



The *WR Newswire* is created exclusively for AALU members by insurance experts led by **Steve Leimberg, Lawrence Brody, and Linas Sudzius**. *WRNewswire* #16.10.14 was written by **Steve Leimberg**, co-author with **Howard Zaritsky**, of [Tax Planning With Life Insurance](#), Publisher of [Leimberg Information Services, Inc. \(LISI\)](#) and Creator of [NumberCruncher Software](#).

The AALU *WRNewswire* and *WRMarketplace* are published by the Association for Advanced Life Underwriting® as part of the Essential Wisdom Series, the trusted source of actionable technical and marketplace knowledge for AALU members—the nation’s most advanced life insurance professionals.

TOPIC: Tom Clancy’s Widow Avoids Paying Estate Tax from Her Share Despite Complicating Life Insurance Provision

CITATION: [Michelle Bandy et al. v. Alexandra Clancy](#), 2016 WL 4471323 No. 93 September Term, 2015 (Ct. App. MD, Aug 24, 2016).

SUMMARY: Perhaps the *SUM OF ALL FEARS* for many an attorney – as well as for the client’s surviving spouse – is for property intended to qualify for a marital deduction to fail to qualify. Thomas L. Clancy, Jr., author of *The Hunt for Red October*, *Patriot Games*, *Clear and Present Danger*, and many other “keep you up all night” page turners died in October of 2013, survived by his second wife, Alexandra, and a minor child by that marriage, as well as four adult children from his first marriage.

The Maryland appeals court here was faced with the interpretation of Clancy’s will as amended by a second codicil and the twin questions of (1) would the *corpus* of the trust formed by that will be burdened with the payment of federal estate taxes and if so, (2) *which* beneficiaries would have to pay such taxes. The question arose because the trust apparently allowed the trustee to use trust assets to purchase life insurance, a non-income producing property.

The contention of the parties opposing Mrs. Clancy’s interpretation was that absent appropriate wording in the QTIP trust, it would not qualify for the marital deduction. This appeals court held that it would qualify.

RELEVANCE: “Magic words” can make all the difference! Here, a “savings clause” saved the day!

This clause, intended to “save” the marital deduction, placed a restriction on any actions by a personal representative that could reduce the tax benefit of the marital deduction. The savings clause assisted with the interpretation and explanation of the testator’s intent with respect to preventing adverse tax consequences. It served as an aid in determining the testator’s intent. Specifically, it expressed the testator’s intent that *any* authority that endangers the marital deduction is void.

An example of such a savings clause might be:

Notwithstanding anything herein contained to the contrary, any power, duty, or discretionary authority granted to my Fiduciary hereunder shall be absolutely void to the extent that either the right to exercise or the exercise thereof, shall in any way affect, jeopardize or cause my estate to lose all or any part of the tax benefit afforded my estate by the Marital Deduction under either Federal or State Laws.

With respect to life insurance, the problem is that in order to qualify for the marital deduction, QTIP trusts must require that the surviving spouse receive *all* of the income and it must be paid annually or more frequently. But life insurance policies are not income producing. In fact, to the contrary, most policies placed in trust require that premiums be paid. This would appear to violate QTIP requirements: a beneficiary of a QTIP trust that owned life insurance would not actually be receiving *any* income from the trust’s “investment” in life insurance and this would appear to eviscerate the marital deduction.

In Clancy’s case, the trusts in question permitted an investment in life insurance and the question was whether that permission applied to the marital trust and, therefore, disqualified it from inclusion in the marital deduction portion of his estate.

Finally, whenever a will or trust is reviewed, especially if one or more codicils are involved, all professionals should check for both ambiguity and conflict both internally and within all the documents as viewed as a whole.

The same warning—to check for ambiguity and consistency—applies to life insurance. The client’s professional advisors should check to see if the will purports to dispose of life insurance proceeds in a way not totally consistent with the policy’s beneficiary designation—and make sure the latest version is current and expresses the wishes of the client and circumstances of the beneficiaries.

FACTS: Tom Clancy executed a will on June 11, 2007. In it, he named his personal representative, left specific instructions with respect to the payment of estate taxes and left his personal and real property to his widow. The will divided the remainder of his estate between three residuary trusts: a marital trust for the benefit of Mrs. Clancy representing one third of the residuary; a family trust for the benefit of Mrs. Clancy and their minor child equal to one half of the residue that remained after the creation of the marital trust; and the final, two older children’s trusts into which the

remaining one half of the residue after the creation of the marital trust was to be deposited.

Clancy died in 2013. His will, along with two codicils, was submitted for probate in Baltimore. In September of 2014, Mrs. Clancy petitioned in the Orphans' Court for a declaratory judgment in which she sought a determination that the family trust, of which she was a beneficiary, was not obligated to pay any estate taxes.

The Orphans' Court decided in favor of Mrs. Clancy, and Clancy's children from his first marriage appealed.

Here are the key will provisions with respect to the marital deduction issues:

All estate, inheritance, legacy, succession and transfer taxes (including any interest and any penalties thereon) lawfully payable with respect to all property includible in my gross estate or taxable in consequence of my death ... shall be paid by my Personal Representative out of my residuary estate, subject, however, to the provisions hereinafter contained in Item SIXTH hereof with respect to the Marital Share therein created....

I give, bequeath, and devise all of the rest and residue of my estate, real and personal, and wheresoever situate (hereinafter referred to as my "residuary estate"), including all property over which I may have any power of appointment, as follows:

A. If my Wife survives me, there shall first be set apart and promptly transferred as set out below a separate fund (hereinafter sometimes referred to as the Marital Share) equal to one-third of my net estate, as calculated pursuant to Section 3-203(c) of the Estates and Trusts Article of the Annotated Code of Maryland.

1....

2. No asset or proceeds of any asset shall be included in the Marital Share as to which a marital deduction would not be allowable if included.

3. The Marital Share shall not be charged with or reduced by any estate, inheritance, succession or other tax of any kind or nature assessed by any State or under the laws of the United States or by any other taxing authority whatsoever.

...

8. The Marital Share shall be paid over and transferred to and held by my trustee or trustees, hereinafter named and sometimes, for convenience, referred to in the singular neuter, as a separate trust, called the "Marital Trust," which shall be administered as set out below in Item SEVENTH.

Clancy also included a savings clause in ITEM TWELVETH of his will, directing that no “payment or distribution by my personal representative or trustee” should be made that would “in any way prevent my estate from receiving the benefit of the marital deduction”.

On July 25, 2013, Clancy executed a second codicil which contained a series of amendments to the family trust as well as explicitly included the family trust within the scope of the savings clause designed to protect the benefit of the marital deduction.

The appeals court was asked to decide whether the savings clause, as amended by the second codicil, prohibited the personal representative from requiring that the family trust contribute to the payment of estate taxes. The court held that the savings clause was applicable to the entire will, was not dependent on a court ruling or IRS determination, and was a clear expression of Tom Clancy’s intent to have the family trust qualify for the marital deduction. Thus, it affirmed the Orphan’s Court decision that the family trust was not obligated to pay a share of estate taxes.

Although the tax clause and division of the residuary trusts seem to be providing some evidence that Clancy intended the family trust to share in the estate tax liability with the older children’s trust, the express language of the savings clause was seen as the clearest and the predominant evidence of Clancy’s intent, which could only be achieved if the family trust was free of estate tax liability.

DISCLAIMER

This information is intended solely for information and education and is not intended for use as legal or tax advice. Reference herein to any specific tax or other planning strategy, process, product or service does not constitute promotion, endorsement or recommendation by AALU. Persons should consult with their own legal or tax advisors for specific legal or tax advice.