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## The QTIP Trust and the Elective Share Trust: Are They Really Parallel?

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## THE QTIP TRUST AND THE ELECTIVE SHARE TRUST: ARE THEY REALLY PARALLEL?

*Lauren B. Epstein* \* \*\*

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### I. INTRODUCTION

“[T]he marital deduction permits a decedent to transfer property to a surviving spouse free of federal estate tax.”<sup>1</sup> For example, if a decedent leaves \$2,000,000 in property to a surviving spouse, assuming no restrictions, that \$2,000,000 will not be included in the decedent’s taxable estate.<sup>2</sup> This means the decedent’s estate will not incur any transfer tax on that \$2,000,000 in property.

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\* To my parents, Mark and Judy.

\*\* *Editor’s Note:* This Note received the Gertrude Brick Apprentice Prize for the Outstanding Note written during the Spring 2001 Semester.

1. *Tarbox v. Palmer*, 564 So. 2d 1106, 1108 (Fla. 4th DCA 1990).

2. This is because the property is passed from the decedent to the surviving spouse. Under section 2056 of the Internal Revenue Code (I.R.C.), this entitles the decedent’s gross estate to a deduction for the amount passed to the surviving spouse. I.R.C. § 2056(a) (2001).

Generally, all property that a decedent has an interest in at his death is included in the decedent's gross estate and is subject to the estate tax.<sup>3</sup> However, property that qualifies for the marital deduction will not be included in the decedent's taxable estate.<sup>4</sup> Instead, this property will be subject to the estate tax upon the surviving spouse's death.<sup>5</sup> A major exception to property qualifying for the marital deduction is that terminable interests, such as life estates, do not qualify for the marital deduction.<sup>6</sup> Nevertheless, there are exceptions to this terminable interest rule.<sup>7</sup> One such exception is the QTIP election, in which Qualified Terminable Interest Property (QTIP) qualifies for the marital deduction.<sup>8</sup>

Assume the decedent creates a testamentary trust in which, the surviving spouse will receive a lifetime interest in a \$2,000,000 trust. The surviving spouse will receive all the income from that trust until her death, and then the remainder of the trust will pass to the decedent's children. As will be discussed later, this trust may qualify as a QTIP trust<sup>9</sup> if the appropriate election is made by the executor of the decedent's estate. If so, the \$2,000,000 trust will not be taxed as part of the decedent's estate, just as if the surviving spouse had been given complete ownership of the property.

There are requirements for a valid QTIP election. First, a QTIP trust requires that the surviving spouse have an interest in the income of a trust for life.<sup>10</sup> Also, no person may have the power to appoint that income or trust property to anyone other than the surviving spouse during the

3. *See id.* §§ 2031, 2033.

4. *Id.* § 2056(a).

5. Property that is passed to the surviving spouse and qualifies for the marital deduction will be included in the surviving spouse's estate and taxed under a variety of I.R.C. sections when the surviving spouse dies. The I.R.C. section under which the property is included depends on the interest that is given to the surviving spouse. For instance, if the spouse is given complete ownership of property, it will be included under I.R.C. § 2033. However, if the spouse was given a limited property interest that qualifies for the marital deduction, other Code sections will apply to tax the spouse's interest in the spouse's gross estate. *See, e.g., id.* §§ 2041, 2044.

6. *Id.* § 2056(b)(1). The general reason for the terminable interest rule is that the government wants to ensure that the property will be taxed upon leaving the marital unit. RICHARD B. STEPHENS ET AL., *FEDERAL ESTATE & GIFT TAXATION* ¶ 5.06[7][a] (7th ed. 1996); Irene A. Vliissides, *Estate of Clack v. Commissioner: An End to the Conflict over Contingent QTIP Elections?*, 6 *GEO. MASON L. REV.* 163, 165 (1997). If the marital deduction is allowed for a terminable interest, such as a life estate, the property is not included in the decedent's taxable estate because of the deduction. I.R.C. § 2056(a) (2001). Also, the property will not be taxed in the spouse's estate because, at the spouse's death, there is no longer any interest to tax, as an interest in a life estate expires at death. STEPHENS, *supra*, ¶ 5.06[7][a].

7. I.R.C. § 2056(b)(3)-(8) (2001).

8. *Id.* § 2056(b)(7).

9. A QTIP trust is a trust that will be funded with the portion of the spouse's estate for which a timely QTIP election has been made.

10. I.R.C. § 2056(b)(7)(B)(i) (2001).

surviving spouse's life.<sup>11</sup> In addition, the surviving spouse's interest must not be subject to a contingency that could cause that interest to terminate or fail before the death of the surviving spouse.<sup>12</sup>

Florida's elective share statute includes similar language.<sup>13</sup> Florida allows an elective share trust to be created where the spouse will have a lifetime income interest in the trust and no one can distribute the trust income away from the spouse for the spouse's life.<sup>14</sup> In addition, just like the QTIP election, the elective share must be elected in order to take effect.<sup>15</sup>

Because a surviving spouse's interest in an elective share trust may qualify for a QTIP election, this Note will explore whether a *contingent* elective share trust may qualify for a QTIP election.<sup>16</sup> More particularly, this Note will consider whether such a provision will actually destroy the ability of that trust to qualify as a valid QTIP trust. The specific issue is whether the option of taking the elective share should be deemed a contingency that may cause the surviving spouse's interest to terminate or fail under the QTIP rules. No court has yet been required to decide this particular issue, but the provision is common and it would concern many practitioners should the Internal Revenue Service (IRS) rule that such an interest does not qualify for the marital deduction.

The concern with the IRS's potential ruling discussed above is great because of the IRS's position on a very similar issue that was hotly debated in the 1990s. The Tax Court ruled in favor of the IRS in three separate cases.<sup>17</sup> The issue was whether a QTIP trust was valid when the surviving spouse's interest was contingent upon the executor actually making the election.<sup>18</sup> The Tax Court reasoned that the executor could choose not to make the election, meaning the election was contingent.<sup>19</sup>

11. *Id.* § 2056(b)(7)(B)(ii).

12. *Id.*

13. *See* FLA. STAT. § 732.2025(2) (2001).

14. *Id.*

15. *See id.* § 732.2125.

16. A contingent elective share trust is a standby trust that will never be funded if the surviving spouse does not make the elective share election. For purposes of this Note, the surviving spouse merely has a right to the income and not an invasion power or a power of appointment. Also, I am assuming that such a contingent elective share trust is permitted in Florida. An amendment to section 732.2075(1)(e) of Florida Statutes has been proposed to specifically allow "interests that are contingent upon making the election. . . ." Proposed amendment to Fla. Stat. § 732.2075 submitted to the Real Property, Probate and Trust Law section of The Florida Bar (Sept. 22, 2001).

17. *Robertson v. Commissioner*, 98 T.C. 678 (1992), *rev'd*, 15 F.3d 779 (8th Cir. 1994); *Spencer v. Commissioner*, 64 T.C.M. (CCH) 937 (1992), *rev'd*, 45 F.3d 226 (6th Cir. 1995); *Clayton v. Commissioner*, 97 T.C. 327 (1991), *rev'd*, 976 F.2d 1486 (5th Cir. 1992).

18. *Robertson*, 98 T.C. at 678-79; *Spencer*, 64 T.C.M. (CCH) at 937; *Clayton*, 97 T.C. at 327.

19. *Robertson*, 98 T.C. at 688-89; *Spencer*, 64 T.C.M. (CCH) at 949; *Clayton*, 97 T.C. at 335-

This contingency gave the executor the ability to appoint the property to someone other than the surviving spouse or to prevent all of the income from passing to the surviving spouse.<sup>20</sup> Thus, all the QTIP requirements were not met.

All three of these cases were reversed on appeal, by three different circuits.<sup>21</sup> Shortly thereafter, the Tax Court issued an opinion in *Clack v. Commissioner*<sup>22</sup> that acceded to the circuit courts' opinions. Since that case, the regulations concerning terminable interests have been changed in order to be consistent with that holding.<sup>23</sup> Hence, a surviving spouse's interest in a trust may be contingent on the executor's election and still qualify as QTIP and, subsequently, qualify for the marital deduction. Despite the resolution of that issue, the IRS may decide to question whether a contingent elective share trust, which comes into existence upon the surviving spouse's election to take the elective share, can qualify for the marital deduction under the QTIP provisions. The answer to this question, which involves many of the same issues and arguments of *Clack* and its predecessors, is still very unpredictable.

Part II of this Note will explain the history of the marital deduction and explain in detail the requirements for the relevant sections of the marital deduction and the QTIP election. The cases involving the executor's election and the conflict between the Tax Court and the circuit courts will be analyzed in Part III. Part IV will discuss the elective share and its relation to the QTIP election. The cases will be compared to the current issue in Part V.

## II. HISTORY AND BACKGROUND INFORMATION

### A. *The Marital Deduction; Section 2056*

The marital deduction, as originally enacted in 1948, allowed a decedent to pass one half of the decedent's gross estate, excluding community property, free of tax to a surviving spouse.<sup>24</sup> One reason for the enactment of the marital deduction was to provide married couples in noncommunity property states equal tax treatment with married couples

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20. *Robertson*, 98 T.C. at 688-89; *Spencer*, 64 T.C.M. (CCH) at 949; *Clayton*, 97 T.C. at 335-36.

21. *Spencer v. Commissioner*, 43 F.3d 226, 234 (6th Cir. 1995); *Robertson v. Commissioner*, 15 F.3d 779, 784 (8th Cir. 1994); *Clayton v. Commissioner*, 976 F.2d 1486, 1501 (5th Cir. 1992).

22. 106 T.C. 131 (1996).

23. Treas. Reg. § 20.2056(b)-(7)(d)(3) (as amended in 1998).

24. *Clayton*, 976 F.2d at 1491; see also STEPHENS, *supra* note 6, ¶ 5.06[10]; David C. Johnson, *Qualified Terminable Interest Property: Discussion of the Alternate Bequest Approach* in *Clayton v. Commissioner*, 18 S. ILL. U. L.J. 159, 163-64 (1993).

in community property states.<sup>25</sup> In community property states, the surviving spouse is treated as owning one half of all the community property owned by the couple. Subsequently, the decedent's estate is not taxed on that half of the property that was owned by the surviving spouse. Therefore, the marital deduction allowed equal treatment to couples in noncommunity property states by providing that one half of decedent's noncommunity property may be passed to the surviving spouse without being taxed in decedent's estate.

In 1981, the Economic Recovery Tax Act removed the fifty percent limit on the marital deduction.<sup>26</sup> This allowed an unlimited deduction, where a decedent could transfer all property tax-free to a surviving spouse, provided that all other requirements of the marital deduction were met. The unlimited marital deduction continues to this day.<sup>27</sup>

However, in order to qualify for the marital deduction, two requirements must be met.<sup>28</sup> First, the interest must pass or must have passed from the decedent to the surviving spouse.<sup>29</sup> Second, the interest or property that is being passed to the surviving spouse must be a deductible interest.<sup>30</sup> One of the requirements for being a deductible interest is that the interest is not terminable.<sup>31</sup> A terminable interest is one that will fail or terminate "on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur."<sup>32</sup> An example of a terminable interest is a life estate. This terminable interest rule is extremely important in determining whether the contingent elective share trust may qualify for the marital deduction. This is because the choice or failure to choose to take an elective share may be considered a contingency or failure of an event, thereby making the elective share a terminable interest and ineligible for the marital deduction.

25. STEPHENS, *supra* note 6, ¶ 5.06[10]; Johnson, *supra* note 24, at 163-64.

26. Economic Recovery Tax Act of 1981, § 403(a)(1)(A), 95 Stat. 172 (1981) (codified as amended in scattered sections of 26 U.S.C.); STEPHENS, *supra* note 6, ¶ 5.06[10]; Johnson, *supra* note 24, at 165-66. Before the 50% limit was removed, the Tax Reform Act of 1976 expanded the limit to the greater of \$250,000 or half of the decedent's adjusted gross estate. STEPHENS, *supra* note 6, ¶ 5.06[10].

27. See I.R.C. § 2056 (2001).

28. STEPHENS, *supra* note 6, ¶ 5.06[2]. In addition to a deductible interest passing, the marital deduction requires that there be a surviving spouse who is a U.S. citizen. I.R.C. § 2052(d) (2001). However, if the surviving spouse is not a citizen, a qualified domestic trust (QDOT) may be established to enable use of the marital deduction. *Id.*

29. I.R.C. § 2056(a) (2001).

30. *Id.* This requirement means that the interest is generally includable in the decedent's gross estate before the deduction is allowed to exempt it from being taxed.

31. *Id.* § 2056(b).

32. *Id.* § 2056(b)(1).

### B. *The QTIP Election*

When the marital deduction was first enacted in 1948, one exception to the terminable interest rule was the general power of appointment trust, in which the surviving spouse was granted the power to appoint all of the property to herself or her estate.<sup>33</sup> Because the surviving spouse possessed a general power of appointment, the property would be taxed as part of the surviving spouse's estate.<sup>34</sup> With this exception, the property would be taxed only once, upon the death of the surviving spouse.

The Economic Recovery Tax Act of 1981 expanded the exceptions to the terminable interest rule and added section 2056(b)(7).<sup>35</sup> This section allows the marital deduction for "qualified terminable interest property" (QTIP). The QTIP provision enables a decedent to pass an interest in property to a surviving spouse while retaining the ability to decide who will receive that property at the death of the surviving spouse.<sup>36</sup> Without such an exception, "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 his tax benefits at his death to insure inheritance by the children."<sup>37</sup> This is a particular problem when a decedent has children from a previous marriage, but wants to provide for a current spouse after death.

If a terminable interest qualifies as QTIP, the surviving spouse is treated as the owner<sup>38</sup> and the entire value of the property can qualify for the marital deduction, despite the general rule that terminable interests do not qualify for the marital deduction. This is true even though the surviving spouse only has a life interest and the remainder will pass to

33. Johnson, *supra* note 24, at 164. There were other exceptions to the terminable interest rule that existed when the marital deduction was first enacted. One exception was for an interest passing to a surviving spouse that will only terminate or fail if such spouse's death occurs (a) within six months of decedent's death, or (b) as a result of a common disaster that caused the death of the decedent and the surviving spouse. I.R.C. § 812(e)(1) (1948) (current version at I.R.C. § 2056(b) (2001)). The other exception was for proceeds of life insurance given to the surviving spouse upon decedent's death if payments commenced within one year of decedent's death and were only payable to the surviving spouse during such spouse's life and such spouse had the power to appoint the amount payable after such spouse's death. *Id.* In addition, today, section 2056 includes other exceptions to the terminable interest rule, including the general power of appointment trust. *Id.* § 2056(b)(3)-(8).

34. Johnson, *supra* note 24, at 164-65.

35. Economic Recovery Tax Act of 1981, § 403(d), 95 Stat. 172 (1981) (codified as amended in scattered sections of 26 U.S.C.). The general power of appointment trust exception has been viewed as a model for the QTIP exception. Johnson, *supra* note 24, at 164.

36. See Clayton v. Commissioner, 976 F.2d 1486, 1492-93 (5th Cir. 1992).

37. *Id.* at 1493 n.26 (quoting H.R. REP. NO. 97-201, at 159-60 (1981)).

38. This means that the entire value of the trust property will be included in the surviving spouse's estate at death. I.R.C. § 2044 (2001).

others, as specified by the decedent. This is because the statute provides that “no part of such property shall be treated as passing to any person other than the surviving spouse.”<sup>39</sup>

However, in order to qualify as QTIP, (1) the property must pass from the decedent, (2) the surviving spouse must have a qualifying income interest for life, and (3) an election must be made by the executor.<sup>40</sup> For the property to pass from the decedent, the interest must be included in the decedent’s gross estate.<sup>41</sup> In order to have a qualifying income interest for life, a surviving spouse must be entitled “to all the income from the property, payable annually or at more frequent intervals.”<sup>42</sup> In addition, “no person [may have] a power to appoint any part of the property to any person other than the surviving spouse.”<sup>43</sup> Because the issue in this Note centers on whether there is a qualifying interest for life, this requirement will be discussed in greater detail below. The last requirement is that the decedent’s executor must elect to use the QTIP provision for all or part of the property.<sup>44</sup>

A qualified income interest for life requires that the spouse’s entitlement to the income interest generally begin at the decedent’s death and last until the surviving spouse’s death.<sup>45</sup> Therefore, the interest must not be contingent or terminable upon a specified event or last for a term of years.<sup>46</sup> Provided, however, that if the interest is contingent upon the executor’s election of the QTIP provision, the QTIP election will not fail with respect to the property for which the election was actually made.<sup>47</sup> However, this exception came about only recently, after a series of conflicting decisions arose out of the Tax Court and the circuit courts.

39. *Id.* § 2056(b)(7)(A)(ii).

40. *Id.* § 2056(b)(7)(B)(i).

41. Section 2056 of the Code provides an explicit, but not exhaustive list, of which interests constitute passing for purposes of that section. *Id.* § 2056(c). Included are interests given to the surviving spouse by will, inheritance, dower or courtesy, pre-death transfer, joint ownership, and insurance. *Id.*

42. *Id.* § 2056(b)(7)(B)(ii)(I). Whether the spouse is entitled to all the income in the trust is also dependent on the purpose of the trust. *See* Treas. Reg. § 20.2056(b)-7(d)(2) (as amended in 1998) (providing that the principles of § 20.2056(b)-5(f) are applicable to determining the “all income for life” provision of the QTIP requirements). The purpose must be to provide the spouse with beneficial enjoyment and the trust must be likely to produce income. *Id.* § 20.2056(b)-5(f).

43. I.R.C. § 2056(b)(7)(B)(ii)(II) (2001).

44. *Id.* § 2056(b)(7)(B)(i)(III). There are no serious limitations to the election requirement. This election may be made merely by listing the property as a deduction on Schedule M, and courts are lenient as to late filings. *See* STEPHENS, *supra* note 6, ¶ 5.06[8][d][iii]. Once the election is made, it is irrevocable. I.R.C. § 2056(b)(7)(B)(v) (2001).

45. STEPHENS, *supra* note 6, ¶ 5.06[8][d][iii].

46. I.R.C. § 2056(b)(1) (2001); Treas. Reg. § 20.2056(b)-7(d)(3) (as amended in 1998); STEPHENS, *supra* note 6, ¶ 5.06[8][d][iii].

47. Treas. Reg. § 20.2056(b)-7(d)(3); *Clack v. Commissioner*, 106 T.C. 131, 141 (1996).

### III. EVOLUTION OF THE CONFLICT

#### A. IRS and Tax Court View

In three separate cases, the IRS argued that if a surviving spouse's interest in a trust, which the decedent had designated in his will as a QTIP trust, was contingent upon the election of the executor,<sup>48</sup> it was not a valid QTIP trust and thus the interest passing to the surviving spouse could not qualify for the marital deduction.<sup>49</sup> In each of the cases, the executor was given the discretion to either elect QTIP treatment for the trust or not to elect QTIP treatment.<sup>50</sup> However, if no election was made, the property would pass to a trust that the surviving spouse had no interest in and that would not qualify for the marital deduction.<sup>51</sup> The Tax Court agreed in all three cases that the trusts at issue did not qualify as QTIP trusts and were subsequently included in the decedent's taxable estate.<sup>52</sup> The three cases will each be briefly discussed.

The first case to be decided was *Clayton v. Commissioner*.<sup>53</sup> In *Clayton*, the decedent provided in his will that a QTIP trust was to be created for his wife, specifically providing that it was his intention for the trust to qualify for the marital deduction.<sup>54</sup> However, the decedent also provided that, if the executor failed to make the section 2056(b)(7) election, the property would pass into a separate trust; one that did not qualify for the marital deduction.<sup>55</sup> The decedent's children, and not his spouse, were the beneficiaries of this separate trust.<sup>56</sup>

In denying QTIP treatment, and therefore a marital deduction for the amount of the trust, the Tax Court rested its opinion on two main principles. First, the Tax Court noted that the determination as to whether a spouse has a qualifying life income interest and whether that interest qualifies for the marital deduction must be made at the date of the decedent's death.<sup>57</sup> In addition, a surviving spouse cannot have a

48. The executor of the decedent's estate must elect to have a trust qualify as a QTIP trust; otherwise, not all of the QTIP requirements have been met. I.R.C. § 2056(b)(7) (2001).

49. *Robertson v. Commissioner*, 98 T.C. 678, 682 (1992), *rev'd*, 15 F.3d 779 (8th Cir. 1994); *Spencer v. Commissioner*, 64 T.C.M. (CCH) 937 (1992), *rev'd*, 45 F.3d 226 (6th Cir. 1995); *Clayton v. Commissioner*, 97 T.C. 327, 334 (1991), *rev'd*, 976 F.2d 1486 (5th Cir. 1992).

50. *Robertson*, 98 T.C. at 681; *Spencer*, 64 T.C.M. (CCH) at 937; *Clayton*, 97 T.C. at 328.

51. *Robertson*, 98 T.C. at 681; *Spencer*, 64 T.C.M. (CCH) at 937; *Clayton*, 97 T.C. at 328.

52. *Robertson*, 98 T.C. at 695; *Spencer*, 64 T.C.M. (CCH) at 937; *Clayton*, 97 T.C. at 336.

53. 97 T.C. 327 (1991), *rev'd*, 976 F.2d 1486 (5th Cir. 1992).

54. *Id.* at 328.

55. *Id.*

56. *Id.*

57. *Id.* at 334; *see also* Vlissides, *supra* note 6, at 168.

qualifying interest if it is contingent on an event that possibly, not probably, will cause the interest to terminate or fail.<sup>58</sup>

Applying these principles, the Tax Court concluded that the executor had the ability not to elect QTIP treatment, thereby divesting the property into a non-qualifying trust in which someone other than the surviving spouse would have an interest.<sup>59</sup> This implied three consequences fatal to QTIP treatment. First, this meant the executor had the power to cause the QTIP trust to fail through non-election, even though that occurrence was unlikely.<sup>60</sup> Additionally, this allowed the executor not only to appoint the property to someone other than the spouse, but also to appoint the property into a trust where the spouse would not be entitled to the income.<sup>61</sup> These last two options, the court reasoned, were in direct violation of both requirements to the “all income for life” provision.<sup>62</sup>

The crucial facts in *Robertson v. Commissioner*<sup>63</sup> were virtually identical to those in *Clayton*. The decedent had created a number of trusts in his will.<sup>64</sup> Two of the trusts were to qualify as QTIP trusts; however, in the event the executor failed to make the QTIP election, the trust assets were to be transferred to a separate, non-qualifying trust.<sup>65</sup> The decedent authorized the executor to elect any part or the entire amount of the property designated for the QTIP trusts as property qualifying for the marital deduction.<sup>66</sup> The Tax Court used the same analysis as was used in *Clayton* and, therefore, the trust was held not to be a valid QTIP trust.<sup>67</sup> The main reason for the holding was that the requirement that the spouse have a qualifying income interest for life was not met.<sup>68</sup>

In *Spencer v. Commissioner*,<sup>69</sup> the facts were again very similar to those in *Clayton*. The decedent created two trusts: one to qualify as QTIP in favor of his spouse and the other trust to benefit his children.<sup>70</sup> The trust was to be funded by whatever amount the executor elected.<sup>71</sup> The decedent

58. *Clayton*, 97 T.C. at 334; see also Vlissides, *supra* note 6, at 168.

59. *Clayton*, 97 T.C. at 335-36.

60. *Id.*

61. *Id.*

62. *Id.*

63. 98 T.C. 678 (1992), *rev'd*, 15 F.3d 779 (8th Cir. 1994).

64. *Id.* at 681.

65. *Id.*

66. *Id.* One of the arguments made by the taxpayer was that the executor was “required” to make the election and, therefore, did not have the ability to appoint the property away from the surviving spouse. *Id.* at 689. However, the Tax Court rejected this argument, reasoning that the decedent’s will made it clear that the election was to be at the executor’s discretion. *Id.* at 689-91.

67. *Id.* at 695.

68. *Id.*

69. 64 T.C.M. (CCH) 937 (1992), *rev'd*, 45 F.3d 226 (6th Cir. 1995).

70. *Id.* at 937-39.

71. *Id.*

designated his spouse as the executor, and she was given broad discretion in determining the amount of the election.<sup>72</sup> Any amount not elected was to pass into the second trust.<sup>73</sup> The rationale used in *Clayton* was applied by the Tax Court.<sup>74</sup> Because section 2056(b)(7) requires that no person, not even the surviving spouse, have the ability to appoint property away from the surviving spouse, the Tax Court found the trust in violation of the QTIP requirements.<sup>75</sup>

### B. Circuit Court Disagreement

On appeal, each of these cases was overturned, respectively, by three different circuit courts. The Fifth Circuit reversed *Clayton*, focusing on the intent of Congress in creating the QTIP exception to provide broad discretion to decedents.<sup>76</sup> The court noted that the QTIP exception was also created to expand the classes of property eligible for the marital deduction.<sup>77</sup> The Fifth Circuit reasoned that the election could only be made by someone other than the decedent and only after the decedent's death.<sup>78</sup> The court concluded that the QTIP election related back to the instant of death, no matter when it was actually made.<sup>79</sup>

The Fifth Circuit found that all QTIP requirements were present in the trust: the interest passed from the decedent, the spouse had a qualified life interest in all the income from the trust, and the election had been made.<sup>80</sup> Additionally, the court found that no one had the power to appoint the property away from the surviving spouse.<sup>81</sup> In response to the Tax Court holding otherwise, the Fifth Circuit found that:

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72. *Id.*

73. *Id.*

74. *Id.* at 942-45.

75. *Id.*

76. *Clayton v. Commissioner*, 976 F.2d 1486, 1491-93 (5th Cir. 1992).

77. *Id.* at 1493.

78. *Id.* at 1494.

79. *Id.* at 1495. The Fifth Circuit held that:

[M]any acts must be done and many facts must be determined *after* the death of the testator in order to determine the taxable estate. The question is not *when* those determinations are made or *when* those acts are performed but whether their effects relate back, *ab initio*, to the moment of death.

*Id.* at 1498; see also *Patterson v. United States*, 181 F.3d 927, 930-31 (8th Cir. 1995) (relying on the reasoning in *Clayton* in holding that the trustee's discretion in passing property to a marital trust did not create an impermissible power of appointment).

80. *Clayton*, 976 F.2d at 1496-97.

81. *Id.* at 1497.

No reasonable reading or construction of the Will or the statute can validate the position of the Commissioner, as endorsed by the Tax Court, that the . . . [executor's] QTIP election itself is "tantamount" to a power of appointment to the testator's children. . . . To embrace the Commissioner's flawed logic and deliberate disregard of the plain wording of the pertinent part of Code § 2056 would be to engage in pure sophistry.<sup>82</sup>

*Robertson* was reversed by the Eighth Circuit, which relied heavily upon the Fifth Circuit's decision in *Clayton*.<sup>83</sup> The court also focused on the intent of Congress in creating the QTIP exception to the terminable interest rule, finding that "Congress . . . believed that as between spouses so long as the property was taxed in the first or second estate the estate tax laws should not dictate how a person decided to dispose of his or her property."<sup>84</sup> Furthermore, the court reasoned that the determination of whether there is valid QTIP should be made by examining the "elected" property and, therefore, what would have happened if the election had not been made is irrelevant.<sup>85</sup> Thus, the court determined that the decedent's estate should receive a marital deduction for the trust property.<sup>86</sup>

The Sixth Circuit, while agreeing with the result that the Fifth and Eighth Circuits reached, disagreed on the primary reason that such trusts should be entitled to QTIP treatment.<sup>87</sup> The court ruled that, because property cannot meet the definition of QTIP until an election has been made, the date of the election is the proper date to determine if all the QTIP requirements in section 2056(b)(7) have been met.<sup>88</sup> After the election is made, no one has the ability to appoint the property to anyone but the surviving spouse.<sup>89</sup> Therefore, all the QTIP requirements are met and the marital deduction is allowed.<sup>90</sup>

To summarize these cases, the main disagreement centers on when to determine if all requirements have been met. Under the IRS's and Tax Court's views, the determination must be made at death. If, at death, anyone has the power to appoint the property away from the spouse, and therefore terminate the spouse's right to income from the property, there is not a valid QTIP trust. The Fifth and Eighth Circuits have taken the

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82. *Id.*

83. *Robertson v. Commissioner*, 15 F.3d 779, 781-84 (8th Cir. 1994).

84. *Id.* at 783 (citation omitted).

85. *Id.* at 784.

86. *Id.*

87. *See Spencer v. Commissioner*, 43 F.3d 226 (6th Cir. 1995).

88. *Id.* at 231.

89. *Id.* at 230.

90. *Id.* at 231-34.

view that, once the election is made, it relates back to the date of death, thereby meeting the “all income for life” test.<sup>91</sup> These courts contend that the requirement for making the election cannot affect the validity of the QTIP trust. In contrast, the Sixth Circuit found that the proper date to determine eligibility was the date of the election.<sup>92</sup>

### C. Concession

In *Clack v. Commissioner*,<sup>93</sup> with facts directly in line with those in the previous cases, the Tax Court acceded to the circuit courts’ position on this issue.<sup>94</sup> Without indicating any reasoning, other than having its prior decisions reversed by three circuits, the Tax Court ruled that it would allow the marital deduction even when the interest is contingent upon the executor’s QTIP election.<sup>95</sup> After recognizing the inconsistent rationales among the circuit courts, the Tax Court decided not to adopt either rule.<sup>96</sup> The Tax Court reasoned that “in either case the result is the same: the marital deduction is allowed.”<sup>97</sup> Since *Clack*, Treasury Regulations related to section 2056(b)(7) have been changed to reflect the court’s holding.<sup>98</sup> While the *Clack* court’s failure to provide reasoning or to adopt either circuit’s rationale makes no difference as to the future of the issue, the absence thereof provides no guidance in interpreting how *Clack* should relate to similar issues, such as whether a contingent elective share trust can qualify for the marital deduction by virtue of a valid QTIP election.

## IV. THE ELECTIVE SHARE

In Florida, a surviving spouse is entitled to take an elective share equal to thirty percent of the decedent’s estate instead of taking under the decedent’s will or taking by intestate succession if the decedent did not

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91. *Clayton v. Commissioner*, 976 F.2d 1486, 1495 (5th Cir. 1992); *Robertson v. Commissioner*, 15 F.3d 779, 783-84 (8th Cir. 1994).

92. *Spencer*, 43 F.3d at 231.

93. 106 T.C. 131 (1996).

94. *Id.* at 141.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Treas. Reg. § 20.2056(b)-(7)(d)(3)* (as amended in 1998). The Regulations now provide that:

A qualifying income interest for life that is contingent upon the executor’s election . . . will not fail to be a qualifying income interest for life because of such contingency or because the portion of the property for which the election is not made passes to or for the benefit of persons other than the surviving spouse.

*Id.* In addition, examples in the Regulations serve to clarify this principle. *Id.* § 20.2056(b)-7(h).

have a valid will.<sup>99</sup> The decision to take the elective share can be made by the surviving spouse, an attorney-in-fact, or a guardian of the surviving spouse's property,<sup>100</sup> and can be made, sometimes up to two years, after the death of the decedent.<sup>101</sup> Just like a QTIP trust, if a surviving spouse makes a valid election to take the elective share, the amount the surviving spouse obtains will qualify for the marital deduction.<sup>102</sup> Section 2056(c)(3) specifically designates an elective share as an interest in property passing that qualifies for the marital deduction.<sup>103</sup>

However, an elective share trust can be set up where the surviving spouse is entitled to use the property for life or to receive annually all the income from the trust for life.<sup>104</sup> With such a trust, "no person other than the spouse has the power to distribute income or principal to anyone other than the spouse."<sup>105</sup> This language is very similar to the language used in the QTIP provision.<sup>106</sup>

If a surviving spouse chooses to take an elective share and the elective share is satisfied with a contingent elective share trust, the main question

99. FLA. STAT. § 732.2125 (2001).

100. *Id.* If the election is not made by the surviving spouse, a probate court must approve the election by taking into consideration the spouse's best interests during the spouse's probable lifetime. *Id.* § 732.2125(2).

101. *Id.* § 732.2135. "[T]he election must be filed within the earlier of 6 months of the date of the first publication of notice of administration or 2 years after the date of the decedent's death." *Id.* § 732.2135(1). An extension of time for making the election may be requested by the surviving spouse. *Id.* § 732.2135(2). If the elective share trust is held to qualify as a QTIP trust, a question may arise as to whether that extension should automatically apply to the QTIP election, which must be made on the decedent's estate tax return. Conversely, an extension to file the decedent's estate tax return may be considered an extension to make the elective share election.

102. I.R.C. § 2056(c)(3) (2001); *see also* *Tarbox v. Palmer*, 564 So. 2d 1106, 1108 (Fla. 4th DCA 1990); Priv. Ltr. Rul. 92-19-001 (Jan. 24, 1992) (finding that, because the state elective share statute required that the portion of the estate that would have passed to the surviving spouse in probate be used first to satisfy the elective share, the elective share qualifies for the marital deduction).

103. I.R.C. § 2056(c)(3) (2001). Section 2056(c)(3) provides, in relevant part, that for purposes of the marital deduction an interest passes from the decedent if the interest "is the dower or curtesy interest (or statutory interest in lieu thereof)" of the decedent's surviving spouse. *Id.* Because "[t]he elective share is the modern day substitute for dower," the amount of the elective share (30% of decedent's estate) qualifies for the marital deduction. *Tarbox*, 564 So. 2d at 1107; FLA. STAT. § 732.2065 (2001).

104. FLA. STAT. § 732.2025(2)(a) (2001). In addition to a QTIP "trust," QTIP can also apply to property, such as a residence, in which the surviving spouse has a legal life estate. *See* STEPHENS, *supra* note 6, ¶ 5.06[8][d]. The key to QTIP is that the spouse retain a qualifying life interest in any type of property. *Id.*

105. FLA. STAT. § 732.2025(2)(c) (2001).

106. Section 2056 of the Code indicates that "the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals [and that] no person has a power to appoint any part of the property to any person other than the surviving spouse." I.R.C. § 2056(b)(7)(B)(ii) (2001).

becomes whether that contingent elective share trust can qualify for the marital deduction by virtue of the QTIP election being made.<sup>107</sup> If so, the property in the trust will be subject to the estate tax when the surviving spouse dies.<sup>108</sup>

Because property passing to a surviving spouse pursuant to an elective share qualifies as property passing for the marital deduction, many may wonder why a decedent, spouse, or practitioner would want or need the elective share trust to qualify separately as a QTIP trust. One reason is that the language used in Florida's elective share statute may be viewed as merely creating a terminable life estate in the elective share trust.<sup>109</sup> If this were the case, the amount of the trust would probably not qualify for the marital deduction under section 2056 because it would be a terminable interest.<sup>110</sup> However, if the elective share trust qualified as a QTIP trust, the property in the trust would qualify for the marital deduction.<sup>111</sup>

With the elective share trust qualifying as a QTIP trust, a surviving spouse would have complete ownership of the trust property for federal transfer tax purposes, while the decedent would still have the ability to designate the beneficiaries of the remainder.<sup>112</sup> Depending on the financial situation of the decedent and the surviving spouse, there may be tax

107. The question arises whether the elective share will be or must be satisfied with a contingent elective share trust upon the election of the elective share by the surviving spouse.

108. The Code provides that the surviving spouse will be taxed at death for property if a deduction was allowed for the decedent's estate under section 2056(b)(7). I.R.C. § 2044(b)(1)(A) (2001). This ensures that the property will be taxed upon leaving the marital unit, instead of escaping estate tax liability altogether. *See, e.g.,* Vlissides, *supra* note 6, at 187.

109. *See* FLA. STAT. § 732.2025(2)(a) (2001). When an elective share trust is created, that trust entitles the surviving spouse either to use of the property for life or the income from the property for life. *Id.* This is a life estate that will terminate upon the spouse's death. The spouse's death is the occurrence of an event that will cause the interest to terminate. *See* I.R.C. § 2056(b) (2001).

110. Section 2056(c)(3) provides explicit circumstances under which an interest is passed by the decedent to the surviving spouse. I.R.C. § 2056(c)(3) (2001). However, passing is only one requirement of the marital deduction. *Id.* § 2056(a). The other main requirement is that the interest be a deductible interest, meaning one that is not terminable. *Id.* § 2056(b). Therefore, even if the elective share is considered as passing under that section, the interest still must not be terminable. Subsequently, an elective share trust that creates merely a life estate is a terminable interest and is not subject to the marital deduction, unless an exception, such as the QTIP provision, applies.

111. This is because the QTIP provision is an exception to the terminable interest rule. *Id.* § 2056(b)(7). Section 2056(b)(7) provides that no part of the property is deemed to pass to anyone other than the surviving spouse, thereby eliminating the problem of the spouse being considered as having merely a life interest. *Id.* § 2056(b)(7)(A)(ii). The main effect of the QTIP provision is that the interest will not escape taxation, as would a mere life estate.

112. The purpose of creating the QTIP exception was to allow the decedent the ability to provide for a spouse while maintaining the ability to control the disposition of the property after the surviving spouse's death. *Clayton v. Commissioner*, 976 F.2d 1486, 1492 (5th Cir. 1992); *see also* Mitchell M. Gans, *Federal Transfer Taxation and the Role of State Law: Does the Marital Deduction Strike the Proper Balance*, 48 EMORY L.J. 871, 900-07 (1999).

benefits in either electing or not electing QTIP treatment.<sup>113</sup> However, an analysis of those benefits or consequences is beyond the scope of this Note. Instead, these next sections will analyze whether the elective share trust should qualify as a QTIP trust and under what circumstances that election either can or may be made.

## V. CURRENT PROBLEM AND RECOMMENDATION

The election of the elective share by a surviving spouse is similar to the QTIP election made by the decedent's executor. Therefore, the question arises whether a qualifying QTIP trust will result from a provision in a decedent's will that provides a spouse with an elective share trust only if that spouse elects to take an elective share to fund that trust. More specifically, does the elective share trust meet all the QTIP requirements? The IRS may argue that the requirements are not met because the spouse has a choice of making the election, and if that election is not made, the property may not pass to the surviving spouse. This could be considered a power in the spouse to appoint the property to another person, a violation of the QTIP requirements.<sup>114</sup>

### A. *May a Contingent Elective Share Trust Qualify as a QTIP Trust?*

The Fifth, Sixth, and Eighth Circuits all found that the election by an executor does not defeat a valid QTIP election.<sup>115</sup> Similarly, an election by the surviving spouse to take an elective share that is satisfied with a contingent elective share trust should not prevent the executor of decedent's estate from electing QTIP treatment. This is because the elective share trust meets all QTIP requirements.<sup>116</sup> When a surviving spouse takes an elective share of the decedent's estate, the first QTIP

113. A proper evaluation of whether to take a marital deduction or to include the property in the decedent's estate is complicated and requires a complete understanding of the estate tax. Generally, however, a marital deduction should only be taken if the decedent has an estate greater than the applicable exclusion amount. See I.R.C. § 2010 (2001). This is because a decedent will receive a credit against the estate for a certain amount and no taxes will have to be paid on that amount. In addition to a decedent's credit, the surviving spouse will be able to utilize this credit as well, possibly eliminating any amount received by the QTIP trust. See STEPHENS, *supra* note 6, ¶ 5.06 for a detailed explanation of the marital deduction and its estate tax consequences. The value of QTIP must also be taken into consideration when determining whether to take the election. See *generally id.* ¶ 5.06; Terry S. Jones, *Estate of Bonner v. United States: QTIPS and Fractional Interest Discounts: Whipsaw Wonderland*, 33 IDAHO L. REV. 595 (1997).

114. See I.R.C. § 2056(b)(7)(B)(ii)(II) (2001).

115. *Spencer v. Commissioner*, 43 F.3d 226, 234 (6th Cir. 1995); *Robertson v. Commissioner*, 15 F.3d 779, 784 (8th Cir. 1994); *Clayton v. Commissioner*, 976 F.2d 1486, 1501 (5th Cir. 1992).

116. A QTIP trust requires that an interest be passed from the decedent to the surviving spouse, that the spouse have a qualifying income interest for life, and that an election be made. I.R.C. § 2056(b)(7)(B) (2001).

requirement is met because an interest in decedent's property passes to the spouse from the decedent.<sup>117</sup>

The second requirement is that the surviving spouse have a qualifying income interest for life.<sup>118</sup> This requirement has two distinct parts. First, the spouse must receive, at least annually, all the income from the property.<sup>119</sup> The specific language of Florida's elective share statute establishes this requirement.<sup>120</sup> This precisely meets the first part of the "all income for life" QTIP requirement.

In addition, having a qualifying income interest for life requires that no person have the ability to appoint any part of the trust property away from the surviving spouse.<sup>121</sup> Florida's elective share trust statute requires that no one, "other than the spouse," can appoint any part of the trust, "income or principal," away from the surviving spouse.<sup>122</sup> This language satisfies the second part of the "all income for life" requirement for a qualifying income interest because only the spouse has the right to the income and no one has the ability to distribute trust property to someone other than the surviving spouse. The language authorizing the spouse to give part of the property to someone else should not defeat the QTIP requirement since a spouse, in any case, should have the ability to do anything with an interest already received. The QTIP requirement is aimed at eliminating the possibility of the spouse never receiving the trust income because someone has designated it to go to another.<sup>123</sup> Therefore, the second QTIP requirement should be met.

The last QTIP requirement is that the election be made.<sup>124</sup> In the case of the elective share, the surviving spouse must also make an election to take the elective share, rather than by the decedent's will or intestate succession.<sup>125</sup> This election is similar to the QTIP election because it must be made after the decedent dies and, if it is not made, the property may pass to someone other than the surviving spouse.<sup>126</sup> Therefore, like the

117. An interest that is given to the surviving spouse through Florida's elective share, which is "a statutory interest in lieu" of a dower or curtesy interest, is specifically provided by the I.R.C. as passing from the decedent to the surviving spouse. *Id.* § 2056(c)(3).

118. *Id.* § 2056(b)(7)(B)(i)(II).

119. *Id.* § 2056(b)(7)(B)(ii)(I).

120. FLA. STAT. § 732.2025(2)(a) (2001).

121. I.R.C. § 2056(b)(7)(B)(ii)(II) (2001).

122. FLA. STAT. § 732.2025(2)(c) (2001).

123. See STEPHENS, *supra* note 6, ¶ 5.06[8][d] (discussing powers over the property during the life of the surviving spouse).

124. I.R.C. § 2056(b)(7)(B)(i)(III) (2001). If a surviving spouse makes the elective share election and receives an elective share trust, the QTIP election must still be made by the decedent's executor in order for the elective share trust to receive QTIP treatment.

125. FLA. STAT. §§ 732.201, .2125 (2001).

126. The surviving spouse may have no interest in the decedent's estate through the decedent's

QTIP election, an argument can be made by the IRS that the surviving spouse has the ability to choose who will get the property by either electing the elective share or by not electing it.<sup>127</sup>

### B. *Application of Clayton, Robertson, and Spencer*

Given the decisions by the circuit courts in *Clayton*, *Robertson*, and *Spencer*, and the concession by the Tax Court in *Clack*, should the preceding argument remain viable? The argument may end up being debated in court, but the decisions in those cases should apply to the elective share as well.

All three circuits focused on the intent of the QTIP exception, which was to provide for a more generous use of the marital deduction.<sup>128</sup> As long as the property will be taxed when it leaves the marital unit, the marital deduction should be allowed.<sup>129</sup> If the elective share trust is designated as a QTIP trust, it will be taxed as part of the surviving spouse's estate upon death.<sup>130</sup> Therefore, since the fear of nontaxation is eliminated, a contingent elective share trust should be eligible for QTIP treatment.

The circuit courts also determined that the election by the executor of the decedent's estate is not tantamount to a power of appointment.<sup>131</sup> The main reason given by the Fifth and Eighth Circuits for this conclusion is that the election can only be made after the decedent's death and it would be illogical to conclude that the choice to make that election will destroy the QTIP election.<sup>132</sup> If the executor had no choice in making the election, including that requirement in the QTIP provision would be pointless.<sup>133</sup> A court must determine whether there is a valid QTIP election by looking at the "elected" property.<sup>134</sup> Furthermore, the executor needs to have

will. If so, and the spouse does not take the elective share, the property that would have passed into the elective share trust will instead go to whomever is designated in the decedent's will.

127. The spouse is left with the choice of whether to take an elective share. Assuming that someone other than the surviving spouse will receive the property if the elective share is not taken, this can be seen as a choice by the surviving spouse to pass the decedent's property either to that spouse or to the other designated recipients. This is a problem because the decedent, not the spouse or an executor, is the person who should be making the decision as to where the property will go.

128. *Spencer v. Commissioner*, 43 F.3d 226, 229-34 (6th Cir. 1995); *Robertson v. Commissioner*, 15 F.3d 779, 782-84 (8th Cir. 1994); *Clayton v. Commissioner*, 976 F.2d 1486, 1490-97 (5th Cir. 1992).

129. *Clayton*, 976 F.2d at 1493 n.26 (citation omitted).

130. I.R.C. § 2044(b)(1)(A) (2001).

131. *Robertson*, 15 F.3d at 782-84; *Spencer*, 43 F.3d at 229-34; *Clayton*, 976 F.2d at 1490-97.

132. *Robertson*, 15 F.3d at 782-84; *Clayton*, 976 F.2d at 1494-98.

133. *See Robertson*, 15 F.3d at 783-84.

134. *Id.* at 783.

flexibility in making that choice in order to maximize estate planning and to make the best use of the marital deduction.<sup>135</sup>

This same reasoning is applicable to the elective share election by the surviving spouse. It can only be made after the decedent's death. The fact that the spouse's failure to make the election may result in the property going to another person should not defeat a valid QTIP trust if the election is actually made. If the election is not made and the property goes to someone other than the spouse, no marital deduction can be taken and the property will be included in the decedent's taxable estate.<sup>136</sup> However, if the election is made and a QTIP trust exists, the property will be included in the surviving spouse's gross estate.<sup>137</sup> Once the election is made, no one can appoint the property away from the surviving spouse. Furthermore, the ability of the spouse to make that choice is of paramount importance to estate planning because the entire purpose of the elective share is to give the spouse a choice in what property to receive from the decedent's estate.

The Sixth Circuit reached the same conclusion: that the election did not destroy otherwise qualifying QTIP.<sup>138</sup> However, the court reached this decision by reasoning that the decision on whether QTIP exists must be made after the election is made.<sup>139</sup> If this reasoning is followed by another court, an elective share trust should qualify for the marital deduction under the QTIP provisions since there would be no question as to the ability to appoint the property away from the spouse. Because the election would be made, by definition the spouse would receive the trust income for life and no one could distribute trust property to anyone else.<sup>140</sup> As a result, upon the spouse's election to take an elective share that is satisfied with an elective share trust, the property transferred to that trust should qualify for the marital deduction under the QTIP provisions if the appropriate election is made by the decedent's personal representative.

Furthermore, the fact that the spouse is making the decision, rather than an executor, is a stronger argument that the spouse's election should not be seen as a power to appoint property away from the spouse.<sup>141</sup> There is debate over whether it is even fair to allow the decedent a deduction when

135. *Clayton*, 976 F.2d at 1495.

136. Generally, property that is passed at the decedent's death will be included and taxed in the decedent's gross estate, unless there is a deduction to prevent taxation of that property. I.R.C. §§ 2031, 2033 (2001). Such exceptions include property passing to a spouse or property passing to a charitable institution. *Id.* §§ 2055, 2056.

137. *Id.* § 2044(b)(1)(A).

138. *Spencer v. Commissioner*, 43 F.3d 226, 229-34 (6th Cir. 1995).

139. *Id.* at 231.

140. FLA. STAT. § 732.2025(2)(a) (2001).

141. In 1986, the IRS issued a private letter ruling holding that an interest qualified as QTIP, even though the interest was contingent upon the executor making the election, where the surviving spouse was the executor. Priv. Ltr. Rul. 86-31-005 (April 23, 1986).

an executor has the power to determine whether the surviving spouse will receive any property from the decedent.<sup>142</sup> Since the spouse, and not an executor who has additional interests, is entitled to make that choice in the case of the elective share, that argument of the IRS is eliminated.

### C. Other Relevant Issues

Assuming that a contingent elective share trust is considered to qualify for the marital deduction under the QTIP provisions if the appropriate election is made, additional questions arise. First, must the elective share trust be considered a QTIP trust if the spouse elects to take the elective share? This is an important issue because the spouse may prefer to have the elective share, but not to have the limitation of a QTIP trust.<sup>143</sup> Also, may a surviving spouse choose to have an elective share trust qualify as a QTIP trust if the decedent did not designate such a result in a will?

Neither Florida's elective share statute nor the Internal Revenue Code provides concrete answers to these questions. Therefore, any answers are purely speculative until the legislature provides some guidance on the issue. This author concludes that the decedent's executor must elect to have an elective share trust qualify as a QTIP trust, since this is a specific QTIP requirement.<sup>144</sup> This should be true even if the decedent does not designate that the elective share trust will be considered a QTIP trust. If the decedent does designate that an election of the elective share by the surviving spouse is to be satisfied by funding an elective share trust and directs the executor to make the appropriate election to qualify the elective share trust as QTIP, the spouse should not have a choice in whether to actually receive QTIP. That decision, as provided in the Code, is left up to the executor.<sup>145</sup>

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142. See, e.g., Wendy C. Gerzog, *The Illogical and Sexist QTIP Provisions: I Just Can't Say It Ain't So*, 76 N.C. L. REV. 1597 (1998); Wendy C. Gerzog, Estate of Clack: *Adding Insult to Injury, or More Problems With the QTIP Tax Provisions*, 6 S. CAL. REV. L. & WOMEN'S STUD. 221 (1996).

143. If a surviving spouse merely elects to take an elective share of the decedent's estate, that spouse would receive complete ownership of the property. However, if a spouse must receive an elective share trust, and subsequently a QTIP interest, there are significant consequences to the surviving spouse. Not only will that spouse receive only a life estate in the property, but there will be limitations on what the spouse can do with the property. See I.R.C. § 2056(b)(7) (2001). Additionally, the spouse's estate, rather than the decedent's estate, will be taxed on the property. *Id.* § 2044(b)(1)(A).

144. *Id.* § 2056(b)(7)(B)(i)(III).

145. However, there is always the possibility that the decedent could designate the surviving spouse as executor of the estate.

## VI. CONCLUSION

The IRS may contend that, because the surviving spouse has the ability not to elect to take an elective share, the spouse has the ability to cause the elective share trust to fail and possibly to appoint the property to another person. If this argument is ruled valid, the property does not meet the requirements of a QTIP trust and the marital deduction should not be allowed. However, because of the similarities between the two elections, a court should follow the rationales behind the circuit court opinions in *Clayton*, *Robertson*, and *Spencer* if confronted with the issue. Until a court is asked to rule on this issue, practitioners and couples engaged in estate planning should be uneasy about the possibility of a different result. This main issue and all related issues could be resolved by the IRS issuing a Treasury Regulation and the Florida Legislature amending the elective share statute to provide answers to these questions. This author urges that these actions be taken.