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QUALIFIED SMALL BUSINESS STOCK

QSBS Stacking: Triple the Exclusion for Married Couples

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This Estate Planning article introduces a novel estate planning strategy allowing married couples to triple their Qualified Small Business Stock capital gains exclusion by using two complementary non-grantor trusts which are each treated as separate taxpayers.

INTRODUCTION TO QSBS STACKING FOR MARRIED COUPLES

Section 1202 of the Internal Revenue Code (IRC) provides a substantial tax incentive for founders and executives owning Qualified Small Business Stock (QSBS) in a qualifying "C" corporation.

For QSBS stock issued *prior to* July 4, 2025, if the stockholder was issued stock in a QSBS-eligible corporation[1] and held the stock for at least five years, the stockholder may exclude up to $10 million of long-term capital gains (or 10x basis, if greater) upon the sale of the QSBS stock. At the state level, except for a few states (most notably, California), most states also conform to the QSBS rules (such that the sale of QSBS stock does not result in either federal *or* state income tax with respect to the $10 million of excluded QSBS gains). Relevant to this article, it is important to note that (i) a married couple does *not* receive two exclusions, but just a *single* $10 million exclusion, regardless of whether they file separately or jointly,[2] and (ii) gifts from individuals to other individuals or trusts preserve QSBS eligibility and "tack" the holding period for purposes of the five-year rule.[3]

For QSBS stock issued *on or after* July 4, 2025, the QSBS benefits were significantly expanded due to the enactment of the One Big Beautiful Bill Act (OBBBA). Specifically, a stockholder enjoys (i) an increased exclusion from $10 million to $15 million, indexed for inflation (or 10x basis, if greater), and (ii) a shorter required holding period (i.e., beginning at year three, partial vesting of the QSBS benefits commences, such that no longer must the stock be held for a strict five-year period to enjoy QSBS benefits).[4]

In this article, the authors propose a novel structure for married couples that *triples* their QSBS exclusion (from $10 million to $30 million; or, in the case of QSBS stock issued after July 4, 2025, $15 million to $45 million), with seemingly little downside.

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Of course, stacking QSBS exclusions is not a new concept and, over the years, many QSBS stacking structures have been developed, most notably (i) incomplete non-grantor trusts (ING Trusts), (ii) irrevocable separate share non-grantor trusts for children and siblings, and (iii) the non-grantor charitable lead trust (NGCLT). As detailed below, however, each of these approaches are far inferior to the novel "dual spousal trust stacking structure" proposed in this article. This is due primarily to the fact that, with the proposed structure, *both spouses continue to maintain substantially the same access, control, and parity over the QSBS stock (and sale proceeds).* Specifically, the spouses enjoy the rights to (i) receive distributions from the trusts, (ii) direct the Trustee regarding investments (including the vote of the QSBS stock), (iii) gift assets to family members, (iv) donate the assets to charity, and (v) amend the beneficiaries who inherit after the spouses' deaths. And critically, in the event of a divorce, the former spouses enjoy near-perfect tax and economic parity. Altogether, there seems to be little downside of married couples utilizing this unique structure to stack QSBS exclusions.

To begin, we will detail, compare, and contrast the two complementary spousal trust vehicles: (1) an inter vivos non-grantor QTIP trust (Non-Grantor QTIP Trust); and (2) a spousal lifetime access non-grantor trust (SLANT). Structured properly, each of the two spousal trusts is treated as an additional taxpayer entitled to claim their own additional QSBS exclusion under IRC Section 1202.[5] Next, we will demonstrate that the dual spousal trust structure is far superior to existing QSBS stacking vehicles, as well as address perceived risks (specifically, the reciprocal trust doctrine and IRC Section 643(f) aggregation). Finally, we will provide a simple case study to illustrate how the structure works from practical, real-world standpoint.

The Inter Vivos Non-Grantor QTIP Trust

The Non-Grantor QTIP Trust is built on the framework of IRC Section 2523(f) which permits one spouse to transfer assets (i.e., QSBS stock) to an irrevocable trust for the other spouse. By timely making a QTIP election on a federal gift tax return, the chief benefit of a QTIP Trust is that the gift does not utilize any federal lifetime gift tax exemption (due to the unlimited gift tax marital deduction), although the QTIP Trust assets are still included in the beneficiary-spouse's taxable estate at death.

> Section 1202 of the Internal Revenue Code (IRC) provides a substantial tax incentive for founders and executives owning Qualified Small Business Stock (QSBS) in a qualifying "C" corporation.

To qualify for QTIP treatment, the two primary requirements are (i) the Trustee must pay all annual income of the trust to the beneficiary-spouse, and (ii) no other individuals or charities may receive distributions from the QTIP Trust until after the beneficiary-spouse's death (although the beneficiary-spouse may retain a testamentary limited power of appointment to appoint assets at death to any persons or charities, other than their estate or creditors of the estate).[6]

In addition to the QTIP requirements, there are added requirements to qualify for QSBS stacking. Specifically, the QTIP Trust must be treated as a *non-grantor trust* with respect to *corpus* (even though the QTIP Trust is treated as a *grantor trust* with respect to its annual *income).*[7] This requires the drafting attorney to possess an expert understanding of the byzantine grantor trust rules in IRC Sections 671-677 (which are normally triggered when a spouse retains benefits in an irrevocable trust created by the other spouse).

To satisfy both the QTIP *and* QSBS trust requirements, the Non-Grantor QTIP Trust should be structured as follows (in addition to ensuring that none of the traditional grantor trust powers are included in the document, i.e. power to substitute assets; power of Trust Protector to add or alter beneficiaries; and power to apply income to premiums on policies insuring the spouses' lives):

Directing Investments in Fiduciary Capacity. Either or both spouses should serve as "directing investment advisor" (DIA) to control the investments of the QTIP Trust, but this power must expressly be held in a fiduciary capacity.[8]

Power to Vote QSBS Stock. As DIAs, the spouses may generally direct the Trustee regarding the vote of the QTIP Trust's shares. However, if the family (including the QTIP Trust) collectively owns more than 20% of the voting shares in the corporation,

IRC Section 2036(b) must also be addressed (as discussed in the SLANT section below).[9]

Distributions of Income. All income must be payable to the beneficiary-spouse, at least annually. The beneficiary-spouse should also be given the power to force the Trustee to make assets productive.

Distributions of Principal.

- An independent Trustee (such as a trust company) may distribute principal to the beneficiary-spouse in an unlimited amount.[10]
- If the Trustee is a "related or subordinary party" within the meaning of the Tax Code[11] (i.e., a parent, sibling, child, or employee of either spouse), distributions of principal to the beneficiary-spouse must be limited to an ascertainable standard.[12]
- In any event, the trust must provide that no distribution of principal to the beneficiary-spouse may occur without the prior consent of an "adverse person"[13] which is an individual with a substantial beneficial interest in the trust. In the case of the Non-Grantor QTIP Trust, this includes a family member who is either initially named (or irrevocably

appointed) as a remainder beneficiary of the Non-Grantor QTIP Trust (perhaps pursuant to the beneficiary-spouse's exercise of his or her testamentary limited power of appointment over the Non-Grantor QTIP Trust).

Loans. As DIA, the spouses may direct the Trustee to lend trust principal back to themselves. However, the trust agreement must require that any such loan bear adequate interest and adequate security (collateral).[14]

The Non-Grantor QTIP Trust is built on the framework of IRC Section 2523(f) which permits one spouse to transfer assets to an irrevocable trust for the other spouse, utilizing the unlimited gift tax marital deduction.

Early Termination. With the consent of a designated family member,[15] an independent Trustee may terminate the Non-Grantor QTIP Trust and distribute the assets to the beneficiary-spouse.

Trustee. Although neither spouse may serve as Trustee of the Non-Grantor QTIP Trust,[16] (i) any other person (including a family member) may be named as Trustee, and (ii) the spouses may retain the power to remove the Trustee, with or without cause, and nominate a non-related, non-subordinate independent Trustee.[17] Consider:

- *Before the QSBS shares are sold*, the Trustee has a limited role since the sale and vote of the Non-Grantor QTIP Trust's shares are directed by one or both spouses as DIA (subject to IRS Section 2036(b) considerations discussed above); and
- *After the QSBS shares are sold*, the Trustee's role is limited to (i) being named on the Non-Grantor QTIP Trust's bank account holding the cash proceeds from the sale of the stock, (ii) paying all annual income to the beneficiary-spouse, and (iii) satisfying any requests from the beneficiary-spouse for discretionary payments from principal.

Distribution at Death. At death, the beneficiary-spouse should be conferred a testamentary limited power of appointment to appoint the Non-Grantor QTIP Trust assets to any persons or charities (other than to his or her estate or creditors of the estate). The Non-Grantor QTIP Trust rules require that the Non-Grantor QTIP Trust assets be included in the beneficiary-spouse's taxable estate at death and potentially subject to federal estate tax;[18] however, if all of the Non-Grantor QTIP Trust assets were distributed to the beneficiary-spouse prior to death, the assets might be gifted from the beneficiary-spouse to other irrevocable trusts to avoid estate inclusion.[19]

The SLANT (Spousal Lifetime Access Non-Grantor Trust)

A SLANT is a non-grantor trust variant of the traditional spousal life access trust (SLAT).

Both SLATs and SLANTs are irrevocable trusts funded by one spouse for the benefit of the other spouse and typically structured as "generation-skipping dynasty trusts" to permanently exclude the assets from the federal estate tax. However, a SLANT includes additional restrictions to avoid "grantor trust" classification under IRC Sections 671-677 (which is required to qualify the SLANT for a "stacked" QSBS exclusion).

In drafting the SLANT, the terms should generally include most of the features of an "optimized" gift trust with SLAT provisions (the reader is encouraged to review the author's previous article on this topic).[20] However, to cause the SLANT to be treated as a "non-grantor trust", the SLANT should incorporate similar restrictions discussed above with respect to the Non-Grantor QTIP Trust, specifically:

- Trustee restrictions (i.e., neither spouse may serve as Trustee);
- Restrictions on principal distributions to the beneficiary-spouse (i.e., no distribution of principal to the beneficiary-spouse without the prior consent of an "adverse person;" distributions by related or subordinate party serving as Trustee must be limited to ascertainable standard);
- Unless distributions of income are made mandatory (which is permitted, but not recommended so that income can be accumulated and re-invested inside the SLANT), the same restrictions above also apply to distributions of income to the beneficiary-spouse;
- Directed trust restrictions (i.e., must be retained in a fiduciary capacity); and
- Loan restrictions (i.e., loans to spouses must bear adequate interest and adequate security).

Unlike the Non-Grantor QTIP Trust, the SLANT has a few differences:

- The SLANT is not subject to QTIP rules. Therefore, in addition to the beneficiary-spouse being able to possess a *testamentary* limited power of appointment (like the Non-Grantor QTIP Trust), the beneficiary-spouse may also possess this power *during life* so long as (i) the power is limited by a reasonably definite standard (such as HEMS) with respect to non-charitable beneficiaries (i.e., individuals), and (ii) there is no power to add additional beneficiaries to the trust (other than after-born children);[21] and
- If the shares of QSBS stock gifted to the SLANT are held in a "controlled corporation" (i.e., a corporation in which the family owns more than 20% of the stock), care must be taken to avoid IRC Section 2036(b). Specifically, the donor-spouse may not retain the right to vote the SLANT's shares. Ideally, the SLANT should grant this power to an independent non-related, non-subordinate person[22] as a special "Voting DIA" (subject to the spouses' power to remove and replace the Voting DIA). If that is not possible (perhaps due to restrictions in the corporation's bylaws), it may be possible to confer the voting power upon the beneficiary-spouse on the basis that (i) the donor-spouse is not retaining the right to vote the shares, either directly or in conjunction with another person, since the power is held *solely*

by the beneficiary-spouse,[23] and (ii) the beneficiary-spouse qualifies as an "adverse party" vis-à-vis the donor-spouse (since the beneficiary-spouse is a primary beneficiary of the SLANT) which has provided a defense in two of the most important IRC Section 2036 "alter-ego" IRS rulings over the past 30 years.[24]

Comparison of Non-Grantor QTIP Trust and SLANT

In comparing the Non-Grantor QTIP Trust and SLANT, the primary differences are as follows:

- The transfer of QSBS stock to the SLANT uses the federal lifetime gift and GST exemptions (Non-Grantor QTIP Trust qualifies for the marital gift tax deduction);
- A SLANT does not require annual distribution of income to the beneficiary-spouse (Non-Grantor QTIP Trust requires all income to be distributed) and other family members and charities may be named discretionary beneficiaries of the SLANT (QTIP rules require that spouse be the sole beneficiary during life);
- The SLANT beneficiary-spouse may possess a limited power of appointment during life and at death (QTIP rules prohibit appointment during life); and
- The SLANT assets are permanently exempt from the federal estate tax assuming the donor-spouse allocates his GST exemption to the SLANT at the outset (Non-Grantor QTIP Trust assets are required to be included in the beneficiary-spouse's estate at death).

The table in Exhibit 1 neatly illustrates these similarities and differences.

After reviewing the similarities and differences, consider the following observations:

Similar Retained Access & Control. The spouses maintain substantially the same access and control over the Non-Grantor QTIP Trust and SLANT assets as they do with their personal assets. Specifically, the spouses enjoy the rights to (i) continue receiving distributions from the trusts, (ii) direct the Trustee regarding investments (including the vote of the QSBS stock), (iii) gift assets to family members, (iv) donate the assets to charity, and (v) amend the beneficiaries who inherit after the spouses' deaths.

Two Practical Drawbacks and Solutions. At first glance, there are two apparent primary drawbacks, but there are solutions for both issues:

- A third-party must be named as Trustee. However, (i) the Trustee may be anyone other than the spouses, including a family member or close friend, and (ii) the spouses can remove and replace the Trustee at any time.
- Except for mandatory income, discretionary distributions require the prior consent of a family member

Exhibit 1: Comparison of Non-Grantor QTIP and SLANT

	Non-Grantor QTIP	SLANT
Trustee	Anyone (except spouses)	Anyone (except spouses)
Who Can Remove Trustee?	Spouses	Spouses
Who Votes Shares	Spouses	Spouses (or just the beneficiary-spouse if IRC 2036(b) applies)
Income Distributions	Mandatory to beneficiary-spouse (only)	May be mandatory to spouse; if discretionary, distributions require consent of one adverse person; other family members and charities can receive discretionary distributions
Principal Distributions	To spouse only; requires consent of one adverse person	Distributions to spouse requires consent of one adverse person; other family members and charities can receive discretionary distributions
Can Beneficiary-Spouse Gift Assets or Donate *During Life*?	No	Yes (provided HEMS limitation for gifts to individuals)
Can Beneficiary-Spouse Gift Assets or Donate *At Death*?	Yes	Yes
Can Beneficiary-Spouse Change Beneficiaries?	Yes	Yes
Termination of Trust	Need consent of one adverse person	Need consent of one adverse person
Gift Tax At Funding?	No gift tax (marital deduction)	Yes, uses lifetime gift exemption
Estate Inclusion?	Yes	No (permanently exempt)

qualifying as an "adverse person" (i.e., a beneficiary of the trust). However, the spouses can strategically exercise their retained limited powers of appointment to effectively "select" family members they want to qualify as "adverse persons" to authorize the Trustee to make discretionary distributions (or perhaps even terminate, amend, or decant the trusts, although this is not recommended until after expiration of the three-year statute of limitations period to avoid the risk of the IRS disqualifying each trust's bonus QSBS exclusion). Although the IRS recently argued that a taxable gift results when a remainder beneficiary consents to a distribution or termination of a trust,[25] this issue could be mitigated (or altogether avoided) if the beneficiary-spouse were to exercise his or her limited power of appointment in favor of a follow-on trust (to be created at the spouse's death) for the benefit of numerous remainder beneficiaries, including individuals and charities, each of whom would have a "diluted"[26] beneficial interest for gift tax valuation purposes. Any such consent should either be immeasurable from a valuation standpoint, or worst case, within the beneficiary's lifetime federal gift exemption.

Divorce Parity. With most irrevocable spousal trust planning (i.e., SLATs), the attorney needs to be cognizant of the disparities that might result between former spouses in the event of divorce. However, with this dual spousal trust design, the former spouses enjoy near-perfect economic parity. Although there are some differences in each spouse's trust, the benefits and drawbacks arguably offset one another.

In the following sections, we will address commonly raised risks associated with spousal trusts and QSBS stacking.

Superior Design to Other Commonly Used QSBS Stacking Structures

Compared to other commonly-used QSBS stacking trusts, the Non-Grantor QTIP Trust and SLANT combination described above is far superior since (i) the married couple continues to maintain substantially the same access, control and parity over the QSBS stock (and sale proceeds), and (ii) the other QSBS-stacking alternatives lack the same tax and economic benefits and/or require the spouses to part with control and access, as explained below:

ING Trusts: ING trusts have two substantial drawbacks. First, ING trusts pose significant risk that the grantor may not be able to receive assets back from the ING trust since distributions must require the consent of at least three family members (the "distribution committee") and the grantor should not possess any power to remove or replace the distribution committee. Second, unlike a SLANT, an ING trust remains subject to the federal estate tax at the grantor's death, such that the pre-sale discounted value of QSBS stock cannot be leveraged from a federal gift tax and GST tax standpoint.

> A SLANT is a non-grantor trust variant of the traditional spousal life access trust (SLAT), designed to qualify for a 'stacked' QSBS exclusion.

Non-Grantor Charitable Lead Trusts: NGCLTs do not present favorable economics or retained-control characteristics. Specifically, NGCLTs require a substantial amount of the assets to be paid to charities, thereby depleting some or all of the assets returned to the family. Moreover, NGCLTs require the assets to be held for the sole benefit of charity for a lengthy term (to maximize the economic benefits of a NGCLT, the charitable term should be at least 20 years).[27] During this 20-plus year period, the NGCLT is "locked up" since (i) distributions, loans, and swaps of assets between the NGCLT and the grantor and the grantor's family are prohibited due to the "self-dealing" rules,[28] and (ii) the NGCLT funds may not be invested into active businesses operated by the grantor's family due to the "excess business holdings" rules.[29]

Non-Grantor Trusts for Children: Separate share non-grantor trusts created for children, siblings and other family members run the risk of violating the IRC Section 643(f) aggregation rules (discussed below). Moreover, the grantor and the grantor's spouse must forfeit virtually all of their rights over such trusts by virtue of the grantor trust rules. Effectively, QSBS stock gifted to such trusts (and any sale proceeds) are forfeited in favor of family members whose interests cannot be altered by the grantor or a Trust Protector.

Inapplicability of IRC Section 643(f) Aggregation Risk

In determining the number of QSBS exclusions, IRC Section 643(f) empowers the IRS to collapse and disregard multiple trusts and treat them as one (thereby disallowing stacked QSBS exclusions) if the grantors, beneficiaries, and terms of the two trusts are substantially the same and the primary purpose is tax avoidance.

However, the Non-Grantor QTIP Trust and SLANT are significantly different enough in their terms, tax consequences, and beneficial interests that IRC Section 643(f) poses little risk. Specifically:

- In addition to QSBS stacking, there are additional reasons for creating the two trusts, notably (i) creditor protection, (ii) in the case of the SLANT, federal estate tax minimization, and (iii) in the case of the SLANT, setting up a discretionary trust to make gifts (via the beneficiary-spouse's lifetime limited power of appointment) to children, grandchildren and charities.
- The Non-Grantor QTIP Trust beneficiary-spouse receives mandatory income, whereas the SLANT beneficiary-spouse cannot receive any distributions from the SLANT without the consent of an adverse party.
- The Non-Grantor QTIP Trust beneficiary-spouse is the sole beneficiary, whereas the SLANT can have the beneficiary-spouse and other family members and charities as discretionary beneficiaries.
- The SLANT beneficiary-spouse possesses a limited lifetime *and* testamentary power of appointment (allowing the SLANT

beneficiary-spouse to gift and donate SLANT assets at any time), whereas the Non-Grantor QTIP Trust beneficiary-spouse cannot exercise this power until death.

- The SLANT utilizes the donor-spouse's federal gift and GST exemptions, whereas the Non-Grantor QTIP Trust does not.
- The SLANT is permanently exempt from the federal estate tax, whereas the Non-Grantor QTIP Trust is included in the beneficiary-spouse's taxable estate.

Inapplicability of Reciprocal Trust Doctrine

In the case of spousal trusts (i.e., dual SLATs), the so-called "reciprocal trust doctrine" must be considered.[30] Analogous to IRC Section 643(f) but applied in the estate tax context, this doctrine permits the IRS to disregard two interrelated spousal trusts and require estate inclusion at the spouses' deaths if their design results in minimal substantive change to the parties' economic positions. To mitigate audit risk and potential malpractice exposure, attorneys who prepare dual SLATs must aim to differentiate each SLAT's terms, trustees, beneficiary rights, and creation and funding dates to sufficiently alter the spouses' relative powers and economic interests to avoid the application of the reciprocal trust doctrine.

The IRS has generally been unsuccessful in its attempts to apply the reciprocal trust doctrine where dual spousal trusts are (i) not interrelated, (ii) the creators are not in the same economic position, both before and after funding the spousal trusts, and (iii) the spousal trusts do not have "reciprocal trustees" (i.e., husband serves as Trustee of wife's trust and vice versa) unless distributions are limited to an ascertainable standard.[31]

With the proposed dual spousal trust design, the application of the reciprocal trust doctrine should not present an issue. In the case of the Non-Grantor QTIP Trust, the reciprocal trust doctrine should be irrelevant (since the Non-Grantor QTIP Trust is already subject to estate inclusion at the beneficiary-spouse's death). But even in the case of the SLANT, the risk of the doctrine applying should be extremely low for the same reasons discussed above with respect to IRC Section 643(f). As always, however, the analysis is fact-specific, and there is some risk that the IRS could reach a different conclusion in unusual circumstances or if the drafting attorney does not strictly adhere to the terms and design proposed in this article.

Compared to other commonly used QSBS stacking trusts, the Non-Grantor QTIP Trust and SLANT combination … is far superior since the married couple continues to maintain substantially the same access, control, and parity over the QSBS stock (and sale proceeds).

Case Study

Background: Harry (H) and Wendy (W) were issued QSBS-eligible shares in 2019 which they plan to sell for $30 million in an upcoming transaction. Their basis is negligible.

New York Residents: H and W reside in New York City where the top state and local income tax rate approaches 15%. Fortunately, New York conforms to the federal QSBS exclusion.

Status Quo: $7M Tax: If H and W sell the QSBS stock for $30 million, they will exclude $10 million of federal and New York state capital gains. This leaves them with $20 million of long-term capital gains, resulting in a $7 million tax (20% federal rate; 15% New York state rate).

Dual Spousal Trust Structure Eliminates $7M Tax:

- **Non-Grantor QTIP.** H creates a Non-Grantor QTIP for the benefit of W. H funds the trust with one-third of H and W's total shares. The transfer does not utilize any of H's federal gift exemption, assuming a timely QTIP election is made on a federal gift tax return.
- **SLANT.** W creates a SLANT for the benefit of H. W funds the trust with one-third of H and W's total shares. The transfer utilizes a portion of W's federal $13.99 million gift and GST tax exemptions (although this should be minimal considering minority interest discounts for lack of control and marketability). Going forward, the SLANT assets are permanently exempt from federal estate taxes.
- **Trustee.** H's son resides in New York. H and W nominate Son to serve as Trustee of both spousal trusts. Son is also named as one of the remainder beneficiaries of both trusts.
- **No Federal/State Tax On Sale.** Each trust's shares are subsequently sold for $10 million per trust. There is no federal gains tax since each trust is eligible for a separate, additional $10 million federal QSBS exclusion. There is no state income tax because New York conforms to the QSBS system. Thus, the Trustee files tax returns for each trust, reporting $0 tax.

Retained Powers & Controls: H and W retain all of the permitted powers over the spousal trusts, including:

- H and W effectively control management of the trusts:
  - The Trustee must take H and W's direction regarding all investments of the trusts, including the vote and sale of the trusts' QSBS shares (subject to due regard for IRC Section 2036 if the family owns more than 20% of the total outstanding shares in the company).
  - H and W may remove and replace the Trustee of the trusts, at any time, with a non-related, non-subordinate party within the meaning of IRC Section 672(c).
- H and W retain access and use over the QSBS proceeds:
  - W receives monthly distributions of income from the Non-Grantor QTIP (as required by the QTIP rules).
  - Son qualifies as an "adverse party" within the meaning of

IRC Section 672(a). Thus, Son may make discretionary distributions of principal to H and W from their respective trusts (in Son's discretion, subject to a HEMS standard).

- H and W may also direct Son, as Trustee, to lend trust funds back to themselves (subject to adequate collateral and interest requirements).

CONCLUSION

Multiplying the QSBS exclusion for married couples requires expert-level drafting to ensure adherence to QTIP requirements, avoidance of the arcane grantor trust rules, and avoidance of the federal estate tax inclusion rules. It also requires proactive compliance – particularly with respect to making a timely QTIP election, claiming the QSBS exclusions, and managing the differences between QSBS stock issued pre-OBBBA and post-OBBBA. But the reward is that married couples can claim three separate QSBS exclusions, while preserving their access and control, minimizing their federal estate tax, and minimizing disparities associated with divorce.

In determining the number of QSBS exclusions, IRC Section 643(f) empowers the IRS to collapse and disregard multiple trusts and treat them as one if the grantors, beneficiaries, and terms of the two trusts are substantially the same and the primary purpose is tax avoidance.

- H and W retain the power to gift and donate the assets:
  - During life, H may appoint SLANT assets to any family members (subject to a HEMS standard) and donate SLANT assets to any charities.
  - At death, H and W each retain the power to change beneficiaries of the trusts (via broad testamentary limited powers of appointment).
  - After some time, Son might consider modifying the trusts (via decanting, non-judicial settlement agreement, or court order) to "unlock" H and W's access to the trust assets. This might include (i) terminating the Non-Grantor QTIP and distributing the assets to W, and/or (ii) removing the restrictions that cause the SLANT to qualify as a non-grantor trust (thereby converting the SLANT to a traditional SLAT). Of course, it is important that (i) there may not be a prearranged plan between H, W and Son to take such action, and (i) the federal gift tax consequences to Son be analyzed as a result of Son's relinquishment of any vested remainder interest in the trusts.

End Notes

[1] In simple terms, QSBS stock refers to shares issued in a domestic "C" corporation with relatively low assets at the time of issuance which is conducting an active operating business. Specifically, the corporation must have had (i) gross assets of $50M or less at the time the shares were issued, and (ii) at least 80% of its assets must have been used in operating a qualifying business during the shareholder's holding period. When these requirements are met, an individual (or non-grantor trust) that holds QSBS for more than five (5) years can sell their shares and exclude a substantial portion of the gain from federal capital gains tax—an extraordinary benefit not available for most other investments. See IRC Sections 1202(a), (c)(1)-(2), (e)(1).

[2] See IRC Sections 1202(b)(1) and 1202(b)(3)(A) ("in the case of a separate return by a married individual, paragraph (1)(A) shall be applied by substituting "$5,000,000" for "$10,000,000"). The law is notoriously unclear on the issue of spouses filing joint returns and the IRS has not provided any guidance. Although IRC Section 1202(b)(3)(A) is clearly adverse regarding the impact of spouses filing separately, IRC Section 1202(b)(3)(B) is silent regarding the impact of spouses filing jointly. Commentators generally agree it is best practice to avoid relying on joint filings as a basis for the doubled QSBS exclusion given the amount at risk. See *Levy*, 46 BTA 1145 (1942)); *Tweedy*, 47 BTA 341 (1942).

[3] IRC Section 1202(h)(1) (transfers made from individuals to other individuals or trusts result in the transferee being treated as acquiring the stock in the same manner and for the same holding period as the transferor).

[4] Another benefit is that the gross asset test for testing whether a corporation is eligible for QSBS treatment was increased from $50 million to $75million.

[5] See Treas. Reg. 1.1202-2(b)(4) ("each person" is entitled to the exclusion; for these purposes, "person" includes both natural persons and non-grantor trusts).

[6] SeeIRC Section 2523(f) and IRC Section 2056(b)(7)(B)(ii).

[7] See Treas. Regs. 1.677(a)-1(b) and 1.671-3(b) (even if fiduciary accounting income is required to be distributed to the beneficiary-spouse, capital gains allocable to corpus and not distributable to the beneficiary-spouse are not necessary considered owned by the grantor for income tax purposes).

[8] IRC Section 675(4)(A) is not violated due to the DIA's fiduciary status.

[9] On one hand, IRC Section 2036(b) is an estate tax concept that does not give rise to grantor trust status for income tax purposes and, since the QTIP Trust is already included in the beneficiary-spouse's taxable estate due to IRC Section 2044, it would seem the application of IRC Section 2036(b) should effectively be moot. On the other hand, it is *theoretically* possible that application of both IRC Section 2044 *and* IRC Section 2036(b) could result in "double inclusion" (albeit subject to recovery rights under IRC Section 2207A). To avoid this theoretical risk and potential confusion in the event of audit, if possible, the voting of the QTIP Trust's shares should ideally be held by an independent party (or, if necessary, the beneficiary-spouse) and with no retained or shared voting power in the donor-spouse.

[10] IRC Section 674(c) exception to IRC Section 674(a).

[11] IRC Section 672(c)(2).

[12] IRC Section 674(d) exception to IRC Section 674(a).

[13] IRC Section 677 requires the consent of an "adverse person" as defined in IRC Section 672.

[14] IRC Section 675(3).

[15] IRC Section 677.

[16] IRC Section 674(d).

[17] See Rev. Rul. 95-58; Rev. Rul. 2004-64.

[18] IRC Section 2044.

[19] Care must be given to avoid IRC Section 2519 (deemed gift to remainder beneficiaries upon relinquishment of qualifying income interest).

[20] See Morrison, "Optimized Gift Trusts & Funding Designs," 51 ETPL 1 (May 2024).

[21] See IRC Section 674(b)(4) and IRC Section 674(b)(5) exceptions to IRC Section 674(a).

[22] See Rev. Rul. 95-58; Rev. Rul. 2004-64.

[23] See Treas. Reg. 20.2036-1(b)(3).

[24] See Rev. Rul. 95-58; Rev. Rul. 2004-64.

[25] See *McDougall*, 163 T.C. No. 5 (2024); CCM 202352018.

[26] Treas. Reg. 25.2512-5(a) (the value of a remainder interest is reduced when divided among multiple beneficiaries, reflecting the diminished and uncertain rights of each).

[27] See Morrison, Siegle & Metzner, "The Optimized CLAT: A Compelling Income Tax Deduction Vehicle Hiding in Plain Sight," 47 ETPL 25 (September 2020).

[28] IRC Section 4941.

[29] IRC Section 4943.

[30] See *United States v. Grace*, 395 U.S. 316 (1969).

[31] See *Estate of Bischoff*, 69 T.C. 32 (1977) where four *non*-SLAT trusts were included in taxable estate due to each spouse serving as trustee of the trusts created by the other spouse where distributions were not limited to ascertainable standard and income could be accumulated in the discretion of the trustee.