

**Steve Leimberg's Estate Planning
Email Newsletter Archive Message #2510**

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Subject: Bruce Steiner on Revenue Procedure 2016-49: Using QTIP Trusts in Smaller Estates

“QTIP trusts will be useful in more cases as a result of [Revenue Procedure 2016-49](#) and increases in the state estate tax exclusion amount in some states. Clients not concerned about Federal estate taxes should consider leaving their entire estate, or the portion of their estate in excess of the state estate tax exclusion amount, in a QTIP or Clayton QTIP trust, so as to get a second basis step-up at the surviving spouse’s death.”

Bruce Steiner provides members with his analysis of [Revenue Procedure 2016-49](#). Bruce previously wrote about the risk that the IRS might disallow a QTIP election that wasn’t needed to eliminate the Federal estate tax in [Estate Planning Newsletter #2060](#), and on the IRS’ recent concession that such a QTIP election will be valid in [Estate Planning Newsletter #2459](#). Bruce now returns to explore new uses of the QTIP trust that are now available.

Bruce D. Steiner, of the New York City law firm of **Kleinberg, Kaplan, Wolff & Cohen, P.C.**, and a member of the New York, New Jersey and Florida Bars, is a long time LISI commentator team member and frequent contributor to Estate Planning, Trusts & Estates and other major tax and estate planning publications. He is on the editorial advisory board of Trusts & Estates, and is a popular seminar presenter at continuing education seminars and for Estate Planning Councils throughout the country. He was named a New York Super Lawyer in 2010, 2011, 2012, 2013, 2014, 2015 and 2016. Bruce has been quoted in various publications including *Forbes*, the *New York Times*, the *Wall Street Journal*, the *Daily Tax Report*, *Investment News*, *Lawyers Weekly*, *Bloomberg’s Wealth Manager*, *Financial Planning*, *Kiplinger’s Retirement Report*, *Medical Economics*, *Newsday*, the *New York Post*,

the *Naples Daily News*, *Individual Investor*, *Fox Business*, *CNBC*, *TheStreet.com*, and Dow Jones (formerly CBS) Market Watch.

Here is Bruce's commentary:

EXECUTIVE SUMMARY:

QTIP trusts will be useful in more cases as a result of Revenue [Procedure 2016-49](#) and increases in the state estate tax exclusion amount in some states.

FACTS:

The Federal estate tax exclusion amount is \$5,490,000 (indexed). Under the American Taxpayer Relief Act of 2012, portability was made permanent.

Some states have a state estate tax with a lower exclusion amount. For example, the exclusion amount is \$1 million in Massachusetts, and \$2 million in Connecticut.

Some states have repealed their state estate taxes in recent years. Others have increased their exclusion amounts.

New York increased its exclusion amount from \$1 million to \$2,062,500 on April 1, 2014, to \$3,125,000 on April 1, 2015, and to \$4,187,500 on April 1, 2016. The New York exclusion amount is scheduled to increase to \$5,250,000 on April 1, 2017, and to the Federal level on January 1, 2019.

New Jersey increased its exclusion amount from \$675,000 to \$2 million on January 1, 2017. The New Jersey estate tax is scheduled to be repealed as of January 1, 2018.

Maryland increased its exclusion amount from \$1 million to \$1.5 million in 2015, \$2 million in 2016, \$3 million in 2017, \$4 million in 2018, and to the Federal level in 2019.

Other states have also increased their exclusion amounts or repealed their estate taxes.

In Rev. Proc. 2016-49, the IRS conceded that a QTIP election on a Federal estate tax return filed to elect portability is valid.

COMMENT:

Married couples with large estates in states with no state estate tax will generally create a credit shelter trust for the Federal estate tax exclusion amount. This offers several advantages over portability. It shelters the income (as well as the growth) in the credit shelter trust during the spouse's lifetime. Portability is not indexed for inflation, and there is no portability for the GST exemption. Most states do not allow portability for state estate tax purposes. If the trust so permits, the trustees can always distribute the trust assets to the surviving spouse if desired.

Given the level of the Federal estate tax exclusion amount, very few estates will pay Federal estate tax. Many states no longer have a state estate tax. Many of the remaining states have increased their exclusion amounts. Even without portability for state estate tax purposes, many estates will not pay any state estate tax.

For these clients, leaving their assets in a credit shelter trust generally provides the most flexibility and the greatest degree of protection against creditors and future spouses.

In states where the elective share is outright and cannot be satisfied with a bequest in trust, consideration must be given to the possibility that the spouse might claim an elective share.

However, Rev. Proc. 2016-49 provides another possibility. Clients not concerned about Federal or state estate taxes can now leave their entire estate in a QTIP trust, thus obtaining a second basis step-up at the surviving spouse's death, while preserving most of the asset protection benefits of the credit shelter trust.

The asset protection tradeoff arises from the fact that in order to be eligible for the QTIP election, the spouse must be entitled to all of the income of the trust for life. This exposes the income to the spouse's

creditors and future spouses. However, the income is likely to be small in relation to the size of the trust; and in smaller estates the spouse may need some distributions in any event.

Therefore, if the estate tax is not a concern, it may be worth sacrificing the asset protection with respect to the income in order to obtain a second basis step-up at the spouse's death.

A variation on this is a *Clayton* QTIP trust. In a *Clayton* QTIP trust, named after the case by that name that allowed it, the testator leaves his or her estate in trust, to be held in a QTIP trust to the extent the executors elect QTIP, and in a credit shelter trust to the extent the executors do not elect QTIP. This permits the decision to be deferred until the client's death, when the executors can decide as to the QTIP election based upon the facts and circumstances at that time, including the size of the estate and the Federal and state estate tax laws at that time.

While the spouse was the executor responsible for the QTIP election in the *Clayton* case, some practitioners believe that an independent executor, or an executor other than the spouse, should be responsible for the QTIP election, to avoid the risk of a taxable gift. However, with a \$5,490,000 Federal estate tax exclusion amount, the possibility of a taxable gift may not matter.

Where the state estate tax is a concern but the Federal estate tax is not a concern, clients might create a credit shelter trust for the state exclusion amount and a QTIP trust for the balance. However, as the state estate tax exclusion amount increases, or as states eliminate their estate tax, fewer clients will be concerned about state estate taxes, and more clients will be able to leave their entire estate in a QTIP or *Clayton* QTIP trust.

Concluding Observation

Clients not concerned about Federal estate taxes should consider leaving their entire estate, or the portion of their estate in excess of the state estate tax exclusion amount, in a QTIP or *Clayton* QTIP trust, so as to get a second basis step-up at the surviving spouse's death.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE*
DIFFERENCE!

Bruce Steiner

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CITES:

[Revenue Procedure 2016-49](#); [Revenue Procedure 2001-38](#);
[Estate of Clayton v. Commissioner](#), 976 F.2d 1486 (5th Cir. 1992), ,
rev'g. [97 T.C. 327 \(1991\)](#).