

[4830-01-u]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 20 and 602

[TD 8779]

RIN 1545-AU27

Estate and Gift Tax Marital Deduction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations amending the estate tax marital deduction regulations. The amendments are made to conform the estate tax regulations to recent court decisions in Estate of Clayton v. Commissioner, 976 F.2d 1486 (5th Cir. 1992), rev'g 97 T.C. 327 (1991); Estate of Robertson v. Commissioner, 15 F.3d 779 (8th Cir. 1994), rev'g 98 T.C. 678 (1992); Estate of Spencer v. Commissioner, 43 F.3d 226 (6th Cir. 1995), rev'g T.C. Memo. 1992-579; and Estate of Clack v. Commissioner, 106 T.C. 131 (1996). The amendments affect estates of decedents electing the marital deduction for qualified terminable interest property (QTIP) and the estates of the surviving spouses of such decedents.

DATES: These regulations are effective August 19, 1998.

FOR FURTHER INFORMATION CONTACT: Susan B. Hurwitz, (202) 622-3090 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

**Paperwork Reduction Act**

The collection of information in these final regulations has

been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3507 and assigned control number 1545-1612.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB.

The collection of information in this regulation is in §20.2056(b)-7(d)(3)(ii). This information is required to provide a method for estates of decedents whose estate tax returns were due on or before February 18, 1997, to obtain an extension of time to make the qualified terminable interest property election under section 2056(b)(7)(B)(v). This information will be used to inform the IRS of the affected estates that are electing to obtain the relief granted in the regulation. The collection of information is mandatory for those estates that seek relief. The likely respondents are individuals representing estates.

Comments concerning the collection of information should be directed to OMB, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attention: IRS Reports Clearance Officer, OP:FS:FP, Washington, DC 20224. Any such comments should be submitted not later than October 19, 1998. Comments are specifically requested concerning:

Whether the collection of information is necessary for the

proper performance of the functions of the IRS, including whether the information will have practical utility.

The accuracy of the estimated burden associated with the collection of information (see below);

How to enhance the quality, utility, and clarity of the information collected;

How to minimize the burden of complying with the collection of information, including the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Estimates of the reporting burden in these final regulations will be reflected in the burden of Form 843 (Claim for Refund and Request for Abatement) and Form 706 (Estate Tax Return) or 706NA (Estate Tax Return for Nonresident Noncitizens).

Books or records relating to this collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

### **Background**

On March 1, 1994, the IRS published final estate and gift tax regulations (26 CFR part 20 and part 25) under sections 2044, 2056, 2207A, 2519, 2523, and 6019 of the Internal Revenue Code

(Code) in the **Federal Register** (59 FR 9642). At that time, §20.2056(b)-7(d)(3) provided that an income interest (or life estate) that is contingent upon the executor's election under section 2056(b)(7)(B)(v) (the QTIP election) is not a qualifying income interest for life.

On February 18, 1997, temporary regulations (TD 8714) amending the existing final estate tax regulations relating to the marital deduction for qualified terminable interest property (QTIP) were published in the **Federal Register** (62 FR 7156). A notice of proposed rulemaking (REG-209830-96) cross-referencing the temporary regulations was published in the **Federal Register** (62 FR 7188) for the same day.

The temporary regulations provide that an income interest for life (or life estate) that is contingent upon the executor's QTIP election, will not, because of the contingency, fail to be a qualifying income interest for life.

Written comments responding to the notice of proposed rulemaking were received. A public hearing was held on June 3, 1997. After consideration of all the comments, the proposed regulations under sections 2044 and 2056 are adopted as revised by this Treasury decision, and the corresponding temporary regulations are removed.

#### **Explanation of Revisions and Summary of Comments**

Under section 2056(b)(7)(B)(ii), the surviving spouse has a qualifying income interest for life in property which passes from

the decedent if (1) the surviving spouse is entitled to all of the income from the property, payable at least annually (or has a usufruct interest for life in the property), and (2) no person has a power to appoint any part of the property to any person other than the surviving spouse.

Commentators suggested that the regulation, based on the case law, should specifically provide that as a result of the executor's election over a portion of the property, in cases where the unelected portion of the property passes to a beneficiary other than the surviving spouse, the executor will not be considered to have a power to appoint any part of the property to any person other than the surviving spouse.

The final regulation is clarified to provide that an interest in property is eligible for treatment as qualified terminable interest property if the income interest is contingent upon the executor's election and if that portion of the property for which no election is made will pass to or for the benefit of beneficiaries other than the surviving spouse. Two examples provided in the temporary regulations have been revised in the final regulations to conform to this clarification.

Comments were also received regarding the effective date of the temporary regulations. It was suggested that relief should be made available for estates of decedents that did not make the QTIP election on their estate tax returns because the surviving spouse's income interest in the property was contingent upon the election or because the nonelected portion of the property was to

pass to a beneficiary other than the surviving spouse. Accordingly, the final regulations provide that estates of decedents whose estate tax returns were due on or before February 18, 1997, are granted an extension of time to make the QTIP election if: (1) the period of limitations on filing a claim for credit or refund under section 6511(a) has not expired; and (2) the estate submits a statement providing that, pursuant to section 2044, the surviving spouse's gross estate will include the value, at the date of the surviving spouse's death, of the property for which the QTIP election is being made. The statement must be signed, under penalties of perjury, by the surviving spouse, the surviving spouse's legal representative (if the surviving spouse is legally incompetent), or the surviving spouse's executor (if the surviving spouse is deceased).

### **Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because these regulations do not impose on small entities a collection of information requirement, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy

of the Small Business Administration for comment on their impact on small business.

**Drafting Information**

The principal author of these regulations is Susan B. Hurwitz, Office of Assistant Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

**List of Subjects**

26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

**Adoption of Amendments to the Regulations**

Accordingly, 26 CFR parts 20 and 602 are amended as follows:  
PART 20--ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

Paragraph 1. The authority citation for part 20 continues to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \*

Par. 2. In §20.2044-1, paragraph (e) Example 8 is added to read as follows:

§20.2044-1 Certain property for which marital deduction was previously allowed.

\* \* \* \* \*

(e) \* \* \*

Example 8. Inclusion of trust property when surviving spouse dies before first decedent's estate tax return is filed. D dies on July 1, 1997. Under the terms of D's will, a trust is established for the benefit of D's spouse, S. The will provides that S is entitled to receive the income from that portion of the trust that the executor elects to treat as qualified terminable interest property. The remaining portion of the trust passes as of D's date of death to a trust for the benefit of C, D's child. The trust terms otherwise provide S with a qualifying income interest for life under section 2056(b)(7)(B)(ii). S dies on February 10, 1998. On April 1, 1998, D's executor files D's estate tax return on which an election is made to treat a portion of the trust as qualified terminable interest property under section 2056(b)(7). S's estate tax return is filed on November 10, 1998. The value on the date of S's death of the portion of the trust for which D's executor made a QTIP election is includible in S's gross estate under section 2044.

**§20.2044-1T [Removed]**

Par. 3. Section 20.2044-1T is removed.

Par. 4. In §20.2056(b)-(7), paragraphs (d)(3) and (h)

Example 6 are revised to read as follows:

§20.2056(b)-(7) Election with respect to life estate for surviving spouse.

\* \* \* \* \*

(d) \* \* \*

(3) Contingent income interests. (i) An income interest for a term of years, or a life estate subject to termination upon the occurrence of a specified event (e.g., remarriage), is not a qualifying income interest for life. However, a qualifying income interest for life that is contingent upon the executor's election under section 2056(b)(7)(B)(v) will not fail to be a qualifying income interest for life because of such contingency or because the portion of the property for which the election is not made passes to or for the benefit of persons other than the

surviving spouse. This paragraph (d)(3)(i) applies with respect to estates of decedents whose estate tax returns are due after February 18, 1997. This paragraph (d)(3)(i) also applies to estates of decedents whose estate tax returns were due on or before February 18, 1997, that meet the requirements of paragraph (d)(3)(ii) of this section.

(ii) Estates of decedents whose estate tax returns were due on or before February 18, 1997, that did not make the election under section 2056(b)(7)(B)(v) because the surviving spouse's income interest in the property was contingent upon the election or because the nonelected portion of the property was to pass to a beneficiary other than the surviving spouse are granted an extension of time to make the QTIP election if the following requirements are satisfied:

(A) The period of limitations on filing a claim for credit or refund under section 6511(a) has not expired.

(B) A claim for credit or refund is filed on Form 843 with a revised Recapitulation and Schedule M, Form 706 (or 706NA) that signifies the QTIP election. Reference to this section should be made on the Form 843.

(C) The following statement is included with the Form 843: "The undersigned certifies that the property with respect to which the QTIP election is being made will be included in the gross estate of the surviving spouse as provided in section 2044 of the Internal Revenue Code, in determining the federal estate tax liability on the spouse's death." The statement must be

signed, under penalties of perjury, by the surviving spouse, the surviving spouse's legal representative (if the surviving spouse is legally incompetent), or the surviving spouse's executor (if the surviving spouse is deceased).

\* \* \* \* \*

(h) \* \* \*

Example 6. Spouse's qualifying income interest for life contingent on executor's election. D's will established a trust providing that S is entitled to receive the income, payable at least annually, from that portion of the trust that the executor elects to treat as qualified terminable interest property. The portion of the trust which the executor does not elect to treat as qualified terminable interest property passes as of D's date of death to a trust for the benefit of C, D's child. Under these facts, the executor is not considered to have a power to appoint any part of the trust property to any person other than S during S's life.

\* \* \* \* \*

**§20.2056(b)-7T [Removed]**

Par. 5. Section 20.2056(b)-7T is removed.

Par. 6. Section 20.2056(b)-10 is revised to read as follows:

§20.2056(b)-10 Effective dates.

Except as specifically provided in §§20.2056(b)-5(c)(3)(ii) and (iii), 20.2056(b)-7(d)(3), 20.2056(b)-7(e)(5), and 20.2056(b)-8(b), the provisions of §§20.2056(b)-5(c), 20.2056(b)-7, 20.2056(b)-8, and 20.2056(b)-9 are applicable with respect to estates of decedents dying after March 1, 1994. With respect to decedents dying on or before such date, the executor of the decedent's estate may rely on any reasonable interpretation of the statutory provisions.

**§20.2056(b)-10T [Removed]**

Par. 7. Section 20.2056(b)-10T is removed.

PART 602--OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 8. In §602.101, paragraph (c), the entry in the table for 20.2056(b)-7 is revised to read as follows:

§602.101 OMB Control numbers.

\* \* \* \* \*

(c) \* \* \*

CFR part or section where identified and described	Current OMB control No.
* * * * *	
20.2056(b)-7.....	1545-0015
	1545-1612
* * * * *	

Michael P. Dolan  
Deputy Commissioner of Internal Revenue

Approved: July 27, 1998

Donald C. Lubick  
Assistant Secretary of the Treasury