

## QUALIFIED TERMINATION INTEREST PROPERTY TRUSTS

A qualified terminable interest property (QTIP) trust is a type of marital deduction trust commonly formed in a will or a revocable living trust. Use of a QTIP trust maximizes the benefit of the marital deduction to defer estate tax consequences at the death of the first spouse while providing for the surviving spouse during life. QTIP trusts are only available for married individuals whose spouses are U.S. citizens.

### **Who Benefits from Creating a QTIP Trust?**

QTIP trusts are most commonly used in two situations: (1) for married individuals whose estates are large enough to incur estate taxes, and (2) for those who wish to preserve assets for children from a prior relationship while providing for the surviving spouse for life. A QTIP trust allows for deferment of estate tax liability until both spouses have passed away. A QTIP trust also provides discretionary access to the funds in the QTIP trust during the life of the surviving spouse while controlling who will ultimately receive the property upon the death of the surviving spouse.

### **How Does a QTIP Trust Defer or Avoid Estate Tax?**

The marital deduction is an unlimited deduction, meaning that any and all assets passed to a surviving spouse will not be subject to estate tax at the death of the first spouse. This includes assets passed to a QTIP trust for the benefit of the surviving spouse. If it is likely that your estate will exceed the federal estate tax exclusion amount (\$11.18 million for 2018), your personal representative may retain the flexibility to implement the QTIP trust upon determination of your tax liability. The assets in the QTIP trust will instead be included in the gross taxable estate of your spouse. At the death of your spouse, estate tax will be due on your spouse's property, but only to the extent the value of your spouse's estate exceeds the federal estate tax exclusion. If your spouse's estate—including the assets in the QTIP trust—does not exceed \$11.18 million, you will have effectively avoided estate taxes on the trust property. If your spouse's estate does exceed the exclusion amount, you have allowed your spouse to use the assets during his or her lifetime by deferring the payment of estate taxes.

### **How Does a QTIP Trust Control Property?**

A QTIP trust provides that the surviving spouse will receive distributions of all income that the property in the trust produces. In the case of real estate, the surviving spouse will have the right to use the property during life. The surviving spouse will not have full ownership of the trust assets, however, and will therefore have no power to sell or give away the assets. The trust will name a trustee to have control over the trust assets. The trustee will manage investment of the trust assets to produce an appropriate income stream, and have the authority to liquidate assets as determined in the trustee's discretion. The surviving spouse can serve as trustee of the trust, or can serve as a cotrustee of the trust. The trust will name

remainder beneficiaries who will receive the property after the death of the surviving spouse. In this way, you can provide for your spouse during life, but also preserve your assets to some degree and ensure that you control who ultimately receives your property, rather than allowing your spouse to decide (as would occur if you left your assets outright to your surviving spouse).

### **How Is a QTIP Trust Created?**

You can create a QTIP trust either in your will or in a revocable living trust. Upon your death, your personal representative must decide whether to make a “QTIP election” on the estate tax return that the personal representative must file for your estate. If the personal representative decides to make the election, he or she must list, on a schedule attached to the estate tax return, the assets that will go into the QTIP trust. Your personal representative must make this election and file the estate tax return within nine months after your death. Personal representatives who must choose whether to make the election should consult with an expert, because the election is irreversible.

Properly prepared and executed QTIP trusts can be very effective estate planning tools. Before creating a QTIP trust, it is very important to discuss your goals with your attorney to be sure that it is the right option for you.

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