Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2244

Date: 15-Sep-14
From: Steve Leimberg's Estate Planning Newsletter
Subject: Barry Nelson & Richard Franklin: Inter Vivos QTIP Trusts Could Have Unanticipated Income Tax Results to Donor Post-Divorce

"Testamentary QTIPs are perhaps the most common form of marital deduction trust. The rules for structuring a QTIP trust upon the settlor's death are generally known and accepted, but the creation of inter vivos QTIP trusts are less common, even though such trusts offer superb estate planning opportunities. While the core principles of testamentary and inter vivos QTIP trusts are exactly the same, inter vivos QTIP trusts require additional considerations that are not as well known to those who may not be using inter vivos QTIP trusts on a regular basis.

Numerous articles and presentations have extolled the many benefits of inter vivos QTIP trusts including asset protection, creation of estate tax discounts and 'Supercharging℠.' However, estate planners and their clients may not focus on the fact that the donor of an inter vivos QTIP trust may have continuing obligations to pay income taxes on trust capital gains post-divorce, notwithstanding that the donor may have no right to trust distributions or access to trust assets to pay such taxes."

Barry A. Nelson and **Richard Franklin** provide **LISI** members with commentary that reviews the potential income tax consequences to the donor of an inter vivos QTIP trust. The authors would like to acknowledge the review of their commentary by **Carlyn S. McCaffrey** and **Bruce Stone**. Their comments were integral to the issues discussed and are integrated herein. The assistance of **Michael A. Sneeringer, Esq.** is also acknowledged and appreciated.

Barry A. Nelson, a Florida Bar Board Certified Tax and Wills, Trusts and Estates Attorney, is a shareholder in the North Miami Beach law firm of **Nelson & Nelson, P.A.** He practices in the areas of tax, estate planning, asset protection planning, probate, partnerships and business law. He provides counsel to high net worth individuals and families focusing on income, estate and gift tax planning and assists business owners to most effectively pass their ownership interests from one generation to the next. He assists physicians, other professionals and business owners in tax, estate and asset protection planning. As the father of a child with autism, Mr.

Nelson combines his legal skills with compassion and understanding in the preparation of Special Needs Trusts for children with disabilities. Mr. Nelson is a Fellow of the American College of Trust and Estate Counsel and served as Chairman of its Asset Protection Committee from 2009 to 2012. Mr. Nelson is named in *Chambers USA: America's Leading Lawyers for Business* as a leading estate planning attorney in Florida. Since 2010, he has been listed as one of less than 10 lawyers receiving their highest rating of "Band 1" in the Florida Estate Planning category. Mr. Nelson has been listed in *the Best Lawyers in America* since 1995 and is a Martindale-Hubbell AV-rated attorney. Mr. Nelson was recently named by Best Lawyers in America as the 2015 Trusts and Estates "Lawyer of the Year" in Miami.

As the Founding Chairman of the Asset Preservation Committee of the Real Property, Probate and Trust Law Section of the Florida Bar from 2004-2007, he introduced and coordinated a project to write a treatise authored by committee members entitled *Asset Protection in Florida* (Florida Bar CLE 2008, 3rd Edition 2013). Mr. Nelson wrote Chapter 5 entitled "Homestead: Creditor Issues." He is a past President of the Greater Miami Tax Institute. Mr. Nelson is a co-founder and current Board Member of the Victory Center for Autism and Behavioral Challenges (a not-for profit corporation) and served as Board Chairman from 2000-2008.

Richard Franklin is a member of **McArthur Franklin PLLC** in Washington, D.C. He focuses on estate planning, trusts and estate administration, and beneficiary and fiduciary representation. Mr. Franklin is a member of the District of Columbia and Florida Bars, is a Fellow of the American College of Trust and Estate Counsel, and is Group Vice-Chair of the ABA RPTE Section's Income and Transfer Tax Planning Group. He serves on the ACTEC Transfer Tax Study Committee and on the Steering Committee for the DC Bar's Estates, Trusts & Probate Law Section. He has spoken at numerous estate planning programs and written on estate planning topics for Actionline, BNA Insights, Estate Planning, Journal of Multistate Taxation and Incentives, Probate & Property, Steve Leimberg's Newsletters, Tax Notes, The Florida Bar Journal, The Washington Lawyer, Trusts & Estates and the BNA Estates, Gifts & Trust Journal. Mr. Franklin is a DC Super Lawyer and is ranked in the 2009 - 2014 editions of the Best Lawyers in America as a leading lawyer in the Trusts and Estates category.

Here is their commentary:

EXECUTIVE SUMMARY:

Testamentary QTIPs are perhaps the most common form of marital deduction trust. The rules for structuring a QTIP trust upon the settlor's death are generally known and accepted, but the creation of inter vivos QTIP trusts are less common, even though such trusts offer superb estate planning opportunities. While the core principles of testamentary and inter vivos QTIP trusts are exactly the same, inter vivos QTIP trusts require additional considerations that are not as well known to those who may not be using inter vivos QTIP trusts on a regular basis. This commentary highlights one of those considerations.

Estate planners typically understand that the donor spouse of an inter vivos QTIP trust will generally be taxed on all trust income under the grantor trust rules provided in Code Sections 672(e) and 677(a).[i] However, the estate planner (and his or her client) may be surprised that for the reasons discussed below, grantor trust status may continue with respect to undistributed capital gains post-divorce during the remaining lifetime of the donee spouse. In such

event the donor spouse will be subject to income taxes, post-divorce, on capital gains retained in the inter vivos QTIP trust during the remaining lifetime of the former spouse.

Numerous articles and presentations have extolled the many benefits of inter vivos QTIP trusts including asset protection, creation of estate tax discounts and "Supercharging[sm]."[ii] However, estate planners and their clients may not focus on the fact that the donor of an inter vivos QTIP trust may have continuing obligations to pay income taxes on trust capital gains post-divorce, notwithstanding that the donor may have no right to trust distributions or access to trust assets to pay such taxes.

COMMENT:

Code Section 682 Provides Limited Relief Post-Divorce

Code Section 682 provides that upon divorce, the donee spouse pays tax on distributed income from a trust that otherwise was a grantor trust taxed to the donor spouse. Specifically, Code Section 682 provides that "[t]here shall be included in the gross income of a wife who is divorced . . . the amount of the income[iii] of any trust which such wife is entitled to receive[iv] and which, except for this section, would be includible in the gross income of her husband, and such amount shall not, despite any other provision of this subtitle, be includible in the gross income of such husband."

Income Is Taxed to Donee Spouse Post-Divorce

For gift tax purposes, qualified terminable interest property is property in which the donee spouse has a qualifying income interest for life and to which a gift tax QTIP election has been made.[v] The donee spouse's right to income must begin immediately upon establishing the inter vivos QTIP trust and must continue for the donee spouse's life. An interest subject to termination upon the occurrence of a specified event, such as divorce, will not satisfy the qualifying income interest for life requirement.[vi] This means that following divorce, the inter vivos QTIP trust income must continue to be distributed to the donee spouse. Pursuant to Code Section 682, this will be "income" the donee spouse is "entitled to receive." But for Code Section 682, this income would be includible in the gross income of the donor spouse pursuant to Code Section 672(e)(1)(A). Therefore, Code Section 682 operates to override the grantor trust rules and tax the income to the divorced donee spouse.[vii]

Capital Gains

Code Section 682 does not apply to shift income tax on accumulated capital gains from the donor spouse (or the trust itself) to the donee spouse post-divorce. In PLR 200408015,[viii] the Service considered a trust established by the husband incident to divorce to pay the wife an annuity for life.[ix] Following the wife's death, the trust continued for the children. The husband retained no beneficial interest following the wife's death that would attract estate taxation. The husband intentionally retained a non-fiduciary power to reacquire the trust assets by substituting assets of equivalent value, thereby causing grantor trust status pursuant to Code Section 675(4)(C). The Service analyzed the application of Code Section 682 as follows:

> Provided that the circumstances surrounding Trust's administration indicate that the power of administration held by Settlor over Trust (i.e., the power to substitute assets for assets of equivalent value) is exercisable by Settlor in a nonfiduciary capacity without the approval or consent of a person in a fiduciary capacity, Settlor will be treated as the owner of Trust. We further conclude that while both Settlor and Wife are alive, section 682 governs the income taxation of Trust. Accordingly, distributions from Trust to Wife are deductible by Trust and includible

> by Wife in her gross income to the extent provided in sections 661 and 662. Under the terms of Trust, capital gains are not includible in the distributions to Wife. Accordingly, capital gains are not included in the distributions to Wife and are included in the gross income of Settlor under section 675(4) (subject to the conditions noted above regarding section 675(4)).[x]
>
> We further conclude that if Wife predeceases Settlor, upon the death of Wife, section 682 would no longer apply and Trust will be treated as a grantor trust with Settlor as owner, provided that, after the death of Wife, Settlor retains the same powers of administration that cause Trust to be a grantor trust under section 675(4) (subject to the conditions noted above regarding section 675(4)). If Settlor predeceases Wife, section 682 no longer applies and payments to Wife will be deductible to Trust under section 661 and includible in Wife's gross income under section 662. Income allocable to principal will be taxable to Trust. If neither Settlor nor Wife is alive, then the income taxation of Trust is also governed by the rules of subchapter J, other than the grantor trust rules and section 682.

If the inter vivos QTIP trust is a grantor trust as to principal, the donor spouse will generally continue to pay the income taxes on undistributed capital gains post-divorce during the lifetime of the donee spouse. The inter vivos QTIP trust may be a grantor trust as to principal for any number of reasons. It may because the assets revert to the donor upon the death of the donee spouse (i.e., the donor spouse has a backend interest), or as in PLR 200408015, another grantor trust trigger could have been intentionally used. In the context of a lifetime QTIP trust, however, the most obvious way grantor trust status would be applicable as to principal is that the trustees have the discretion to distribute trust principal to the donee spouse.

If capital gains are allocated to income in an inter vivos QTIP trust, Code Section 682 should apply to shift income tax on capital gains from the trust donor to the donee spouse post-divorce.[xi] According to PLR 9235032, if capital gains are properly part of DNI, Code Section 682 operates to switch the income taxation of such amounts from the donor spouse to the donee spouse. Therefore, in the context of an inter vivos QTIP trust, the trust instrument could mandate that capital gains be allocated to income, which then would be distributed pursuant to the "all income" requirement applicable to a QTIP trust, and Code Section 682 would require the donee spouse to include such amounts in gross income, subject to the amounts being included in DNI.[xii] However, this most likely will not be the desired result post-divorce as the donor usually would prefer that the capital gains be accumulated rather than paid to a former spouse.

Flying under the Radar

There are only limited articles that address the post-divorce income tax consequences to the donor of an inter vivos QTIP trust.[xiii] Attorneys and other advisors should be aware of the continuing income tax obligations during divorce negotiations, and the potential continuing income tax burden on the inter vivos QTIP trust donor should be considered as a part of marriage settlement agreements. Possibly the issue could be addressed in the form of a postnuptial agreement executed prior to creation of the inter vivos QTIP trust, but clients are often reluctant to do so. To avoid a surprise in the event of divorce where the donor spouse becomes taxed on undistributed trust capital gains, the issues described herein should be considered in advance of execution of the inter vivos QTIP trust. The planning options described below should be considered.

QTIP Qualifications versus Divorce Consequences

Even if the parties recognize the income tax exposure to the donor spouse post-divorce, there is no ability to provide for a tax reimbursement clause in the inter vivos QTIP trust in favor of the donor spouse, without disqualifying such trust from the gift tax marital deduction. Code Section 2523(f)(3) applies the testamentary definition of a qualifying income interest for life for an inter vivos QTIP trust by reference to Code Section 2056(b)(7)(B)(ii). The donee spouse has a qualifying income interest for life if: (i) the donee spouse is entitled to all the income[xiv] from the property; and (ii) no person has a power to appoint any part of the property to any person other than the surviving spouse.

Some inter vivos QTIP trusts provide that in the event of divorce, the donee beneficiary no longer is entitled to discretionary principal distributions from the inter vivos QTIP trust. This should terminate grantor trust status under Code Section 677(a)(1) based on the discretionary right to distribute principal. In such case, if there is no other trigger creating grantor trust status as to principal, the capital gains allocated to principal should be taxable to the trust post-divorce. As noted above, to qualify for the gift tax marital deduction, the inter vivos QTIP trust income must continue to be paid to the donee spouse for the lifetime of the donee spouse even after divorce, and no distributions can be made to anyone other than the donee spouse.[xv] But, Code Section 682 would switch the taxation of the trust's income post-divorce to the donee spouse.

The Potential Income Tax Surprise for the Donor Spouse Post-Divorce

Typically in the event of a divorce, the donor spouse has lost a portion of marital assets, may have obligations to pay alimony and child support, will no longer have indirect access to the inter vivos QTIP trust income that is payable annually to the donee spouse, and yet may be required to pay capital gains taxes on sales of the assets of the inter vivos QTIP trust where the sales proceeds either are not or may not be distributed to the donee spouse. Possible planning techniques to reduce the unanticipated tax liability for capital gains to the donor spouse post-divorce include:

> **1. Donor Retains Remainder Interest if Donee Spouse Predeceases Donor**. Inter vivos QTIP Trusts can provide excellent asset protection in states that have adopted self-settled asset protection legislation or legislation that provides that if assets held in an inter vivos QTIP trust revert upon the death of the donee spouse back to the donor spouse in trust, that such trust held for the benefit of the donor spouse is deemed to be settled by the donee spouse and not as a self-settled trust of the donor spouse (referred to as "Inter Vivos QTIP Trust Jurisdictions").[xvi] Although there are significant asset protection benefits for those in jurisdictions with either self-settled trust asset protection laws or in Inter Vivos QTIP Trust Jurisdictions where the donor reserves the right to trust assets upon the death of the donee spouse, Code Sections 677(a) and 672(e) result in the donor being subject to income taxes post-divorce on undistributed capital gains. The donor spouse may be willing to assume such a risk or may take advantage of planning to minimize the potential income taxes on such capital gains by, for example, providing the donor spouse with a power to substitute assets of equal value and thereby control the character of assets in the inter vivos QTIP trust so they are unlikely to significantly appreciate or if they do, to acquire the appreciated assets by substituting other assets without appreciation in the trust. If the donor spouse has liquidity to pay potential capital gains taxes, the donor spouse may be willing to do so if the donor and/or the donor's children are the residuary beneficiaries of the inter vivos QTIP trust.

2. Donor does not Retain an Interest in the Inter Vivos QTIP Trust but, the Donor's Spouse is Provided a Testamentary Special Power of Appointment ("SPA") in Favor of the Donor or Donor's Lineal Descendants. If the donor is not designated as a remainder beneficiary under the terms of the inter vivos QTIP trust upon the death of the donee spouse but the donee spouse has a special power of appointment in favor of the donor spouse or the donor's lineal descendants, would the donor still be subject to tax on undistributed capital gains post-divorce under Code Section 677(a), whether or not the power of appointment is in fact exercised in favor of the donor? This issue appears less clear than where the inter vivos QTIP trust provides a reversion back to the donor if the donee spouse predeceases the donor, but it would appear that the IRS could take the position that grantor trust status continues with respect to undistributed capital gains post-divorce if the special power of appointment continues post-divorce. It appears that pursuant to Code Section 674, any special power of appointment held by the donee spouse would be attributed to the donor spouse and likely cause grantor trust status as to principal. Like a discretionary power to distribute principal, a special power of appointment given to the donee spouse could terminate automatically in the event of divorce.

3. Terminate Trust Post Divorce. If upon divorce the assets of the inter vivos QTIP trust are distributed outright to the donee spouse, then the donor spouse is relieved of any obligation to pay income tax on accumulated capital gains under the grantor trust provisions. However, in order to be sure that trust assets pass to the donor's lineal descendants, termination of the trust may be an unacceptable alternative.[xvii] Furthermore, if the inter vivos QTIP trust was initially created as part of an asset protection plan, outright distributions to the donee spouse are unlikely to be an acceptable alternative.

4. Require Reimbursement of Income Taxes Payable by Donor from Other Assets of Donee Spouse. Although the inter vivos QTIP trust cannot permit distributions to anyone other than the donee spouse during the life of the donee spouse, a marital settlement agreement can obligate the donee spouse to reimburse the donor spouse for income taxes paid on accumulated capital gains or enable the donor spouse to setoff alimony or other payments otherwise due to the donee spouse by the income taxes payable on accumulated capital gains. This option is especially fair where the donor spouse has no retained interest should Code Sections 677(a) and 672(e) result in grantor trust treatment subjecting the donor spouse to tax without any rights to trust remainder upon death of the donee spouse. Perhaps this reimbursement obligation would be coupled with a right in the donee spouse to require the trustee to pay him or her an amount equal to the taxes. Without such coupling, the obligation of the donee spouse to reimburse the donor spouse may be difficult to secure and it is possible that alimony payments owed by the donor spouse to the donee spouse could be less than the amount of income taxes payable by the donor spouse, such that a portion of the reimbursement to the donor spouse is unsecured.

5. Creation of Nonreciprocal Inter Vivos QTIP Trusts. If non reciprocal inter vivos QTIP trusts are created by husband and wife, then each inter vivos QTIP trust can authorize discretionary distributions of trust principal to the donee spouse of an amount in excess of trust income to reimburse the donee spouse for any income tax obligations post-divorce resulting from grantor trust status of

such trust (i.e., the inter vivos QTIP trust created by husband for wife would provide that in addition to trust income that must be distributed annually to wife, wife would be entitled to a distribution from trust principal post-divorce to reimburse wife for any income taxes payable by wife on any trusts created by wife for husband that are determined to be grantor trusts). As long as there are sufficient assets in both inter vivos QTIP trusts, this approach may provide the security against an unanticipated diminishment of the donor's estate so that the consequences of grantor trust status, post-divorce, will not be burdensome to the donor spouse. However the provisions may enhance an IRS position that the trusts are in fact reciprocal trusts.

6. Create Options to Terminate Wholly Grantor Trust Status. One possible solution is to create some alternatives for turning off grantor trust status as to principal. For example, the inter vivos QTIP trust could have a trust protector authorized to terminate grantor trust status as to principal, including the ability to terminate the backend interests of the donor spouse. Moreover, the donor spouse could release his or her backend interests to terminate that incident of grantor trust status. The gift tax QTIP rules specifically provide that a transfer of such retained interests during the donee spouse's lifetime is not a transfer for gift tax purposes.[xviii] These options could be combined with provisions that automatically terminate the trustee's authority to distribute principal and/or any special power of appointment in favor of the donee spouse upon divorce.

Conclusion

Although there are numerous asset protection and estate planning benefits of using inter vivos QTIP trusts discussed at tax conferences and in articles and treatise materials, potential income tax exposure on undistributed capital gains in the event of divorce of the donor and donee of the inter vivos QTIP trust needs to be a part of planning discussions. In light of the potential income tax consequences to the donor of an inter vivos QTIP trust, practitioners should address these issues when inter vivos QTIP trust planning is considered and during marital settlement negotiations. The asset protection and estate planning benefits of inter vivos QTIP trust planning are exceptional, especially in Inter Vivos QTIP Trust Jurisdictions.[xix] Yet, a divorce could disrupt the plan and clients must be aware of potential income tax consequences in the event of divorce.

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

Barry Nelson

Richard Franklin

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LISI Estate Planning Newsletter #2244, (September 15, 2014) at http://www.leimbergservices.com

CITATIONS:

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[i] As discussed below, the donor is not subject to the grantor trust rules as to principal if there are no grantor trust triggers as to principal, post-divorce.

[ii] *See* Barry A. Nelson, Lester Law & Richard S. Franklin, Seeking and Finding New Silver Patterns in a Changed Estate Planning Environment: Creative Inter Vivos QTIP Planning, Address at the ABA Section of Real Property, Trust and Estate Law Spring Symposia (May 2, 2014) (and accompanying materials); Jonathan G. Blattmachr, Mitchell M. Gans & Diana S.C. Zeydel, *Supercharged Credit Shelter Trust*[sm] *versus Portability*, 28 Prob. & Prop. 10 (Mar./Apr. 2014); Diana S.C. Zeydel, *Cutting Edge Estate Planning Techniques: What Have I Learned From My Colleagues?*, NAEPC J. of Est. & Tax Plan. at 29 (2012); Mitchell M. Gans, Jonathan G. Blattmachr & Diana S.C. Zeydel, *Supercharged Credit Shelter Trust*[sm]*: A Super Idea for Married Couples Especially in Light of the 2010 Tax Act*, AK Tr. Co. Newsl. (May 2011); Barry A. Nelson & Richard R. Gans, *New §736.0505(3) Assures Tax/Asset Protection of Inter Vivos QTIP Trusts*, 84 Fla. Bar J. 50 (Dec. 2010); Mitchell M. Gans, Jonathan G. Blattmachr & Diana S.C. Zeydel, *Supercharged Credit Shelter Trust*, 21 Prob. & Prop. 52 (July/Aug. 2007).

[iii] What is "income" for purposes of Code Section 682 and how does the reallocation of income (and deductions) work as compared to grantor trust status? By its terms, the definition of "income" in Code Section 643(b), which looks to the governing instrument and local law to define income, does not apply to Code Section 682. This is because Code Section 643(b) applies to Subparts A, B, C and D of Subchapter J, and Code Section 682 is in Subpart E of Subchapter J. Even so, it seems that these rules would apply to determine income.

[iv] Consider when the donee spouse is "entitled to receive" income for purposes of § 682.

[v] I.R.C. § 2523(f)(2).

[vi] Treas. Reg. §§ 25.2523(f)-1(c), 25.2523(e)-1(f).

[vii] Presumably, the portion rules of Treas. Reg. § 1.671-3(b) would also be applicable to allocating deductions between the donee spouse.

[viii] PLR 200408015. Please note, Private Letter Rulings ("PLRs") cannot be cited as precedent and apply only to the taxpayer who requested the ruling.

[ix] This ruling also explains that Code Section 682 is applicable to trusts created incident to a divorce, notwithstanding the out of date regulations, which previously made Code Section 71 apply in such circumstances. "Prior to 1984, the section 682 regulations provided that section 71 would govern trusts formed in contemplation of divorce such as the one at issue here."

[x] Presumably, if the donor spouse had not retained the power to substitute assets to create grantor trust status as to principal, the capital gains allocated to principal would have been taxed to the trust itself.

[xi] PLR 9235032.

[xii] Treas. Reg. §§ 1.643(a)-3(b)(2) and (3) also allow capital gains to be included in DNI if the gains are allocated to principal but consistently treated as part of the distribution to the beneficiary or actually distributed to the beneficiary. Will Code Section 682 apply in these situations if the inter vivos QTIP trust allows the trustee the discretion to distribute principal to the donee spouse, even after divorce? This question is unanswered.

[xiii] *See* Carlyn S. McCaffrey, *Restructuring and Dissolving Trusts in the Context of Divorce*, 12 (*forthcoming* 2014); Robert T. Danforth & Howard M. Zaritsky, Grantor Trusts: Income Taxation Under Subpart E, 819 T.M. Est. Gifts & Tr. at A-60 (2010); Donna G. Barwick, Divorce: Right up There With Death and Taxes, Estate Planning Techniques in the Context of Divorce, Address at the 29th Annual Heckerling Institute on Estate Planning (Jan. 1995), *in* 29th Annual Heckerling Institute on Estate Planning (Matthew Bender, Pub., 1995).

[xiv] The term "income" means fiduciary accounting income or "trust income," and not taxable income. *See* Treas. Reg. § 25.2523(f)-1(c)(2).

[xv] I.R.C. §§ 2523(f)(1)(B) & 2056(b)(7)(B).

[xvi] *See* discussion in materials of Nelson, Law & Franklin, *supra* note i. The "Inter Vivos QTIP Trust Jurisdictions" are Arizona, Delaware, Florida, Kentucky, Maryland, Michigan, North Carolina, Oregon, South Carolina, Texas, Virginia and Wyoming.

[xvii] Consideration could be given to requiring the donee spouse to make a payment at death to the descendants of some portion of the value of the distribution.

[xviii] I.R.C. §2523(f)(5)(A); Treas. Reg. § 25.2523(f)-1(d)(1).

[xix] *See* ARIZ. REV. STAT. § 14-10505(E); DEL. CODE ANN. TIT. 12 § 3536(C)(2); FLA. STAT. § 736.0505(3); KY. REV. STAT. ANN. § 381.180(8)(a); MD. EST. & TR. CODE ANN. § 14-116(a)(1)-(2); MICH. COMP. LAWS § 700.7506(4); N.C. GEN STAT. § 36C-5-505(c); OR. REV. STAT. § 130.315(4); S.C. CODE ANN. § 62-7-505(b)(2); TEX. PROP. CODE § 112.035(g); VA. CODE ANN. § 64.2-747(B)(2); WYO. STAT. ANN. § 4-10-506(e).