



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 76 | Number 5

Article 5

6-1-1998

Illogical and Sexist Qtip Provisions: I Just Can't Say It Ain't So

Wendy C. Gerzog

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Wendy C. Gerzog, *Illogical and Sexist Qtip Provisions: I Just Can't Say It Ain't So*, 76 N.C. L. REV. 1597 (1998).

Available at: <http://scholarship.law.unc.edu/nclr/vol76/iss5/5>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

THE ILLOGICAL AND SEXIST QTIP PROVISIONS: I JUST CAN'T SAY IT AIN'T SO

WENDY C. GERZOG*

Professor Zelenak and I agree on one half of my thesis: that the qualified terminable interest property (“QTIP”) provisions are illogical and do not serve their purported public policy goal.¹ They were based on the premise that a married couple acts as a unit about “their” property and, quite obviously, they were motivated by the fear that in fact husband and wife do not.² However, Professor Zelenak disagrees with the other half of my thesis: that the QTIP provisions are degrading to women, sexist, and financially unrewarding to widows.³ While he would like to separate these two ideas, the sexism of the statute is, to a large degree, intertwined with its illogic.⁴

* Professor, University of Baltimore School of Law. I would like to thank Professor Joseph M. Dodge for his most encouraging and helpful comments on all of my QTIP articles. I would also like to thank my colleagues, Professors Fred Brown, John A. Lynch, Jr., and Walter Schwidetzky, for their continual support and critiques of my work. Finally, I would like to thank Barbara Jones for her secretarial skills and patience.

1. See Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301, 304 (1995); Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1544 (1998).

2. See Gerzog, *supra* note 1, at 303-04, 318-19, 326. The goal of the marital deduction is to tax property when it leaves the marital “unit;” because the QTIP does not express marital unity, the proper time to tax the property is when the property leaves the “unit” and that is when the husband, and not the widow, dies. See *id.* at 318-19.

3. See *id.* at 306, 320-27; Zelenak, *supra* note 1, at 1544-48. Professor Zelenak decries scholarship that he contends displays “an overeagerness to accuse the tax laws of hostility to women.” Zelenak, *supra* note 1, at 1523. However, Professor Zelenak is “overeager” to cast me as a feminist and to give me a political agenda. He says that I have “fail[ed] to prove [my] feminist case[] against the QTIP.” *Id.* at 1544. By inventing motives for me, Zelenak ironically does what he disdains. So anxious to prove that feminist writers are knee-jerk in their responses, he reads a piece that forms feminist conclusions and is too quick to exclaim that it is an example of a feminist trying to superimpose feminist ideology on the Code. In his stereotyping, he fails to consider the alternative possibility: that a woman scholar could find gender bias without herself being a feminist.

4. Professor Zelenak would separate the two interrelated points that my article makes. He sees the non-sexist illogic of the provision as negating “the assumption of spousal unity upon which the marital deduction is based,” but does not see the logical conclusion that the statute is sexist. Zelenak, *supra* note 1, at 1544. If the next step of an argument, however, is to show research that this fiction of the marital unit is rooted in a

The QTIP provisions are degrading to women and sexist for two reasons: (1) they treat women as the invisible member of a marital unit; and (2) they implicitly equate giving an income interest to women with giving them the property itself.

Women are treated as the invisible member of a marital unit when, purportedly enacted because husbands and wives share decisions about “their” property, the QTIP provisions actually enable the husband alone to control the ultimate disposition of “their” property. Women are treated as the invisible member of a marital unit when it is the donor or the executor and not the wife or the widow who makes the QTIP election.⁵

The QTIP provisions implicitly equate giving an income interest to women with giving them the property itself. As an exception to the terminable interest rule, unlike the other exceptions where the widow is given a rough equivalent to outright ownership of the property itself, the QTIP provisions allow a marital deduction for the full fair market value of the property at the husband’s death even though the wife, the other half of the marital unit, does not receive the property but only the income interest in that property.

At the heart of Professor Zelenak’s inability to perceive any sexism in the statute is, perhaps, a general assumption that it is the husband who made the money, it is his money alone, and he has every right to control where it ultimately goes. However, this assumption is in direct opposition to the central argument made for the unlimited marital deduction: that both husband and wife considered property acquired during their marriage as “theirs” rather than the property of just the earner spouse.⁶ If it is their property and not just his, despite his being the sole or main income earner, then the QTIP provisions that have him in the role of sole decision-maker are sexist and degrading to women.

Professor Zelenak suggests that half a loaf is better than none or that receiving an income interest is better than receiving none of the property,⁷ but that really begs the question. Half a loaf is half a loaf; an income interest is only an income interest. It is the “new math” of

man’s desire to control the marital unit, surely it “necessarily” follows that “the QTIP rules are sexist.” When I began my research, I merely thought the QTIP provisions were illogical and wanted to find an explanation. I soon was immersed in evidence, convincing to me, that their illogic could only be explained by what I discovered to be their sexist origin, intent, and consequence. See Gerzog, *supra* note 1, at 320-27.

5. I state in my article that the executor and the widow may in fact be the same person; however, they are not required to be so. See Gerzog, *supra* note 1, at 325.

6. See *id.* at 303.

7. See Zelenak, *supra* note 1, at 1545-48.

the QTIP provisions that is both illogical and degrading to women; despite giving the widow only an income interest, the husband's estate is entitled to a "marital" deduction for the full value of the property. Thus, under the QTIP provisions, half a loaf is equal to a full loaf; an income interest is equal to the property itself.

Professor Zelenak acknowledges that he is unsure whether widows would fare better with or without the QTIP provisions although his "intuition is that widows probably fare better with the QTIP than they would without."⁸ He creates a hypothetical situation in which the husband would be willing to leave \$1 million in a QTIP trust, but would leave either the full \$1 million or nothing with equal probability if there were no QTIP statute. That particular hypothetical, however, is artificial. It assumes that fifty out of one hundred men would actually leave nothing to their wives and that is simply ridiculous.

Instead of Professor Zelenak's coin toss, consider a situation in which the husband cares about his wife's welfare, but also wants some say in how much will go to his children. Assume that he has a \$1.6 million estate and plans to leave \$600,000 of that amount tax-free to his children.⁹ If there were no QTIP statute, he would have to decide how to split the remaining \$1 million. He knows that if he transfers the \$1 million to his children, they will actually receive only about half of that amount, with the remainder going directly to the government. He also knows that if he leaves the \$1 million to his wife, she will receive the full \$1 million and that at her death she could transfer another \$600,000 tax-free to his children, which is about \$100,000 more than he could have left them directly. Finally, he knows that his wife might elect her statutory share if he leaves her too little. Given that dilemma, is it really a leap to suggest that this coin toss is one with a weighted coin?

Regardless of the coin toss theory, moreover, if the husband disinherits his wife, he gets no tax benefit for doing so; hence, the tax laws do not encourage such action. If he gives his wife less than an ownership equivalent in his property and if there were no QTIP legislation, he would be receiving no tax benefit for such transfer.

Professor Zelenak intuits that the widow benefits from the QTIP in an enlarged income interest.¹⁰ However, if it is so much in the

8. *Id.* at 1546.

9. Prior to the enactment of § 501 of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 501, 111 Stat. 788, 845 (to be codified in scattered sections of 26 U.S.C.), the unified credit sheltered \$600,000 worth of taxable transfers. See I.R.C. § 2010 (1994).

10. See Zelenak, *supra* note 1, at 1546-48. With the Tax Court's concession in *Estate*

widow's interest to make a QTIP election, why is she not given even that choice? As I stated in my article, "[a]t a minimum, Congress should only allow the marital deduction where the transferor's spouse must agree both to the identity of the recipient and to a QTIP election."¹¹

My conclusion that it is more likely that the husband will give his wife a rough equivalent to ownership in at least most of his property also rests on the statements that are part of the legislative history of the QTIP provisions, on the influence of estate planners on their clients, and on statistics showing the popularity of the marital deduction before the QTIP's enactment when the husband had to transfer the underlying property to receive the marital deduction.

While the legislative history emphasizes the husband's dilemma itself, one finds such statements as that offered by the American Bar Association's Tax Section Chairman and Chairman-elect during the 1981 Senate Hearings, that with the contemporaneous enactment of the unlimited marital deduction, there would be "a greater inducement to give 'all' to the surviving spouse and not provide for children."¹² Donald Thurman of the American Bankers Association said, "[i]f the marital deduction were made unlimited, the 'tax pull' would be substantial to make full use of the deduction."¹³

Moreover, because of the complexity of the tax laws, the influence of estate planners on their clients is great. If the marital deduction were only available for fee simple property transfers, estate planners would be urging their clients to make such transfers. When a couple seeks estate planning advice today, even in the climate of multiple marriages, most people want to leave the bulk of their property to their spouse. Yet, many men are counseled to give

of *Clack v. Commissioner*, 106 T.C. 131, 141 (1996), and with the proposed Treasury regulation embodying that decision, see Prop. Treas. Reg. §§ 20.2044-1, 20.2056(b)-7, 20.2056(b)-10, 62 Fed. Reg. 7188 (1997), the widow is not even assured an income interest in a QTIP trust if the executor, often a third party such as the decedent's child from an earlier marriage, chooses not to give her even that benefit. *Clack* and the proposed regulation extend the marital deduction to QTIP trusts with contingent income interests, that is, to trusts wherein the widow will only receive an income interest if the executor makes a QTIP election. See Wendy C. Gerzog, Estate of Clack: *Adding Insult to Injury, or More Problems with the QTIP Tax Provisions*, 6 S. CAL. REV. L. & WOMEN'S STUD. 221, 246-47 (1996).

11. Gerzog, *supra* note 1, at 327.

12. *Major Estate and Gift Tax Issues: Hearing Before the Subcomm. on Estate and Gift Taxation of the Senate Comm. on Finance* (pt. 2), 97th Cong. 156, 179 (1981) (joint statement of Harvie Branscomb, Jr. and John S. Nolan, Chairman & Chairman-elect, Section of Taxation, American Bar Association).

13. *Id.* at 159.

their wives only a life estate in the form of a QTIP trust.¹⁴

The statistics indicate that the marital deduction was, and continues to be,¹⁵ a popular tax benefit. For example, just prior to 1976, when the marital deduction was only allowed to the extent of one-half of the decedent's estate, the statistics show that "[m]arried men, on average left (or the court distributed) sixty-five percent of their estate to their surviving spouses."¹⁶ Although they only received a marital deduction for fifty percent of their estate in 1976, nevertheless, husbands wanted to give most of their property to their widows.

Most significantly, however, Professor Zelenak ignores the benefit inherent in the QTIP provisions that allows the husband to utilize two unified credits as well as two generation-skipping transfer tax exemptions, where the widow owns little property of her own, without even consulting his wife. That is, by means of the QTIP

14. According to Professor Ordower, estate planners use the QTIP trust for almost half of their clients, and he infers that the suggestion to do so comes from the attorney. See Henry M. Ordower, *Trusting Our Partners: An Essay on Resetting the Estate Planning Defaults for an Adult World*, 31 REAL PROP. PROB. & TR. J. 313, 315 n.3 (1996).

15. The marital deduction is still the largest deduction taken by decedents. See Martha Britton Eller, *Federal Taxation of Wealth Transfers, 1992-1995*, IRS STAT. INCOME BULL., Winter 1996-97, at 8, 16. The marital deduction represented 67.8% of the total deductions taken by all decedents and 79.2% of the total deductions of nontaxable estates. See *id.*; see also *id.* at 27 tbl.1a (providing 1992 marital deduction data); *id.* at 33 tbl.1b (providing 1993 marital deduction data); *id.* at 39 tbl.1c (providing 1994 marital deduction data); *id.* at 45 tbl.1d (providing 1995 marital deduction data). In 1992, for example, although men owned 61.5% of the total gross estate for all decedents, women paid \$5.8 billion, as compared to the \$4.7 billion paid by men, in estate tax liabilities. See *id.* at 12. Martha Eller notes that

[a]t least part of this sex-specific differential in combined estate tax liability is attributable to the unlimited marital deduction, available to decedents who are married at death. . . . And, since the largest group of male decedents in the 1992 estate tax decedent population was married males, it seems reasonable that these male decedents used the marital deduction to avoid estate taxation, at least until the deaths of their surviving spouses.

Id. Of male estate tax decedents, 65.8% were married, and married men comprised 37.2% of all estate tax decedents. See *id.* These figures contrast with married women constituting 23.9% of women decedents and 10.4% of all decedents. See *id.* "The majority of female decedents (16,063 women) were widowed at death." *Id.* Since there were 26,115 female estate tax decedents in 1992, widows represented 61.5% of that group. See *id.* at 12-13. Widows who were the "probable recipients of non-taxable marital bequests by previously deceased husbands, were responsible for postponed estate tax liabilities." *Id.* at 13.

16. *Federal Estate and Gift Taxes: Public Hearings and Panel Discussions Before the House Comm. on Ways and Means* (pt. 2), 94th Cong. 1309, 1327 (1976) (statement of Prof. James D. Smith, Senior Researcher, Urban Institute, Washington, D.C. and Department of Economics, Pennsylvania State University). Married women left approximately 50% of their estates to their husbands. See *id.*

provisions, he is able to make a \$600,000 transfer to his children tax-free in his own estate and then he makes another \$600,000 transfer to his children tax-free when his widow dies. If she is not the mother of his children and has no say in the matter, it is hard to find a cogent policy reason for such a benefit.

Thus, regardless of whether the widow receives a larger income interest from a QTIP election, the decedent's children receive a totally unwarranted benefit.¹⁷ It is because third parties are the intended beneficiaries of the QTIP provisions that I find the statute particularly inequitable. On this subject, my article underlines the inequity created by the QTIP statutes between an unmarried and a married parent.¹⁸ The QTIP provisions allow a tax benefit to the married parent *only* because of his marital status for a transfer made to his children; there is no such benefit available to an unmarried parent who transfers property to his children.

The unlimited marital deduction was justified on the bases of the marital relationship and tracing problems;¹⁹ by contrast, the QTIP provisions are not premised on these rationales. It is solely marital status that enables a married father to transfer more property tax-free to his children, a benefit denied to unmarried fathers. Since all transfers outside the marital unit should be taxed equally, eliminating the QTIP would be equitable and logical.²⁰

In the remainder of this response, I would like to address a few of the specific criticisms Professor Zelenak makes about my article: that my "smoking gun" shoots blanks;²¹ that there is nothing degrading about second wives thinking independently of their husbands;²² that I am even more condescending to women than the QTIP provisions themselves;²³ and that whining about the mistreatment of wealthy white women is unworthy of a true feminist.²⁴

17. Indeed, if it were not so, where the executor is the decedent's child from an earlier marriage, he would have little incentive to make the QTIP election.

18. See Gerzog, *supra* note 1, at 304, 326-27.

19. See *id.* at 308-09. Congress recognized that it was often difficult to determine the proportion of funds each spouse provided in order to acquire some of their property; it was also difficult, in some cases, to be certain which spouse actually owned the property. See *id.* at 309 n.30.

20. While Professor Zelenak would seem to allow for non-sexist conclusions such as this one, he bisects my article in a way it was never intended to be read. See Zelenak, *supra* note 1, at 1543-44; *supra* note 4.

21. See Zelenak, *supra* note 1, at 1544-45.

22. See *id.* at 1545.

23. See *id.* at 1545 n.125.

24. See *id.* at 1548-49.

Professor Zelenak zooms in on one quote which prefaces the section in my article discussing the sexist origins of the QTIP provisions and he denounces it as shallow proof of QTIP sexism.²⁵ However, this introductory quote was never intended to be my “smoking gun” or central to my “proof” of that statute’s degrading concept of women. I know and state that the quote was written by someone who did not write the 1960s prototype of the QTIP provisions.²⁶ But Professor Zelenak stops reading here and ignores the second paragraph on page 320 as well as the text and notes on pages 321 through 325.²⁷ Indeed, this section of my article does not elaborate on the theme of “widow as charlatan prey” that Professor Zelenak alone sets up as a paper tiger and then attacks.²⁸ Rather, this section indicates where in the legislative history of the QTIP provisions there is hard evidence of gender bias.

In response to Professor Zelenak’s criticism that the preface

25. See *id.* at 1544. The entire quote which prefaces section IV of my QTIP article reads:

“There are few men in common law states who are willing to grant their widows more than a life estate where there are surviving children. They do not want to grant the widow a life estate plus a general power of appointment as that in effect is to give her the fee simple, and the widow who has unfettered power to dispose of the property may do so and cut off the interest of the children. There are many widows in this country who are experienced and astute in the management of property and business affairs. *But there are many more who have been active only in domestic circles and who lack the experience and judgment to suddenly assume outright ownership and disposal of substantial properties. The tax law should not offer a premium to a husband who ignores his better judgment and grants his widow a general power of appointment leaving his children at the mercy of any charlatan who has his widow’s ear.*”

Gerzog, *supra* note 1, at 320 (emphasis in original) (quoting John W. Beveridge, *The Estate Tax Marital Deduction—Beneficent Intent, Baneful Result*, 44 TAXES 283, 284 (1966)).

26. See Gerzog, *supra* note 1, at 320. The first paragraph of section IV of my QTIP article reads:

It is amidst this climate of paternalism, which is degrading to women, that the American Law Institute (A.L.I.) wrote its proposed changes in Federal Estate and Gift Taxation. While Mr. Beveridge, author of the above quotation and a co-author of treatises on Gift Taxation and Estate Taxation, was not on the A.L.I. committees proposing the new exception to the terminable interest rule, his words state the sentiment to which others merely allude.

Id. (footnote omitted). Indeed, the editors of *Taxes* prefaced John Beveridge’s article with: “The author, an attorney in Fort Worth, Texas, presents here an article on estate tax law and marital deduction which should be of interest to all lawyers in common law states.” Beveridge, *supra* note 25, at 283.

27. Professor Zelenak does, however, latch onto one sentence on page 325 which he proceeds to take out of context and misread. See Zelenak, *supra* note 1, at 1545 n.125; *infra* notes 39-41 and accompanying text.

28. See Zelenak, *supra* note 1, at 1544-45.

quote was written some fifteen years before the enactment of the QTIP provisions,²⁹ since the prototype of the QTIP provision was indeed written some fifteen years prior to its enactment in 1981,³⁰ it is logical that a quote evoking the climate among tax practitioners in the 1960s would be drawn from writings in those years.

So what proof did I offer in this section of my article to conclude the sexist origins of the QTIP provisions? I reasoned that if the "surviving spouse" was intended to be identified as a woman, and in fact generally was a woman, there was gender bias in the QTIP statute.³¹ After all, the purpose of the statute is to offer a marital deduction for a much more limited property interest than had previously qualified for the marital deduction; so, if a husband was encouraged to reduce what he transferred to his wife, the statute shows gender bias. Likewise, if the surviving spouse is identified as intended to be a woman, since it is the decedent and not the surviving spouse who controls the ultimate disposition of the property and since it is the executor and, again, not the surviving spouse who is able to make a QTIP election, the statute reflects gender bias.

What evidence did I offer on pages 320 through 325 of my QTIP article to show that intention of identity between "surviving spouse" and women? First, all of the examples used in both the ALI Proposal and the Treasury recommendations refer to husbands transferring property to their widows.³² Second, all of the descriptions and discussions in the ALI project as well as in the Treasury recommendations identify the donee spouse as a woman.³³ Third, John Alexander, a consultant to the ALI and a commentator on the ALI project, framed his criticisms in terms of a woman being identified as the donee spouse.³⁴ Fourth, the Treasury Department provided statistics only on the number of years widows survived their husbands and did not even mention or provide data on the number of years widowers survived their wives.³⁵ These were the facts I offered

29. *See id.* at 1544 ("But she has to go back fifteen years before the QTIP rules were enacted . . .").

30. The prototype of the 1981 QTIP legislation is found in the 1960s ALI recommendation to allow the marital deduction where the surviving spouse is granted only the current beneficial interest in the property. *See Gerzog, supra* note 1, at 321-24. It is comparable to the 1981 requirement that, in order to qualify for the marital deduction, the surviving spouse be given a qualifying income interest for life. *See id.* at 305, 321-24.

31. *See id.* at 322.

32. *See id.*

33. *See id.* at 323.

34. *See id.* at 324 & nn.106-07.

35. *See id.* at 322.

to explain how the framers of the QTIP prototype, by identifying the "surviving spouse" as a woman, intended gender bias.³⁶

Not only did the creators of the QTIP prototype intend for a woman to be the surviving spouse, but also she was in fact statistically favored for that role. As I stated in several places in my article, since women generally outlive their husbands, they will in fact fill that role more often than men.³⁷ Because she would likely be the surviving spouse in fact, the QTIP provisions evince gender bias.

I agree with Professor Zelenak that it is not degrading to women that, because a second wife does not share her husband's feelings towards his children, he would want to transfer property to them directly.³⁸ What is degrading, however, is that he is offered a tax benefit on the basis that he and his wife are making a joint decision about "their" property when in reality he is making that decision and she is treated as if she does not even exist. By enacting the QTIP provisions, Congress is allowing the husband to transfer more

36. Moreover, I offered evidence that when Senator Symms introduced the QTIP amendment in 1981, while he began with the gender neutral terms of "his or her," he then slipped into language indicating that the donor would want to protect "his" property to ensure that it goes to "his" children, indicating the gender of the donor as male and that the desire was to protect "his" children. *See id.* at 322 n.95.

Likewise, the expansion of the marital deduction to eliminate the double taxation of the surviving spouse pursuant to the 50% maximum marital deduction under pre-1981 law was referred to as the "widow's tax." *See id.* at 309 n.31.

37. *See id.* at 305 n.11, 309. Women continue to outlive their husbands. In 1992, females outlived male estate tax decedents by an average of 5.6 years and 61.5% of all female estate tax decedents were widows. *See Eller, supra* note 15, at 12-13. In his article, Professor Zelenak presents a hypothetical example to demonstrate that a widow may do less well with a forced share of one-third of her husband's estate than with the QTIP. *See Zelenak, supra* note 1, at 1547-48. He assumes that the husband has an estate of \$10 million, leaves \$600,000 outright to his children, and leaves the remaining \$9.4 million in a QTIP. *See id.* By assuming that the widow will outlive her husband by 11 years, he values the life estate at \$3.9 million and concludes that the widow is benefiting to the tune of about \$500,000 over her one-third elective share of about \$3.3 million. *See id.* at 1548. Professor Zelenak uses the survival rate suggested by 1960s data of the Treasury Department that was cited in my article, together with 1980s and 1990s census statistics, merely to support the statement that women generally outlive their husbands. *See id.* at 1548 n.136. While I do not have current data on the number of years widows survive their estate tax decedents (the 5.6 year survival rate of all female estate tax decedents includes more than just the widows, although they are clearly the largest group of female estate tax decedents), the 11-year figure of nearly 30 years ago may well be significantly less today. Using a six-year figure instead of the 11-year interest, the widow's life estate is worth about \$2.4 million, \$900,000 less than the widow's \$3.3 million elective share (that is, the present value of a life estate in \$9.4 million at the same 5% discount rate). Even applying an eight-year survival figure, the widow's life estate is worth \$3.04 million, about \$250,000 less than her elective share. At a nine-year survival rate, the widow's life estate is roughly equal to her one-third statutory share.

38. *See Zelenak, supra* note 1, at 1545.

property to his children from a previous marriage on the supposed justification that the transfer is a marital decision. What is degrading is that Congress, by enacting the QTIP provisions giving the husband, and not the couple, control over the ultimate disposition of the property and giving the donor or the executor, and not the widow, the right to make the QTIP election, is treating at least one half of the marital unit as if she were invisible. Thus, it is not degrading to indicate that second wives think independently of their husbands, but a statute that allows them no chance to think at all is sexist.

Professor Zelenak criticizes my statement that “[t]he QTIP’s requirement of giving the surviving spouse less than full ownership reveals an intention to delude the surviving spouse into accepting QTIP treatment as if she truly owned the property” as being even more degrading to women than the QTIP provisions could be.³⁹ But, he misreads these words and takes them out of context. I wrote:

Essentially, the current income distribution requirement of the QTIP provisions is meant to pacify the surviving spouse. The QTIP’s requirement of giving the surviving spouse less than full ownership reveals an intention to delude the surviving spouse into accepting QTIP treatment as if she truly owned the property. Ironically and interestingly, nowhere else in the transfer tax provisions is a taxpayer deemed to be owner of more property than he or she either controls or once controlled.⁴⁰

A fair reading of that middle sentence in its context would not equate Congress’s intentions with women’s actually being deluded and certainly cannot be equated with Professor Zelenak’s reading that I think “widows are too ignorant or too stupid to understand the difference between outright ownership and an income interest for life.”⁴¹ On the contrary, I think widows know well the difference between an income interest and the property itself, but widows have not been given the opportunity to choose between those unequal property interests. Remember they are not consulted about the QTIP transfer.

Finally, Professor Zelenak states that criticizing the QTIP as degrading to women is really a frivolous exercise in itself, that such scholarship is “simply trivial” because the QTIP affects very few women who are mostly wealthy and white.⁴² I hope that this

39. *Id.* at 1545 n.125 (quoting Gerzog, *supra* note 1, at 325).

40. Gerzog, *supra* note 1, at 325.

41. Zelenak, *supra* note 1, at 1545 n.125.

42. *See id.* at 1548-49.

statement is an unintentional afterthought. Such an attitude would chill the writing of any transfer tax criticism since the estate and gift tax provisions only affect the wealthy. Trying to silence criticism on the basis that we should somehow all be writing about helping the poor multitudes belies most tax criticism; we are rarely dealing with issues that affect the poor. Treating any women, wealthy or not, as if they did not exist should anger all women and indeed all men. It is not merely that these women could and should be wealthier, but that even a wealthy widow is entitled to be free of gender bias. That should not make anyone less mindful of the hungry and the poor, but biased and degrading public laws should not escape criticism because they bias and degrade mostly wealthy white women.

