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THE LIFE USUFRUCT AS AN ESTATE PLANNING TOOL

Introduction

The marital deduction originally was enacted to equalize the estate and gift tax consequences of property transfers made between married persons living in community property states with those transfers made between married persons living in non-community property states. Because of this underlying purpose, community property was not eligible for the marital deduction, and where the marital deduction could be claimed, it was limited to one-half of the decedent's adjusted gross estate. However, the Economic Recovery Tax Act of 1981 (ERTA) changed the underlying rationale of the marital deduction. The marital deduction's primary objective is no longer to equalize the transfer tax consequences to married couples regardless of their domicile, but is to allow an individual to transfer his entire estate to his surviving spouse without the...
imposition of any estate or gift tax. This has been accomplished by removing the quantitative limitations on the marital deduction and, in order to encourage its use, by enacting an additional exception to the "terminable interest rule."

Prior to the enactment of ERTA, the general rule was that no marital deduction was allowed when an interest in property passed to the spouse if the spouse's right to such property terminated upon any contingency, the lapse of time, or the occurrence or nonoccurrence of an event. The rule disallowing a deduction for "terminable interest," however, contained certain limited exceptions. The first exception was that an interest was not considered terminable if the surviving spouse's interest would fail upon the surviving spouse's death within six months of the deceased spouse's death. The second exception occurred if the legacy to the spouse would fail if the spouses died in a common disaster, and the contingency did not in fact occur. The third exception to the terminable interest rule allowed the marital deduction when the surviving spouse had a life interest coupled with the power to appoint the underlying property to himself or his estate. The final exception dealt with life insurance proceeds or payments under an annuity contract if the surviving spouse had the power to appoint all or a specific portion of the amounts held by the insurer to himself or his estate.

ERTA does not change the "terminable interest rule" but merely adds an additional exception. This exception allows "qualified terminable interest property" (QTIP) to qualify for the marital deduction if three requirements are met: (1) the property passes from the decedent; (2) the surviving spouse has a qualifying income interest for life; and (3) the executor timely and properly elects to treat the transfer as a qualifying terminable interest. Under this new rule, a spouse can dispose of the naked ownership of his property as he desires and still obtain the benefits of the marital deduction on the entire property if he grants a qualifying life interest to his surviving spouse.

12. I.R.C. § 2056(b)(7) (1982). An election by the executor merely defers the estate tax until the death of the surviving spouse. Also, there may be cases where QTIP treatment is available, but would not be advisable. This paper only addresses the availability of the deduction. See Blackstone, More on the Marital Deduction: Choosing Between Outright vs. LifeUsufruct vs. QTIP Trust, 31 La. B.J. 335 (1984).
The most onerous of the QTIP requirements is that the interest be a "qualifying income interest," which requires that several tests be satisfied. First, the interest must exist for the life of the spouse. Since a legal usufruct which arises by operation of Louisiana law terminates upon remarriage, it normally would not be a qualifying income interest eligible for the marital deduction. Similarly, neither a usufruct for a term of years determined other than by the death of the surviving spouse, nor one subject to a resolutory condition would qualify.

The second requirement for a "qualifying income interest" is that the surviving spouse be entitled to all of the income or a specific portion of the income from the interest transferred. The surviving spouse's rights are determined by the governing instrument and, if the instrument is silent, by state law. These rights must be sufficient to meet the requirements for a marital deduction trust, i.e., a trust which gives to the surviving spouse substantially that degree of beneficial enjoyment which the law of trusts accords to a person who is unqualifiedly designated as the life beneficiary of a trust. The required degree of enjoyment exists if the surviving spouse is entitled to income or has such use of the property as is consistent both with the value of the trust corpus and with its preservation. The QTIP rules do not require that the surviving spouse have the power to invade the corpus of the property, nor that the income interest be placed in trust in order to qualify for the marital deduction. The deduction is not allowed if the primary purpose of the trust is to safeguard the corpus without providing the surviving spouse the beneficial enjoyment of the property.

The third requirement is fairly mechanical, and requires the income to be paid at least annually. An interest does not fail to meet this condition merely because the spouse is not entitled to the income during the administration of the estate assets, unless the executor is authorized by

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20. Id.
22. See generally ERTA Report, supra note 18.
the decedent's will to delay the distribution beyond a reasonable period.\textsuperscript{23}

The final requirement for a "qualifying income interest" is that no person have the power to appoint any part of the property to any person other than the surviving spouse.\textsuperscript{26} The legislative history indicates that a remainderman's right to transfer his interest does not disqualify the property, provided the spouse's income interest is not affected by the transfer.\textsuperscript{27} The property rights of a remainder interest are analogous to the rights of a naked owner;\textsuperscript{28} hence, the power of a naked owner to dispose of his interest subject to the usufruct should not be considered as a power to appoint the property to a person other than the surviving spouse.

Under the Louisiana Civil Code, the surviving spouse obtains a legal usufruct over community property inherited by the descendents if the property is not adversely disposed of by testament.\textsuperscript{29} The deceased spouse may go further, however, and confirm the usufruct for the life of the surviving spouse over his share of community property, as well as his separate property, without impinging upon the legitime of the forced heirs.\textsuperscript{30}

The ability of a testator to confirm the usufruct for life naturally raises the question of whether such a testamentary usufruct is a "qualifying income interest" eligible for the marital deduction. The essential condition for qualifying for QTIP treatment is that the surviving spouse have a nonterminable right to enjoy the income from the property. A usufruct confirmed for the life of the usufructuary is nonterminable and easily meets this requirement of the legislation. The major problem is determining whether the usufructuary has the requisite degree of "income interest." The usufructuary's right to enjoy the income from the property subject to the usufruct and the usufructuary's right to change the character of the property in order to make it "productive" must be examined to determine whether the usufructuary enjoys a requisite "income interest." Additionally, it is necessary to consider whether a testamentary grant to the surviving spouse of the power to convert nonconsumables is an impediment upon the legitime of the forced heirs.

\textit{Internal Revenue Service Approach}

Prior to the enactment of Internal Revenue Code (IRC) section 2056(b)(7), a life usufruct of both consumables and nonconsumables was considered a terminable interest ineligible for the marital deduction since

\textsuperscript{28} See Rev. Rul. 74-273, 1974-1 C.B. 201.
\textsuperscript{29} La. Civ. Code art. 890.
the surviving spouse's interest terminated upon his death.\textsuperscript{31} Additionally, the testamentary usufruct did not fall within the exception to the terminable interest rule contained in IRC section 2056(b)(5), because of the usufructuary's duty to account to the naked owner at the termination of the usufruct, and the exclusion of the value of the underlying property subject to the usufruct from the second spouse's estate.\textsuperscript{32} However, it is no longer necessary that the surviving spouse have an interest in the corpus equivalent to ownership in order for the interest to qualify as an exception to the terminable interest rule. QTIP requires only that the surviving spouse receive a nonterminable income interest. Because of this major change, the rationale of the prior jurisprudence does not apply.

The Internal Revenue Service (IRS) has addressed the question of whether a testamentary usufruct confirmed for life qualifies for QTIP treatment in several recent Private Letter Rulings.\textsuperscript{33} Although these rulings apply only to the individual requesting them and cannot be cited as precedent by other taxpayers,\textsuperscript{34} they do give an indication of the current views of the IRS. In each ruling, the issue before the IRS was whether a usufruct over consumables and nonconsumables was a qualifying income interest eligible for QTIP treatment when the usufruct was confirmed for life, but the usufructuary was not granted the right to dispose of, alienate, or sell nonconsumable property.

The IRS's initial approach was to separately consider the usufruct over consumables and nonconsumables, and then to further subdivide property into productive and nonproductive. The IRS concluded that, in the case of consumables, the property qualified regardless of whether the property was productive or nonproductive, since the usufructuary has the immediate right to consume, alienate or encumber the property—qualified only by the statutory obligation to account to the naked owner at the termination of the usufruct. The duty to account was not considered as impeding the usufructuary's beneficial enjoyment of the lifetime interest.\textsuperscript{35} In the case of nonconsumables, however, the IRS hinged the qualification for QTIP treatment upon a determination of whether or not the property was productive or nonproductive.\textsuperscript{36} Nonproductive nonconsumables did not qualify for QTIP treatment under the IRS's opinion, since the

\textsuperscript{31} Stewart v. Usry, 399 F.2d 50 (5th Cir. 1968); Hickey, The Usufruct and Taxation, 8 La. B.J. 223, 224 (1961); Hickey, The Usufruct and Taxation, (Second Edition), 22 La. B.J. 261 (1975); see also Liebman v. Fontenot, 275 F. 688 (W.D. La. 1921).
\textsuperscript{32} Stewart v. Usry, 399 F.2d at 58.
\textsuperscript{34} I.R.C. § 6110(J)(3) (1982).
\textsuperscript{35} See Private Letter Rulings cited supra note 33.
\textsuperscript{36} Id.
surviving spouse was not provided with the requisite degree of income. The residential property, although not "productive," qualified for QTIP treatment since the surviving spouse has beneficial use and enjoyment of the property consistent with its nature.

In light of the IRS’s productive/nonproductive dichotomy, it is necessary to consider whether the property must be productive at the inception of the usufruct, or whether it is only necessary that the property can be made productive within a reasonable period of time. The first Private Letter Ruling on this topic required that nonconsumable property be productive at the inception of the usufruct. In a later ruling, however, the IRS stated that nonproductive nonconsumable property did not qualify for QTIP treatment unless the spouse could either in fact make the property productive or derive the requisite degree of beneficial enjoyment consistent with the value of the asset. It is not clear if the IRS, by using different language in the later ruling, intended to change the time at which to evaluate the productive quality of an asset.

Requiring that the property be productive at the inception of the usufruct could affect the availability of QTIP treatment in certain instances. This would occur, for example, if property was unproductive in fact at the date of death, but could easily be made productive within a reasonable period of time. If the relevant time to evaluate the property is at the inception of the usufruct, this property would not qualify for QTIP treatment, while if the relevant time is within a reasonable period after death, the property would qualify.

The correct approach should be to allow QTIP treatment when the usufructuary can either in fact make the property productive, or can derive the requisite degree of beneficial enjoyment consistent with the value of the asset within a reasonable period of time after the inception of the usufruct. This is the result reached under the regulations dealing with marital deduction trusts, which allow the marital deduction on nonproductive assets placed in trust if the trustee has the power to make the property productive within a reasonable period of time. That the property be productive on the date of the decedent’s death is not necessary.

37. Id.
Property Rights of the Usufructuary

The emphasis placed by the IRS in allowing the deduction on the usufructuary's ability to make the property productive requires an examination of the rights of the usufructuary under Louisiana law. The usufructuary has the right to use the thing which, in principle, is as extensive as that of an owner, and has absolute ownership of the natural and civil fruits produced. This right can be exercised by the usufructuary personally, or through other persons to whom the right is transferred.

Consumable property is property which cannot be enjoyed without being consumed or expended, or without its substance being changed. Examples of consumables are money, stocks of merchandise, certificates of deposit, and beverages. Nonconsumable property is property which may be enjoyed without altering its substance, although its substance may be diminished or deteriorated naturally by time or by use. Except for the case of corporeal movables that are gradually and substantially impaired by use, wear, or decay, or where the right has been expressly granted, the usufructuary does not have the right to dispose of nonconsumable things. Examples of nonconsumables are land, houses, shares of stock, and furniture.

Under the IRS's approach, the focus in determining whether property qualifies for QTIP treatment is the ability of the usufructuary to make nonconsumable property "productive." The usufructuary generally has the power to make property subject to the usufruct productive. For example, the usufructuary can grant an agricultural lease, or any other type of lease, on previously nonproductive property. The usufructuary also appears to have greater power to make the property productive under article 558 (as revised in 1976) than previously existed. This article allows the usufructuary, with court approval, to make those improvements and alterations that a prudent administrator would make, even if they change the destination of the property, provided that they do not change the

42. A. Yiannopoulos, Personal Servitudes § 21, in 3 Louisiana Civil Law Treatise (2d ed. 1978).
44. A. Yiannopoulos, supra note 42, § 40.
47. La. Civ. Code art. 537.
52. For a discussion of special problems arising out of mineral properties, see infra text accompanying notes 63-64.
substance of the property. Given the broad powers of the usufructuary, the only limitation to making nonconsumable property "productive" may be the nature of the property involved.

Type of Property May Determine Result

The power of the usufructuary to make nonconsumables productive, or income producing, may depend upon whether the property is unimproved real estate, mineral property, or stock. For example, if the nonproductive nonconsumable is an undeveloped tract of land, the usufructuary can easily make the property productive and meet the income requirement of the QTIP provisions by granting a predial lease.

If the nonproductive property is stock in a closely held corporation that historically has not paid dividends, different considerations arise. The usufructuary has the power to vote shares subject to the usufruct. If the usufructuary has effective voting control over the corporation by combining any shares owned by him with the voting rights obtained by virtue of the usufruct, then he should be considered as having the power to make the property productive for QTIP purposes. This conclusion is reached since the usufructuary has the power to control the Board of Directors, which determines whether dividends should be paid. Even with effective control, however, special problems may arise when there are limitations on the corporation's ability to pay dividends. These would arise when there are no earnings and profits, or when restrictions are placed on dividend payments in the articles of incorporation, or when the payment would violate the directors' duty owed to the corporation and its shareholders. The most recent Private Letter Ruling states that when the property becomes productive during the term of the usufruct, QTIP treatment is available. In cases where impediments to dividend payments exist, the determination of whether the interest will in fact be made productive, and thus be eligible for QTIP treatment, should depend on the economic prospects that the corporation will pay dividends.

Another situation in which the usufructuary may not be able to make property productive may occur when the usufructuary has a minority interest in the corporation. Here, the usufructuary does not have effective

54. La. Civ. Code art. 558; A. Yiannopoulos, supra note 42, § 63, at 264. The destination of the property also can be changed, of course, if the consent of the naked owner is obtained. La. Civ. Code art. 558.
control over the board of directors. The ability of the minority shareholders to compel dividend payments, or to force a liquidation of the corporation, is severely limited. This lack of power to make the property productive may disqualify the interest from QTIP treatment.

Mineral interests also present special problems. Land, as well as mineral rights segregated from the land, may be the object of a usufruct. The usufruct of land generally does not include the right of use and enjoyment of the minerals unless an "open mine" exists on the property at the time of the creation of the usufruct or the right to use and enjoy the minerals has been expressly granted. Thus, if the usufruct of land does not include mineral rights, the usufructuary can not lease the property for mineral development, and, except in the case of coal or lignite, the naked owner has the same rights to minerals that he would have if the land was not subject to the usufruct.

The usufructuary of mineral rights, as distinguished from the usufructuary of land, is entitled to all the benefits of use and enjoyment that would accrue to him if he were the owner of the right. The usufructuary of a servitude, therefore, can grant a mineral lease that extends beyond the term of the usufruct and binds the naked owner.

Land which is unproductive at the creation of the usufruct, and which because of its nature can only be made productive by mineral exploitation, will not qualify for QTIP treatment since the naked owner is the only person who has the power to make the property productive. QTIP treatment should be available, however, if the usufruct over the land includes the right of use and enjoyment of the minerals, or if the usufruct is over mineral rights since the usufructuary then has the power to make the property productive.

Right of Conversion

Nonconsumable property which will not in fact become productive clearly can qualify for QTIP treatment if the surviving spouse is given

62. Streb v. Abramson-Caro Clinic, 401 So. 2d 410 (La. App. 1st Cir. 1981) (denying attempt to compel a liquidation); Gruenberg v. Goldmine Plantation, Inc., 304 So. 2d 873 (La. App. 4th Cir. 1974) (denying attempt to compel a liquidation); La. Bus. Corp. Law § 143. There may be a fiduciary duty owed by a director to pay sufficient dividends to avoid the accumulated earnings tax imposed by I.R.C. §§ 531-537 (1982). But see Levy v. Billeaud, 443 So. 2d 539 (La. 1983) (finding that the majority shareholders of a liquidating corporation owe a fiduciary duty to the minority shareholders).
the right to convert nonconsumables into consumables. This right gives the surviving spouse the power equivalent to that granted to the trustee of a qualifying marital deduction trust. Unfortunately, this solution may create another problem. Some writers have suggested that the right of the surviving spouse to convert nonconsumables into consumables impinges upon the legitime of the forced heirs. The essence of the argument is that the grant of the power of conversion in the testament exceeds the authority granted by Louisiana Civil Code article 890 and constitutes the grant of an additional right to the surviving spouse. Article 890 allows the surviving spouse to have a usufruct over community and separate property without impinging upon the legitime, but it does not give the surviving spouse the right of conversion. This argument is consistent with Succession of Waldron, in which the court said that if the rights granted the usufructuary by will exceed the rights that would have been granted by operation of law, then the usufruct is a testamentary one, and must be examined to determine if it impinges upon the legitime.

Another argument supports the position that the right of conversion impinges upon the legitime. A surviving spouse who has the power to convert nonconsumables into consumables can expend the property, but must account to the naked owner for its value at the termination of the usufruct. The Louisiana Supreme Court has stated, however, that a forced heir has an interest in property, not value. The effect of granting

70. The right of the surviving spouse to convert nonconsumables into consumables may also present a problem in the area of state inheritance taxes. A surviving spouse's legal usufruct over the deceased spouse's community property is not subject to Louisiana inheritance taxes, since the usufructuary's interest is acquired through the marriage contract by operation of law rather than by inheritance. The Louisiana Department of Revenue has taken the position that the exemption is not available when the spouse obtains a testamentary usufruct rather than a legal one, Succession of Lynch, 145 So. 42 (La. App. Orl. 1932); however, the confirmation of a legal usufruct by testament is considered to be a legal usufruct and therefore is exempt from inheritance taxes. Succession of Brown, 94 So. 2d 317 (La. App. Orl. 1957).

In Succession of Lynch, the issue was whether the confirmation of a usufruct for the life of the surviving spouse was a testamentary usufruct subject to Louisiana inheritance taxes. The court found that it was unnecessary to decide this issue since the only additional property right transferred to the surviving spouse was the right of remarriage, a right that could not be valued. It can be argued that the right of conversion gives the surviving spouse a right in excess of that granted by the operation of law and that to the extent it can be valued it is subject to state inheritance taxes. See also Succession of Chauvin, 260 La. 828, 257 So. 2d 422 (1972).
72. 323 So. 2d 434 (La. 1975).
73. Id.
75. Succession of Hyde, 292 So. 2d 693 (La. 1974); see also Succession of Williams,
the surviving spouse the right to convert nonconsumables into consumables is to satisfy the legitime with value rather than property.

One argument supporting the position that the right of conversion does not impinge upon the legitime is that the surviving spouse and the forced heirs are in the same position with respect to the converted assets as they are with respect to consumables owned by the deceased spouse on the date of death. Furthermore, analogous situations arise where the usufruct continues on nonconsumables without an impingement on the legitime. This occurs when the property is destroyed due to the fault of a third person, or when the property changes form without any act of the usufructuary.

**Use of a Qualified Disclaimer**

A legal usufruct in Louisiana created by operation of law over community property terminates upon the remarriage of the surviving spouse, and unless confirmed for the life of the surviving spouse, does not qualify for QTIP treatment. At first glance this appears to preclude all intestate successions and all testate successions where the usufruct was not confirmed for life. But would a disclaimer by the naked owner of the right to have the usufruct terminate upon remarriage cure the terminable nature of the legal usufruct, and thus qualify the usufruct under the QTIP provisions? The answer, of course, is not clear.

A "qualified disclaimer" is a complete and unqualified refusal to accept some or all of the rights to which one is entitled either by bequest or by operation of law. Generally, the release of a right or interest in property is considered a taxable transfer, but the exception contained in IRC section 2518 provides that a person who makes a "qualified disclaimer" is not treated as having made a taxable transfer to the person to whom the disclaimed interest passes. Rather, the interest is treated as devolving directly from the decedent. To qualify, the disclaimer must be irrevocable, unqualified, and filed in writing not later than nine months.

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184 So. 2d 70, 73 (La. App. 4th Cir. 1966). The underlying premise of Succession of Williams may have been overruled by the amendments to Civil Code articles 1505 and 1573. Article 1505 now allows the forced portion to be satisfied with life insurance proceeds or proceeds from pension and profit sharing plans.

76. A different result would be reached if, in addition to the right to convert nonconsumables into consumables, the surviving spouse was relieved of the obligation to account to the naked owner. Here, the rights of the usufructuary are as extensive as those of an owner, and could possibly impinge upon the legitime of the forced heirs. See A. Yianoupolos, supra note 42, § 21, at n.14.


after the date on which the transfer creating the interest is made, or the
day on which the disclaimant reaches twenty-one, whichever comes later. Additionaliy, the disclaimant must not have accepted any of the benefits from the disclaimed interest, and the interest must pass either to the surviving spouse or to someone other than the disclaimant. Property which passes to the surviving spouse by virtue of a qualified disclaimer qualifies for the marital deduction since the property is considered as passing directly from the deceased to the surviving spouse.

The proposed regulations, which were issued prior to the enactment of the QTIP provisions, treat the income interest as one property interest, and the corpus as a separate property interest. The regulations provide, however, that if state law merges the separate property interests they are merged for federal tax purposes. Where state law recognizes the separate property interests and they are not in trust, a beneficiary can make a qualified disclaimer of either the income interest or the remainder interest without disclaiming the other. Where state law merges the interests, partial disclaimers are not permitted; a disclaimer of the income interest does not qualify under section 2518, unless the remainder interest also is disclaimer.

The IRS recently addressed the question of whether a trust would be eligible for QTIP treatment if the legatee irrevocably and unqualifiedly renounced the right to invade the corpus of a trust during the lifetime of the surviving spouse but the legatee did not renounce the right to receive the corpus of the trust on the death of the surviving spouse. The trust was created under a will where the intent of the testator was to create a QTIP trust, but this was not accomplished due to drafting errors. The IRS concluded that the limited renunciation cured the defect in the trust and that it qualified for QTIP treatment.

The major hurdle in reaching this result was the requirement that all beneficial rights in the corpus be renounced in order for the disclaimer to be effective. This apparent problem was overcome, however, by finding that all beneficial rights treated as passing from the decedent had been disclaimed. The legatee's beneficial right to the corpus of the trust passing upon the death of the surviving spouse was treated as passing directly to the legatee from the surviving spouse because of IRC section 2044(c).

81. Id.
84. Id.
87. Id.
Section 2044(c) provides that an interest to which the QTIP provisions apply shall be includable in the gross estate of the surviving spouse, and shall be considered as passing directly from the surviving spouse.

The logic of the IRS should be recounted. First, the IRS stated that upon the legatee is renouncing the right to invade the corpus during the lifetime of the surviving spouse, no one can any longer appoint any part of the property to a person other than the surviving spouse. Secondly, because the QTIP requirements were now met, the corpus of the property passed directly to the legatee from the surviving spouse. And finally, no partial disclaimer resulted, since all interests treated as passing from the decedent to the legatee were disclaimed.

The rationale of this ruling should apply by analogy to the case of the naked owner who disclaims the right to have the usufruct terminate upon remarriage of the surviving spouse. Since the disclaimer removes the terminable nature of the legal usufruct, the interest should be eligible for QTIP treatment. Additionally, by treating property subject to the QTIP provisions as passing directly from the surviving spouse, all rights passing from the decedent are disclaimed, and therefore, no partial disclaimer results.

Conclusion

A usufruct confirmed for the life of the surviving spouse should qualify for the exception to the terminable interest rule under the newly enacted QTIP provisions. The treatment should be available whether the underlying property subject to the usufruct is consumable or nonconsumable, provided however, that the property will in fact be productive within a reasonable period of time after the inception of the usufruct. The legislature should address the question of whether the power of the usufructuary to convert nonconsumables into consumables is an impingement upon the legitime of the forced heirs. Additionally, QTIP treatment should be available in intestate successions or testamentary successions through the use of a qualified disclaimer by the naked owner even though the surviving spouse was not granted the usufruct for life.

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