A. Introduction

1. “I’m opposed to millionaires, but it would be dangerous to offer me the position.”—Mark Twain.

2. If the requirements for the estate or gift tax marital deduction are satisfied, the deduction itself is unlimited. Generally, the requirements are the same for both the estate and gift tax marital deductions. The marital deduction results in the deferral, not elimination, of federal estate tax.

3. A typical estate plan for a wealthy couple will use the applicable credit in each estate and the marital deduction in the first estate to minimize federal estate tax and maximize its deferral.
a. Mr. and Mrs. Miller each have $1,000,000; they have a combined estate of $2,000,000. Each of them have established a credit shelter trust with any excess assets being distributed to the surviving spouse (if there is a surviving spouse) or the credit shelter trust (if there is no surviving spouse).

b. If Mr. Miller dies first, his $1,000,000 will be used first to fund the credit shelter trust ($650,000 in 1999) and the remaining $350,000 will be distributed to Mrs. Miller. If Mrs. Miller dies later in 1999, her estate of $1,350,000 will be reduced by $280,000 for death taxes and $1,070,000 would be distributed to her credit shelter trust.

c. If all of the assets are held by one spouse or are held jointly, the results may change dramatically. For instance, if Mr. and Mrs. Miller hold their $2,000,000 as tenants by the entireties or as joint tenants with rights of survivorship, no tax will be paid on the first estate, but all $2,000,000 will be included in the second estate at a tax cost of $569,000 rather than $280,000. Similarly, if Mr. Miller held all of the assets in his name and Mrs. Miller died first, there would be no federal tax on the first estate and the second estate would be taxed at $569,000 if both deaths occurred in 1999.

d. Much estate planning, then, involves arranging assets so both applicable credits may be fully used with the remaining assets disposed of in a manner qualifying for the marital deduction in the first estate.

e. Since use of the marital deduction and the applicable credit are so interrelated in estate planning, a table of the increasing credits is included here.

<table>
<thead>
<tr>
<th>Year</th>
<th>Credit</th>
<th>Tax Free</th>
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<tbody>
<tr>
<td>1999</td>
<td>$211,300.00</td>
<td>$650,000.00</td>
</tr>
<tr>
<td>2000</td>
<td>$220,550.00</td>
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<tr>
<td>2002</td>
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<td>$700,000.00</td>
</tr>
<tr>
<td>2003</td>
<td>$229,800.00</td>
<td>$700,000.00</td>
</tr>
<tr>
<td>2004</td>
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</tr>
<tr>
<td>2005</td>
<td>$326,300.00</td>
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</tr>
<tr>
<td>2006</td>
<td>$345,800.00</td>
<td>$1,000,000.00</td>
</tr>
</tbody>
</table>

B. Requirements for Estate Tax Marital Deduction

1. “Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patri-
otic duty to increase one’s taxes.” Judge Learned Hand, Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934), aff’d, 293 U.S. 465 (1935).

2. **Marriage.** The parties must be married at the time of one spouse’s death.
   
a. The validity and the existence of marriage is a question of local law, such as common law marriages and, possibly, same sex marriages.

   b. Marriage continues until a final divorce or dissolution decree is entered by the court. Eccles v. Commissioner, 19 T.C. 1049 (1953), aff’d on other grounds, 208 F.2d 796 (4th Cir. 1954).

   c. The failure to change the beneficiary after divorce may result in transfer to former spouse which does not qualify for marital deduction.

3. **Survivorship.** Local law will govern survivorship determination in the case of simultaneous death and in the absence of a contrary provision in the governing document.
   
a. The Uniform Simultaneous Death Act presumes that each spouse survived the other which results in each estate receiving one half of joint property.

   b. Survivorship clauses should be drafted to avoid under-utilization of the unified credit. The spouse who otherwise would have insufficient separate assets to fully fund a credit shelter trust should be presumed to have survived.

   c. The marital deduction is allowed in situation in which the spouse is required by the will or trust to survive the decedent by as much as six months. But if the bequest is contingent upon a condition which may not be determined within that six-month period, the marital deduction will fail. Accordingly, a survivorship clause should not be based upon death as the result of a common disaster (“If my spouse and I die as the result of a common disaster) unless it is qualified “such that it cannot be determined which of us died first.”

4. **Deductible Property Interests.** To qualify for the marital deduction, the property must first be included in the decedent’s gross estate. Not surprisingly, no deduction is allowed for property that passes to a surviving spouse, but is not included in the decedent’s gross estate for federal estate tax purposes.
Examples of property not included in a gross estate are property subject to a special power of appointment and irrevocable life insurance trusts.

a. A marital deduction will not be allowed for property that is otherwise deductible as expense, claim or loss. No double deduction is permitted.

b. The interest received by the surviving spouse cannot be a nondeductible terminable interest.

5. *Citizenship or Qualified Domestic Trust*. The surviving spouse must be or become a United States citizen by the time the federal estate tax return is filed.

a. A noncitizen who is in the process of obtaining citizenship must also be a U.S. resident at all times after the decedent’s death and before citizenship granted.

b. If the surviving spouse decides to become a citizen, the lawyer should request an extension of time to file the federal estate tax return because the citizenship process will take more than nine months in most instances.

c. In the absence of citizenship, the marital deduction is allowed only for property placed in a qualified domestic trust before the estate tax return is filed and for property governed by an applicable tax treaty.

C. Pass from Decedent to Surviving Spouse as Beneficial Owner

1. “With all my worldly goods I thee endow.”—*The Book of Common Prayer*

2. *Bequest or Inheritance*. For property to pass as a bequest, the decedent’s will must be probated. A bequest for marital deduction purposes includes instructions to pay a debt of the surviving spouse for which the decedent was not responsible. Rev. Rul. 79-383, 1979-2 C.B. 337.

a. If the personal representative or the trustee has too much discretion in determining what a surviving spouse will receive, the distribution will not qualify for the marital deduction. See Priv. Ltr. Rul. 90-10-001 (Oct. 20, 1989).

b. Amounts paid to a surviving spouse in settlement of a dispute with other family members often is determined not to “pass from” a decedent. See *Estate of Allen v. Commissioner*, 60 T.C.M. (CCH) 904 (1990).
3. **Dower and Curtsey.** Dower and curtsey interests are considered to have passed from the decedent.

4. **Elective Share.** The amount the surviving spouse receives by electing to take against decedent’s will qualifies for the marital deduction if the distribution otherwise satisfies requirements for the marital deduction.

   a. For federal estate tax purposes, taking against a will does not disqualify otherwise deductible property interests, such as jointly held property, from the marital deduction.

   b. The elective share is determined by state law. See *Estate of Tenenbaum v. Commissioner*, 112 F. 3d 251 (6th Cir. 1997)

5. **Jointly Held Property.** Generally only one half of the value of property held jointly by a decedent and the surviving spouse will be included in the decedent’s gross estate for federal estate tax purposes. The half that is included will also qualify for the marital deduction. Property acquired by a married couple before 1977 has been held to be fully includable in a decedent’s gross estate and also fully deductible for marital deduction purposes. (Full inclusion is beneficial because the entire property then receives a stepped-up basis.) *Gallenstein v. United States*, 975 F.2d 286 (6th Cir. 1992); *Patten v. United States*, 116 F.3d 1029 (4th Cir. 1997).

6. **Estate Remainder Trust.** None of the trust income or principal may pass to anyone other than the surviving spouse or the surviving spouse’s estate.

   a. The estate remainder trust is the only property interest qualifying for the marital deduction which does not require the payment of income to the surviving spouse during the spouse’s lifetime.

   b. The trust may hold unproductive property since income is not required to be paid to the surviving spouse.

   c. The income may be paid to the spouse or for the benefit of the spouse, but payment is not required.

   d. Principal may be paid to the spouse, but distribution during life is not required.

7. **Spouse as Beneficiary.** Proceeds of life insurance policies, IRAs, and other retirement plans which are paid outright to a surviving spouse will qualify for the marital deduction.