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Postmortem Conservation Easements: Substantial Estate Tax Savings
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A postmortem qualified conservation easement yields significant tax savings, and can provide a lasting legacy for the decedent and his heirs. In this article, Rhode Island attorney Robert G. Petix, Jr. analyzes the rules applicable to such easements, and shows planners how they can take a "second bite of the apple."

by Robert G. Petix, Jr., Attorney [1]

A postmortem qualified conservation easement yields significant tax savings, and can provide a lasting legacy for the decedent and his heirs. This article analyzes the rules applicable to such easements, and offers planning suggestions.

One of the least understood -- and, consequently, one of the least used -- postmortem estate tax planning techniques is the granting of a conservation easement on real property owned by the decedent at death.[1] [2] The Internal Revenue Code prescribes two separate rules that use conservation easements to help reduce, for estate tax purposes, the value of real property included in the gross estate. Both methods can be implemented after death to lower the estate's federal estate tax liability, thus giving the heirs a "second bite at the apple" to reduce estate taxes even if the decedent did not (or could not) do so during life.

A conservation easement is a legal agreement between a landowner and another party which restricts, in perpetuity, the owner's right to develop commercially the tract of land subject to the easement. Congress enacted Section 2031(c) as part of TRA '97 in order to provide estate tax relief for estates that convey a qualified conservation easement to a donee organization that is eligible to receive and enforce the easement.

A variety of rules govern conservation easements that are considered "qualified" for purposes of the estate tax benefits afforded by Section 2031(c). Generally, if a conservation easement is conveyed to an eligible donee and is made exclusively for conservation purposes, then such an easement will be considered "qualified" for purposes of Section 2031(c) and an estate can derive two benefits that separately operate to decrease estate tax liability. I call the first of these two benefits the "Exclusion Rule" and the other the "Deduction Rule." Although both rules apply to pre-death and post-death grants of easements, here we are concerned with their applicability only in postmortem situations.

Exclusion Rule

The Exclusion Rule is the general provision enacted by Congress in TRA '97 and set forth in Section 2031(c): for estate tax purposes, it is possible to exclude from the gross estate up to 40%

of the value of land subject to a qualified conservation easement (QCE).2 [3] To qualify as a QCE, the land that will be subject to a QCE must comply with the following requirements contained in Section 2031(c):

- The land must have been owned by the decedent or a member of his family for the three-year period ending with the decedent's death;3 [4]
- The land must be located in the U.S. or any U.S. possession;4 [5] and
- The QCE election must be made on or before the due date (including extensions) of the estate tax return (Form 706).5 [6]

Assuming these preliminary requirements are met, then under the Exclusion Rule the amount that can be excluded from the gross estate is 40% of the difference between the gross value of the property minus the value of the easement.

Example. Greenacre is worth $1.5 million, and a QCE worth $500,000 is granted on Greenacre. The gross value of Greenacre (or $1.5 million) minus the value of the easement (or $500,000) equals $1 million which, multiplied by 40%, equals $400,000; $400,000 is excludable from the gross estate under the Exclusion Rule.6 [7]

There are a number of subordinate rules, however, that restrict the apparent generosity of the Exclusion Rule. First, there is an absolute cap on the amount that may be excluded under the Exclusion Rule. For decedents dying in 2002 and later, the exclusion limitation is $500,000.7 [8] Consequently, the most that an estate can exclude from the gross estate under the Exclusion Rule is $500,000.

Example. Greenacre is worth $4 million, and a QCE worth $2 million is granted on Greenacre. Without the cap limitation, 40% of the post-easement value of the land (i.e., 40% of $2 million), or $800,000, would be excludable under the Exclusion Rule. But, because of the cap limitation of Section 2031(c)(3), only $500,000 can be excluded from the gross estate under the Exclusion Rule.

Second, if the value of the QCE is less than 30% of the gross value8 [9] of the property, then the 40% exclusion will be reduced by two percentage points for each percentage point (or fraction thereof) by which the QCE's value is less than 30% of the gross value of the subject property.9 [10]

Example. Greenacre is worth $4 million, and a QCE worth $500,000 is granted on Greenacre. Because the QCE is worth only 12-1/2% of the gross value of the land (i.e., $500,000 is 12-1/2% of $4 million), the amount eligible to be excluded under the Exclusion Rule is only $105,000. This is calculated as follows: 30% - 12-1/2% = 18-1/2% xc3x97 2 = 37%; 40% - 37% = 3%; 3% of $3.5 million = $105,000.

Third, the Exclusion Rule does not apply to the extent the land is "debt- financed property"10 [11] and to the extent that the owner retains a development right with respect to the land subject to the QCE. Helpfully, Section 2031(c)(5)(B) allows heirs who have received an interest in the subject property to terminate by agreement a development right that had been retained by the decedent.11 [12] This, too, is a postmortem election that should be considered by heirs to decrease estate tax liability.

Fourth, the Exclusion Rule applies equally to an interest in a partnership, corporation, or trust so long as at least 30% of the entity was owned -- directly or indirectly -- by the decedent.12 [13] In this case, the amount excluded under Section 2031(c) is reduced on a pro rata basis by the percentage not owned by the estate. Ownership, in these circumstances, is determined under the same rules governing qualified family owned business interests in Section 2057(e)(3). Deduction Rule

The Deduction Rule is a separate and distinct rule from the Exclusion Rule. It permits an estate to take an estate tax charitable deduction under Section 2055(f) for a QCE granted to a qualified charity. In effect, estate taxes will be assessed only against the net value of property subject to the QCE. This is an extremely powerful mechanism to decrease estate tax liability because there is no cap on the allowed deduction (as there is under the Exclusion Rule). The charitable transfer of the QCE can be made on a postmortem basis,[13] [14] which has been allowed since subsection (9) was added to the original Section 2031(c) by Congress in the Internal Revenue Service Restructuring and Reform Act of 1998. Like any other charitable deduction, such a transfer of a QCE will reduce a taxable estate at its highest marginal rate.

Example. The decedent died in 2003. His gross estate totals $2.5 million, comprised of Greenacre (worth $2 million) and $500,000 in other assets. Absent a QCE, there will be an estate tax liability of approximately $680,000. Assume instead that a QCE worth $750,000 is granted on Greenacre. Under the Exclusion Rule, $500,000 will be excluded from the gross estate, and under the Deduction Rule, the $750,000 QCE will be entitled to an estate tax charitable deduction. After the application of these two rules, the estate tax liability will be approximately $102,500, or a savings of $577,500.

Of course, charitable deductions are nothing new in wealth transfer planning. Testamentary charitable donations normally are entitled to an estate tax deduction under Section 2055. What makes the Deduction Rule so unique and powerful is that a transfer of a QCE to restrict development rights effectively permits the land to remain in the hands of the beneficiaries and requires only that the land continue to be used in the same way it has been used up until now. And, because of the postmortem rule provided by Section 2031(c)(9), it can be left up to the beneficiaries of an estate to decide whether to go forward with the transfer of a QCE after the owner's death. Furthermore, the Deduction Rule can be combined with the Exclusion Rule to provide separate reductions in estate tax liability from a single transfer.[14] [15]

Issues to consider

Despite the extraordinary promise of the QCE technique, a number of issues must be resolved before a postmortem QCE is granted. These issues are discussed briefly below. One or more of these may prevent an estate from actually granting a postmortem easement on land. Because of the potentially enormous estate tax savings, however, these options should be considered carefully by an estate's executors and heirs.

1. *Fiduciary issues*. There may be complex fiduciary problems presented by an estate's granting a QCE. The conveyance of a QCE does not involve simply making a tax election; that would normally be authorized in a testamentary instrument. Instead, it involves the actual transfer of a property right from an estate to a qualified recipient, and effectively deprives the estate's beneficiaries of potentially valuable development rights. This must be considered from a variety of viewpoints. Do the fiduciaries have the legal power to make such a conveyance? What if the beneficiaries agree to the conveyance?

There are a few articles discussing the power of executors to convey postmortem QCEs.[15] [16] The analysis may hinge on how title to real property is conveyed at death under applicable state law, as well as the scope of the legal authority that fiduciaries possess over probate property.

Postmortem conveyance of a QCE may well require a court action, although at least three states[16] [17] have enacted legislation giving fiduciaries the discretion to convey QCEs. In any event, the practical problems presented by the conveyance of a property right to a nonbeneficiary of an estate must be resolved under applicable local law before a postmortem conservation easement can be successfully transferred.

2. *Economic loss to the beneficiaries*. It is somewhat difficult to estimate the value of what an estate would be "giving up" in granting a QCE. Reportedly, the market value of land subject to QCEs in western states has not diminished significantly. There, the marketability of property did not change as a result of a QCE grant, although the market (i.e., the class of interested buyers) did. However, that same phenomenon may not hold true in other areas of the country, since many buyers interested in purchasing large tracts of land in the West are probably motivated largely by their specific desire to keep the land undeveloped, while potential buyers elsewhere are likely to include developers who would be deterred from purchasing land subject to a QCE.

In any event, granting a conservation easement will by definition bar, in perpetuity, the right of the landowner to use the land for development, and this could have a significant impact on the value of such land in the future. On the other hand, given the time value of money, the present savings in estate taxes could favorably enhance the value of an entire estate in the long run. Furthermore, on an ongoing basis, the easement may reduce the subject land's local property taxes.

3. *Methods of conveying the conservation easement*. There are two primary methods used to convey a QCE to a qualified recipient while reserving some development rights over the property. The first, the "reservation method," basically allows the grantor to convey an easement over an entire parcel, with the reservation of a right to develop a discrete number of lots (e.g., single-family dwellings) on the property. The second method, the "carve-out method," allows the grantor to carve out specific portions for development (or, conversely, specific portions that will be subject to the easement). The carve-out method allows the parcels not subject to the easement to be developed, and in fact could enhance the market value of these parcels because of their proximity to the QCE-subject parcels. The exact method used to convey the easement should be discussed with the donee organization that will enforce the easement.

4. *Limitations imposed by the easement*. It is important to keep in mind that the restriction contained in the QCE may have an effect on the planned use of the property, even if no development is planned. For example, under Section 2031(c)(8)(B), the QCE must prohibit more than a de minimis use of the property for a commercial recreation activity. Because of the scant law in this area, it is not clear what constitutes a de minimis use for purposes of the QCE rules. For example, the use of land for commercial hunting purposes may exceed the de minimis use restrictions. It would be helpful to investigate what limitations may be imposed on the use of the property by the QCE.

5. *Working with eligible donees*. Although there are Regulations governing who can properly receive a QCE,[17] [18] for planning purposes it is sufficient to understand that the recipient must be a qualified organization that has a commitment to protect the conservation purposes of the donation and is capable of enforcing the easement. The Land Trust Alliance,[18] [19] headquartered in Washington, D.C., is a national umbrella organization and is a great place to begin to find an eligible donee organization.

Typically, the donor (or, in the case of a postmortem conveyance, the fiduciaries and/or devisees of the property) will walk the grounds with a representative from the recipient organization to formulate the scope of the proposed easement. Usually, the representative can give an estate a rough idea of the potential estate tax savings. Formally, an appraiser who is an expert on qualified conservation easements will have to be hired to appraise the property both with and without the QCE.[19] [20] The recipient organization can help the estate find and hire a qualified appraiser.

The granting of a conservation easement should involve extensive consultation with the recipient organization. Obviously, land trust charities have an interest in protecting as much land from development as possible, but the estate might have different views. On the other hand, if there is not enough land proposed to be subject to an easement, then an estate may not be able to convey the easement at all for lack of interest by a recipient organization. The relationship between a recipient organization and the donor can be described as a "partnership" but there is no doubt that negotiations between donor and donee will be necessary to delineate the exact nature and scope of the conservation easement to be conveyed. The entire process of granting a conservation easement should take approximately two to three months, with the appraisal process consuming much of that time.

6. *Miscellaneous issues*. There are a few other issues that should be considered by fiduciaries and beneficiaries before going forward with a postmortem QCE conveyance. First, to the extent that estate tax is avoided through the Exclusion Rule and the Deduction Rule, there will be no "step-up" in the income tax basis of the property under Section 1014. Thus, the savings discussed earlier will be offset somewhat by the capital gains tax that will be due if the land is ever sold.

Second, under Section 2031(c)(9), the Deduction Rule permits an estate tax deduction for a QCE granted after death only so long as no income tax charitable deduction is taken by any person with respect to the grant of the easement. Accordingly, an estate will not be able to claim an income tax deduction for the postmortem grant of a QCE, even though the decedent could have taken an income tax deduction had the easement been conveyed during life.

Third, the postmortem conveyance of a QCE is a relatively new estate planning technique; there are no cases on point, and the Treasury Department has issued no Regulations governing such transfers. Only two private letter rulings (Ltr. Ruls. 200014013 [21] and 200143011 [22]) have been issued to date by the IRS under Section 2031(c), so there is a dearth of law governing these transfers.

Conclusion

A postmortem conservation easement presents a unique opportunity to heirs. First, it allows a reduction in estate tax liability, even without an explicit direction by the decedent, either during life or by will, to make a charitable transfer. Second, the donation of an easement to a charitable recipient may well permit continued use of the property in exactly the same manner as it has been used to date. Third, under a relatively new and beneficial statutory provision, all land located in the U.S. is potentially a candidate for a conservation easement. An executor needs only to find an eligible recipient organization that will accept and enforce the easement.

Fourth, the law apparently allows a "double count" to reduce estate tax liability, in the form of an exclusion under Section 2031(c) and a deduction under Section 2055(f). (A "triple count" may even be possible if the land subject to the easement will enjoy a lower property tax burden under local law.) Finally, and perhaps more important than the tax savings, granting a conservation easement on real property can provide a lasting legacy for the decedent and his heirs.

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1. Stephen J. Small, Esq., one of the preeminent practitioners in the area of conservation easements, has said that the opportunity to donate a postmortem conservation easement is "terribly important and very poorly understood." See Small, An Important Tax Incentive for Landowners (last modified 9/4/99) http://www.stevesmall.com/art/articles/990830.html [25].back [26]
2. Section 2031(c)(1)(A). See Small, "New Estate Tax Relief for Land Under Conservation Easement," Tax Notes, p. 1171 (3/2/98), for a general discussion of Section 2031(c).back [27]
3. Section 2031(c)(8)(A)(ii).back [28]
4. Section 2031(c)(8)(A)(i) . This is a recent change that was adopted as part of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). Prior to EGTRRA, only land that was situated within 25 miles of a metropolitan area or national park or wilderness area, or within ten miles of an urban national forest, was eligible to be subject to a QCE.back [29]
5. Section 2031(c)(6).back [30]
6. See, generally, Schedule U to Form 706 (U.S. Estate Tax Return) on how to calculate the exclusion amount.back [31]
7. Sections 2031(c)(1)(B) and 2031(c)(3).back [32]
8. I.e., the value of a property unencumbered by debt and not subject to a conservation easement.back [33]
9. Section 2031(c)(2).back [34]
10. Defined in Section 2031(c)(4)(B)(i) as property with respect to which there is "acquisition indebtedness" on the date of the decedent's death. "Acquisition indebtedness" is defined in Section 2031(c)(4)(B)(ii).back [35]
11. In Ltr. Rul. 200014013 [21], for example, transferees of real property were permitted to agree in writing to terminate the retained development right on a postmortem basis so as to qualify the land for the benefits of a QCE under Section 2031(c).back [36]
12. Section 2031(c)(10).back [37]
13. Section 2031(c)(9).back [38]
14. It is, perhaps, counterintuitive that Congress would permit use of both the Exclusion Rule and the Deduction Rule for estate tax reduction stemming from a single transfer. The Code does not explicitly allow such a "double count," but does not preclude it either. In Ltr. Rul. 200143011 [22], the IRS implicitly confirmed the correctness of the double-count approach.

That ruling concerns an estate that claimed both an exclusion under Section 2031(c) and a deduction under Section 2055(f) for a single transfer of a conservation easement. Although the ruling request involved only the Section 2055(f) estate tax deduction, it seems clear that the double counting was permissible. back [39]

15. See, for example, Small, "Understanding the Conservation Easement Estate Tax Provisions," Tax Notes, p. 435 (4/17/00); Levin, "You're Not Too Late: Post-Mortem Donations of Conservation Easements," Tax Notes, p. 661 (10/30/00). back [40]

16. Colo., Md., and Va. back [41]

17. Reg. 1.170A-14(c). back [42]

18. The organization's website is http://www.lta.org [43]. back [44]

19. Although the exact methods used to calculate the relative values of the land are beyond the scope of this article, the appraiser will effectively determine the value of the property without the easement, and then calculate the value of the easement, which is then subtracted from the gross value of the land, yielding the post-easement value for estate tax purposes. back [45]

http://www.stevesmall.com/art/articles/990830.html.x1e[delim]x1efn2;;;bfn2;;;Section 2031(c)(1)(A). See Small, "New Estate Tax Relief for Land Under Conservation Easement," Tax Notes, p. 1171 (3/2/98), for a general discussion of Section 2031(c).x1e[delim]x1efn3;;;bfn3;;;Section 2031(c)(8)(A)(ii).x1e[delim]x1efn4;;;bfn4;;;Section 2031(c)(8)(A)(i) . This is a recent change that was adopted as part of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). Prior to EGTRRA, only land that was situated within 25 miles of a metropolitan area or national park or wilderness area, or within ten miles of an urban national forest, was eligible to be subject to a QCE.x1e[delim]x1efn5;;;bfn5;;;Section 2031(c)(6).x1e[delim]x1efn6;;;bfn6;;;See, generally, Schedule U to Form 706 (U.S. Estate Tax Return) on how to calculate the exclusion amount.x1e[delim]x1efn7;;;bfn7;;;Sections 2031(c)(1)(B) and 2031(c)(3).x1e[delim]x1efn8;;;bfn8;;;I.e., the value of a property unencumbered by debt and not subject to a conservation easement.x1e[delim]x1efn9;;;bfn9;;;Section 2031(c)(2).x1e[delim]x1efn10;;;bfn10;;;Defined in Section 2031(c)(4)(B)(i) as property with respect to which there is "acquisition indebtedness" on the date of the decedent's death. "Acquisition indebtedness" is defined in Section 2031(c)(4)(B)(ii).x1e[delim]x1efn11;;;bfn11;;;In Ltr. Rul. 200014013 [21], for example, transferees of real property were permitted to agree in writing to terminate the retained development right on a postmortem basis so as to qualify the land for the benefits of a QCE under Section 2031(c).x1e[delim]x1efn12;;;bfn12;;;Section 2031(c)(10).x1e[delim]x1efn13;;;bfn13;;;Section 2031(c)(9).x1e[delim]x1efn14;;;bfn14;;;It is, perhaps, counterintuitive that Congress would permit use of both the Exclusion Rule and the Deduction Rule for estate tax reduction stemming from a single transfer. The Code does not explicitly allow such a "double count," but does not preclude it either. In Ltr. Rul. 200143011 [22], the IRS implicitly confirmed the correctness of the double-count approach. That ruling concerns an estate that claimed both an exclusion under Section 2031(c) and a deduction under Section 2055(f) for a single transfer of a conservation easement. Although the ruling request involved only the Section 2055(f) estate tax deduction, it seems clear that the double counting was permissible.x1e[delim]x1efn15;;;bfn15;;;See, for example, Small, "Understanding the Conservation Easement Estate Tax Provisions," Tax Notes, p. 435 (4/17/00); Levin, "You're Not Too Late: Post-Mortem Donations of Conservation Easements," Tax Notes, p. 661

(10/30/00).x1e[delim]x1efn16;;;bfn16;;;Colo., Md., and Va.x1e[delim]x1efn17;;;bfn17;;;Reg. 1.170A-14(c).x1e[delim]x1efn18;;;bfn18;;;The organization's website is http://www.lta.org [43].x1e[delim]x1efn19;;;bfn19;;;Although the exact methods used to calculate the relative values of the land are beyond the scope of this article, the appraiser will effectively determine the value of the property without the easement, and then calculate the value of the easement, which is then subtracted from the gross value of the land, yielding the post-easement value for estate tax purposes.-->

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[4] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#fn3
[5] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#fn4
[6] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#fn5
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[9] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#fn8
[10] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#fn9
[11] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#fn10
[12] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#fn11
[13] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#fn12
[14] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#fn13
[15] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#fn14
[16] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#fn15
[17] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#fn16
[18] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#fn17
[19] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#fn18
[20] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#fn19
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[26] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#bfn1
[27] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#bfn2
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[31] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#bfn6
[32] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#bfn7
[33] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#bfn8
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[35] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#bfn10
[36] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#bfn11
[37] http://www.pgdc.com/pgdc/article/2003/07/postmortem-conservation-easements-substantial-estate-tax-savings#bfn12
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