Estate and Gift Tax Planning for the Noncitizen Spouse

Introduction

Prior to 1988, each United States citizen or resident was permitted to transfer assets during lifetime or upon death to a spouse without estate or gift tax consequences regardless of the spouse’s citizenship. However, in reaction to the possibility that a noncitizen surviving spouse could return to his or her country of origin and avoid federal taxation of assets held outside of the United States, Congress enacted new rules denying the federal marital deduction when assets pass to noncitizen spouses unless certain requirements are satisfied. Generally, the rules require the use of a Qualified Domestic Trust (QDOT) unless the spouse becomes a U.S. citizen and thus becomes subject to taxation on worldwide property.
Developing an estate plan for a married couple when one spouse is not a U.S. citizen requires the consideration of both tax and non-tax issues. The issues particular to noncitizen planning require a thorough analysis of the couple’s assets and objectives even for planners generally familiar with the estate tax. In this issue of Legal & Tax Trends we examine the rules surrounding the use of the marital deduction if a spouse is not a U.S. citizen. Additionally, we discuss several estate and gift planning options that may address the clients’ needs and provide planning flexibility. The article does not address the nonresident, noncitizen situation.

This type of planning is complex, and it is important that clients work with qualified legal counsel.

For purposes of this material, the term “citizen” and “citizenship” refer to United States citizen and United States citizenship, respectively.

1 Technical and Miscellaneous Revenue Act of 1988, H.R. No. 795, 100th Cong., 2nd Sess. 592 (1988). The unlimited marital deduction will continue to apply when a noncitizen gifts or bequeaths property to a citizen spouse.

2 Treas. Reg. Section 20.2056A–1(c). For cases involving noncitizen nonresidents from a country with which the U.S. has an estate and gift tax treaty that is inconsistent with the QDOT rules, the estate (or the donor) may avail itself either of the statutory rules of §2056A (QDOT) or the marital deduction allowed under the treaty.

3 Although it also applies to both citizen and noncitizen residents, the Generation-Skipping Transfer Tax is beyond the scope of this material.

Federal Estate and Gift Taxation

The Internal Revenue Code (IRC) imposes a federal estate tax on the taxable estate of every decedent who is a citizen or resident of the United States. While most of the rules apply to citizens and noncitizen residents alike, a number of rules are unique to planning for noncitizens. First, we will review the estate tax system and then look at the provisions that differ based on citizenship.

Under the federal estate tax system, the gross estate of each citizen or resident includes his or her worldwide property. The value of property, which passes from the decedent to a surviving spouse who is a U.S. citizen, is deducted, among other items, from the gross estate.

On December 31, 2012, Congress passed and the President signed the American Taxpayer Relief Act of 2012. The estate and gift tax exemptions and rates now are unified and made permanent. It sets a top estate, gift, and generation-skipping transfer tax rate of 40 percent. The unified estate, gift, and generation-skipping transfer tax exemption was set at $5 million, inflation adjusted as of 2011. Individuals can now transfer at death or make gifts during their lifetimes of up to $11,580,000 (inflation adjusted exemption amount for 2020). Any portion of the federal gift tax exemption used during life will reduce the federal estate tax exemption available at death. The Act provides that this exemption at death is portable between spouses. Thus, a surviving spouse may use any unused portion of the deceased spouse’s exemption. A surviving noncitizen spouse may be able to use this exemption either through a tax treaty or a QDOT. Portability does not apply if the surviving noncitizen spouse is also a nonresident alien.

While citizens and noncitizen residents similarly are subject to the federal estate tax, two important distinctions relate to citizenship. First, direct gifts and direct bequests to a noncitizen spouse do not qualify for the unlimited marital deduction. As part of this provision, gifts in trust that would otherwise qualify for a marital deduction (e.g., QTIP trusts) will not qualify when the spouse is not a citizen unless the trust meets certain other requirements (see QDOT discussion, below). Second, the annual gift tax exclusion for gifts made to a noncitizen spouse is $157,000 (for 2020, as indexed) instead of the usual $15,000 per donee. The lifetime gift exemption is also available to exempt transfers of assets to a noncitizen spouse in excess of the enhanced annual exclusion amount from the imposition of a gift tax (e.g., in lieu of the marital gift tax deduction). Note, however, that donors making lifetime transfers to noncitizen spouses who utilize their lifetime gift exemption are correspondingly reducing their available future estate tax exemption.
Notwithstanding the general rule that assets passing to a noncitizen spouse are not eligible for the unlimited marital deduction, in three circumstances the deduction will be allowed. First, the marital deduction is allowed if the property passing to the surviving spouse passes to a qualified domestic trust (QDOT). Second, the marital deduction is allowed if the surviving spouse (1) becomes a U.S. citizen before the decedent’s estate tax return is filed and (2) has maintained U.S. residency at all times after the decedent’s death and until becoming a U.S. citizen. Finally, the marital deduction is allowed for property passing directly to the surviving spouse if the surviving spouse irrevocably transfers such assets to a QDOT prior to the filing of the decedent’s estate tax return.

The question of residence at death is beyond the scope of this material. Generally, however, residency is determined under a system different than that used for federal income tax. Where the income tax system uses a quantitative formula based on days of physical presence in the U.S., the estate tax determination is based on domicile and intent. A surviving spouse is a resident only if he/she is a resident under Chapter 11 of the Internal Revenue Code. See Treas. Reg. §20.0-1(b)(1).

IRC § 2056(a) and (d).

Ibid 3.

IRC § 2056A(a) and Temporary Reg § 20.2010-2T(c)(4).

These provisions attempt to prevent assets from leaving U.S. jurisdiction at the death of the citizen spouse. Without special restrictions a noncitizen spouse could leave the country with a bequest or gift — such assets could be taken beyond the reach of the U.S. taxing authority. IRC § 2523(i).

IRC § 2523(i).

IRC § 2056A.

IRC § 2056(d)(4).

IRC § 2056(d)(2)(B).

What is a QDOT?

The majority of estate plans for married couples with adjusted gross estates greater than the basic exemption amount are designed to take advantage of the marital deduction and therefore defer estate taxes until the death of the surviving spouse. A QDOT is a statutorily defined trust allowing married couples with at least one noncitizen spouse to take advantage of the marital deduction opportunities available to married citizens. It works differently from the typical marital trust, in that while the QDOT postpones the estate tax until a subsequent taxable event occurs, the tax always remains that of the first decedent spouse. This effectively means that a surviving spouse’s basic exclusion amount cannot be used to shelter QDOT assets from estate tax. It also means that the QDOT tax, which is attributable to the taxable event, equals the estate tax that would have been imposed if the amount involved in the taxable event had been included in the decedent’s estate and had not been deducted. Furthermore, the applicable tax rate is the rate that was in effect at the time of the decedent’s death.

The QDOT design ensures that the property held by it will be subject to federal estate taxation upon distribution or death of the noncitizen spouse. A QDOT may be created by the deceased spouse’s executor, or by the noncitizen surviving spouse to hold property he or she received outright from the decedent.

Two sets of rules apply to QDOTs with respect to the marital deduction. As a marital deduction trust, it must first meet the IRC provisions generally applicable to deductions made for gifts and bequests to a spouse. This may be accomplished with any of a number of trusts: (1) a qualified terminable interest property trust (QTIP), (2) a trust in which the assets will be paid to the noncitizen spouse’s estate, or (3) a general power of appointment trust.

In addition to general marital deduction qualifications, a QDOT must meet four more requirements specific to QDOTs. First, at least one trustee of the trust must be an individual citizen of the U.S. or a domestic corporation. Second, the trust must require that the trustee have the right to withhold any federal estate tax due on any trust distribution of principal. Third, the trust must satisfy the requirements prescribed by regulations to ensure the collection of any tax imposed by IRC § 2056A(b). Finally, the executor must make an irrevocable election on the deceased spouse’s federal estate tax return to qualify the property for the marital deduction.
Additionally, the Code imposes certain security requirements on QDOTs to ensure the payment of estate taxes. The trustee of a QDOT is personally liable for any estate tax imposed as a result of a distribution. The Code divides these trusts into two categories with different rules applying to each. If the value of the QDOT exceeds $2,000,000, it is considered a large QDOT and either (a) must name a U.S. bank or trust company to act as trustee or (b) furnish a bond or letter of credit in the amount of 65 percent of the value of the QDOT. If the value of the QDOT does not exceed $2,000,000, it is considered a small QDOT and does not have to satisfy these security arrangements if the value of any real estate located outside of the U.S. does not exceed 35 percent of the value of the trust. The $2,000,000 threshold applies as of the date of death or the alternate valuation date, if applicable. It excludes debt and under certain circumstances the personal residences of the surviving spouse.

15 Treas. Reg. §20.2056A-2(b)(1). A QDOT may also be formed if the noncitizen spouse is the only non-charitable beneficiary of a charitable remainder trust (§2056(b)(8)). See power of appointment trust at §2056(b)(5), QTIP at §2056(b)(7), and estate trust at Treas. Reg. §20.2056(c)-2(b)(1)(i)-(iii).
16 IRC § 2056A(a).
17 IRC § 2056A(a)(1)(A).
18 IRC § 2056A(a)(1)(B).
19 IRC § 2056A(a)(2).
20 IRC § 2056A(a)(3).
22 IRC § 2056A(b)(6).
23 The Treas. Regs. provide a sample bond at §20.2056A(d)(1)(i)(B) and a sample letter of credit at (d)(1)(i)(C). The value of property for purposes of calculating the $2 million threshold is not reduced for any indebtedness associated with it, as for example, real estate with a mortgage.

Triggering Estate Taxation

An estate tax will be imposed on a QDOT in the following three circumstances: (1) upon a distribution of principal to the noncitizen spouse during his or her lifetime; (2) in the event that it fails to continue to meet any of the QDOT requirements, including security arrangements; and (3) upon the death of the surviving spouse. The amount of estate tax imposed on the principal distribution or against the entire QDOT equals the amount of federal estate tax that would have been imposed if the property had been included in the decedent’s estate. In other words, the property is taxed as if it had never qualified for a marital deduction.

However, there are several exceptions to the imposition of an estate tax. First, distributions of income from a QDOT to a noncitizen spouse are not subject to estate tax. The trust instrument and applicable state law determine if a distribution is classified as income.

Second, an estate tax will not be imposed on distributions of principal from a QDOT in the event of hardship. Hardship is defined as an immediate and substantial financial need relating to the spouse’s health, maintenance, education, or support, or the health, maintenance, education, or support of any person that the spouse is legally obligated to support. A hardship does not exist if funds are reasonably available from other sources such as publicly traded stocks and securities.

Finally, the estate tax exposure will cease to exist if the surviving spouse becomes a U.S. citizen at any time, provided either that the spouse maintained U.S. residency at all times following the decedent’s death, or that no taxable distributions were made from the QDOT before the spouse became a U.S. citizen. The Code permits this exception because United States citizenship permits the federal government to tax worldwide property, absent any tax treaty between the U.S. and the other jurisdiction.

Even if the surviving spouse becomes a U.S. citizen, federal income, estate, and gift taxes may still be imposed if the surviving spouse later loses his or her U.S. citizenship (e.g., becomes an expatriate). Section 2107 provides that the estate tax will be
imposed on the estate of any decedent nonresident whose death occurs while subject to expatriate income tax under §877. In turn, §877 will apply to any nonresident noncitizen who expatriated within ten years and who has average five-year net income tax liability above $168,000 (in 2020, as indexed) or net worth above $2 million (not indexed).  

25 IRC § 2056A(b)(1). A payment of the estate tax by the QDOT will be considered a distribution for these purposes. As a result, the estate tax payment itself is subject to estate tax.

26 IRC § 2056A(b)(2)(A). The formula requires the trustee to calculate the decedent’s estate tax with and without the QDOT property (or distribution), subtracting the latter from the former. The applicable rates are those in effect on the date of the first decedent’s death (see Treas. Reg. §20.2056A-6(a)). The difference represents the amount of tax owed by the QDOT trustee. The tax withheld is also considered a tax-triggering distribution.

27 IRC §§ 2056A(c)(2) and 643(b).

28 IRC §§ 2056A(b)(3)(B).


30 For purposes of this exception, sources that are not considered reasonably available include closely held business interests, real estate, and tangible personal property.

31 IRC § 2056A(b)(12).

32 IRC § 2107. This section references income tax §877, which provides for a ten-year look back period for expatriate noncitizens.

33 The American Jobs Creation Act (AJCA) of 2004 amended §877, which provides for an alternative federal income tax regime for certain expatriated individuals. It eliminated the subjective tax avoidance criteria in favor of objective criteria (in the form of an average five-year net income and net worth tests). The AJCA provides that individuals will continue to be treated as U.S. citizens or long-term residents for U.S. tax purposes even after the ten-year period, until they have notified the Secretary of the Department of State or of Homeland Security of expatriation or termination of residency. The implementation date of this provision is retroactive and applies to expatriations occurring after June 3, 2004. For more information on expatriation, see IRS Form 8854, Initial and Annual Expatriation Information Statement.

General Estate Planning Considerations

Most married couples establish estate plans that will delay paying an estate tax until the death of the surviving spouse. As we have seen, however, in order for couples with a noncitizen surviving spouse to take advantage of the marital deduction, they must either use a QDOT or the surviving spouse must become a U.S. citizen before the filing of the citizen spouse’s estate tax return. Generally, because of the certainty that the deduction will be available, the QDOT plan is thought to be the better short-term solution. In some circumstances, though, it may not be appropriate. For example, a QDOT may not be the appropriate planning vehicle if the estate is not substantial. That is, if the decedent’s gross estate is less than his or her estate tax exemption equivalent, and they intend to use the entire exemption to leave assets to the surviving spouse, then no marital deduction will be necessary to avoid estate tax. Further, a QDOT may not be appropriate if the surviving spouse does not intend to remain a U.S. resident after the death of the spouse. In this case, the value of direct ownership of the assets may outweigh the estate tax costs of such a transfer.

To evaluate the propriety of the QDOT in a particular estate plan, it will be necessary to first determine the value of the taxable estate of the first spouse to die. The estate of every U.S. citizen or resident includes all property that he or she owns at the time of death either outright or with another individual. Generally, property owned jointly (e.g., joint tenants with right of survivorship or tenants by the entirety) by spouses is assumed to be owned one-half by each spouse. If the surviving spouse is not a U.S. citizen, however, the entire value of the jointly titled property is included in the estate of the deceased spouse unless the executor can prove that the noncitizen spouse furnished consideration. In contrast, community property laws operate normally even where a noncitizen spouse is involved – each spouse owns one-half of the couple’s community property, so one-half of community property assets avoid estate taxation upon the death of the first spouse.

Once the couple’s net worth has been identified, the next step is to determine whether a QDOT should be used (whether created by the decedent spouse or later by the executor or surviving spouse). The ability to use the marital deduction and thus defer estate tax payments until the death of the noncitizen spouse may be advantageous for larger estates composed primarily
of illiquid assets. Similarly, a QDOT may be appropriate if the estate assets will not grow substantially after the first spouse’s death.\textsuperscript{35} It should also be considered if the noncitizen spouse plans to become a U.S. citizen in the future. If a plan calls for a QDOT, consideration should be given to providing estate tax liquidity at the surviving noncitizen spouse’s death. Alternatively, depending upon the size of the estate and the couple’s objectives, choosing to pay the applicable estate taxes at the decedent’s death may be a viable estate planning option.

This latter choice — to pay some estate tax upon the death of the first spouse — may be economically advantageous. This is particularly true if the estate assets are anticipated to achieve significant growth in the estate of the surviving spouse. In these situations, it may be better to over-fund the credit shelter trust and pay estate taxes at the first death, thereby reducing the estate tax exposure upon the surviving spouse’s death. However, while paying taxes at the first death may be financially advantageous in some situations; this approach is generally not followed. This may be because it is emotionally difficult to have the surviving spouse part with assets voluntarily (i.e., pay estate taxes) at a time when he or she may be most vulnerable.

\textsuperscript{34} IRC § 2056(d)(1)(B).
\textsuperscript{35} As, for example, where the decedent spouse’s income contributes significantly to the couple’s projected estate tax problem.

\section*{Beneficiary Planning for Life Insurance, Retirement Plans, and Annuities}

Considerable planning flexibility exists when choosing the designated beneficiary of a life insurance policy, annuity contract, or retirement plan. The beneficiary of these assets could be a QDOT created by the spouse to take advantage of the marital deduction and defer estate taxes. Alternatively, the noncitizen spouse could be named as the beneficiary of these assets. If the noncitizen spouse is named as the beneficiary of these assets, he or she has several options regarding taxation: (1) disclaim the assets and allow them to pass to the contingent beneficiary, (2) maintain the assets in his or her individual name and pay any applicable estate taxes, or (3) roll the assets over into a QDOT created by the surviving spouse.

\subsection*{Life Insurance}

Life insurance, if the beneficiary designations are structured properly, can be an excellent vehicle to provide for survivor income needs. In most circumstances the insured spouse names his or her spouse as the beneficiary of an insurance policy without giving the choice too much thought. However, designating a noncitizen spouse beneficiary involves additional considerations. In these situations, where the insured owns his or her own policy, the insured spouse must determine if he or she wants to take advantage of the marital deduction by naming a QDOT as the beneficiary or to name the noncitizen spouse as the beneficiary (and to allow for post mortem planning). If a QDOT is named as the beneficiary of an insurance policy on the life of the citizen spouse, the proceeds will qualify for the marital deduction, thus deferring estate taxation. The trust would provide income to the surviving spouse during his or her lifetime and could provide for distributions of trust principal for his or her health, education, maintenance, and support or for any reason if an independent trustee is used. Income generated by the death proceeds and distributed from the trust to the surviving spouse would not be subject to estate taxation. However, if principal, except for hardship purposes, is distributed to the surviving spouse during his or her lifetime or if any remains in the trust upon his or her death, such amount will be subject to estate taxation. Therefore, naming a QDOT as the beneficiary of a life insurance policy merely defers the estate taxation of the proceeds.

Alternatively, the surviving spouse could be named as the primary beneficiary of an insurance policy on the citizen spouse’s life. This option provides considerable post mortem estate planning flexibility. For example, if the estate has sufficient liquid assets
to satisfy estate taxes, the surviving spouse may choose to receive the death proceeds outright or disclaim the assets so that they pass to the contingent beneficiary. If, however, the estate does not have sufficient liquid assets, the surviving spouse could transfer all or a portion of the death benefit to a QDOT created by the surviving spouse and qualify the transferred portion for the marital deduction.

Two other planning options should be considered where proceeds will benefit a noncitizen spouse. The easiest option would be for the noncitizen spouse to be the owner and beneficiary of an insurance policy on the life of the citizen spouse. The death benefit generally will not be subject to estate tax in the insured’s estate. Therefore, the proceeds do not have to pass to a QDOT, because they do not need to qualify for the marital deduction. Similarly, where an irrevocable trust for the primary benefit of the noncitizen spouse is the owner and beneficiary of an insurance policy on the life of the citizen spouse, the death proceeds do not have to qualify for the marital deduction, as the death benefit generally will be excluded from the insured’s estate. These two alternatives will often be preferable to qualifying for the marital deduction by creating or funding a QDOT or obtaining U.S. citizenship.

Where the noncitizen spouse is the owner and beneficiary of the life insurance policy, and the insured spouse is the primary source of family’s income and assets, the insured’s payment of premiums will be considered to be a gift to his or her spouse. As described earlier, the annual gift tax exclusion for transfers to a noncitizen spouse is an indexed amount that is $157,000 as of 2020.

IRAs and 401(k)s

As with life insurance, the estate tax marital deduction problem for noncitizen spouses applies to qualified plans and IRAs. Several options are available, each with advantages and disadvantages that should be considered in light of the owner’s goals and concerns:

- Owner designates spouse as beneficiary of the account; No post-mortem elections taken by spouse.
- Owner designates a QDOT as beneficiary of the account.
- Owner designates spouse as beneficiary of the account; Spouse assigns it to a QDOT.
- Owner designates spouse as beneficiary of the account; Spouse consents to pay deferred tax under non-assignment options provided in Treasury Regs.

Noncitizen Spouse is Named Beneficiary:

Naming a noncitizen spousal beneficiary is a simple option, but it creates potential estate tax problems at the account owner’s death — namely that the account will be included in the owner’s gross estate with no offsetting marital deduction. If the estate tax is not a concern, naming a surviving spouse can be a good solution, since the surviving spouse can roll over the account values into his/her own name. Citizenship is not a prerequisite to the rollover by the surviving spouse. A rollover can defer the beginning of required distributions for younger (pre-72) surviving spouses and reduce the minimum distributions when they begin. None of the account distributions will be accumulated in a trust and so will not be taxed at trust income rates.

QDOT is Named Beneficiary

A QDOT is a qualified domestic trust established by a surviving spouse to hold and distribute the proceeds of a life insurance policy or retirement account for the benefit of a noncitizen spouse. The QDOT is treated as a trust entity for estate tax purposes and is subject to the same tax rules as a domestic trust.

An owner (e.g., the surviving spouse) may use the MDIB table for calculating RMDs, while the beneficiary of an inherited IRA must use the Single Life Table.
Naming a QDOT as the beneficiary of an IRA, 401(k), or other defined contribution plan allows for the deferral of the estate tax via marital deduction but restricts distribution options in several ways. As discussed above, the QDOT must qualify as a marital deduction trust (most commonly as a QTIP trust) under which the spouse beneficiary will receive all trust income. The beneficiary’s right to trust investment income and the unrelated RMD requirement together result in faster liquidation of the qualified balance than otherwise would be permissible. For example, in years where the RMD is less than the IRA investment income, the trustee will have to extract from the IRA the higher (accounting income) amount and pass it to the spouse to satisfy the QTIP requirements. In years where the RMD is greater than the IRA investment income, the trustee will have to take out the higher RMD amount. Together the rules ensure that the greater of the investment income or the RMD amount will come out of the IRA each year. Such distributions result in a substantial loss of potential income tax deferral that is often the selling point for the qualified plan and IRA.

In distribution years where the RMD requirement exceeds investment income, the trustee might be given the option of accumulating the excess RMD amount in the QDOT. While this may be advantageous from an estate planning viewpoint in that it will delay the imposition of estate taxation of a QDOT distribution in excess of current income, and may further the non-tax distribution goals of the grantor, it may also cause a higher income tax rate to apply to the portion retained by the trust. A taxable distribution from the retirement plan to the QDOT will be subject to income tax at the trust’s income tax rate unless such income is distributed to the beneficiary. To the extent that the trust does not receive a deduction for passing the taxable income on to the beneficiary the trust itself is taxable on the income. Trust income, to the extent it exceeds $12,950 (in 2020), will be taxable at the 37% marginal rate.

The background to the minimum distribution final regulations (1.401(a)(9)-0 and following) indicates that a spousal rollover might be possible where benefits are actually paid via a trust. A spousal rollover of an IRA passing through a QTIP trust has been approved in several PLRs, but the IRS has yet to publish a Revenue Ruling citable by other taxpayers. Further, in each ruling the PLR recites the general rule that a rollover is not available unless the surviving spouse had unfettered access to or a demand right to take all of the plan distributions.

In summary, a rollover is not guaranteed to be available where IRA or plan assets are payable to a QDOT with a QTIP design. Upon the surviving spouse’s death the trust must follow the 10-year RMD Rule (all funds from the Beneficiary IRA must be distributed by December 31 of the year that contains the 10th anniversary of the surviving spouse’s date of death.

Noncitizen Spouse Named as Beneficiary; Assignment to QDOT

If the estate tax is a concern, and the benefits are assignable, the surviving noncitizen spouse may take advantage of the QDOT even though the trust was not named as beneficiary directly. The surviving spouse may: (1) roll the assets into an individual retirement trust that qualifies as a QDOT (e.g., QDOT IRA Trust); or (2) assign the plan to a QDOT created by the surviving spouse. Both of these options require careful consideration due to the lack of IRS guidance in this area.

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38 “Income” for these purposes is not simply the amount distributed from the account (e.g., a required minimum distribution). In Rev. Rul. 2006-26, 2006-22 I.R.B. 939, the IRS provides a safe harbor definition for “income” that will meet the marital deduction standards. The QDOT must provide a formula for income that will provide the surviving spouse with either (1) the IRA (or plan account’s) internal investment income, or (2) a unitrust percentage between 3% and 5% based on the account value.

39 An income tax deduction is available to the trustee for distributable net income (DNI) transferred from the trust to the beneficiary. A complete discussion of the DNI rules in this context is beyond the scope of this article. For a more complete discussion, see Life and Death Planning for Retirement Benefits, by Natalie Choate (7th Edition 2011).

40 “The 2001 proposed regulations clarified that a deemed election is permitted only if the spouse is the sole beneficiary of the account and has an unlimited right to withdraw from the account. This requirement is not satisfied if a trust is named as beneficiary of the IRA, even if the spouse is the sole beneficiary of the trust.” But, it continues later: “If the spouse actually receives a distribution from the IRA, the spouse is permitted to roll that distribution over within 60 days into an IRA in the spouse’s own name to the extent that the distribution is not a required distribution, regardless of whether or not the spouse is the sole beneficiary of the IRA owner.” Treasury Decision 8987 (16 Apr 2002).
An individual retirement account can be in the form of a trust or a custodial account. A QDOT IRA Trust is basically an individual retirement account held in the form of a trust with QDOT provisions. Because the trust is created by the surviving spouse there is no requirement (as with most QTIP trusts) that all plan or IRA income be distributed to the trust annually. Therefore, the surviving spouse may limit distributions from the plan to minimum required distributions and maintain the income tax deferral provided by the plan. Further, since the spouse was the named beneficiary on the account, the transfer to a QDOT IRA Trust may be a spousal rollover. A spousal rollover permits the surviving spouse to take distributions based upon the joint life expectancy of the surviving spouse and another beneficiary (e.g., child), thereby potentially maximizing income tax deferral over more than one generation. As with other QDOT strategies, the opportunity to maximize the plan income tax deferral should be weighed against the estate tax that will attend future trust distributions.

Alternatively, the surviving spouse could assign the plan assets to a regular QDOT created by the surviving spouse. This trust should be a revocable trust so that the surviving spouse is considered the owner of all of the trust’s assets for income tax purposes. This approach also permits the surviving spouse, via spousal rollover, to name a new designated beneficiary and take advantage of joint life expectancy minimum required distributions. The benefit of this approach over the QDOT IRA Trust is that when minimum required distributions include principal (e.g., later in the spouse’s lifetime), the principal distributions to the QDOT can be held by it and not distributed to the surviving spouse, thus avoiding estate taxation during the surviving spouse’s lifetime. In contrast, principal distributions from a QDOT IRA Trust will be made directly to the surviving spouse and will therefore be subject to estate taxes immediately.

41 IRC §§ 408(a) and (h).
42 The IRS will not issue a ruling regarding this type of IRA; therefore it is recommended that the trustee use the Model Trust Account Form S305 and include QDOT provisions. See the model trust at https://www.irs.gov/pub/irs-pdf/f5305.pdf
43 Since this structure is uncommon, it may be difficult to find a U.S. bank or trust company that is willing to serve as trustee of this type of trust.

**Annuities (and other situations where noncitizen spouse is named direct beneficiary of non-assignable assets)**

In order to defer the estate tax when a noncitizen spouse is named direct beneficiary of an annuity of other non-assignable asset, including IRAs or qualified plan accounts, the estate tax may nevertheless be deferred if the surviving spouse elects one of two options provided in Treasury Regulation §20.2056A-4(c)(2) and (3): the tax payment option or the rollover option. The tax payment option requires the surviving spouse to annually pay the estate tax associated with the principal portion of any payment received. The rollover option requires the surviving spouse to roll over the principal portion of any annuity payment received to a QDOT created by the decedent, executor, or surviving spouse. Each of these options requires the surviving spouse to sign an agreement with the IRS. Failure to comply with the agreement could result in an estate tax being imposed on the entire remaining present value of the annuity or assets that may be non-assignable. The amount of principal included in each annuity payment is calculated by a four-step formula provided by the Regulations.

44 Treas. Reg. § 20.2056A-4(c)(1).

**Estate Tax Liquidity**

Although the use of a QDOT created by the spouse, executor, or surviving spouse takes advantage of the marital deduction, it merely postpones the estate taxation of the trust assets. Estate taxes may be imposed during the surviving spouse’s lifetime if trust principal is distributed to the surviving spouse. Additionally, any remaining proceeds held in the trust upon the surviving spouse’s death will be subject to estate taxation. Irrevocable life insurance trusts have traditionally been an integral part of...
many estate plans. In the case of a noncitizen spouse, these trusts can offer significant estate and gift planning opportunities. Depending upon the estate plan, an irrevocable trust could be funded to provide liquidity upon the death of the first spouse (i.e., citizen spouse), upon the death of the second spouse (using a QDOT), or under both circumstances if post mortem planning is anticipated. Providing estate tax liquidity at the death of the citizen spouse would enable the estate to over-fund the credit shelter trust and therefore avoid estate taxation upon the death of the noncitizen spouse. Alternatively, where a QDOT will be used, an irrevocable trust could be funded to provide liquidity upon the surviving spouse’s death through the use of survivorship life insurance. A combination approach may allow the most planning flexibility. An irrevocable trust or trusts funded with insurance on the life of the citizen spouse and survivorship insurance could provide supplemental benefits to the surviving spouse without the restrictions required by a QDOT and address estate liquidity issues upon the death of the surviving spouse (i.e., noncitizen spouse). Irrevocable trusts may help provide liquidity in these circumstances as the example below illustrates:

Assume D (a U.S. citizen), dies in 2020 while married to S (a non U.S. citizen) and with a gross estate of $23,160,000. D’s will provides for $11,580,000 in assets to go to a credit shelter trust and assets of $11,580,000 to be paid to a QDOT. D’s estate will not result in a federal estate tax payable because (1) the transfer to the QDOT qualifies for an estate tax marital deduction, and (2) D’s available estate tax exemption equals the remaining $11,580,000 transferred to the credit shelter trust. During S’s life, S receives a distribution each year of income from the QDOT. These distributions are not subject to estate tax, but are subject to income tax. At the end of 2020, S requests a distribution of $1,000,000 of principal from the QDOT. The estate tax on the distribution equals $400,000 (assuming a flat 40% estate tax rate on the full amount of taxable estate rather than a graduated rate). This is the amount of tax that would have been payable had the $1,000,000 been taxable in D’s estate. The trustee withholds the $400,000 to pay the estate tax and distributes $600,000 to S. In 2020, S dies. The QDOT comprises $11,580,000 (all principal). A tax of $4,232,000 (this amount assumes a flat 40% estate tax rate rather than a graduated rate for illustration purposes only) is due on the balance.

In this example, the ability of the QDOT trustee to make the necessary estate tax payments of $400,000 and $4,232,000 will depend, in part, on the liquidity of trust assets. If the property is not easily made liquid, payment of the tax — and therefore the making of the distributions — may be difficult. However, where an ILIT is able to buy illiquid property from the QDOT, the QDOT will have a ready source of cash from which to make the estate tax payments.

Conclusion

Using the marital deduction is an integral component of most estate plans. However, this benefit is not available if the surviving spouse is not a U.S. citizen unless the estate plan includes a QDOT or the surviving spouse becomes a U.S. citizen. An understanding of the QDOT requirements and the ability to apply these rules to a client’s particular situation is essential when transferring wealth to a noncitizen spouse.