a letter of credit in an amount equal to 65% of the fair market value of the trust assets.⁶⁰
- (ii) If, however, the QDOT is classified as a "Small QDOT" (i.e. total assets equal to or less than \$2 million as determined in the Federal Estate Tax proceeding), the bonding requirements will not apply.⁶¹
- (d) No distribution of principal can be made from the QDOT without the approval of the U.S. Trustee.
- (e) For any distribution of principal from the trust to the non-U.S. citizen spouse, the Trustee must have the right to withhold the amount of any QDOT tax imposed⁶² and must file a Form 706-QDT with the IRS.
- (f) The Executor must make an election on the IRS Form 706 to treat the trust as a QDOT.⁶³
- (4) If after the QDOT is funded the surviving spouse obtains U.S. citizenship, the QDOT requirements are no longer applicable

⁵⁸ Please note that the present interest rules in IRC Section 2503 will apply to these transfers.

⁵⁹ It should be noted that the above techniques will result in the inclusion of the trust property in the surviving spouse's Gross Estate (to the extent that a QTIP election is made).

⁶⁰ See Treas. Reg. Section 20.2056A-2(d)(1)(i).

⁶¹ Consequently in QDOT planning it almost always makes sense to nominate a corporate trustee.

⁶² Essentially the estate tax on the amount distributed (40% of the amount distributed under current tax law).

⁶³ This is accomplished by making an election on Schedule M by checking the box that the surviving spouse is not a U.S. citizen, which creates the presumption that QDOT treatment has been elected. To elect out of QDOT an affirmative statement would need to be made on Schedule M. Please note that if a QTIP election is made on the IRS Form 706, the tax preparer will need to include the trust property on Part A of the Schedule M. .

(5) Estate Planning For The Non-US Citizen Spouse

- (a) Step #1: Determine whether the transfer is an intervivos transfer (gift) or transfer on death (estate tax).
- (i) If the transfer is an intervivos (gift) transfer, then a QDOT is not an option and the transferor spouse is limited to the supercharged annual exclusion for non U.S. citizen spouses (\$159,000 in 2021).
 - (ii) If the transfer is testamentary, then proceed with Step #2
- (b) Step #2: Determine the Spouse's National Citizenship
- (i) Is the surviving spouse is a citizen of any of the following three countries:
 - (A) Canada
 - (B) France
 - (C) Germany
 - (ii) If the surviving spouse is not a citizen of one of the above three countries, then the QDOT rules must be incorporated into the client's estate plan.⁶⁴
 - (iii) If the surviving spouse is a citizen of one of the above countries, then the planner will need to evaluate whether it makes sense to elect the "Marital Credit" provisions contained in each treaty. These provisions grant the decedent's spouse's estate a credit equal to the Federal Estate Tax Exemption Equivalent which can be used to offset the tax caused by any testamentary transfer to the surviving non-U.S. citizen spouse. Any amount in excess of the Marital Credit amount that passes to the spouse will be subject to US Estate Tax and the QDOT safe harbor is unavailable.

Example: A U.S. citizen spouse dies in 2021 with a total Gross Estate (net of debts and administration expenses) of \$25,000,000 (assume no taxable gifts made during lifetime). Under his or her estate plan, the citizen provides for the creation of a By-Pass Trust equal to his or her Federal Estate Tax Exemption and the balance to pass to a QTIP Trust for the benefit of his or her Canadian spouse (who is a U.S. Resident). As a result, \$11,700,000 will be designated for the By-Pass Trust and \$13,300,000 will pass to the QTIP Trust. Assuming that all of the QDOT document requirements are met, the Executor may elect one of two options:

⁶⁴ Please note that dual citizenship between the US and Canada, France or Germany is possible. If your client is a dual citizen, then there is no need for any QDOT planning as the spouse's US citizenship will negate the same.

Option #1: Make a QDOT election for the full amount of the QTIP Trust.⁶⁵ In this event the entire QTIP Trust will be includible in the Gross Estate of the surviving spouse.

Option #2: Do not make the QDOT election and instead elect the Marital Credit under the US-Canadian Revised Protocol Estate Tax Treaty in which event \$11,700,000 will pass tax free to the Spouse and the citizen's estate will incur a US Estate Tax liability of \$1.6 million.⁶⁶

(c) Step #3- Draft the Marital Trust to incorporate the requisite QDOT language.

(6) Other Key Points To Keep In Mind

(a) As discussed above, if the surviving spouse eventually becomes a U.S. citizen, the QDOT rules and requirements are no longer applicable.

(i) Therefore consider whether alternate dispositive provisions should be included (e.g. should the principal just be distributed to the surviving spouse or should it remain in trust).

(ii) The governing instrument should also contain language suspending the QDOT regime if the spouse becomes a U.S. citizen.

(iii) This citizenship issue should be discussed very early in the estate administration process. Since an Executor has up to 15 months following a decedent's date of death (including an extension) to make the QTIP election, most QDOT's have historically been constructed as QTIP Trusts to provide for the citizenship option.

(b) Trustee Selection

(i) As a general rule, a non-U.S. citizen (including a resident alien) should never serve as the Trustee of a U.S. created trust.⁶⁷ Therefore, the non-U.S. citizen spouse should never be nominated as a Trustee of a QDOT (or any trust for that matter).

(ii) To avoid the "Large QDOT" vs. "Small QDOT" surety issue discussed above, it is generally best to nominate a U.S. trust company to serve as an initial Trustee of the QDOT.

⁶⁵ It should be noted that partial QDOT elections may not be made- but this issue can be easily overcome by dividing a Marital Trust into two separate trusts and making the QDOT election of one of the two trusts.

⁶⁶ Determined as follows: (13,300,00-11,700,000) * 40%.

⁶⁷ If a non-U.S. citizen becomes a Trustee of a U.S. situs trust, the trust will be classified as a "foreign trust" under IRC Section 7701(a)(31), which could result in adverse income tax consequences. A discussion of foreign trust income taxation is beyond the scope of this outline.

(c) Rescuing a Failed QDOT

(i) As a general rule, the determination of whether a trust qualifies as a QDOT will be made on the date on which the decedent's estate tax return is made (filed).⁶⁸

(ii) Marital Trust in Place But Failed QDOT Requirements: If a trust otherwise qualifies for the Federal Estate Tax Marital deduction (i.e. trust meets the requirements of an Estate Trust, General Power of Appointment Trust or QTIP) but is disqualified from the Marital because the trust does not meet the requirements for a QDOT, the trust can be reformed to qualify as a QDOT (by adding the requisite provisions) either by:

(A) by a judicial proceeding; or,

(B) in accordance with the terms of the decedent's LW&T or trust agreement ("Trustee Reformation").⁶⁹

The judicial proceeding or Trustee Reformation needs to be completed by the due date (plus extensions) for the filing of the decedent's IRS Form 706.

Drafting Point: Rather than rely on a time consuming and costly judicial proceeding, it is best to include a provision in the governing instrument (LW&T or trust agreement) that grants to an Independent Trustee the power to unilaterally reform the Marital Trust to comply with the QDOT requirements.

(iii) No Marital Trust In Place: If for some reason the decedent spouse's estate plan does not provide for the creation of a QDOT (or a Marital Trust that can be reformed into a valid QDOT), the Treasury Regulations allow the surviving spouse to transfer or assign property to a QDOT, provided that the transfer is completed before the due date for the filing of the decedent's estate tax return.⁷⁰

(A) The transfer must be in writing and must be in accordance with all local law requirements for such transfers.⁷¹

(B) Although the Marital Deduction is salvaged in the decedent spouse's estate, the surviving spouse is treated as the transferor of the property to the QDOT for income, gift, estate and generation skipping transfer tax purposes.⁷²

⁶⁸ See IRC Section 2056(d)(5)(A)(ii).

⁶⁹ See Treas. Reg. Sections 2056(d)(5)(A)(ii) and 20.2056A-4(a)(1).

⁷⁰ See IRC Section 2056(d)(2)(B)(i), Section 2056A(d) and Treas. Reg. Section 20.2056A-4(b)(1).

⁷¹ See Treas. Reg. Section 20.2056A-4(b)(2).

⁷² See Treas. Reg. Section 20.2056A-4(b)(5).

- (i) This should not present an issue for estate and gift tax purposes (as the property will be includible in the surviving spouse's Gross Estate upon his or her death).⁷³
- (ii) However, this will present a problem for GSTT purposes as the surviving spouse will be deemed to be the transferor for Chapter 13 purposes.
- (iii) This will also most likely result in the QDOT being treated as a Grantor Trust for income tax purposes.⁷⁴

B. QTIP and QDOT ("Perfect Together")

- (1) Although any form of Marital Trust disposition (Estate Trust, Power of Appointment Trust, Charitable Remainder Trust or QTIP Trust) will qualify for QDOT Treatment, almost all QDOT Trusts are set up initially as a QTIP Trust. Why?

VII. PART VI- OTHER USES OF QTIP TRUSTS

A. Elective Share Trusts

- (1) Many US states which base their legal systems on English common law initially adopted the laws of Dower and Curtesy so as to ensure that a surviving spouse (historically the wife) well provided for following the death of the decedent spouse.
- (2) Over time, almost all of these US states abolished Dower and Curtesy and replaced these concepts with an elective share system (the "Elective Share") that was designed to provide for a surviving spouse who was not financially secure.⁷⁵
- (3) Some US jurisdictions have adopted a "needs based" elective share system under which the amount of a decedent spouse's estate that a surviving spouse may claim is limited after taking into account the surviving spouse's available resources.⁷⁶
- (4) Others on the other hand have adopted a "partnership approach" elective share system under which the surviving spouse's personal resources are ignored in computing the elective share amount.⁷⁷
- (5) Some state Elective Share systems permit decedent spouse's to create trusts for the sole benefit of the surviving spouse ("Elective Share Trusts") which will count towards

⁷³ See IRC Section 2036(a).

⁷⁴ See IRC Section 677(a)/ A more interesting question is whether the trust will be treated as a self-settled trust for trust law purposes.. If yes- then the inclusion of a spendthrift provision governing instrument would not protect the spouse from the claims of third party creditors and predators. One potential solution to this issue would be to draft the trust to be governed by the laws of a U.S. jurisdiction offering self-settled trust protection such as Alaska, Delaware, New Hampshire, Nevada and South Dakota

⁷⁵ It should be noted that Georgia does not have an Elective Share statute.

⁷⁶ See New Jersey's Elective Share statutes at N.J.S.A 3B:8-1 et. seq.

⁷⁷ See Massachusetts' Elective Share statute at MA ST. 191 §15 (M.G.L.A. 191 §15)

satisfying the surviving spouse's Elective Share right. The Elective Share Trust requirements may vary from jurisdiction, but in several states the use of a QTIP Trust will count towards satisfying the Elective Share.

B. Minimization of State Estate Taxes

- (1) As of January 2022 there are seventeen (17) US jurisdictions that have either an or Estate Tax or Inheritance Tax system in place.⁷⁸
 - (a) Eleven (11) states (CT, HI, IL, ME, MA, MN, NY, OR, RI, VT, WA) and the District of Columbia have an Estate Tax system.
 - (b) Five (5) US jurisdictions (IA, KY, NE, NJ and PA) have an Inheritance Tax System.
 - (c) One (1) US jurisdiction (MD) has both an Estate Tax and Inheritance Tax System.
- (2) Some of these US jurisdictions permit a decedent taxpayer's Executor to elect to make a "State QTIP" election property equal to difference between the current Federal Estate Tax Exemption Amount and State Estate Tax Exemption Amount.⁷⁹

C. Other Non-Tax Reasons For QTIP Trust

- (1) Spendthrift Protection
- (2) Second Marriage situations where there are children of a first marriage.

VIII- PART VII- PRESENTATION OF QTIP TRUST ON IRS FORM 706

Example #7: S1 (age 87) and S2 (age 80) are married and have three healthy living adult children and six healthy living grandchildren. S1 and S2 have combined wealth of \$30 million (S1 has \$24 million in assets and S2 has \$6 million), S1 and S2 have each made \$6 million of outright taxable gifts to their children (\$2 million per child).

S1 dies in 2022. S1's estate plan (as expressed in S1's LW&T/Revocable Trust) provides for the funding of a credit shelter trust using S1's and any amount in excess is to be held in a QTIP eligible trust for the benefit of S2 for life. Upon the death of the surviving spouse, property is to be distributed to descendants per stirpes with any share set aside for the benefit of a descendant to be held in trust for such descendant's sole benefit for life.

The Executor/Personal Representative of S1's estate does not wish to pay Federal Estate Tax in S1's estate. Furthermore S2 has emphatically indicated that he/she does not want to give up any of his/her beneficial interest in S1's estate.

⁷⁸ See AARP Bulletin article by John Waggoner dated June 21, 2022 (<https://www.aarp.org/money/taxes/info-2020/states-with-estate-inheritance-taxes.html>)

⁷⁹ For example, MA has a State Estate Tax Exemption Amount of \$1 million but will allow the Executor of a deceased Spouse's estate to make a MA State QTIP Election for amounts passing to a QTIP Trust that could be funded with property having a value of \$11,060,000 (for decedent's dying in 2022). See M.G.L. c 65C, §3A.

Issue: How should the Marital Trust be presented on the IRS Form 706? Assume that administration expenses and debts are \$1 million in total. Ignore all other elections.

IX. CONCLUSION AND QUESTIONS.