

USE OF LIFETIME QTIP TRUST WHERE PORTABILITY NOT EFFECTIVE

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For more than ten years (since 2011 under the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010), the I.R.C. has provided for a “unified” federal gift and estate tax system.¹ The system is unified in that a taxpayer’s gifts are taxed in the same way for gift and estate tax purposes (i.e., whether a gift is made during a taxpayer’s lifetime or at death).² To accomplish this objective, when a taxpayer makes a gift to third persons other than to a spouse or charity, the excess amount of the gift over and above the taxpayer’s available exemption is subject to gift

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1. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296.

2. See I.R.C. § 2001.

tax during lifetime and estate tax upon death.³ The amount of the “taxable” gifts made during a person’s lifetime are cumulated to determine how much of the exemption has been used for prior gifts and how much remains available at the time a current gift is made.⁴ If this is fully used during a person’s lifetime, the gift tax is imposed on the amount of gifts in excess of the exemption and estate tax is imposed at the taxpayer’s death.⁵ If the exemption is not fully used during a person’s lifetime, the remaining amount is available to the taxpayer’s estate at death.⁶ The value of the estate over and above the amount of the exemption in effect at the taxpayer’s death is currently taxed at a rate of 40%.⁷

I. THE UNIFIED FEDERAL GIFT AND ESTATE TAX

At death, a tax is imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.⁸ The amount of the estate tax is determined by calculating a tentative tax on the amount of the taxable estate plus adjusted taxable gifts, reduced by the amount of tax that would have been payable with respect to gifts made by the decedent after December 31, 1976, other than gifts includible in the decedent’s gross estate.⁹ The tentative tax is then adjusted for differences in tax rates in effect at the time of the taxpayer’s death versus rates and credits applied to taxable gifts made during the decedent’s lifetime.¹⁰ After those adjustments, credit is deducted for the applicable credit amount.¹¹

A. Lifetime and Deathtime Exemption

The amount of each taxpayer’s exemption from gift and estate taxes is \$5 million.¹² The exemption is indexed for inflation on an annual basis.¹³ Additionally, the Tax Cuts and Jobs Act of 2017 (TCJA) temporarily doubled the amount of the exemption for the years 2018–2025.¹⁴ For the year 2022, the inflation adjusted amount of the exemption doubled under the TCJA, is

3. *See id.* § 2010.

4. *See id.* § 2010(c).

5. *Id.*

6. *Id.*

7. *See id.* § 2001(c).

8. *Id.* § 2001(a).

9. *Id.* § 2001(b).

10. *See id.* § 2001(c).

11. *Id.* § 2001(g).

12. *Id.* § 2010(c)(3)(A).

13. *Id.* § 2010(c)(3)(B).

14. *Id.* § 2010(c)(3)(C).

\$12.06 million for every taxpayer other than a non-resident, non-citizen; and for 2023 the IRS has announced that the exemption will be \$12.92 million.¹⁵

From 1987 to 1997, the exemption remained constant at \$600,000; for 2002 and 2003, the exemption was a flat \$1 million.¹⁶ The exemption increased to \$1.5 million for 2004 and 2005, \$2 million for 2006, 2007, and 2008, and \$3.5 million for 2009.¹⁷ In 2010, estates had the choice of an unlimited exemption with a limited step-up in basis for capital gain purposes or a \$5 million exemption with a full step-up in basis.¹⁸ In 2011, the exemption was raised to \$5 million and was thereafter adjusted for inflation.¹⁹ Thus, for several years, the amount of the exemption has fluctuated; and future legislative changes are both likely and difficult to predict, which makes gift and estate tax planning more challenging for taxpayers and their advisors.²⁰

B. Marital and Charitable Deductions

After applying the gift and estate tax exemption, whatever the amount, other than debts and administration expenses, there generally are only two types of deductions allowed to a taxpayer or an estate in determining the gift or estate tax: gifts made to a spouse or a charity.²¹ The tax laws also contain provisions that exclude “annual exclusion gifts” from the calculation of taxable gifts, as well as direct payments of certain educational and medical expenses.²² The tradeoff for the marital deduction is that the property given to the spouse will be included in the spouse’s taxable estate if not used up or spent during the spouse’s remaining lifetime.²³ The tradeoff for the charitable deduction is that the property is given away to one or more charities and nothing remains to pass on to the taxpayer’s noncharitable beneficiaries—

15. See Kate Dore, *IRS bumps up estate-tax exclusion to \$12.92 million for 2023. Here's what that means for wealthy Americans*, CNBC, <https://www.cnbc.com/2022/10/19/irs-bumps-estate-tax-exclusion-to-12point92-million-for-2023.html> (last visited Jan. 23, 2023) [<https://perma.cc/R7FU-4CBG>].

16. Darien B. Jacobson, et al., *The Estate Tax: Ninety Years and Counting*, IRS, 118, 122, <https://www.irs.gov/pub/irs-soi/ninetyestate.pdf> [<https://perma.cc/AM3G-LY88>].

17. *Id.*

18. *Id.*

19. See Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296.

20. See *id.*

21. Julia Kagan, *Gift Tax Explained: What It Is and How Much You Can Gift Tax-Free*, INVESTOPEDIA, <https://www.investopedia.com/terms/g/gifttax.asp> (last updated Oct. 30, 2022) [<https://perma.cc/4VCY-U9GJ>].

22. I.R.C. § 2503(b), (c). Annual exclusion gifts are gifts to any person in a calendar year up to \$10,000 adjusted annually for inflation. *Id.* For 2023, the adjusted amount is \$17,000. *Id.* Gifts must be of a present interest in property and not a future interest. *Id.* Tuition and payments for medical care that are excluded from the calculation must be paid directly to the educational organization or provider of medical care. Julie Garber, *How Much is the Annual Gift Tax Exclusion?*, THE BALANCE (Nov. 1, 2022), <https://www.thebalancemoney.com/annual-exclusion-from-gift-taxes-3505637> [<https://perma.cc/X3ZK-3CT9>].

23. I.R.C. § 2044.

family members or friends.²⁴ Except for severely limited provisions which can permit individuals to earn income from employment by a private foundation created by a decedent, the assets are no longer available to benefit the taxpayer's family or friends.²⁵

1. Rate of Tax

The estate and gift tax rate is set forth in a schedule contained in I.R.C. Section 2001(c) and is essentially a flat 40% rate for gifts made and for the estates of decedents dying after 2012.²⁶ Historically, for deaths occurring prior to December 31, 2001, however, estate tax rates were graduated, lower rates were imposed on smaller taxable estates, and, since 1976, at times reached a top marginal rate of 55% for larger taxable estates.²⁷ On estates in excess of \$10 million, an additional 5% tax was imposed to eliminate the benefit of the lower graduated rates that were then in effect.²⁸ The 5% surcharge was repealed under the Economic Growth and Tax Relief Reconciliation Act of 2001.²⁹

24. *Charity*, FIDELITY, <https://www.fidelity.com/life-events/estate-planning/beneficiary-strategies/charity> (last visited Jan. 24, 2023) [<https://perma.cc/99VE-JNL6>].

25. Andrew Megosh, et al., *H. Private Benefit Under IRC 501(c)(3)*, IRS 135, 138, <https://www.irs.gov/pub/irs-tege/eotopich01.pdf> (last visited May 4, 2023) [<https://perma.cc/34V3-C9QY>]. Detailed rules are set forth in the I.R.C. governing the operation of private foundations. *See Private Foundations*, IRS, <https://www.irs.gov/charities-non-profits/charitable-organizations/private-foundations> (last updated Aug. 8, 2022) [<https://perma.cc/5H4W-Y8C9>]. These rules restrict transactions with related parties, defined as “disqualified persons,” mandate the types of investments that may be made by the private foundation, and set forth minimum distributions that must be made by the private foundation each year. *See id.* Failure to comply with the rules results in imposition of severe penalty taxes on the private foundation. *Id.* Nevertheless, a private foundation may be controlled by a board of directors composed of the donor and the donor's family members. *What is a Private Foundation?*, FOUND. SOURCE, <https://foundationsource.com/what-is-a-private-foundation/> (last visited Jan. 23, 2023) [<https://perma.cc/P7MM-XS7J>]. The private foundation also may employ family members of the donor to perform ordinary and necessary personal services, and pay them reasonable compensation, which is measured by comparison to compensation paid to others for similar work. *See id.*

26. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313.

27. *Historically, a 70 percent marginal tax rate is not unusual*, FIFTYTHREEEIGHT 1, 7–8, https://eml.berkeley.edu/~saez/course/Labortaxes/taxableincome/taxableincome_attach.pdf (last visited Feb. 8, 2023) [<https://perma.cc/5UUT-NKP4>]. Prior to 1976, top marginal rates were as high as 77% in many years. *Id.*

28. William R. Lane Jr. & Shane A. Hart, *Economic Growth and Tax Relief Reconciliation Act of 2001 Summary*, HOLLAND & KNIGHT (June 13, 2001), <https://www.hklaw.com/es/insights/publications/2001/06/economic-growth-and-tax-relief-reconciliation-act> [<https://perma.cc/9UY4-DV3C>].

29. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38.

2. Deductions

Provisions in the I.R.C. allow for deductions for marital and charitable gifts for both lifetime gifts and gifts made by a decedent's estate.³⁰ Our focus will be on the marital deduction under I.R.C. Section 2523.³¹

3. Credit Shelter Trust

Since the introduction of the unlimited marital deduction, gift and estate tax policy has been to treat married couples as a unitary taxpayer.³² By affording a married person's estate an unlimited deduction for gifts and bequests to a surviving spouse, all estate tax may be deferred until the death of the survivor.³³ Because each taxpayer has his or her own exemption from the estate tax, a common plan for married couples was to provide in their wills or revocable trust agreements for creation of a "credit shelter trust" at death.³⁴ This is known as such because the exemption was previously defined in the I.R.C. as the unified credit, which is now referred to as the applicable credit amount.³⁵

Prior to the 2010 Tax Relief Act, married persons used the creation of a credit shelter trust to "shelter" the amount that could pass free of tax at the first spouse's death.³⁶ The credit shelter trust could benefit the surviving spouse, but would not be included in the survivor's estate unless the survivor had a "general power of appointment," i.e., the power to vest the trust property in the survivor, his or her estate, creditors, or the creditors of the survivor's estate.³⁷

The credit shelter was a very popular technique, and is still widely used as an important estate tax planning tool.³⁸ However, the credit shelter trust was not a perfect solution.³⁹ Because its assets are typically not included in the surviving spouse's taxable estate, there is no "step-up" in the tax basis of appreciated property for capital gains purposes.⁴⁰ Fewer estates are subject to the estate tax because of the increase in exemptions.⁴¹ There is therefore now

30. Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2689-909 (1998); see I.R.C. §§ 2055-2056, 2522-2523.

31. I.R.C. § 2523.

32. Economic Recovery Tax Act (ERTA) of 1981, Pub. L. No. 97-34, 95 Stat. 172.

33. I.R.C. § 2001(e).

34. *Id.* § 2010

35. *Id.*

36. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38.

37. I.R.C. § 2041.

38. Leonard Golub, *Credit Shelter Trust*, NEW CAP. (Nov. 28, 2018), <https://www.broadridgeadvisor.com/finaweb/login.aspx?ReturnUrl=%2Ffinaweb%2Fhome.aspx> [https://perma.cc/229R-9CPF].

39. See *id.*

40. I.R.C. § 1014(e).

41. *Estate tax returns*, USA FACTS, <https://usafacts.org/data/topics/economy/taxes/individual-taxes>

less need for the credit shelter trust in married couples' estate plans solely for tax planning purposes.⁴² Also, since passage of the 2010 Tax Relief Act, which introduced the Deceased Spouse Unused Exclusion Amount (DSUEA, or portability), taxpayers may "port" the amount of the unused estate tax exemption of the first spouse's estate to the surviving spouse's estate in many (but not all) situations.⁴³

In order to port a decedent's unused exemption to his or her surviving spouse, Section 2010(c) of the I.R.C. requires the executor of the estate of the first spouse that died to file a federal estate tax return on which the DSUEA is calculated, and makes an election on the return that provides for the surviving spouse to use the DSUEA.⁴⁴ Applicable Treasury Regulations prescribed under Section 2010(c)(6) set forth other detailed provisions regarding elements of the DSUEA.⁴⁵

Treasury Regulations Section 20.2010-1(e)(4) defines the applicable exclusion amount as the sum of the basic exclusion amount and, in the case of a surviving spouse, the deceased spousal unused exclusion (DSUE) amount.⁴⁶ Detailed rules are set forth in the Treasury Regulations, including requirements that the decedent be married and have a surviving spouse, that a federal estate tax return must be filed, that the amount of the DSUE be calculated, and have an election made on the return.⁴⁷ The Regulations also set forth numerous examples.⁴⁸

Another important consideration in using the DSUEA is that the exemption that is available to a surviving spouse is that of the survivor's last deceased spouse.⁴⁹ Accordingly, particularly for a younger surviving spouse, there is a risk that the survivor could remarry and also survive that subsequent spouse, who may or may not have an unused exclusion amount available (or a much smaller amount available) for use at the survivor's later death.⁵⁰

Mitigating this disadvantage, the rules do provide that any DSUE amount available to the decedent is deemed to be applied to gifts made by the

/estate-tax-returns/ (last visited Jan. 23, 2023) [<https://perma.cc/JDN8-B9JA>]. Since 1996, there was a high of 108,322 federal estate tax returns filed in the year 2000, declining to 4,588 returns filed in 2011, with a slight increase since then to 13,526 returns filed in 2018, increasing in part due to returns being filed for purposes of portability. *Id.*

42. See Golub, *supra* note 38 (the credit shelter technique still provides a valuable tool for creditor protection in the estate plan of the surviving spouse).

43. I.R.C. § 2010(c)(4)–(c)(5).

44. *Id.* § 2010(c)(4).

45. *Id.* § 2010(c)(6); Treas. Reg. §§ 20.2010-1 to 20.2010-3.

46. Treas. Reg. § 20.2010-1(e)(4).

47. *Id.* § 20.2010-2.

48. *Id.* § 20.2010-2(c)(5).

49. *Id.* § 20.2010-3.

50. See *id.* § 20.2010-3.

decedent before the decedent's basic exclusion amount is applied to those gifts.⁵¹

As illustrated by the example discussed later in this Article, portability of the DSUEA does not allow for use of both estate tax exemptions in certain circumstances.⁵² One such circumstance arises when the survivor remarries and survives the subsequent spouse who does not have any estate tax exemption available, as discussed above.⁵³ Another circumstance when both exemptions cannot be used arises where the survivor has only charitable beneficiaries and does not use his or her estate tax exemption, or the survivor fails to use the exemption because the value of the survivor's estate is less than the amount of the exemption.⁵⁴

C. Married Taxpayers and Traditional Planning; Portability

As a result of the Supreme Court case *Obergefell v. Hodges*, which requires all states to recognize and issue marriage licenses to same sex couples, the marital deduction is equally available to a surviving spouse of the same sex as the decedent, as is portability of the estate tax exemption.⁵⁵ The result in *Obergefell* has been essentially codified in the Respect for Marriage Act enacted on December 13, 2022.⁵⁶

Portability allows a surviving spouse to utilize the unused portion of a decedent's estate tax exemption, with certain limitations, at the survivor's death.⁵⁷ Simply put, to the extent that a taxpayer fails to use his or her gift and estate tax exemption to shelter assets from estate tax at death, the decedent's surviving spouse may add the amount of the decedent's unused exemption to the survivor's exemption in calculating the amount of estate tax due at the survivor's death.⁵⁸ If the spouse with solely charitable beneficiaries died first, then portability might be used to capture the charitably inclined spouse's estate tax exemption for use by the survivor's estate.⁵⁹

51. See *id.* §§ 20.2010 3(b), 25.2505 2(b) (for additional rules pertaining to the identity of the last deceased spouse for purposes of determining the applicable exclusion amount of the surviving spouse).

52. See discussion *infra* Part IV.

53. See discussion *infra* Part IV.

54. See discussion *infra* Part IV.

55. *Obergefell v. Hodges*, 576 U.S. 644, 652 (2015).

56. Respect for Marriage Act of 2022, Pub. L. No. 117-228, 136 Stat. 2305.

57. See generally I.R.C. § 2010(c)(5) (calling this the "deceased spousal unused exclusion amount" or DSUEA).

58. *Id.* § 2010(c).

59. See *id.* § 2010(c)(5).

II. GIFT TAX MARITAL DEDUCTION: REQUIREMENTS UNDER I.R.C. SECTION 2523

In order to utilize both spouses' estate tax exemptions, the outright gift under I.R.C. Section 2523(a) is not especially helpful.⁶⁰ I.R.C. Section 2523(b) sets out the operative rules for the more effective technique discussed in this Article.⁶¹ Although estate tax is an important consideration in the estate plan, it is not the only consideration.⁶² Above all else, the estate planning attorney must consider the client's financial and family circumstances and the client's testamentary intent.⁶³ Many clients have children from a prior marriage to whom they wish to leave property (as well as to their spouse, if their spouse survives them), and commonly use trusts to satisfy their conflicting objectives.⁶⁴ A trust may be created for the benefit of the surviving spouse for his or her remaining lifetime, which trust will terminate at the survivor's death, with the assets being distributed to the children of the first spouse to die.⁶⁵ The credit shelter trust often is structured in this manner, and could be successfully utilized in combination with a testamentary marital trust for the survivor's benefit, so long as the older spouse dies first, or more precisely, the spouse who is not charitably inclined dies first.⁶⁶

Because the problem to be addressed is the potential waste of the charitably inclined spouse's exemption, use of the credit shelter trust alone would not be a solution.⁶⁷ The testamentary marital trust does address the problem in a similar manner as the lifetime trust discussed below.⁶⁸ However, there are other issues to consider, including immediate creditor protection afforded by the lifetime trust, and the possible death of the charitably inclined spouse survived by the other spouse (although that situation could be addressed through portability of the DSUEA).⁶⁹

This Article argues for one spouse to create an irrevocable gift trust during lifetime for the benefit of the other spouse, also called a marital trust.⁷⁰

60. *Id.* § 2523 (the taxpayer would need to rely on the surviving spouse to preserve the assets that were the subject of the gift and to pass them on to the taxpayer's beneficiaries at the surviving spouse's death).

61. *Id.* § 2523(b).

62. *See infra* notes 104–07 and accompanying text.

63. *See infra* notes 104–07 and accompanying text.

64. *See* Jackie R. Luthringshausen, *Estate Planning for Second Marriages*, LAVELLE L. (Mar. 31, 2021), <https://www.lavellelaw.com/estate-planning-for-second-marriages> [https://perma.cc/J4EB-Z5ET].

65. *See* Kristin L. Brown, *First Comes Love, Then Comes the Marital Deduction*, 13 EST. PLAN. & CMTY. PROP. L.J. 1, 10–11 (2020).

66. *See* Alan S. Glassman & Christopher J. Denicolo, *The Role of Credit Shelter Trusts Under the New Estate Tax Law*, 38 EST. PLAN. 10, 11 (2011).

67. *See id.*

68. *See id.*

69. *See id.*

70. I.R.C. §§ 2523, 2044.

This marital trust would qualify for the gift tax marital deduction under I.R.C. Section 2523, be included in the taxable estate of the survivor under I.R.C. Section 2044, and thereby utilize the survivor's estate tax and generation skipping transfer (GST) tax exemptions, as well as satisfy the taxpayer's underlying testamentary intent.⁷¹ There are some uncertainties in using this approach, such as the amount of the exemption that will be in effect at the time of the taxpayer's death and the value of the trust assets at that time.⁷² These issues are discussed in more detail below.⁷³ But first, we analyze the statute to confirm that the plan will satisfy the technical requirements of the applicable I.R.C. provisions.⁷⁴

The easier and more straightforward approach to obtain the marital deduction is for the taxpayer to make an outright gift to the spouse.⁷⁵ The simplicity of this approach has great appeal.⁷⁶ However, the approach gives ownership to the spouse without protecting the property from the spouse's creditors, future spouses, or the spouse's possible profligate spending.⁷⁷ Further, the taxpayer runs the significant risk of relying on the surviving spouse to leave the property in the manner desired by the donor at the time of the survivor's death (i.e., to the donor's children or other family members).⁷⁸

Paragraph (b) of I.R.C. Section 2523 then sets forth the general rule of non-deductibility of a life estate or terminable interest, the exception to which, under paragraph (f), affords the taxpayer with the planning opportunity discussed below.⁷⁹ Paraphrasing paragraph (f), the marital deduction will be allowed for "qualified terminable interest property," which is property transferred by the donor spouse in which the donee spouse has a qualifying income interest for life and for which an irrevocable election is made in the manner prescribed by the I.R.C. and Regulations.⁸⁰

71. *Id.* § 2652 (this statute allows the donor—the grantor of the marital trust—to elect to be treated as the transferor for GST purposes, which would not be made in such situations because it is beneficial to use the spouse's exemption from the GST).

72. *See* discussion *infra* Part IV.A.

73. *See* discussion *infra* Part IV.A.

74. *See* I.R.C. § 2523.

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.* § 2523(b), (f).

80. *Id.* § 2523(f).

III. OUTRIGHT GIFTS AND GIFTS IN TRUST

A. Alternate Approaches and Potential Tax Savings

As noted above, an outright gift, in any amount, may be made to a spouse who is a U.S. citizen, and the taxpayer will obtain an automatic marital deduction equal to the amount of the gift.⁸¹ However, there are drawbacks to the use of an outright gift.⁸² Therefore, this Article focuses on the use of the gift tax marital deduction for gifts made in trust for the benefit of a surviving spouse.⁸³ More specifically, the following discussion describes how a lifetime marital trust may be employed to use the spouse's exemption from the gift and estate tax in situations where it otherwise would be wasted.⁸⁴ Currently, such savings would equal the amount of the exemption, \$12.92 million, multiplied by the tax rate of 40%, or tax in the amount of \$5.17 million.⁸⁵ After 2025, without adjustment for the amount of inflation between now and then, \$6.46 million of wasted exemption, multiplied by the estate tax rate of 40%, would impose estate taxes in the amount of \$2.58 million that could be saved through the use of a lifetime marital trust.⁸⁶ The example discussed herein illustrates a common situation in which portability of a spouse's exemption would not be useful for reducing taxes on the surviving spouse's estate, but a lifetime marital trust could be used to achieve tax savings.⁸⁷

Technical requirements for a marital trust that qualifies for the marital deduction, a qualifying terminable interest trust (or QTIP trust) are discussed in more detail below.⁸⁸

B. Required Components of the QTIP Trust

I.R.C. Section 2523 directs us to Section 2056(b)(7)(B)(ii), (iii), (iv), and Section 2056(b)(10), stating that similar rules apply for lifetime transfers of property subject to terminable interests.⁸⁹ These sections are set forth

81. *Id.* § 2056.

82. *See id.*

83. Author's original thought.

84. *See* I.R.C. § 2056.

85. Daniel R. Cooper et al., *IRS Announces Increased Gift and Estate Tax Exemption Amounts for 2023*, MORGAN LEWIS (Oct. 21, 2022), <https://www.morganlewis.com/pubs/2022/10/irs-announces-increased-gift-and-estate-tax-exemption-amounts-for-2023> [<https://perma.cc/CBQ6-2RLY>].

86. *Client Alert: Expected 2023 Inflation Adjustments Affecting Estate and Gift Taxes Create Wealth Preservation Opportunity Window*, MANNINGFULTON (Oct. 31, 2022), <https://www.manningfulton.com/news/client-alert-expected-2023-inflation-adjustments-affecting-estate-and-gift-taxes-create-wealth-preservation-opportunity-window/> [<https://perma.cc/Q2R9-C9HG>].

87. *See id.*

88. *See* discussion *infra* Part III.A.

89. I.R.C. § 2523(f)(3).

below.⁹⁰ Thus, a spouse has a qualifying income interest for life if 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, typically a concept employed only in Louisiana under Louisiana law.⁹¹ No person has the power to appoint any part of the property to any person other than the surviving spouse (excepting, however, a power exercisable only at or after the death of the surviving spouse).⁹² I.R.C. Section 2056 also provides that an interest in the property will qualify for the marital deduction if it is a portion determined on a fractional or percentage basis.⁹³

I.R.C. Section 2056(b)(7)(B) provides in part as follows:

- (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.⁹⁴

Thus, the qualifying income interest for life, which may be held in trust (QTIP) is satisfied if it meets all of the above requirements.⁹⁵

An additional requirement to obtain the marital deduction is that the taxpayer’s spouse must be a U.S. citizen.⁹⁶ Thus, the lifetime QTIP is not available if the taxpayer’s spouse is not a U.S. citizen.⁹⁷

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* § 2056(b)(10).

94. *Id.* § 2056(b)(7)(B).

95. *See id.*

96. *See id.* § 2523(i).

97. *See id.* § 2056(d) (provisions similar to those set forth in I.R.C. § 2056(d) allowing for the creation of a “qualified domestic trust” or QDOT (and a marital deduction) in a decedent’s estate do not exist under the corresponding gift tax provisions).

IV. PORTABILITY OF DECEASED SPOUSE'S EXEMPTION NOT SOLUTION FOR ALL TAXPAYERS; UTILIZING I.R.C. SECTION 2523 WHEN PORTABILITY NOT USEFUL

As discussed earlier, the portability of the estate tax exemption is a welcome development to taxpayers and their advisors in estate and gift tax laws.⁹⁸ While portability will allow the taxpayer to utilize both spouses' exemptions in many cases, it will not do so in every situation.⁹⁹ The set of facts discussed below is one in which portability does not provide a solution.¹⁰⁰

If a credit shelter trust is not the solution to preserving both spouses' exemption from the estate tax, then an irrevocable trust for the benefit of a taxpayer's spouse that qualifies for the marital deduction may be an answer.¹⁰¹ An irrevocable trust for the benefit of a grantor's spouse is a well-established estate planning technique.¹⁰² Essentially, a married person creates a trust for the benefit of the person's spouse that, if all the requirements are satisfied, allows a gift tax marital deduction to the taxpayer for the property transferred to the trust.¹⁰³

Consider a situation where a married couple has an estate valued well over their combined exemptions: there is a gap in their relative ages such that there is a high probability the younger spouse will survive the older spouse, the older spouse has the intent to benefit children or other non-charitable beneficiaries in addition to the younger spouse, and the younger spouse has no children or non-charitable beneficiaries other than, perhaps, the older spouse.¹⁰⁴

If the younger spouse survives the older spouse as expected, the older spouse will benefit from only his or her exemption at death.¹⁰⁵ Property valued over the exemption passing to the taxpayer's children or other non-charitable beneficiaries will be taxed at the estate tax rate in effect at the time of the taxpayer's death (assumed in the example below to be 40%).¹⁰⁶ Portability provides the taxpayers with no relief because the surviving spouse's exemption is not available at the older spouse's death and will not be utilized upon the survivor's death.¹⁰⁷ Note that the use of a credit shelter or bypass trust also provides no solution to the problem of being able to

98. See *supra* notes 52–54 and accompanying text.

99. See *supra* notes 52–54 and accompanying text.

100. See *supra* notes 97–106 and accompanying text.

101. See discussion *supra* Part I.C.

102. See discussion *supra* Part I.C.

103. See discussion *supra* Part III.

104. Author's original hypothetical.

105. *Id.*

106. See I.R.C. § 2010(c).

107. See *id.* § 2010(c)(5).

utilize both exemptions.¹⁰⁸ The older spouse could include a marital QTIP in his or her testamentary estate plan, but this approach does not work if the younger spouse unexpectedly dies first.¹⁰⁹

At the death of the younger surviving spouse, his or her estate passes all or mostly to charity, and the survivor's estate tax exemption goes unused.¹¹⁰ If instead the older taxpayer had established an irrevocable lifetime trust for the benefit of the surviving spouse that qualified for the marital deduction (a QTIP trust), then the taxpayer could have saved between \$2,584,000.00 and \$5,168,000.00.¹¹¹ A further benefit is that the QTIP trust included in the survivor's taxable estate passes to the older spouse's children or other non-charitable beneficiaries at the survivor's death, and can be structured so as to pass in trust for their benefit.¹¹² Additionally, the survivor's executor may allocate the survivor's exemption from the GST tax to these trusts and keep them exempt from tax for multiple generations.¹¹³

A. Fact Pattern Illustrating Use of Lifetime QTIP

Let us examine how a lifetime QTIP trust could benefit a hypothetical married couple, Harry and Sally, both U.S. citizens who met when Harry was in his early fifties, and Sally was in her late thirties.¹¹⁴ Harry had previously been married to Helen, with whom he had two children, Marie and Jess.¹¹⁵ Sally was not previously married and has no children, but is deeply committed to several charitable causes.¹¹⁶ Harry and Sally each have taxable estates valued well in excess of the amount of the estate and gift tax exemption.¹¹⁷ While Harry shares some of Sally's charitable interests, he primarily wishes to leave his estate to his children.¹¹⁸

Sally's estate plan is to leave all of her assets in trust for Harry's benefit, if he survives her, and then to charity on Harry's death or if he fails to survive Sally.¹¹⁹ Harry owns the couple's three residences in New York, California, and Texas as his separate property.¹²⁰ Harry's plan is to leave the residences,

108. See James G. Blase, *Flexible Tax Strategies Now Needed in Succession Planning for Business Owners*, HUCK BOUMA PC, <https://huckbouma.com/flexible-tax-strategies-now-needed-in-succession-planning-for-business-owners/> (last visited Jan. 24, 2023) [<https://perma.cc/8DJA-ZXA6>].

109. Kristin L. Brown, *Filing Gift Tax Returns with 2020 Vision*, 14 EST. PLAN. & CMTY. PROP. L. J. 377, 385–86 (2022).

110. See Blase, *supra* note 108.

111. See I.R.C. § 2523(f)(2).

112. See *id.* § 2523(b)(1).

113. See *id.* § 2056(b)(7)(B).

114. Author's original hypothetical.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

furnishings, and personal effects to Sally, and the rest of his estate to his children.¹²¹

If Sally predeceases Harry, then Sally's executor can elect portability of Sally's estate tax exemption.¹²² So long as Sally is Harry's last spouse to predecease him, her estate tax exemption will be available to Harry's estate at his death.¹²³ If, in the more likely event, Sally survives Harry, then at Harry's death, he will have the benefit of only his estate tax exemption and not Sally's.¹²⁴ No estate tax will be due upon Sally's later death because all of her estate will pass to charity, for which it will receive an estate tax charitable deduction under I.R.C. Section 2055.¹²⁵

In creating the lifetime QTIP trust, Harry should consider certain important state law considerations.¹²⁶ Harry and Sally may have community property that would be particularly suitable for transfer to the trust (because it is expected to appreciate more than other assets or because it generates a reliable stream of income, for example).¹²⁷ However, Harry should only transfer his separate property to the trust and not any community property; Sally should not transfer any of her separate property to the trust.¹²⁸ Ordinarily, one potential problem that would be encountered is estate tax inclusion in Sally's estate under I.R.C. Section 2036 for a retained interest in the property transferred to the trust.¹²⁹ But the QTIP trust structure, as described above, plans for inclusion of the trust assets in the surviving spouse's taxable estate anyway.¹³⁰ However, another problem that may arise is the potential loss of creditor protection provided by the spendthrift clause typically included in the trust agreement; such protection is not afforded to a beneficiary of a "self-settled" trust.¹³¹

If Harry wishes to contribute community property to the QTIP trust, in order to avoid the potential loss of creditor protection, he and Sally should

121. *Id.*

122. See RBC WEALTH MGMT., *Portability of the estate tax exemption*, RBC CAP. MKTS., LLC 1, 1–2 (2020), <https://www.rbcwm-usa.com/resources/file-687701.pdf> [<https://perma.cc/C8ZQ-8YAN>].

123. See *id.*

124. See *id.*

125. I.R.C. § 2055(a)(2).

126. See Bruce D. Steiner & Martin M. Shenkman, *Estate Planning in Decoupled States Post-ATRA*, 13 TR. & EST. 14, 13 (Aug. 2013), https://www.kkwc.com/wp-content/uploads/2015/04/uf_Estate_Planning_in_Decoupled_States_PostATRA.pdf [<https://perma.cc/6T6H-E7YL>].

127. See *QTIP Trust Versus Outright Gift - The Basic Rationale*, STIMMEL, STIMMEL & ROESER (Mar. 17, 2021), <https://www.stimmel-law.com/en/articles/qtip-trust-versus-outright-gift-basic-rationale> [<https://perma.cc/N87P-KR3S>].

128. See *id.*

129. I.R.C. § 2036.

130. Hollis F. Russell, et al., *Lifetime 'QTIPable' Trusts for Gift*, *Estate Tax Exemption Planning*, N.Y. L.J.: TR. & EST. 1, 1–2 (Mar. 17, 2021), <https://www.mclaughlinstern.com/wp-content/uploads/2021/06/NYLJ03172021483509McLaughlin.pdf> [<https://perma.cc/WCD2-MUL7>].

131. See generally TEX. PROP. CODE ANN. § 112.035(d) ("If the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of the settlor's beneficial interest does not prevent the settlor's creditors from satisfying claims from the settlor's interest in the trust estate.").

first enter into a partition agreement by which certain property would be set aside to each of Harry and Sally as their respective separate property.¹³²

Here's how Harry might structure a lifetime QTIP trust for Sally's benefit: Harry may make a taxable gift into an irrevocable trust for Sally's benefit for her lifetime, perhaps in the amount of the current estate tax exemption.¹³³ Harry can serve as trustee and continue to manage the assets, and be a remainder beneficiary of the trust as to both trust income and principal.¹³⁴ Harry can provide for all income to be paid to Sally on an annual or more frequent basis.¹³⁵ In order to utilize the full amount of Sally's estate tax exemption, Harry would need to estimate what the amount of that exemption will be in the future at the time of Sally's death.¹³⁶ This is difficult, if not impossible, to do.¹³⁷ If Harry underestimates the amount of the exemption that will be in effect, then he will underutilize Sally's estate tax exemption.¹³⁸ If Harry is liberal in his estimate and the value of the trust assets exceeds the amount of the estate tax exemption in effect at Sally's death, then Sally's estate will owe some amount of estate tax.¹³⁹ That result may be more palatable because Sally's executor will have the right to recover from the trust the amount of estate tax attributable to inclusion of the trust property in her taxable estate.¹⁴⁰

B. Imperfect but Potential Solution

The QTIP trust assets will be included in Sally's taxable estate at her death.¹⁴¹ However, unless Sally waives her estate's right of recovery, her executor will be able to recover the amount of estate tax attributable to the inclusion of the trust property from the recipients thereof.¹⁴²

Harry will need to file a gift tax return (Form 709) to report the gift he made to the QTIP trust and must elect a marital deduction for the amount of

132. See generally TEX. FAM. CODE ANN. § 4.102 ("At any time, the spouses may partition or exchange between themselves all or part of their community property, then existing or to be acquired, as the spouses may desire. Property or a property interest transferred to a spouse by a partition or exchange agreement becomes that spouse's separate property. The partition or exchange of property may also provide that future earnings and income arising from the transferred property shall be the separate property of the owning spouse.").

133. See Russell, *supra* note 130.

134. See *id.*

135. See *id.*

136. See *id.*

137. See *id.*

138. See *id.*

139. I.R.C. § 2207A.

140. *Id.*

141. See generally I.R.C. §§ 2044, 2523(f) (stating that the value of the gross estate shall include the value of any property in which the decedent had a qualifying income interest for life if a deduction was allowed under I.R.C. § 2523(f)).

142. See I.R.C. §§ 2207A, 2044 (provides for a right of recovery for property included in the taxable estate under I.R.C. § 2044).

the gift so as not to use any of his own exemption from the gift and estate tax.¹⁴³ The election must be made on a timely filed gift tax return and, once made, is irrevocable.¹⁴⁴ The manner of making the election is set forth in the United States Gift (and GST) Tax Return, Form 709, under Schedule A, Part 4, line 4, where it asks the taxpayer to list gifts of interests to a spouse for which a marital deduction will be claimed.¹⁴⁵ The form contains the following specific instructions:

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*.¹⁴⁶

Assuming Harry and Sally remain married to each other and continue to have a good relationship, the QTIP trust will allow Harry to benefit from the income distributed to Sally during her lifetime.¹⁴⁷ Note in our example that no distributions of principal are permitted.¹⁴⁸ Thus, in making the gift to the trust, Harry can contribute income producing property, and in effect, continue to enjoy that income indirectly as Sally's spouse.¹⁴⁹ At Sally's death, or Harry's death if he survives Sally, remaining trust assets can pass down into lifetime trusts for the benefit of each of Marie and Jess, and presumably more

143. See IRS Form 709 1, 1-5 (2022) <https://www.irs.gov/pub/irs-pdf/f709.pdf>.

144. See I.R.C. § 2523(f)(4).

145. See IRS Form 709, *supra* note 143.

146. See *id.*

147. See *id.*

148. See *id.*

149. See *id.*

remote descendants.¹⁵⁰ This technique provides Harry with the use of Sally's estate tax exemption that otherwise would go unused, while accomplishing Harry's objective that the assets benefit his children.¹⁵¹

Although an in-depth discussion of the GST tax is outside the scope of this Article, the lifetime QTIP trust provides an important additional tax benefit that should be mentioned.¹⁵² As with Sally's estate tax exemption, her exemption from the GST tax also would go unused without the QTIP trust.¹⁵³ That exemption could be quite valuable to future generations of Harry's family (the respective descendants of Marie and Jess).¹⁵⁴

A tax is imposed on every GST.¹⁵⁵ Complicated rules and definitions are set forth in the I.R.C. and Treasury Regulations governing imposition of the tax; detailed provisions are set forth for the exemption provided to taxpayers, including the definition of what constitutes a GST.¹⁵⁶ An oversimplified illustration of the tax application is that it would be imposed upon a transfer from Harry to one or more of his grandchildren (the children of either Marie or Jess).¹⁵⁷

Each taxpayer also has a GST exemption in an amount equal to the applicable exclusion amount under I.R.C. Section 2010(c).¹⁵⁸ Assuming the QTIP trust divides into separate trusts that continue for the respective lifetimes of Marie and Jess, and then passes down to their descendants, a GST tax would be imposed on the property at such time unless exempted by the GST exemption.¹⁵⁹ Accordingly, Sally's GST exemption—which otherwise would be unused—could be allocated by Sally's executor to the QTIP trust assets, thereby saving substantial taxes for Harry's grandchildren.¹⁶⁰

If the value of the QTIP trust assets exceeds the amount of Sally's GST exemption available at her death, provisions under the I.R.C. and Treasury Regulations allow for severance of the trust, consistent with the trust provisions, the result could be one trust (the exempt trust) created for Marie or Jess's benefit equal to the amount of Sally's GST exemption and another trust (the non-exempt trust) could be created for the excess over such amount.¹⁶¹ It is important that the QTIP trust agreement include provisions for division or severance of trust created under the agreement.¹⁶² Note

150. *See* I.R.C. § 2207A.

151. *See id.* § 2523(a).

152. *See id.* § 2601.

153. *See id.*

154. *See id.*

155. *Id.*

156. *See id.* § 2631.

157. *See id.*; author's original hypothetical.

158. I.R.C. §§ 2010, 2631.

159. *Id.* § 2631.

160. *Id.* § 2632 (showing that the GST exemption may be deemed allocated to the trusts under the automatic allocation rules of I.R.C. §§ 2631(a) and 2632).

161. *Id.* § 2654 (considering also the treasury regulations thereunder).

162. *Id.*

however, that the Texas Trust Code furnishes authority for the division or severance of trusts.¹⁶³ Additionally, provisions might be included in the trust agreement to grant a beneficiary a general power of appointment for the portion exceeding the amount of the GST exemption (causing intentional inclusion in the beneficiary's taxable estate in order to take advantage of the beneficiary's tax exemptions).¹⁶⁴ Also, severance would allow for different management of the exempt versus the non-exempt trust.¹⁶⁵ For example, the trustee first could make distributions from the non-exempt trust, or deplete those trust assets, before they pass down to grandchildren and incur a GST tax.¹⁶⁶

1. Subsequent Events

Following Harry's creation of the lifetime QTIP trust, important subsequent events may or will occur, one of which is Harry's and Sally's possible divorce.¹⁶⁷ Divorce impacts the QTIP trust in both tax and nontax ways, and is addressed in the discussion below.¹⁶⁸ Also, unless they die together in a common accident, either Sally will survive Harry or vice versa.¹⁶⁹ The consequences of each order of death is discussed in greater detail below.¹⁷⁰

a. Divorce

Although they currently are happy together, Harry and Sally's marriage is not immune from the possibility of divorce.¹⁷¹ Should divorce occur, several issues arise for Harry from the QTIP trust he established.¹⁷² Recall that one of the requirements for the QTIP trust was the "all income annually" requirement mandating that all income be distributed to Sally at least annually.¹⁷³ Once divorced, Sally will continue to receive distributions of trust income and likely not share any of that income with Harry.¹⁷⁴ Additionally, upon its creation, the trust is classified as a "grantor trust" under Section 677 of the I.R.C., meaning that all trust income will be reportable by

163. TEX. PROP. CODE ANN. § 112.057.

164. See I.R.C. § 2654 (considering also the Treasury Regulations thereunder).

165. *Id.*

166. *Id.*

167. Author's original hypothetical.

168. See discussion *infra* Part IV.B.1.a.

169. Author's original hypothetical.

170. See discussion *infra* Part IV.B.1.a.

171. Author's original hypothetical.

172. See *supra* notes 125–28 and accompanying text.

173. See I.R.C. § 2056(b)(7)(B).

174. See *id.*

Harry on his income tax returns.¹⁷⁵ This classification means that all trust income will be taxed to Harry, following their divorce, even though distributed to Sally.¹⁷⁶ Prior I.R.C. Section 682, repealed by the TCJA, provided that, upon divorce, such trust income would no longer be taxed to the grantor but, rather, to the recipient of the income.¹⁷⁷ Is Harry's only consolation the fact that Sally is entitled to receive trust income and not principal and, upon her death, all remaining trust property passes into trust for the benefit of Marie and Jess?¹⁷⁸ And, assuming Sally's estate plan to benefit charity remains unchanged, does Harry take solace from the knowledge that he will have the use of Sally's estate tax exemption to pass property to his children free of estate tax?¹⁷⁹

The possibility of divorce highlights the importance of considering the above issues in advance of any divorce decree or marital settlement agreement and, possibly, even addressing it in the QTIP trust agreement.¹⁸⁰ It is unknown whether the trust agreement could provide for reimbursement of the income tax paid by the grantor in the event of divorce.¹⁸¹ That may be a possible solution, although there is the risk that the IRS would argue for denial of the marital deduction and estate inclusion in the grantor's (Harry's) estate under Section 2036 of the I.R.C.¹⁸² Another manner in which the income tax issue could be addressed in the event of the parties' divorce is for the trust agreement to provide for an independent trustee to have the discretion to reimburse the income taxes to Harry.¹⁸³ This possible solution may pass scrutiny because divorce would be an event of independent significance recognized under the tax law (but, again, could be subject to attack by the IRS).¹⁸⁴

b. Sally Predeceases Harry

If Sally dies survived by Harry, the QTIP trust is included in her taxable estate, as it was designed to do under Harry's estate plan.¹⁸⁵ To the extent her taxable estate exceeds the amount of her estate tax exemption in effect, her estate is reimbursed by the trust for the amount of tax imposed due to the

175. *Id.* § 677 (providing that the grantor is treated as the owner of any portion of the trust, whose income may be distributed to the grantor or the grantor's spouse).

176. *Id.*

177. *Id.* § 682.

178. *See id.* § 2056.

179. *See id.*

180. Author's original thought.

181. *Id.*

182. I.R.C. § 2036 (the IRS could argue that the grantor has retained the right to possession or enjoyment of the income).

183. Author's original thought.

184. *See* Laurel Stephenson, *Divorce-Proofing the Plan: The Planner's Perspective*, State Bar of Tex., 42nd Ann. Advanced Est. Plan. & Prob. Course (2018).

185. *See* Blase, *supra* note 108.

inclusion of the QTIP trust assets.¹⁸⁶ Alternatively, Sally's executor could make a "partial" QTIP election for the portion in excess of the amount of her estate tax exemption.¹⁸⁷ This election would cause inclusion in Harry's estate, but, at a minimum, defer the tax until Harry's death at some time in the future.¹⁸⁸

Sally's executor would allocate all of her exemption from the GST tax to the QTIP trust.¹⁸⁹ If the value of the QTIP trust exceeds the amount of available exemption from the GST tax, the trustee of the QTIP trust may divide it into two trusts such that one is entirely "exempt" from the GST tax and the other is entirely subject to the GST, or "nonexempt."¹⁹⁰ Harry continues to enjoy income from the trust and even principal, if needed, through the remainder of his lifetime.¹⁹¹ At his death, trust assets are not included in Harry's taxable estate—except in case of a partial QTIP election—and remaining assets pass into trusts for the benefit of Marie and Jess.¹⁹²

c. Harry Predeceases Sally

If Harry dies survived by Sally, the QTIP trust will continue for Sally's benefit for her remaining lifetime.¹⁹³ Sally continues to receive all trust income but no trust principal.¹⁹⁴ At Sally's death, the QTIP trust is included in her taxable estate and uses her available estate tax exemption and GST exemption.¹⁹⁵ The value of the trust assets in excess of the estate tax exemption is subject to estate tax, and Sally's estate is entitled to recover from the QTIP trust the amount of estate tax imposed as a result of inclusion of QTIP trust assets in Sally's taxable estate.¹⁹⁶ This is the planned result of the QTIP trust planning undertaken by Harry to make use of Sally's estate tax exemption, which the portability provisions of the I.R.C. would not have afforded him.¹⁹⁷ One disadvantage to using this planning technique is that Sally could live for many more years, delaying delivery of the trust assets for Marie's and Jess's benefit long after Harry's death.¹⁹⁸ Of course, if Sally is agreeable, she could relinquish her interest in the QTIP trust following Harry's death and allow the assets to pass into trusts for the benefit of Marie

186. I.R.C. § 2207A.

187. Treas. Reg. § 20.2056(b)-7.

188. *Id.* § 20.2056(a)-1.

189. *Id.* § 26.2654-1.

190. *Id.* § 20.2056(b)-7.

191. *Id.* § 26.2654-1.

192. *Id.*

193. *Id.* § 20.2056(b)-7.

194. *Id.*

195. *Id.* § 20.2044-1.

196. *Id.* § 2207A-1.

197. *See id.* § 20.2010-2.

198. *See id.*

and Jess.¹⁹⁹ If she did so, it would constitute a taxable gift by Sally in the amount of the full value of the trust assets, and she could use her available estate tax exemption at that time.²⁰⁰ A previously unmentioned benefit of the QTIP trust is that, because of inclusion of the assets in Sally's taxable estate, there is a full step up in basis in the trust assets at the time of Sally's death, assuming appreciation in the value of the trust assets.²⁰¹

V. CONCLUSION

As set forth in the discussion at the beginning of this Article, there is significant benefit to be derived from use of the estate tax exemption of both spouses.²⁰² In rough terms, that benefit may range between just under \$3 million to over \$5 million in estate tax under current law.²⁰³ In enacting the portability or the DSUEA provisions, Congress also recognized the underlying fairness to married taxpayers being able to use both exemptions from the estate tax.²⁰⁴ Some fact patterns, such as the one that is the subject of this Article, do not benefit from the portability provisions, and need special planning in order to utilize both estate tax exemptions.²⁰⁵ The lifetime QTIP trust is one technique that, as illustrated herein, allows the estate tax exemption of both spouses to be fully used where a unique set of facts otherwise would result in the loss of the estate tax exemption of one spouse and the imposition of a significant amount of estate tax.²⁰⁶ The lifetime QTIP trust may be the best approach for using both estate tax exemptions of a married couple, especially where there are so many unknown factors and future events that may impact the ultimate result, including the potential for divorce, remarriage following the first death, fluctuation in the value of a taxpayer's gross estate, and the amount of the estate tax exemption that will be in effect in the future at the time of a taxpayer's date of death.²⁰⁷

199. *Id.* § 25.2511-2.

200. *Id.*

201. I.R.C. § 1014(e).

202. See discussion *supra* Part I.

203. See I.R.C. § 2010(c)(3)(B).

204. See *id.* § 2010(c)(6); Treas. Reg. §§ 20.2010-1 to 20.2010-3.

205. Author's original thought.

206. See I.R.C. § 2056(d).

207. Author's original thought.