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THE MARITAL DEDUCTION QTIP PROVISIONS: ILLOGICAL AND DEGRADING TO WOMEN

Wendy C. Gerzog*

Whether or not estate and gift tax reform occur soon, the final product of the American Law Institute's Federal Estate and Gift Tax Project . . . will provide basic source material for those who consider revision of the Federal statutes taxing property transfers — for a long, long time.[1]

INTRODUCTION

In 1981, Congress enacted the qualified terminable interest provisions (QTIP)[2] that allow an estate and gift tax marital deduction for the full value of the underlying property where a spouse receives only a qualifying income interest for life[3] and

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* Professor of Law, University of Baltimore, School of Law. I would like to thank my helpful colleagues, Fred Brown, John A. Lynch, and Walter Schwidetzky, and my able research assistants, Susan Oliveri and Alphonzo Butler. I want to extend special thanks to Robin Klein for her encouragement and research assistance. I would also like to thank Professor Jesse Dukeminier for his comments and kind remarks.

1. Laurens Williams, *The American Law Institute's Federal Estate and Gift Tax Project (Its History, Current Status and Timetable)*, 25 N.Y.U. INST. ON FED. TAX'N 1395, 1407 (1967) (emphasis added).

2. The Economic Recovery Tax Act (ERTA) of 1981, Pub. L. No. 97-34, § 403(d)(1), 95 Stat. 172, 302–03 (1981) [hereinafter ERTA]. QTIP is the acronym for "qualified terminable interest property," which is defined as property:

(I) which passes from the decedent,
(II) in which the surviving spouse has a qualifying income interest for life, and
(III) to which an election under this paragraph applies.

I.R.C. §§ 2056(b)(7)(B)(i), 2523(f)(2); *see also* Treas. Regs. §§ 20.2056(b)-7(b), 25.2523(f)-1(b).

3. A qualifying income interest for life is found in the surviving spouse where:

where the executor of the estate or the donor spouse makes a timely election.[4] Generally, however, the availability of the estate and gift tax marital deduction is restricted to the transfer of property ownership itself from one spouse to the other.[5] That is, under the terminable interest rule, most terminable interests, such as a life estate or a life income interest in a trust, do not qualify for the marital deduction.[6] There are two reasons for the

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> (I) The surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property, and
>
> (II) no person has a power to appoint any part of the property to any person other than the surviving spouse. Subclause (II) shall not apply to a power exercisable only at or after the death of the surviving spouse. To the extent provided in regulations, an annuity shall be treated in a manner similar to an income interest in property (regardless of whether the property from which the annuity is payable can be separately identified).

I.R.C. § 2056(b)(7)(B)(ii); *see* Treas. Regs. §§ 20.2056(b)-7(d), 25.2523(f)-1(c).

4. I.R.C. §§ 2056(b)(7)(B)(v), 2523(f)(4). In the case of the estate tax marital deduction, the executor must make the election on the last timely-filed return or, where such return is not timely filed, on the first late estate return that is filed. In the case of the gift tax marital deduction, the donor must make the election on the last timely-filed gift tax return. Once the election is made, it is irrevocable. *Id.*; *see* Treas. Regs. §§ 20.2056(b)-7(b)(4), 20.2056(b)-7(c), 25.2523(f)-(b)(3).

5. Even the exceptions to the terminable interest rule are justified as equivalents of property ownership. Thus, for example, I.R.C. § 2056(b)(5) allows a marital deduction for a qualifying life interest coupled with a general power of appointment. *See infra* note 45 and accompanying text; *see also* U.S. TREASURY DEPARTMENT'S GENERAL AND TECHNICAL EXPLANATION OF H.R. 3849, 97TH CONG., 1ST SESS., *reprinted in* TAX MANAGEMENT PRIMARY SOURCES, SERIES IV 8 (Tax Management Inc. ed., 1982) [hereinafter TREASURY ERTA EXPLANATION].

6. Besides the elimination of the current QTIP provisions, this author advocates the repeal of the terminable interest rule; however, only the value of the interest actually transferred to the surviving spouse should be eligible for the marital deduction. Interests such as those created under current I.R.C. §§ 2056(b)(5), 2523(e), and 2056(b)(6), since equivalents of ownership, could be valued as fee interests. *See infra* note 45. Many advocates of eliminating the terminable interest rule have made the proposal that only the transferred interest be valued; thus, if only a life estate were transferred to the surviving spouse, only its value should be included. *See, e.g.*, Harry L. Gutman, *Reforming Federal Wealth Transfer Taxes After ERTA*, 69 VA. L. REV. 1183, 1256 (1983). That is, if a taxpayer only transfers a life estate to his or her spouse, only the value of that life interest should be eligible for the marital deduction. In light of the new rules governing the valuation of annuities and life interests, *see* I.R.C. § 7520, enacted by the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 5031(a), 102 Stat. 3342, 3668 (1988), and the Internal Revenue Service's ability to apply a 1980 ruling in its own favor, some of the problems of underinclusion adhering to valuing life or term interests have been or could be alleviated, making repeal of the terminable interest rule more acceptable, *see* Rev. Rul. 80-80, 1980-1 C.B. 194, 195 (wherein the Service stated it would only depart from traditional valuation tables where the individual's death was imminent). Although this ruling concerned § 2037 life expectancies, the Service could

terminable interest rule. First, the decedent/donor is not transferring the underlying property to the surviving spouse. Second, the terminable interest would initially be undervalued in the estate of the first spouse to die, and at the expiration of the terminable interest, nothing would be included in the surviving spouse's estate.[7] Congress adopted the QTIP provisions as an extension of its contemporaneous decision to select the marital unit as the unit of taxation for estate and gift taxes.[8] Congress believed that most couples view property acquired during the marriage as "ours."[9] Therefore, Congress reasoned that as long

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more generally take this position. *See* Joseph M. Dodge, *Redoing the Estate and Gift Taxes Along Easy-to-Value Lines*, 43 TAX L. REV. 241, 349 n.474 (1988); Joseph Isenbergh, *Simplifying Retained Life Interests, Revocable Transfers, and the Marital Deduction*, 51 U. CHI. L. REV. 1, 31–32 (1984). Isenbergh suggests that to remedy this problem the statute could require that the surviving spouse's estate include whatever value was deducted on the return on the first spouse to die. *Id.* at 32. However, it might be preferable to resort to such equivalence only where the surviving spouse has died significantly before his or her predicted life expectancy, resulting in a significant undervaluation. Such treatment would parallel the Service's position in Rev. Rul. 80-80, 1980-1 C.B. 194. Whether the terminable interest rule is repealed, however, the QTIP provisions as currently written are clearly illogical and degrading to women.

7. I.R.C. §§ 2056(b)(1), 2523(b); *see* Treas. Regs. §§ 20.2056(b)-1, 25.2523(b)-1. If the decedent spouse is allowed a marital deduction for a transfer of a life estate to his or her surviving spouse with the remainder to his or her children, only the value of the remainder interest is subject to taxation when the the first spouse dies. This value could be substantially less than the total value of the property. When the surviving spouse dies, since the life estate is extinguished at his or her death, nothing is included in that second estate. The combined effect of this scenario would be to provide taxpayers with a terrific tax avoidance device.

8. With ERTA, Congress enacted an unlimited marital deduction. The ERTA version of this benefit was no longer based on the desire to equalize the treatment of couples who lived in common law property states with those who resided in community property law states. Rather, the unlimited marital deduction was designed to treat married persons as the proper economic unit for transfer taxation, consistent with the same decision for income taxation, because most married persons considered marital property as belonging to both spouses. Other justifications for the change to an unlimited marital deduction included the desire to remove problems involved in tracing of interspousal transfers, to aid married couples with more modest estates, and to simplify the administration of the provision. *See infra* part I.

9. *See, e.g.*, TREASURY ERTA EXPLANATION, *supra* note 5, at 39; *see also Public Hearings and Panel Discussions on the General Subject of Federal Estate and Gift Taxes, Part 2 of 2: Hearings Before the House Comm. on Ways and Means*, 94th Cong., 2d Sess. 1187 (1976) (Statement of Charles M. Walker, Assistant Secretary for Tax Policy, Dep't of Treasury.) [hereinafter Statement of Charles M. Walker]; FEDERAL ESTATE AND GIFT TAXATION RECOMMENDATIONS ADOPTED BY THE AMERICAN LAW INSTITUTE AND REPORTERS' STUDIES (1968), *reprinted in* HOUSE WAYS AND MEANS COMM., 94TH CONG., 2D SESS., BACKGROUND MATERIALS ON FEDERAL ESTATE AND GIFT TAXATION 311, 355 (Comm. Print 1976) [hereinafter A.L.I. RECOMMENDATIONS]; U.S. TREAS. DEP'T, 91ST CONG., 1ST SESS., TAX RE-

as the property is subject to transfer taxes when it leaves the marital unit it is not necessary that the surviving spouse own, or control the ownership of, the underlying property.[10] After all, with married couples sharing such identity in their marital property, Congress did not consider any problems arising from one spouse having actual control over the transfer of property. However, the reality is that only one spouse (the donor spouse or decedent) controls the transfer of the underlying property. Making a QTIP election, including naming the ultimate beneficiary of the property, does not in fact require both spouses' participation. In the case of a gift, the donor alone makes that election; in the case of a testamentary transfer, the executor of the QTIP trust has that responsibility. In both cases, it is the transferor alone who determines the final recipient of the property, and in both instances it is a transfer to a non-spouse. Thus, it was a rather Herculean leap in logic that led Congress to state that the QTIP provisions reflect the shared decision-making of a husband and wife in a marriage.

Further, Congress believed that the QTIP provisions would not create problems of undervaluation and tax avoidance because the full value of the underlying property would be included in the surviving spouse's estate. Here too, Congress was mistaken in its analysis. The QTIP offers the tax benefit of deferral for transfers made to a third party of property that the surviving spouse never owned or controlled. In so structuring the QTIP, Congress has created an inequity between transfers made to children (or other third parties) where there is a surviving spouse and transfers made to children of a single parent.

There is no cogent policy argument to explain this unequal treatment. When an unmarried individual transfers property, such as a vested remainder interest, to his or her children, he or she is subject to transfer taxes at that exercise of control over the property. Similarly, when a married person establishes a QTIP, he or she is, at that time, creating a future interest in the underlying property in his or her children, but he or she is allowed to defer taxation because of the fiction that both spouses are making a joint decision.

FORM STUDIES AND PROPOSALS, (Joint Comm. Print 1969) [hereinafter 1969 TREASURY PROPOSALS], *reprinted in* A.L.I. RECOMMENDATIONS, *supra*, at 258.

10. JOINT COMM. ON TAX'N, 97TH CONG., 1ST SESS., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, at 233 (Joint Comm. Print 1981) [hereinafter 1981 JOINT COMM. EXPLANATION]; *see also* Dodge, *supra* note 6, at 345.

While the 1981 legislative history of the QTIP provisions is couched in politically correct, gender neutral terms, the provisions themselves are rooted in the prejudices and stereotypes of the 1960s and can only be explained as a gender-biased, paternalistic, and degrading treatment of women. The QTIP's current income distribution requirement is merely an illusion given to the widow[11] to pretend that an income interest is as valuable as ownership of the underlying property. The QTIP "current beneficial enjoyment"[12] requirement has no logical explanation except as a "bone" being tossed to the obsequious surviving spouse. This lack of a logical basis for requiring that the income from the property be distributed to the surviving spouse has resulted in an ongoing conflict between the Tax Court and the Ninth Circuit and has recently caused Congress to propose anomalous legislation.[13] Indeed, a simplified version of the QTIP with no current

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11. Women more often survive their husbands and are, therefore, ordinarily "the surviving spouse." For persons 65 years and older, in 1992, 15% of the males were widowed as compared to 48.3% of the females; the figures for 1980 were 13.5% of males and 51.2% of females of that age group. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1993, at 45 (113th ed. 1993). In 1969, the Treasury Department estimated that 94% of widows survive their husbands for one year, 88% for two years, 73% for five years, 54% for 10 years, 27% for 20 years, and 9% for 30 years. 1969 TREASURY PROPOSALS, *supra* note 9, at 260 (from a table based on data from matching estate tax returns). The Treasury Department did not even offer statistics on the number of years men survived their wives.

Moreover, it is clear from the legislative history of the QTIP provisions that it is the widow who was intended to be "protected" by these provisions. *See infra* part IV. Thus, while the legislation is written in gender neutral terms, because statistically more decedents/donors are men and surviving spouses/donees are women, this author will be using gendered pronouns throughout this article.

12. The current QTIP provisions' qualifying income interest for life is rooted in the current beneficial enjoyment test that the American Law Institute (A.L.I.) recommended in 1969. *See* A.L.I. RECOMMENDATIONS, *supra* note 9, at 355; *see also infra* part IV.

13. As a result of the conflicting Tax Court and Ninth Circuit decisions in Estate of Howard v. Comm'r, 910 F.2d 633 (9th Cir. 1990), *rev'g* 91 T.C. 329 (1988), Congress has proposed, in each attempted tax legislation from 1991 through 1994, that an income interest qualify for QTIP treatment even if the income accumulated from the last distribution date to the time of the surviving spouse's death is neither required to be paid out to the surviving spouse's estate nor subject to a power of appointment by the surviving spouse. *See* Tax Simplification and Technical Corrections Bill of 1993, H.R. 3419, 103d Cong., 1st Sess. (1994); The Tax Simplification Act of 1993, H.R. 13, 103d Cong., 1st Sess. § 703 (H.R. 13 was combined with H.R. 17, The Technical Corrections Bill of 1993); The Revenue Act of 1992, H.R. 11, 102d Cong., 2d Sess. § 4703, (H.R. 11 was passed by both Houses of Congress but vetoed by President Bush); Tax Simplification Act of 1991, H.R. 2777, 102d Cong., 1st Sess. § 403; JOINT COMM. ON TAXATION, 103D CONG., 1ST SESS., TECHNICAL EXPLANATION OF THE TAX SIMPLIFICATION ACT OF 1993, at 208 (Comm. Print 1993) [herein-

pay-out requirement would be more logically compatible with its purported legislative intent.[14] Since Congress merged the interests of husband and wife and provided that their property would not be taxed until the death of, or earlier relinquishment by, the surviving spouse, why require that the surviving spouse enjoy any incident of actual property ownership?

On the one hand, revising the QTIP to eliminate any current income distribution requirement would create more flexibility in estate planning and would be attractive in situations where each spouse has adequate assets in his or her own right. On the other hand, such a change would neither correct the sexism inherent in the QTIP provisions nor offer a logical policy basis for allowing the deferral of taxation in the first instance.

This article will review the history of the marital deduction and its evolved rationale, explain and analyze the current QTIP provisions together with their supposed comity with the decision to adopt the marital unit as the proper unit of transfer taxation, illustrate how the QTIP demeans women, and propose that Congress repeal the QTIP provisions.

I. A Brief History of the Marital Deduction

Congress enacted the marital deduction in 1948[15] in order to give married couples in common law states tax benefits comparable to the tax benefits available in community property law jurisdictions.[16] Prior to its enactment, community property law states had given married persons the transfer tax advantage of tax equalization and deferral. Regardless of which spouse originally

after Joint Comm. Explanation of 1993 Tax Bill]; John Turro, *Bill Could Force Exempts to Pay UBIT on Foreign Dividends*, 63 Tax Notes 1085, 1087 (1994).

The recently promulgated Treasury Regulation is in accord with the proposed legislation and the Ninth Circuit's decision in *Estate of Howard. See* Treas. Regs. § 20.2056(b)-7(d)(4), finalized by T.D. 8522, 1994-11 I.R.B. 6.

Despite its reversal by the Ninth Circuit in *Estate of Howard*, the Tax Court recently reiterated its interpretation of the QTIP provisions in Estate of Shelfer v. Comm'r, 103 T.C. 10 (1994), and refused to say how it would rule under the finalized regulation.

14. *See* Howard E. Abrams, *A Reevaluation of the Terminable Interest Rule*, 39 Tax L. Rev. 1, 24 (1983) (questioning the income requirement of the QTIP provisions); Gutman, *supra* note 6, at 1254–59.

15. Revenue Act of 1948, Pub. L. No. 471, § 361, 62 Stat. 110, 117-121.

16. H.R. Rep. No. 1274, 80th Cong., 2d Sess. 21, 24–26 (1948), *reprinted in* 1948-1 C.B. 241, 260–61 [hereinafter 1948 H.R. Rep.]; S. Rep. No. 1013, 80th Cong., 2d Sess. 22, 26–29 (1948), *reprinted in* 1948-1 C.B. 301 [hereinafter 1948 S. Rep.]; *see* Treasury ERTA Explanation, *supra* note 5, at 38; A.L.I. Recommendations, *supra* note 9, at 353.

earned or acquired marital property, one-half of a couple's assets was included in the estate of the first spouse to die.[17] Thus, under the marital deduction as it was first enacted, taxpayers were entitled to deduct 50% of their non-community property assets that they transferred to their spouses.[18] As with the outcome in community property law states, all estates could be equalized, and all taxpayers could benefit from the overall lower tax rates secured by splitting an estate. Likewise, the marital deduction enabled any married couple to defer paying taxes on one-half of its property until the death of, or earlier transfer by, the surviving spouse.

For the next twenty-eight years, Congress made only minor revisions to the marital deduction provisions.[19] In 1976, in order to allow married persons to transfer small or moderate estates to each other tax-free,[20] Congress increased the estate tax marital deduction to the greater of $250,000 or one-half of the decedent's adjusted gross estate.[21] At the same time and for substantially the same reason,[22] Congress expanded the gift tax marital deduc-

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17. The advantage of splitting the inclusion of a couple's total marital assets is that, if the monied spouse dies first, he or she will be taxed on only one-half of those assets. Because the other spouse automatically owns the other half of the assets, there is no transfer. Therefore, these assets are not taxed until the surviving spouse later transfers the property. In addition, by equalizing the spouses' estates, each spouse is able to take full advantage of lower tax brackets and any other exemption or credit to which each individual is entitled. *See* 1948 H.R. REP., *supra* note 16, at 24–26; 1948 S. REP., *supra* note 16, at 26–29.

18. I.R.C. § 812(e)(1)(H) (1939), which became I.R.C. § 2056(c) (1954).

19. The 1954 I.R.C. amended § 812(e) so that life estates as well as income interests in a trust would qualify for the marital deduction where they were combined with a general power of appointment in the surviving spouse. JOINT COMM. ON INTERNAL REVENUE TAX'N, 83D CONG., 2D SESS., SUMMARY OF THE NEW PROVISIONS OF THE INTERNAL REVENUE CODE OF 1954 (H.R. 8300) AS AGREED TO BY THE CONFEREES 115 (Comm. Print 1955). Also, The Technical Amendments Act of 1966 clarified that, under certain circumstances, property interests received by the surviving spouse because of a disclaimer by another person are deemed to be interests satisfying the "passing" requirement. The Technical Amendments Act of 1966, Pub. L. No. 89-621, § 1, 80 Stat. 872 (amending I.R.C. § 2056(d)(2) (1954)); *see* H.R. REP. No. 1513, 89th Cong., 2d Sess. 5 (1966); S. REP. No. 1599, 89th Cong., 2d Sess. 5 (1966).

20. *See* H.R. REP. No. 1380, 94th Cong., 2d Sess. 17 (1976) [hereinafter 1976 H.R. REP.].

21. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2002(a)(1)(A), 90 Stat. 1520, 1854 (1976).

22. *See* 1976 H.R. REP., *supra* note 20, at 17 ("Your committee further believes that the present limitation on transfers to a spouse free of gift tax is too restrictive and tends to interfere with normal interspousal lifetime transfers.").

tion to shield the first $100,000 of interspousal gifts as well as 50% of such gifts above $200,000.[23]

In 1981,[24] Congress enacted both the unlimited marital deduction[25] and the QTIP exception to the terminable interest rule.[26] The unlimited marital deduction reflected a decision to treat a husband and wife as one unit for the purposes of transfer taxation,[27] a decision which paralleled the choice of the married couple as the proper unit for income taxation[28] and solidified the concept that a husband and wife's property is really "theirs."[29] During a marriage, property is often transferred between spouses and commingled. Thus, the provision has also been justified as a

23. Tax Reform Act of 1976, Pub. L. No. 94-455, secs. 2002(b), (d)(2), 90 Stat. 1520, 1854–55 (1976) (amending I.R.C. § 2523(a) (1954)). Before the 1976 amendment, the gift tax marital deduction, like the estate tax provision, allowed a deduction equal to one-half of the property transferred to one's spouse.

24. ERTA, *supra* note 2, secs. 403(a)(1)(B), (b)(1) (amending I.R.C. §§ 2056, 2523 (1954)). Between 1976 and 1981, Congress again made only minor revisions in the marital deduction provisions. Specifically, the Technical Corrections Act of 1977, Pub. L. No. 96-600, sec. 701(g), 92 Stat. 2763, amended I.R.C. § 2056(c)(1)(B) (1954) to explain that the marital deduction is not reduced for a gift to the decedent's spouse includable in the decedent's estate under I.R.C. § 2035 (1954) by reason of its being "in contemplation of death." Also, the Revenue Act of 1978 clarified that there is no reduction in the marital deduction for gifts included in decedent's gross estate because they were deemed to be made in contemplation of death under I.R.C. § 2035 (1954). The Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763.

25. I.R.C. § 2056(a). ERTA, *supra* note 2, sec. 403(a)(1)(A) repealed I.R.C. § 2056(c) (1954), which contained the dollar and percentage limitations placed on the deduction. The adoption of the unlimited marital deduction and the married couple as the unit of estate and gift taxation has rarely been criticized by scholars or practitioners. *See* Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 123 (1990) (merely remarking on the dearth of criticism of these 1981 changes).

26. ERTA, *supra* note 2, at sec. 403(d)(1) (adding §§ 2056(b)(7)–(8)). These provisions are applicable to decedents dying after 1981. *Id.* at § 403(e)(1).

27. With the unification of estate and gift taxes in 1976, Congress reviewed the 1969 Treasury Proposals to expand the marital deduction to 100% of interspousal transfers. *See* 1969 TREASURY PROPOSALS, *supra* note 9, at 203–04. Similarly, the A.L.I. recommended the unlimited marital deduction as a way that married couples, in transferring property to others, could take full advantage of both spouses' lower transfer tax brackets. *See* A.L.I. RECOMMENDATIONS, *supra* note 9, at 357–58; *see also* Isenbergh, *supra* note 6, at 32 ("Viewed broadly, the unlimited marital deduction has the effect of treating spouses as a single taxpayer with lifetime equal to the survivor's.").

28. *See* S. REP. No. 144, 97th Cong., 1st Sess. 127 (1981) [hereinafter 1981 S. REP.]; *see also* Lawrence Zelenak, *Taxing Gains at Death: A Further Comment*, 48 VAND. L. REV. 361, 396 (1993). This author has already questioned the appropriateness of the marital unit as the unit of taxation for income tax purposes. *See* Wendy C. Gerzog, *The Marriage Penalty: The Working Couple's Dilemma*, 47 FORDHAM L. REV. 27 (1978).

29. *See supra* note 9 and accompanying text.

means of eliminating the tracing problem for interspousal transfers, and indeed, tracing difficulties seem to provide the most cogent argument for the unlimited marital deduction.[30] Other rationales for the unlimited marital deduction include: providing the surviving spouse with an adequate estate that is free of transfer tax[31] and that reflects a better time for the incidence of taxation;[32] further equalizing the tax treatment of residents of common law and community property states;[33] facilitating *inter vivos* equalization of estates;[34] and simplifying estate planning.[35]

II. The QTIP Provisions: An Explanation and Analysis

The QTIP provisions provide an additional exception to the marital deduction terminable interest rule. Unlike the terminable interest exception for a qualifying income interest coupled with a general power of appointment, the QTIP allows the predeceasing spouse to receive the benefits of a marital deduction without ceding control of the transferred property. Because statistically the majority of predeceasing spouses are men, the QTIP in effect provides a loophole that perpetuates the women-deserve-only-support school of thought by allowing husbands to reap the benefits of the marital deduction without relinquishing control of the ultimate disposition of the underlying property. In so doing, the provisions give an unwarranted tax benefit to mar-

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30. H.R. Rep. No. 201, 97th Cong., 1st Sess. 159 (1981) [hereinafter 1981 H.R. Rep.]; 1981 S. Rep., *supra* note 28, at 127; 1981 Joint Comm. Explanation, *supra* note 10, at 233 ("Under prior law, it was often extremely difficult to determine the ownership of property held within the marital unit and to determine whose funds were used to acquire that property."); *see also* A.L.I. Recommendations, *supra* note 9, at 354.

31. 1981 H.R. Rep., *supra* note 30, at 159. In modest estates, where the husband leaves his widow all of his estate and only one-half is deductible, the property is taxed twice. That is, the nondeductible half of decedent's estate is taxed at both spouses' deaths. *See* 1969 Treasury Proposals, *supra* note 9, at 258–59; A.L.I. Recommendations, *supra* note 9, at 355.

32. *See* A.L.I. Recommendations, *supra* note 9, at 354–55 ("frequently the tax that has to be paid as a result of an interspousal transfer comes at the death of a spouse, a time when significant sources of income may disappear, and hence not a time when a further economic adjustment should be required to pay taxes on the transfer").

33. *See id.* at 354 n.18.

34. *See* Statement of Charles M. Walker, *supra* note 9, at 1187–88; 1981 H.R. Rep., *supra* note 30, at 159; 1976 H.R. Rep., *supra* note 20, at 17; A.L.I. Recommendations, *supra* note 9, at 355; 1969 Treasury Proposals, *supra* note 9, at 259.

35. *See* Statement of Charles M. Walker, *supra* note 9, at 1187–88; Treasury ERTA Explanation, *supra* note 5, at 39; A.L.I. Recommendations, *supra* note 9, at 355.

ried couples based on the fallacy that decisions by the husband are decisions of the marital unit.

A. *The Mechanics of the QTIP*

By voice vote the Senate adopted the QTIP provisions,[36] which were not originally in the 1981 tax bill.[37] Senator Symms explained that if Congress enacted an unlimited marital deduction section, it would present the taxpayer with a quandary:

> All estate taxes could be postponed, but only by giving the surviving spouse unrestricted control over the property, which current law requires in order to obtain a deduction. The owner may prefer not to give his or her spouse such control. The point becomes more significant as divorce and remarriage increase, which has occurred. The property owner would like to be sure that upon the death of his spouse his children by a prior marriage or marriages share in his property, including the marital deduction property.[38]

Essentially, the QTIP provisions allow the taxpayer to control the ultimate disposition of the underlying property after the death of, or earlier transfer by, the surviving spouse. They provide that qualified terminable interest property[39] will be treated as if it passed to the surviving spouse and that no part of such property will be deemed to pass to anyone else[40] — although the surviving spouse will receive only a lifetime income interest[41] in the property. A qualifying income interest for life requires that the surviving spouse be entitled to all the income from the property. This income must be payable at least annually, and no person, including the surviving spouse, can have a power over the

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36. 127 CONG. REC. 17,288–94 (1981) (statement of Sen. Symms). The amendment was co-sponsored by Senator Boren and had the approval of Senator Metzenbaum, Senator Dole, and the Treasury Department. *Id.* at 17,289.

37. H.R. 97-201, 97th Cong., 1st Sess. 352 (1981); *see* 1981 S. REP., *supra* note 28, at 127 (maintaining the present rule that transfers of terminable interests do not qualify for the marital deduction); TREASURY ERTA EXPLANATION, *supra* note 5, at 39.

38. 127 CONG. REC., *supra* note 36, at 17,289.

39. *See supra* note 2.

40. In the case of the gift tax marital deduction, the transfer of the property itself is deemed to be made to the donee spouse and no part of the property is deemed to be either retained by the donor spouse or transferred to a third party. I.R.C. §§ 2523(f)(1)(A)–(B).

41. Indeed, one commentator has stated that " 'qualified' interests are treated in effect as though the surviving spouse had a fee interest in the underlying property but consumed only the income during life." Isenbergh, *supra* note 6, at 24.

property to appoint it to anyone other than the surviving spouse during her lifetime.[42]

By enacting these provisions, Congress created another exception to the nondeductible terminable interest rule.[43] The original exceptions either related to common contingency provisions found in a typical will[44] or to similar income interests that are coupled with a general power of appointment. These latter exceptions require that the surviving or donee spouse be entitled to all of the income from the property, payable at least annually, and be given either an *inter vivos* or testamentary power to appoint the property to herself. Elsewhere in the transfer tax provisions, such general powers of appointment constitute sufficient ownership and control to require their possessor to include such property in her estate at death.[45]

In order to qualify property as QTIP property, the donor or executor must also make a proper election.[46] However, there is no requirement that the donee spouse participate in any way in this decision. Indeed, Congress added the QTIP provisions precisely to avoid entitling the other spouse to control the ultimate disposition of this property.[47] If it were not for this policy of keeping control from the surviving spouse, there would be no need for the QTIP provisions; the exception for income interests coupled with a general power of appointment would suffice.

Congress enacted the terminable interest rule primarily to ensure that property would be included in the surviving spouse's estate. Generally, the transfer of a terminable interest to one's spouse is not eligible for the marital deduction because many terminable interests, such as a life estate, are extinguished at the

42. The gift tax provision follows the same rules as are found in the estate tax provision § 2056(b)(7)(B). *See* I.R.C. §§ 2056(b)(7)(B), 2523(f)(3).

43. *See* Treas. Regs. §§ 20.2056(b)-1(c), 25.2523(a)-1(b)(3).

44. I.R.C. § 2056(b)(3); *see* Treas. Reg. § 20.2056(b)-3. This exception to the terminable interest rule allows a decedent to have a "common disaster" clause or a "survival" requirement not exceeding six months in his will as long as these events do not in fact occur and thereby extinguish the transfer to the surviving spouse. By the time the executor files the decedent's estate tax return, he or she will know whether these provisions destroyed the surviving spouse's interest. Therefore, Congress did not see any reason for excluding these interests from the marital deduction.

45. I.R.C. §§ 2056(b)(5), 2523(e). Likewise, the exception under § 2056(b)(6) combines life insurance or annuity payments with a power of appointment in the surviving spouse. *See* I.R.C. § 2041 (requiring estate tax inclusion of property over which decedent has a general power of appointment); I.R.C. § 2514 (relating to *inter vivos* powers of appointment).

46. *See supra* note 4.

47. *See infra* notes 80–81 and accompanying text.

possessor's death. If such transfers were eligible for the marital deduction, this would provide a chance for tax abuse because the underlying property would never be included in either spouse's estate at its full fair market value.[48] However, the value of the property transferred under a QTIP election by definition is either included in the surviving spouse's estate or treated as a taxable gift.[49] This inclusion ensures that the property will be taxable when it ultimately leaves the "marital unit."

The surviving spouse does not bear the burden of paying the extra tax on QTIP property. Moreover, the surviving spouse's non-QTIP assets will not be taxed at a higher bracket because of the inclusion of QTIP property in her estate. In 1981 Congress provided that the surviving spouse is entitled to recover, from the recipient of the underlying property, any additional taxes relating to the transfer taxation of QTIP property.[50]

The QTIP provisions themselves have been amended since their original enactment to clarify that QTIP property is eligible for a stepped up basis for income tax purposes;[51] that the value

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48. *See* Dodge, *supra* note 6, at 345. Congress also explained the terminable interest rule as a further means to equalize the treatment of property in common law property states and property in community property law states. This purpose was eroded when Congress enacted the unlimited marital deduction. Consequently, several commentators have urged repeal of the terminable interest rule and its replacement with a simplified provision that would retain its principal intent. *See* Abrams, *supra* note 14, at 29; Dodge, *supra* note 6, at 345–47; Gutman, *supra* note 6, at 1254; Isenbergh, *supra* note 6, at 29–31 (ultimately urging only the elimination of §§ 2056(b)(1)–(6) and retention of the QTIP provisions).

49. I.R.C. §§ 2019, 2044.

50. *See* ERTA, *supra* note 2, § 403 (codified as I.R.C. § 2207(a)); 1981 H.R. REP., *supra* note 30, at 162; Treas. Regs. §§ 20.2207(a)-1, 20.2207(a)-2 (effective for decedents dying after March 1, 1994); *see also* A.L.I. RECOMMENDATIONS, *supra* note 9, at 356. Over the past three years, Congress has unsuccessfully attempted to amend this provision to ensure that the surviving spouse does not inadvertently waive her right to recovery with respect to the tax on QTIP property. For provisions attempting to amend I.R.C. § 2207(a), see Tax Simplification and Technical Corrections Bill of 1993, H.R. 3419, 103d Cong., 1st Sess. § 601 (1994); The Tax Simplification Act of 1993, H.R. 13, 103d Cong., 1st Sess. § 701; The Revenue Act of 1992, H.R. 11, 102d Cong., 2d Sess. §§ 4701, 4703; Tax Simplification Act of 1991, H.R. 2777, 102d Cong., 1st Sess. § 501. "Thus, a general provision specifying that all taxes be paid by the estate is no longer sufficient to waive the [surviving spouse's] right of recovery." JOINT COMM. EXPLANATION OF 1993 TAX BILL, *supra* note 13, at 206.

51. *See* The Technical Corrections Act of 1982, Pub. L. No. 97-448, § 104(a)(1)(A), 96 Stat. 2365 (adding I.R.C. § 1014(b)(10)); *see also* S. REP. No. 592, 97th Cong., 2d Sess. 20–21 (1982). *But see* Gutman, *supra* note 6, at 1235–39 (criticizing all post-ERTA stepped-up basis treatment). "Under the current unlimited marital deduction regime, a stepped-up basis for assets passing free of transfer tax pursuant to a marital bequest is fundamentally inconsistent with the notion that no transfer occurs when property interests are shifted between spouses." *Id.* at 1239.

of a property interest is not allowed to be deducted twice where the income passes to the surviving spouse and the property itself, at the extinguishment of that spouse's interest, is donated to a charity;[52] that a usufruct interest for life qualifies as a qualifying income interest for life;[53] that a decedent or donor spouse may ignore his QTIP election for the purpose of the generation skipping transfer tax exemption election;[54] and that a transfer of an interest in a joint and survivor annuity in which only the spouses have income rights prior to the surviving spouse's death qualifies for QTIP treatment.[55]

A trust may fail to qualify for QTIP treatment when even a small amount of income is not paid to the surviving spouse. Indeed, there has been a problem with income that is produced but not distributed to the surviving spouse between her regular distribution of income and the time of her death. The Tax Court has repeatedly denied QTIP treatment to trusts that do not require the trustee to pay this portion of income, commonly referred to as "stub" income, to the surviving spouse.[56] In recent years, Congress has unsuccessfully attempted to amend the QTIP statutes to provide that an income interest will not fail to be a qualifying income interest for life even if stub income is not required to be distributed to the surviving spouse as long as the value of the stub income is also included in her estate.[57] This proposed change to the QTIP provisions underlines the illogical nature of the qualifying income interest for life current distribution requirement of the QTIP provisions.

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52. *See* The Technical Corrections Act of 1982, Pub. L. No. 97-448, § 104(a)(2)(A)-(B), 96 Stat. 2365 (adding I.R.C. §§ 2056(b)(9), 2523(h)).

53. Tax Reform Act of 1984, Pub. L. No. 98-369, sec. 1027(a), 98 Stat. 494 (adding subclause 1 of I.R.C. § 2056(b)(7)(B)(ii) (1954)); *see also* H.R. REP. No. 432, 98th Cong., 2d Sess. 1128-29 (noting that Congress wanted the estates of Louisiana decedents to be allowed to qualify for QTIP treatment).

54. The Tax Reform Act of 1986, Pub. L. No. 99-514, § 1431(F), 100 Stat. 2085, 2726 (codified as amended at 26 U.S.C. § 2652(a)(3) (1986)). The Technical and Miscellaneous Revenue Act of 1988 further amended this provision to explain that this election must be made for all of the property in the QTIP trust. The Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, §§ 1014(g)(14)(A)-(B), 102 Stat. 3342, 3566; *see* S. REP. No. 375, 100th Cong., 2d Sess. 212 (1988).

55. *See* The Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6152(a), 102 Stat. 3342, 3725 (adding I.R.C. § 2056(b)(7)(C) (1986)); *see also* H.R. REP. No. 1104, 100th Cong., 2d Sess. 202 (1988).

56. *See infra* notes 67-80 and accompanying text.

57. *See supra* note 13.

B. *An Analysis of the QTIP*

The current distribution requirement of the QTIP provisions is identical to the current distribution requirement of the power of appointment exception to the terminable interest rule.[58] In fact, Congress seems to have borrowed indiscriminately from this provision for no logical reason and without any stated explanation. Although the current distribution requirement coupled with a general power of appointment is roughly equivalent to outright ownership, there is no apparent reason to copy this requirement for a QTIP deduction because the QTIP is not intended to convey the parallel control and enjoyment of property inherent in property ownership.[59]

Indeed, estate trusts are allowed a marital deduction because they do not contain a terminable interest;[60] they are trusts

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58. *See* I.R.C. § 2056(b)(5); *see also supra* note 13.

59. The House Report only gives examples of what types of income interests will qualify for QTIP treatment and compares the income qualifications to the then-current law. It does not explain, however, *why* Congress chose to require the same income interest as in § 2056(b)(5):

> A qualifying income interest must meet several conditions. First, the spouse must be entitled for a period measured solely by the spouse's life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals. Thus, income interests granted for a term of years or life estates subject to termination upon remarriage or the occurrence of a specified event will not qualify under the committee bill. The bill does not limit qualifying income interests to those placed in trust. However, a qualifying life income interest in any other property must provide the spouse with rights to income which are sufficient to satisfy the rules applicable to marital deduction trusts under present law (Treas. Reg. § 20.2056(b)-(f)).

1981 H.R. REP., *supra* note 30, at 161; *see* 1981 JOINT COMM. EXPLANATION, *supra* note 10, at 235.

Professor Abrams considered the income requirement of the QTIP provisions to be "no more than an unthinking decision to follow the conditions imposed by the Revenue Act of 1948 on deductible devises in trust, conditions imposed to ensure that the surviving spouse's interest in the trust is comparable to a surviving spouse's interest in community property." Abrams, *supra* note 14, at 24 (citation omitted). The Ninth Circuit, in *Estate of Howard*, 910 F.2d 633 (1990), saw a distinction in the language of the two provisions that, the Court contended, while "nearly identical," was not "the same." *Id.* at 636. However, this author thinks that Professor Abrams's analysis is the more accurate one.

60. Estate trusts qualify for the marital deduction under the general rule of § 2056(a). They are generally used where the surviving spouse has independent wealth and does not need current income or where the corpus of a trust is comprised of non-income producing assets. *See* William K. Stevens, *Fourteen Years of Marital Deduction*, 21 N.Y.U. INST. ON FED. TAX'N 257, 258 (1963) (citing to an example in the 1949 regulations).

where income is accumulated during the surviving spouse's life and where the value of both the accumulated income and underlying property is included in the surviving spouse's estate. Moreover, the surviving spouse, although unable currently to enjoy the property, is allowed to direct, by testamentary transfer, its recipient's identity.[61] Essentially, the power of appointment exception under section 2056(b)(5) and the estate trust share the element that the surviving spouse controls the final transfer of the underlying property — a basic indicium of property ownership. Partaking of an income interest is neither as valuable nor as reflective of property ownership as controlling the property's ultimate disposition.[62]

If the current distribution requirement is indeed founded on the concept that a married couple considers its property as "theirs,"[63] and if the proper time to tax interspousal transfers is when a third party actually comes into possession of its future interest,[64] there is no logical reason for requiring that income be currently paid to the recipient spouse. As long as income is accumulated during her lifetime and then taxed, together with the value of the underlying property, at the time of her death or earlier transfer, that objective will be met.

Thus, a simpler version of the QTIP[65] could be developed as a logical consequence of that rationale.[66] Such a statute would not pretend to give the surviving spouse any equivalence of ownership and would emphasize only the tax deferral consequence of the QTIP. Without the window dressing of the current distribu-

61. Although an estate trust does not apparently provide for any current enjoyment, the surviving spouse could borrow on the basis of this trust by using the property in the trust at his or her death as collateral. Likewise, a vested remainder interest in property, which never becomes possessory during the taxpayer's lifetime, would not provide any current beneficial enjoyment apart from the owner's ability to use that property as collateral on a loan.

62. *See generally supra* notes 5–10 and accompanying text (noting that the power to dispose of property is equated with property ownership).

63. *See supra* note 9.

64. *See supra* note 10 and accompanying text. Congress seems to equate the time of actual possession by a third party as the time that the property leaves the marital unit. Yet the creation of a vested remainder in a third party is more accurately the time when the property has "left the marital unit."

65. A simpler statute would require that income either be distributed to the surviving spouse or be accumulated during her life and that the value of any accumulated income plus the value of the underlying property be included in the surviving spouse's estate.

66. Simplification has been urged by many commentators who advocate the elimination of the terminable interest rule. *See supra* note 48.

tion requirement, Congress would have to find a policy reason for such a tax benefit. With the Emperor's new clothes removed, however, it will be hard to justify retaining the QTIP.

The illogic of the current distribution requirement is underlined by the controversy found among *Estate of Howard*,[67] *Estate of Ellingson*,[68] and most recently, in *Estate of Shelfer*[69] as well as in the many recent attempts to enact legislation to save trusts that do not adequately provide for the treatment of stub income.[70] In *Estate of Howard*, and again in *Estate of Shelfer*, the Tax Court, applying the plain meaning rule, held that where the taxpayer does not require the distribution of stub income to the surviving spouse, the income interest can not be a qualifying income interest for life for QTIP purposes.[71] Yet the Ninth Circuit, in reversing the Tax Court in *Howard*, looked to congressional intent and recognized that as long as accumulated income is included in the surviving spouse's estate, the omission of a statement in the QTIP trust instrument requiring stub income be distributed to the surviving spouse did not undermine the main policy behind the QTIP provisions, *i.e.*, that the property be taxed when it leaves the marital unit.[72]

The major frustration for the Commissioner in the Tax Court's reading in *Shelfer* was that the initial decedent-spouse

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67. 910 F.2d 633 (9th Cir. 1990), *rev'g* 91 T.C. 329 (1988). The Tax Court continues to follow its interpretation in *Estate of Howard*. *See* Estate of Shelfer v. Comm'r, 103 T.C. 10 (1994); *see also* Estate of Ellingson v. Comm'r, 964 F.2d 959 (9th Cir. 1992), *rev'g* 96 T.C. 760 (1991) (holding that an income interest in a trust that allowed the trustee to accumulate income in excess of the surviving spouse's "needs, best interest and welfare" nevertheless qualified for QTIP treatment because "best interests" nullified application of that provision); Estate of Nicholson v. Comm'r, 94 T.C. 666 (1990) (holding that a trust which provided that income was to be paid when required to maintain the surviving spouse in her usual and customary standard of living did not create a qualifying income interest for life and disallowed QTIP treatment).

68. 964 F.2d 959 (9th Cir. 1992), *rev'g* 96 T.C. 760 (1991).

69. 103 T.C. 10 (1994).

70. *Id.*

71. 103 T.C. 10 (1994); Estate of Howard v. Comm'r, 91 T.C. 329 (1988), *rev'd*, 910 F.2d 633 (1990).

72. Estate of Howard v. Comm'r, 910 F.2d 633, 636–37 (9th Cir. 1990), *rev'g* 91 T.C. 329 (1988). The Circuit Court cites to the then-proposed Estate Tax Regulation § 20.2056(b)-7(c)(ii), finalized as § 20.2056(b)-7(d)(4), which conforms to the Court's interpretation. *Id.*; *see* Treas. Reg. § 20.2044-1. The Tax Court in *Estate of Shelfer*, however, has made it clear that the recently finalized regulation applies only to decedents dying after March 1, 1994. It also refused to state how it would rule on the same issue under the newly promulgated regulation. *See Estate of Shelfer*, 103 T.C. 10 (1994).

had received a marital deduction under the QTIP provisions that had gone unchallenged by the government.[73] Following the Tax Court's interpretation in *Howard*, the second spouse, the widow in *Shelfer*, was not required to include the value of the underlying property in her estate.[74] Thus, with the first decedent's estate closed, this marital unit would receive a double benefit under the Tax Court's opinion.

The conflict in *Howard* between the Tax Court and the Ninth Circuit is underlined again in *Estate of Ellingson*. In *Ellingson*, these two courts predictably split on the issue of whether a provision in the decedent's trust that allowed the trustee to accumulate income exceeding the surviving spouse's "needs, best interest and welfare" was a qualifying income interest under the QTIP provisions.[75] The Tax Court held that the accumulation provision "limits the surviving spouse's right to receive income annually from the Trust"[76] and, therefore, does not require current income distribution as needed for a QTIP deduction.[77] In contrast, the Ninth Circuit, attempting to give effect to the settlor's intent, interpreted the trust provision to lack meaning because it could only be applied when trust income exceeded the widow's "best interests," which they believed would never occur.[78]

Even though it has been reversed by the Ninth Circuit in *Howard*, and although it is aware that the government's pending regulation espoused the Ninth Circuit's interpretation, the Tax Court continues to maintain that a plain meaning analysis of the QTIP statute requires that all income, including stub income, be distributed to the surviving spouse. A divided Tax Court in *Estate of Shelfer*[79] recently applied its holding in *Howard* to disqualify a QTIP trust and refused to "determine how we would decide the case if the final regulations were applicable."[80]

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73. Estate of Shelfer v. Comm'r, 103 T.C. 10, 23–25 (1994) (Beghe, J., dissenting).

74. *Id.* at 14–17 (citing Estate of Howard v. Comm'r, 91 T.C. 329, 338 (1988), *rev'd*, 910 F.2d 633 (9th Cir. 1990).

75. 96 T.C. 760, 770 (1991).

76. *Id.* at 764.

77. *Id.* at 772.

78. 964 F.2d at 964–65.

79. Estate of Shelfer v. Comm'r, 103 T.C. 10 (1994).

80. *Estate of Shelfer* is appealable to the Eleventh Circuit, and thus, the Tax Court, under its own rule in *Golsen* is not required to follow the Ninth Circuit opinion except for cases appealable to that circuit. Golsen v. Comm'r, 54 T.C. 742 (1970), *aff'd on other grounds*, 445 F.2d 985 (10th Cir. 1971).

While agreeing with the Tax Court's plain meaning interpretation of the statute, this author is sympathetic to the Ninth Circuit's reading of legislative intent because it does seem that Congress was only concerned with ensuring that the property is ultimately subject to transfer taxation.[81] Because the current income requirement is extraneous to this issue, there seems no reason not to ignore the statute's plain requirement of a qualifying income interest.

The current distribution requirement, which merely gives the surviving spouse an income interest, is not a substitute for giving the surviving spouse an ownership interest in the underlying property. Essentially, the current distribution requirement complicates the QTIP without providing a cogent policy basis for allowing the benefit of a marital deduction where the surviving spouse does not own the underlying property.

III. Is the Decision to Use the Marital Unit as the Proper Unit of Taxation for Transfer Tax Purposes Compatible with the Rationale for the QTIP Provisions?

The decision to use the marital unit as the proper unit of taxation for transfer tax purposes rests on the concept that married persons share and make joint decisions about "their" property.[82] Thus, the best time to tax that property is when it leaves the marital unit, whether at the surviving spouse's death or at earlier transfer.[83] However, the legislative history behind the QTIP provisions reveals a policy rationale incompatible with at least one of these assumptions: that married persons both decide what they will do with "their" property. Rather, the QTIP statute itself does not require any *joint* decision-making between husband and wife.

81. Likewise, this author understands why a state court would want to reform a trust to qualify for QTIP treatment where the drafter of the trust instrument inadvertently crossed a general power of appointment over income with a special power of appointment over principal, with the consequence that a special power over the income was written in the trust instrument. Such special power over stub income would have prevented QTIP qualification, costing the estate an additional $400,000 in transfer taxes. *See* Loeser v. Talbot, 589 N.E. 2d 301 (Mass. 1992).

82. *See supra* note 8–9 and accompanying text.

83. *See supra* note 10.

The legislative history of the QTIP provisions is replete with expressions of the decedent/donor spouse's fear[84] of transferring the underlying property to his wife. Basically, the decedent/donor is worried that she will not subsequently transfer the property to his children from either that current marriage or from his prior marriages.[85] Yet the QTIP is based on the theory that a couple shares and makes "joint" decisions about "their" property. If that purported rationale for the QTIP were indeed true, there would be no need for such fear. Underlying the husband's fear is the fact that he does not wish to *share* his decision with his spouse but wants unilaterally to control to whom "his" property is transferred when it leaves the marital unit. In other words, without the QTIP statute the decedent would probably utilize the power of appointment exception to the terminable interest rule. However, the decedent is horrified at this option because he sees the recipient spouse as unilaterally controlling the ultimate disposition of *his* property specifically *not* in accord with *his* wishes.[86] He wants his cake (*i.e.*, the tax benefit of deferral), and he wants to eat it, too (*i.e.*, to control who will finally receive the underlying property). The icing covering this cake is Congress's pretense that the QTIP's preferred tax treatment is based on the decision to use the marital unit as the unit of taxation because married persons *share their* property. Evidently, they do not.

84. The fears expressed in the legislative history are indicative of the timing of the dissolution of the "marital unit," that the unit is terminated at the death of the first spouse to die, which obviously it actually is, and that it is only an illusion, for tax purposes, that the unit persists until the surviving spouse dies or earlier transfers such property to a third party.

85. *See supra* note 36 and accompanying text; *Major Estate and Gift Tax Issues, Part 2 of 2: Hearings Before the Senate Finance Comm.*, 97th Cong., 1st Sess. 187, at 206-07 (1981) (statement of John A. Wallace, on behalf of the American College of Probate Counsel on Estate and Gift Tax Reform) [hereinafter *1981 S. Hearings*]; 1981 JOINT COMM. EXPLANATION, *supra* note 10, at 233 ("Because [under prior law] the surviving spouse had to be given control over the property, the decedent could not insure that the spouse would subsequently pass the property to his children . . . .").

86. *See 1981 S. Hearings*, *supra* note 85, at 206 ("In many instances a taxpayer will forego the benefit of the marital deduction because of a concern that the surviving spouse will direct the property at his or her death to persons who *are unacceptable to the taxpayer*."((emphasis added). In fact, the American College of Probate Counsel would support the unlimited marital deduction only if Congress also enacted the QTIP provisions. *Id.* The American Bankers Association would endorse the unlimited marital deduction only if "a qualitative change is also made so that a current beneficial interest in property would qualify for the deduction." *Major Estate and Gift Tax Issues, Part 1 of 2: Hearings Before the Senate Finance Comm.*, 97th Cong., 1st Sess. 151, 158 (1981) (statement of Donald W. Thurman on behalf of the American Bankers Association on Estate and Gift Taxation).

IV. How the QTIP Provisions Degrade Women

> There are few men in common law states who are willing to grant their widows more than a life estate where there are surviving children. They do not want to grant the widow a life estate plus a general power of appointment as that in effect is to give her the fee simple, and the widow who has unfettered power to dispose of the property may do so and cut off the interest of the children. There are many widows in this country who are experienced and astute in the management of property and business affairs. *But there are many more who have been active only in domestic circles and who lack the experience and judgment to suddenly assume outright ownership and disposal of substantial properties. The tax law should not offer a premium to a husband who ignores his better judgment and grants his widow a general power of appointment leaving his children at the mercy of any charlatan who has his widow's ear.*[87]

It is amidst this climate of paternalism, which is degrading to women, that the American Law Institute (A.L.I.) wrote its proposed changes in Federal Estate and Gift Taxation. While Mr. Beveridge, author of the above quotation and a co-author of treatises on Gift Taxation and Estate Taxation,[88] was not on the A.L.I. committees proposing the new exception to the terminable interest rule, his words state the sentiment to which others merely allude.

The QTIP provisions degrade women because they were enacted to enable men to control the ultimate disposition of property but nonetheless the provisions qualify QTIP transfers for a marital deduction. The framers of this new exception to the terminable interest rule further degraded women because they assumed that widows would be content with receiving only one of the indicia of property ownership, *e.g.*, current beneficial enjoyment, and would not protest against the enactment of such a provision. Unfortunately, these men were successful. Since the

87. John W. Beveridge, *The Estate Tax Marital Deduction — Beneficent Intent, Baneful Result*, 44 TAXES 283, 284 (1966) (emphasis added).

88. *See* JOHN W. BEVERIDGE, LAW OF FEDERAL ESTATE TAXATION (1958); JOHN W. BEVERIDGE, LAW OF FEDERAL GIFT TAXATION (1956). Mr. Beveridge's estate tax treatise was cited as authority by the Supreme Court in United States v. Byrum, 408 U.S. 125, 164 (1972), by the Fifth Circuit in such cases as United States v. Stapf, 309 F.2d 592, 606 (5th Cir. 1962), and by the United States Tax Court in such cases as Estate of Courtney v. Comm'r, 62 T.C. 317, 321 (1974), among other courts. Mr. Beveridge's treatise on gift taxation was cited by the Fifth Circuit Court of Appeals in such cases as Stern v. United States, 436 F.2d 1327, 1330 (5th Cir. 1971).

enactment of the QTIP provisions in 1981, no one has called for their repeal.

The source of the QTIP's qualifying income interest for life provision is the current beneficial enjoyment test[89] that was proposed by the A.L.I. Federal Estate and Gift Tax Project in the mid to late 1960s. The current beneficial enjoyment test provides that any transfer that gives the recipient spouse a limited, present enjoyment of the property[90] should qualify the full value of the underlying property for the marital deduction.[91] In 1969, the Treasury Department also recommended such a change.[92]

Indeed, Professor Dodge has argued that *only* dispositions containing a current income distribution requirement should qualify for the marital deduction. Thus, he would not allow the marital deduction to apply to estate trusts.[93] While acknowledging that removal of the current payout requirement would simplify the QTIP provisions, Professor Dodge prefers its retention for nontax reasons:

> Otherwise, if transferors are given the opportunity to defer tax without conferring real and substantial economic benefits on their spouses, the elimination of the income requirement would be perceived as: (1) contravening women's rights, (2) disruptive of family harmony, (3) necessitating that each spouse be represented by an attorney, and (4) undermining public acceptance of the marital deduction for anything other than outright transfers.[94]

While Professor Dodge should be commended for being sensitive to women's issues, women's interests would be better served by requiring husbands to make outright transfers of property to their wives. A repeal of the QTIP provisions would em-

89. *See* A.L.I. RECOMMENDATIONS, *supra* note 9, at 358–59.

90. The A.L.I. explained that, with respect to income-producing property, current beneficial enjoyment meant the right to income from that property. "Thus, a transfer to T in trust with directions to pay the income to the donor's wife for life, with remainder over to designated beneficiaries would qualify. . . ." *Id.* at 355. This type of transfer would be particularly attractive to the donor who "want[ed] to protect his children from being left out as a result, for example, of the second marriage of his spouse." *Id.*

91. Proposal number seventeen reads: "The terminable interest rule in relation to marital deduction transfers should be abolished and a current-beneficial-enjoyment test adopted, under either a dual tax system or a unified tax." *Id.* at 358–59.

92. *See* 1969 TREASURY PROPOSALS, *supra* note 9, *passim*; *see also* Gutman, *supra* note 6, at 1256.

93. *See* Dodge, *supra* note 6, at 352.

94. *Id.* at 350–51.

power women and enhance their ability to protect their own interests.

While the 1981 legislative history is expressed in gender neutral terms,[95] earlier versions of the QTIP evidence a clear gender bias and stereotyping. All examples in both the A.L.I. Proposal and the Treasury Recommendations envision the surviving spouse as a woman, which is, of course, borne out by the statistical evidence.[96] In fact, in 1969 when it compiled its statistics for recommending the unlimited marital deductions, the Treasury Department only offered statistics relating to the number of years *widows* outlive their *husbands*.[97] If the government had been concerned with both widows and widowers, surely it would have compiled similar data with respect to the men.

Doubtless, the A.L.I. and the Treasury Department contemplated a tax benefit for a limited interest to be transferred to the surviving *widow* when they recommended the adoption of "the current beneficial enjoyment test." In the A.L.I. Recommendations, the examples speak of a transfer to the "donor's *wife* for life"[98] and of the donor spouse who "wants to protect *his* children."[99] The transfer will be taxed to the donee spouse

> on *her* death, if *she* is given a life interest, but may be prior to *her* death if *she* is given a current interest until *she* remarries or for some stated period of time. The property *she* is treated

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95. For gender neutral terminology, *see, e.g.*, 1981 JOINT COMM. EXPLANATION, *supra* note 10, at 233-34. For example:

> Because the *surviving spouse* had to be given control over the property, the *decedent* could not insure that the *spouse* would subsequently pass the property to his children .... However, unless certain interests which do not grant the *spouse* total control are eligible for the unlimited marital deduction, a *decedent* would be forced to choose between surrendering control of the entire estate to avoid imposition of estate tax at his death or reducing tax benefits at death to insure inheritance by his legatees. The Congress believed that the transfer tax consequences should not unduly influence how *an individual* disposes of his property. Accordingly, the Congress determined that a deduction should be permitted for certain terminable interests.

Id. (emphasis added).

However, even in 1981, the gender of the intended donor is sometimes revealed as male. Note how Senator Symms' speech introducing the QTIP amendment begins with gender neutral terms but slips when he states that the property owner wants to protect *his* property and insure that it go to *his* children. Suddenly, the "his or her" language is dropped. *See supra* note 38 and accompanying text.

96. *See* 1969 TREASURY PROPOSALS, *supra* note 9, *passim*; *see also supra* note 11 (listing key statistics).

97. *See* 1969 TREASURY PROPOSALS, *supra* note 9, *passim*; *see also* note 11.

98. A.L.I. RECOMMENDATIONS, *supra* note 9, at 355.

99. *Id.* (emphasis added).

as transferring on the termination of *her* current beneficial enjoyment may pass to predetermined beneficiaries.[100]

Likewise, a description of the A.L.I. project dealing with the *Study Draft No. 2*[101] underlines the preconception that the donee spouse is a woman.[102] All of the discussion of the donee spouse is framed in terms of "she" or "her," and all the examples of transfers are from husband to wife.[103] Similarly, the 1969 Treasury recommendations explained that the then-current rules stating that "*she* must be given outright ownership (or its equivalent) over the property . . . have curtailed the use of some *natural* forms of transfers between spouses";[104] that is:

> A *husband* may want to leave the income from his property to *his wife* but make sure that the property goes on *her* death to the children. Ordinarily this would imply that *the wife* has no control over the underlying property and thus the bequest would not qualify under present law for the marital deduction. It is not of significant concern, however, to the Federal Government whether the *husband or the wife* makes the decision as to who gets the property ultimately.[105]

While it might have made no difference to the federal government which spouse controlled the ultimate disposition of the property, it does seem that the federal government was mostly concerned with effectuating *the husband's* desires.

To be fair — but also to show that the framers of the QTIP provisions contemplated the widow, and not the widower, as the recipient of the limited interest transfer — it should be noted that one male commentator, in 1967, did point out that the A.L.I.'s proposal to allow the marital deduction for a limited cur-

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100. *Id.* at 356 (emphasis added). The A.L.I. RECOMMENDATIONS then outline how not to assess additional tax from *her* other assets to pay for this imputed transfer. The concern that she would have her other property taxed at a higher tax bracket led to the concomitant enactment, in 1981, of § 2207(a). *See supra* notes 50–51 and accompanying text.

101. *See* A. James Casner, *American Law Institute Federal Estate and Gift Project*, 22 TAX L. REV. 515 (1967).

102. When is current beneficial enjoyment given to the donee spouse?

> The answer to this question is that the donee spouse is given the current beneficial enjoyment with respect to transferred property if *she* is entitled to whatever income the property produces . . . . The donee spouse need not be given the beneficial enjoyment for *her* life; the transfer can qualify if it is for any lesser period . . . .

See id. at 550 (emphasis added).

103. *Id.* at 550–57. Feminine pronouns are used to describe the donee spouse and masculine ones to define the donor spouse. Current beneficial transfers are made from the donor husband to the donee wife or widow. *Id.*

104. 1969 TREASURY PROPOSALS, *supra* note 9, at 257–58.

105. *Id.* at 259–60 (emphasis added).

rent interest could be replaced with an alternative similar to the exception found in section 2056(b)(5): "The rationale for this alternative is that a transfer should be treated as being made by the donee spouse only if the ultimate transfer of the property is within *her* control."[106] But even he allowed that general power of appointment to "laps[e] in any event on termination of *her* enjoyment, on divorce or on remarriage, or perhaps preferably, within a short period, such as six months or one year thereafter."[107]

While not necessarily indicative of bias, all seventy-five members of the Tax Advisory Group of the A.L.I., in May 1968, when the recommendations contained in the A.L.I. Report were approved, were men.[108] Likewise, all thirteen members of the Liaison Committee of the Section of Taxation of the American Bar Association (ABA); all three members of the Liaison Committee of Real Property, Probate and Trust Law of the ABA; and all eleven subcommittee chairs of the Committee on Estate and Gift Taxes of the Section of Taxation of the ABA[109] were men. While the all-male composition of the committees creating the QTIP provision is not proof of gender bias, representation by women, and perhaps another perspective, was virtually absent.[110] (It is interesting that the current beneficial enjoyment test proposal was unanimously approved).[111]

106. John H. Alexander, *Federal Estate and Gift Taxation: The Major Issues Presented in the American Law Institute Project*, 22 TAX L. REV. 635, 663 (1967) (emphasis added). Mr. Alexander is listed as a "consultant" to the A.L.I.'s project, but he was not a member of the Tax Advisory Group, a member of the American Bar Association (ABA) Liaison Committee, or a subcommittee chair on the Committee on Estate and Gift Taxes of the Tax Section of the ABA. A.L.I. RECOMMENDATIONS, *supra* note 9, at 318–22.

107. Alexander, *supra* note 106, at 663. To his almost unique credit, Mr. Alexander does use the terms husband and wife throughout his article and even uses a male donee spouse example once in this discussion. All other examples in his article as well as throughout the A.L.I. Proposals and 1969 Treasury Recommendations involve transfers of a current interest from a husband to his wife. *Id.* at 660–65. He states that the A.L.I.'s current beneficial enjoyment test "presents a troublesome issue — is there enough value in the proposal to justify its adoption even though it permits one spouse, by unilateral action, to affect the transfer tax liability of the other spouse on subsequent transfers?" *Id.* at 662.

108. *See* A.L.I. RECOMMENDATIONS, *supra* note 9, at 319–21.

109. *Id.* at 321.

110. *But see* Alexander, *supra* note 106, *passim* (offering an alternative to the A.L.I. proposal that was more beneficial to the surviving spouse).

111. A.L.I. RECOMMENDATIONS, *supra* note 9, at 358. This unanimous vote recommending QTIP treatment for spousal transfers of a current income interest is noteworthy as compared to the slightly less than three-fourths approval rate given by the same Advisory Group to, and the slightly more than two-thirds rate voted by

When Congress finally adopted these provisions in the 1970s, it merely patched gender neutral phrases, such as "his or her," into the legislative history without any re-examination of the rationale for the provisions themselves. Essentially, the current income distribution requirement of the QTIP provisions is meant to pacify the surviving spouse. The QTIP's requirement of giving the surviving spouse less than full ownership reveals an intention to delude the surviving spouse into accepting QTIP treatment as if she truly owned the property. Ironically and interestingly, nowhere else in the transfer tax provisions is a taxpayer deemed to be owner of more property than he or she either controls or once controlled.

Although a widow may renounce all her interests under the will, including the QTIP life estate, and elect to take her statutory share under state law, that option only governs a portion of a decedent's probate assets (usually one-third to one-half). Moreover, that option is unavailable for an *inter vivos* interest given to a spouse. Similarly, the widow may be made an executrix, in which case she would ultimately control whether the property receives QTIP treatment. However, nowhere in the QTIP provisions is there a requirement that the recipient spouse accede to a QTIP election. Moreover, any partial remedies are external to the issue of whether the QTIP provisions are rooted in biases that are degrading to women.

Finally, while one might apply the statistics to say that the marital deduction provisions disproportionately benefit widows who receive more property tax-free because of their application, the reason for enacting the marital deduction was to equalize the transfer tax treatment of common law property states and community property law states — not to create gender-based, favored treatment. In contrast, in 1981, when Congress changed the rationale for the marital deduction by enacting the unlimited marital deduction section and the QTIP provisions, Congress was basing its enactment of the latter on sources from the 1960s that clearly were intended to create a limited interest in the widow while allowing the husband to control the ultimate disposition of the underlying property.

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the Institute's Council for, the unlimited marital deduction. The Tax Advisory Group voted 30 to 11 in favor of the 100% marital deduction. The Council of the Institute approved that provision by a vote of 13 to seven. *Id.* This is significant in that there were *no* dissenters to the gender-based provision; yet even the relatively popular unlimited marital deduction had a significant number of dissenters.

CONCLUSION

When a donor or decedent irrevocably relinquishes control over his or her property, that property is subject to a transfer tax.[112] A special deduction, the marital deduction, applies to married persons because Congress believes that husband and wife share decisions about property ownership. Under this rationale, interspousal transfers should not be taxed because the marital unit continues to hold *their* property. Until the enactment of the QTIP provisions in 1981, the marital deduction required that the recipient spouse own, or have the equivalent of ownership of, property transferred to her. In this way, the property would continue to be owned by at least one member of the marital unit and by no one outside that unit.

With the enactment of the QTIP provisions, Congress extended the tax benefit afforded by the marital deduction to transfers of only a life estate to a member of the marital unit and of a vested remainder to third parties outside the marital unit. It did so on the stated rationale that: (1) married couples share decisions about "their" property, and (2) as long as the value of the underlying property would be included in the surviving spouse's estate at her death, the government's right to such transfer tax revenue would not be compromised.

In fact, however, neither of those policies are served by the QTIP provisions. It is precisely because married couples do *not* share decisions about the ultimate recipient of QTIP property that these provisions were enacted. The QTIP provisions clearly do not require that the surviving spouse agree to either the identity of the beneficiary of the underlying property or to the QTIP election itself. Rather, it is the decedent/donor alone who names the beneficiary of the underlying property, and it is the executor who is entitled to make the QTIP election. Likewise, federal revenue is compromised because the very real economic benefit of tax deferral is given to the transferor despite the fact that the property is transferred outside the marital unit at the creation of the vested remainder in a third party. That is, the QTIP provisions give a benefit to married persons with children that is unavailable to single people with children. Single individuals who want to transfer property to their children do not have the luxury

112. *See, e.g.*, Treas. Reg. § 25.2511-2(a) (imposing a gift tax when the transferor relinquishes control of property that he owns). *See generally* I.R.C. §§ 2033–2042 (applicable to estate taxation).

of a deferral provision; they know that when they make such a property disposition they will then be subject to transfer taxes.

The only legitimate rationale for allowing married persons to receive the tax benefit of deferral is because a spouse must transfer the underlying property itself to the other spouse. At a minimum, Congress should only allow the marital deduction where the transferor's spouse must agree both to the identity of the recipient and to a QTIP election.

Ideally, Congress should repeal the current QTIP provisions because they degrade women; clearly, the motivation for their enactment was gender-biased, and as applied, even today the QTIP disadvantages mostly widows. The QTIP provisions encourage husbands to transfer less than a full property interest to their wives by providing the donors with a marital deduction based on the value of the underlying property although the husbands actually give their surviving spouses only a life interest in that property.

The 1981 decision to adopt the marital unit as the unit of taxation may be justified solely by the tracing problems inherent in interspousal transfers. Although intended to indicate that married couples share decisions about their property, the decision to use the married couple as the unit of taxation does not really form the basis of the QTIP provisions. If it did, there would be no current distribution requirement and both spouses would have to make joint decisions about the transfer. Indeed, the illogical nature of the current QTIP provisions, the fact that they degrade women, and their adverse economic consequences for women are all sufficient reasons for advocating their repeal.