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A FEMINIST PERSPECTIVE ON THE QTIP TRUST AND THE UNLIMITED MARITAL DEDUCTION

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Professor Lawrence Zelenak's article, *Taking Critical Tax Theory Seriously*,¹ scores many points, but I am nevertheless moved to critique the part of the article that relates to the QTIP trust and the marital deduction. I also have some bones to pick with feminist scholarship in this area, namely, its innuendos of a male chauvinist plot, its general inattention to the QTIP trust problem, its acquiescence in the unlimited marital deduction, and its failure to come up with a plausible solution. The foregoing critiques tend to validate Professor Zelenak's thesis that critical tax scholarship betrays a "whiner" mentality: (1) critical tax scholarship obsesses over tax provisions it does not like while ignoring the larger context, and (2) it is weak on plausible solutions.

I. INTRODUCTION

The full value of the QTIP trust² qualifies for the gift or estate tax marital deduction even though the transferee spouse (herein the "wife" or "widow")³ has *only a right to income for life, with no powers*

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1. 76 N.C. L. REV. 1521 (1998).

2. "QTIP" stands for "qualified terminable interest property." The provisions that qualify QTIP trusts, *see* I.R.C. §§ 2056(b)(7), 2523(f) (West Supp. 1998), are exceptions to the so-called "terminable interest rule," which holds that an interest which, as of the date of transfer, *might* terminate, lapse, or fail pursuant to a condition (precedent or subsequent) does not qualify for the marital deduction, *see id.* §§ 2056(b)(1), 2523(b). Without the QTIP qualification rule, an income interest for life in the wife or widow would not qualify for the marital deduction because it lapses on the death of the wife or widow.

3. The transferee herein is deemed to be the wife, because husbands statistically are richer but have shorter life spans than wives. Statistics on survival are cited in U.S. DEP'T OF THE TREASURY, 91ST CONG., TAX REFORM STUDIES AND PROPOSALS 260 (Comm. Print 1969) [hereinafter TAX REFORM PROPOSALS 1969]. Moreover, the feminist literature deems the transferee to be the wife or widow and the transferor to be the husband. *See* Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers,"* 10 LAW & INEQ. J. 137, 156-59 (1991); Wendy C. Gerzog, *The Marital Deduction QTIP*

of disposition or control.⁴ The "price" to be paid for full qualification for the marital deduction is that the QTIP trust property is included in the wife's unified estate and gift tax base,⁵ although the burden of the tax "on" the QTIP trust is usually borne by the trust itself and not the wife's own estate.⁶

Both the QTIP trust device and the unlimited marital deduction entered the estate and gift tax as a "package" in the Economic Recovery Tax Act of 1981⁷ ("ERTA"). The link between the two was explicit.⁸ Previously, to qualify for the marital deduction the husband had to give the wife, at a minimum, not only an income interest for life but also a general power of appointment, that is, an unrestricted power of inter vivos or testamentary disposition.⁹ At the same time, under pre-ERTA law (and simplifying matters somewhat) the amount of the marital deduction could not exceed half of the gift, or half of the husband's net estate.¹⁰ The pre-ERTA marital deduction was designed (although poorly) to allow a tax-free splitting of the aggregate marital estate, similar to the result achieved automatically (and without tax) in the case of community property upon divorce.

With an unlimited marital deduction, the husband can reduce his taxable estate to zero by leaving his entire gross estate in the form of

Provisions: Illogical and Degrading to Women, 5 UCLA WOMEN'S L.J. 301, 305 n.11 (1995).

4. See I.R.C. §§ 2056(b)(7)(B), 2523(f)(2)-(3) (West Supp. 1998).

5. See *id.* §§ 2044, 2519 (1994 & West Supp. 1998). The terminable interest rule, described *supra* in note 2, is aimed at preventing qualification for transfers that *might not* appear in the estate and gift tax base of the transferee spouse, but QTIP transfers qualify because of their statutory inclusion in the estate or gift tax base of the wife or widow.

6. See *id.* § 2207A (West Supp. 1998) (providing that a spouse or spouse's estate has a right of recovery against transferee of QTIP transfer).

7. Pub. L. No. 97-34, § 403, 95 Stat. 172, 301-05 (codified as amended at I.R.C. §§ 2044, 2207A, 2519 (1994 & West Supp. 1998)).

8. See H.R. REP. NO. 97-201, at 159-60 (1981), *reprinted in* 1981 U.S.C.C.A.N. 105, 258-59.

9. See I.R.C. §§ 2056(b)(5), 2523(e) (West Supp. 1998). There is also the "estate trust" in which no distribution can be made to any person other than the widow during her life, and on her death the trust property is payable to her estate. The estate trust does not mandate any distributions to the widow during life, but qualifies because it is not a terminable interest. This result appears to have been an accidental by-product of technical statutory language, rather than the outcome of an explicit policy decision by Congress. See S. REP. NO. 80-1013, at 28 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1163 (omitting mention of estate trusts). The estate trust appears to be rarely used. See DAVID WESTFALL & GEORGE P. MAIR, ESTATE PLANNING LAW AND TAXATION 13-15 (2d ed. 1989).

10. See RICHARD B. STEPHENS ET AL., FEDERAL ESTATE AND GIFT TAXATION 5-118 (5th ed. 1983). Also, the prior rule that an interest in community property could not qualify for the gift and estate tax marital deduction was repealed.

qualifying marital deduction transfers. A more sophisticated alternative is for the husband to make that amount of qualifying marital deduction transfers as will reduce his taxable estate to that amount (currently \$625,000, but \$1 million by the year 2006) that will produce a tax which will be reduced to zero after subtracting the unified transfer tax credit available to the husband's estate.¹¹ Since qualifying transfers will, unless consumed or wasted, appear in the surviving spouse's transfer tax base, the current unlimited marital deduction allows no transfer tax to be paid until the widow dies or disposes of the property.

II. THE QTIP TRUST AND FEMALE EMPOWERMENT

Articles by Professors Mary Louise Fellows and Wendy C. Gerzog have asserted that the QTIP arrangement is patriarchal in motive and effect in that it deprives wives and widows of both testamentary and management control over property.¹² This claim—at least as it pertains to effect—is unassailable, because a QTIP trust confers on the widow only an income interest for life, and the widow has no power of disposition or control; the property passes to the successive beneficiaries or remainders designated by the husband. When the wife has little wealth of her own, the QTIP arrangement effectively allows the husband to “use” the wife's unified transfer tax credit for his own dispositive ends at the cost only of having to give the wife an income-only interest in trust.¹³

Professor Zelenak critiques the feminist position. His main points are: (1) the QTIP trust is not demeaning to wives because it

11. The unified transfer tax credit in effect from 1986 through 1997 exempts from tax the first \$600,000 of a person's (lifetime plus deathtime) transfers. See I.R.C. §§ 2010, 2505 (West Supp. 1998). The exemption equivalent is \$625,000 in 1998 and is scheduled to increase (in steps) to \$1 million in the year 2006. See Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 501(a), 1997 U.S.C.A.N. (111 Stat.) 788, 845 (codified at I.R.C. § 2010 (West Supp. 1998)). Thus, a husband (with no lifetime gifts) dying in 1997 with a gross estate of \$2 million could completely avoid tax by making a marital deduction bequest of \$1.4 million: \$2 million gross estate less marital deduction of \$1.4 million equals taxable estate of \$600,000, which produces no tax due to the unified transfer tax credit.

12. See Fellows, *supra* note 3, at 156-59; Gerzog, *supra* note 3, at 305 n.11.

13. The husband can create minority-interest discounts in the estate of the widow. For example, the husband owning a 60% control block can make an outright gift of one 30% minority interest to the wife, bequeath the remaining 30% minority interest to a QTIP trust, and obtain minority-interest discounts in both estates. See *Estate of Bonner v. United States*, 84 F.3d 196, 198 (5th Cir. 1996) (holding that stock in a QTIP trust is not aggregated with a widow's other stock in the same corporation). This holding confirms the view that property in a QTIP trust does not really belong to the widow.

assumes that wives have a mind of their own,¹⁴ (2) the issue should be low on the list of feminist concerns because it affects only a small, and wealthy, group of women,¹⁵ and (3) an income interest may be better than the alternatives.¹⁶ I view the first argument as irrelevant, the second as rejecting important feminist values, and the third as misguided (based on the wrong standard of comparison).

A. *Effect Is More Important Than Intent*

Feminists attack the QTIP trust arrangement on the ground that it was motivated by male determination to prevent the widow from controlling the devolution of the property.¹⁷ This claim appears to be overstated. The QTIP trust was always viewed as a trade-off for the unlimited marital deduction.¹⁸ The unlimited marital deduction is assumed naturally (if superficially and indeed wrongly) to be beneficial to wives and widows due to its allowance and its (apparent) encouragement of an increase in qualifying marital deduction bequests.

The QTIP concept appears to have surfaced first in the 1968 ALI transfer tax proposal, which also recommended an unlimited marital deduction and elimination of the terminable interest rule.¹⁹ There

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

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

16. See *id.* at 1545-48.

17. See Gerzog, *supra* note 3, at 320-21 (citing statements from the 1950s and 60s). Professor Gerzog attacks my alleged position that *only* QTIP transfers should qualify for the marital deduction, thereby implying that I am a misogynist. See *id.* at 321. In the passage cited, I was actually arguing against qualification for "estate trusts" (described *supra* in note 9). See Joseph M. Dodge, *Redoing the Estate and Gift Taxes Along Easy-to-Value Lines*, 43 TAX L. REV. 241, 352 (1988) [hereinafter Dodge, *Redoing*]. Of course, I have always favored qualification for outright transfers. (I am more ambivalent towards power-of-appointment trusts.) See *id.* at 345-46; see also Joseph M. Dodge, *Further Thoughts on Realizing Gains and Losses at Death*, 47 VAND. L. REV. 1827, 1854-55 (1994) (advocating that *only* outright transfers should qualify). In stating that the "QTIP scheme" was "theoretically sound," I was arguing only that if a partial interest was to entail qualification, it was better to give a deduction to the husband's estate equal to the full value of the property subject to the partial interest followed by a full inclusion by the widow. This is opposed to a deduction only for the value of the partial interest transferred to the widow. For this reason I use the word "scheme" instead of "qualification rule." See Dodge, *Redoing*, *supra*, at 350. My 1988 article explicitly attacked the deduction-equals-value approach, which Professor Gerzog favors. See *id.* at 345-52; see also Gerzog, *supra* note 3, at 302 n.6 (advocating that "only the value of the interest actually transferred to the surviving spouse should be eligible for the marital deduction"). The deduction-equals-value approach is critiqued in the text accompanying *infra* notes 88-92.

18. See TAX REFORM PROPOSALS 1969, *supra* note 3, at 359-60.

19. See AMERICAN LAW INST., FEDERAL ESTATE AND GIFT TAXATION, RECOMMENDATIONS AND REPORTERS' STUDIES 33 (1969).

was little discussion of the QTIP proposal, other than a statement that it would allow the husband to protect his children from a prior marriage. In a prior draft, it was argued that the widow's loss of control would be compensated for by the income from the larger marital trust allowed by the unlimited marital deduction.²⁰ There was also the notion that the package could be viewed as a simplification measure.²¹ A QTIP-type transfer was also proposed in the 1969 Treasury tax reform proposal, in which the stated rationale was that the federal government should not influence the form of transfers.²² The 1969 Treasury proposal gave the transferee spouse ultimate control over whether an income-only trust would be deductible.²³

Neither the ALI proposal nor the Treasury proposal was adopted by the 1969 Tax Reform Act. What caused the appearance of the QTIP provision in the 1981 legislation is hard to determine, but it was clearly an afterthought to the unlimited marital deduction, which was promoted for political reasons.²⁴ Thus, it is difficult to attribute to the 1981 Congress as a collective body a plot to deprive women of property rights, although it is conceivable that some legislators were aware of the effect of the 1981 package. There appears to have been no public objection to the QTIP rules as they passed through the legislative process, nor was there adverse reaction

20. See AMERICAN LAW INST., FEDERAL ESTATE AND GIFT TAX PROJECT: MAJOR PROBLEMS IN FEDERAL ESTATE AND GIFT TAXATION AND RECOMMENDATIONS IN REFERENCE THERETO 33 (1968).

21. See David Westfall, *Revitalizing the Federal Estate and Gift Taxes*, 83 HARV. L. REV. 986, 1001 (1970). The technical problems at that time related to certain applications of the terminable interest rule, the treatment of community property, what powers of appointment qualified, computation of the limitation, and enforcement of the gift tax rule.

22. See TAX REFORM PROPOSALS 1969, *supra* note 3, at 359-60. This rationale for the QTIP transfer is at odds with the statement that "the present treatment of taxing transfers between spouses does not accord with the common understanding of most husbands and wives that the property they have accumulated is 'ours.'" *Id.* at 358. It is a strange concept of common ownership that allows one spouse alone to exercise dispositive control.

23. Current law provides that the election is to be made by the donor or the deceased spouse's executor. See I.R.C. §§ 2056(b)(7)(B)(i)(III), 2056(b)(7)(B)(v), 2523(f)(2)(C), 2523(f)(4) (West Supp. 1998).

24. It appears that the main impetus behind the 1981 changes was a political drive by farmers and small business interests to emasculate the federal estate and gift tax. An unlimited marital deduction furthered this aim. The QTIP provision was not in the early bills, but emerged later from a task force controlled by Democrats on the House Ways and Means Committee. The Democrats, who controlled the House, were engaged in a tax-reduction bidding war with the Senate Republicans. The genesis of the marital deduction provisions of the 1981 Act is discussed in Harry L. Gutman, *Reforming Wealth Transfer Taxes After ERTA*, 69 VA. L. REV. 1183, 1198-1206 (1985), which cites the proposed Family Enterprise Estate and Gift Tax Equity Act of 1980, which did not have a QTIP rule.

after enactment, even by feminists. Two male legal commentators criticized (if obscurely) the QTIP trust shortly after the 1981 changes became effective,²⁵ but a feminist critique did not materialize until at least ten years later.²⁶ If even feminists did not recognize the significance of the QTIP trust on female empowerment, it is hard to attribute a sinister motive to (mostly) male legislators and policy-makers, unless one assumes that male chauvinists are smarter and more clever than feminists. Still, it is astonishing that after sixteen years only two feminist legal scholars have objected in print to the QTIP trust.²⁷

There is no doubt that the QTIP device diminishes the autonomy of wives and widows, who statistically are the usual beneficiaries of QTIP trusts.²⁸ The wife or widow is deprived of any power to control the disposition of the property, and the property is usually in trust, which deprives her of administrative control. QTIP trusts implement the husband's dead-hand control. Even if the welfare interests of widows of wealthy husbands may in some cases be furthered by trusts, it should be up to the widow herself to make the decision to self-settle a trust, or perhaps to employ investment advisors.²⁹ The federal tax law allows QTIP trusts, and estate planners are more than eager to use them. According to a recent survey, QTIP trusts are by far the most commonly used form of marital deduction for wealthy husbands.³⁰ Given the existence of the options of outright transfers and power-of-appointment trusts, it would appear that the estate planning community (if not Congress) is deeply patriarchal in outlook.³¹

25. See JOSEPH M. DODGE, *FEDERAL TAXATION OF ESTATES, TRUSTS, AND GIFTS* 84-85 (Supp. 1982); Joel C. Dobris, *Marital Deduction Estate Planning: Variations on a Classic Theme*, 20 SAN DIEGO L. REV. 801, 818-21, 819 n.155 (1983); see also Henry M. Ordower, *Trusting Our Partners: An Essay on Resetting the Estate Planning Defaults in an Adult World*, 31 REAL PROP. PROB. & TR. J. 313, 320, 355-56 (1996) (arguing against the common attitude that QTIP trusts should be the default choice in estate planning).

26. See Fellows, *supra* note 3. During the 1980s, I would often question in class the effect of QTIP trusts on women. Typically there was no response, even though about half of the students (on average) were women.

27. See *supra* note 12 and accompanying text.

28. See *supra* note 3.

29. See Ordower, *supra* note 25, at 338-39 (arguing that widows are not generally less capable of managing wealth than men).

30. See Chris J. Prestofina, *Strategies Recommended by Experienced Estate Planners*, TR. & EST., Jan. 1994, at 47, 50-51. The leading text on drafting marital deduction clauses prefers the QTIP trust and includes only QTIP provisions in the forms section. See RICHARD B. COVEY, *MARITAL DEDUCTION AND CREDIT SHELTER DISPOSITIONS AND THE USE OF FORMULA PROVISIONS* 147-48, 195-204 (1984).

31. See Ordower, *supra* note 25, at 315 (stating that estate planners use QTIP trusts

Nevertheless, Professor Zelenak downgrades the chauvinistic culture of estate planning and the detrimental effect of QTIP trusts on wives and widows by arguing that these phenomena only show "respect" for the independent judgment of wives and widows, that is, the possibility that wives and widows would in fact divert the "husband's" property away from the objects of his bounty.³² But a legal impediment motivated by fear (of the widow's dispositive power) can hardly be attributed to "respect for independence."³³ Such a claim is equivalent to arguing that the institution of slavery was a manifestation of white respect for African-Americans. Some respect! And, of course, the fear is often irrational or, at best, anecdotal.³⁴

In any case, the issue of motives for the enactment of the QTIP trust, emphasized by Professors Zelenak, Fellows, and Gerzog, is quite peripheral. What matters is the enormous constraints imposed by the QTIP trust on women's control of wealth.

B. Do We Care About the Top Ten Percent Wealthiest Women?

Professor Zelenak also responds to the attack on QTIP trusts by pointing out that it is primarily the widows of rich husbands who are disadvantaged by QTIP trusts.³⁵ I confess that the point eludes me.

for half of their clients and indicating that the planner often recommends use of the QTIP trust). Interestingly, the American College of Trust and Estate Counsel (the "ACTEC") promotes the view that an attorney is permitted to represent both husband and wife in estate planning. See AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL, COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 87-89 (2d ed. 1995). But the ACTEC appears not to recognize the possibility that recommending and drafting a QTIP trust for the husband entails a conflict of interest with the wife. See *id.*; see also GEOFFREY C. HAZARD, JR., CONFLICT OF INTEREST IN ESTATE PLANNING FOR HUSBAND AND WIFE 15-19 (1994), reprinted in PROB. LAW., Summer 1994, at 1, 15-19 (pointing out that a husband and wife might have different ideas on how a husband should dispose of his property).

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

33. In a similar vein, it is argued that the reluctance of state legislatures to shift to community property regimes also betrays husbands' fear of wives' ability to exercise the power of disposition over half of the marital property. See Fellows, *supra* note 3, at 151-56.

34. Thus, since widowers have a much greater chance of remarrying or acquiring lovers than widows, it would seem that women would have a lot more to fear than men on this score. Also, women may be less likely to disinherit their children than men. See Ordower, *supra* note 25, at 339 n.64.

35. Surveys indicate that low- to moderate-income husbands generally desire to leave all their property to their widows. See JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 70-71 (5th ed. 1995); Ordower, *supra* note 25, at 318-19. Such transfers would typically be outright and free of trust, since trusts are uneconomical except for large amounts of wealth.

Reforming the tax system to favor the poor may be an objective of a certain type of scholarship, but it is not per se a concern of feminism, which favors economic self-determination for women of all classes.³⁶ Self-determination by wealthy women by way of economic empowerment is important to allow such women to be role models over time. The ability to manage investments and to responsibly transfer wealth is as important an aspect of economic empowerment as owning or running a business. A class can hardly exercise economic power responsibly if it is not given the opportunity.

C. *Do QTIP Trusts Further Spousal Welfare?*

Although Professor Zelenak correctly points out that welfare feminism often indicates different policy choices than autonomy feminism,³⁷ it is not clear that such a conflict exists in the QTIP trust area. Professor Zelenak's welfare argument suggests that a QTIP trust may be a better deal (for the widow of a rich husband) than a widow's right to elect against the will. Presumably this point is inapplicable to community property states—which contain nearly a third of the U.S. population³⁸—in which the husband has testamentary control over only half of the community property. In any event, elective share statutes are the wrong baseline for comparison. With the ability to enter into antenuptial agreements and the ease with which divorce can be obtained, the cruder forms of disinheritance of widows (inter vivos gifts, revocable trusts, and single premium life insurance) are not a significant problem for most couples.

The QTIP trust is itself a potent, if subtle, technique for the disinheritance of widows. The lure of an income interest for life in a large portion of the husband's estate may seduce the widow into foregoing her inheritance rights.³⁹ Even an objective evaluation of the QTIP trust may dictate that state law anti-disinheritance

36. See Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1026-29 (1993) (discussing the effect of the "marriage penalty" under the income tax on upper income couples).

37. See Zelenak, *supra* note 1, at 1560-61.

38. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 35 (estimating 29% for the year 2000).

39. A widow's inheritance right, namely to claim one half or one third of the husband's estate (however defined for this purpose) outright, is likely to be worth more than an income-only interest in a QTIP trust. See *infra* text accompanying notes 59-67. However, an unsophisticated layperson may well assume that an income-only interest is worth half or more of the estate. See *infra* note 46 and accompanying text.

remedies not be pursued.⁴⁰ For the deceased husband, the retention of dead-hand control of the property's devolution can be obtained at a minimal price. In short, the QTIP trust offers marginal welfare-type benefits, at best, for widows, but allows husbands to reap supermarginal benefits.

The appropriate baseline for evaluating the QTIP trust is the norm of facilitating (if not mandating) equal estate-splitting, which was the norm that informed the pre-ERTA marital deduction regime and accords with the notion of wealth that is "shared." The pre-ERTA regime did this crudely and in an excessively complex manner, but that need not concern us here. Under pre-ERTA law, in order to obtain the marital deduction, the husband had to leave the widow no less than a power-of-appointment trust.⁴¹

III. THE QTIP TRUST CANNOT BE DEFENDED ON THE MERITS

Despite the foregoing, Professor Zelenak declares, without elaboration, that he is "no great fan of the QTIP rules."⁴² It would seem that Professor Zelenak could evaluate the QTIP trust on the merits. In the absence of such evaluation, his comments about the feminist critique of the QTIP trust look like petty academic carping. I contend that the QTIP trust cannot be defended on its own, wholly apart from its being a trade-off for the unlimited marital deduction (which is discussed in Part IV below).

An argument for QTIP trusts (not linked to the unlimited marital deduction) would be based on the core values that: (1) the issue of marital property rights is one for the states to resolve, and (2) a person should be able to dispose of his property as he sees fit (without influence by federal tax law).

The federalism argument is a smokescreen. The pre-ERTA estate-splitting marital deduction regime was enacted in 1948

40. Typically, if a widow elects against a will, she must forfeit all benefits obtained under the will. See WILLIAM M. MCGOVERN, JR. ET AL., *WILLS, TRUSTS AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS* 122 n.60 (1988). Thus, even if the widow received no benefits under a will other than an income interest in a QTIP trust in the decedent husband's estate, a decision to elect against the will (and forfeit the interest in the QTIP trust) would be a close call. See also *infra* note 56 (stating that most widows choose to take the QTIP trust option rather than elect against the husband's will).

41. See *supra* note 9 and accompanying text.

42. Zelenak, *supra* note 1, at 1543. Professor Zelenak admits that there is a certain inconsistency between the premise underlying the QTIP trust (that the property is the husband's) and the premise underlying the unlimited marital deduction (that the property is "theirs"). See *id.* at 1545 (citing Gerzog, *supra* note 3, at 305 n.11). Neither author questions the unlimited marital deduction.

precisely to prevent federal tax law from influencing state property regimes.⁴³ In contrast, the federal QTIP trust provision can be seen as a potential influence on the states to dilute the spousal election against the will and to decline to move to a community property regime.⁴⁴

As to freedom of testation, marital deduction qualification rules cannot avoid influencing the form of spousal transfers. But influence is not compulsion. Unlike changes in state property law, marital deduction qualification rules accommodate freedom of testation. Since a QTIP trust gives the widow a low level of benefits while giving the husband maximum control (without losing tax benefits), it is not surprising that QTIP trusts are heavily favored by (wealthy) husbands.⁴⁵ Given that federal gift and estate tax rules inevitably influence dispositive patterns, such influence should be as benign and neutral as possible.

IV. THE QTIP TRUST WAS A BAD TRADE-OFF FOR THE UNLIMITED MARITAL DEDUCTION

The QTIP trust was both proposed and enacted on the basis that a QTIP trust in all of the husband's estate is at least as good as a fifty percent outright share or power-of-appointment trust.⁴⁶ It seems highly unlikely that feminists can obtain repeal of the QTIP trust without giving up the unlimited quality of the marital deduction, since the two were closely linked upon enactment.⁴⁷ Thus, it is pertinent to inquire whether the unlimited quality of the marital deduction is a good deal for wives and widows.

The 1969 QTIP proposals assumed a low exemption level.⁴⁸ In that context, an unlimited marital deduction coupled with a rule requiring outright or power-of-appointment transfers would result in the husband losing dispositive control over his entire estate. However, starting in 1976 the exemption level (implemented by

43. See STEPHENS ET AL., *supra* note 10, at 5-117 to -118.

44. See *supra* note 33. But see 1993 N.Y. Laws 515 (codified at N.Y. EST. POWERS & TRUSTS LAW § 5-1.1A(a)(2), (4) (McKinney 1981 & Supp. 1997)) (repealing a provision that allowed a QTIP-type trust to preclude a spousal election against the will).

45. Of course, the QTIP trust would also be favored by wealthy wives who are married to less wealthy husbands, although statistically a QTIP trust in this situation will be less likely to take effect, since wives usually outlive husbands. Thus, the QTIP trust is agreeable to the wealthier spouse, regardless of gender, which might explain why there has been little political opposition to the QTIP trust.

46. See *supra* notes 8, 19-20 and accompanying text.

47. See *supra* note 8 and accompanying text.

48. The exemption level was \$60,000. See STEPHENS ET AL., *supra* note 10, at 5-3 n.1.

means of the unified transfer tax credit) has risen greatly: from \$175,625 in 1981, to \$1 million by the year 2006.⁴⁹ The Taxpayer Relief Act of 1997 added an estate exclusion for family businesses and farms; this exclusion, when combined with the unified transfer tax credit, will produce an aggregate exemption level of \$1.3 million per transferor for 1998 and later years.⁵⁰ Thus, if the husband has the right kind of property, he can make up to \$1.3 million of nondeductible transfers to third parties without tax.

As a general proposition, the unlimited marital deduction would influence a husband desiring to eliminate all estate tax to leave a marital deduction transfer equal to his net estate reduced by the sizable exempted amount. (Such a transfer is herein referred to as the "optimal" marital deduction.) If the husband's estate is less than the exemption level, the marital deduction does not create any inducement at all to make qualifying marital deduction bequests: bequests to any person (widow or otherwise) are simply free of tax. A husband would be interested in leaving a marital bequest in excess of fifty percent only if his estate is very large and if he wishes to reduce the tax on his own estate to zero.⁵¹

But it is also true that the maximum overall tax savings are achieved with marital deduction transfers such that the potential taxable estates of husband and wife are equalized.⁵² Estate equalization is the estate planning alternative (for wealthy couples) to the reduce-to-zero (optimal-marital-deduction) approach. The conventional wisdom, however, is that the reduce-to-zero approach using an optimal marital deduction is economically preferable to estate equalization, because (if the widow lives long enough) the net economic return on the taxes avoided at the husband's death earned up to the wife's death should exceed the marginal taxes saved under estate equalization.⁵³ But the conventional wisdom has been called into question.⁵⁴ The numbers indeed favor the estate-equalization

49. See *supra* note 11.

50. See Pub. L. No. 105-34, § 502(a), 1997 U.S.C.C.A.N. (111 Stat.) 788, 847 (codified at I.R.C. § 2033A (West Supp. 1998)).

51. See *supra* note 11 for an example of how an optimal marital deduction combines with a non-marital transfer to eliminate tax.

52. With progressive rates, aggregate taxes are always minimized when the aggregate tax base is allocated 50-50 to each spouse.

53. See, e.g., JOSEPH M. DODGE, WILLS, TRUSTS, AND ESTATE PLANNING 569-74 (1988) (setting forth calculations); Ordower, *supra* note 25, at 323-24 (setting forth formula for judging whether deferral is preferable).

54. See Don W. Llewellyn et al., *Computing the Optimum Marital Deduction: Is a Zero-Tax Formula Appropriate?*, 24 REAL PROP. PROB. & TR. J. 331, 338-40 (1989); Jeffrey N. Pennell & R. Mark Williamson, *The Economics of Prepaying Wealth Transfer*

approach for wealthy couples under the following assumptions: (1) a progressive rate structure is in effect, and (2) the non-marital transfers are not consumed.⁵⁵ In very large estates, these conditions are likely to hold. Indeed, the "new math" is offered to the estate planning community explicitly to facilitate giving the widow reduced economic benefits in the husband's property.⁵⁶ The message is that husbands do not have to leave the widow more than an estate equalization QTIP bequest in order to maximize the tax savings.

Similar considerations fatally undermine the claims of husbands that the QTIP trust format is necessary to protect either their freedom of testation or their children of a prior marriage; the husband's interests are adequately protected under the estate equalization format without the QTIP trust, because the husband wholly controls the enjoyment and disposition of half of the total wealth, and the widow (in the absence of the QTIP option) controls and enjoys the other half. Indeed, if the wife has any wealth of her own, estate equalization would induce the husband to effect marital deduction transfers (entailing surrender of dispositive control) of *less* than half of "his" wealth.⁵⁷ Even if (mostly grown) children of prior marriages deserve special congressional solicitation, this scenario is not typical. Congress could have limited the use of QTIP trusts to situations in which the remainder in fact is to pass to descendants of prior marriages.⁵⁸

An ability to achieve equal estate-splitting (in large estates) not

Tax, TR. & EST., June 1997, at 49, 49.

55. The non-marital trust avoids making distributions until the widow's death, so that the accumulated income and appreciation will inure to the benefit of non-spousal beneficiaries.

56. See Pennell & Williamson, *supra* note 54, at 51-52 (noting that a maximum-deferral marital deduction may give a widow more income than her husband wants her to receive). Professor Pennell delivered a speech at the 1998 University of Miami Estate Planning Institute entitled, "Minimizing the Surviving Spouse's Elective Share," the theme being that most widows would swallow an estate-equalization QTIP rather than elect against the husband's will. See Jeffrey N. Pennell, Address at the University of Miami Philip E. Heckerling Institute on Estate Planning (January 7, 1998) (publication forthcoming 32 U. MIAMI PHILIP E. HECKERLING INST. ON EST. PLAN., ch. 8).

57. If the husband has wealth of \$2 million and the wife \$1 million, an estate equalization limitation would induce the husband to leave \$500,000 (out of his \$2 million) to the wife, leaving each of them at a wealth position of \$1.5 million.

58. In at least two sections of the Uniform Probate Code, the share of the surviving spouse is dependent on the parentage of the decedent's children. See UNIF. PROBATE CODE § 2-102 (revised 1990), 8 U.L.A. 81 (1998) (making the elective share of the surviving spouse dependent on the parentage of the decedent's children); *id.* § 2-301, 8 U.L.A. at 133 (making the share of the surviving spouse excluded from the premarital will equal to the intestate share of the estate not devised to the children of a prior marriage).

only is generous in itself, but also is likely the most generous proposal that can be justified normatively (that is, by analogy to community property or to the shared-wealth concept invoked in conjunction with the unlimited marital deduction). In addition, the estate-equalization approach allows (if it does not require) husbands to give the widow more benefits than exist under the marital deduction bequest without causing inclusion of the extra benefits in the widow's gross estate. Typically, the nonqualifying transfer is a trust (called a by-pass trust) in which the widow has one or more income interests, limited powers of disposition, the trusteeship (or co-trusteeship), and a possibility of receiving income and/or corpus distributions pursuant to the trustee's discretion or standards (such as "maintenance" or "comfort"). Such a by-pass trust package is more favorable to the widow than a QTIP trust, which does not allow for any power of inter vivos disposition. Thus, it would be ludicrous to maintain that an estate plan under an estate-splitting marital deduction limitation (without QTIP trusts) must necessarily be less favorable to widows than even a 100%-of-husband's-estate QTIP trust. The present qualification rules merely set the parameters of the tax game; the level of benefits to be received by the wife is basically up to the husband, independent of the qualification rules.

Perhaps the most decisive argument against the QTIP trust is that the widow's income-only interest in trust is not very valuable. First, the concept of "income" under the law of trusts is narrower than economic income: capital gains and appreciation are excluded.⁵⁹ Second, the trustee's normal duty is to preserve the corpus against erosion by inflation and to balance fairly the interests of the income beneficiary and the remainder.⁶⁰ These conditions produce a situation in which a substantial portion of the economic return is (or can be) devoted to the remainder interest. Third, trustees are subject to the prudent investor rule constraining investments.⁶¹ Fourth, the "income" is net of trustee fees charged against income,⁶² an expense

59. See UNIF. PRINCIPAL AND INCOME ACT § 3 (1962), 7B U.L.A. 154-55 (1985). Trust accounting income can also be reduced by charges to depreciation, *see id.* § 13(a)(2), 7B U.L.A. at 176, and depletion reserves, *see id.* §§ 9-11, 7B U.L.A. at 168-72, and can be exclusive of income accruing through original issue discount, *see id.* § 7(a), 7B U.L.A. at 165-66.

60. See RESTATEMENT (THIRD) OF TRUSTS § 227 (1992); RESTATEMENT (SECOND) OF TRUSTS § 183 (1959).

61. See RESTATEMENT (THIRD) OF TRUSTS § 227 (1992) (requiring trustees to conform to fiduciary standards, act with undivided loyalty, and in the sole interest of the beneficiary).

62. See UNIF. PRINCIPAL AND INCOME ACT § 13(a) (1962), 7B U.L.A. at 175-76

that would be eliminated if the widow owned the property outright. The third and fourth points combine to suppress the total economic return. Thus, in the mid-1990s, a QTIP trust beneficiary would be likely to enjoy an income yield of only three or four percent of asset value.⁶³ This income is, of course, subject to income tax in the hands of the widow.⁶⁴ Using a four percent discount rate, an income interest in trust for ten years (roughly the median survival period for widows)⁶⁵ is worth only about thirty percent of the corpus. The notion of a three or four percent "income" yield is now being touted as a desirable norm in order to "preserve" corpus more effectively against erosion.⁶⁶ Such a strategy in the context of an income-only QTIP trust will have the effect of reducing the income to be distributed to the widow and increasing the amount passing to third parties. In addition, the widow's income right in a QTIP trust has been eroded at the margins by recent cases and regulations.⁶⁷

Finally, any tax savings attributable to the unlimited marital deduction (which can occur only in large estates due to the generous exemptions) will in most cases inure wholly to the benefit of the non-

(1985).

63. See Robert B. Wolf, *Defeating the Duty to Disappoint Equally—The Total Return Trust*, 32 REAL PROP. PROB. & TR. J. 45, 51 (1997) (specifying yield of 3.9%, based on 1996 average federal mid-term yield of 6.5% and Standard & Poor's 500 equity dividend yield of 2.0%).

64. One study indicated that, to preserve asset values against inflation, the maximum "income" return of three percent after taxes would sufficiently avoid erosion of principal (adjusted for inflation). See Roger Hertog & David A. Levine, *Income Versus Wealth: Making the Trade-Off*, J. INVESTING, Spring 1996, at 5, 12 (covering a 35-year period).

65. See TAX REFORM PROPOSALS 1969, *supra* note 3, at 260.

66. See William L. Hoisington, *Modern Trust Design: New Paradigms for the 21st Century*, 31 U. MIAMI INST. EST. PLAN. 6-1, 6-10 to 6-13 (1997) (discussing financial managers' preoccupation with capital protection and the "total return" investment strategy).

67. See *Commissioner v. Estate of Hubert*, 117 S. Ct. 1124, 1133-34 (1997) (holding that the marital deduction is not reduced in which estate administration expenses are charged against the income of a marital bequest and deducted for income tax purposes); *Estate of Robertson v. Commissioner*, 15 F.3d 779, 781 (8th Cir. 1994) (holding that the marital deduction is not lost when executor had discretionary power to choose between funding a deductible trust and a nondeductible trust); Treas. Reg. § 20.2056(b)-7(d)(4) (1994) (stating income interest not disqualified when trust provides that income between last distribution date and widow's death is payable to third party); Temp. Treas. Reg. § 20.2056(b)-7T(d)(3)(ii), -7T(h) ex. 6 (1997) (stating income interest not disqualified when trust provides that widow is to receive the income from only that portion of the QTIP trust for which the QTIP election is made). See generally 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 (1996) (discussing the effect of *Estate of Clack v. Commissioner*, 106 T.C. 31 (1996), which allows a widowed spouse's trust income to be dependent on the executor's determination).

marital-deduction transfers, since any taxes would otherwise be charged to such transfers.⁶⁸ Thus, the widow will rarely benefit from any incremental tax savings attributable to an unlimited marital deduction; any tax savings that do augment the QTIP trust will benefit the widow only in proportion to the value of her income-only interest in such trust.

A deduction that neither provides a tax incentive to benefit widows (beyond about three percent in half of the couple's aggregate wealth) nor gives widows a significant economic stake in any tax savings that result from the system hardly deserves to be called a "marital deduction."

V. CAN THE UNLIMITED MARITAL DEDUCTION BE INDEPENDENTLY JUSTIFIED?

Some theories have been advanced for an unlimited marital deduction that are not accurate explanations of current law, are not normatively justified, or are not practical. For reasons of space, I will deal with them only briefly.

The first is the idea that the unlimited marital deduction embodies the notion that husband and wife belong to the same taxable unit.⁶⁹ The marital-unit model is premised on the assumption that married couples view earnings and property as "theirs," as opposed to "his" or "hers." As a factual description, this view of control is doubtful—even with regard to community property⁷⁰—especially among the wealthy.⁷¹ Even assuming that the idea of joint control is a desirable property norm, in practice, during a viable marriage, control over earnings and property within a given household will be governed more by personalities and the informal dynamics of the relationship than by legal rules. Finally, the concept of "sharing" implies fifty-fifty ownership, which in turn would justify

68. The exception would be when the taxes saved to the husband's estate are greater than the amount of non-marital transfers to which such taxes could have been charged. Thanks to the large exemptions and the fact that an estate-equalization plan is generally preferable to a reduce-to-zero plan, this exception should rarely apply.

69. See H.R. REP. NO. 97-201, at 159 (1981), *reprinted in* U.S. Cong. Serial Set, Serial No. 13432, at 159 (1981).

70. Legally, community earnings and community property can be consumed, sold, or disposed of by gift (subject to some constraints) by whichever spouse (or perhaps both of them) is the "manager" of such property. See generally WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, *COMMUNITY PROPERTY IN THE UNITED STATES* 6-7, 205-50 (2d ed. 1982) (discussing control of community property).

71. See Marjorie E. Kornhauser, *Love, Marriage, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 80-91 (1993).

an estate equalization scheme.

In any event, for estate and gift tax purposes, husband and wife are clearly separate taxpayers with separate schedules and exemption levels. Implementation of the marital-unit theory would require the imposition, upon the death of the second spouse, of a tax on the *aggregate* tax base of both spouses combined.⁷² Such an aggregate tax base would raise the issue of an appropriate rate schedule. A joint-return type of solution⁷³ is unworkable due to the fact that spouses can divorce, and surviving (or divorced) spouses can remarry, so that a person could serially belong to more than one marital (or non-marital) unit. Treating each such unit as a separate taxpayer would undermine progressivity, especially in the case of those who take marriage and divorce casually. Alternatively, the basic taxable unit for rate purposes could remain with the individual over his or her lifetime, but each marriage, divorce, and remarriage could entail a reallocation and perhaps modification of a person's transfer tax attributes. It is interesting to speculate about such a system, but it would be excessively cumbersome relative to whatever good it might accomplish.⁷⁴

The second theory is that the unlimited marital deduction "defers tax" until the widow's death. But if there were true tax deferral, the husband's cumulative gift and estate tax liability would be figured without regard to any marital deduction, and such liability would be deferred, with interest, until the widow's death.⁷⁵ Indeed, the deferral rationale in its naked form suggests that *any* transfer by the husband—even an outright gift to a third party—is entitled to deferral.⁷⁶ In reality, the marital deduction shifts all or a portion of the husband's tax base to the widow's tax base. In other words, it defers not the tax but rather a portion of the aggregate tax base. The implied justification is that somehow widows as a group benefit from deferral, but (as noted above) that is hardly the case under the post-

72. See Gutman, *supra* note 24, at 1223.

73. This would entail a "halved" rate schedule and double exemptions for the aggregate estate.

74. Transfer tax attributes would include the (unused) unified transfer tax credit and the amount of "adjusted taxable gifts" that enter into the calculation of post-termination gift and estate tax liability. The problems of aggregating and disaggregating marital units occupy 20 pages in one commentary. See Gutman, *supra* note 24, at 1219-39.

75. Of course, such a system would not provide any inducement to prefer spousal transfers to non-spousal transfers.

76. This point is made by Howard E. Abrams, *A Reevaluation of the Terminable Interest Rule*, 39 TAX L. REV. 1, 23-25 (1983), as well as by Gerzog, *supra* note 3, at 318-19.

ERTA system, which actually has the effect of favoring the successors of married couples relative to those of nonmarried individuals. As far as I know, no justification has been attempted for this result, nor can I conceive of any.

A third theory is that the unlimited marital deduction implements the overriding principle of one tax per generation. Whatever the dubious merits of such a principle,⁷⁷ the present system, through the generation-skipping tax,⁷⁸ seeks to assure only that the tax is imposed *no less* than once a generation.⁷⁹ Otherwise, there is no other feature of the transfer tax system that refers to generational status. There are no exemptions for same-generation or “backward flowing” transfers. The problem of *too frequent* imposition of tax can better be mitigated by a provision like I.R.C. § 2013, which is keyed to the number of years between deaths,⁸⁰ than a generational rule. In the fairly common situation in which the widow outlives her husband by more than ten years,⁸¹ I.R.C. § 2013 in its current form would not

77. The generation idea might be thought to produce some kind of horizontal equity in the sense, say, that all persons receiving bequests in 1998 will be treated equally because the wealth will have been taxed roughly the same number of times. See *Tax Reform, 1969: Hearings Before the House Comm. on Ways & Means*, 91st Cong. 3980 (1969) (statement of Jerome Kurtz, practitioner and professor) (arguing that promoting equity in estate taxes requires that “comparable fortunes be subjected to the tax at relatively comparable time intervals”). However, this description of the situation erroneously assumes that all wealth acquired by gratuitous accession in 1998 is of (nearly) the same vintage. Moreover, the norm of equal taxation of lineages (as opposed to individuals) is problematic. Another argument might be that the idea of a wealth transfer tax is to approximate an *annual* wealth tax and that imposing the wealth transfer tax once per generation is a crude way of averaging. But a wealth transfer tax can be designed so as to take into account the transferor’s actual holding period of assets. See Joseph M. Dodge II, *The Taxation of Wealth and Wealth Transfers: Where Do We Go After ERTA?*, 34 RUTGERS L. REV. 738, 760-68 (1982). In any event, it is not clear that an annual wealth tax is the appropriate norm. A wealth transfer tax might well be preferable on both economic and administrative efficiency grounds. The generational idea does not relate at all to the following rationales for the current transfer tax system: (1) raising revenue, (2) levying an excise on the privilege of transferring wealth, (3) breaking up undue concentrations of wealth, and (4) enhancing the progressivity of the income tax.

78. See I.R.C. §§ 2601-2654 (1994 & West Supp. 1998).

79. Alternatively, the generation-skipping tax could be based on the idea of successive beneficial enjoyment, regardless of generational status. See Joseph M. Dodge, *Substantial Ownership and Substance Versus Form: Proposals for the Unification of Federal Estate and Gift Taxes and for the Taxation of Generation-Skipping Transfers*, 1976 U. ILL. L.F. 657, 670-77.

80. See I.R.C. § 2013(a) (West Supp. 1998). Section 2013 allows a credit against the estate tax of the second decedent for any estate tax “on” estate transfers to the second decedent by an earlier decedent. See *id.* The credit is 100% of the earlier tax if the deaths are less than two years apart; the credit is scaled down for longer intervals, and disappears if the interval is greater than 10 years. See *id.*

81. Statistics on survival are cited in part three of TAX REFORM PROPOSALS 1969,

help. Finally, and most importantly, the generation idea does not mandate an *unlimited* marital deduction; small and moderate wealth is already exempt from tax, regardless of relationship, and for wealthy couples an estate-splitting approach can achieve the result of one tax per couple, since nondeductible transfers by the husband can be made in a form that avoids inclusion in the widow's tax base.⁸²

A fourth theory is that the purpose of the marital deduction is to provide economic benefits to widows. From a pure welfare perspective, however, any exclusion above what is necessary to allow the widow to live comfortably is not justified.⁸³ In any event, the welfare rationale has been pre-empted by the unified transfer tax credit, which essentially accomplishes the same goal.⁸⁴ A \$625,000 outright bequest translates into an annuity of about \$89,000 per year for ten years or \$69,000 per year for fifteen years.⁸⁵ Even if there were no credit (and assuming that there are other legatees), the widow would have no guarantee of benefiting from the tax savings attributable to an optimal marital deduction.⁸⁶ Finally, an estate-splitting marital deduction assures that the widow will obtain no less than half of the before-tax wealth of the couple.⁸⁷

VI. A DEDUCTION FOR THE VALUE OF INTERESTS TRANSFERRED TO SPOUSES?

It has been proposed by Professor Gerzog (among others) that the amount of the marital deduction should equal the value of the interests in property that the wife or widow obtains from the husband.⁸⁸ In contrast to the current system, which allows a deduction equal to the full amount of the property in a QTIP trust,

supra note 3, at 260.

82. See *supra* text following note 58.

83. See Westfall, *supra* note 21, at 989 (noting that the marital deduction applies without regard to the size of the decedent's estate); *id.* at 996 (contending that the size of the marital deduction should depend on the need of the widow).

84. It is noteworthy that there is no provision exempting transfers to destitute orphans. The orphan's deduction, former I.R.C. § 2057, was repealed in 1981 precisely because the unified transfer tax credit was deemed to be sufficient. See Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 427(a), 95 Stat. 172, 318, reprinted in 1981 U.S.C.A.N. (95 Stat.) 172, 318 (repealing previous I.R.C. § 2057).

85. These figures assume a discount rate of seven percent. Ten years appears to be about the mean period of survival by widows. See *supra* note 3.

86. See *supra* text accompanying note 68.

87. Any taxes on the "taxable" portion of the husband's estate will be charged to that portion, because charging the tax to the marital deduction transfer will reduce the marital deduction. See I.R.C. § 2056(b)(4)(A) (West Supp. 1998).

88. See Gerzog, *supra* note 3, at 302 n.6.

the proposal would result, when the husband leaves the wife or widow a life estate, in a deduction limited to the actuarial value of the life estate as of the husband's death.⁸⁹ The rationale is that the marital deduction should equal only the value of what the widow or wife gets.

The deduction-equals-value approach has seductive appeal, but it is ultimately a bad idea. From the feminist perspective, it would do little to inhibit a husband from using a spousal income-only trust. Giving wives special powers of appointment or naming them as trustees would be discouraged, since powers would not possess any value. The deductible amount would be a function of the widow's life expectancy, which would create an irrational incentive structure. Most importantly, estate planners would greatly favor income-only trusts because income-only interests are, under the estate and gift tax actuarial tables, greatly overvalued.⁹⁰ Thus, the husband's deduction would far exceed (on average) the real value of the widow's benefit in present value terms. Moreover, reliance on actuarial tables allows gaming of the system: the excess of the deductible amount over the present value of what widows actually receive would widen if the widow dies prematurely or the trust can shift economic return from "income" to capital appreciation, which benefits the remainder interest. Finally, the "estate trust" would become the misogynist's dream: a 100% deduction, but no guarantee that the widow will receive any benefits during life.⁹¹

The only airtight solution that prevents actuarial manipulation would be a qualification rule that would require an outright transfer, a power-of-appointment trust, or an annuity for a term of years.⁹²

89. See Abrams, *supra* note 76, at 18; Gutman, *supra* note 24, at 1256; Joseph Isenbergh, *Simplifying Retained Life Interests, Revocable Transfers, and the Marital Deduction*, 51 U. CHI. L. REV. 1, 31-32 (1984).

90. The actual before-tax rate of "income" return for trusts in 1996 was 3.9%. See *supra* note 63. The mid-term applicable federal rate for November 1997 was 6.01%. See RESEARCH INST. OF AM., RIA FEDERAL TAX HANDBOOK 89 (1997). Section 7520(a)(2) prescribes a discount rate in valuing interests equal to 120% of the federal mid-term rate. See I.R.C. § 7520(a)(2) (1994). Thus, the statutory discount rate can be more than twice the "real" discount rate in a trust. The higher the discount rate, the higher the value of income interests.

91. The estate trust is described *supra* in note 9. The estate trust would be fully deductible, since (in the property law sense) no interest is transferred to any person other than the widow and/or her estate. In practice, the widow has testamentary control, but that, standing alone, might have little utility to her, especially if the natural objects of her bounty are the same as her husband's. A widow's interest in an estate trust equals 100% of the initial corpus, because the widow "owns" both the remainder interest and the (accumulated) income interest.

92. Another option is a unitrust (fixed percentage of corpus valued annually) for a

The term-annuity option would be unappealing both to the husband, since a widow dying prematurely could control the disposition of the unpaid account balance, and to the widow, who might outlive the annuity period.

VII. CONCLUSION

The analysis of both the post-ERTA system and the deduction-equals-value alternative leads to the conclusion that the optimal solution is to abolish the QTIP trust (and the estate trust) and to allow qualification only for outright transfers and (perhaps) power-of-appointment trusts. The unlimited marital deduction could be kept for gift tax purposes for reasons of administrative simplicity. For estate tax purposes, the unlimited marital deduction should be replaced by an estate-equalization limitation. This system would create a community-property-like template for interspousal transfers, a template that already is the property regime governing about thirty percent of the population,⁹³ and would reasonably accommodate the interests of both husbands and wives.

Of course, as Professor Zelenak points out, tax is not everything. The best marital deduction scheme would not be as effective in securing the interests of wives as would the optimal legal regime pertaining to marital property rights and succession. Autonomy feminists should be especially skeptical of the institution of the trust and other forms of long-term, dead-hand control.⁹⁴

term of years. However, the unitrust percentage could be set quite low (two to four percent) in order to preserve corpus for the remainders. A rule that required a minimum unitrust percentage (say, five percent) would be deemed unacceptable by the estate planning community, since it would typically result in the erosion of corpus. See *supra* note 64.

93. See *supra* note 38.

94. Cf. Ordower, *supra* note 25, at 329-37 (discussing factors that influence decisions of after-death control and urging estate planners to resist client urges to exert maximum dead-hand control).