

MARITAL DEDUCTION PLANNING
UNDER THE 2001 ACT

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- I. Between now and 2010 and after 2011
- A. Use of Formulas Before Death to Split Estate
1. Formulas have been used to split an estate between taxable and nontaxable shares since the marital deduction was first enacted in 1948. How the shares have been divided has changed over the years (fifty percent marital share, optimum marital deduction share, etc.) but the basic testamentary estate planning document involved a split using some formula. How will our formula clauses change as a result of the 2001 Act?
 2. After the 2001 Act, the challenge will be designing the formula to take advantage of the full increased exemption in a manner that is compatible with the client's wishes.
 3. For mid-tier estates (\$1 - 10 million ?) the issue of who gets what must be addressed because the increase in exemption may alter the basic dispositive plan of the client. If the credit shelter share and marital share both benefit primarily the surviving spouse and the descendants are all of both spouses, then the increase in exemption amounts will probably not adversely affect the estate plan but they can create a serious problem if the beneficiaries of both shares are not substantially the same. A formula clause that automatically creates a credit shelter share in an amount equal to the increased exemption can greatly reduce or even eliminate the share the spouse receives. This is particularly a problem when spouse and descendants of first spouse don't see eye to eye and they are all beneficiaries of the credit shelter share. For example, if an estate remains constant at \$4,000,000, the share the spouse receives outright or in a marital trust exclusively for the benefit of the spouse drops from \$3,000,000 in 2002 to \$500,000 in 2009.
 4. In such a situation, it may be desirable to put some limit or cap on the credit shelter share - how much will differ with each client situation. The limitation can be a pecuniary amount or a fraction and can be expressed as a ceiling on the credit shelter share or as a floor on the marital share.

Example of ceiling on the credit share: □The amount that can pass free of estate tax due to credits, etc. but not more than \$_____.□

Example of floor on the marital share: □Smallest amount necessary to reduce the estate tax to zero but not less than \$_____.□

If a fractional cap is desired, it can be expressed as a 'pecuniary fraction' in which the numerator is a dollar amount or a true fraction. It's best to describe the cap the same way the marital share is determined. If a pecuniary marital deduction is used, then the cap should be described as a pecuniary amount also. A fractional share marital form should be coupled with a fractional cap. See appendix for sample forms.

5. If a cap on the credit shelter share is used, then some of the exemption will be wasted, which may be important especially if we revert back to the lower exemption amounts in 2011 and later. This can be avoided if the excess of the exemption amount of the first spouse over the cap is held in a second credit shelter trust for the exclusive benefit of the surviving spouse.

Exemption up to the cap	Exemption over the cap	Marital share
↓	↓ ↓	
Sprinkle provisions to benefit descendants and spouse (or just descendants)	benefits spouse exclusively - can have broad trustee powers for invasion	in trust or outright

Advantages of this method:

- a. Unneeded income doesn't accumulate in spouse's estate and won't be subject to estate tax at surviving spouse's death.
- b. Funds can be distributed to descendants during life of spouse without incurring gift tax.
- c. No part of first spouse's exemption is wasted.
- d. Helps to avoid fights between spouse and descendants.

- e. Insures that some portion of estate will be held for benefit of descendants - not subject to decision by fiduciary or surviving spouse.

Can also accomplish this by putting estate in excess of the cap into a QTIP and making a partial QTIP election.

6. Funding mechanisms for dividing into shares becomes more difficult. We have the same choices as before but the increased exemption amount makes the decision harder, particularly if the pecuniary true worth funding mechanism is used. If this method is used, it is usually desirable to have the smaller share be a preresiduary devise because of the potential for capital gain on funding. This means that as the exemption amounts go up, the residuary and preresiduary shares should be reversed to minimize the gain on funding, but this may be cumbersome or difficult to draft.

Maybe answer is to use a funding mechanism that doesn't trigger gain such as a fairly representative or fractional share (pick and choose) formulas.

B. Don't Use Formulas to Split Estate

Three different approaches can be used instead of mandating before death division of the estate:

1. Disclaimer. Give everything to surviving spouse but provide for a disclaimer credit shelter trust, so spouse can control how much exemption is to be used on death of first spouse by disclaiming part or all of the estate. Avoids the arbitrariness of a cap or a dollar limitation and gives spouse flexibility to make decisions based on circumstances at death of first spouse and to take in account health, age and assets of spouse and the state of the law in making decisions as to how much if any goes to the credit share. Spouse may disclaim it all if concerned that repeal will be temporary (and spouse won't die in 2010) or disclaim nothing if believes repeal will be permanent.

Problems with Disclaimer:

- a. unwillingness or inability of spouse to disclaim and benefits can be lost
 - b. acceptance of benefits before an opportunity to counsel regarding disclaimer
 - c. spouse can't have a limited power of appointment in disclaimer trust
 - d. opens up availability to creditors
 - e. possible effect on eligibility for federal/state benefits
2. Divisible QTIP. Give everything to a QTIP and give the trustee right to divide the QTIP to take best advantage of estate tax exemption, GST exemption, marital deduction and spousal basis increase. This only works when it is desired for the entire estate to benefit surviving spouse. This avoids most of the problems with the disclaimer; the Trustee makes decision, not the spouse; and the Trustee has 15 months instead of 9 months to make decision.
3. Clayton QTIP. A variation on the single divisible QTIP is the "Clayton QTIP" in which the estate passes to a QTIP only to the extent the Personal Representative elects for it to qualify. The non-elected portion of the trust is held in a different trust, on terms that don't qualify for marital deduction (presumably a trust that sprinkles income among spouse and descendants or only descendants). Even though the non-elected portion passes to a trust which doesn't qualify for the marital deduction, the remainder of the QTIP will qualify. See Regulation 20.2056(d)(3) which approves of this technique. Unlike the divisible QTIP, this approach gives the fiduciary the power to actually shift beneficial interests.

Advantages of Clayton approach over disclaimer trust or divisible QTIP:

- a. Fiduciary makes the decision - doesn't depend on spouse to go along with the plan or ability of spouse (or the spouse's estate) to make disclaimer.
- b. Have up to 15 months to make the decision instead of 9 months - more time to analyze info.
- c. Because the trust that doesn't qualify for marital deduction can be designed in any fashion, greatly increases flexibility.
- d. Spouse can have a limited power of appointment in the non-elected trust.

- e. Doesn't increase estate of spouse with income that was required to be distributed as in divisible QTIP.
- f. Avoid gift tax in getting benefits to descendants during surviving spouse's lifetime

Disadvantages:

- a. Lose Section 2013 credit. If have divisible QTIP and spouse dies within 10 years, it qualifies for Section 2013 credit because spouse receives all the income on the nonelected part. Most Clayton QTIPS would give non-elected portion to a sprinkle trust which doesn't qualify for Section 2013 credit (of course, if the estate pays no estate tax on death of first spouse, this is immaterial).
- b. Clayton QTIP may exacerbate elective share problems - (see below).
- c. Surviving spouse shouldn't be the Personal Representative with the power to shift beneficial interests between family members by holding right to make QTIP election due to the huge potential for a conflict of interest. Because all goes to the same trust in a divisible QTIP, not a problem for spouse to be Personal Representative.
- d. Same problem with beneficiary of the non-elected share being the sole fiduciary making this decision. If don't have disinterested Trustee, maybe give existing fiduciary the right to name independent fiduciary solely for this purpose.

C. Reverse QTIP

If reverse QTIP planning was desired prior to the 2001 Act, it will still be needed, even after 2004 when the estate tax credit and the GST exemption become equal. It is very possible that some of the estate and gift tax credit will be used on non-generation skipping transfers during life, or that GST exemption will be allocated to annual exclusion gifts, or that non-GST bequests at death will be made.

D. Flexibility - Fiduciary Powers and Exonerations

Need to build in flexibility to deal with changes, such as using any or all of the following:

1. Durable Power of Attorney - giving right to amend/create trust, make gifts, fund revocable trust, etc. as allowed under state law.
2. Give powers to Trustee to take into account changes in tax law that will allow Trustee to shift beneficial interests to approximate overall testamentary intent, alter or amend trust, and distribute principal from trust during repeal to utilize basis increase.
3. Give Trustee (or someone else) right to collapse or terminate trusts if estate tax is repealed.
4. Powers to deal with carryover basis.
5. [Vanishing marital deduction.] - See suggested clause in *Journal of Taxation* article, page 85.

However, the big issue is who can or should be the fiduciary with all these powers. Do we need an independent fiduciary? What about power to appoint independent fiduciary? Need to consider exoneration provisions for the fiduciary because flexibility can expose fiduciary to potential liability.

E. Impact of State Death Tax Credit

1. Effect of the Changes
 - a. Merely because the federal estate tax exemption is increased does not mean that any state death tax exemption automatically will be made equal to that exemption amount unless the state has a [pickup] or [sop] estate tax. Many states, such as Florida and California, have such a pickup tax system. In such states, the death tax exactly equals the amount allowable as the state death tax exemption under Sec. 2011. That means, in those states, that the state death tax exemption essentially increases as the federal exemption increases. Similarly, in those states, the state death tax will decline as the state death tax credit under Sec. 2011 is reduced from 2002 to 2004. It also means that such states will cease imposing state death tax when the state death tax credit under Sec. 2011 expires for years after 2004. (Nevertheless, it is appropriate,

perhaps, to note that the state death tax credit will be restored for those dying after 2010, so that barring a change in the state death tax system the "pickup tax" states will again collect state death tax beginning in 2011.)

- b. Not all states are pure pickup tax states. In New York, for example, the state death tax is equal to the section 2011 credit but only based upon the Internal Revenue Code provisions as they existed before the 2001 Act. Hence, New York probably will take the position that its estate tax is equal to the state death tax credit in effect under the Internal Revenue Code as it existed before the 2001 Act. Furthermore, New York probably will attempt to continue to impose its state death even after the state death tax credit is entirely phased out and after the Federal estate tax itself has been repealed. Similarly, states that impose an inheritance tax presumably will continue to impose that tax regardless of the phase out of the state death tax credit and repeal of the Federal estate tax.
- c. If a state has a pure pickup tax system, the phase out of the state death tax credit will not affect the amount of the total death tax paid. The portion that under prior law would have been paid to the state will now be paid instead to the Federal government. However, because a larger portion (or all) of the state death tax will be paid to the Federal government in such cases, the deduction allowed under Sec. 691(c) to the person who must include an item of income in respect of a decedent in gross income for the net Federal estate tax paid will increase.
- d. In states that impose an independent state death tax, overall taxes may increase. For example, if New York, as suspected, will continue to impose a state death tax equal to the full credit allowable under Code Sec. 2011 prior to 2002, it could impose a 16% death tax. An individual's estate could in 2002 face a 50% Federal estate tax of which only 12% would be allowed as a credit under Code Sec. 2011. Hence, the Federal government would receive up to 38% of the estate tax and New York would receive 16%, bringing the total to 54%, which is one percent lower than the "top" current Federal rate (although a portion of the estate may face a 60% rate) and 4% above the top Federal rate for 2002 of 50%. It should be noted that today the combined Federal and New York death taxes can equal but not exceed the top Federal rate. In 2005, the first year when the state death tax credit will be entirely phased out, the Federal rate can reach 47%. If the estate also faced a 16% New York estate tax, which would then be allowed as a

deduction against the Federal estate tax, the combined top rate would be 55.48%. The following represents the combined marginal tax rates for the Federal estate tax and state tax in a state with a pickup tax that freezes the state death tax at the Federal credit amount applicable prior to the 2001 Act:

2002	54%
2003	57%
2004	60%
2005	55.48%
2006	54.64%
2007	53.8%
2008	53.8%
2009	53.8%
2010	16%

- e. Even individuals who reside in states that have a pure pickup tax may be affected by independent state death taxes. Real and tangible property having a situs in a state with an independent state death tax is taxed by that state even if the decedent's domicile is in another state. This suggests that action should be taken to change the nature of property from real or tangible personal property to an intangible in an attempt to avoid tax by the state in which the property is situated if that state has an independent death tax system. Action steps may include transferring the property to a corporation, a partnership or a limited liability company. Perhaps, a "tax neutral" entity will be preferred. Indeed, an entity that is ignored for Federal income tax purposes (such as a single member LLC) may be best of all. Nevertheless, consequences of the transfer should be considered. For example, a transfer may require the consent of a person or entity having a lien on the property (or the underlying debt may be accelerated) or may cause the base of real property taxation to change or may attract a tax itself. Also, some property may not be permitted to be transferred by reason of contract - such as a condominium bylaw or a right to purchase.

2. Drafting Issues

- a. At a minimum, formulas that specifically identify all the factors that impact the amount that can pass tax free due to credits allowed to the estate instead of utilizing the short form will need to be checked to make sure the language still works when credit is replaced by a deduction. Does reference need to be made to new Section 2058?
- b. In addition, the presence of an independent state death tax may suggest changes in drafting testamentary documents. For example, some states may have smaller death tax exemptions than the Federal law allows. Hence, dividing a married person's estate into credit shelter share and a marital deduction portion where the marital deduction portion is equal to the minimum amount needed as the Federal marital deduction in order to reduce the Federal estate tax to zero may mean there is state death tax payable that could have been avoided if the state marital deduction portion were larger. In New York, for example, the state exemption in 2002 probably will be only \$700,000 (see Sec. 2010(c) as in effect before the 2001 Act.) Hence, if the estate of a married person (who has never made any taxable gifts) is divided into a \$1 million credit shelter share (the amount of Federal exemption equivalent for 2002) and a marital deduction share, New York, in effect, will impose state death tax on \$300,000. But the ramifications do not stop there. The New York estate tax payable is the equivalent of an additional taxable bequest reducing the amount of allowable Federal exemption. A "proper" formula provision will cause the burden of the state tax to fall on the credit shelter share so the Federal marital deduction amount is not reduced. A reduction in the Federal marital deduction would cause Federal tax to be payable.
- c. On the other hand, paying a relatively small state death tax may be preferable to losing part of the Federal estate tax exemption. This could happen if a formula requires the marital deduction to be an amount to reduce all estate tax to zero. If it is desired to avoid all estate tax at the death of the first spouse, then the formula provision needs to provide for the marital share to be the greater of (1) the minimum amount necessary to reduce the Federal estate tax

to its minimum or (2) the minimum amount necessary to reduce the state death tax to its minimum. Although that may sound simple in theory, it may be challenging in some cases because different states use different concepts of marital deductions or marital exemptions. Also, some states have additional requirements for property to qualify for a marital exemption. In Connecticut, for example, a pure QTIP will not qualify - the spouse must have a general power of appointment for the property to qualify for that state's death tax marital exemption. It should be kept in mind again that some estates will be exposed to state death tax systems that have different marital exemption systems than does the Federal government because the decedent owned real or tangible property in that jurisdiction even though he or she was not domiciled there at death.

- d. Another possible strategy is to divide the estate into the credit shelter and marital deduction portions based upon Federal estate tax concepts but then divide the credit shelter portion itself into state exemption and state marital deduction portions with the split off state marital deduction share having terms that will qualify for the state marital deduction. This may preserve the full use of the Federal exemption equivalent although presumably a portion will now be devoted only to the spouse during the remainder of his or her lifetime. This is the same concept suggested above to split a credit shelter share when a cap on the credit shelter share is desirable to ensure sufficient funds be available to the surviving spouse. Here the split is based on the state exemption amount. Nevertheless, if the state death tax exemption allows a marital deduction only if the surviving spouse receives the property outright or has a general power of appointment over it, the Federal exemption equivalent will not have been preserved for that portion.
- e. Using the larger state marital deduction does not necessarily mean the estate of the surviving spouse will be subject to state death tax upon the assets that qualified for the state marital deduction in the estate of the spouse first to die. Except, perhaps, for real and tangible personal property located in that state when the surviving spouse dies, the surviving spouse probably can avoid all state

death tax on the property by changing domicile before death to another state.

F. Effect of Elective Share on Planning

1. As the exemption amount increases, standard planning will increase the credit shelter share and decrease the marital share. Even in cases in which the marital share is given outright to the spouse, the possibility of a spouse electing against a will will also increase, particularly if the credit shelter share provides for distributions to be sprinkled among the spouse and descendants. How this works will differ with the elective share laws of every state. In states like Florida that require the elective share to be satisfied first by the dispositions in the will (or revocable trust), the important consideration is how an interest in a trust (credit shelter or marital) is valued.
2. As an example of the importance of the exemption increase, the table below shows the threshold size of estate below which a standard credit shelter/marital QTIP plan designed to eliminate all taxes will not yield a QTIP of sufficient size to preclude an elective share election. Although the value of an interest in a trust in some states is an actuarial determination based on the age of the spouse at the death of the first spouse, in Florida there is an arbitrary percentage valuation based upon the terms of the trust. If the trust gives the spouse the right to income without any power in the Trustee to invade the principal of the trust for the spouse's benefit, the trust counts at 50% towards satisfying the elective share. With an invasion power in addition to the right to receive income, the trust is counted at 80%.

Table I - QTIP Counts at 80%

Exemption Amount	Amount of Estate
675,000	1,080,000
1,000,000	1,600,000
1,500,000	2,400,000
2,000,000	3,200,000
3,500,000	5,600,000

3. In other words, in an optimum marital deduction standard plan where 80% of the QTIP counts, estates of less than \$5,600,000 can have a likelihood of an elective share election in 2009 whereas estates in 2001 of at least \$1,080,000 were exempt from that concern. If the QTIP counts at only half its value, the size of estate that can be affected greatly increases.

Table II - QTIP Counts at 50%

Exemption Amount	Amount of Estate
675,000	1,667,500
1,000,000	2,500,000
1,500,000	3,750,000
2,000,000	5,000,000
3,500,000	8,750,000

4. In some cases, a credit shelter trust that gives all income to the spouse may help satisfy the elective share. Therefore, elective share concerns may affect the design of the credit share and certainly needs to be considered with regard to the split between marital and credit shares.

II. Year (or Years) of Repeal

A. Will alternate dispositions be used?

There have been some suggestions that documents drafted now to deal with the 2001 Act should contain one set of provisions for years in which there is an estate tax and an entirely different set of provisions to cover death at a time when there is no estate tax. Because of the uncertainty of what the tax laws will be in the future and whether repeal will ever happen, many planners (and clients) don't feel the need to go to the expense of doing so. If documents will **NOT** have alternate dispositive provisions, then two things still need to be considered:

1. How does the formula (if any) used work if there is no estate tax? Most formulas will operate to give all to one share or the other. If the formula carves out and puts into a bypass trust the amount that can pass tax free due to the credit allowed to the estate with the residue going to the QTIP or spouse outright, when there is no credit to be allowed to the estate the entire estate may go to the surviving spouse. On the other hand, if the carve out is defined in terms of the marital deduction, then everything may pass to the bypass trust. Make sure in the document what is to happen so that it's not by accident, which may produce misunderstanding and possible litigation (including against the drafter of the document).
2. If repeal is not to be covered, make sure you have documented that in writing to the client. You should communicate the need for review and possible revision of the estate plan. See appendix for sample language to be included in the letter to a client.

- B. How much needs to be done to anticipate the advent of carryover basis?
1. Most clients will not want to deal with this now, but some direction to the fiduciary authorizing allocation of the increased basis amounts may be appropriate. See clause at pg. 88 of the *Journal of Taxation* article.
 2. Although the utilization of the \$1.3 million basis increase and the \$3 million spousal property increase is certainly not the most important consideration in designing the rest of the estate plan, it is at least appropriate to note that:
 - a. A devise to a general power of appointment marital trust will not qualify for the \$3 million spousal property basis increase; and
 - b. Property held in a QTIP trust will not qualify to utilize the surviving spouse's \$1.3 basis increase.

The following is an example of a fractional share formula clause that contains a fractional share cap on the amount of the nonmarital share, determined by applying a pecuniary cap as the numerator of the fraction and the residuary estate as the denominator:

B. Estate Tax Exemption Share. The "Estate Tax Exemption Share" shall be a fractional share of my Residuary Estate.

(1) The numerator of the fraction shall equal the lesser of the following:

(a) the largest value of my Residuary Estate that can pass free of federal estate tax by reason of the unified credit and the credit for state death taxes, to the extent the use of such credit does not increase state death taxes, allowable to my estate. This value shall be determined after being reduced by reason of my adjusted taxable gifts, all other dispositions of property included in my gross estate for which no deduction is allowed in computing my federal estate tax, and administration expenses and other charges to principal that are not claimed and allowed as federal estate tax deductions; and

(b) one million three hundred thousand dollars (\$1,300,000). I recognize that by selecting one million three hundred thousand dollars (\$1,300,000) as the numerator of this fraction, I may, in some cases, increase the estate taxes due at my *spouse*'s death, but I choose to impose this limitation on the Estate Tax Exemption Share in order to assure that my *spouse* receives an amount that I believe to be sufficient.

(2) The denominator of the fraction shall equal the value of my Residuary Estate.

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APPENDIX 1

The following is an example of a fractional share formula clause that contains a true fractional share cap on the amount of the nonmarital share:

B. Estate Tax Exemption Share. The "Estate Tax Exemption Share" shall be a fractional share of my Residuary Estate.

(1) The numerator of the fraction shall equal the smaller of:

(a) the largest value of my Residuary Estate that can pass free of federal estate tax by reason of the unified credit and the credit for state death taxes, to the extent the use of such credit does not increase state death taxes, allowable to my estate. This value shall be determined after being reduced by reason of my adjusted taxable gifts, all other dispositions of property included in my gross estate for which no deduction is allowed in computing my federal estate tax, and administration expenses and other charges to principal that are not claimed and allowed as federal estate tax deductions; and

(b) an amount equal to one-half (1/2) of the value of my Residuary Estate. I recognize that leaving only one-half (1/2) of my Residuary Estate as the Estate Tax Exemption Share may, in some cases, increase the estate taxes due at my *spouse*'s death, but I choose to impose this limitation on the Estate Tax Exemption Share in order to assure that my *spouse* receives an amount that I believe to be sufficient.

(2) The denominator of the fraction shall equal the value of my Residuary Estate.

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The following is an example of a clause that creates (1) a family nonmarital share to be held in trust for the benefit of family members other than the surviving spouse; (2) a spousal nonmarital share to be held in trust for the benefit of the surviving spouse; and (3) a marital share. This clause also contains an arbitrary cap on the amount of the family nonmarital share.

A. If My [Spouse] Survives Me. Upon my death, if my [spouse] survives me, my Residuary Estate shall be divided into three shares, pursuant to the formulae set forth below. The [Family Nonmarital Share] shall be held under the article entitled [Trust for My Descendants]. The [Spousal Nonmarital Share] shall be held under the article entitled [Nonmarital Trust for My *Spouse*]. The [Marital Share] shall be held under the article entitled [Marital Trust].

B. If My [Spouse] Does Not Survive Me. Upon my death, if my [spouse] does not survive me, my Residuary Estate shall be under the article entitled [Trust for My Descendants].

C. Formula for Division of the Residue of My Estate. If my [spouse] survives me, the shares of my Residuary Estate shall be determined according to the following formulae:

(1) The [Family Nonmarital Share] shall be a fractional share of my Residuary Estate.

(a) the numerator of the fraction shall equal to the lesser of:

(i) One million three hundred thousand dollars (\$1,300,000); and

(ii) the largest value of my Residuary Estate that can pass free of federal estate tax by reason of the unified credit and the credit for state death taxes, to the extent the use of such credit does not increase state death taxes, allowable to my estate. This value shall be determined after being reduced by reason of my adjusted taxable gifts, all other dispositions of property included in my gross estate for which no deduction is allowed in computing my federal estate tax, and administration expenses and other charges to principal that are not claimed and allowed as federal estate tax deductions.

(b) The denominator of the fraction shall equal the value of my Residuary Estate.

(2) The [Spousal Nonmarital Share] shall be a fractional share of my Residuary Estate.

The following language should produce the smallest nonmarital share sufficient to receive a \$1.3 million aggregate basis increase:

B. Nonmarital Share. The [Nonmarital Share] shall be a fractional share of my Residuary Estate.

(1) The numerator of the fraction shall equal the smallest value of the assets of my Residuary Estate to which my Personal Representative can allocate the entire aggregate basis increase allowed under federal income tax laws for property not acquired by a surviving spouse; and

(2) The denominator of the fraction shall equal the value of my Residuary Estate.

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APPENDIX 4

The following language should produce the largest nonmarital share that will absorb a \$1.3 million aggregate basis increase:

B. Nonmarital Share. The [Nonmarital Share] shall be a fractional share of my Residuary Estate.

(1) The numerator of the fraction shall equal the largest value of those assets of my Residuary Estate in which the difference between the fair market value on the date of my death and the adjusted basis for federal income tax purposes in which shall be equal to the aggregate basis increase allowed under federal income tax laws for property not acquired by a surviving spouse; and

(2) The denominator of the fraction shall equal the value of my Residuary Estate.

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The following language should produce a fairly representative selection of assets:

B. Nonmarital Share. The [Nonmarital Share] shall be a fractional share of my Residuary Estate.

(1) The numerator of the fraction shall equal the value of the assets of my Residuary Estate to which my Personal Representative can allocate the entire aggregate basis increase allowed under federal income tax laws for property not acquired by a surviving spouse; and

(2) The denominator of the fraction shall equal the value of my Residuary Estate.

(3) My Personal Representative shall select the assets that shall constitute the Family Share in manner such that the adjusted basis for Federal income tax purposes of any property allocated to the Family Share shall be fairly representative of the adjusted basis of all property available for such allocation (excluding, for this purpose, any property to which my Personal Representative cannot validly allocate any of the aggregate basis increase under Federal income tax law).

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APPENDIX 6

REPEAL DISCLAIMER

As we have discussed, your documents do not take into account the possible repeal of the estate tax in 2010. Because of the uncertainty that the repeal will ever take effect, you did not deem it necessary to provide for that eventuality at the present time. However, I urge you to keep abreast of the status of the estate tax laws, and if it appears that the repeal may actually occur, you would need to modify your documents accordingly.

APPENDIX 7