Lewis v. Commissioner, *McDougall v. Commissioner*, T.C. Memo. 2026-58 (July 20, 2026)

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Children Made Huge Gifts When They Agreed to Early Termination of QTIP Trust With All Assets Passing to Their Father; Possible Distinction Between Agreeing to Early Trust Termination vs. Giving Remainder Interests to the Income Beneficiary

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1. Brief Synopsis

Lewis v. Commissioner and *McDougall v. Commissioner*, T.C. Memo. 2026-58, address the valuation of taxable gifts arising from the consensual termination of a QTIP trust. The opinion follows the Tax Court's earlier decision in *McDougall v. Commissioner*, 163 T.C. 112 (2024), which held that Linda Lewis and Peter McDougall made taxable gifts to their father, Bruce McDougall, when they agreed to terminate the trust and permit Bruce to receive all of its assets. The earlier opinion determined that the children made gifts but left the valuation of the gifts for later determination.

The Residuary Trust was created under the will of Clotilde McDougall, Bruce's wife and the mother of Linda and Peter (petitioners). Clotilde's estate consisted principally of her interest in a family real estate business. Bruce, as personal representative, made a QTIP election for the property funding the trust. Under the will, Bruce was entitled to the QTIP trust's net income for life and could receive principal, in the trustee's discretion, for his health, maintenance, and support in his accustomed manner of living. Bruce also held a limited testamentary power to appoint the trust property among Clotilde's descendants. In default of appointment, the remainder would pass in equal shares to Clotilde's children or their descendants.

Section 12.8 of Clotilde's will governed distributions upon the termination of any trust created under the will. Although the trustee was not required to make pro rata distributions, each distributee was required to receive property having a value equal to that distributee's interest in the trust at the time of distribution. On October 31, 2016, Linda, Peter, and Bruce entered into a nonjudicial agreement terminating the Residuary Trust and directing that its entire balance be distributed outright to Bruce. The parties stipulated that the trust assets were then worth $117,604,143.

The 2024 opinion held that Bruce did not make a gift under §2519 when the QTIP trust was terminated, because he received outright all of the trust property. The present opinion determines the values of the gifts made by Linda and Peter when they agreed that the QTIP trust would be terminated and all of its assets would be distributed to Bruce by valuing what Linda and Peter would have received if the beneficiaries had terminated the trust without directing all of its assets to Bruce. Under that hypothetical, §12.8 of Clotilde's will would have governed the allocation of the trust assets.

The parties' valuation positions differed substantially. The Commissioner initially asserted that each petitioner made a gift of $53,408,746, based principally on the actuarial tables prescribed under §7520. The petitioners maintained that, because Bruce had signed a will that would exercise his limited power of appointment in favor of his revocable trust, their remainder interests were worth only $156,000 each. Their expert also treated Bruce, who was 85 years old, as though he were 80 for life-expectancy purposes because of his high income and perceived good health.

The court rejected essential elements of both parties' analyses. The largest difference in the valuations by the parties turned on whether the gifts would be reduced because of Bruce's testamentary limited power of appointment. The Commissioner argued the power of appointment should be ignored because "the termination of the trust eliminated Bruce's limited power of appointment." The court rejected that reasoning but disregarded the power of appointment for another reason, because of an interpretation of Clotilde's intent under her will as to how trust assets would have been divided upon an early termination of the trust if the petitioners had not agreed that all the assets would pass to Bruce. It further held that the value of each petitioner's gift had to be reduced by the §2207A reimbursement obligation that each petitioner would have incurred if he or she had actually received a terminating distribution. The court also held that the valuation of income and remainder interests under §7520 did not control the allocation of trust assets because the beneficiaries' rights upon termination were determined initially under state law, and §7520 was not controlling for that purpose. Finally, the court rejected the petitioners' expert's decision to treat Bruce as five years younger than his actual age for purposes of determining the value of his income interest.

Because the Commissioner had conceded that each gift was worth no more than $35,141,321 if §2207A applied and §7520 did not control, the court held the Commissioner to that concession. Linda and Peter were each determined to have made a taxable gift of $35,141,321.

The petitioners resided in the state of Washington when they filed their petitions; therefore, any appeal will be to the Ninth Circuit Federal Court of Appeals. Petitioners no doubt will appeal this decision.

Lewis v. Commissioner, *McDougall v. Commissioner*, T.C. Memo. 2026-58 (July 20, 2026) (Judge Halpern).

2. Basic Facts

The following are the key facts under the QTIP trust and the termination agreement.

- Bruce's interests: Mandatory net income for life; discretionary principal for health, maintenance, and support; and a limited testamentary power of appointment among Clotilde's descendants.
- Linda's and Peter's interests: Remainder interests at Bruce's death, subject to Bruce's limited power of appointment and the other terms of the will.
- Power of appointment exercise: Bruce's will appointed the QTIP trust assets to Bruce's revocable trust, which would be allocated among Bruce's descendants (with specific provisions for tangible personal property).
- Nonjudicial agreement: Bruce, Linda, and Peter signed a nonjudicial agreement stating that the trust "shall be commuted and the entire remaining balance of the Trust shall be distributed outright and free of trust to Bruce."
- Termination provision: Section 12.8 of Clotilde's will provided that, upon the termination of any trust created under the will, the trustee was to distribute the trust assets among its beneficiaries. The distributions did not have to be pro rata, "so long as the distributees receive assets of a value equal to the value of their respective interest in the trust at the time of distribution."

  > The Trustee shall not be required to distribute assets of the trust estate, or interests therein, pro rata to the beneficiaries receiving such distributions, but may, in the exercise of the Trustee's discretion, make non-pro rata distributions, so long as the distributees receive assets of a value equal to the value of their respective interest in the trust as of the time of distribution. §12.8 of Clotilde's will.

- Actual transaction: The parties terminated the QTIP trust and distributed all $117,604,143 of its assets outright to Bruce.

For a discussion of the initial Tax Court case, see Akers, *McDougall v. Commissioner*, 163 T.C. No. 5 (Sept. 17, 2024), found **here** and available at **www.bessemertrust.com/for-professional-partners/advisor-insights**.

3. Court Analysis of Issues

a. **Valuation Framework.** The court entered an Order on April 25, 2025, in response to the Commissioner's motion for partial summary judgment concerning the nature of the property that Linda and Peter transferred by gift. The Order treated the relevant property transferred by each petitioner as the right to receive the distribution that would have been made under §12.8 if the beneficiaries had agreed to terminate the Residuary Trust without specifying how the assets would be divided. The gift was therefore not valued simply as a marketable remainder interest immediately before termination or as a remainder interest after the power of appointment had disappeared.

   The court compared the actual transaction – all property distributed to Bruce – with the state-law distribution that would have occurred under the will. That approach required the court to determine the petitioners' gross terminating distributions, account for liabilities associated with those distributions, and then apply federal gift-tax principles to the rights surrendered.

b. **Bruce's Testamentary Limited Power of Appointment Did Not Reduce Petitioners' Gifts.** The first issue was whether Bruce's limited testamentary power of appointment substantially reduced the value of Linda's and Peter's remainder interests. Before the trust was terminated, Bruce had executed a will exercising the power in favor of his revocable trust. The petitioners therefore contended that a hypothetical purchaser of their remainder interests would have paid almost nothing because, absent a change to Bruce's estate plan, the petitioners would not receive the trust property upon Bruce's death.

The Commissioner argued that the power of appointment should be disregarded because it was extinguished when the trust terminated. In the Commissioner's view, the petitioners could not have made gifts until the trust terminated because of a spendthrift clause and, at that point, the power of appointment no longer existed.

The court rejected both arguments but disregarded the power of appointment for another reason. The relevant inquiry was what Linda and Peter would have received if the beneficiaries had terminated the trust without specifying that all assets were to be distributed to Bruce. Section 12.8 would then have required the trustee to value the beneficiaries' interests and distribute assets of equivalent value.

The court acknowledged that a conventional discounted-cash-flow analysis might ordinarily consider Bruce's power of appointment because the "limited power of appointment could well have affected the future distributions to petitioners. Therefore, the limited power of appointment cannot be summarily disregarded simply because it was extinguished by the trust's termination." The difficulty was that the revocable trust named in Bruce's exercise was not itself a beneficiary of the QTIP trust. A cash-flow analysis incorporating that exercise therefore produced aggregate values for the actual trust beneficiaries that were substantially below the stipulated value of the trust assets and required some method of allocating the otherwise unassigned value.

> If the trustee applying section 12.8 of Clotilde's will were to begin by determining the discounted present value of expected future distributions to the beneficiaries, the trustee would have quickly faced a problem. Because of Bruce's limited power of appointment, the aggregate value of the trust interests could not have equaled the value of the trust assets…. The present value of the expected distribution to the Revocable Trust would not be included in the value of either the income interest or the remainder interests in the Residuary Trust.
>
> How would the trustee of the Residuary Trust have made the numbers add up? How, in particular, would the trustee have allocated among the trust's actual beneficiaries (petitioners and their father) the value of the expected future distribution to Bruce's Revocable Trust? (Slip Op. at 16).

Petitioners argued that if the values of the income and remainder trust interests do not add up to the stipulated value of the trust assets, the difference should be allocated proportionately based on the relative values of the income and remainder interests.[1] However, the court observed that the petitioners "cited no authority for why their approach 'must' be followed," and did not adopt that approach.

The petitioners' discounted cash-flow analysis, considering the power of appointment, valued each of the children's remainder interests at only $156,000.

> Petitioners would have us accept that, if they and their father had agreed to terminate the Residuary Trust without specifying a distribution of assets, section 12.8 of Clotilde's will would have required the trustee to distribute to Bruce all but $312,000 of the trust's $117,604,143 of assets. The amount distributed to Bruce would have far exceeded the fair market value of his interest in the trust, measured by the present value of the expected distributions he would have received if the trust had not terminated. More importantly, that result would have been manifestly contrary to the intent reflected in Clotilde's will…. Her will thus reflects a preference that Bruce not have outright ownership of her share of her father's business. (Slip Op. at 16-17).

The court concluded that the trustee applying §12.8 would have assumed that, absent termination, the remaining trust property would pass in equal shares to Linda and Peter at Bruce's death. The holding did not invalidate Bruce's exercise of the power; it prevented that exercise from controlling a

[1] Under that approach, each child would have made a gift of about $1.7 million rather than $35 million. The IRS determined that Bruce's income interest was worth $10,786,651. (Slip op., n.7). The petitioners asserted that the collective value of their remainder interests was $156,000 x 2, or $312,000. The income and remainder interest values would have totaled $10,786,651 + $312,000, or $11,096,651. That would have left trust assets not allocated to either the income or remainder interests of $117,604,143 - $11,096,651, or $106,507,492. The portion of the unallocated assets that would have been attributed to each child would have been $156,000/$11,096,651 x $106,507,492, or $1,497,314. Therefore, each child would have received $1,497,314 + $156,000, or $1,653,313 under the hypothetical commutation of the trust.

hypothetical termination allocation in a manner the court regarded as contrary to the dispositive plan reflected in Clotilde's will.

Holding: If the trust had been terminated without a specified allocation, the trustee would not have reduced Linda's and Peter's distributions because of Bruce's limited testamentary power of appointment.

c. **Section 2207A Reduced the Value of the Gifts.** The second issue concerned §2207A, which permits a surviving spouse to recover certain transfer taxes attributable to QTIP property from the persons receiving that property. The court held that the value of each petitioner's gift had to be reduced by the reimbursement obligation that would have accompanied the petitioner's hypothetical terminating distribution.

If Linda and Peter had received property corresponding to their remainder interests, the termination would have constituted a disposition of Bruce's qualifying income interest. Section 2519 would have treated Bruce as transferring all QTIP interests other than his income interest. Because Bruce would not have retained all the QTIP property, the rationale for finding no gift by Bruce in the actual transaction would not have applied. Bruce would have made a taxable gift and would have been entitled under §2207A to recover the resulting tax from Linda and Peter.

The Commissioner characterized the reimbursement obligation as speculative because Bruce incurred and paid no gift tax in the transaction actually implemented. The court found that objection misdirected. The gift was measured by a hypothetical alternative transaction. Under that alternative, Bruce would have owed tax, and it was appropriate to assume that he would pay a legally due tax giving rise to his reimbursement right.

> We thus consider what would have happened if petitioners had received the distributions to which they would have been entitled under section 12.8 of Clotilde's will. If petitioners had received *those* distributions, Bruce *would* have owed gift tax and he would have been entitled to recover the tax from petitioners. Under the circumstances, it is appropriate to assume that Bruce would have paid the gift tax owed, giving rise to the right of reimbursement that would have reduced the value that petitioners gave up in allowing their father to receive all the trust assets. (Slip op. at 20).

Accordingly, the economic benefit each petitioner surrendered was not the gross terminating distribution but the amount remaining after the reimbursement obligation. At a 40% gift-tax rate, the net-gift computation divided the gross value by 1.4. Using the Commissioner's original gross valuation of $53,408,746 as an illustration, each petitioner would have retained $38,149,104 after the reimbursement burden.

Holding: Each gift was reduced by the §2207A reimbursement obligation that the petitioner would have incurred if he or she had received a terminating distribution.

d. **Section 7520 Did Not Determine the Beneficiaries' State-Law Entitlements.** The Commissioner maintained that the termination transformed the petitioners' interests into conventional remainder interests that had to be valued under §7520. The petitioners argued instead that the tables were unavailable because their interests were "restricted beneficial interests" subject to Bruce's power of appointment and other contingencies. (Treas. Reg. §25.7520-3(b)(1)(i) states that "[a] restricted beneficial interest is an annuity, income, remainder, or reversionary interest that is subject to any contingency, power, or other restriction," and standard factors under §7520 "may not be used to value a restricted beneficial interest.")

The court agreed that §7520 did not control, but on a different ground. State law creates and defines property rights; federal law determines the tax consequences of those rights. A trustee allocating assets under §12.8 would first be determining what property each beneficiary was entitled to receive under the will and Washington law. The trustee would not be valuing an interest, in the first instance, "for purposes of" the Internal Revenue Code.

The court emphasized §7520's opening limitation: "For purposes of this title." The prescribed tables could provide guidance, but they were not binding on a Washington trustee or court determining the beneficiaries' rights under the governing instrument. Once the state-law entitlement was established, federal tax law would determine the consequences of surrendering it.

Because the court's conclusion rested on the state-law nature of the allocation, it did not need to decide whether the petitioners' interests were restricted beneficial interests under Treasury Regulation §25.7520-3(b).

The court does not provide a detailed analysis of how to value the income and remainder interests apart from the §7520 tables. (Presumably different discount rates for each interest and assumed growth rates were used, different than the discount rate used under §7520.) The court merely used the values calculated by the parties' experts.

Holding: The §7520 actuarial tables did not control the amounts to which Linda and Peter were entitled upon termination because those entitlements were determined under the will and Washington law.

e. **Bruce's Actual Age Had to Be Used for Life-Expectancy Purposes.** In determining the present value of the remainder interests following Bruce's death, the petitioners' valuation expert used the life expectancy of an 80-year-old even though Bruce was 85. The adjustment was based principally on Bruce's high income and Linda's description of him as being in generally good health.

> Mr. Eckstein [the petitioners' valuation expert] referred to research "indicat[ing] that healthy males categorized as high-earning individuals are likely to outlive the average male of average means." According to a study published in the Journal of the American Medical Association (JAMA), "a 40-year-old male in the top income percentile" had a "9-year greater life expectancy" compared to those with average incomes. Any life expectancy gap based on income, however, would "narrow[] . . . with age." At trial, Mr. Eckstein opined that the JAMA study gave him "very strong support to say that [the Social Security tables] underestimated [Bruce's] life expectancy." On the basis of Bruce's income and "above-average health," Mr. Eckstein concluded that "the life expectancy statistics for a typical 80-year-old" would be "a reasonable approximation for Bruce at age 85." (Slip op. at 6).

The court recognized that income may correlate with longevity, but income was only one of many relevant factors. Standard mortality tables rely on the law of large numbers and inevitably understate some individuals' life expectancies while overstating others'. Selectively adjusting a table for one favorable factor, without examining the full range of favorable and unfavorable factors, introduced potential bias and was methodologically questionable.

The expert did not interview Bruce, review his medical records, or consult an actuary. His information came primarily from Linda, and he knew that Bruce had osteoporosis and mobility limitations. In addition, the expert specialized in valuation rather than actuarial science or medicine. The record therefore did not support an individualized five-year age adjustment.

Using Bruce's actual age, the petitioners' expert's alternative calculation, without considering the power of appointment, produced a value of approximately $37.4 million for each gift.

Holding: Bruce was required to be treated as age 85, his actual age on the valuation date, rather than as age 80.

f. **Each Petitioner Made a Gift of $35,141,321.** The Commissioner had conceded that each gift was worth no more than $35,141,321 if two conditions were satisfied: the gifts were reduced for §2207A reimbursement and the §7520 tables did not control. The court had resolved both issues against the Commissioner.

The petitioners' own expert's calculation using Bruce's actual age indicated that each gift might have been worth at least $37.4 million. The evidence therefore did not support a value below the Commissioner's conceded amount. Other unresolved matters - including the effect of Bruce's qualified right to principal and the appropriateness of discounts for lack of control or marketability - might have affected the valuation, but they could not increase the result above the Commissioner's conceded ceiling amount. [Observation: Consideration of Bruce's right to distributions and lack of control or marketability discounts would have decreased, not increased the remainder interests and the amount of the gifts. In any event, the Commissioner's conceded amount was less than the petitioners' expert's amount.]

Holding: The court held the Commissioner to the concession and fixed each gift at $35,141,321.

4. Planning Considerations

a. **Beneficiary Gifts Resulting from Trust Modification or Termination Agreements.** *Lewis-McDougall* resulted in huge gifts by beneficiaries ($35 million by each) who agreed to terminate a trust early. In CCA 202352018 the IRS Chief Counsel opined that beneficiaries made gifts when they agreed to a trust modification to add a discretionary power to reimburse the grantor for income taxes attributable to the grantor trust income. (The CCA did not suggest how the gift would be valued but noted that the same result would apply if the beneficiary had not consented to the modification but merely failed object.) Perhaps these developments suggest that the IRS may be focusing on the gift tax effects of trust modifications and terminations.

Transfers in compromise and settlement of a trust or estate dispute typically will be treated as transfers for full and adequate consideration that do not result in gifts. The IRS has issued a number of favorable private letter rulings finding no gift tax exposure in a variety of settlement contexts. *E.g.*, PLRs 201342001, 201104001, 200845028, 200825007, 200638020, and 200209008.

Authority exists for treating the failure to enforce one's legal rights as a gift by that individual in appropriate circumstances. *See* Rev. Rul 84-105 (surviving spouse's failure to object to underfunding of a general power of appointment marital deduction trust); Rev. Rul 81-264 (failure to enforce note payable). Also, consenting to trust modifications in appropriate circumstances can result in a gift. *See* Reg. §26.2601-1(b)(4)(i)(E) Ex.7 ("modification increasing A's share of trust income is a transfer by B and C to A for Federal gift tax purposes").

b. **Gift by Beneficiaries Who Fail To Object to Improper Distributions, CCA 202352018.** The IRS may take the position that remainder beneficiaries make gifts to the spouse by not objecting and taking actions to prevent improper distributions. *See* CCA 202352018 (trust beneficiaries made gift to grantor by consenting to modification action to add reimbursement power; result would have been the same if the beneficiaries had not explicitly consented if they had notice of the modification and a right to object but failed to exercise their right to object). For a detailed discussion of CCA 202352018, see Item 9 of LOOKING AHEAD – Estate Planning in 2024, Current Developments & Hot Topics (December 2024) found **here** and available at **www.bessemertrust.com/for-professional-partners/advisor-insights**. *See also* Rev. Rul. 81-264 (gift can occur by permitting legal rights to expire, but a transfer that one may rescind under state law might remain incomplete until the right to rescind expires).

c. **Trust Termination vs. Assignment of Remainder Interests.** A different analysis might have applied in *Lewis-McDougall* if the parties had first amended the trust (if possible) to remove the spendthrift clause and the beneficiaries had then assigned their remainder interests to their father. That would not have involved the termination of the trust and the necessity of having the trustee allocate trust assets among the beneficiaries in a commutation analysis to determine how the assets would pass in the absence of an agreement of the parties. That commutation analysis to determine the property rights of the income and remainder interests and their values under state law is what resulted in ignoring the effect of the testamentary limited power of appointment and of not applying §7520 to determine the values of the income and remainder interests. Rather than using a hypothetical willing buyer-willing seller approach to value the gift made by the children by agreeing to the termination of the QTIP trust, in effect the court applied a hypothetical fair commutation analysis to determine how a trustee would divide the trust assets fairly upon an early termination of the trust. To the extent that a party received more than was appropriate, the other parties would be treated as having made gifts.

If the remainder interests had been assigned, the remainder interests would simply have been valued under the hypothetical willing buyer-willing seller standard, and a hypothetical buyer of the remainder interests presumably would take the power of appointment into consideration. In that circumstance, §7520 would presumably apply if the parties had fixed rights, but the values would be determined under the hypothetical willing buyer-willing seller test if the trust interests were "restricted beneficial interests."

d. **Was the Valuation Framework Proper? What Is the Proper Time for Determining the Gift Amounts?** The court's valuation framework was to examine the facts after the modification agreement had been signed and to examine what the children would have received if they had not agreed that all assets would pass to their father. Another approach would be to examine the value of what the children owned *before* they entered into the agreement to terminate the trust, and that would be the value of the gifts after agreeing that they would give up all their interests in the trust. At that time, all they owned were remainder interests subject to several big contingencies, including what principal distributions would be made to their father during his lifetime and how the father's power of appointment might be exercised. Those contingencies may have lowered the value of their interests dramatically when valued under the hypothetical willing seller-willing buyer test. A hypothetical buyer likely would have assumed that the father would appoint the assets to family members and not allow them to pass to a hypothetical buyer. That was all the children owned, so how could they make a gift of more than that value?

   That seems to be a much more straightforward valuation approach than the approach used by the court. Perhaps the court was bothered with the potential of value manipulation, but the result would have been that the children made a small gift to their father, all the assets would be in their father's estate, and estate tax would be paid on that value at the father's death. There would have been no abuse of the transfer tax system. Which leads to the "QTIP regime" augment made in the Tax Court summary judgement proceeding.

e. **QTIP Regime.** In the summary judgment proceeding, the taxpayers argued that while the Children may have interests under state law as trust remaindermen, H is treated as the owner of the assets for tax purposes under the fiction of the QTIP regime. How can one make a gift of an asset to a donee who already owns the asset for tax purposes? The court disagreed. It addressed the scope of the "QTIP fiction," concluding that it applies for deferring transfer tax until assets are transferred to someone outside the marital unit, but does not apply to transactions by transferees outside the marital unit (such as transfers by the children of their interests in the QTIP trust). "Any rights [H] may have been deemed to hold because of the QTIP fiction do not negate the very real interests [the Children] held …." If the Children had transferred their rights to a third party, the transfers would clearly be a gift; that H was the recipient does not change this conclusion. No doubt, the taxpayers will again make the QTIP regime argument on appeal of this case.

f. **Devastating Overall Tax Effect; No Estate Tax Offset for Gift Taxes Paid by the Children.** The effect of the planning in *Lewis-McDougall* is that the children made gifts to their father of $70 million, and the father will include the entire $117 million of QTIP assets in his estate for estate tax purposes at his death. The father has reportedly entered into gift and sales transactions to freeze the value in his estate, but $70 million of value is taxed to the children as a gift and will ultimately be taxed to them again when they pay estate tax on their father's estate.

   The Internal Revenue Code does not provide a general credit allowing the father's estate to offset estate tax by the gift tax paid by the children. The taxes are imposed on separate transferors. Sections 2001, 2012, and 2013 do not supply a cross-taxpayer credit on these facts, and §2207A affected the value of the children's gifts rather than creating an estate-tax credit.

g. **Income Tax Issue**. Apparently, the IRS did not take the position that the early termination of the QTIP trust resulted in an income taxable transaction between the income and remainder beneficiaries. The IRS has made that argument sometimes in transactions involving early terminations of trusts. Amounts "paid" by the remainder beneficiaries to the spouse for the remainder interest of the QTIP trust may be gifts (and not taxable under §102(a)), but amounts paid for the spouse's income interest may be fully taxable because the spouse's basis in the income interest is zero under the uniform basis rules of §1001(e). The remainder interest may recognize gain to the extent that appreciated property is used to satisfy the value of the commuted income interest. It is hard to say the remainder beneficiaries "purchased" the income interest when the remainder beneficiaries did not receive anything, but they may be treated as having first commuted the income and remainder interests (resulting in an income tax event) and then having gifted their remainder interest to H (an income-tax free gift). *E.g.*, PLRs 202509010, 201932001-201932010.

h. **Actuary to Determine Life Expectancy.** If §7520 does not apply in valuing trust interests, consider using an actuarial expert to determine appropriate life expectancies rather than merely relying on the average life expectancies used in the §7520 tables. A large body of studies supports that persons with higher income and that live in higher income communities have longer life expectancies (which would therefore reduce the value of remainder interests following life interests). *See* Richard Franklin & Claudia Tordini, *Well-Being Supported by Family Wealth—A Foundation to Flourish*, BLOOMBERG ESTATES, GIFTS & TRUSTS J. (May 14, 2020); Richard Franklin & Claudia Tordini, *"Health" in HEMS Means Complete Well-Being*, 50 ACTEC L.J. 339, at 361 n.102 (Summer 2025).

i. **QTIP Trust Planning Is Difficult**.

- All of the growth in the value of QTIP trust assets will be subject to estate tax under §2044 at the spouse's death. Planning to avoid or minimize that tax that difficult.
- The trustee may enter into estate freezing transactions directly with the QTIP trust assets (*e.g.*, invest in fixed income portfolios or sell QTIP assets to other family trusts or entities for notes).
- Consider distributions to the beneficiary-spouse pursuant to the trust distribution standards; the spouse can then enter into estate freezing transactions. However, distributions beyond what is permitted under the trust distribution standards may be ignored for tax purposes.
- Classic commutations, in which the spouse merely receives the value of the income interest, would result in a taxable gift under §2519 of the entire value of the remainder interest (that is the clear purpose of §2519 and the spouse receives nothing with respect to the remainder interest to offset the deemed transfer of the remainder interest).
- Terminating QTIP trusts early and distributing everything to the spouse should be viewed as an aggressive transaction; this is clearly on the IRS "hot list" (the Tax Court held that this approach did not result in a deemed gift of the remainder interest under §2519 by the spouse-beneficiary, but the IRS may ultimately appeal a §2519 case).
- Using decanting rather than judicial termination to transfer assets to the spouse (perhaps by adopting a broad distribution standard) may avoid having explicit consent from remainder beneficiaries, but there are fiduciary concerns and the IRS took the position in CCA 202352018 that failing to object would result in a gift, the same as with consent.
- In a planning mode, draft QTIP trusts to give someone a power to appoint assets to the spouse-beneficiary (assuming the client is comfortable giving someone that power); Reg. §25.2519-1(e) says appointing assets to the spouse does not trigger §2519 even if the spouse subsequently disposes of the appointed property; the power is not exercisable in a fiduciary capacity whereas a decision by the trustee to terminate the trust and distribute substantial assets to the spouse must be appropriate consistent with the trustee's fiduciary duty.

- Similarly, in a planning mode give the spouse (or someone) a power to appoint the remainder interest at the spouse's death to minimize the possible gift by any particular beneficiary resulting from the beneficiary's assignment of the remainder interest to the spouse; however, the IRS dismissed the impact of the spouse's power of appointment in CCA 202118008 and the court in *Lewis-McDougall* ultimately determined that the power of appointment was not considered in the valuation of the gift when the trust was terminated early.
- Dividing a single QTIP trust into separate QTIP trusts may minimize the §2519 risk; transfers to the spouse to allow transfer planning by the spouse could be made from just one of the trusts, not risking the application of §2519 to the assets of the other trust. Many PLRs have allowed taxpayers to sever QTIP trusts in anticipation of this type of planning. *E.g.*, Ltr. Ruls. 202504006-202504007; 202146001.
- Planning with large QTIP trusts is difficult. *See* Joy Miyasaki & Read Moore, *Estate Planning Strategies for QTIP Trusts: Do Good Things Come to Those Who Defer?*, AMERICAN COLLEGE OF TRUST & ESTATE COUNSEL 2023 ANNUAL MEETING (Mar. 2023); Read Moore, Neil Kawashima & Joy Miyasaki, *Estate Planning for QTIP Trust Assets*, 44th U. MIAMI HECKERLING INST. ON EST. PLAN. ch. 12 1202.3 (2010); Richard S. Franklin, *Lifetime QTIPs—Why They Should Be Ubiquitous in Estate Planning*, 50th HECKERLING INST. ON EST. PL. ch. 16 (2016); Richard S. Franklin & George Karibjanian, *The Lifetime QTIP Trust – the Perfect (Best) Approach to Using Your Spouse's New Applicable Exclusion Amount and GST Exemption*, 44 BLOOMBERG TAX MGMT. ESTATES, GIFTS & TR. J. 1 (Mar. 14, 2019).