

Death Tax

Non-citizen surviving spouse

Qualified Domestic Trust Provisions

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These Qualified Domestic Trust Provisions apply if the surviving spouse is not a citizen of the United States and has not become a United States citizen before the date on which the federal estate tax return for the deceased estate is made.

The lifetime exemption from taxation at death for U.S. citizen spouses is \$11.4 million each (as of 2019) (this is indexed for inflation). But if your spouse is not a U.S. citizen, the lifetime exemption is limited to \$154,000 a year (in 2019). This amount is also indexed for inflation. This is in addition to the amount you can give away or leave to any recipient without owing federal gift/estate tax.

The marital deduction is separate from the lifetime exemption. For US citizen spouses it is unlimited, but in order to qualify for the benefits of the marital deduction for non-US citizen spouse, there must be created a Qualified Domestic Trust (“QDOT”).

If the non-US citizen spouse becomes a US citizen prior to the creation of the QDOT, the QDOT will not be formed and will not be needed. The US citizen spouse will receive the full 100% exemption from death taxes under the marital deduction.

Appointment of a United States Trustee

During the existence of the Qualified Domestic Trust, at least one Trustee must be a United States domestic corporation or an individual United States citizen having a tax home (as defined by Internal Revenue Code Section 911(d)(3)) in the United States (the *United States Trustee*). If the United States Trustee is removed or is unwilling or unable to serve, a replacement United States Trustee will be appointed.

Distributions Subject to United States Trustee Approval; Authority to Withhold

Notwithstanding any other distributive authority held by any Trustee, no Trustee may distribute any principal from the trust without the prior approval of the United States Trustee. The United States Trustee may, in its sole and absolute discretion, withhold the tax imposed by Internal Revenue Code Section 2056A from any distribution of principal from the Qualified Domestic Trust.

The QDOT does not exempt the funds passing into the QDOT from taxation, but simply defers the tax until distribution of the principal is made by the US Trustee. The taxable events from a QDOT is any of the following: (1) Any distribution from the QDOT before the death of the surviving spouse unless the distribution is solely of income of the trust paid to the surviving spouse, and any distributions made to the surviving spouse on account of hardship. “Hardship” is where there is

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 surviving spouse is legally obligated to support.; and (2) Distribution paid on the death of the surviving spouse or the (3) The failure of the QDOT to qualify.

Additional Requirements Based upon the Qualified Domestic Trust Value

As soon as is practicable after the death of the first spouse, the United States Trustee will determine the value of that portion of the deceased passing into the QDOT.

(1) If QDOT Value Exceeds \$2,000,000

If the value of the Qualified Domestic Trust exceeds \$2,000,000, the United States Trustee must meet one of these requirements:

at least one United States Trustee must be a bank or trust company described in Internal Revenue Code Section 581; or

the Trustee must furnish a bond or security equal to 65% of the Qualified Domestic Trust value in a form that satisfies the requirements of Internal Revenue Code Section 7101.

(2) If QDOT Value Does Not Exceed \$2,000,000

If the value of the Qualified Domestic Trust does not exceed \$2,000,000, the United States Trustee must:

satisfy one of the requirements listed above in (1);
or

verify that, as of the last day of each taxable year of the Qualified Domestic Trust, no more than 35% of its value consists of real property located outside the United States and take all appropriate action to ensure that all other Qualified Domestic Trust assets are physically located in the United States at all times during the term of the trust in accordance with applicable Regulations under Internal Revenue Code Section 2056A.

Compliance with Tax Code; Minimizing Tax Liability

The Trustee may take any action that the Trustee determines to ensure that the Qualified Domestic Trust complies with Internal Revenue Code Section 2056A. In addition, the Trustee may consider whether any tax imposed by Section 2056A

can be minimized by taking advantage of a hardship exemption under Section 2056A(b)(3)(B) and any other exemptions that may be available.

Exclusion of personal residence

In determining the amount of the \$2,000,000 threshold, the surviving spouse may elect to exclude up to \$600,000 of the value of the residence of real property that meets the following requirements: (1) It is used by or held for the use of the surviving spouse as a personal residence; (2) It is owned directly by the QDOT; and (3) It passed or was treated as passing to the QDOT under the rules for the marital deduction when the surviving spouse is not a U.S. citizen. The \$600,000 may also exclude the value of any related furnishings. This election may be made by the executor on the estate tax return for the decedent's estate, or it may be made by the US Trustee by attaching a statement to Form 706-QDT claiming the exclusion.

Termination of Qualified Domestic Trust Status

The provisions of this Section will no longer apply to the QDOT after the surviving spouse becomes a United States citizen if the surviving spouse resided in the United States at all times after the death of the first spouse to die before becoming a United States Citizen; received no prior distributions from the QDOT that were subject to tax under Internal Revenue Code Section 2056A; or elects to treat any taxes imposed on distributions of the principal from the Qualified Domestic Trust as taxable gifts and pay the taxes on them.