Marital Deduction Estate Planning: Variations on a Classic Theme

Joel C. Dobris
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Recent modifications in the tax laws, brought about by the Economic Recovery Tax Act of 1981, have changed traditional methods of estate planning. In the past, limitations on the amount of the marital deduction at death led to several widely accepted types of estate plans. Today, with the new unlimited marital deduction, these plans have to be modified in order to arrive at plans which provide maximum tax savings with maximum benefit to the heirs and beneficiaries.

The... wealthy person will seek ways of conferring benefits on his family and at the same time reducing his tax liability.**

INTRODUCTION

Property transfers between spouses—marital deduction transfers—which take effect when the first spouse dies are the linchpin of most tax-oriented estate plans.1 Transfers which take effect at

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death and which are nontaxable because of the estate tax marital deduction are fundamental because they respond both to the desire to provide for one's spouse and to the desire to reduce taxes. Since 1948, to achieve both of these goals, testators have usually chosen to make use of the estate tax marital deduction.

Until 1981 there were two significant limitations on the use of the marital deduction. First, the amount of the deduction was limited. Second, the surviving spouse had to be given the ultimate power of disposition over the marital deduction.

From Marital Deduction Litigation, 104 TR. & EST. 943 (1965); Friedman, Choosing the Proper Formula Marital Bequest, 58 TAXES 632 (1980); Hastings, Coordinating the Marital Deduction, Orphan's Deduction and Estate Tax Credits, 14th INST. EST. PLAN. ¶ 1900 (1980); Kurtz, The Impact of the Revenue Act of 1978 and the 1976 Tax Reform Act on Estate Tax Marital Deduction Formulas, 64 IOWA L. REV. 739 (1979); Ordower, Tax Act Offers New Choices, 121 TR. & EST. 35 (1982); Polasky, Marital Deduction Formula Clauses in Estate Planning—Estate and Income Tax Considerations, 63 MICH. L. REV. 899 (1965) [hereinafter cited as Polasky, Marital Deduction]; Polasky, Estate Tax Marital Deduction in Estate Planning, 3 TAX COUNS. Q. 1 (1959); [hereinafter cited as Polasky, Estate Tax]; Strauss, Qualified Terminable Interest Property Offers New Opportunities But Many Problems are Unresolved, 9 INST. PLANN. 74 (1982); Trapp, Appreciation, Depreciation, and Basis in Drafting and Funding Marital Deduction Formula Bequests, 13th INST. EST. PLAN. ¶ 300 (1979).


4. The marital deduction is allowed for qualifying transfers made by a decedent to a surviving spouse. See I.R.C. § 2056(a) (Supp. V 1981). This article assumes that the reader is familiar with the terminology and the practice of estate planning prior to the Economic Recovery Tax Act of 1981 (ERTA).

5. See I.R.C. § 2056(a) (1976), amended by Pub. L. No. 97-34, § 403(a)(1)(B), 95 Stat. 172, 301. From 1948 to 1976 the quantitative limit on the marital deduction was one half of the decedent's "adjusted gross estate." See I.R.C. § 2056(c) (Supp. II 1948), amended by Tax Reform Act of 1976, Pub. L. No. 94-455, § 2002(a), 90 Stat. 1520, 1554. The concept of the adjusted gross estate was an essentially single purpose tool designed to limit the marital deduction. See J. Price, CONTEMPORARY ESTATE PLANNING § 5.2, at 228 (1983). The adjusted gross estate was a decedent's gross estate minus the decedent's debts, estate administration expenses, and certain taxes and losses incurred during estate administration that were actually taken as deductions on the federal estate tax return. See Treas. Reg. § 20.2056(c)-1(b) (1958). From 1976 to 1981 the Internal Revenue Code allowed a married person to transfer to a surviving spouse, free of estate tax, the greater of $250,000 or half of his or her adjusted gross estate. See I.R.C. § 2056(c) (Supp. II 1948), amended by Tax Reform Act of 1976, Pub. L. No. 94-455, § 2002(a), 90 Stat. 1520, 1554. See generally R. Covey, supra note 1; Kurtz, supra note 1; Polasky, Marital Deduction, supra note 1; see also J. Price, CONTEMPORARY ESTATE PLANNING § 5.2, at 230 (1982); D. Westfall, supra note 1, § 11.03[1][a] (1981).

The enactment of the Economic Recovery Tax Act of 1981 (ERTA) has changed these limits and thus had a major impact on the estate planning practice. ERTA created a marital deduction, unlimited in amount; a new type of terminable interest (an interest in property over which the surviving spouse does not have the ultimate power of disposition) which qualifies for the marital deduction; an increase in the unified credit that phases in over the next five years; and estate tax rates that decrease over the next four years.

This article focuses on the changes these provisions have brought about in estate planning for married couples when the first meaningful transfers take effect at death and are essentially interspousal in nature. This is an appropriate focus since such...
planning forms the spine of family estate planning. To discuss such planning in light of ERTA one must consider credit shelter provisions, marital formulas, QTI trusts, drafting for simultaneous death situations, and standard patterns of drafting.

**GENERAL CONSIDERATIONS**

The essence of good estate planning is to provide a sensible compromise among various factors. These factors include, among others, tax savings, economic security, the opportunity for survivors to realize their full potential, and a realistic appraisal of the human frailties of the beneficiaries. Some clients will be extremely concerned about taxes and depart from typical notions of proper provision for survivors. Some others will ignore taxes and plan solely for the personal needs of their survivors. Just as the lawyer should be willing to respond to the tax-obsessed client, she should also be willing to respond to the client who is unconcerned about taxes. Most clients, however, seek a harmonious resolution of the competing factors.

Family or human considerations will often take precedence over tax considerations. Such considerations are unaffected by tax law changes. Survivors should be left financially and emotionally secure. Thus, it may be wise to give a particular surviving spouse all of a decedent's property outright, even though it may

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10. See Friedman, supra note 2, at 9.
11. I.R.C. § 2056(b)(7) (Supp. V 1981) now allows a marital deduction for "qualified terminable interest property". Lawyers specializing in estate planning have taken to calling such arrangements "QTIP" trusts. Cheesbroughs-Ponds, Inc. sells a cotton swab under the trademark "Q tip" and is seeking to prevent the use of the trademark term. Schmedel, Tax Report, Wall St. J., Mar. 10, 1982, at 1, col. 5. This article uses the term QTI trusts.
12. Post-ERTA drafting may be less standardized than pre-ERTA drafting. See United States Trust Company of New York, supra note 1, at 12.
13. See generally J. Trachtman, ESTATE PLANNING (rev. ed. 1968) (Trachtman was the dean of sensible estate planning).
15. See T. Shaffer, supra note 14, at 371.
16. See J. Trachtman, supra note 13, at 3; Blattmachr & Lustgarten, Selected Considerations in Structuring Wills (or Will Substitutes) 121 Tr. & Est. 37, 39 (1982).
17. See generally J. Trachtman, supra note 13 (advice to readers not to glorify tax avoidance).
18. Id. at 1-3.
19. Id.
20. See Friedman, supra note 2, at 9.
cost tax dollars.\textsuperscript{21}

Basic tax strategies in estate planning also remain essentially the same after ERTA.\textsuperscript{22} They include, as before, five basic strategies: shifting income within the family; reducing the size of the estate during lifetime; freezing the value of the client's estate; bypassing the estates of survivors; and deferring the payment of estate taxes.\textsuperscript{23}

Similarly, the more specialized tax strategies in marital deduction planning remain the same.\textsuperscript{24} These include: equalizing the spouses' estate tax brackets to take full advantage of the progressive rate structure;\textsuperscript{25} deferring the payment of estate taxes, for a variety of reasons, until the death of the surviving spouse;\textsuperscript{26} making full use of the unified credit in the estates of both spouses;\textsuperscript{27} and delaying current tax liability to take advantage of the more liberal provisions of ERTA,\textsuperscript{28} which are being phased in over the next few years.\textsuperscript{29} In smaller estates the income tax advantages, such as basis step-up,\textsuperscript{30} sprinkling income,\textsuperscript{31} and postmortem income tax planning,\textsuperscript{32} may far exceed estate tax savings.\textsuperscript{33}

\begin{enumerate}
\item One must always be wary of what Mr. Trachtman called "overplanning." J. Trachtman, supra note 13, at 3.
\item See D. Westfall, supra note 1, ¶¶ 12.01-07.
\item J. Price, supra note 5, § 2.27, at 97.
\item See id. §§ 5.22-25.
\item Id. § 5.23 at 265-67; Doussard, Estate Planning After the Economic Recovery Tax Act of 1981, 60 Taxes 22, 25 (1982).
\item J. Price, supra note 5, § 5.24 at 267-68. Deferral is a complex question which is discussed infra. See Halbach, Inter Spousal Transfers and Ownership After ERTA '81, 8 Prob. Notes 122 (1982).
\item J. Price, supra note 5, § 5.25 at 268-70. See generally R. Covey, supra note 1, at 159-67 (early identification of the realities of credit shelter planning).
\item See J. Price, supra note 5, § 5.25. See generally Cornfeld, Marital Deduction: Planning and Drafting, 54 Major Tax Plan. ¶ 1402.1 (1982); Cornfeld, the Use and Abuse of the Unlimited Marital Deduction, 16th Inst. on Est. Plan. ¶¶ 1700, 1702.2 (1982) [hereinafter cited as Cornfeld, Unlimited Marital Deduction]; see also R. Covey, supra note 1, at 159-67.
\item During the period 1982 to 1987 the unified credit will increase from $62,800 to $192,800. During the period 1982 to 1985 marginal estate tax rates will drop from 70% to 50%. See Halbach, supra note 26, at 123.
\item See Wormser, The Problems of the Sprinkling Trustee, 2 Inst. on Est. Plan. ¶ 68.500 (1968).
\item See Brackney, Post-Mortem Planning, is Now Estate Planning, 121 Tr. & Est. 28 (1982); see also Dobris, Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning, 66 Iowa L. Rev. 273 (1981) [hereinafter cited as Dobris, Postmortem Tax Planning]; Dobris, Equitable Adjustments in Postmortem Income Tax Planning: An Unremitting Diet of Warm, 65 Iowa L. Rev. 103 (1979); Solomon, Planning Estates for the Forgotten Middle Class, 18th
And that most basic of will-drafting strategies remains the same—drafting an instrument that will not require constant revision. The tools are formula provisions,34 disclaimers,35 and qualified terminable interest property (QTI) elections.36

The liberalized credit shelter provisions of ERTA enhance preexisting planning techniques.37 Marital deduction estate planning after ERTA continues to employ the standard bypass trust (or save-the-second-tax trust, or B trust) to take full advantage of the decedent's unified credit.38 That is, tax savings can often be effected by putting the unified credit amount into a bypass trust.39

Since 1976, gift and estate taxes have been unified.40 A single, progressive transfer tax is applied to the client's total taxable transfers made during life and at death.41 A credit against this transfer tax allows substantial transfers free of tax.42 This credit increases dramatically from 1982 to 1987. The credit acts, as before, to "shelter" a corresponding amount of property from transfer taxes. Thus a citizen dying in 1987, without having made taxable gifts, will have a unified credit of $192,800 which will "exempt" or "shelter" $600,000.43 And so one can speak in terms of

<table>
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<th>Year</th>
<th>Unified Credit</th>
<th>Exemption Equivalent (or Unified Credit Shelter)</th>
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<tr>
<td>1982</td>
<td>$62,800</td>
<td>$225,000</td>
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<tr>
<td>1983</td>
<td>79,300</td>
<td>275,000</td>
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<tr>
<td>1984</td>
<td>96,300</td>
<td>325,000</td>
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<td>1985</td>
<td>121,800</td>
<td>400,000</td>
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<tr>
<td>1986</td>
<td>155,800</td>
<td>500,000</td>
</tr>
<tr>
<td>1987</td>
<td>192,800</td>
<td>600,000</td>
</tr>
</tbody>
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While lifetime gifts absorbing the credit shelter will often make sense, this article assumes that no gifts have been made, and that the decedent has full access to his
"credit shelter planning." 44

Thus the credit shelter “planner” must immediately face the question of what to do with the credit shelter amount—the $600,000 in 1987.

The tax oriented lawyer’s answer is automatic: bypass the surviving spouse’s estate, usually by use of a classic “bypass trust.” 45 That trust can give the beneficiary substantial access to income and principal, as before ERTA, without subjecting trust principal to transfer taxes when the beneficiary dies. 46

This same credit shelter trust can also be used to save income and gift taxes for the survivors in the standard pre-ERTA ways. It can save income taxes if the trustee is given the power to sprinkle income among the various income beneficiaries, 47 and it can save gift and estate taxes for beneficiaries if they are given nontaxable special powers of appointment. 48

One can skip the credit shelter trust completely without sacrificing tax savings when the beneficiary does not need a trust and when he is expected to die with less than $600,000. 49

Because this discussion is illustrative rather than comprehensive the following discussion holds certain variables constant. While lifetime gifts will frequently be advantageous, the discussion assumes that no gifts have been made before death.

For simplicity, much of this article is written on the assumption that ERTA is fully phased in. That is, the author often assumes it is 1987 and that a decedent can transfer $600,000 free of estate tax. 50

or her exemption equivalent or credit shelter. See Case, Lifetime Gifting Strategies After ERTA, 16th Inst. on Est. Plan. ¶ 1200 (1982).

44. R. Covey, supra note 1, at 159-67; J. Price, supra note 5, § 5.25; United States Trust Company of New York, supra note 1, at 5, 11; Ascher & Kartiganer, supra note 1, at 4; Note, supra note 8, at 203-94. Credit shelter planning is disposing of the amount sheltered by the unified credit from estate tax in such a manner that it will not be included in the surviving spouse’s estate.


46. See generally H. Weinstock, supra note 1, §§ 5.1-39 (for many couples, saving the second tax is the lawyer’s primary contribution).

47. J. Price, supra note 5, ¶ 10.18; see also Wormser, supra note 31, ¶ 68.500 (1968).

48. J. Price, supra note 5, § 10.21 at 607-09. See generally H. Weinstock, supra note 1, § 5.6 (the power of appointment gives added flexibility).


50. In 1987 and years following, the unified credit of $192,600 will shelter $600,000 in property. See Case, supra note 43, ¶¶ 1200-1203.
A further complicating factor which this discussion ignores is the generation-skipping transfer tax. That is done for three reasons: considerations of that tax is outside the scope of this article; there is still some reason to believe it will be repealed, and this article assumes that the beneficiary of the credit shelter trust is the surviving spouse.

**The Marital Deduction**

One of the major changes in ERTA was the addition of the unlimited marital deduction. Property in any amount can now be passed to a surviving spouse, either inter vivos or at death, free of transfer tax. In larger estates one would never use the unlimited marital deduction for the entire estate. To do so would waste the unified credit of the first spouse to die. One would always bypass the surviving spouse's estate to the extent of the credit shelter amount. Thus a wise drafter will put at least the credit shelter amount, the $600,000 in 1987, into a bypass trust.

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52. For several decades there has been concern about the fact that skillful drafting of trusts could keep property insulated from transfer taxation for several generations. *See* e.g., C. Shoup, *Federal Estate and Gift Taxes* 32-49 (1966). Reform proposals were thwarted, in part, by concerns that an effective tax would be inequitable in its application. A fair generation skipping transfer tax system was created but it is perceived by many as too complex. For a period of time it seemed that the tax would be repealed—arguably a triumph of simplicity over equity achieved in a complex fashion. At this writing, repeal seems unlikely to the author. *See Commissioner Egger Discusses Issues Facing The Internal Revenue Service*, 121 Tax. & Est. 10, 12 (1982). On the generation skipping transfer tax, see R. Covey, supra note 51, at 1-3. On the question of simplicity, see generally Halbach, *Toward a Simplified System of Law*, in *Law and the American Future* 143-157 (1978), and *Simplification Symposium*, 34 Tax. L. Rev. 1, 1-3 (1978).

53. If the credit shelter trust is solely for the benefit of the surviving spouse during his or her lifetime then it is exempt from the generation skipping transfer tax. *See* R. Covey, supra note 51, at 272. This is quite common. If the credit shelter trust is primarily for the benefit of the surviving spouse it may or may not be subject to the tax depending on the generation of the other beneficiaries. *See* id. at 273.


56. *See* Blattmachr & Lustgarten, supra note 1, at 18-20; *see also* Blattmachr & Lustgarten, supra note 16.


58. *See generally* H. Weinstock, supra note 1, § 4.8 (a useful discussion of bypass planning).

59. In very large estates the credit shelter may be absorbed by state death taxes. Berall, *Marital Deduction Planning*, 8 Prob. Notes 69, 73 (1982); *see also*
Either disposition makes use of the unified credit and saves the "second" tax on that amount when the surviving spouse dies.

The enactment of ERTA did not affect basic marital deduction goals—minimizing the estate taxes for the couple as a unit, and providing well for the surviving spouse. Prior to 1976 these goals were usually reached by giving the surviving spouse a maximum marital deduction formula gift (outright or in trust) of essentially one-half of the decedent's estate. What remained went into a bypass trust.

In the years 1976-1981, marital deduction planning remained the same for wealthy couples. For people of more moderate means, credit shelter planning emerged. That is, in 1976-1981, in a very narrow band of the estate planning client spectrum, it was possible to maximize tax savings by credit shelter planning. Drafters used the credit shelter first before using the marital deduction in order to maximize transfer tax savings for the couple. However,

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60. The author believes it is wise to give adult children, who are going to inherit great wealth, some money sooner rather than later. This will likely make their lives more pleasant, and accustom them to being propertied persons.

61. See H. Tweed & W. Parsons, supra note 45, at 64-69.

62. See J. Trachtman, supra note 13, at 1-3; H. Tweed & W. Parsons, supra note 45, at 56.

63. See H. Weinstock, supra note 1, §§ 4.1, 5.1-2.

64. See R. Covey, supra note 1, at 1.


66. See generally R. Covey, supra note 1 (a complete discussion of marital formula clauses).

67. The gift can qualify for the deduction if made outright or if put in the proper form of trust. See D. Westfall, supra note 1, ¶¶ 12.01-04.


69. See H. Tweed & W. Parsons, supra note 45, at 64-69.

70. See R. Covey, supra note 1, at 167-68.

71. Id. at 159-62.

72. During the period 1976-1981 the marital deduction was the "greater" of $250,000 or one half of the adjusted gross estate, and the credit shelter equivalent was $175,000. Large estates had sufficient assets to fund both a maximum marital deduction trust in excess of $250,000 and a bypass trust well in excess of $175,000 (which automatically obtained the $175,000 credit shelter). If the estate was greater than $425,000, the bypass trust was still sheltered to the extent of $175,000.

In an estate of up to $350,000, full use of the credit shelter of both spouses would eliminate all estate tax. However, if the maximum marital deduction of $250,000 was left to the surviving spouse by the first to die, and if the survivor died with $250,000, the survivor's estate would exceed the credit shelter amount by $75,000.
because it affected only people of moderate means who ordinarily do not obtain sophisticated estate planning advice, credit shelter planning was not closely considered by the estate planning bar which directs its efforts to larger estates. 73 In other words, prior to the enactment of ERTA most planners used the maximum marital deduction and a bypass trust when planning for prosperous couples. 74 Drafters sought the marital deduction using one of a few standard drafting patterns. 75

After ERTA there is no longer agreement about either how to save the most taxes or what drafting tools to use. 76 Now the only consensus is that one should make full use of the credit shelter. 77 That is, in 1987 the first $600,000 should go into a bypass trust or to the children or other third parties. 78 Beyond that, there is agreement neither on how to save the most taxes nor on which drafting tools are best.

A major point of discussion is how much of the unlimited marital deduction to use. 79 There are three schools of thought:

One—use the unlimited marital deduction to reduce the tax in the first spouse’s estate to zero. 80 This might be called “reduce-to-zero” planning. 81

Two—use the first spouse’s lower estate tax brackets to reduce the overall estate tax cost of both deaths. 82 This is the equaliza-


73 Arguably, credit shelter planning was for the forgotten middle class. See Solomon, supra note 32, §§ 1300-1305.

74 H. Tweed & W. Parsons, supra note 45, at 64-65.

75 See R. Covey, supra note 1, at 8-10.

76 See Blattmachr & Lustgarten, supra note 1; Ordower, supra note 1; Strauss, supra note 1.

77 See, e.g., United States Trust Company of New York, supra note 1.

78 See generally H. Weinstock, supra note 1, §§ 5.1-3 (an overview of bypass planning).

79 See Backman & Frank, Five Factors to Consider in Determining How Much of the Unlimited Marital Deduction to Use, 9 Est. Plan. 194 (1982); Cornfeld, Unlimited Marital Deduction, supra note 28, §§ 1700, 1702; Eubank, ERTA: Estate Planning Aspects, New Options and Mental Reconditioning, 8 Prob. Notes 47 (1982); Garlock, supra note 59; Halbach, supra note 26; Ordower, supra note 1; Note, supra note 8, at 204-08.

80 J. Price, supra note 5, § 5.24, at 267.

81 As the term “reduce-to-zero” planning is used in this article, the estate of the first spouse to die uses the full credit shelter in combination with only so much of the unlimited marital deduction as is required to reduce the first spouse’s estate tax to zero. See J. Manning, Estate Planning 41-44 (1980); J. Price, supra note 5, § 5.24.

82 Dean Price has described the matter in the following manner: After 1984, when the highest marginal estate tax rate will be 50%, the largest amount of additional tax that could result from the use of the unlimited marital deduction is $129,200 if the values remain constant. That
tion of estate tax brackets (not estates). It involves the heretical idea of paying death taxes sooner than absolutely required.

The bypass trust, or gift, then exceeds the credit shelter in an amount sufficient to use the first spouse's lower estate tax brackets.

The third answer is to make even larger estate taxable transfers for a variety of reasons.

\[ \text{amount represents the difference between the tentative tax on an estate of } \$2.5 \text{ million (} \$1,025,800 \text{) and the tentative tax on 2 estates of } \$1.25 \text{ million (} \$448,300 \times 2 \text{ or } \$896,600 \text{).} \]

J. Price, supra note 5, § 5.24, at 268. The point is made visually in charts in Halbach, supra note 26, at 123; MacDonald, Coping with ERTA: What Do You Tell Your Clients? 121 Tenn. & Est. 37, 40 (1982).

83. See J. Price, supra note 5, § 5.23; Garlock, supra note 59, at 237-38; Halbach, supra note 26, at 126-27.

84. See sources cited supra note 79.

85. J. Price, supra note 5, § 5.24. After 1984, when the highest rate has dropped to 50%, the first spouse to die would leave the survivor enough property to put the first spouse's estate in the 49% bracket. See Halbach, supra note 26, at 127-29.

86. The reasons for making post-1984 taxable transfers that generate a 50% estate tax include: (1) a desire to give beneficiaries property sooner rather than later (for example, a parent may want children to receive property at a younger age); (2) a desire to guarantee a transfer in the 50% bracket (if estate tax brackets can come down they can also go back up); (3) a desire to assure that the income from the property goes to the non-spouse beneficiaries during the surviving spouse's life; and (4) a belief that the person who controls the bypass property will be a better investor (for the family as an economic unit) than the person who controls the marital deduction property. As will be shown below, once the unified credit amount has reached its maximum and the highest marginal estate tax rate has dropped to 50% there is no loss if estate taxes are paid "early" in the estate of the first spouse. See Halbach, supra note 26.

Simply put, the analysis is as follows: if the first spouse's estate is in the 50% bracket, and if the second spouse's estate will also be in the 50% bracket, and if the investment performance will be the same, it makes no direct difference if the tax is paid in the first or the second estate. The family unit will end up with the same amount of property after the second spouse's estate pays its estate tax. If taxed in the first estate, the bypass beneficiaries will get only half, but it will not be taxed in the survivor's estate. If the survivor gets twice as much (and is in the 50% bracket) then it will be halved at the survivor's death and the survivor's beneficiaries will get the same amount as they would if the tax was paid early. It has been put as follows:

A simple example will illustrate. If the decedent has two dollars over the . . . [49% bracket] mark and they are transferred to the surviving spouse and that spouse doubled the money before he or she died, then the second estate would be four dollars larger. After paying an estate tax of two dollars, the children would end up with two dollars. If, on the other hand the one dollar (two dollars less one dollar of estate tax) were paid directly to the children, then on the second spouse's death the funds in their hands would also have doubled (it is assumed that the same net of income tax rate of return applies to the children's and spouse's funds) and they would have the same two dollars.
The majority of testators will choose reduce-to-zero planning. This is so because of the powerful appeal of a package which combines paying no taxes with devoting most, if not all, of the decedent's property to the surviving spouse. Because of this appeal, reduce-to-zero planning deserves special attention. The following discussion is based on reduce-to-zero planning. Reiterating, this involves full use of the credit shelter in conjunction with the unlimited marital deduction for the balance of the estate. Several drafting tools are available to divide the estate into these two shares. They are formula clauses, disclaimers, and QTI elections.

Harris, Optimal Use of the Unlimited Estate Tax Marital Deduction, Est. GIFTS & Tr. J. May-June 1982, at 13, 14. See also sources cited supra note 79.

77. Many lawyers will advise married clients that after obtaining the maximum credit shelter, the unlimited marital deduction should be used to reduce the estate tax in the first spouse’s estate to zero. Such planning will be especially popular in the period 1982 through the end of 1986 because estate tax rates will be dropping (until 1985) and the credit shelter will be increasing (until 1987). If the surviving spouse lives until 1987, substantial tax savings will be available in the survivor's estate. The primary virtue of reduce-to-zero planning is tax deferral on spousal assets. The rewards of borrowing the tax money include increasing opportunities to give away or consume assets and avoiding (temporarily or permanently) liquidity problems. The primary flaw of deferral by using the unlimited marital deduction is it throws the surviving spouse's estate into a higher estate tax bracket. This statement applies both to assets left to the surviving spouse and to income and appreciation attributable to those original assets.

As indicated in the text, some testators will choose not to reduce the first spouse's estate tax to zero through the use of the unlimited marital deduction. Rather, they will choose to put additional funds into the bypass trust and pay an “unnecessary” estate tax in the first spouse’s estate. To the extent the property is taxed in the first estate in a lower bracket than it would be taxed in the second estate, this will insulate the additional taxed property and its income and appreciation from the higher tax.

Analysis of the “prepayment” of taxes in the first spouse's estate is ultimately beyond the scope of this article. See, e.g., Ordower, supra note 1. A number of factors must be considered including the life expectancy of the spouse expected to survive, and the family's investment opportunities. However, it should be noted that a prepayment transfer is most attractive when it uses the below-50% rates in the first spouse's estate. That is, after 1986, those testators disposed to prepayment will get the most for their money by giving an additional $1.9 million to the bypass trust. In 1987, the first $600,000 transferred will pass tax-free; the next $1.9 million will pass at rates going from 37% to 49%. Beyond $2.5 million, savings via the progressive rate table in the first spouse to die's estate will not be a factor in the decision.

88. See S. KESS & B. WESTLIN, CCH ESTATE PLANNING GUIDE ¶ 220 (1982).
89. See generally R. COVEY, supra note 1 (fully explores reduce-to-zero planning before ERTA).
90. See Brackney, supra note 32.
91. See Strauss, supra note 1.
FORMULA DRAFTING

A formula is an abstract expression used to describe a gift.92 It is a description of a gift in terms external to the actual property transfer.93 A formula allows the drafter to obtain maximum tax benefits in the face of changing circumstances.94 For example, prior to ERTA this was done by expressing the marital gift in terms of the maximum marital deduction.95 After ERTA one can describe the credit shelter gift by formula with the balance of the estate going to the marital gift.96 Alternatively, one can describe the marital gift by formula and let the balance go to the credit shelter gift.97 Many drafters are describing the credit shelter gift by formula and allowing the balance of the estate to constitute the marital gift.98

Just as either gift can be the formula gift, there are two kinds of formulas, the pecuniary and the fractional.99 A pecuniary formula gift is a preresiduary gift of a dollar amount expressed in abstract terms. A simple example is, “I give each person in my employ at the time of my death $100 for each year of such employment.”100

A fractional formula gift is a gift of a fractional interest in a

92. See generally R. Covey, supra note 1 (a book devoted entirely to formula clauses).
94. See generally Polasky, Marital Deduction, supra note 1; Polasky, Estate Tax, supra note 1.
95. J. Price, supra note 5, § 5.34.
96. Id. § 5.33.
97. See, e.g., United States Trust Company of New York, supra note 1, at 20-37. Lawyers who seek useful forms may wish to look at the following sources, among others: California Continuing Education of the Bar, California Will Draftings Practice (1982); D. Westfall, supra note 1; United States Trust Company of New York, Trust & Will Provisions (1981).
98. There are basically two kinds of formula provisions: the pecuniary formula clause and the fractional formula clause. Additional categories, both intended and unintended, are also recognized. See R. Covey, supra note 1, at 122-38; United States Trust Company of New York, supra note 1, at 1-14.
100. Cf. Morgan Guaranty Trust Company of New York, Wills & Trust Agreements 11 (1978) (the bank form book has a similar form). Mr. Covey’s simplified, pre-ERTA, discussion version of a pecuniary provision is as follows:

If my wife shall survive me, I give to her a legacy in an amount equal to the maximum marital deduction, as finally determined in the Federal estate tax proceeding relating to my estate, reduced by the total of any other amounts allowed as a marital deduction in said proceeding.

R. Covey, supra note 1, at 8.
fund, the fraction to be determined at the death of the testator by the application of the abstract terms. The fund to which the fraction is applied is usually the residuary estate. Typically this type of drafting is reserved for marital deduction planning. The fraction is again defined by an abstract formula written in terms of the marital deduction or the credit shelter.

The question of which formula should be used—pecuniary or fractional—has been debated for years. After ERTA's enactment there is no agreement among drafters about which is preferable; each has both positive and negative characteristics.

Pecuniaries are generally simpler to draft, explain, and administer. However, the gifts described by a pecuniary formula can be affected by changes in value of estate assets during administration. That is, the pecuniary can be affected by market swings. In rising markets several things are true. Post-mortem appreciation goes to the residuary, that is, to the share not described by the formula. The longer the funding of the pecuniary is delayed, the more the residuary benefits. This is so because the pecuniary obligation is then being funded with inflated dollars, leaving more for the residuary. Finally, funding a

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101. Mr. Covey's simplified, pre-ERTA, discussion version of a "true residue" fractional provision is as follows:

All of the rest, residue and remainder of my estate, real or personal, of whatever nature and wherever located remaining after the payment of all death taxes as directed by Article ___ of this Will, debts, expenses of administration and other lawful charges against my estate I give as follows:

A. If my wife survives me, I give to her a fraction of my said residuary estate, which fraction shall be of such size that the numerator thereof will be an amount equal to the maximum marital deduction, as finally determined in the Federal estate tax proceeding relating to my estate, reduced by the total of any other amounts allowed as a marital deduction in said proceeding, and the denominator thereof shall be the value of my said residuary estate, using the values of assets as so determined.

R. COVEY, supra note 1, at 9-10.


103. See UNITED STATES TRUST COMPANY OF NEW YORK, supra note 1, at 1-14. See generally Kurtz, supra note 1.

104. See, e.g., Covey, The Marital Deduction: When to Use, How to Use, 12 REAL PROP. Prob. & Tr. J. 360 (1977); Friedman, supra note 1; see also J. PARR & J. WRIGHT, AN ESTATE PLANNER'S HANDBOOK § 51 (4th ed. 1979).

105. See UNITED STATES TRUST COMPANY OF NEW YORK, supra note 1, at 15.


107. See J. PRICE, supra note 5, § 5.34.

108. Id.

109. See Durand, supra note 1.

110. The statement in the text assumes that the assets in the estate are rising in value. As has been said: "Markets do not always rise even in inflationary times. Furthermore, there are different markets. Real estate can rise in value while stocks are declining." J. MANNING, supra note 81, at 22.

111. This is so because the pecuniary gift is a pre-residuary dollar amount obligation. See J. MANNING, supra note 106, at 48.

112. See Durand, supra note 1.
pecuniary in kind with appreciated property will trigger capital gain for the estate.\textsuperscript{113}

In falling markets, the pecuniary legatee is protected because a pecuniary gift must be fully funded before the residuary legatee receives anything.\textsuperscript{114} The residuary may, therefore, be diminished by slow funding in falling markets.\textsuperscript{115}

By comparison, if a fractional formula is used, both gifts share in gain or loss.\textsuperscript{116} Because the gifts are not of a specific amount, funding them with appreciated property will not trigger gain or loss.\textsuperscript{117} But administration of estates with fractional gifts is more complex.\textsuperscript{118}

Prior to ERTA the pecuniary formula was more popular.\textsuperscript{119} Now, however, fractionals are more attractive\textsuperscript{120} although they are not clearly superior to pecuniaries.\textsuperscript{121} It seems a drafter will no longer be able to use one formula for all clients.\textsuperscript{122}

Assume the drafter has decided to use a pecuniary formula gift for a particular client. Which gift should be the pecuniary formula gift—the credit shelter gift or the marital deduction gift?

Before ERTA the pecuniary gift was almost always the marital gift.\textsuperscript{123} After ERTA many drafters are making the credit shelter gift the pecuniary gift.\textsuperscript{124} In deciding which should be the pecuniary formula gift, the drafter must consider the following, sometimes contradictory, principles.

The smaller gift should always be the pecuniary gift in order to have a “normal” administration with a substantial residuary estate.\textsuperscript{125} The contradictory view is that the marital gift should be

\begin{itemize}
  \item \textsuperscript{113} J. Price, supra note 5, § 5.35, at 280.
  \item \textsuperscript{114} See Durand, supra note 1.
  \item \textsuperscript{115} See Blattmachr & Lustgarten, supra note 16, at 40.
  \item \textsuperscript{116} S. Kess & B. Westlin, supra note 88, ¶ 223, at 410.
  \item \textsuperscript{117} Id.
  \item \textsuperscript{118} Using a fractional formula in a community property state is especially complicated because of further fractionalization. J. Price, supra note 1, § 5.42, at 290.
  \item \textsuperscript{119} J. Price, supra note 5, § 5.32, at 277.
  \item \textsuperscript{120} See United States Trust Company of New York, supra note 1, at 14.
  \item \textsuperscript{121} Id. at 14-15.
  \item \textsuperscript{122} Id. at 15; see also Trachtman, supra note 7.
  \item \textsuperscript{123} Post-ERTA it can be either. See J. Price, supra note 5, § 5.32.
  \item \textsuperscript{124} See Cornfeld, Unlimited Marital Deduction, supra note 28, ¶¶ 1700, 1704.2.
  \item \textsuperscript{125} See United States Trust Company of New York, supra note 1, at 5-6, 11-12; Cornfeld, Unlimited Marital Deduction, supra note 28, ¶¶ 1700, 1704.2. At one point the typical testator did the important business of his will in the pre-residuary clauses. The residuary clause was a catch-all provision to provide for any
\end{itemize}
the pecuniary in most cases, in order to "set" the marital gift. That assures the surviving spouse a fixed amount in a deteriorating economy. And, in a healthy economy, it automatically allocates post-death appreciation to the credit shelter trust. There it will not be taxed when the survivor dies.

However, in the post-ERTA world of the unlimited marital deduction, a formula marital pecuniary gift may turn out to be quite large. An estate with a large pecuniary bequest and a small residuary estate has a special set of administrative problems. These are funding and leverage problems. Funding can be difficult because a pecuniary legacy is an absolute obligation which the executor must satisfy before transferring assets to the residuary legatees. That is, the pecuniary obligation is senior to the residuary. For example, assume the pecuniary bequest is $2,000,000. The executor owes the legatee $2,000,000, which is a large obligation. Given a deteriorating market for the assets in the estate, delay in funding that bequest in kind, or a delay in raising the cash to fund it, can seriously impair or even wipe out the residuary. For example, if a pecuniary legacy constitutes ninety percent of an estate, a ten percent decline in value of estate assets will completely eliminate the residuary. A sophisticated executor can deal with these problems but problems they remain, nonetheless.

missed property or unanticipated circumstances. See T. ATKINSON, WILLS 756 (2d ed. 1953). Simplifying, in modern wills one expects to see much, if not the bulk, of the testator's business done in the residuary clause. It is the pre-residuary bequests that often do the unimportant business of the testator. An obvious exception to the preceding statement is the pre-residuary bequest of a substantial formula amount designed to maximize opportunities under the Internal Revenue Code. Other exceptions exist as well.

126. See J. MANNING, supra note 106, at 48.
127. Id. at 49.
128. See United States Trust Company of New York, supra note 1, at 6.
129. See H. WEINSTOCK, supra note 1, §§ 4.30, 5.2.
130. See United States Trust Company of New York, supra note 98, at 19; H. Weinstock, supra note 1, § 4.30; Cornfeld, Unlimited Marital Deduction, supra note 28, §§ 1700, 1704.1.
131. See generally Durand, supra note 1.
132. Id.
133. The statement in the text is, of course, limited to estate assets. See generally T. ATKINSON, supra note 125, at 754-56.
134. See J. MANNING, supra note 106, at 48-49.
135. See T. ATKINSON, supra note 125, at 754-56.
136. See H. WEINSTOCK, supra note 1, § 4.30, at 69. In the absence of authorization in the will or in local law, the obligation must be satisfied in cash and not in kind. See id. For an example of such an authorization, see H. Tweed & W. Parsons, supra note 45, at 128.
137. See Durand, supra note 1; see also Tarbox, 28 Carmody-Wait, Cyclopedia of N.Y. Practice § 170:13 (1968); Blattmachr & Lustgarten, supra note 16, at 40.

The author has the following comments on the fiduciary problems associated with large pecuniary formula bequests. Large (in all likelihood, unlimited marital
Similarly, the drafter who has decided to use the fractional deduction) pecuniary bequests can create problems in estate administration. As stated in the text these problems are known and can be dealt with to a certain extent. The following assumes the pecuniary formula bequest is going to the surviving spouse, and that a "true worth" clause is being used (a true worth clause is one which allows funding a pecuniary bequest in kind and requires using date of distribution funding values).

The basic problems are as follows: in up markets for estate assets, or in periods of general inflation affecting estate assets, delay in funding leads to the transfer of less value to the pecuniary legatee (surviving spouse) and more value to the bypass trust. That is, the dollar amount received by the pecuniary legatee remains as specified in the will. That dollar amount, due to inflation, is discharged with fewer assets. The benefit of the difference accrues to the residuary. In a "happy family" where the survivor is satisfied with the bypass terms, this is a way to save death taxes in the survivor's estate. The less the survivor gets, the lower the second estate tax. Where conflicts exist, delay in funding the surviving spouse's gift (which costs the survivor investment appreciation) may cause problems. J. MANNING, supra note 81, at 34-35. In up markets, delayed funding will also be likely to lead to funding pecuniary obligations with appreciated assets which will in turn lead to the recognition of capital gain by the estate. See Treas. Reg. § 1.1014-4(a)(3) (1960). This will diminish residuary legatees who must pay the capital gains tax.

In down markets, or periods of deflation, delayed funding of large pecuniary bequests may wipe out the residuary estate. This is so because pre-residuary pecuniary gifts must be satisfied before residuary legacies.

A variety of solutions exist. An executor can be encouraged to take risks (to a limited extent) by inserting language in the will exonerating him from all liability except that caused by gross negligence or wilful misconduct.

The executor can liquidate virtually the entire estate to meet the pecuniary obligation. This will protect the beneficiaries, especially the residuary, against deflation, but will give up access to appreciation during administration, and may create other problems as well.

The executor can make a very large partial distribution on account of the pecuniary legacy. This will shift the market risk of the value distributed to the pecuniary legatee, but will sacrifice the goal of postmortem increase going to the bypass trust.

All adult beneficiaries can be asked to approve the proposed funding plans of the executor, release him from liability, and agree to indemnify him against all losses. To the extent such instruments are based on full disclosure, do not constitute overreaching, are not against public policy, and do not constitute the constructive distribution of assets for tax purposes, this may work to induce a conservative executor to adopt an adventurous and tax-oriented postmortem plan.

The surviving spouse can be appointed the sole executor if the expectation is an up market where slow funding will reduce the postmortem appreciation of the pecuniary legacy. If the survivor is the sole beneficiary of the marital deduction gift, and if the survivor as sole executor chooses to "injure" himself by slow funding, there can be no complaint. However, if the survivor as sole executor is slow to fund and the estate values go down, then the residuary legatees are the injured parties and the spouse is open to surcharge. See J. MANNING, supra note 81, at 33-36. See generally Durand, supra note 1.

It may be that drafters will turn to the pecuniary minimum worth, marital formula clause. See UNITED STATES TRUST COMPANY OF NEW YORK, supra note 1, at 7-9. The most exotic of marital deduction beasts is a pecuniary formula bequest
formula for a particular client must decide which gift is defined by the fraction. The author recommends a credit shelter fraction because it is more straightforward.

QTI TRUSTS

Assume it has been decided to divide the estate, by whatever method, into marital deduction and credit shelter shares. The next question is the form of the marital deduction gift. There are five basic ways to obtain the marital deduction. Three of them existed before ERTA. They are outright gifts, life-interest-power-of-appointment trusts, and estate trusts. ERTA has added two more. They are qualified terminable interest (or QTI) trusts and qualified charitable remainder trusts. Of these two, only QTIs will be discussed here.

Generally speaking, the marital deduction is not allowed for so-called terminable interests. There were pre-ERTA exceptions. And ERTA now allows a marital deduction for certain "qualified" terminable interests. To simplify, ERTA allows a marital deduction for property interests (typically trusts) if: (1) the surviving spouse has a life interest; (2) no one else has any interest in the property during the survivor's life; (3) no one which allows funding in kind at the lower of income tax basis (estate tax value) or date of distribution value. This puts a floor (a minimum worth) but no ceiling on the bequest, and avoids the recognition of capital gain if the bequest is funded with assets which have appreciated. It can also be used for a pecuniary credit shelter bequest.

139. A credit shelter fraction is more straightforward because it involves a more easily determinable amount. For a form of such a provision, see United States Trust Company of New York, supra note 98, at 46.
140. See D. Westfall, supra note 1, §§ 12.01-.04.
141. See Strauss, supra note 1.
142. ERTA allows the first spouse to die to obtain a marital deduction for a QTI in which a charity is the remainder beneficiary (a QTI for charity). ERTA also allows a mixed marital and charitable deduction for both a charitable remainder annuity trust in which the surviving spouse is the annuitant and a charitable remainder unitrust in which the surviving spouse is the unitrust beneficiary. If the trust is a QTI for charity it qualifies at the executor's election for the marital deduction under I.R.C. § 2056(b)(7) (Supp. V 1981). If the trust is a "Q-Crat" or "Q-Crut" then the income interest alone automatically qualifies for the marital deduction under I.R.C. § 2056(b)(8) (Supp. V 1981) and the remainder for the charitable deduction under I.R.C. § 2055 (1976 & Supp. V 1981). Thus the death of the surviving spouse who has a Q-Crat or Q-Crut is a nonevent for estate tax purposes.
143. Q-Crats and Q-Cruts are beyond the scope of this article.
144. J. Price, supra note 5, § 5.10, at 239; see L.R.C. § 2056(b)(1) (1976).
145. Pre-ERTA there were several safe harbors from the effect of the terminable interest rule. See supra note 6.
146. L.R.C. § 2056(b)(7) (Supp. V 1981). An income interest in a "qualified charitable remainder trust" may be created. Id. § 2056(b)(8).
(including the spouse) has any power during the survivor's life to appoint trust property to anyone except the surviving spouse; and, (4) marital deduction treatment is elected by the deceased spouse's executor.\textsuperscript{147}

The marital deduction is available for the full value of the property covered by the QTI election,\textsuperscript{148} even though the spouse may receive as little as an income interest in that property.\textsuperscript{149} At the survivor's death, the property covered by the QTI election is included in the survivor's estate.\textsuperscript{150} The estate tax attributable to the QTI property is payable by the QTI remainder beneficiaries\textsuperscript{151} unless the surviving spouse's will states otherwise.\textsuperscript{152}

Thus, when the client does not want to leave the marital gift outright, a QTI trust is an alternative to the old life-interest-power-of-appointment trust.\textsuperscript{153} These new arrangements are proving to be extremely popular,\textsuperscript{154} arguably for one reason—the QTI allows the first spouse to die to impose dramatic restraints on the gift to the surviving spouse and still obtain the marital deduction.\textsuperscript{155} One assumes, perhaps incorrectly, that in the current so-

\textsuperscript{147} See id. § 2056(b)(7). Pre-ERTA contractual wills inevitably lost the marital deduction because they created terminable interests. See Estate of Opal v. Commissioner, 450 F.2d 1085 (2d Cir. 1971). Post-ERTA contractual wills are likely to create interests which can be qualified for the QTI election. See J. PRICE, supra note 5, § 5.10, at 242. The contractual will is usually used by unsophisticated lawyers. Thus prosperous persons who go to unsophisticated lawyers and get contractual wills will now have access to the marital deduction. This is an arguably unintended ERTA reform. See generally B. SPARKS, CONTRACTS TO MAKE WILLS (1956).


\textsuperscript{149} J. PRICE, supra note 5, § 5.18; see I.R.C. § 2056(b)(7) (Supp. V 1981).


\textsuperscript{152} Id. § 2207A(a)(2); see also Dobris, Postmortem Tax Planning, supra note 32, at 316-17 (intent of testator determines allocation of death taxes).

\textsuperscript{153} I.R.C. § 2056(b)(5) (1976).

\textsuperscript{154} E.g., Strauss, supra note 1, at 74. In drafting QTI provisions the wise drafter will be sensible and not seek to obtain every last dollar out of the QTI device. A pattern in marital dedictions estate planning has developed: when the law changes a general consensus emerges about how to obtain the benefits available under the new statute. Some lawyers then go on to seek the marginal last-dollar benefits. It seems fairly safe to predict that there is very substantial risk in seeking those last benefits. It was such thinking that led to the promulgation of Rev. Proc. 64-19 (1964-1 C.3 682). See Trachtman, supra note 7, at 126.

\textsuperscript{155} See Strauss, supra note 1, at 74. Oversimplifying, and writing subjectively, for centuries much property has been in the name of men. Husbands have often provided at death for their wives by putting substantial amounts of property into trust. At the death of the widow the property would often go to the issue of the marriage. See Leach, Planning and Drafting a Will, 27 B.U.L. Rev. 157, 180-81
cial climate few people die married to spouses they actively dislike. Such constraints, however, may be particularly appealing

(1947). In 1948, the marital deduction was enacted in response to the growing movement to introduce community property regimes into the common law states, which was in turn a response to the growing impact of the essentially 20th century American transfer tax system. See J. Price, supra note 5, § 5.2 at 223; T. Shaffer, supra note 14, at 118. Prior to the marital deduction, most wealthy first-to-die spouses (usually husbands) left their property in trust for the benefit of the surviving spouse (usually the wife). Before there was an estate tax (i.e. pre-1916), this was done because it was what most people wanted or at least expected. Kales, The Will of an English Gentleman of Moderate Fortune, 19 Green Bag 214, 218 (1907). It accorded with the beliefs of many people that women needed the protection of trusts and it guaranteed that the property would go to the issue of the marriage. See J. Shaffer, supra note 14, at 269. Moreover, under the estate tax as it existed before 1948 it made sense from a tax viewpoint to make such an arrangement because at the death of the surviving spouse nothing was included in his or her estate. It constituted classic “save-the-second-tax-trust” planning. Thus, prior to the enactment of the estate tax in 1916, the income-to-the-wife-for-life trust responded to the patriarchal notions of male testators. After the enactment of the estate tax, the tax system reinforced this pattern by responding to the trust as a save-the-second-tax device.

In the Revenue Act of 1948, a series of changes in the tax law were enacted to replicate the effect of community property under the tax system. For the first time there was an incentive to give the surviving spouse (often a widow) something akin to full ownership of a meaningful portion of the husband’s property. That is, in order to obtain post-1948 tax benefits one had to give the surviving spouse a power of disposition over the property. See J. Price, supra note 5, § 5.2

As a result, from 1948 to 1981, the centuries-old pattern of husbands leaving their wives income interests in property (or income plus some access to principal) was disturbed by the tax incentive of the marital deduction as it existed during that period. ERTA has increased the marital deduction but it has made it available to testators who choose the centuries-old income-only trust. It can be argued that the drafting patterns of the period 1948 to 1981 where surviving spouses (so often widows) were given meaningful access to property of the marriage were aberrations from a centuries-old pattern of estate planning.

It will be interesting to see whether ERTA signals a permanent return to the pattern of entrusting the property of widows. At least one author assumes the use of QTI trusts will be very limited. See Peckham, New Estate Planning Techniques For Small and Medium Sized Estates, 54 N.Y. St. B.J. 514, 515 (1982).

It is interesting to speculate on the inspiration for the congressional response to the states’ movement toward community property. The Revenue Act of 1948 benefitted the societal position of women as surviving spouses by encouraging at death transfers to them over which they had the ultimate power of disposition. However, had the Act not been passed, more sweeping changes favoring community property-type control at the state level might have followed. One might ask the question: was the congressional response based on a desire to prevent women from owning half of the marital property in America? The answer is probably not. The likelier explanation is one of legal process. Presumably, the conversion of the property system of most of the American states to community property was understood as being too much for the social system to absorb. Conversion from a common-law system to a community-property system throughout the country would have been achieved only at great cost of time and energy.

ERTA’s arguable retreat from inchoate feminism in the estate tax might be part of a more general step back in our society as arguably witnessed in a recent article of special interest. Bolotin, Voices From the Post-Feminist Generation, N.Y. Times, Oct. 17, 1982, § 6 (Magazine), at 28.

The author believes that the observations in this footnote are accurate. To the
to a testator who has children by a previous marriage\textsuperscript{156} or who is concerned that the survivor may remarry and frustrate an estate plan previously agreed upon.\textsuperscript{157} Moreover, there will be many testators who believe their spouses need the protection of a constraining trust.\textsuperscript{158}

As drafters, lawyers will have to help their clients decide whether the QTI is going to be mean or generous.\textsuperscript{159} The minimum QTI need provide nothing more than income to the surviving spouse for life.\textsuperscript{160} This minimum QTI is not a very handsome provision for a survivor. Most testators will probably add additional lifetime access.\textsuperscript{161}

At death, the QTI property could pass as directed by the terms of the will of the first spouse to die.\textsuperscript{162} Alternatively, the survivor could be given a special testamentary power of appointment, as limited or as broad as the first spouse desires.\textsuperscript{163}

Lawyers have a professional responsibility to offer wise coun-

\textsuperscript{156} See Peckham, supra note 155, at 515.

\textsuperscript{157} See H. WEINSTEIN, supra note 1, § 4.20-24.

\textsuperscript{158} See J. MANNING, supra note 81, at 46-47.

\textsuperscript{159} See generally Trachtman, \textit{A Credo for Estate Lawyers}, 100 Tr. & Est. 871, 873 (1961) ("the testator is inexperienced—he has never died before").


\textsuperscript{161} That might include a power in the trustee to invade principal for the spouse and/or a power in the spouse to withdraw principal during life, subject to an ascertainable standard.

\textsuperscript{162} See Strauss, supra note 1.

\textsuperscript{163} See J. PRICE, supra note 5, § 5.18.
Although each lawyer must decide how strongly to urge the case for generous treatment of the survivor, one hopes that all clients will be advised to use the QTI trust in a generous, and not a mean, fashion.\textsuperscript{165}

The QTI provisions of ERTA create a variety of new coordination and drafting problems for estate planners.\textsuperscript{166} A primary concern is coordination between QTI marital deduction gifts and credit shelter provisions.\textsuperscript{167} As already indicated, the primary tools for coordination are formulas, disclaimers, and QTI elections. Formulas have been used for some time to divide estates into marital and nonmarital shares.\textsuperscript{168} These formulas are still very useful with QTI property, as a formula gift may be put into a QTI trust. A disclaimer—an unqualified refusal to accept an interest in property—has also been used for many years as a tool in flexible postmortem estate planning.\textsuperscript{169} Initially a state law concept, disclaimers are now governed for federal transfer tax purposes by a federal standard enacted in ERTA.\textsuperscript{170} ERTA has also dramatically increased their usefulness.\textsuperscript{171} An estate tax rate which decreases over the next several years and a unified credit which increases over several years make postmortem flexibility all the more important.\textsuperscript{172} And disclaimers allow reduce-to-zero planning decisions to be postponed until the first spouse’s death.\textsuperscript{173}

One application of this very valuable tool is coordination of the marital deduction gift in QTI form and the credit shelter disposition.\textsuperscript{174} Assume a testator has established a QTI plan which relies on a disclaimer for coordination of the marital deduction transfer and the credit shelter gift.\textsuperscript{175} Then the testator would leave essentially all of his or her property to the QTI trust and fol-

\textsuperscript{165} See generally B. Partridge, Country Lawyer 237 (1939).
\textsuperscript{166} See J. Price, supra note 5, § 5.18; H. Weinstock, supra note 1, § 4.20-.24.
\textsuperscript{167} See Strauss, supra note 1.
\textsuperscript{168} See generally R. Covey, supra note 1 (detailed discussion of formula clauses).
\textsuperscript{170} I.R.C. § 2518(c) (3) (Supp. V 1981).
\textsuperscript{171} See Moore, The New Marital Deduction Qualified Terminable Interest Trust: Planning and Drafting Considerations, 16th Inst. on Est. Plan. ¶¶ 900, 906 (1982).
\textsuperscript{172} See generally J. Price, supra note 5, §§ 12.26-.29 (explanations of disclaimers).
\textsuperscript{174} See id. ¶ 404.2.
\textsuperscript{175} See id.
low with a credit shelter trust to receive any disclaimed property. Since a surviving spouse can disclaim part or all of a QTI trust the disclaimed QTI property, by the terms of the will, could pass in the desired amount into the credit shelter trust.

QTI elections are another tool for postmortem coordination between marital deduction and credit shelter provisions. The QTI election is a creation of ERTA. It allows the executor of the first spouse to die to elect marital deduction treatment for all or part of otherwise qualifying property. An executor can thus elect QTI treatment for part of a single trust, with the remainder of the trust passing tax free under the credit shelter disposition.

Another facet of QTIs—death tax apportionment—must also be handled with care. Several points should be noted. As with all marital deduction transfers, death taxes, if any, in the first spouse’s estate should not be allocated to the marital portion. This will avoid circular tax-on-tax computations. In the sur-

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177. Id.
178. However, the survivor must have no power over that disclaimer trust, or the government will seek to tax the disclaimed property in her estate also. See Proposed Regs. § 25.2518-2(e)(2).
179. See Moore, supra note 171, ¶ 904.
181. The author believes that most QTI elections will take place under the following circumstances. First is the situation where a sophisticated lawyer has drafted a formula will which creates two transfers—the credit shelter transfer and the marital deduction QTI transfer. The executor, as part of a prearranged reduce-to-zero plan, will elect marital deduction QTI treatment for the QTI trust. Second is the situation where a sophisticated lawyer has created a single trust for the surviving spouse with the idea that the executor of the first spouse to die will elect partial QTI treatment in a manner designed to maximize credit shelter and reduce-to-zero planning opportunities. Third is the situation where the testator has obtained unsophisticated advice and has simply created a trust for the surviving spouse which happens to qualify for QTI treatment. Then the executor has the same opportunity as the executor in the second situation to elect QTI treatment if he or she becomes aware of the tax subtleties. To the extent that the QTI election has the effect of allowing persons with unsophisticated lawyers to obtain a marital deduction, it is good. Any tax rule that places a premium on obtaining sophisticated counsel is presumptively unwholesome.
183. See generally Blattmachr & Lustgarten, supra note 16, at 42; Keydel, supra note 138, at 51-52; Moore, supra note 171, ¶ 908; Mulligan, Drafting Marital Deduction Formula Clauses After ERTA to Achieve Maximum Tax Savings, 57 J. OF TAX'N 362, 367-68 (1982); Suter, Techniques to Apportion Estate Taxes Will Have to be Reviewed Due to the New Tax Law, 9 EST. PLAN. 96 (1982).
184. See Blattmachr & Lustgarten, supra note 16, at 42-43. In the estate of the
vor's estate, ERTA allocates the estate tax on QTI assets to the QTI remainder beneficiaries. That tax is paid at the survivor's marginal estate tax rate. In the interest of certainty and efficiency it would be wise to empower the QTI trustee to pay those taxes directly. That way the executor of the surviving spouse can arrange with the QTI trustee, rather than with the QTI beneficiaries, for payment of the estate tax attributable to the QTI trust. The surviving spouse can, by will, exonerate the QTI trust from paying any taxes.

State death taxes may also affect QTI planning. The law is some states has not kept up with ERTA. The drafter must be sure that a QTI trust obtains the marital deduction in the testator's domiciliary jurisdiction. In some states it may be necessary to forgo QTI drafting to the extent of the state marital deduction.

State fiduciary law may also affect the executor's QTI elec-

186. I.R.C. § 2207A (Supp. V 1981); see J. PRICE, supra note 5, § 5.18, at 259-60.
187. See Keydel, supra note 138; Mulligan, supra note 183, at 367-70.
188. See Keydel, supra note 138; Mulligan supra note 183, at 368. That should avoid problems of dealing with hostile or unbusinesslike beneficiaries.
189. See Mulligan, supra note 183, at 367-70. Presumably the surviving spouse cannot direct in his or her will that death taxes not attributable to the QTI trust be assessed against it. Moore, supra note 171, ¶ 908.
190. See Moore, supra note 171, ¶ 903.
191. See, e.g., UNITED STATES TRUST COMPANY OF NEW YORK, supra note 98, at 25-26; Garlock, supra note 59, at 239-40; McCaffrey & Kalick, Estate Planning, N.Y.L.J., Nov. 15, 1982, at 1, col. 1.
192. See, e.g., Garlock, supra note 59, at 239-40.
193. For example, in New York there was a 50% marital deduction for which QTI trusts did not qualify. Then, a drafter might have used a credit shelter bequest, a pre-ERTA 50% marital deduction trust, and then a QTI trust only for the balance which would be subject to state death tax irrespective of form. See UNITED STATES TRUST COMPANY OF NEW YORK, supra note 98, at 25-26; Garlock, supra note 59, at 239-40; McCaffrey & Kalick, supra note 191. See generally Blattmachr, N.Y. Conforms to U.S. Rules For Estate and Gift Taxes, N.Y.L.J., Dec. 27, 1982, at 1, col. 2 (discussion of recent changes in New York law).
tion. He may have a duty to minimize estate taxes in the first spouse's estate. This might require him to elect full QTI treatment in the first spouse's estate of all property above the credit shelter amount, that is, "reduce-to-zero." He might save tax dollars for the family unit, however, by paying lower bracket taxes in the first estate. The QTI executor should be given broad powers to deal flexibly with the QTI election.

Finally, it is to be noted that a spouse must receive all the income from the QTI. The rule must be satisfied, as in every other year, in the year of the survivor's death. Thus, the trust should provide that the accrued, but undistributed, income go to the survivor's estate (or that the income be subject to a general power of appointment).

This discussion of the QTI would be incomplete without a brief reference to conflicts of interest and questions of professional responsibility. Prior to ERTA, testators who wanted the marital deduction estate planning

196. See generally Ordower, supra note 1.
197. For an example of such flexible powers, see California Continuing Education of the Bar, California Will Drafting Practice § 6.52 (1982); United States Trust Company of New York, supra note 98, at 25.
199. See generally Flaherty, Conflicts of Interest Arising in the Two-Spouse Estate Planning Context, Est. Gifts & Trs. J. May-June 1982, at 17; Moore, supra note 171, ¶ 910; Strauss, supra note 1, at 79-80; see also J. Manning, supra note 81, at 34-35 (criteria for selecting formulas); Dobris, Postmortem Tax Planning, supra note 32, at 290-321.
200. Questions can arise at both the planning stage and during an estate administration.
tal deduction had to make a generous provision for their spouses. The QTI provisions allow a marital deduction for a mere income interest. An attorney has a duty to provide advice as well as technical services and the author believes that all concerned are best served when lawyers advise testators to be generous with their spouses.

The availability of the income-only QTI might create a conflict of interest between spouses at the drafting stage. If it does not create a conflict of interest, it at least does create a question of legal etiquette. The spread between the minimum QTI and an outright gift is very great. Therefore, the lawyer may wish to initially address the question of the marital deduction in a separate conference with the wealthier spouse. However, once the wealthier spouse picks the marital deduction format, the same lawyer should be able to represent both spouses in most situations.

The QTI can also create conflicts of interest after the client dies. Virtually all of these will involve conflicts between beneficiaries. Under particular circumstances the QTI election can affect beneficial interests. The attorney representing the executor must alert the executor to this problem. The attorney must

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203. See supra note 155.
205. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (Proposed Final Draft 1982); see also supra text accompanying note 164.
207. CALIFORNIA CONTINUING EDUCATION OF THE BAR, ESTATE PLANNING FOR THE GENERAL PRACTITIONER §§ 2.14–25 (1970); Kahn & Gallo, supra note 207; Flaherty, supra note 201; Strauss, supra note 201, at 79-80.
208. One commentator sees a duty of disclosure of QTI planning to both spouses. See Strauss, supra note 1, at 80.
209. See Kahn & Gallo, supra note 206.
210. See generally sources cited supra note 207; see also Miller, Functions and Ethical Problems of the Lawyer in Drafting a Will, 1950 U. Ill. L.F. 415.
211. See Moore, supra note 171, ¶ 910; Strauss, supra note 1, at 79-80; see also Brackney, supra note 32; Developments in the Law—Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244 (1981).
212. See J. MANNING, supra note 81, at 35.
213. The QTI election can effect the timing of paying death taxes, the amount of death taxes paid, and the sources from which the death taxes are paid. Thus, the potential will often exist for rearrangement of beneficial interests (to one degree or another) by the exercise or nonexercise of the election power. See generally Dobris, Postmorten Tax Planning, supra note 32 (discussion of how elections may change the size of marital deduction gifts).

To the extent that the executor of the first spouse to die chooses to pay any taxes by way of QTI election, less money is devoted to the surviving spouse, and whoever bears the cost of death taxes in the first estate receives fewer dollars.

If the executor of the first spouse to die chooses to reduce the death taxes to zero, when the surviving spouse dies the QTI remainder beneficiaries pay tax on the QTI at the surviving spouse's marginal rate, unless the surviving spouse
also make it abundantly clear to the beneficiaries that she does not represent them. This avoids the risk of the lawyer for the executor entering into a de facto representation of the beneficiaries who have by hypothesis conflicting interests. This also has the effect of making the beneficiaries aware that they must obtain separate counsel if they are dissatisfied with the executor's QTI election.

**SIMULTANEOUS DEATH**

The unlimited marital deduction also affects drafting for the simultaneous death of both spouses. Simultaneous death is, for purposes of this article, the situation in which husband and wife die simultaneously or under circumstances which make it impossible to exonerate the remainder interest from that tax out of his own assets. I.R.C. § 2207A (Supp. V 1981).

Who is harmed by postponement is a function of too many variables to allow for generalization. The variables include the terms of the particular QTI trust, the estate tax brackets of both spouses, the amount left in the QTI trust at the death of the survivor, and the identity of the nonmarital beneficiaries in the first spouse's estate. All contribute to the "answer" in a particular case. There is no doubt that, given the right set of circumstances, the QTI election could enhance one beneficiary at a cost to another. See Moore, supra note 171, ¶ 910.

Because there may be conflicting interests between beneficiaries, the lawyer will want to clarify for her fiduciary client the problems that may exist. The lawyer will also want to be sure that no beneficiary relies on the lawyer because of the potential conflict. These problems are exacerbated if the fiduciary is a beneficiary. Then the fiduciary will have a personal conflict of interest and the question will not simply be one of impartial exercise of a management power by a disinterested fiduciary. See Mueller v. Mueller, 28 Wis. 2d 26, 135 N.W.2d 854 (1965).

Resolution of these problems will involve accommodating the duty of impartiality, the duty to maximize estate assets by minimizing taxes, and the duty to act with **minimal** skill. Moreover, part of the answer depends upon to whom one believes the first spouse's executor owes a duty. Is it to the couple as a financial unit or is it (as is more likely) to the beneficiaries of the first spouse's estate? These questions are further complicated by the fact that there are no equitable adjustments for impositions made by the inequitable impact of death taxes. Dobris, Postmortem Tax Planning, supra note 32.

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217. See Ascher & Kartiganer, supra note 1, at 7. See generally R. Covey, supra note 1, at 195-99; J. Price, supra note 5, §§ 5.12, at 244-45.
sible to determine which one died first. For simplicity's sake assume a testamentary transfer. If the testator and the expectant legatee die simultaneously then the law presumes the legatee died first, and he then loses the gift under the common law doctrine of lapse. Thus, if H leaves property to W, she (or more accurately, her estate) will lose the gift. And if W leaves property to H, then he (or more accurately, his estate) will lose the gift. This presumption can cost an estate the marital deduction. Without more, this loss of the marital deduction may cost the couple as a financial unit extra death taxes. This is so because the couple loses the opportunity to equalize estate tax brackets in the estates via a marital deduction transfer. Thus the drafter may want to reverse the presumption, in whole or in part, to save taxes.

There is an ideal disposition, from a tax viewpoint, when there are simultaneous deaths. The drafter would use the credit shelter in both estates and then equalize both sets of estate tax brackets by a marital deduction transfer to the "poorer" spouse. The careful lawyer might also draft to avoid the cost of administering assets in both estates. Finally, the drafter might well choose a disposition which both secures the marital deduction and allows the property to pass under the terms of the wealthier spouse’s will.

218. See Uniform Simultaneous Death Act § 2 (1953).
219. If transferor and transferee die simultaneously or under such circumstances as to make it impossible to determine who predeceased whom, then the transferor is deemed to have survived the transferee, thereby depriving the transferee of the property (and perhaps the transferor of the marital deduction). Most estate planners choose to reverse this rule of the Uniform Simultaneous Death Act in order to preserve the marital deduction. See generally id.
220. Id.
221. T. Atkinson, supra note 125, at 777-83.
223. Id.
224. See generally J. Price, supra note 5, § 5.12, at 244-45; R. Covey, supra note 1, at 185-99.
226. See Ascher & Kartiganer, supra note 1, at 7-8.
227. For a sample of such language, see United States Trust Company of New York, supra note 98, at 23.
228. The same disposition would also be useful for close order deaths. See Keydel, supra note 138, at 33.
229. See J. Price, supra note 5, §§ 5.22-.25.
230. See id.
231. See J. Manning, supra note 106, at 72.
232. Such might well be the combined effect of Articles Tenth and Eighteenth of the form of will in Tweed and Parsons. See H. Tweed & W. Parsons, supra note 45, at 117-19, 125. With the spouse dead, the advantages of deferral of death taxes via the marital deduction are gone. Therefore, it may not make sense to use the unlimited marital deduction past the point of using the deemed survivor's credit shelter and lower estate tax bracket. If there is a simultaneous death the wealth-
There are three ways to accomplish these goals. They are formula equalization clauses,\textsuperscript{233} partial disclaimers by the poorer spouse’s executor,\textsuperscript{234} and partial QT\textsuperscript{2}I elections.\textsuperscript{235}

Partial QT\textsuperscript{2}I elections, now clearly permissible,\textsuperscript{236} are an attractive tool for fine tuning in simultaneous death situations.\textsuperscript{237} They appear to be simple both to draft\textsuperscript{238} and administer, and the QT\textsuperscript{2}I election can be delayed until nine months after the first death.\textsuperscript{239} Equalization clauses and executor disclaimers are available but are arguably less attractive than QT\textsuperscript{2}I elections.\textsuperscript{240} Formula equalization clauses for simultaneous death situations are too cumbersome.\textsuperscript{241} Executor disclaimer of the marital gift will clearly create problems of fiduciary duty if the two wills have different legatees.\textsuperscript{242}

ier spouse's estate should be allocated, through precise drafting, first to his or her own credit shelter bypass, second to the deemed survivor’s credit shelter (using a trust in the deemed first decedent’s estate so the property does not actually pass through the deemed survivor's estate, or become subject to his/her control), and third to the deemed survivor's estate in an amount sufficient to put the two estates into the same estate tax bracket (again using a trust in the deemed first decedent's estate to avoid second probate, etc.). To summarize, it may make sense to roughly equalize the estate tax brackets in the event of simultaneous deaths.

If the survivor lives for six months, the “ideal” will might then provide a further bequest to take advantage of the unlimited marital deduction in order to obtain the benefits of tax deferral.

Obviously, postmortem planning through disclaimers by the deemed spouse’s estate, or partial QT\textsuperscript{2}I elections by the deemed predeceasing spouse’s executor, will provide the desired results in a less cumbersome fashion, and the QT\textsuperscript{2}I election can be made up to nine months after death.

\textsuperscript{233} See J. Price, supra note 5, § 5.23.


\textsuperscript{235} See generally Brackney, supra note 32 (discussion of partial QT\textsuperscript{2}I elections as a postmortem planning tool).


\textsuperscript{237} See generally Brackney, supra note 32 (discussion of postmortem planning after ERTA).

\textsuperscript{238} Essentially, no sophisticated drafting is required to create a QT\textsuperscript{2}I trust and once the trust is created the election is automatically available under the Internal Revenue Code. See I.R.C. § 2056(b)(7) (Supp. V 1981).

\textsuperscript{239} See Brackney, supra note 32.

\textsuperscript{240} See Blattmachr & Lustgarten, supra note 1, at 21; Blattmachr & Lustgarten, supra note 16, at 43-44.

\textsuperscript{241} The statement in the text is subjective and assumes an equalization clause for simultaneous death purposes only. See generally J. Price, supra note 5, § 5.2 (history of marital deductions).

\textsuperscript{242} The surviving spouse's executor may be under a fiduciary duty to disclaim no property unless the beneficiaries are the same under both wills or he is specifi-
Although estate planning experience is still somewhat limited under ERTA, and the long-range effects have yet to be determined, estate planning patterns are emerging. Which patterns are most effective for tax saving purposes depends in large part upon the size of the estate. Estates fall into three rough categories. The first is the modest estate— one in which the combined assets of both spouses are less than the amount of the unified credit. That is, for purposes of this article, a modest estate is one in which, if all of the first spouse's property goes outright to the survivor, the survivor will still incur no estate tax liability on death.

In 1983 a husband with $275,000 who wants to leave it outright to his wife (who, let us assume, has no assets of her own) need not worry about bypass planning or the credit shelter. An outright gift to her will qualify for the unlimited marital deduction and will "waste" his credit shelter. However, it will not matter because when she dies the $275,000 will undoubtedly be protected by her credit shelter. Inflation of that $275,000 is most unlikely to keep pace with the increase in the credit shelter over the next four years.

In contrast, if a husband has $400,000 in 1983, there would be some tax risk in leaving all his property to his wife. Her estate would incur an estate tax unless she survived until 1985 when her credit shelter would cover the $400,000.

If that risk is a concern, as where, for example, the clients are...
older, then some credit shelter planning may be in order. In other words, the question is: Will both spouses die before the unified credit increases to cover the family property? The probability of a “yes” answer may justify the increased cost and complexity of drafting a trust to take advantage of the first spouse’s credit shelter.

It is appropriate to turn next to the second category of estate. Recall that the three categories are a function of estate size as related to the credit shelter amount. Using 1987 figures, the next category consists of estates in the $600,000 to $1,200,000 range. It seems useful to call them medium-size estates. They require more thought. In such estates, with careful planning, no estate tax need be paid at either death—in 1987. More specifically, the drafter can use both spouses’ credit shelters in conjunction with the unlimited marital deduction in the first spouse’s estate.

An example will illustrate the point. Assume it is 1987 and H has 1.2 million dollars, and W again has nothing. If H predeceases W, the first $600,000 can go into a credit shelter trust and the second $600,000 can pass under the unlimited marital deduction. The husband’s estate will have zero tax liability because of the combined effect of the credit shelter and the marital deduc-

257. The discussion in the text assumes the wealthier spouse dies first. If not, the family could lose the marital deduction. The solution is gifts to the “poorer” spouse during life which take advantage of the unlimited gift tax marital deduction and which are designed to use the poorer spouse’s credit shelter at death. See generally Case, supra note 43.
258. See, e.g., Peckham, supra note 155, at 516.
259. See, e.g., id.
260. Id. at 517.
261. Id. at 517, 543-45.
262. It can be said that it is socially unwholesome to have a tax system which taxes or fails to tax owners of medium-sized estates as a function of whether or not they get good lawyers. Trusts still work their tax magic, but as Professor Maudsley wrote in another context, “Clearly, the great days of using trusts for avoiding taxes on capital have gone forever.” H. HANBURY & R. MAUDSLEY, MODERN EQUITY vi (10th ed. 1976).
263. The example in the text is stark, unrealistic and over-simplified. It is, however, a classic hypothetical. In our society, marriage patterns and mortality patterns suggest that husbands do indeed die first. And, in our society, husbands often have more property of the marriage in their names than wives do. This is not the case, of course, in community property states. And one assumes it is less the case in newer marriages.
264. See generally J. PRICE, supra note 5, §§ 5.22-25 (tax plan objectives).
tion.265 The wife’s estate, that is the $600,000 legacy from the husband, will also generate zero estate tax liability.266 It will be completely within her credit shelter.

These two gifts—the credit shelter gift and the marital gift—can be made in a number of ways. Several drafting patterns have emerged.267 They involve either postmortem planning268 or formula provisions.269

Drafting patterns which rely on postmortem planning are currently attracting considerable interest.270 The first pattern relying on postmortem planning gives the residuary outright to the surviving spouse.271 It is followed by a “disclaimer” trust also for her benefit;272 that is, the wife rejects a portion of the outright gift to her.273 Under the terms of H’s will the property so disclaimed goes into the disclaimer trust. However, she is given no power over the trust which will cause it to be taxed in her estate under the proposed disclaimer regulations.274

This plan depends on the surviving spouse disclaiming the credit shelter amount.275 This disclaiming of an amount equal to the decedent’s credit shelter equivalent takes full advantage of the opportunity to transfer property free of estate tax in the first spouse’s estate.276 The more the disclaimer trust provides for the surviving spouse, the more likely she is to disclaim the appropri-

265. See generally id.
266. The $600,000 will pass tax free under the wife’s credit shelter. This assumes no inflation of the $600,000. See Backman & Frank, supra note 79, at 197.
267. The wise drafter will try to stay as close as possible to traditional drafting patterns. This allows her to build on a base of prior doctrine. She will also adopt standard patterns of disposition. This will provide access to a useful body of cases and commentary that will emerge. See generally Trachtman, supra note 7 (a brief for common sense in estate planning).
268. See generally Brackney, supra note 32.
269. See generally Cornfeld, Unlimited Marital Deduction, supra note 28, ¶¶1703-1704.5.
270. The attraction of drafting based on postmortem planning is the flexibility and the ability to postpone decisions until the dust settles.
271. This pattern is discussed first for several reasons. It is the simplest to draft, explain, and administer. It is the least imprinted with tax oriented complexities. That is, it comes the closest to leaving everything to the surviving spouse that a tax-oriented lawyer can endorse. It is the disposition the author would most like to receive. And it is the most “modern” of the dispositive patterns.
272. See generally Melvoin, supra note 173 (a general discussion of disclaimers).
273. This can be done under I.R.C. § 2518(c)(1) (1976). See generally Melvoin, supra note 173; Saunders & Jackson, supra note 234.
276. Id. at 8.
ate amount. These provisions are suitable for the testator who is only creating a trust for tax purposes.

The second pattern consists of transferring the residuary to a generous QTI trust with provision for spousal disclaimer into a generous credit shelter trust. This is similar to the first dispositive pattern except that the survivor's marital deduction gift is held in trust instead of being given outright. Again, obtaining the credit shelter in the first spouse's estate is a function of post-mortem planning which relies on the survivor's disclaimer.

The third pattern relies for flexibility on the first spouse's executor rather than on the surviving spouse. The testator leaves the entire residuary to a single QTI trust, relying on the executor to make only a partial QTI election with the balance constituting the credit shelter share. Now that it is clear that the partial QTI election is available, it should become a standard, though somewhat limited, tool. The attraction is simplicity and access to postmortem flexibility.

The next two patterns involve the use of pecuniary formula gifts in the medium sized estate. There are several variables which will complicate this discussion. The variables include the size of the estate, the size of the unified credit, and the question of which gift is to be pecuniary. Beginning in 1987 the size of the estate will dictate which gift is to be the pecuniary gift. That is, most drafters have as a goal a normal administration—an estate with a substantial residuary estate. Thus, in larger estates the pecuniary would be the credit shelter gift and in smaller estates it would be the marital deduction gift in order to obtain a.

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277. Id.
278. See I.R.C. § 2518(c)(1) (1976); Ascher & Kartiganer, supra note 1, at 4, 6-7.
280. See, e.g., United States Trust Company of New York, supra note 98, at 29, 67-68; Ascher & Kartiganer, supra note 1, at 4.
282. The limitations are discussed in United States Trust Company of New York, supra note 1, at 1-2.
283. See Peckham, supra note 155, at 516.
284. See generally id.
286. Post-ERTA it can make sense for either the credit shelter gift or the marital deduction gift to be the pecuniary.
287. See United States Trust Company of New York, supra note 1, at 14.
normal administration with a substantial residuary estate. However, during the ERTA phase-in period the credit shelter is a loose cannon on deck. Initially, in 1982, it was an easy to fund $225,000. The amount increases annually and by 1987 the $600,000 credit shelter can present dramatic funding problems for the executor of many medium-sized estates, for example in the $800,000 range. Conversely, in this size estate, if the marital share is chosen as the pecuniary gift it could present funding problems in the early years but not in the later years.

A simple example using the $800,000 estate will illustrate. For decedents dying in 1987 the pecuniary marital deduction gift would be no higher than $200,000 because most of the estate will go to the credit shelter trust. Two hundred thousand dollars is a very manageable pecuniary bequest in an $800,000 estate. However, if the hypothetical $800,000 testator died in 1983, the pecuniary marital gift would be much larger because the unified credit would still be comparatively small. The potential funding problems are such that drafters may choose to use a fractional formula in this size estate through the ERTA phase-in period.

The final pattern is a standard fractional division of the entire residuary estate into a credit shelter portion and a marital deduction portion. The credit shelter gift might well be a sprinkle trust. The marital legacy could either be given outright or in a generous QTI trust. For simplicity the formula would define the credit shelter gift.

Drafting for large estates—those over $1,200,000—is similar in many respects to drafting for moderate estates. As discussed, a tax on the first estate can be eliminated by combined use of the unified credit and the unlimited marital deduction. Or it might be preferable to incur some tax in the first estate in order to use

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288. See id.
290. See Peckham, supra note 155, at 544.
291. See generally Durand, supra note 1 (a discussion of the administrative problems created by pecuniaries).
292. The pecuniary marital gift could be as high as $525,000. This would still be manageable, but more skill might be required. See generally id.
293. See United States Trust Company of New York, supra note 1, at 14.
294. See, e.g., United States Trust Company of New York, supra note 98, at 46.
295. See generally, Wormser, supra note 31, ¶ 63.500 (a discussion of the obligations of the sprinkling trustee).
297. The credit shelter fraction is easier to express because it is a function of the unified credit shelter, a known figure.
298. See generally Garlock, supra note 59 (a brief for prepaying taxes on larger estates).
the first spouse's lower tax brackets. However, the basic assumption of this discussion is reduce-to-zero planning. Most of the drafting patterns suitable for the medium-sized estate are appropriate for a large estate also. A pecuniary formula marital bequest is not suitable, however. A credit shelter residuary would be a disproportionately small part of a large estate. A disproportionately large marital pecuniary formula gift would be difficult to fund. And any decline in the value of the estate's assets during administration would be completely absorbed by the relatively small residuary.

The author's personal choice in very large estates would be as follows—a formula, pecuniary, credit shelter disposition followed by a residuary marital deduction gift, with further provision for a disclaimer trust in the event that the surviving spouse chooses to partially disclaim the marital gift to prepay taxes. In medium-sized estates, because of the dramatic shift in the credit shelter amount during the next few years, the author would rely on postmortem planning at least until 1987. Alternatively, in medium-sized estates, at least during the phase-in period, the author's somewhat reluctant conclusion is that the safest pattern is the standard fractional formula. The choice of the fractional disposition eliminates the problem which the increasing credit shelter amount presents in the medium-sized estate when a pecuniary gift is used. The reluctance is due to the complexity associated with administering fractional marital deduction bequests.


301. See UNITED STATES TRUST COMPANY OF NEW YORK, supra note 1, at 5-6, 14.

302. See Durand, supra note 1. It might also create unnecessary capital gains on funding.

303. The statements in the text are simplified for purposes of illustration. The smaller estates in the large-estate range will not dramatically differ from the larger estates in the medium-estate range. Pecuniary maritals will not overhang large estates until they start to fall into the two, three, four million dollar range. This is obviously a continuum on which the pecuniary legacy becomes progressively more burdensome as the size of the estate increases. The residuary credit shelter trust will never be $600,000 because of debts and expenses and perhaps because of state death taxes. At the lower end of the large estate range the pecuniary marital will not overhang the estate to the extent it will in larger estates.

304. See J. Price, supra note 5, § 5.34.

305. The surviving spouse might also disclaim to allow property to fall into the disclaimer trust to benefit the beneficiaries of that trust.

306. See UNITED STATES TRUST COMPANY OF NEW YORK, supra note 1, at 14. The
CONCLUSION

Post-ERTA estate planning relies substantially on modifications of preexisting principles and patterns. The thoughtful drafter can accommodate herself to the latest tax reform with a modicum of effort.\textsuperscript{307}

choice is "reluctant" because of the complexities of fractional dispositions. J. Price, supra note 5, § 5.48. See generally Kurtz, supra note 1.

\textsuperscript{307} The author would like to end this paper, as he began it, with a quote from Professor Maudsley. In his introduction to the tenth edition of MODERN EQUITY, Professor Maudsley wrote "of the respect and affection in which . . . [Professor Hanbury was] held by generations of friends and pupils." Let the same be said of Professor Maudsley as well. H. Hanbury & R. Maudsley, Modern Equity vii (10th ed. 1976).