

considered to have added a new line of business for purposes of paragraph (b) of this section.

Example 3. X Corp. has manufactured Device A in Puerto Rico for a number of years and began to manufacture Device B in Puerto Rico in 1997. Device A and Device B are both used to conduct electrical current to the heart and are both sold to cardiologists. There is no significant change in the type of activity conducted in Puerto Rico after the transfer of the manufacturing of Device B to Puerto Rico. Similar manufacturing equipment, manufacturing processes and skills are used in the manufacture of both devices. Both are regulated and licensed by the Food and Drug Administration. The economic success of Device B is dependent upon the success of Device A only to the extent that the liability and manufacturing prowess with respect to one reflects favorably on the other. Depending upon the heart abnormality, the cardiologist may choose to use Device A, Device B or both on a patient. Both devices are within the same business sector of the taxpayer's business. The manufacture of Device A is in the six-digit NAICS code 339112, Surgical and Medical Instrument Manufacturing. The manufacture of Device B is in the six-digit NAICS code 334510, Electromedical and electro-therapeutic Apparatus Manufacturing. (The manufacture of Device A is in the four-digit SIC code 3845, Electromedical and Electrotherapeutic Apparatus. The manufacture of Device B is in the four-digit SIC code 3841, Surgical and Medical Instruments and Apparatus.) The safe harbor of paragraph (b)(2)(ii)(B) of this section applies because the two activities are within the same three-digit SIC code and Corp. X satisfies paragraphs (b)(2)(i)(A), (B), (C), (D), (F), and (G) of this section.

Example 4. X Corp. has been manufacturing house slippers in Puerto Rico since 1990. Y Corp. is a U.S. corporation that is not affiliated with X Corp. and is not an existing credit claimant. Y Corp. has been manufacturing snack food in the United States. In 1997, X Corp. purchased the assets of Y Corp. and began to manufacture snack food in Puerto Rico. House slipper manufacturing is in the six-digit NAICS code 316212 (Four-digit SIC code 3142, House Slippers). The manufacture of snack foods falls under the six-digit NAICS code 311919, Other Snack Food Manufacturing (four-digit SIC code 2052, Cookies and Crackers (pretzels)). Because these activities are not within the same five or six digit NAICS code (or the same three or four-digit SIC code), and because snack food is not an integrated product that contains house slippers, the safe harbor of paragraph (b)(2)(ii) of this section cannot apply. Considering all the facts and circumstances, including the eight factors of paragraph (b)(2)(i) of this section, the snack food manufacturing activity is not closely related to the manufacture of house slippers, and is a new line of business, within the meaning of paragraph (b) of this section.

Example 5. X Corp. is an existing credit claimant that has elected the profit-split method for computing taxable income. P Corp. was not an existing credit claimant and manufactured a product in a different five-digit NAICS code than the product

manufactured by X Corp. In 1997, X Corp. acquired the stock of P Corp. and liquidated P Corp. in a tax-free liquidation under section 332, but continued the business activity of P Corp. as a new business segment. Assume that this new business segment is a new line of business within the meaning of paragraph (c) of this section. In 1997, X Corp. has gross income from the active conduct of a trade or business in a possession computed under section 936(a)(2) of \$500 million and the adjusted tax basis of its assets is \$200 million. The new business segment had gross income of \$60 million, or 12 percent of the X Corp. gross income, and the adjusted basis of the new segment's assets was \$20 million, or 10 percent of the X Corp. total assets. In 1997, X Corp. does not derive more than 15 percent of its gross income, or directly use more than 15 percent of its total assets, from the new business segment. Thus, the new line of business acquired from P Corp. is not a *substantial* new line of business within the meaning of paragraph (c) of this section, and the new activity will not cause X Corp. to lose its status as an existing credit claimant during 1997. In 1998, however, the gross income of X Corp. grew to \$750 million while the gross income of the new line of business grew to \$150 million, or 20% of the X Corp. 1998 gross income. Thus, in 1998, the new line of business is substantial within the meaning of paragraph (c) of this section, and X Corp. loses its status as an existing credit claimant as of December 31, 1997.

(e) *Loss of status as existing credit claimant.* An existing credit claimant that adds a substantial new line of business in a taxable year, or that has a new line of business that becomes substantial in a taxable year, loses its status as an existing credit claimant as of the close of the taxable year ending before either such taxable year. In such case, the possession corporation must not claim the Puerto Rico and possession tax credit on its return for the taxable year in which the substantial new line of business is added or a new line of business becomes substantial.

(f) *Effective date—(1) General rule.* This section applies to taxable years of a possessions corporation beginning after August 19, 1998.

(2) *Election for retroactive application.* Taxpayers may elect to apply retroactively all the provisions of this section for any open taxable year beginning after December 31, 1995. Such election will be effective for the year of the election and all subsequent taxable years. This section will not apply to activities of pre-existing

businesses for taxable years beginning before January 1, 1996.

Michael P. Dolan,
Deputy Commissioner of Internal Revenue.

Approved:

Donald C. Lubick,
Assistant Secretary of the Treasury.
(FR Doc. 98-21826 Filed 8-18-98; 8:45 am)
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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 20 and 602

[TD 8779]

RIN 1545-AU27

Estate and Gift Tax Marital Deduction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations amending the estate tax marital deduction regulations. The amendments are made to conform the estate tax regulations to recent court decisions in *Estate of Clayton v. Commissioner*, 976 F.2d 1486 (5th Cir. 1992), *rev'g* 97 T.C. 327 (1991); *Estate of Robertson v. Commissioner*, 15 F.3d 779 (8th Cir. 1994), *rev'g* 98 T.C. 678 (1992); *Estate of Spencer v. Commissioner*, 43 F.3d 226 (6th Cir. 1995), *rev'g* T.C. Memo. 1992-579; and *Estate of Clack v. Commissioner*, 106 T.C. 131 (1996). The amendments affect estates of decedents electing the marital deduction for qualified terminable interest property (QTIP) and the estates of the surviving spouses of such decedents.

DATES: These regulations are effective August 19, 1998.

FOR FURTHER INFORMATION CONTACT: Susan B. Hurwitz, (202) 622-3090 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information in these final regulations has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3507 and assigned control number 1545-1612.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB.

The collection of information in this regulation is in § 20.2056(b)-7(d)(3)(ii). This information is required to provide a method for estates of decedents whose estate tax returns were due on or before February 18, 1997, to obtain an extension of time to make the qualified terminable interest property election under section 2056(b)(7)(B)(v). This information will be used to inform the IRS of the affected estates that are electing to obtain the relief granted in the regulation. The collection of information is mandatory for those estates that seek relief. The likely respondents are individuals representing estates.

Comments concerning the collection of information should be directed to OMB, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attention: IRS Reports Clearance Officer, OP:FS:FP, Washington, DC 20224. Any such comments should be submitted not later than October 19, 1998. Comments are specifically requested concerning:

Whether the collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility.

The accuracy of the estimated burden associated with the collection of information (see below):

How to enhance the quality, utility, and clarity of the information collected;

How to minimize the burden of complying with the collection of information, including the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Estimates of the reporting burden in these final regulations will be reflected in the burden of Form 843 (Claim for Refund and Request for Abatement) and Form 706 (Estate Tax Return) or 706NA (Estate Tax Return for Nonresident Noncitizens).

Books or records relating to this collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

On March 1, 1994, the IRS published final estate and gift tax regulations (26 CFR part 20 and part 25) under sections

2044, 2056, 2207A, 2519, 2523, and 6019 of the Internal Revenue Code (Code) in the *Federal Register* (59 FR 9642). At that time, § 20.2056(b)-7(d)(3) provided that an income interest (or life estate) that is contingent upon the executor's election under section 2056(b)(7)(B)(v) (the QTIP election) is not a qualifying income interest for life.

On February 18, 1997, temporary regulations (TD 8714) amending the existing final estate tax regulations relating to the marital deduction for qualified terminable interest property (QTIP) were published in the *Federal Register* (62 FR 7156). A notice of proposed rulemaking (REG-209830-96) cross-referencing the temporary regulations was published in the *Federal Register* (62 FR 7188) for the same day.

The temporary regulations provide that an income interest for life (or life estate) that is contingent upon the executor's QTIP election, will not, because of the contingency, fail to be a qualifying income interest for life.

Written comments responding to the notice of proposed rulemaking were received. A public hearing was held on June 3, 1997. After consideration of all the comments, the proposed regulations under sections 2044 and 2056 are adopted as revised by this Treasury decision, and the corresponding temporary regulations are removed.

Explanation of Revisions and Summary of Comments

Under section 2056(b)(7)(B)(ii), the surviving spouse has a qualifying income interest for life in property which passes from the decedent if (1) the surviving spouse is entitled to all of the income from the property, payable at least annually (or has a usufruct interest for life in the property), and (2) no person has a power to appoint any part of the property to any person other than the surviving spouse.

Commentators suggested that the regulation, based on the case law, should specifically provide that as a result of the executor's election over a portion of the property, in cases where the unelected portion of the property passes to a beneficiary other than the surviving spouse, the executor will not be considered to have a power to appoint any part of the property to any person other than the surviving spouse.

The final regulation is clarified to provide that an interest in property is eligible for treatment as qualified terminable interest property if the income interest is contingent upon the executor's election and if that portion of the property for which no election is made will pass to or for the benefit of

beneficiaries other than the surviving spouse. Two examples provided in the temporary regulations have been revised in the final regulations to conform to this clarification.

Comments were also received regarding the effective date of the temporary regulations. It was suggested that relief should be made available for estates of decedents that did not make the QTIP election on their estate tax returns because the surviving spouse's income interest in the property was contingent upon the election or because the nonelected portion of the property was to pass to a beneficiary other than the surviving spouse. Accordingly, the final regulations provide that estates of decedents whose estate tax returns were due on or before February 18, 1997, are granted an extension of time to make the QTIP election if: (1) the period of limitations on filing a claim for credit or refund under section 6511(a) has not expired; and (2) the estate submits a statement providing that, pursuant to section 2044, the surviving spouse's gross estate will include the value, at the date of the surviving spouse's death, of the property for which the QTIP election is being made. The statement must be signed, under penalties of perjury, by the surviving spouse, the surviving spouse's legal representative (if the surviving spouse is legally incompetent), or the surviving spouse's executor (if the surviving spouse is deceased).

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because these regulations do not impose on small entities a collection of information requirement, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information. The principal author of these regulations is Susan B. Hurwitz, Office of Assistant Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS

and the Treasury Department participated in their development.

List of Subjects

26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 20 and 602 are amended as follows:

PART 20—ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

Paragraph 1. The authority citation for part 20 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. In § 20.2044-1, paragraph (e), *Example 8* is added to read as follows:

§ 20.2044-1 Certain property for which marital deduction was previously allowed.

* * * * *
(e) * * *

Example 8. Inclusion of trust property when surviving spouse dies before first decedent's estate tax return is filed. D dies on July 1, 1997. Under the terms of D's will, a trust is established for the benefit of D's spouse, S. The will provides that S is entitled to receive the income from that portion of the trust that the executor elects to treat as qualified terminable interest property. The remaining portion of the trust passes as of D's date of death to a trust for the benefit of C, D's child. The trust terms otherwise provide S with a qualifying income interest for life under section 2056(b)(7)(B)(ii). S dies on February 10, 1998. On April 1, 1998, D's executor files D's estate tax return on which an election is made to treat a portion of the trust as qualified terminable interest property under section 2056(b)(7). S's estate tax return is filed on November 10, 1998. The value on the date of S's death of the portion of the trust for which D's executor made a QTIP election is includible in S's gross estate under section 2044.

§ 20.2044-1T [Removed]

Par. 3. Section 20.2044-1T is removed.

Par. 4. In § 20.2056(b)-(7), paragraphs (d)(3) and (h) *Example 6* are revised to read as follows:

§ 20.2056(b)-(7) Election with respect to life estate for surviving spouse.

* * * * *
(d) * * *

(3) *Contingent income interests.* (i) An income interest for a term of years, or

a life estate subject to termination upon the occurrence of a specified event (e.g., remarriage), is not a qualifying income interest for life. However, a qualifying income interest for life that is contingent upon the executor's election under section 2056(b)(7)(B)(v) 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. This paragraph (d)(3)(i) applies with respect to estates of decedents whose estate tax returns are due after February 18, 1997. This paragraph (d)(3)(i) also applies to estates of decedents whose estate tax returns were due on or before February 18, 1997, that meet the requirements of paragraph (d)(3)(ii) of this section.

(ii) Estates of decedents whose estate tax returns were due on or before February 18, 1997, that did not make the election under section 2056(b)(7)(B)(v) because the surviving spouse's income interest in the property was contingent upon the election or because the nonelected portion of the property was to pass to a beneficiary other than the surviving spouse are granted an extension of time to make the QTIP election if the following requirements are satisfied:

(A) The period of limitations on filing a claim for credit or refund under section 6511(a) has not expired.

(B) A claim for credit or refund is filed on Form 843 with a revised Recapitulation and Schedule M, Form 706 (or 706NA) that signifies the QTIP election. Reference to this section should be made on the Form 843.

(C) The following statement is included with the Form 843: "The undersigned certifies that the property with respect to which the QTIP election is being made will be included in the gross estate of the surviving spouse as provided in section 2044 of the Internal Revenue Code, in determining the federal estate tax liability on the spouse's death." The statement must be signed, under penalties of perjury, by the surviving spouse, the surviving spouse's legal representative (if the surviving spouse is legally incompetent), or the surviving spouse's executor (if the surviving spouse is deceased).

* * * * *

(h) * * *

Example 6. Spouse's qualifying income interest for life contingent on executor's election. D's will established a trust providing that S is entitled to receive the income, payable at least annually, from that portion of the trust that the executor elects

to treat as qualified terminable interest property. The portion of the trust which the executor does not elect to treat as qualified terminable interest property passes as of D's date of death to a trust for the benefit of C, D's child. Under these facts, the executor is not considered to have a power to appoint any part of the trust property to any person other than S during S's life.

* * * * *

§ 20.2056(b)-7T [Removed]

Par. 5. Section 20.2056(b)-7T is removed.

Par. 6. Section 20.2056(b)-10 is revised to read as follows:

§ 20.2056(b)-10 Effective dates.

Except as specifically provided in §§ 20.2056(b)-5(c)(3) (ii) and (iii), 20.2056(b)-7(d)(3), 20.2056(b)-7(e)(5), and 20.2056(b)-8(b), the provisions of §§ 20.2056(b)-5(c), 20.2056(b)-7, 20.2056(b)-8, and 20.2056(b)-9 are applicable with respect to estates of decedents dying after March 1, 1994. With respect to decedents dying on or before such date, the executor of the decedent's estate may rely on any reasonable interpretation of the statutory provisions.

§ 20.2056(b)-10T [Removed]

Par. 7. Section 20.2056(b)-10T is removed.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 8. In § 602.101, paragraph (c), the entry in the table for 20.2056(b)-7 is revised to read as follows:

§ 602.101 OMB Control numbers.

* * * * *
(c) * * *

CFR part or section where identified and described	Current OMB control No.
20.2056(b)-7	1545-0015 1545-1612

Michael P. Dolan,
Deputy Commissioner of Internal Revenue.

Approved: July 27, 1998.
Donald C. Lubick,
Assistant Secretary of the Treasury.
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BILLING CODE 4830-01-U

... exemption of bequests for benefit of Office of ... and Library, Navy Department, see section 2 of the Act of 1937 (50 Stat. 25; 5 U.S.C. 4196).

... exemption of bequests to or for benefit of National ... section 5 of the Act of July 10, 1935 (49 Stat. 479).

... construction of devises or bequests accepted by the ... under the Foreign Service Act of 1946 as devised ... for the use of the United States, see section 102 ... (60 Stat. 1032; 31 U.S.C. 809).

... construction of gifts or bequests of money accepted ... General for credit to "Commissary Funds, Foreign ... gifts or bequests to or for the use of the United States ... of the Act of May 15, 1952, 66 Stat. 73, as amended ... of July 9, 1952, 66 Stat. 479 (31 U.S.C. 725-4).

... payment of tax on bequests of United States obligations ... States, see section 24 of the Second Liberty Bond ... (59 Stat. 48, § 4; 31 U.S.C. 757e).

... construction of bequests for benefit of or use in connection ... Naval Academy as bequests to or for the use of ... see section 3 of the Act of March 31, 1944 (58 Stat. ... 1115b).

... completion of bequests for benefit of Naval Academy ... section 4 of the Act of March 26, 1938 (52 Stat. 11 ...).

... completion of bequests received by National Archives ... and, see section 7 of the National Archives Transfer ... (55 Stat. 582; 44 U.S.C. 300gg).

... Sec. 1907(a)(12)(A), deleted "Territory," which ... "in para. (a)(1), for gifts made after 12/31/76 ... Sec. 1906(b)(13)(A), substituted "Secretary" for ... delegate" in para. (e)(3), effective 2/1/77.

... Sec. 2009(b)(4)(B), amended so much of subsection ... (a)(1), effective with respect to transfers made ... the person disclaiming made after 12/31/76 ... nt, that part of subsec. (a) read as follows:

... if the tax imposed by section 2001, the value of ... shall be determined by deducting from the value ... the amount of all bequests, legacies, devises, or ... the interest which falls into any such bequest, ... transfer as a result of an irrevocable disclaimer of ... devise, transfer, or power, if the disclaimer is ... e prescribed for the filing of the estate tax re-

... 2009(b)(4)(C), substituted "a qualified" for ... § "such qualified" for "such irrevocable" in ... of subsec. (a), effective with respect to trans- ... rest in the person disclaiming made after

... 124(e)(2), substituted "(other than an interest ... (A)(3)(B))" for "(other than a remainder in ... dence or farm or an undivided portion of the ... est in property)" in para. (e)(2), effective ... sions or transfers made after 8/13/76 in ... (b)(2) of P.L. 95-30, see above, and in ... f P.L. 96-544, see above).

... 3(a), added para. (3) to subsec. (e), effec- ... es of decedents dying after 12/31/69.

... 132, made bequests to one of the Social ... request. See note following Code Sec. 170.

... 101(c), substituted "6 months" for "one ... (C), effective for decedents dying after

... 201(d)(1), amended subsec. (c). Sec. ... provides as follows:

... ed in subparagraphs (B) and (C), the ... traphs (1) and (2) of subsection (d) shall ... ns dying after December 31, 1969.

... shall not apply in the case of property ... will executed on or before October 9,

... before October 9, 1972, without having ... ber 9, 1969, by codicil or otherwise,

... time after October 9, 1969, had de- ... f the will which pertains to the passing ... use of, any organization described in

... lished by codicil or otherwise before ... ment is on such date and at all times ... lity to republish the will by codicil

... not apply in the case of property ... October 9, 1969.

... e October 9, 1972, without having ... e instrument governing the dispo-

... (2)(b) If the property transferred was an irrevocable interest to, or ... for the use of, an organization described in section 2055(s), or

... (2)(b) If the instrument governing the disposition of the property ... was not amended by the decedent before October 9, 1972, and the ... decedent is on such date and at all times thereafter under a mental ... disability to change the disposition of the property."

... Prior to amendment, subsec. (e) read as follows:

... (e) Disallowance of deductions in certain cases. ... For disallowance of certain charitable, etc., deductions otherwise ... allowable under this section, see sections 503 and 681." ... Sec. ... 2014(a)(4)(A), deleted "and" before "no substantial part" in par. (2)

... and inserted before the semicolon at the end of such paragraph "... and which does not participate in, or intervene in (including the ... publishing or distributing of statements), any political campaign on ... behalf of any candidate for public office", and deleted "and"

... before "no substantial part" in par. (1) and inserted before the sem- ... icolon at the end of such paragraph "... and such trustee or trustee ... or such fraternal society, order, or association, does not participate ... or intervene in (including the publishing or distributing of state-

... ments), any political campaign on behalf of any candidate for pub- ... lic office" in subsec. (a), effective for gifts and transfers made after ... 12/31/69.

... in '58, P.L. 85-866, Sec. 30(d), substituted "503" for "504" in ... subsec. (e).

... in '56, P.L. 1011, Sec. 1, designated original paragraph as "(1) ... General rule," and added par. (2) for decedents dying after 8/16/54.

... 2056. Bequests, etc., to surviving spouse. ... Allowance of marital deduction.

... For purposes of the tax imposed by section 2001, the ... value of the taxable estate shall, except as limited by subsec- ... (b), be determined by deducting from the value of the ... gross estate an amount equal to the value of any interest in ... property which passes or has passed from the decedent to his ... surviving spouse, but only to the extent that such interest is ... included in determining the value of the gross estate.

... Limitation in the case of life estate or other termina- ... ble interest.

... (1) General rule. Where, on the lapse of time, on the oc- ... currence of an event or contingency, or on the failure of ... an event or contingency to occur, an interest passing to ... the surviving spouse will terminate or fail, no deduction ... shall be allowed under this section with respect to such in- ... terest—

... (A) if an interest in such property passes or has passed ... (for less than an adequate and full consideration in ... money or money's worth) from the decedent to any per- ... son other than such surviving spouse (or the estate of ... such spouse); and

... (B) if by reason of such passing such person (or his ... heirs or assigns) may possess or enjoy any part of such ... property after such termination or failure of the interest ... so passing to the surviving spouse;

... and no deduction shall be allowed with respect to such in- ... terest (even if such deduction is not disallowed under sub- ... paragraphs (A) and (B))—

... (C) if such interest is to be acquired for the surviving ... spouse, pursuant to directions of the decedent, by his ... executor or by the trustee of a trust.

... For purposes of this paragraph, an interest shall not be ... considered as an interest which will terminate or fail ... merely because it is the ownership of a bond, note, or ... similar contractual obligation, the discharge of which ... would not have the effect of an annuity for life or for a ... term.

... (2) Interest in unidentified assets. Where the assets (in- ... cluded in the decedent's gross estate) out of which, or the ... proceeds of which, an interest passing to the surviving ... spouse may be satisfied include a particular asset or assets ... with respect to which no deduction would be allowed if ... such asset or assets passed from the decedent to such ... spouse, then the value of such interest passing to such

... spouse shall, for purposes of subsection (a), be reduced by ... the aggregate value of such particular assets.

... (3) Interest of spouse conditional on survival for lim- ... ited period. For purposes of this subsection, an interest ... passing to the surviving spouse shall not be considered as ... an interest which will terminate or fail on the death of ... such spouse if—

... (A) such death will cause a termination or failure of ... such interest only if it occurs within a period not ex- ... ceeding 6 months after the decedent's death, or only if ... it occurs as a result of a common disaster resulting in ... the death of the decedent and the surviving spouse, or ... only if it occurs in the case of either such event; and

... (B) such termination or failure does not in fact occur.

... (4) Valuation of interest passing to surviving spouse. In ... determining for purposes of subsection (a) the value of ... any interest in property passing to the surviving spouse ... for which a deduction is allowed by this section—

... (A) there shall be taken into account the effect which ... the tax imposed by section 2001, or any estate, success- ... sion, legacy, or inheritance tax, has on the net value to ... the surviving spouse of such interest; and

... (B) where such interest or property is encumbered in ... any manner, or where the surviving spouse incurs any ... obligation imposed by the decedent with respect to the ... passing of such interest, such encumbrance or obliga- ... tion shall be taken into account in the same manner as ... if the amount of a gift to such spouse of such interest ... were being determined.

... (5) Life estate with power of appointment in surviving ... spouse. In the case of an interest in property passing from ... the decedent, if his surviving spouse is entitled for life to ... all the income from the entire interest, or all the income ... from a specific portion thereof, payable annually or at ... more frequent intervals, with power in the surviving ... spouse to appoint the entire interest, or such specific por- ... tion (exercisable in favor of such surviving spouse, or of ... the estate of such surviving spouse, or in favor of either, ... whether or not in each case the power is exercisable in ... favor of others), and with no power in any other person to ... appoint any part of the interest, or such specific por- ... tion, to any person other than the surviving spouse—

... (A) the interest or such portion thereof so passing shall, ... for purposes of subsection (a), be considered as passing ... to the surviving spouse, and

... (B) no part of the interest so passing shall, for purposes ... of paragraph (1)(A), be considered as passing to any ... person other than the surviving spouse.

... This paragraph shall apply only if such power in the sur- ... viving spouse to appoint the entire interest, or such spec- ... ific portion thereof, whether exercisable by will or during ... life, is exercisable by such spouse alone and in all events.

... (6) Life insurance or annuity payments with power of ... appointment in surviving spouse. In the case of an inter- ... est in property passing from the decedent consisting of ... proceeds under a life insurance, endowment, or annuity ... contract, if under the terms of the contract such proceeds ... are payable in installments or are held by the insurer sub- ... ject to an agreement to pay interest thereon (whether the ... proceeds, on the termination of any interest payments, are ... payable in a lump sum or in annual or more frequent in- ... stallments), and such installment or interest payments are ... payable annually or at more frequent intervals, commenc- ... ing not later than 13 months after the decedent's death, ... and all amounts, or a specific portion of all such amounts, ... payable during the life of the surviving spouse are payable ... only to such spouse, and such spouse has the power to ap-

point all amounts, or such specific portion, payable under such contract (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), with no power in any other person to appoint such amounts to any person other than the surviving spouse—

(A) such amounts shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of such amounts shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if, under the terms of the contract, such power in the surviving spouse to appoint such amounts, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

(7) Election with respect to life estate for surviving spouse.

(A) In general. In the case of qualified terminable interest property—

(i) for purposes of subsection (a), such property shall be treated as passing to the surviving spouse, and

(ii) for purposes of paragraph (1)(A), no part of such property shall be treated as passing to any person other than the surviving spouse.

(B) Qualified terminable interest property defined. For purposes of this paragraph—

(i) In general. The term "qualified terminable interest property" means property—

(I) which passes from the decedent,

(II) in which the surviving spouse has a qualifying income interest for life, and

(III) to which an election under this paragraph applies.

(ii) Qualifying income interest for life. The surviving spouse has a qualifying income interest for life if—

(I) the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property, and

(II) no person has a power to appoint any part of the property to any person other than the surviving spouse.

Subclause (II) shall not apply to a power exercisable only at or after the death of the surviving spouse. To the extent provided in regulations, an annuity shall be treated in a manner similar to an income interest in property (regardless of whether the property from which the annuity is payable can be separately identified).

(iii) Property includes interest therein. The term "property" includes an interest in property.

(iv) Specific portion treated as separate property. A specific portion of property shall be treated as separate property.

(v) Election. An election under this paragraph with respect to any property shall be made by the executor on the return of tax imposed by section 2001. Such an election, once made, shall be irrevocable.

(C) Treatment of survivor annuities. In the case of an annuity included in the gross estate of the decedent under section 2039 (or, in the case of an interest in an annuity arising under the community property laws of a State, included in the gross estate of the decedent under section 2033) where only the surviving spouse has the

right to receive payments before the death of such surviving spouse—

(i) the interest of such surviving spouse shall be treated as a qualifying income interest for life, and

(ii) the executor shall be treated as having made an election under this subsection with respect to such annuity unless the executor otherwise elects on the return of tax imposed by section 2001.

An election under clause (ii), once made, shall be irrevocable.

(8) Special rule for charitable remainder trusts.

(A) In general. If the surviving spouse of the decedent is the only beneficiary of a qualified charitable remainder trust who is not a charitable beneficiary nor an ESOP beneficiary, paragraph (1) shall not apply to any interest in such trust which passes or has passed from the decedent to such surviving spouse.

(B) Definitions. For purposes of subparagraph (A)—

(i) Charitable beneficiary. The term "charitable beneficiary" means any beneficiary which is an organization described in section 170(c).

(ii) ESOP beneficiary. The term "ESOP beneficiary" means any beneficiary which is an employee stock ownership plan (as defined in section 4975(e)(7)) that holds a remainder interest in qualified employer securities (as defined in section 664(g)(4)) to be transferred to such plan in a qualified gratuitous transfer (as defined in section 664(g)(1)).

(iii) Qualified charitable remainder trust. The term "qualified charitable remainder trust" means a charitable remainder annuity trust or charitable remainder unitrust (described in section 664).

(9) Denial of double deduction. Nothing in this section or any other provision of this chapter shall allow the value of any interest in property to be deducted under this chapter more than once with respect to the same decedent.

(10) Specific portion. For purposes of paragraphs (5), (6), and (7)(B)(iv), the term "specific portion" only includes a portion determined on a fractional or percentage basis.

(c) Definition.

For purposes of this section, an interest in property shall be considered as passing from the decedent to any person if and only if—

(1) such interest is bequeathed or devised to such person by the decedent;

(2) such interest is inherited by such person from the decedent;

(3) such interest is the dower or curtesy interest (or statutory interest in lieu thereof) of such person as surviving spouse of the decedent;

(4) such interest has been transferred to such person by the decedent at any time;

(5) such interest was, at the time of the decedent's death, held by such person and the decedent (or by them and any other person) in joint ownership with right of survivorship;

(6) the decedent had a power (either alone or in conjunction with any person) to appoint such interest and if he appoints or has appointed such interest to such person, or if such person takes such interest in default on the release or nonexercise of such power; or

(7) such interest consists of proceeds of insurance on the life of the decedent receivable by such person.

Except as provided in paragraph (5) or (6) of subsection (b), where at the time of the decedent's death it is not possible to ascertain the particular person or persons to whom an inter-

...in property may pass from the decedent, such interest shall, for purposes of subparagraphs (A) and (B) of subsection (b)(1), be considered as passing from the decedent to a person other than the surviving spouse.

(B) Disallowance of marital deduction where surviving spouse not United States citizen.

(1) In general. Except as provided in paragraph (2), if the surviving spouse of the decedent is not a citizen of the United States—

- (A) no deduction shall be allowed under subsection (a), and
(B) section 2040(b) shall not apply.

(2) Marital deduction allowed for certain transfers in trust.

(A) In general. Paragraph (1) shall not apply to any property passing to the surviving spouse in a qualified domestic trust.

(B) Special rule. If any property passes from the decedent to the surviving spouse of the decedent, for purposes of subparagraph (A), such property shall be treated as passing to such spouse in a qualified domestic trust if—

- (i) such property is transferred to such a trust before the date on which the return of the tax imposed by this chapter is made, or
(ii) such property is irrevocably assigned to such a trust under an irrevocable assignment made on or before such date which is enforceable under local law.

(3) Allowance of credit to certain spouses. If—

(A) property passes to the surviving spouse of the decedent (hereinafter in this paragraph referred to as the "first decedent"),

(B) without regard to this subsection, a deduction would be allowable under subsection (a) with respect to such property, and

(C) such surviving spouse dies and the estate of such surviving spouse is subject to the tax imposed by this chapter,

the Federal estate tax paid (or treated as paid under section 2056A(b)(7)) by the first decedent with respect to such property shall be allowed as a credit under section 2013 to the estate of such surviving spouse and the amount of such credit shall be determined under such section without regard to when the first decedent died and without regard to subsection (d)(3) of such section.

(4) Special rule where resident spouse becomes citizen. Paragraph (1) shall not apply if—

- (A) the surviving spouse of the decedent becomes a citizen of the United States before the day on which the return of the tax imposed by this chapter is made, and
(B) such spouse was a resident of the United States at all times after the date of the death of the decedent and before becoming a citizen of the United States.

(5) Reformations permitted.

(A) In general. In the case of any property with respect to which a deduction would be allowable under subsection (a) but for this subsection, the determination of whether a trust is a qualified domestic trust shall be made—

- (i) as of the date on which the return of the tax imposed by this chapter is made, or
(ii) if a judicial proceeding is commenced on or before the due date (determined with regard to extensions) for filing such return to change such trust into a trust which is a qualified domestic trust, as of the

time when the changes pursuant to such proceeding are made.

(B) Statute of limitations. If a judicial proceeding described in subparagraph (A)(ii) is commenced with respect to any trust, the period for assessing any deficiency of tax attributable to any failure of such trust to be a qualified domestic trust shall not expire before the date 1 year after the date on which the Secretary is notified that the trust has been changed pursuant to such judicial proceeding or that such proceeding has been terminated.

In '97, P.L. 105-34, Sec. 1311(a), added "(or, in the case of an interest in an annuity arising under the community property laws of a State, included in the gross estate of the decedent under section 2033)" after "section 2039" in subpara. (b)(7)(C), effective for estates of decedents dying after 8/5/97.

—P.L. 105-34, Sec. 1530(c)(8), amended para. (b)(8), effective for transfers made by trusts to, or for the use of, an employee stock ownership plan after 8/5/97.

Prior to amendment, para. (b)(8) read as follows:

"(B) Special rule for charitable remainder trusts.

"(A) In general. If the surviving spouse of the decedent is the only noncharitable beneficiary of a qualified charitable remainder trust, paragraph (1) shall not apply to any interest in such trust which passes or has passed from the decedent to such surviving spouse.

"(B) Definitions. For purposes of subparagraph (A)—

"(i) Noncharitable beneficiary. The term 'noncharitable beneficiary' means any beneficiary of the qualified charitable remainder trust other than an organization described in section 170(c).

"(ii) Qualified charitable remainder trust. The term 'qualified charitable remainder trust' means a charitable remainder annuity trust or charitable remainder unitrust (described in section 664).

In '92, P.L. 102-486, Sec. 1941(a), added para. (b)(10), effective for estates of decedents dying after 10/24/92 except as provided in Sec. 1941(c)(1)(B) of this Act, which read as follows:

"(B) Exception. The amendment made by subsection (a) shall not apply to any interest in property which passes (or has passed) to the surviving spouse of the decedent pursuant to a will (or revocable trust) in existence on the date of the enactment of this Act if—

- (i) the decedent dies on or before the date 3 years after such date of enactment, or
(ii) the decedent was, on such date of enactment, under a mental disability to change the disposition of his property and did not regain his competence to dispose of such property before the date of his death.

The preceding sentence shall not apply if such will (or revocable trust) is amended at any time after such date of enactment in any respect which will increase the amount of the interest which so passes or alters the terms of the transfer by which the interest so passes.

In '90, P.L. 101-508, Sec. 11701(i)(1), redesignated para. (d)(4) [added by Sec. 7815(d)(8) of P.L. 101-239, see below] relating to reformations permitted, as para. (d)(5), effective for the estates of decedents dying after 11/10/88, except as provided in Sec. 7815(d)(4)(B) and (d)(14) of P.L. 101-239, reproduced below.

—P.L. 101-508, Sec. 11701(i)(2), provides the following:

"(2) The period during which a proceeding may be commenced under section 2056(d)(5)(A)(ii) of the Internal Revenue Code of 1986 (as redesignated by paragraph (1) of Sec. 11701(i) of this Act) shall not expire before the date 6 months after the date of the enactment of this Act."

—P.L. 101-508, Sec. 11702(g)(5), substituted "section 2056A(b)(7) for "section 2056A(b)(6)" in para. (d)(3), effective for the estates of decedents dying after 11/10/88.

In '89, P.L. 101-239, Sec. 7815(d)(4)(A), amended subpara. (d)(2)(B) ... Sec. 7815(d)(5), added para. (d)(4) ... Sec. 7815(d)(6)(A), substituted "this chapter" for "section 2001" in para. (d)(3) ... Sec. 7815(d)(6)(B), added "and without regard to subsection (d)(3) of such section" before the period at the end of para. (d)(3) ... Sec. 7815(d)(8), added para. (d)(4)(ii) [sic (d)(5)], effective for the estates of decedents dying after 11/10/88, except as provided in Secs. 7815(d)(4)(B) and (d)(14) of this Act which reads as follows:

"(B) In the case of the estate of a decedent dying before the date of the enactment of this Act, the period during which the transfer (or irrevocable assignment) referred to in section 2056(d)(2)(B) of the Internal Revenue Code of 1986 (as amended by subparagraph (A)) may be made shall not expire before the date 1 year after such date of enactment."
