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RE-EVALUATING THE QTIP TRUST FOR THE SECOND MARRIAGE COUPLE By Randy Spiro

John and Mary have entered their marriage with relatively equal assets, but each of them has children by a prior marriage. Their attorney recommends a QTIP Trust which says that when one of them dies that spouse's share of the assets become irrevocable and the survivor receives the income for life from that portion. When both spouses die the survivor's portion passes to the survivor's children and the first spouse to die's portion passes to the first spouse to die's children.

The attorney says that on the first spouse to die's portion, the survivor can be sole trustee or the survivor and a representative of the first spouse to die's side can be co-trustees. The attorney says that on the first spouse to die's side the survivor can be given a right to receive principal for her health, education, support and maintenance.

A second attorney has suggested that the QTIP arrangement be scrapped, that on the first spouse to die's death that spouse's children receive the present value of the right to receive the first spouse to die's share of the assets at the survivor's later death. If the survivor has a life expectancy of ten years and if the prevailing interest rate is 5% and if we know the value of the first spouse to die's assets at the first spouse to die's death, we can calculate the value at such time of the right to receive those assets as of the survivor's later death.

Mary says she doesn't like the idea of stripping herself of a large portion of the assets at John's death. But the QTIP arrangement also has a down side. Mary may feel she will be the surviving spouse and that therefore the survivor should be the sole trustee over the first spouse to die's portion and that the Trustee should be able to make distributions from the principal of the first to die's share for the survivor's true needs. John, believing he will be more likely to die first, opposes making the survivor the sole trustee or granting the survivor principal invasion rights on the first spouse to die's portion. His concern is that there may be little left for his children when Mary dies after him.

Mary must also understand that under the QTIP arrangement, John's children will be able to see the trust. From this they will learn what the restrictions are imposed on Mary. They may even hire an attorney to advise them.

John's children will likely request an accounting from Mary on John's portion as frequently as the law allows. This accounting will show the principal distributions to Mary, assuming the trust allows for this, and John's children may go to court to challenge these distributions if they believe Mary took more than she should have.

From the accounting John's children will learn how their father's share of the assets has been invested. They may go to court to challenge the specific investments and/or to sanction Mary if the assets have gone down in value.

If John's children bring court actions against Mary, challenging her actions as Trustee, Mary will ask her counsel whether those actions can be interpreted as violating the no contest clause in the trust. Anticipating this, and if state law allows, John's children may file a declaratory relief action in which they ask the court for an advanced ruling that their proposed petition is not a contest.

In the face of the above, John and Mary may conclude that "paying off" John's children at John's death, so that Mary can hold the remaining assets in her revocable trust is worth a second look.