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REPORT ON LEGISLATION BY THE
ESTATE AND GIFT TAXATION COMMITTEE AND THE
TRUSTS, ESTATES AND SURROGATE'S COURTS COMMITTEE

A.6556-A **M. of A. Weinstein**
S.4851-A **Sen. Bonacic**

AN ACT to amend the tax law, in relation to the estate tax treatment of dispositions to surviving spouses who are not United States citizens

THIS BILL IS APPROVED

This memorandum is offered by the Estate and Gift Taxation Committee and the Trusts, Estates and Surrogate's Courts Committee of the New York City Bar Association in support of A.6566-A/S.4851-A, which would amend §951 of the New York Tax Law by adding a new subsection (c).[1] The Committees support the proposed amendment for the purpose of (1) reducing legal and administrative expenses and (2) simplifying the procedure for obtaining a marital deduction for a disposition to a non-US citizen surviving spouse where no federal estate tax return is required.

BACKGROUND

In order for a disposition to a non-US citizen surviving spouse to qualify for the federal marital deduction, the disposition must pass in a Qualified Domestic Trust ("QDOT"), which results in a deferral of estate tax until the death of the surviving spouse.[2] For federal tax purposes, distributions of principal from the QDOT to the surviving spouse are subject to estate tax. However, there is no corresponding New York tax imposed on such distributions.

If a federal estate tax return is required under federal law, the taxable estate shown on that return is used as a starting point for computing the New York State estate tax-imposed by Tax Law §952. However, if no federal estate tax return is necessary (i.e. if the estate is below the federal estate tax exclusion amount), the taxpayer is required to complete a pro-forma federal estate tax return for purposes of computing the New York State estate tax. Because the federal estate tax exclusion amount is currently $5,250,000 and the New York State exemption is $1,000,000, estates

[1] A.6566-A/S.4851-A has been amended to include a a three year sunset provision. Although the Committee does not view the sunset provision as necessary, we nonetheless support the bill and urge its passage this legislative session.

[2] Internal Revenue Code §2056(d)

above $1,000,000 and below $5,250,000 have a New York filing requirement without a corresponding federal filing requirement.

Because under current law, the New York marital deduction will not be granted unless the appropriate elections are made on the pro forma federal Form 706, the estate of a New York decedent who is survived by a non-citizen spouse must meet *federal estate tax* requirements to obtain a marital deduction. This includes creating a QDOT even though there is no federal estate tax due and despite the fact that New York does not require a QDOT in order to obtain the New York estate tax marital deduction for bequests to a non-citizen surviving spouse. The need to create a QDOT that is unnecessary for new York purposes imposes a significant burden on estates with non-citizen surviving spouses, including adding legal expenses and significant administrative costs (particularly where a bank is trustee, a requirement in some situations). Indeed, because the QDOT is not a requirement for obtaining a New York estate tax marital deduction for bequests to a non-citizen spouse, it may be terminated and distributed to the surviving spouse almost immediately after its creation without any New York State estate tax consequences.

PROPOSED LEGISLATION

The proposed legislation provides that, where a federal estate tax return is not required to be filed, it is not necessary to create a QDOT in order to obtain the New York State estate tax marital deduction for transfers to a non-citizen spouse if the disposition would otherwise qualify for the federal estate tax marital deduction.

For the foregoing reasons, the Committees support this bill and urge its enactment.

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