

Steve Leimberg's Estate Planning Email Newsletter - Archive Message #3034

Date: 01-May-23
From: Steve Leimberg's Estate Planning Newsletter
Subject: [James M. Kane with a Holy Grail Inter-Vivos QTIP Client-Memo](#)

“A fully creative, broad-options inter-vivos QTIP trust can be quite complex as to how the trust document is crafted, and so forth. And, due to this complexity (as with most estate planning beyond the basics), I have struggled for years with finding the best way to give potential clients sufficient information about the design and benefits for this inter-vivos QTIP planning, but without them having first to obtain a Tax L.L.M. so as comfortably to move forward with this QTIP planning.”

James M. Kane provides members with his recommendation on how more effectively to introduce clients to the significant asset protection and tax planning benefits of using an *inter-vivos* QTIP trust, without overburdening clients initially with too much overly-technical fodder. Members who wish to learn more about this topic should consider watching James' exclusive **LISI** Webinar [“Inter-Vivos QTIP Trusts; The Holy Grail of Spousal Asset Protection and Gift / Estate Tax Planning”](#) on May 24th @ 11:00 AM EST. Click this link to learn more: [James M. Kane](#)

James, a trust planning and litigation attorney licensed in Georgia, North Carolina, and New York, is with his Atlanta law firm **KaneTreadwell Law LLC** [www.ktlawllc.com). James, for approximately the past 15 years, handled an extensive amount of trust and estate litigation (and planning); but beginning in 2022 is now primarily back to handling trust and estate planning, and related civil litigation matters only as a consulting attorney, or expert witness. Prior to law school James was an IRS Revenue Agent with the Internal Revenue Service large-case examination division in Atlanta. His combined tax, trust, estate, and litigation experience gives James a broad perspective for identifying, understanding, and addressing complex trust and estate issues and disputes, along with understanding the resulting combined tax and non-tax factors. James has 25+ years' experience previously with

Atlanta law firms Sutherland, Asbill & Brennan and Chamberlain, Hrdlicka, White, Williams & Aughtry. He attended Emory University Law School and has undergraduate finance (University of Georgia) and graduate business (Georgia State University) degrees. Although he never worked as a CPA, James held a CPA certificate during his time with the IRS. James was the winner of the 2016 Heckerling Tax Court Opinion (Richard Covey) writing contest. James' outside interests include studying (laboriously) jazz guitar, reading, and weightlifting. Google also: James Kane Legal Blog

Here is his commentary:

EXECUTIVE SUMMARY:


COMMENT:

I continue to be a great fan of the *inter-vivos* QTIP trust. In my experience, it can provide a larger range of clients with excellent asset protection, and some of the most flexible tax-planning features available for trust planning within the range of estate planning options. It also is the only trust planning option, to my knowledge (see Treas. Reg. Section 25.2523(f)-1(d)(1), with the tax law expressly allowing the settlor spouse to retain a secondary QTIP interest without triggering retained interest problems under Code Section 2036, etc. Primarily for its powerful asset protection features, a client does not have to be in the singularly narrow “super-wealthy” estate-tax class in order to gain the advantage of these planning benefits.

The design of a creative, broad-options *inter-vivos* QTIP trust can be quite complex as to both its optimal tax and non-tax features, and so forth. And, due to this complexity (as with most estate planning beyond the basics), I have struggled for years with finding an effective way to give *potential clients* sufficient information about the design and benefits on *inter-vivos* QTIP planning, but without them having first to obtain a Tax L.L.M. in order comfortably to decide on moving forward with this QTIP planning.

The bottom line of this newsletter is to share a recent “John Doe” client memo I prepared with the hope it operates as a Holy Grail for better introducing readers to the broad range of benefits for this *inter-vivos* QTIP planning. I, therefore, simply reproduce my memo immediately below:

Date: **May 1, 2023**
To: **John and Jane Doe**
From: **James M. Kane, attorney (Atlanta)**
KaneTreadwell Law LLC
email: james@ktlawllc.com
(470) 401-0101
(470) 401-0100 [text]
Re: **My Reference to an *Inter-Vivos* QTIP Trust**



Before I begin preparing your core estate planning documents in line with my previous discussions, introductory memo, and engagement letter with you, the purpose of this memo is to ask whether you have any interest in further discussing your possible inclusion of an *inter-vivos* **irrevocable** QTIP trust as part of the estate planning work I will handle for you. My previous memo to you referred briefly to this *inter-vivos* irrevocable QTIP trust. “*Inter-vivos*” refers to a trust document that becomes effective while you are alive.

I am a big fan of the *inter-vivos* **irrevocable** QTIP trust, but also realize some clients prefer not to move into this additional level of complexity for their estate planning. I also believe it is important for you at least to read the following information for your consideration. There is no right or wrong answer to your decision.

The *inter-vivos* irrevocable QTIP is relatively high-level estate planning due to its combined asset protection features and tax-options flexibility. In my view, there are few other estate planning options with these optimally effective combined benefits. I hope to give you enough information in this memo without it becoming overwhelming. “QTIP” is a gift / estate tax law acronym for “qualified terminable interest property”.

By contrast, your core estate planning documents will provide asset protection for your beneficiaries after your death; but no asset protection for you during your lifetime.

The Essence of the *Inter-Vivos* Irrevocable QTIP Trust

The *inter-vivos* irrevocable QTIP trust can provide an immediate, greater level of asset protection for any property you transfer now into the QTIP trust; and, as I state below, can presently lock-in the trust document beneficiary provisions for both of you and your children, without the possibility later of you making changes to include other spouses if you were to remarry, or have other children (other than other children born only to the two of you together).

By comparison, core estate planning documents, including those I am preparing for you, are **revocable**. You can essentially later change and rewrite your core documents at any time while you are alive. Core estate planning documents, being revocable, can be revised, changed, or even revoked entirely at any time thereafter (but generally not after your death or incapacity (e.g., dementia)).

Irrevocable vs. Revocable

“Irrevocable” means the trust document has an unchangeable binding effect as to its written terms and provisions. An irrevocable trust document generally cannot later be changed to include new, or additional beneficiaries, other than *if the two or you* have more children, grandchildren, etc. An irrevocable trust can (and typically does) include language for additional children, grandchildren, etc.; however, often also with a provision not to include new spouses or children born later with another spouse (second marriages to someone else, etc.).

The core estate planning documents I discussed with you in our introductory meeting are also *inter-vivos*, but not irrevocable. They are revocable. Your core documents will become effective immediately when you sign them (thus *inter-vivos*), but because the core estate planning documents are not irrevocable, you each together, or separately, can at any time later revise, change, and even revoke entirely, your core documents (assuming you are not later mentally incapable of making any changes).

As an aside, it is possible I can draft your core estate planning documents to be irrevocable, but that would create certain estate and gift tax planning hurdles and other non-tax problems that are better addressed with this QTIP trust. This more beneficial distinction for the QTIP trust (and its related more-flexible QTIP tax laws) centers on highly technical reasons, both tax and non-tax, that I can discuss with you further if you wish.

Asset Protection for Irrevocable vs. Revocable Trusts

An irrevocable trust provides much greater asset protection for the trust property, compared to a revocable trust. In basic terms, when you put property into a revocable trust, the law *substantively* treats that trust property as if you still own it (even though the property is in the name of the revocable trust and not in your individual name).

Because the law treats you, *substantively*, as still owning the revocable trust property, the law does not let you use a revocable trust as a shield to avoid a creditor or lawsuit judgment holder from reaching into your revocable trust and grabbing the trust property to satisfy your own personal liabilities.

Again, by contrast, you typically are not deemed under the law to own property after you transfer your property into an irrevocable trust. This is because you no longer have the power to revise, change, or revoke the trust document and get back the trust assets. The law, therefore, does allow you to use an irrevocable trust as a protective shield to prevent creditors from reaching into the trust and taking the trust property to satisfy claims against you.

The above irrevocable distinction for the *inter-vivos* QTIP trust is why it can provide you and your family this greater degree of asset protection, *especially while both of you are still alive*.

Bottom Line. This irrevocable QTIP option is best for whatever portion of your assets you wish now to protect more fully for asset protection purposes *while you are both still living*, and also for ensuring the assets do not later end up with other spouses or children, in the event of a divorce or remarriage (including a possible elderly second marriage, etc.); and generally this irrevocable QTIP is better suited for assets that you do not need to use for your current spending needs (e.g., assets that ideally are for use during your later retirement, or for longer-term investment growth, etc.).

The Irrevocable QTIP and Your Core Estate Planning

Ideally, and depending on how you own your assets between the two of you, the one of you with the greater value of assets could create an irrevocable QTIP trust and use those assets to fund this irrevocable QTIP trust. Either of you could be trustee of the QTIP trust and, thereafter, handle the investment of the trust assets, as to selection of investments, changes in those investments, etc. The other one of you could thereafter evaluate and decide on whether later to create and fund a similar QTIP trust.

As to some specific details, and similar to your core estate planning documents, the *inter-vivos* irrevocable QTIP trust can operate in similar manner to provide benefits for each of you as the surviving spouse, and for your children (and your grandchildren, etc.) after both your deaths, but with the following key differences:

- (1) With this irrevocable QTIP trust you now would be each binding yourselves to its surviving spouse / children operative trust provisions, with you not later being able to change this QTIP design set-up; for example, no changes to the QTIP trust if you were later to remarry, have children with another spouse, etc. This will be an irrevocable set-up only for both of you, and your children (and any future children born to or adopted only by both of you);
- (2) The QTIP trust, with use of certain limited powers of appointment, can be designed to address a divorce between the two of you, if such design is desired;
- (3) Also, this binding effect will apply only to whatever assets you now transfer into this irrevocable QTIP trust, and not any other assets that you either do not transfer now into the QTIP trust or that you obtain in the future and later not transfer into this QTIP trust;
- (4) Any assets you do not transfer now into the QTIP trust will continue to be subject to your core estate planning documents if, and until, you put those additional assets later into the irrevocable QTIP trust;
- (5) You can generally transfer additional assets later at any time into the irrevocable QTIP trust;
- (6) As a result of certain tax law limitations, called “Qualified Domestic Trust” requirements, this QTIP planning is better suited when you both are U.S. citizens;
- (7) At your death, and under the language of your core estate planning documents, your then-remaining estate assets at that time can “pour-over” into your irrevocable QTIP trust, unless you specify (by future changes to your core planning documents) for your estate not to go into the QTIP trust, or that those remaining estate assets then pass to other beneficiaries that you later revise and name in your core documents, etc.;
- (8) For many clients where a threat of estate tax is not predominant (due to the combined estate exemption), the flexibility of this QTIP planning is even better enhanced when designed purposely as an incomplete gift for gift tax purposes;

- (9) The design of this *inter-vivos* QTIP trust can include a “secondary QTIP interest” if the one of you who creates and funds the QTIP trust were to end up being the surviving spouse (as between the two of you). This is a significant asset protection feature available in a number of states with favorable state laws that relate specifically to this design. Georgia is one of these favorable states; and
 - (10) As I stated earlier during our recent meeting, neither your core planning, nor this irrevocable QTIP trust, can apply to your tax-deferred accounts, such as an IRA, 401(k), Roth IRA, Roth 401(k), etc. These under the tax law can be governed only by your written account beneficiary designation forms.
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Conclusion

In my experience, the *inter-vivos* QTIP trust can provide a larger range of clients with excellent asset protection, and some of the most flexible tax-planning features available for trust planning within the range of estate planning options. Primarily for its powerful asset protection features, a client does not have to be in the singularly narrow “super-wealthy” class in order to gain the advantage of these planning benefits.

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

James M. Kane

CITE AS:

LISI Estate Planning Newsletter #3034, May, 1, 2023
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