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THE LIMITED MARITAL DEDUCTION FOR TRANSFERS TO NONCITIZEN SPOUSES — IS IT FAIR?

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I. Introduction

Beginning in 1948, the Internal Revenue Code (Code) provided for a marital deduction against estate or gift taxes in cases where property passes from one spouse to another. Until 1988, the estate and gift tax provisions of the Code which allow the marital deduction did not differentiate between United States citizens and noncitizens. For years, property transfers to a spouse generally were free from estate or gift taxes regardless of whether the transferee spouse was a United States citizen.

The Technical and Miscellaneous Revenue Act of 1988 (TAMRA) repealed the estate and gift tax marital deduction provisions with respect to certain transfers to spouses who are not citizens of the United States. Additionally, TAMRA enacted new rules for transfers to noncitizen spouses.[1] These newly-enacted provisions, however, were not without technical flaws. In response to such flaws, Congress included in the Revenue Reconciliation Act of 1989 (1989 Act)[2] and the Revenue Reconciliation Act of 1990 (1990 Act)[3] provisions that refine the rules created in TAMRA.

This article will begin with a brief overview of sections 2056 and 2523 of the Code (the estate and gift tax marital deduction provisions). In addition, the article will analyze the provisions of TAMRA, the 1989 Act, and the 1990 Act. Next, I will focus on the estate planning implications resulting from both the historical and the newly-enacted marital deduction provisions. Then I will critique the rules by concentrating on the comparable treatment of surviving spouses who are United States citizens with the treatment of surviving spouses who are not citizens. Finally, the article will discuss possible changes which would favorably consider the competing factors of federal revenue collection and nondiscriminatory treatment of noncitizens.

II. Analysis of Historical Sections 2056 and 2523

A. *Revenue Act of 1942*

Prior to 1942, no specific statutory authority allowed a tax-free transfer of property from a decedent to a surviving spouse. However, a married individual residing in a community property state could

1. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 5033(a)(1), 102 Stat. 3670 [hereinafter TAMRA].

2. Revenue Reconciliation Act of 1989, Pub. L. No. 101-239, § 7815(d), 103 Stat. 2301, 2415 [hereinafter 1989 Act].

3. Revenue Reconciliation Act of 1990, Pub. L. No. 101-508, § 11702(g)(2) [hereinafter 1990 Act].

exclude one-half the individual's property from his or her estate.[4] The reason for such estate tax treatment was that community property laws consider the husband and wife as each having an undivided one-half interest in the marital property.[5]

On the other hand, the rules in common law states subjected a decedent spouse to disparate estate tax treatment. Common-law jurisdictions do not provide for a division of assets.[6] In most cases, all the property belonged to a single spouse. Thus, the property generally was taxed in such spouse's estate. Since estates were subject to sharply progressive rates, laws generally accorded a decedent spouse in a community property state a greater benefit than that available to a common-law jurisdiction counterpart.[7]

Congress attempted to place individuals in common-law jurisdictions on par with those in community property jurisdictions.[8] In 1942, Congress added amendments to the 1939 Code which taxed all of a married couple's property in a community property jurisdiction in the estate of the first spouse to die.[9] Excepted from inclusion in the estate of the first spouse to die were items which were economically attributable to the surviving spouse.[10] Basically, these amendments attempted to eliminate the beneficial treatment afforded residents of community property jurisdictions.[11]

B. *Revenue Act of 1948*

The estate and gift tax equalization provisions of the Revenue Reconciliation Act of 1948 repealed the 1942 amendments to the Code.[12]

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4. H.R. REP. NO. 1274, 80th Cong., 2d Sess. 24 (1948) [hereinafter 1948 Ways and Means Report].

5. *Id.* at 25.

6. *Id.*

7. *Id.*

8. *Id.*

9. Revenue Act of 1942, Pub. L. No. 77-753, §§ 402, 404 & 453 (adding I.R.C. §§ 811(d)(5), 811(e)(2), 811(g)(4) & 1000(d) (1942)).

10. H.R. REP. NO. 2333, 77th Cong., 2d Sess. 37 (1942).

11. Abrams, *A Revaluation of the Terminable Interest Rule*, 39 TAX L. REV. 1, 5 (1983).

12. Revenue Act of 1948, Pub. L. No. 80-471, §§ 351 & 371 [hereinafter Revenue Act of 1948]. In 1948, Congress also enacted income tax equalization provisions. The United States Supreme Court held in Poe v. Seaborn, 282 U.S. 101 (1930), that a husband and wife living in a community property jurisdiction were entitled to file separate returns whereby each spouse could return one-half the community income. This holding resulted in disparate treatment between married couples living in common-law states earning the same amount of income as married couples living in community property states since couples in common-law states could not "split" their income. *See* 1948 Ways and Means Report, *supra* note 4, at 21. Thus, in 1948,

The 1948 provisions are the predecessor of the present marital deduction provisions. Generally, the 1948 provisions permitted an individual in a common-law jurisdiction to compute the estate tax using the same method available to an individual in a community property jurisdiction.[13] Congress stated that the policy reason for the 1948 provisions was to allow an individual to pass one-half of his or her noncommunity property to the individual's surviving spouse free of tax.[14] In other words, Congress originally enacted the 1948 marital deduction provisions to provide married couples from common-law jurisdictions with estate tax treatment equal to the treatment accorded married couples in community property jurisdictions.

The general marital deduction rule provided a deduction to be used in computing the decedent's net estate for "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."[15] The most important limitation to this general rule was that to qualify for the deduction, the interest passing to the surviving spouse could not be a terminable interest.[16] The terminable interest rule renders a property interest passing to a surviving spouse nondeductible if (1) the spouse's interest is terminable; (2) the decedent has given an interest in the property to a third party; and (3) upon failure or termination of the spouse's interest, the third party comes into possession or enjoyment of the property by reason of his or her interest in the property.[17] Congress enacted the terminable interest rule to ensure that property passing tax-free to a surviving spouse via the marital deduction provisions would, if retained by the surviving spouse until

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Congress enacted provisions which allowed for the filing of joint returns. Revenue Act of 1948, § 301 (amending I.R.C. § 12 (1948)). These provisions embodied the principles of "income-splitting" between spouses and produced the same results in common-law states as in community property states following the *Seaborn* case.

13. Sugarman, *Estate and Gift Tax Equalization — The Marital Deduction*, 36 CALIF. L. REV. 223, 229 (1948). *See also* I.R.C. § 1014(b)(6) (both the decedent's and the surviving spouse's one-half share of community property receive a stepped-up basis if at least one-half the community property was includible in the decedent's gross estate) (Unless otherwise indicated, all references are to the Internal Revenue Code of 1986, as amended and in effect for 1990.).

14. 1948 Ways and Means Report, *supra* note 4, at 26; S. REP. NO. 1013, 80th Cong., 2d Sess. 22, 27 (1948).

15. I.R.C. § 812(e)(1)(A) (1948).

16. I.R.C. § 812(e)(1)(B) (1948).

17. R. STEPHENS, G. MAXFIELD & S. LIND, FEDERAL ESTATE AND GIFT TAXATION § 5.06[7] (5th ed. 1983).

death, be taxed in the successor spousal estate.[18] The terminable interest rule survives in today's Code in basically the same format.[19]

C. *Tax Reform Act of 1976 and the Economic Recovery Tax Act of 1981*

The Tax Reform Act of 1976 expanded the 1948 marital-deduction provisions.[20] After the 1976 Act, the estate of a decedent with noncommunity property could claim a marital deduction equal to the greater of $250,000 or one-half of his or her adjusted gross estate.[21] Congress stated that the policy rationale behind the expansion of the marital deduction provisions was to allow a decedent with a modest estate to transfer sufficient property to provide for a surviving spouse without incurring estate taxes.[22]

The Economic Recovery Tax Act of 1981 further expanded the marital deduction provisions by providing for an unlimited marital deduction regardless of the size of the estate.[23] The policy reason for this major expansion of the Code was that "a husband and wife should be treated as one economic unit for purposes of the estate and gift taxes."[24] Thus, during the transformation of the marital deduction provisions, Congress changed the rationale for such provisions from avoiding disparate treatment between community-property jurisdictions and common-law jurisdictions to allowing tax-free interspousal transfers because of the single economic-unit theory.[25]

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18. *Id.*

19. *But see* I.R.C. § 2056(b)(7). Congress added this Code section in 1981 as an exception to the terminable interest rule. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403(d)(1), 95 Stat. 172, 305 [hereinafter Economic Recovery Tax Act of 1981]. This section allows a transfer of "qualified terminable interest property" (QTIP) to qualify for the marital deduction. QTIP is property that a decedent wishes his or her spouse to enjoy during the spouse's lifetime but does not wish the spouse to have unlimited control to dispose of such property at the spouse's subsequent death.

The 1948 provisions also contained another significant limitation. The marital deduction originally was limited to 50% of the adjusted gross estate of the decedent. I.R.C. § 812(e)(1)(H) (1948). Again, the purpose of the 50% limitation was to accord equal tax treatment for community and common-law jurisdictions. Sugarman, *supra* note 13, at 267.

20. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2002, 90 Stat. 1520, 1854.

21. I.R.C. § 2056(c)(1)(A), repealed by the Economic Recovery Tax Act of 1981, *supra* note 19, § 403(a)(1)(A), 95 Stat. 172, 301.

22. S. REP. No. 938, 94th Cong., 2d Sess., pt. 2, at 14 (1976); H.R. REP. No. 1380, 94th Cong., 2d Sess. 17 (1976).

23. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403(d)(1), 95 Stat. 172.

24. S. REP. No. 144, 97th Cong., 1st Sess. 127 (1981).

25. *See supra* text accompanying notes 14 & 24; *see also* I.R.C. § 1041 (providing that no gain or loss shall be recognized on transfers of property to spouses or former spouses). *But see*

While the above discussion focused on the history of the estate tax marital deduction, the gift tax marital deduction has a parallel historical development. In 1948, Congress enacted the original gift tax marital deduction, which allowed a deduction of one-half the value of interspousal gifts.[26] In 1976, Congress substantially modified the gift tax marital deductions provisions by allowing tax-free interspousal transfers of modest gifts.[27] Finally, Congress enacted the Economic Recovery Tax Act of 1981 which removed all limitations on the deductibility of interspousal gifts.[28]

III. THE TECHNICAL AND MISCELLANEOUS REVENUE ACT OF 1988 (TAMRA)

A. *Rationale*

Prior to 1988, legislators assumed that the marital deduction merely postponed the estate tax until the death of the surviving spouse.[29] This assumption is correct if the surviving spouse is a United States citizen. To avoid an estate tax when a surviving spouse died, a surviving spouse who is a United States citizen must have consumed the assets or given the assets away. Alternatively, the surviving spouse could have renounced his or her United States citizenship, given up his or her United States residence and any assets in the United States, and, therefore, the former United States spouse would have avoided the United States estate tax.[30] However, if a former United States citizen died within ten years of renouncing citizenship, then the former citizen spouse potentially was subject to a special estate tax which the Code imposes in the event of an expatriation to avoid tax.[31]

Nonresident/non-United States citizens are subject to the United States estate tax only to the extent they have property in the United States.[32] A noncitizen surviving spouse could avoid taxation by giving

I.R.C. § 1041(d) (providing an exception to the general rule if the transferee spouse is a nonresident alien). The exception is grounded in sound policy because a gain might otherwise never be recognized since the transferee spouse resides outside the United States and may not be subject to United States income tax. *See, e.g.*, I.R.C. § 865.

26. Revenue Act of 1948, Pub. L. No. 80-471, ch. 168, § 372, 62 Stat. 110, 125.

27. H.R. REP. No. 1380, 94th Cong., 2d Sess. 17 (1976).

28. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403(b)(1), 95 Stat. 172, 301.

29. H.R. REP. No. 795, 100th Cong., 2d Sess. 592 (1988) [hereinafter 1988 Ways and Means Report].

30. *See* I.R.C. § 2104.

31. *See* I.R.C. § 2107.

32. I.R.C. §§ 2104, 2106.

up United States residency and transferring assets out of the United States.[33] The expatriation tax does not apply to an individual who has never been a United States citizen.[34] Thus, the assumption that the marital deduction was merely a postponement of tax may not be valid since a noncitizen surviving spouse could have taken assets out of the United States that were never subject to the United States estate tax. For this reason, TAMRA enacted Internal Revenue Code section 2056(d).[35]

B. *Disallowing Marital Deduction to Noncitizen Spouses*

Section 2056(d)(1), as enacted by TAMRA, provides that testamentary transfers to noncitizen surviving spouses are subject to the United States estate tax.[36] More specifically, section 2056(d)(1) disallows the estate tax marital deduction provided under section 2056(a) in cases where the surviving spouse is not a United States citizen. Also, section 2056(d)(1) expressly provides that section 2040(b) shall not apply if the surviving spouse is not a United States citizen.[37] In other words, the full value of property received by the noncitizen spouse by a right of survivorship will be subject to an estate tax in the decedent's estate. These results will occur regardless of whether the noncitizen spouse is a permanent resident of the United States and regardless of whether the property is located in the United States.[38]

C. *Exception for Qualified Domestic Trusts*

The general rule of section 2056(d)(1) provides for an exception to taxation when the property passes to a noncitizen surviving spouse via a qualified domestic trust (QDT).[39] As enacted by TAMRA, section 2056(d) provided that the marital deduction would continue to apply where property passes outside the probate estate and a decision is made to transfer such property to the QDT prior to the day on which the estate tax return is made.[40]

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33. Plaine & Munk, *New Estate and Gift Tax Provisions Affecting Alien Residents and Nonresidents*, 14 TAX MGMT. EST., GIFTS, & TR. J. 51, 52 (1989).

34. I.R.C. § 2107.

35. 1988 Ways and Means Report, *supra* note 29.

36. I.R.C. § 2056(d)(1).

37. I.R.C. § 2056(d)(1)(B); *but see infra* text accompanying notes 110-11.

38. Zimble, *Marital Deductions for Transfers to Spouses Who Are Not U.S. Citizens*, 42 TAX NOTES 613, 615 (Jan. 30, 1989).

39. I.R.C. § 2056(d)(2)(A).

40. I.R.C. § 2056(d)(2)(B) (amended by the 1989 Act, *supra* note 2). *See infra* text accompanying notes 86-87.

TAMRA added section 2056A(a) which when enacted defined a QDT as follows:

> (a) Qualified Domestic Trust Defined. For purposes of this section and section 2056(d), the term "qualified domestic trust" means, with respect to any decedent, any trust if —
> (1) the trust instrument requires that all trustees of the trust be individual citizens of the United States or domestic corporations,
> (2) the surviving spouse of the decedent is entitled to all the income from the property in such trust, payable annually or at more frequent intervals,
> (3) such trust meets such requirements as the Secretary may by regulations prescribe to ensure the collection of any tax imposed by subsection (b), and
> (4) an election under this section by the executor of the decedent applies to such trust.[41]

The requirements that Congress originally enacted were fairly straightforward. Note that the third requirement promises forthcoming regulations. The legislative history of the Act suggests that future regulations may require that sufficient trust assets be subject to United States jurisdiction.[42] The legislative history suggests that the regulations may require that a portion of the trust property be situated in the United States or may require that the trustee be an institution with substantial United States assets.[43]

Under the new TAMRA provisions, the Code imposes an estate tax on any distributions from the QDT occurring before the death of the surviving spouse.[44] The new provisions, however, do not impose estate tax upon distributions of income from the trust.[45] At the death of the surviving spouse, the Code imposes an estate tax on the value of the property remaining in the trust.[46] Thus, if a citizen spouse who has transferred all of his or her assets into a QDT dies in year one and is survived by a noncitizen spouse, the Code will impose no estate tax at the citizen spouse's death.

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41. TAMRA, *supra* note 1 (amended by the 1989 Act, *supra* note 2, and further amended by the 1990 Act, *supra* note 3). *See infra* text accompanying notes 76-82.
42. *See* H.R. REP. NO. 1104, 100th Cong., 2d Sess., vol.II at 115 (1988).
43. *Id.*
44. I.R.C. § 2056A(b)(1)(A).
45. I.R.C. § 2056A(b)(3)(A).
46. I.R.C. § 2056A(b)(1)(B).

If in year two, the surviving spouse wishes to receive a distribution of principal from the trust, the marital deduction provisions will impose an estate tax on such distribution. Finally, at the surviving spouse's subsequent death in year three, the Code will impose an estate tax on the value of the property remaining in the trust. It should also be noted that if any person or entity other than a United States citizen or a domestic corporation becomes trustee of the QDT, the Code, as originally enacted by TAMRA, imposed an estate tax just as if the surviving spouse had died.[47]

The tax imposed by section 2056A is equal to the amount of additional tax which the rules would impose at the first spouse's death if the estate included either the amount distributed from the principal of the trust or the amount remaining in the QDT.[48] In the event the decedent's estate tax has yet to be finally determined, the amount of the tax would be determined tentatively using the highest rate of tax in effect at the date of the decedent's death.[49] It is important to note that section 2056A imposes an estate tax as if the decedent spouse's estate is subject to the tax.[50] The surviving spouse, therefore, will not be able to use his or her unified credit, deductions, or favorable tax bracket to reduce or offset the estate tax.[51] If the property is also subject to estate tax in the surviving spouse's estate, it would be subject to estate tax twice. The surviving spouse's estate, however, may qualify for a credit.[52]

D. *TAMRA and the Section 2013 Deduction*

Generally, section 2013 provides a credit for estate taxes paid on the same property in separate estates.[53] Section 2013 gradually phases out the credit by twenty percent every two years.[54] Section 2056(d)(3), however, provides that if the transfer would have been eligible for the estate tax marital deduction notwithstanding the limitation of the TAMRA marital deduction provisions, and the estate of the surviving spouse is subject to the tax which section 2001 imposes, then the estate of the surviving spouse is not subject to the section 2013 phase-

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47. I.R.C. § 2056A(b)(3) (amended by the 1989 Act, *supra* note 2). *See infra* text accompanying notes 78-79.
48. I.R.C. § 2056A(b)(2)(A).
49. I.R.C. § 2056A(b)(2)(B).
50. I.R.C. § 2056A(b)(2).
51. *Id.*
52. I.R.C. §§ 2013, 2056(d)(3)(C).
53. I.R.C. § 2013.
54. *Id.*

out rule.[55] The special credit will not be available if the surviving spouse is a nonresident alien at the time of death because the spouse will be subject to an estate tax under section 2101, rather than section 2001.[56] Instead, the Code will subject the surviving spouse's estate to the general section 2013 credit and its phaseout rules.[57]

The primary application of the section 2056(d)(3) credit will probably be with respect to non-QDT transfers.[58] For example, under TAMRA, if an individual leaves property outright to a noncitizen spouse, such property would be subject to an estate tax and no corresponding marital deduction would be allowed.[59] At the surviving spouse's subsequent death, if the spouse is still a resident of the United States, such property will again be subject to United States estate tax.[60]

Section 2056(d)(3) allows the subsequent estate to claim a credit regardless of the amount of time which has passed since the first spouse's death.[61] Likewise, the section 2056(d)(3) credit should apply to property which originally was placed in a QDT and later distributed out of the QDT subject to the section 2056A(b) tax.[62] Again, at the surviving spouse's death, the section 2056(d)(3) credit would be allowed if the same property is again subject to an estate tax.[63]

E. *Gift Tax Marital Deduction*

Congress did not leave the gift tax marital deduction unscathed in 1988. Congress placed a significant limitation on the availability of the gift tax marital deduction. New section 2523(i) disallows the unlimited gift tax marital deduction for gifts to noncitizen spouses.[64] Congress, however, realized the harshness of such a limitation and, therefore, raised the annual gift tax exclusion for gifts to noncitizen spouses from $10,000 per year to $100,000 per year.[65] Presumably, such transfers

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55. I.R.C. § 2056(d)(3).
56. Plaine & Munk, *supra* note 33, at 54.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. I.R.C. § 2523(i).
65. I.R.C. § 2523(i)(2).

must involve present interests in property to qualify for the $100,000 annual exclusion.[66]

By enacting section 2523(i)(3), Congress resurrected the "consideration-furnished" test for jointly-held property.[67] Generally, the creation of a joint tenancy will not trigger any gift tax consequences.[68] Upon the termination of the joint tenancy, a gift will result to the extent the percentage of the total consideration a spouse furnished to purchase the property multiplied by the proceeds of the termination exceeds the value of the proceeds the spouse ultimately receives.[69] In other words, unless the amount of proceeds which each spouse receives is proportionate to the amount that each spouse originally contributed, a gift tax will arise. Seemingly, this new Code provision will create proof problems.

IV. The Revenue Reconciliation Acts of 1989 and 1990

Commentators criticized the new TAMRA Code provisions which deny the marital deduction for transfers to noncitizen surviving spouses as being unworkable and incredibly harsh.[70] Thus, the 1989 Act[71] and the 1990 Act[72] included provisions which revised the rules enacted by TAMRA. Under the 1989 Act, if a surviving spouse becomes a United States citizen before the federal estate tax return is filed, non-QDT property passing to such spouse will qualify for the marital deduction.[73] To meet this requirement, the surviving spouse must be a United States resident at the date of the decedent's death and at all times thereafter before becoming a United States citizen.[74] The surviving spouse does not meet these requirements by merely

66. Plaine & Munk, *supra* note 33, at 56. *See also* H.R. Rep. No. 894, 101st Cong., 2d Sess., Vol. ___ at 29 (1990).

67. *See* I.R.C. § 2523(i)(3) (provision resurrects the principles of §§ 2515 and 2515A, repealed by the Economic Recovery Tax Act of 1981, *supra* note 19, § 403(c)(3)(B), 95 Stat. 172, 302); *see also* Plaine & Munk, *supra* note 33, at 56.

68. 1988 Ways and Means Report, *supra* note 29, at 593.

69. *Id.*

70. *See, e.g.*, Lawrence & Kaufman, *Estate Plan of Nonresidents Requires Review*, 128 Tr. & Est. 38, 53-54 (1989); *see also* letter from Professor Myron C. Grauer to Dan Rostenkowski, Chairman, House Ways and Means Committee (May 31, 1989), *reprinted in* 43 Tax Notes (Tax Analysts) 1538 (June 19, 1989) (criticizing taxation of noncitizen's QDT principal when used for valid medical or necessity reasons unrelated to tax avoidance).

71. 1989 Act, *supra* note 2.

72. 1990 Act, *supra* note 3.

73. I.R.C. § 2056(d)(4)(A).

74. I.R.C. § 2056(d)(4)(B).

instituting naturalization proceedings.[75] Thus, a citizen spouse should not leave property outright to a surviving noncitizen spouse in the hopes that by the date the estate tax return is filed the spouse will be a United States citizen.

A. *Amendments to TAMRA Qualifed Domestic Trust Requirements*

The 1989 Act revised the four straightforward requirements of section 2056A(a) which defined a QDT.[76] While Congress did not change the third and fourth requirements of section 2056A(a), the 1989 Act did revise the first two requirements of a QDT. First, the 1989 Act revised the rule of section 2056A(a)(1) that all trustees of the trust must be individual United States citizens or domestic corporations.[77] After the 1989 Act, section 2056A(a)(1) only requires that one trustee be an individual United States citizen or domestic corporation.[78]

The 1989 Act required that the qualifying trustee approve all distributions from the trust.[79] The 1990 Act, however, modified this requirement by providing that the qualifying trustee is not required to approve all distributions. Rather, section 2056A(a)(1) provides that a corpus distribution cannot be made without being subject to the qualifying trustee's right to withhold any estate tax imposed on the distribution.[80] The most significant result of the modifications to section 2056A(a)(1) by the 1989 and 1990 Acts is that a noncitizen surviving spouse may serve as a co-trustee of the QDT.

The 1989 Act also revised section 2056A(a)(2) to eliminate the requirement that the surviving spouse have an income interest in the QDT.[81] The legislative history, nevertheless, indicates the spouse may have to have an income interest to qualify under the terminable interest rule.[82] Additionally, the 1989 Act added section 2056(d)(5) which

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75. McCoy, *1989 Tax Act: Estate and Gift Tax Treatment of Non-U.S. Citizens*, Tax Mgmt. (BNA), vol. 31, no. 5, at 59 (1990).

76. *See supra* text accompanying note 41. The 1990 Act also amended § 2056A(d) to prohibit a QDT election from being made on an estate tax return filed more than one year after the due date of the return, including extensions. 1990 Act, *supra* note 3, § 11702(g)(3).

77. *See* 1989 Act, *supra* note 2.

78. I.R.C. § 2056A(a)(1).

79. *Id.*

80. 1990 Act, *supra* note 3, § 11702(g)(2). The 1990 Act provides that no QDT will fail to meet the requirements for exceptions to the terminable interest rules for power of appointment and QTIP trusts merely because the trust agreement permits withholding under § 2056A(a)(1). I.R.C. § 2056A(b)(14), added by the 1990 Act, *supra* note 3.

81. I.R.C. § 2056A(a)(2). *See* 1989 Act, *supra* note 2.

82. H.R. REP. NO. 101-247, 101st Cong., 1st Sess. 1431 n.97 (1989), *reprinted in* 1989 U.S. CODE CONG. & ADMIN. NEWS 1906, 2901 [hereinafter 1989 Conference Report].

provides that a trust will qualify as a QDT if it meets the QDT requirements by the time the decedent's estate tax return is filed (or during a judicial proceeding commenced before the due date of the return).[83] The new section allows a surviving spouse to reform a trust after the date of the decedent's death to qualify the trust as a QDT, thus enabling the surviving spouse to take the marital deduction.[84]

For example, suppose pursuant to a decedent's will, all the property is to pass to a trust and the surviving noncitizen spouse is named as sole trustee. The trust would not qualify as a QDT under section 2056A(a)(1) since the trust instrument does not require at least one trustee be an individual United States citizen or a domestic corporation. Section 2056(d)(5), however, allows the surviving spouse to reform the trust to require that at least one trustee be a United States citizen or domestic corporation.[85] Thereafter, the trust would qualify as a QDT.

Under section 2056(d)(2)(B) as enacted by TAMRA, a surviving spouse could transfer nonprobate property to a QDT before the filing of an estate tax return and treat the transfer as passing to a QDT.[86] With respect to this section, there appears to be no reason to distinguish between probate and nonprobate property. Thus, the 1989 Act extended the rule to allow probate property passing to a surviving spouse to be treated as passing to a QDT if the surviving spouse transfers the property to the QDT prior to the filing of the estate tax return or if the surviving spouse irrevocably assigns the property to the QDT under an agreement which is enforceable under local law and executed on or before the date the estate tax return is filed.[87]

Section 2056A(b)(3) does not impose an estate tax on distributions to the surviving spouse which are defined as income.[88] The 1989 Act enacted section 2056A(e) which authorizes the promulgation of regulations which may be necessary to carry out the purposes of section 2056A.[89] The Treasury Department could issue regulations to define the meaning of income as used in the application of section 2056A(b)(3).

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83. I.R.C. § 2056(d)(5)(A). The 1990 Act allows a proceeding to reform a trust so it will qualify as a QDT to commence prior to the time six months after enactment of the 1990 Act notwithstanding the decedent's date of death. 1990 Act, *supra* note 3, § 11701(l)(2). This allows estates of persons deceased prior to the enactment of the 1990 Act to take advantage of its provisions.

84. I.R.C. § 2056(d)(5)(A).

85. *Id.*

86. *See supra* text accompanying note 40 for a discussion of § 2056(d)(2)(B).

87. I.R.C. § 2056(d)(2)(B).

88. I.R.C. § 2056A(b)(3)(A).

89. I.R.C. § 2056A(e). *See* 1989 Act, *supra* note 2.

Specifically, section 2056A(e) provides that the Secretary may issue regulations to treat any annuity or other payment which is includible in the decedent's gross estate and is payable by its terms for life or a term of years as a QDT.[90] Interests treated in this manner might include interests in a qualified plan or an individual retirement account.[91]

B. *New Provisions Under 1989 and 1990 Acts*

Under section 2056A(b)(12) enacted by the 1989 Act, the estate tax otherwise applicable to a QDT will not apply if the surviving spouse subsequently becomes a United States citizen and certain other requirements are met.[92] First, the surviving spouse must be a United States resident at the decedent spouse's death and all times thereafter until becoming a United States citizen.[93] Next, no tax must have been imposed on a distribution from the QDT prior to the time the surviving spouse becomes a United States citizen.[94]

If a tax has been imposed on a distribution from the QDT, then the surviving spouse may still qualify for the estate tax exclusion by electing to treat any prior distribution from the QDT as a taxable gift and to treat any section 2010 unified credit claimed by the decedent's estate as the surviving spouse's own section 2505 credit.[95] Thus, such an election will reduce the spouse's own unified credit for purposes of determining the spouse's future estate and gift tax liability. New section 2056A(b)(13) would apply in the above scenario and would treat any tax paid on a distribution from a QDT as a gift tax, thereby resulting in a stepped-up basis under section 1015.[96]

As originally enacted by TAMRA, the QDT provisions did not take into account many of the estate tax benefits which are generally allowable to other estates. Therefore, the 1989 Act enacted section 2056A(b)(10) which provides that certain estate tax benefits including the charitable and marital deductions, special use valuation, alternate valuation, and extensions of time to pay the estate tax are allowed against the estate tax imposed upon a QDT.[97] However, such benefits are only allowed if they would be allowable to the estate of the surviv-

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90. *Id.*
91. *See* McCoy, *supra* note 75, at 60.
92. I.R.C. § 2056A.
93. I.R.C. § 2056A(b)(12)(A).
94. I.R.C. § 2056A(b)(12)(B).
95. I.R.C. § 2056A(b)(12)(C).
96. I.R.C. § 2056A(b)(13).
97. *See* McCoy, *supra* note 75, at 60.

ing spouse if the surviving spouse was a United States citizen or United States resident.[98] The 1990 Act added the benefits of a credit for state death taxes and a credit for foreign death taxes.[99]

Section 2056A(b)(10) closes gaps in the law which existed because the tax on the QDT is outside the general estate tax scheme. How these estate tax benefits will fit into the estate tax computation remains uncertain.[100] Future regulations should provide meaningful insight to this question.

A unique provision of the 1989 Act provides that no QDT tax should be imposed on a distribution from a trust to a surviving spouse on account of hardship.[101] Neither the 1989 Act nor the legislative history, however, provide any guidance for determining when a spousal hardship arises. Further, under section 2056A(b)(11) of the 1989 Act, any QDT tax paid out of the trust will be treated as a QDT distribution.[102] In other words, the trust's payment of the QDT tax is itself a distribution from the QDT and is subject to tax. Trustees of the QDT, therefore, should withhold an amount equivalent to the QDT tax on distributions from the QDT to avoid the imposition of an additional tax.[103] Despite section 2056A(b)(11), the 1990 Act enacted section 2056A(b)(14) which provides that no additional estate tax should be imposed on a distribution to a surviving spouse to the extent the distribution is to reimburse the surviving spouse for federal income tax (not QDT tax) paid on an item of QDT income that the spouse is not entitled to receive under the terms of the trust (e.g., capital gains).[104]

The legislative history of the 1989 Act also provides some insight into a provision in the original bill which the final 1989 legislation did not include. The House version of the bill would have allowed a $100,000 tax-free distribution per year to the surviving spouse plus unlimited tax-free distributions to the medical care provider of the surviving spouse.[105] This provision would have allowed the QDT to make the same amount of tax-free distributions to the surviving spouse

98. I.R.C. § 2056A(b)(10).
99. 1990 Act, *supra* note 3, § 11702(g)(4).
100. *See* McCoy, *supra* note 75, at 61.
101. I.R.C. § 2056A(b)(3)(B).
102. I.R.C. § 2056A(b)(11).
103. Jackel, *Interspousal Transfers Involving Foreigners After the 1989 Act*, 19 TAX MGMT. INT'L J. 111, 114 (1990).
104. I.R.C. § 2056A(b)(14).
105. 1989 Conference Report, *supra* note 82, at 1432.

as the decedent spouse could have made under the gift tax marital deduction provisions had the decedent spouse remained alive.[106]

C. *Gift Tax Marital Deduction*

The 1989 Act also amended section 2523(i) which provides the gift tax marital deduction in cases where the donee spouse is a noncitizen.[107] Basically, the amendment merely limits the $100,000 annual exclusion to transfers which would qualify for the marital deduction if the donee were a United States citizen.[108] For example, a gift in trust will only qualify for the marital deduction if it is within one of the exceptions to the terminable interest rule. The 1990 Act amended section 2523(i) as well. Congress extended the gift tax marital deduction for transfers of benefits under a joint and survivor annuity pursuant to section 2523(f)(6) to transfers to noncitizen spouses.[109]

Section 7815(d)(16) of the 1989 Act treats a gift arising through the creation of a joint tenancy in property as consideration belonging to the surviving spouse for purposes of applying section 2040(a) of the Code, if the joint tenancy was created prior to July 14, 1988.[110] Thus, the value of the joint tenancy property included in the decedent spouse's estate is reduced proportionately by the amount of such gift. For example, if in 1987 a citizen spouse used his or her own funds to purchase property and created a joint tenancy with the noncitizen spouse, then at the citizen spouse's death in 1990, the rule will consider the noncitizen spouse as having furnished one-half the consideration under section 2040(a). Thus, only one-half the present value of the property will be included in the citizen spouse's estate. The provision in section 2056(d)(1)(B) limiting the use of section 2040(b) will not effect the creation of this joint tenancy since it arose prior to July 14, 1988.[111]

D. TREATY PROVISIONS

Finally, the 1989 Act addresses the conflict that arises between the new marital deduction provisions and certain treaty provisions

106. McCoy, *supra* note 75, at 61.
107. I.R.C. § 2523(i).
108. *Id.*
109. *Id.*
110. 1989 Act, *supra* note 2, § 7815(d)(16), 103 Stat. 2301, 2419. The 1990 Act clarified this provision of the 1989 Act by specifying that a transfer creating a joint tenancy should be treated as consideration belonging to the surviving spouse if the transfer would have constituted a gift had the donor been a U.S. citizen. 1990 Act, *supra* note 3, § 11701(l)(3). Thus, this provision applies whether or not the donor spouse is a U.S. citizen.
111. *See supra* text accompanying note 37.

which ensure nondiscriminatory treatment of foreign citizens.[112] Under article VI of the United States Constitution, international treaties and legislation enacted by Congress are of equal force.[113] Generally, the latter in time prevails if a conflict arises.[114] Thus, recent statutes should supersede prior contradictory treaty provisions. However, due to the potential negative effects upon foreign policy, courts are reluctant to hold that treaty provisions have been abrogated by subsequent statutory enactments, unless there is clear congressional intent to do so.[115]

The majority of bilateral treaties have nondiscrimination provisions which preclude the United States from imposing more burdensome taxes on noncitizens than those taxes imposed upon its own citizens.[116] However, the provisions of TAMRA limiting the marital deduction conflict with the nondiscrimination provisions of existing treaty provisions.[117] By disallowing the marital deduction for transfers to noncitizen spouses, Congress imposes more burdensome taxes upon such spouses than those Congress imposes upon citizen spouses.

The 1989 Act addresses this conflict by providing that the 1988 repeal of the marital deduction provisions for property passing from a United States citizen to a noncitizen surviving spouse will not override a marital deduction provided for by treaty until at least three years after the enactment of the 1989 Act.[118] Thus, Congress has made its intent clear regarding the override of any treaty provisions. Unfortunately, as a result of these actions by Congress and concerns over

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112. 1989 Conference Report, *supra* note 82, at 1435.

113. U.S. CONST. art. VI.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

114. Whitney v. Robertson, 124 U.S. 190, 194 (1888).

115. Cook v. United States, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.").

116. Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, July 22, 1954, United States-Federal Republic of Germany, art. XX (as amended by Protocol, Sept. 17, 1965).

117. *See* McCoy, *supra* note 75, at 61.

118. 1989 Conference Report, *supra* note 82, at 1435.

possible discrimination against its citizens, Germany delayed ratifying its tax treaty with the United States.[119]

V. Estate Planning Considerations

Under the current marital deduction rules, an attorney planning for the estate of an individual whose spouse is a noncitizen must consider several factors. First, if the noncitizen spouse intends to reside permanently in the United States, there is a strong incentive for the noncitizen spouse to obtain United States citizenship.[120] If the surviving spouse is a United States citizen, the marital deduction would be available to the estate and would not be subject to any of the restrictions imposed by TAMRA or the 1989 and 1990 Acts.[121]

As mentioned above, however, a naturalization proceeding can be lengthy.[122] Thus, the attorney and the client should plan in the interim to avoid unfavorable tax consequences should an untimely death occur. Also, for personal reasons, some individuals likely will resist giving up their foreign citizenship merely to obtain more favorable United States tax treatment.

The new marital deduction provisions make it more desirable for an individual to make inter vivos gifts to a noncitizen spouse. The Code presently provides for a $100,000 exclusion for such gifts.[123] Therefore, an individual can easily avoid estate taxation by transferring assets to a noncitizen spouse through inter vivos gifts.

A challenge will arise, however, for individuals who wish to make present interest gifts while retaining some elements of control over the property. If the individual retains too much control, the property will remain in the deceased spouse's estate. For example, if an individual transfers stock in a closely-held corporation, the individual probably would like to retain control over the management of the business. By transferring stock while retaining voting control, however, the stock might have to be included in the estate of the citizen spouse.[124]

Practitioners should notify clients of the tax ramifications resulting from TAMRA and the 1989 and 1990 Acts if one of the spouses is a

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119. Turro, *German Government's Distress Over TAMRA Estate Tax Changes Could Derail New U.S.-F.R.G. Income Tax Treaty*, 47 TAX NOTES (TAX ANALYSTS) 837 (1990); *see also* Embassy of the Republic of Germany Position Paper on the Effect of Changes in the U.S. Estate Tax on German Nationals dated Mar. 29, 1990.

120. *See supra* text accompanying notes 36-38.

121. *Id.*

122. *See supra* text accompanying note 75.

123. I.R.C. § 2523(i).

124. *See* I.R.C. § 2036.

noncitizen. This may be a problem for many practitioners since the status of a spouse as a citizen or noncitizen was previously unimportant. Practitioners may not know which of their clients the new rules will affect. In the future, practitioners must determine whether either spouse is a noncitizen before they create an estate plan.

Also, practitioners may have to redraft their documents to account for the new marital deduction provisions. For example, documents previously drafted to provide for a QTIP trust may not satisfy the QDT requirements. Specifically, the document may name the noncitizen spouse as the sole trustee of the QTIP trust. If so, the QDT requirement that at least one trustee be an individual United States citizen or domestic corporation would not be met. Thus, the marital deduction would not be allowed. If a QDT election will be made, it is also advisable to ensure that principal distributions not be made from the QDT since such distributions will be subject to the QDT tax.

When an individual has died and is survived by a noncitizen spouse, the practitioner should determine the propriety of making a QDT election. In some cases, making the election will result in more tax being imposed than if the election is not made. For example, an important consideration is whether the noncitizen surviving spouse will remain permanently in the United States. The Code imposes an estate tax on the estates of nonresident aliens, but only to the extent such individuals have United States situs property.[125] By exercising the QDT election, the new marital deduction provisions may force a client to maintain a certain amount of United States situs property in the QDT.[126] Thus, on the surviving spouse's subsequent death, if he or she is a nonresident, the Code provisions impose a tax on the property remaining in the QDT and also impose a tax on the surviving spouse's estate due to the requirement that a certain portion of the QDT assets remain United States situs property. The phaseout rules of section 2013 continue to apply to nonresident aliens and, therefore, if a substantial period of time has elapsed between the deaths of each spouse, no credit will be allowed to the surviving spouse's estate.[127] In such a case, the election may cause more tax to be levied than would have been levied had the election not been exercised.

While exercising the election may result in higher taxes, the opposite result usually occurs. By placing property in a QDT, the individual will continue to earn income on the full amount of the property. On

125. I.R.C. § 2103.

126. *See supra* text accompanying note 42.

127. *See* Zimble, *supra* note 38, at 617.

the other hand, if the property is not placed in a QDT, a portion of the property will be used to pay the estate taxes of the first spouse to die and, therefore, will reduce the amount of property available to earn income.

VI. FAIRNESS AND WORKABILITY OF THE NEW MARITAL DEDUCTION PROVISIONS

The tax laws of the United States generally have accorded United States citizens and resident aliens similar treatment. On the other hand, the tax laws have treated nonresident aliens differently.[128] The rationale for such treatment is that resident aliens have sufficient ties to this country and should be treated the same as citizens for tax purposes. Nonresident aliens, however, do not share such similar ties and, therefore, treating them differently for tax purposes is justified. The new marital deduction provisions dramatically change this traditional categorization and create a distinct line between the treatment of citizens and resident aliens.[129] It is questionable whether such disparate treatment is fair.

For example, the new QDT provides tax distributions at the decedent spouse's tax rates which could be considerably higher than the surviving spouse's tax rates. As noted above, the surviving spouse also will not be allowed to offset the amount subject to the QDT tax by his or her unified credit or deductions.[130] However, a surviving spouse who is a United States citizen and receives property via the marital deduction will have the property taxed at his or her own

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128. If a nonresident alien is not engaged in a trade or business in the United States, only his or her United States source income is subject to tax in the United States. *See* I.R.C. § 871(a). Such United States source income is taxed at a flat 30% statutory rate. *Id.* On the other hand, if a nonresident individual is engaged in a trade or business in the United States, then any income which is effectively connected with the conduct of such trade or business is taxed as if the individual was a United States resident. *See* I.R.C. § 871(b). Also, under Code § 897, any gain realized by a nonresident alien on the sale of United States real property is taxed as if the individual is engaged in a United States trade or business and as if such gain is effectively connected to the United States trade or business. I.R.C. § 897. The United States income tax treatment of resident and nonresident aliens is beyond the scope of this article. See the following articles for the current income tax treatment of foreigners: Kaplan, *Creeping Xenophobia and the Taxation of Foreign-Owned Real Estate*, 71 GEO. L.J. 1091 (1983); Nicholson & Campbell, *How to Tax an Alien*, 118 TAX'N 115 (1986); Comment, *U.S. Taxation of Nonresident Aliens and Foreign Corporations: A Strategy for the International Capital Market Game*, 42 SW. L.J. 975 (1988).

129. *See* Grauer, *Xenophobia, Estate Taxes, and the Miscellaneous Revenue Act of 1988*, 40 TAX NOTES (TAX ANALYSTS) 1199, 1200 (1988).

130. *See supra* text accompanying notes 48-52.

section 2001 rates and will be able to offset the amount of his or her estate with the unified credit and any allowable deductions.[131]

Another distinction between the present treatment of United States citizen and noncitizen surviving spouses arises depending upon how the assets are used. For example, a citizen spouse who uses property received tax-free from a decedent on travel or other disposable assets which have been expended prior to his or her subsequent death will face no further wealth transfer tax.[132] The new marital deduction provisions, however, tax principal distributions from a QDT regardless of the use of such assets.[133] Thus, a noncitizen surviving spouse who wishes to use funds for travel will face a tax on the distributions from the QDT.

If property does not pass to a QDT, the estate of the first spouse to die will not be allowed a marital deduction and will be subject to tax.[134] As previously noted, section 2056(d)(3) will provide a credit in the noncitizen surviving spouse's estate provided such spouse is a resident at his or her death.[135] The section 2056(d)(3) credit, however, may not result in comparable treatment between the estate of an individual with a citizen surviving spouse and an estate with a noncitizen surviving spouse.

Since no refund of taxes is allowed, to obtain comparable treatment for the noncitizen spouse, the estate tax levied upon the estate of the second spouse to die must be at least as much as the tax levied upon the estate of the first spouse to die. Additionally, tax would be due on the estate of the first spouse to die. Thus, the payment of tax would be accelerated. The time value of money, therefore, works to disadvantage noncitizen surviving spouses.

It should be pointed out that the result of these new provisions may be to discriminate against the children of a United States citizen and his or her noncitizen spouse. These children are often native-born United States citizens and no reasonable basis exists for such discrimination. Specifically, Congress generally allows $1,200,000 to pass tax-free to the children of a deceased couple through the use of each parent's unified credit.[136] The new marital deduction provisions, how-

131. I.R.C. §§ 2001, 2010, 2051, 2056(a).

132. I.R.C. §§ 2031, 2051. The surviving spouse's estate will include only those assets owned at death.

133. I.R.C. § 2056A(b)(1)(A).

134. I.R.C. § 2056(d).

135. I.R.C. § 2056(d)(3). *See also supra* text accompanying note 55.

136. *See* I.R.C. § 2010.

ever, will make it much more difficult to pass $1,200,000 to the children of a deceased United States citizen and the noncitizen spouse.[137]

Obviously, a simple method for avoiding the negative effects of the limited marital deduction for transfers to noncitizen spouses is for noncitizen spouses to become naturalized United States citizens. However, something is distasteful about Congress providing an incentive to seek United States citizenship that focuses upon the desire to obtain favorable tax treatment rather than the genuine desire to be an American. Even if a noncitizen spouse wishes to become a United States citizen, the naturalization proceedings are lengthy. The Code does not provide for the possibility that the United States citizen spouse might die and the estate tax return be filed prior to the time the naturalization proceeding is completed.[138] Thus, a noncitizen spouse who is seeking United States citizenship will still face disparate tax treatment.

The rationale behind the TAMRA provisions and the 1989 Act seems to be that a noncitizen surviving spouse will return to his or her home country simply to avoid the United States estate tax.[139] This, however, does not appear to be a severe problem.[140] It is possible for Congress to address such an exceptional case in a manner that avoids disadvantaging those who intend to remain permanently in the United States and that retains the ability of the United States to collect any revenue it might otherwise lose. The next section of this article addresses this alternative.

As previously discussed, Germany has been concerned about the discriminatory treatment of the new marital deduction provisions and delayed ratification of the United States-Germany treaty.[141] The 1989 Act sought to remedy the exact situation that arose with respect to Germany. The new marital deduction provisions, however, do treat noncitizens differently from United States citizens.

The Germans may have a legitimate argument that such disparate treatment is discriminatory. This issue is something that Congress should consider when deciding whether to repeal or amend the new marital deduction provisions. The United States does not need to gain a reputation for discriminating against foreigners through the provisions of its tax laws.

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137. *See* Grauer, *supra* note 129, at 1200.
138. *But see supra* text accompanying notes 95-96.
139. *See supra* text accompanying notes 32-35.
140. *See* Grauer, *supra* note 129.
141. *See supra* text accompanying note 119.

Despite the fact that the marital deduction provisions were enacted by TAMRA in 1988 and revised by the 1989 and 1990 Acts, Congress has failed to address issues which continue to make the rules hard to follow. First, it is not clear in the statutes whether a transfer of assets that complies with the QDT rules also must comply with the general marital deduction provisions of section 2056 to qualify for the marital deduction. The general consensus is that the general marital deduction rules must be followed.[142] Congress, however, should clarify the statute.

Generally, section 2056(b)(8) allows a marital deduction even though a charity receives the property from a trust upon the surviving spouse's subsequent death.[143] If the surviving spouse is the only noncharitable beneficiary, the decedent spouse's estate is allowed a marital deduction while the surviving spouse's estate is allowed a charitable deduction at his or her subsequent death.[144] The 1989 Act allows a QDT the benefit of a charitable deduction.[145] However, this amendment does not align the treatment of an individual with a noncitizen surviving spouse to that of an individual with a citizen surviving spouse.

For example, if the transferee spouse is a United States citizen, his or her interest in a qualified charitable remainder trust will qualify for an estate or gift tax marital deduction. On the other hand, since the QDT rules do not allow a gift tax marital deduction under any circumstances, the application of the marital deduction to a noncitizen surviving spouse's interest in a qualified charitable remainder trust is limited. The only time an individual with a noncitizen spouse could set up a qualified charitable remainder trust tax-free during his or her lifetime would be when the spouse's interest is within the $100,000 annual exclusion provided by section 2523(i)(2).[146] Again, such disparate treatment is unfounded.

This article cannot address all the issues raised by the new marital deduction provisions. The article has attempted to focus on the most obvious and important. Smaller issues arise, such as whether upon a QDT distribution or termination the rate tables in effect at the date of the decedent spouse's death should be used or whether the rate

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142. Zimble, *supra* note 38, at 615; *see also* Lawrence & Kaufman, *supra* note 70, at 42. The legislative history to the 1989 Act states that the Bill "retains" the present-law requirement that property passing to a QDT must also meet requirements generally applicable to the marital deduction such as § 2056(b). 1989 Conference Report, *supra* note 82, at 1431.

143. I.R.C. § 2056(b)(8).

144. *Id.*

145. 1989 Act, *supra* note 2.

146. *See* McCoy, *supra* note 75, at 62.

tables in effect at the date of the taxable event should be used.[147] Despite the fact that the 1989 and 1990 Acts attempted to revise the provisions enacted by TAMRA, a repeal or a major revision of the provisions appears necessary to avoid the present inequitable treatment of noncitizens and to make the rules more practical.

VII. PROPOSALS FOR CHANGE

As discussed throughout this article, the new marital deduction provisions continue to treat noncitizen spouses differently from citizen spouses. The rules also do not address fully all the issues involved and, therefore, are not easily applied. The reason the rules were enacted originally was to allow the government to collect taxes from noncitizen spouses who leave the United States after their citizen spouses' deaths. If such spouses take assets with them when they leave the United States, they will not be subject to a United States estate tax at their deaths since they will be nonresident aliens. However, there is no evidence proving this is a severe problem which causes the government to lose significant amounts of revenue. Since the perceived problem is that noncitizen spouses may leave the United States after their spouses' deaths, this article proposes that Congress enact provisions that tax noncitizen surviving spouses when they actually leave the country rather than tax all noncitizen surviving spouses at their citizen spouses' deaths.

As previously argued, it is unfair and unreasonable to treat noncitizen surviving spouses who intend to remain permanently in the United States after their spouses' deaths differently than the citizen surviving spouses. One method of specifically addressing this problem would be to expand the section 2107 expatriation to avoid tax statute whereby decedents who expatriate within ten years of death may still be subject to the United States estate tax.[148] Section 2107 could be expanded to include the "expatriation equivalent" of a resident noncitizen surviving spouse leaving the United States.

In such a case, the Code should provide for levying the "expatriation equivalent" tax on all those assets for which the surviving spouse claimed the marital deduction and which are still in existence when the spouse leaves the United States. Such an expansion of section 2107 would address specifically the perceived problem and, unlike the present provisions, would not broadly affect those who plan to reside

147. *See* Lawrence & Kaufman, *supra* note 70, at 48.
148. *See supra* text accompanying note 31.

permanently in the United States. If section 2107 is expanded, then the marital deduction provisions of TAMRA and the 1989 and 1990 Acts could be repealed.

If Congress is unwilling to repeal the provisions of TAMRA and the 1989 and 1990 Acts, certain amendments should be made to those provisions. It would be more equitable for the tax on principal distributions from a QDT or for the tax on the termination of a QDT trust to be at the surviving spouse's tax rates rather than at the citizen spouse's earlier tax rates. Such a change would allow the surviving spouse to use his or her unified credit and deductions against the value of the QDT assets and would do away with much of the unneeded disparate treatment.

As noted in the Committee Reports of the 1989 Act,[149] an exclusion of $100,000 per year for principal distributions from a QDT should be allowed. Such a rule would permit the surviving spouse to receive a tax-free amount from the QDT each year after his or her spouse's death equal to the amount he or she could have received tax-free from the decedent spouse during his or her lifetime. Congress should also consider the criticisms of the rules enumerated in section VI of this article prior to any revision of the current marital deduction provisions.

VIII. CONCLUSION

The new marital deduction provisions result in unequal treatment between transfers from a United States citizen to his or her United States citizen spouse versus transfers from a United States citizen to his or her noncitizen spouse. Congress enacted the rules to prevent a noncitizen spouse from returning to his or her homeland and avoiding United States estate tax. The rules, however, overreach their purpose and result in unfavorable tax consequences for all transfers to noncitizen spouses, regardless of a spouse's intention to reside permanently in the United States.

To avoid discriminatory treatment, Congress should repeal these rules and replace them with a rule which specifically addresses the perceived problem rather than broadly taxing all transfers to noncitizen spouses. With such a rule, the federal government would be assured of collecting revenue if a noncitizen spouse returns to his or her homeland; yet, a noncitizen spouse who intends to reside permanently in the United States would not be treated unfairly.

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149. *See supra* text accompanying notes 105-06.