Appendix 1[1]

[Revised thru 04092008]

SAMPLE MARITAL DEDUCTION TRUST

Note: This form is a sample revocable living trust that provides two alternative types of bequest to the surviving spouse: (1) a *Clayton* contingent QTIP bequest to the surviving spouse; or (2) an outright bequest to the surviving spouse with special disclaimer provisions.

The first type of bequest (Alternative 1 to Paragraphs 3.5, 3.6 and 3.7) devises the residue of the deceased grantor's estate to the Marital Trust for the sole benefit of the surviving spouse. The Marital Trust is intended to qualify for the QTIP marital deduction. The fiduciary of the grantor's estate has the authority to elect all or a portion of the Marital Trust for QTIP treatment through a *Clayton* contingent QTIP election. The portion of the Marital Trust property not elected for QTIP treatment is held in the Family Trust (i.e., the credit shelter trust) for the benefit of the surviving spouse and the deceased grantor's children. The Family Trust contains provisions permitting it to be divided into a marital deduction trust for state death tax purposes. Such provisions permit the full use of the deceased grantor's federal estate tax applicable exclusion amount when there is a state death tax that has decoupled from the federal applicable exclusion amount or is different from the federal transfer tax regime, and state death tax law permits a marital deduction for the surviving spouse. The surviving spouse can disclaim all or part of the Family Trust, in which case the disclaimed amount is then held in the Children's Trust (i.e., descendant's credit shelter trust) as though the surviving spouse had predeceased the grantor. Both the Marital Trust and the Family Trust contain ascertainable standards and no detrimental powers of appointment with regard to a beneficiary-trustee, and thus permit the surviving spouse to serve as sole trustee of the Marital Trust and/or the Family Trust. The surviving spouse cannot serve as trustee of the children's trust. This form of marital bequest is suitable for a surviving spouse who is not a U.S. citizen, provided the appropriate QDOT provisions are added to Paragraph 3.6. *See*, Chapter 5, above. This type of trust can be used in conjunction with the sample irrevocable life insurance trust forms contained in Sebastian V. Grassi, *A Practical Guide to Drafting Irrevocable Life Insurance Trusts (with Sample Forms and Checklists)-Second Edition* (ALI-ABA, Philadelphia, 2007), www.ali-aba.org/aliaba/BK45, subject to appropriate modifications by the drafting attorney to ensure coordination of the trusts.

The second type of bequest (Alternative 2 to Paragraphs 3.5, 3.6 and 3.7) devises the residue of the deceased grantor's estate to the surviving spouse, outright, subject to the spouse's right to disclaim all or part of the devise. Amounts disclaimed by the surviving spouse are held in the Family Trust (i.e., the credit shelter trust). The Family Trust contains provisions permitting it to be divided into a marital deduction trust for state death tax purposes. Such provisions permit the full use of the deceased grantor's federal estate tax applicable exclusion amount when there is a state death tax that has decoupled from the federal applicable exclusion amount or is different from the federal transfer tax regime, and state death tax law permits a marital deduction for the surviving spouse. The Family Trust may also be disclaimed, in which case the disclaimed amount is then held in the Children's Trust (i.e., descendant's credit shelter trust) as though the surviving spouse had predeceased the grantor. The Family Trust contains ascertainable standards and no impermissible powers of appointment under IRC section 2518, and thus permits the surviving spouse to serve as sole trustee of the Family Trust. The surviving spouse cannot serve as trustee of the Children's trust. This type of marital bequest is generally not suitable for a surviving spouse who is not a U.S. citizen.

Practice Note: Choose either the Alternative 1 or Alternative 2 provisions to Paragraphs 3.5, 3.6 and 3.7. Do not mix and match between the two Alternatives. Michigan practitioners should note that the sample trusts comply with Michigan's Estates and Protected Individuals Code, which went into effect April 1, 2000.

Optional and alternate language is contained in { }.

As this is a sample form, practitioners must be careful when using the form to adapt it to comply with new developments in federal and state estate, gift, and generation-skipping transfer tax law and to modify it to comply with applicable state law and the particular requirements and needs of their client; accordingly, the author makes no representations or warranties as to the efficacy of the form.

Drafting Update Note: This trust form reflects changes under the final GST tax qualified severance regulations and the proposed GST tax non-qualified severance regulations issued August 1, 2007. Practitioners are urged to become familiar with the new final GST tax qualified severance regulations (effective August 2, 2007) contained in Treas. Reg. §§ 1.1001-1(h); 26.2642-6; and 26.2654-1(b)(4). Practitioner are also

[1] **Note:** The 2004 original text that has not been changed (i.e., has not been supplemented) is not highlighted. The 2006 Supplement text changes are highlighted in yellow. The 2008 Supplement text changes are highlighted in turquoise. Together, the original (i.e., non-highlighted) text **and all** of the highlighted text changes constitute the 2008 Cumulative Supplement.

urged to become familiar with the proposed amendments to the final GST tax qualified severance regulations (issued August 1, 2007) and the new GST tax non-qualified proposed severance regulations (issued August 1, 2007). *See*, Prop. Treas. Reg. §§26.2642-6; and 26.2654-1(a).

If you have any questions, suggestions, or comments concerning this form, please do not hesitate to write, or contact me at (248) 269-2020, svgjr@aol.com or at www.probateandtrusts.com. If you contact me by e-mail, please supply your name, your firm's name, your address, and your phone number. Thank you.

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The «SettlorFullName» Living Trust

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