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## A Tale of Two Trusts: The Problems of Foreign Spouses Who Inherit Pension Benefits

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## COMMENTS

# A TALE OF TWO TRUSTS: THE PROBLEMS OF FOREIGN SPOUSES WHO INHERIT PENSION BENEFITS

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### I. INTRODUCTION

In 1988 Congress amended the estate tax provisions of the Internal Revenue Code (IRC) by denying the benefit of the marital deduction to a surviving spouse who is not a United States citizen.<sup>1</sup> This denial can cost the foreign surviving spouse a substantial amount of increased estate tax. The surviving spouse, however,

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1. I.R.C. § 2056 (Law. Co-op 1990).

may avoid the loss of the deduction by placing the assets in a "qualified domestic trust."<sup>2</sup> One asset frequently included among the assets the surviving spouse inherits is a pension plan.

A pension plan is a common employee benefit. The Employee Retirement Income Security Act (ERISA) provides a guarantee to employees that their pension is secure and that the funds will be available to them on retirement. The primary tool for providing that security is the placement of pension funds in a trust.

The requirements for both a qualified domestic trust (QDOT) and an ERISA trust are prescribed by the IRC. However, the current language of the IRC and regulations makes it unclear whether or not an ERISA-governed pension trust qualifies as a qualified domestic trust.

The thesis of this comment is that the two trusts are sufficiently similar in their requirements and regulation that an ERISA trust should qualify as a qualified domestic trust. Thus an estate should be allowed the marital deduction when a foreign surviving spouse inherits benefits from an ERISA-governed pension plan. Similar consideration is given to the impact of QDOT's on Individual Retirement Accounts (IRA's).

## II. THE ESTATE TAX MARITAL DEDUCTION

This section briefly sets forth the requirements to claim a marital deduction pursuant to the IRC and regulations. The loss of the deduction for a foreign surviving spouse is also explored. Finally, the requirements for a qualifying domestic trust (QDOT) are introduced.

The marital deduction is an important and fairly simple estate tax saving device. In essence, this deduction allows the value of a decedent's gross estate to be reduced by the value of property passing from the decedent to the surviving spouse.<sup>3</sup> The net effect of this deduction is that a decedent is permitted to transfer his estate to his spouse tax-free.

The marital deduction is allowed if five conditions are met: 1) the property interest must be a deductible interest,<sup>4</sup>

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2. I.R.C. § 2056(d)(2)(A) (Law. Co-op 1990).

3. I.R.C. § 2056 (Law. Co-op 1990).

4. I.R.C. § 2056(b) (Law. Co-op 1990). An interest is not deductible if it is a terminable interest. Generally, a terminable interest is one which lapses on passage of time, or on the

- 2) the property interest must be included in decedent's gross estate,<sup>5</sup>
- 3) the property interest must pass from decedent to the surviving spouse,<sup>6</sup>
- 4) the decedent must be survived by a spouse,<sup>7</sup>
- 5) the surviving spouse must be a United States citizen.<sup>8</sup>

The final requirement, disallowance of the marital deduction where the surviving spouse is a foreign citizen, is not absolute. The disallowance does not apply if:

1. the spouse becomes a U.S. citizen before the estate tax return is filed; and the spouse was a U.S. resident at all times after the decedent's death and before becoming a citizen,<sup>9</sup>
2. the decedent dies before December 19, 1992 and was a resident of a country with which the United States has an estate or inheritance tax treaty, to the extent the disallowance is inconsistent with the treaty provisions,<sup>10</sup>
3. the property passes to the surviving spouse in a qualified domestic trust (QDOT).<sup>11</sup>

The latter of these is of most interest here. A QDOT is a trust which adheres to the following requirements:

1. the trust instrument requires at least one trustee to be a U.S. citizen or domestic corporation,<sup>12</sup>
2. no distribution, other than income, may be made unless the domestic trustee has a right to withhold the estate tax from such distribution,<sup>13</sup>
3. the trust must comply with any regulations that are issued to ensure collection of estate tax imposed,<sup>14</sup>
4. the executor of the estate elects to have the trust treated as a QDOT.<sup>15</sup>

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occurrence or failure of an event or contingency.

5. I.R.C. § 2056(a) (Law. Co-op 1990).
6. I.R.C. §§ 2056(a) and (c) (Law. Co-op 1990).
7. Treas. Reg. § 20.2056(a)-1(b) (1986).
8. I.R.C. § 2056(d) (Law. Co-op 1990).
9. I.R.C. § 2056(d)(4) (Law. Co-op 1990).
10. Pub. L. 101-239, Dec. 19, 1989. To the extent that the IRC is inconsistent with the treaty after Dec. 19, 1992, the IRC will take precedence over the treaty.
11. I.R.C. § 2056(d)(2)(A) (Law. Co-op 1990).
12. I.R.C. § 2056A(a)(1) (Law. Co-op 1990).
13. Revenue Reconciliation Act of 1990, § 11702(g)(2), Pub. L. 101-508 [hereinafter RRA].
14. I.R.C. § 2056A(a)(2) (Law. Co-op 1990).
15. I.R.C. § 2056A(a)(3) (Law. Co-op 1990).

The regulations mentioned in number 3 above governing the collection of the estate tax imposed on distribution from a QDOT have not yet been proposed by the Treasury Department.<sup>16</sup>

### III. ERISA QUALIFIED PENSION PLANS

A pension plan is a common and significant asset to many U.S. citizens. As of March 1988, some 118,150,000 civilian wage and salary workers over the age of fifteen years were covered by a pension plan; those workers constitute 40.8 percent of the population.<sup>17</sup>

ERISA's design provides minimum standards to assure "the equitable character of such plans and their financial soundness."<sup>18</sup> Congress recognized the need for federal legislation imposing the guarantees needed to provide adequate protection to those employees whose personal financial plans and security were based on their reliance on a retirement income.<sup>19</sup> The purpose of ERISA as stated in the Act and its legislative history has judicial sanction and use. Congress wanted to guarantee that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it."<sup>20</sup> In sum, ERISA assures an employee that when retirement arrives, the pension check will arrive as well.

Most pension plans must satisfy the requirements of both ERISA and the IRC and regulations thereunder.<sup>21</sup> ERISA generally mandates compliance with its regulations on any plan estab-

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16. The Department of the Treasury has submitted the new tax form 706-QDT, Estate Tax Return for Qualified Domestic Trusts, to Office of Management and Budget for review and clearance. 55 Fed. Reg. 38778-01 (Sept. 20, 1990). The Treasury has also announced that it is developing proposed regulations to clarify the estate tax treatment of property transferred to a qualifying domestic trust for the benefit of alien surviving spouses. 54 Fed. Reg. 45083-01 (Oct. 30, 1989).

17. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 1990 STATISTICAL ABSTRACT OF THE UNITED STATES, Table No. 678.

18. 29 U.S.C. § 1001(a) (Law. Co-op 1990).

19. H.R. REP. NO. 93-533, 93rd Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 4639. Prior to ERISA the two primary federal statutes that protected pension plan participants were the Welfare and Pension Plan Disclosure Act, 29 U.S.C. § 301 *et seq.* (1958) and the I.R.C. §§ 401-403. Neither statute provided for insurance of the pension funds nor employee guarantees that termination of employment through discontinuation of the business, firing, or resignation would not cause the total loss of all benefits.

20. Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980)).

21. The primary rules are set forth in I.R.C. § 401(a) (Law. Co-op 1990), and Treas. Reg. §§ 1.401(a)-1 (1981) and 1.401-1 (1976).

lished by an employer who engages in interstate commerce.<sup>22</sup> The requirements in the IRC provide for tax qualification and resulting tax benefits.<sup>23</sup> The IRC overlaps many ERISA requirements.

The most significant requirement, for purposes of this comment, is that the funds are segregated in a separate fund managed by a third party. Generally, this is accomplished by the establishment of a trust governed by a written plan. The plan must not permit the employee to assign benefits and must provide benefits to the surviving spouse.<sup>24</sup> The other requirements are not germane here but can be summarized by saying that the plan must be established by the employer with contributions from the employer, employee or both.<sup>25</sup> The plan must be defined, written, and permanent. Minimum standards for vesting must be met. Provisions must be made for non-diversion of the funds which are to be held for the exclusive use of participants and their beneficiaries. In addition, the IRC requires that the plan must be non-discriminatory in that it must provide coverage for the majority of employees, not just highly compensated employees.<sup>26</sup> There are more than 30 requirements which must be satisfied to comply with the IRC and Regulations.<sup>27</sup>

Considering the thirty requirements and myriad of regulations, it is difficult to establish a qualified plan. However, such a plan benefits both employer and employee. First, the income produced by the fund is exempt from tax.<sup>28</sup> Second, the contributions made by the employer are deductible from its gross income for income tax purposes.<sup>29</sup> Finally, the amounts contributed to the plan by the employer are not considered income and thus not taxed to the employee until distribution is made.<sup>30</sup> These economic benefits explain the extent to which such plans exist.

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22. 29 U.S.C. § 1003(a)(1) (Law. Co-op 1990). The language merely refers to "commerce;" however, within ERISA commerce is defined as commerce between any state and any place outside the state. 29 U.S.C. § 1002(11) (Law. Co-op 1990).

23. Some retirement plans, like Individual Retirement Accounts and Keogh Plans, carry tax benefits but are not subject to ERISA.

24. Treas. Reg. § 1.401-1 (1976).

25. I.R.C. § 401(a) (Law. Co-op 1990).

26. *Id.*

27. I.R.C. § 401(a) (Law. Co-op 1990) and Treas. Reg. § 1.401-1 (1976).

28. If the fund is held in a trust, its income is tax exempt under I.R.C. § 501(a) (Law. Co-op 1990). If the funds are in a custodial account, annuity, endowment, contract, or certificate they are treated as trusts. I.R.C. §§ 401 (f) and (g) (Law. Co-op 1990).

29. I.R.C. § 404 (Law. Co-op 1990).

30. I.R.C. § 402(a) (Law. Co-op 1990).

## IV. ESTATE TAX TREATMENT OF PENSION BENEFITS

In general the value of the gross estate will include the value of an annuity or other receivable payable to any beneficiary by virtue of that beneficiary surviving the decedent.<sup>31</sup> Since the passage of the Retirement Equity Act (REA), more estates include retirement plan survivor's benefits because REA requires that a plan must include spousal survivor's benefits.<sup>32</sup>

If the value of the surviving spouse's annuity or pension benefit is included in the deceased employee's gross estate, it typically will qualify for the marital deduction.<sup>33</sup> Although marital deduction status is denied to terminable interests, there are two prongs to the definition of a terminable interest.<sup>34</sup> The first prong fits the surviving spouse's interest in the pension benefit: the interest terminates on the death of the spouse or some earlier period depending on the terms of the plan. For the interest to be a non-deductible terminable interest, the second prong requires that another person enjoy or possess an interest in the property after the survivor's interest terminates, and that this interest must have been received from the decedent.<sup>35</sup> Because no other person may enjoy or possess an interest in a pure annuity after the surviving spouse's interest terminates, the survivor's pension benefit qualifies for the marital deduction.<sup>36</sup>

Therefore, if not for the disallowance of the marital deduction for interests passing to a non-citizen surviving spouse, the foreign surviving spouse would take the pension benefit free of estate tax.<sup>37</sup> The citizen spouse's interest in the pension terminates at death. Accordingly, this is not part of the second decedent's estate.

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31. I.R.C. § 2039 (Law. Co-op 1990).

32. REA was passed as Pub. L. 98-397 (1984) which, among other code sections, amended I.R.C. § 401(a)(11) and 29 U.S.C. § 1055(a) (Law. Co-op 1990).

33. I.R.C. § 2056(a) (Law. Co-op 1990).

34. I.R.C. § 2056(b) (Law. Co-op 1990).

35. *Id.*

36. I.R.C. § 2056(b) (Law. Co-op 1990). By pure annuity I refer to a payment scheme that terminates on the death of the surviving spouse. If the plan guarantees payment of a specified amount or specified number of payments, then the plan would only qualify for a marital deduction if the balance of the payments pass to the surviving spouse's estate.

37. Pension income is subject to income tax much like any other source of income. I.R.C. §§ 402(a) and 72 (Law. Co-op 1990). The primary difference is that pension income is subjected to a calculation which subtracts from the gross amount of the check that amount attributable to the employee's contribution from an income source on which tax has already been paid. *Id.* Pension benefit paid to either a citizen or non-citizen is generally included in income.

In short, the pension benefit is never subject to estate tax. However, for the non-citizen spouse the marital deduction is lost to any asset not placed in a QDOT. Because of that disallowance, it is critical to determine whether the pension benefit qualifies as a QDOT.

## V. RECONCILING THE TRUSTS

A QDOT and pension trust have many similarities. The trusts are both domestic entities, or at a bare minimum have very strong legal ties to the United States. Distributions from either trust can only be made in accordance with the plan or statute or both. The beneficiary as well as the trustee are restricted by anti-alienation provisions. Finally, Congress has stated its preference that a pension trust be a QDOT equivalent.

### A. *The Domestic Requirement*

The trust requirements pursuant to both ERISA and IRC are virtually identical. Under the IRC, in order for a trust which forms the basis of a pension plan to be a qualified trust it must be "created or organized in the United States."<sup>38</sup> The United States is defined as any one of the states or the District of Columbia.<sup>39</sup> The trust must also be maintained as a domestic trust at all times.<sup>40</sup> The purpose for these requirements is to "subject the trust to the continuing jurisdiction of the United States to insure that the appropriate tax will be obtained with regard to trust distribution."<sup>41</sup>

Similarly, for the estate tax marital deduction to apply by means of a QDOT, the acquired assets must be placed in a domestic trust.<sup>42</sup> The IRC goes on to require that the trust must meet any regulations issued by the Treasury to ensure the collection of any estate tax imposed on the trust.<sup>43</sup> Congress expressed its intent that this be accomplished by requiring some portion of the trust property to be located within the United States.<sup>44</sup> The inference

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38. Treas. Reg. § 1.401-1(a)(3)(i) (1976).

39. *Id.* and I.R.C. § 7701(a)(9) (Law. Co-op 1990).

40. Treas. Reg. § 1.401-1(3)(a)(i) (1976).

41. Rev. Rul. 70-242, 1970-1 C.B. 89.

42. I.R.C. § 2056A (Law. Co-op 1990).

43. I.R.C. § 2056A(a)(2) (Law. Co-op 1990).

44. CONF. REP. NO. 1104, 100th Cong., 2nd Sess. 115 (1988), reprinted in 1988 U.S.C.C.A.N. 5048.

that arises from this congressional expectation is that in the estate situation it intended to permit a domestic trust to be partially comprised of assets located without the United States.

Although this inference permitting a QDOT to include assets outside the United States initially appears to be in conflict with the *domestic* requirement, it does not conflict with the pension trust requirements. The Internal Revenue Service permits deductions to a foreign trust.<sup>45</sup> The deductions are allowed if the trust qualifies for tax exempt status in all respects except for the fact that it is created, organized, or maintained outside the United States when the employer is a resident, corporation, or other U.S. entity.<sup>46</sup> In short, the domestic trust requirement of QDOT's and pension trusts share common traits. In both cases there is a strong domestic tie; either a substantial portion of the assets must be maintained in the U.S. or the employer who establishes the pension plan must be in the U.S. and there must be a U.S. trustee with specific powers.

### *B. The Trustee*

Another similarity between the pension trust and the QDOT is the role of the trustee in each. At least one trustee of the QDOT must be a U.S. citizen or domestic corporation.<sup>47</sup> The trustee cannot make a distribution, other than an income distribution, without having the right to withhold the estate tax attributable to the distribution.<sup>48</sup> The right to withhold is to ensure that sufficient assets are jurisdictionally available to pay the estate tax. The trustee would otherwise be personally liable for payment of the tax. Therefore, the trustee will not denude the trust corpus when making distribution. In other words, the trustee of a QDOT is not without limitations on the ability to make trust distributions.

ERISA imposes no such limits on trustees. The trustee is required to operate under a written trust instrument. Therefore, the trustee's ability to make distributions is controlled by the plan. In order for the plan to comply with ERISA, it must include certain provisions such as benefits to the surviving spouse. For the plan to be tax qualified, it must include certain provisions required by the

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45. Treas. Reg. § 1.404(a)-11 (1960).

46. *Id.*

47. I.R.C. § 2056A(a)(1) (Law. Co-op 1990).

48. RRA § 11702(g)(2)(A).

IRC such as no distribution before age fifty-nine and six months

The essential duties of the trustee in either the ERISA plan or the QDOT are those duties that are imposed on any trustee. They must comply with the specific statutory requirements established either in a particular jurisdiction or by a particular type of trust. They must abide by the terms of the trust instrument and generally observe the proprieties of fiduciary duty.

### C. *Anti-Alienation Provisions*

The primary statutory conflict that would prevent a pension trust from being considered a QDOT is that the language of QDOT speaks of assignment or transfer of the property interest to the trust<sup>49</sup> and the language of the pension trust prohibits the alienation or assignment.<sup>50</sup>

However, there are exceptions to the anti-alienation provisions. One permissible form of alienation is payment of taxes.<sup>51</sup> Another example is that assignment or alienation does not include an arrangement for the transfer of the benefits to another plan.<sup>52</sup> Because of the strict requirements placed on the creation of both a QDOT and a pension plan, and the similarities between the requirements of the trustees in those situations, a strong argument can be made that a QDOT is nothing less than another plan and thus within the regulatory language. While the Internal Revenue Service may not be willing to concede that a QDOT is the same as a qualified plan, the exception contained in the regulation can be construed as a basis for permitting a foreign surviving spouse to elect to treat the survivor benefits as a QDOT.

The purpose of not allowing the transfer or assignment of pension benefits is the protection of the plan participants and their survivors. The statutory purpose is analogous to the reasons for establishing a spendthrift trust. Given that premise, the pension benefits should be allowed to be considered held in a QDOT because that would afford maximum protection to the surviving spouse by not reducing the value of the pension plan by the amount of the attributable estate tax.

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49. I.R.C. § 2056A (Law. Co-op 1990).

50. 29 U.S.C. § 1056(d) and I.R.C. § 401(a)(13) (Law. Co-op 1990).

51. See *infra* text accompanying notes 65-69.

52. Treas. Reg. § 1.401(a)-13 (1988).

### *D. Taxation*

The problematic area, although administrative not statutory, is complying with the regulations that must be prescribed to ensure the collection of the estate tax.<sup>53</sup> Estate tax is imposed on distributions from the trust before the death of the surviving spouse.<sup>54</sup> The liability for payment of the tax rests personally with the trustee.<sup>55</sup> The code is silent as to whether or not the tax must be paid from QDOT assets. While the trustee has the right to withhold estate tax on non-income distributions, withholding is not required.<sup>56</sup> The trustee of the QDOT is personally liable for payment of the estate tax. Clearly, payment of the estate tax by the trustee is not payment from QDOT assets. Because of the assurance of payment coupled with the option not to withhold, it should not be necessary to require payment of the estate tax from the QDOT.

While distributions of QDOT corpus are subject to estate tax, income distributions are estate tax exempt.<sup>57</sup> This raises another problem as to the meaning of income and distribution. When the surviving spouse is a United States citizen, the survivor's benefits are part of the gross estate and also part of the marital deduction.<sup>58</sup> The result is that the pension checks pass to the survivor free of any estate tax. If the survivor benefits are treated as corpus of the QDOT, then the entire monthly check might be considered distribution. If it is considered distribution, it is subject to estate tax.<sup>59</sup> Many people rely on a periodic pension payment to meet normal living expenses. Such an interpretation could work a severe hardship on the survivor not to mention significant discrimination against the foreign surviving spouse.

This interpretation is not likely to be followed. The 1989 and 1990 amendments to the IRC substantially liberalized the rules for QDOT's.<sup>60</sup> Given the fact that Congress progressively abated some of the harsh consequences for the non-resident alien surviving

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53. I.R.C. § 2056A(a)(2) (Law. Co-op 1990).

54. I.R.C. § 2056A(b)(1)(A) (Law. Co-op 1990).

55. I.R.C. § 2056A(b)(6) (Law. Co-op 1990).

56. RRA § 11702(g)(2)(A).

57. I.R.C. § 2056A(b)(3)(A) (Law. Co-op 1990).

58. I.R.C. §§ 2039 and 2056(b) (Law. Co-op 1990).

59. I.R.C. § 2056A(b) (Law. Co-op 1990).

60. For example, the requirement that one trustee had to be a U.S. citizens and that the same had to approve distributions is eliminated; reformation of the trust to meet QDOT standards is now permitted; and the surviving spouse may now become a U.S. citizen and thus qualify for the marital deduction.

spouse, it is improbable that the regulations will impose such consequences.

It is more likely that if a pension plan trust is construed to meet the requirements of a QDOT, then the payment of those pension benefits to the foreign surviving spouse will be treated in a similar fashion as the payment of those pension benefits to the citizen surviving spouse. The probable treatment will be analogous to the income tax treatment. The value of the survivor's benefit can be actuarially determined. That value will be reduced to the present value as of the date of the decedent's death and that will be the amount of the corpus of the QDOT. Any amount paid to the surviving spouse above the amount of corpus would be income and thus not subject to the estate tax.

Consideration must be given to the tax treatment of the assets at the death of the surviving spouse. In the case of either citizen or non-citizen surviving spouse, the right to receive the pension will terminate at the death of the first surviving spouse. Therefore, there will be no property interest to include in the value of the gross estate of the second decedent.<sup>61</sup> If the survivor's benefit accruing to a foreign spouse was taken as a lump sum payment, the lump sum would, in order to qualify for the marital deduction, have to be placed in a QDOT. In that case the tax would either be paid on the death of the foreign surviving spouse; or if consumed during the life of surviving spouse, at the time distribution was made.<sup>62</sup> The only advantage a foreign surviving spouse might have would be if the income from the QDOT were accumulated and taken outside of the U.S. In that case there would be a property interest at death which would be outside the jurisdiction of U.S. estate tax. For a citizen spouse who accumulates the income from a pension plan, that accumulation would be subject to estate tax. Of course, that result seemingly in favor of the foreign spouse is offset by the foreign spouse paying an estate tax on some portion of the pension benefit while the citizen spouse did not. Also, a foreign spouse may be subject to a 30 percent withholding of income tax from the pension benefit.<sup>63</sup>

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61. I.R.C. § 2033 (Law. Co-op 1990).

62. If a foreign surviving spouse inherited an IRA or Keogh Plan, this option would be available. In the case of an IRA or Keogh the problem is not merely transferring the funds to a QDOT to avoid the estate tax. The problem is rolling over the funds into a QDOT to avoid any income tax consequences.

63. Treas. Reg. § 1.1441-1 (1980).

To hold a pension trust is the equivalent of a QDOT, a key issue becomes whether the trustee of a pension plan can withhold the estate tax without violating the anti-alienation provisions.<sup>64</sup> Alienation does not include any arrangement for the withholding of federal, state or local tax from plan payments.<sup>65</sup> Although the regulation was probably intended to provide for withholding of income taxes, its language does not limit the withholding to a particular type of tax.

The regulation also excepts a Federal tax levy from the anti-alienation provisions.<sup>66</sup> A Federal tax levy may be issued for any type of tax for which there is liability and for which notice and demand has been made.<sup>67</sup> None of the regulations that pertain to anti-alienation and taxes limit the type of tax to be withheld. Also, federal courts have recognized that withholding tax is not a violation of ERISA's anti-alienation provisions and have not allowed taxpayer challenges to pension withholding.<sup>68</sup> Therefore, it appears that the estate tax could be withheld from the pension payment.

Withholding of taxes from plan payments made to a nonresident alien now is required.<sup>69</sup> Presently, a trustee arranges for withholding of federal income tax for citizen recipients at the prevailing rate; for withholding of federal income taxes for non-resident aliens at the 30 percent rate; for withholding of state income taxes at the statutory rate which in large plans involves multiple states; and for the withholding of local, city, or county taxes at the required rate which again may involve multiple localities. If the new Internal Revenue Service regulations require a trustee to withhold estate tax from a pension payment to a non-citizen surviving spouse, there would be some administrative details that the trustee would need to work out. However, in light of the present requirements, it does not appear to be overwhelming. If the benefit is in the form of a lump sum payment, there is only one calculation and withholding. If the pension is paid periodically, then the corpus

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64. I am presuming withholding based on the assumption that a reasonable trustee would elect withholding to prevent personal liability for the estate tax.

65. Treas. Reg. § 1.401(a)-13(c)(2)(ii) (1988).

66. Treas. Reg. § 1.401(a)-13(b)(2)(i) (1988).

67. I.R.C. § 6331 (Law. Co-op 1990).

68. Retirement Fund Trust of the Plumbing v. Franchise Tax Board, 909 F.2d 1266 (9th Cir. 1990).

69. Treas. Reg. § 1.441-4T (1990). See discussion of the confusion regarding withholding from pension payments made to nonresident aliens. John Turro, *Simplicity Absent in Regs on Nonresident Alien Withholding*, 49 TAX NOTES, Nov. 12, 1990, at 783.

and income portions should be constant and the amount to be withheld would remain constant. Thus, once the amount is determined, the withholding of the estate tax could be accomplished in the same manner as the withholding of any federal, state or local tax.

The Internal Revenue Service will also have to develop a system for payment of the withheld estate tax. However, since the IRC presently requires payment of the estate tax upon any distribution of corpus from the QDOT and also permits withholding of the estate tax by the trustee of the QDOT, a system will have to be designed regardless of the pension plan/QDOT discrepancy.

Finally, there is a logical inference that the pension trust should be considered a QDOT because of the elective nature of the QDOT. The election to transfer or assign property to a QDOT may be made up to the due date established for the filing of the estate tax return.<sup>70</sup> Any property that passed from the decedent to the surviving spouse of the decedent may be transferred or assigned to the QDOT.<sup>71</sup> This property that passes from the decedent to the surviving spouse is not limited to probate property but may include such non-probate assets as property interests acquired as the result of a joint tenancy with the right of survivorship.<sup>72</sup> If the surviving spouse may elect to transfer property acquired outside the will to a QDOT to avoid the estate tax, it is logical to permit the surviving spouse to elect to transfer figuratively the survivor pension benefits which also pass outside of probate.

The denial of the election to use a QDOT to protect the surviving spouse in respect to pension benefits is inconsistent with the statute designed to protect pension funds. The survivor's benefit is a required feature of a qualifying pension plan.<sup>73</sup> If the survivor's benefit is important enough to be required by law and important enough that the survivor's benefit cannot be waived without the written consent of the participant's spouse,<sup>74</sup> then it is inconsistent to deprive the surviving spouse of that benefit through double taxation.

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70. I.R.C. § 2056(d)(2)(B) (Law. Co-op 1990).

71. *Id.*

72. I.R.C. § 2056(c) (Law. Co-op 1990).

73. I.R.C. § 401(a) and 29 U.S.C. § 1055 (Law. Co-op 1990).

74. I.R.C. § 417(a)(2) and 29 U.S.C. § 1055(c)(2)(A) (Law. Co-op 1990).

### *E. Congressional Intent*

When Congress amended the QDOT requirements in 1989, it recognized that pension plan survivor benefits would pose unique problems. However, Congress specifically expressed its intent that:

the regulatory authority to treat an annuity or other payment included in the gross estate which by its terms is payable over the life of the surviving spouse or a term of years (and which would otherwise qualify for the marital deduction) as a QDT be applied to property interests that cannot be transferred to a QDT under Federal law. Such interests include interests in a qualified plan.<sup>76</sup>

The Secretary of the Treasury is granted sweeping powers to prescribe all rules and regulations as are necessary to enforce the IRC.<sup>76</sup> This vast power has been given judicial sanction. The United States Supreme Court speaks of "our customary deference to Treasury regulations. . . ."<sup>77</sup> The court specifically notes "[w]e therefore must defer to Treasury Regulations that implement the congressional mandate in some reasonable manner."<sup>78</sup> A regulation which in sum states that the benefits accruing to a surviving spouse from an ERISA qualified pension trust will be treated as an asset placed in a QDOT, if the surviving spouse so elects, is within the regulatory power of the Secretary of the Treasury and in accord with congressional mandate and, therefore, appropriate.

## VI. INDIVIDUAL RETIREMENT ACCOUNTS

Those people who are not covered by a pension plan may establish an IRA to provide a source of retirement income. Subject to certain restrictions, an amount up to \$2,000 may be deposited into an IRA and the amount of the deposit is allowed as a deduction.<sup>79</sup>

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75. CONF. REP. No. 386, 101st Cong., 1st Sess., 670 (1989), *reprinted in* 1989 U.S.C.C.A.N. 3273.

76. IRC § 7805(a) (Law. Co-op 1990).

77. *Commissioner of Internal Revenue v. Portland Cement Co. of Utah*, 450 U.S. 156, 169 (1981).

78. *Id.* (quoting *U.S. v. Correll*, 389 U.S. 299, 307 (1967)).

79. I.R.C. § 219 (Law. Co-op 1990). For married persons filing a joint return the limit is \$2,250 if one spouse has no compensation. In the case of an individual or married couple the amount deducted may not exceed the amount of compensation includable in the gross income for the taxable year. *Id.*

Unlike a pension plan participant, the individual IRA owner may select any beneficiary; the spouse is not a required beneficiary. However, for the same policy reasons that resulted in Congress passing REA, there are tax advantages in having a spouse as beneficiary. First, a spouse who inherits an IRA may elect to roll it over into her own IRA. The roll over causes the existing balance of the account and its future income to remain free from income tax.<sup>80</sup> The IRA continues to be tax deferred until the calendar year after the surviving spouse reaches age seventy and six months at which time distribution must begin.<sup>81</sup> Second, an IRA inherited by a spouse is not subject to estate tax because of the marital deduction.<sup>82</sup>

A foreign surviving spouse loses the estate tax marital deduction unless the assets are placed in a QDOT.<sup>83</sup> An IRA does not have the anti-alienation limitations of a pension plan. Accordingly, as long as the trustee of the QDOT is a bank or person that meets the approval of the Secretary of Treasury,<sup>84</sup> an IRA inherited by a foreign surviving spouse may be rolled over into an account that is a QDOT and IRA for the survivor. Similarly, a lump sum payment from a pension plan may be rolled over into a QDOT/IRA.<sup>85</sup>

Unfortunately, the QDOT/IRA fails to avoid estate tax for the foreign surviving spouse; it merely postpones payment. When the surviving spouse reaches the age at which distribution must begin, she will receive both corpus and accumulated income.<sup>86</sup> The income is not subject to estate tax but the corpus is.<sup>87</sup>

Absent a change in the statutes and regulations governing IRA's, the required distribution from IRA's results in payment of estate tax by a foreign spouse who inherits an IRA. The estate planner with a client who has a foreign spouse and a goal of reducing estate tax should avoid IRA's and place the assets in a form that can be sheltered for her life.

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80. I.R.C. § 408(d) (Law. Co-op 1990).

81. I.R.C. § 401(a)(9) (Law. Co-op 1990).

82. I.R.C. § 2056 (Law. Co-op 1990).

83. I.R.C. § 2056(d) (Law. Co-op 1990).

84. I.R.C. § 408(a)(2) (Law. Co-op 1990).

85. For a thorough treatment of the problem associated with IRA's lump sums and QDOTs as well as drafting advice, see Lloyd Leva Plaine and Douglas L. Steiner, *The Federal Gift and Estate Tax Marital Deduction for Non-United States Citizen Recipient Spouses*, 25 REAL PROP. PROB. & TR. J. 385 (1990).

86. Treas. Reg. § 1.408-2 (1980).

87. I.R.C. § 2056A(b) (Law. Co-op Supp. 1991).

## VII. CONCLUSION

The new Treasury regulations should follow the precatory words of Congress and allow an estate tax marital deduction for survivors pension benefits as if the asset had been placed in a QDOT. This marital deduction will permit the surviving spouse to have maximum value of the pension benefit which is consistent with the purpose of ERISA. The striking similarities and reconcilable differences between the two trusts would allow such a regulation to be consistent with both ERISA and the IRC.

In the best possible scenario, the regulations will not only allow the pension trust to substitute for a QDOT but will allocate the pension payment between income and corpus. This will reduce the administrative burden for the trustee of the pension plan by making the estate tax payment consistent for the periodic payments and a one-time procedure for a lump sum distribution.

Pending the issuance of the regulations, a court which must decide the issue should follow an often used form of statutory interpretation, legislative intent. A review of the legislative intent of IRC § 2056A indicates that Congress clearly intended a pension plan to be a substitute QDOT and therefore intended that a non-citizen spouse who is the beneficiary of an ERISA pension be permitted to claim a marital deduction for the value of the benefit.

In summary, there is no absolute prohibition against permitting a QDOT to encompass a pension trust. The underlying protections that were intended in creating these types of trust are compatible. Both must be domestic trusts and neither type of trust excludes the other. Finally, the intent of Congress cannot be overlooked, and that intent was specifically to permit a pension plan to fall within the definition of a QDOT.

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