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Former Judge Kettering of the Denver County Court once remarked that the most common weakness in will-drafting was the inability of the will draftsman to use the English language clearly and precisely. No will of any complexity should be signed until at least two attorneys have checked it—every one of us occasionally has an intellectual or linguistic blind spot. Finally, the attorney's job is not complete unless he periodically checks the wills he has drawn in the light of any changed conditions and reviews the situation with his client whenever a new will may be advisable.

TRANSFERS TAKING EFFECT AT OR UPON DEATH

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When we talk about transfers taking effect at or upon death we are generally talking about rich man's law. Generally we are talking about the Law of Trusts and the Law of Future Interests and their impeding effect on the imposition of death taxes and income taxes. A short translation of the terms "transfers taking effect at or upon death" is a *string* between the donor and the donee. Unfortunately, it is this string upon which has been played the sad note of tax victories for the Government.

Any study of transfers taking effect at or upon death is also a study of the law of the Philadelphia property lawyer. The first inheritance tax law in the United States was passed in Pennsylvania in 1862. This law anticipated the desire of Philadelphia property lawyers to avoid the imposition of the inheritance tax which applied to property passing at death. Accordingly, the law imposes the inheritance tax on transfers intended to take effect in possession or enjoyment at or upon death. The techniques developed by the Philadelphia property lawyers were brought into the Federal tax area with the passage of the Federal Estate Tax Law in 1916. From the passage of the federal law on September 8, 1916 and down to 1935, well drafted property law trusts involving future interests, were successful in insulating large estates from the federal estate tax. Some of the celebrated taxpayer victories well known to us are: *Shukert v. Allen,*[1] *Reinecke v. Northern Trust Company,*[2] *May v. Heiner,*[3] and *Helvering v. St. Louis Union Trust Company.*[4] Each of these decisions, with the exception possibly of *Shukert v. Allen,* has been expressly overruled either by the United States Supreme Court or by Congress. The tide began to run against the taxpayers in 1940. You all recall the celebrated case of *Helvering v. Hallock* [5] which reversed *Helvering v. St. Louis Union Trust Company* and held that whenever

[1] 273 U. S. 545 (1927).
[2] 278 U. S. 339 (1929).
[3] 281 U. S. 238 (1930).
[4] 296 U. S. 39 (1935).
[5] 309 U. S. 106 (1940).

there was in the decedent a possibility of reverter that the entire estate should be subject to federal estate tax. You also recall *Commissioner v. Church's Estate* [6] in 1949 which expressly overruled *May v. Heiner*. The Technical Changes Act of October 7, 1949 has repudiated *Reinecke v. Northern Trust Company*.

Not only clients, but also lawyers, tend to believe that property transferred in trust with just a little string attached should do no harm. Small lines have destroyed great ships and sent them onto the rocks and shoals. Let us hope that none of the instruments with which you and I are identified will ever put our client's "treasure trove" into the sovereign's treasury.

To you it is obvious that "transfers intended" are found most frequently in the pattern where the husband-father-grantor has created trusts or made other transfers for the present or future benefit of his wife and children. In most of the cases, the trusts have been irrevocable trusts. However, life insurance and annuity contracts have also run afoul of the taxing words.

Transfers intended to take effect in possession will cause heavy imposition of death taxes because recently many advisers, lawyers as well as life underwriters, have been near-sighted. They focused attention on the Federal Income Tax Law. You all recall that in 1943 the Federal Income Tax Law amended Section 167 (c) for two purposes: (1) to counteract *Helvering v. Stewart;*[7] and (2) in order to give income tax relief to some parent-grantors who had created irrevocable intervivos trusts for minor dependents.

Some advisers and some lay men have been by this federal income tax section lulled into a false sense of security. Under this section, the federal income tax consequences are fairly clear as it applies to one widely used type of trust clause. The section contains provisions for accumulation of income during the minority of the beneficiary with a further provision that the trustee may apply to the use of the child so much of the income as the trustee considers proper for education, maintenance or support. In fact, the Federal Income Tax Regulations (Reg. 111, Section 29.167-2), and those under the *Clifford Doctrine*, expressly except from their broad scope any contention for income taxation of the grantor, contrary to Section 167 (c), Reg. 111, Sec. 29.22 (a)—21 (d).

In passing, let us point out that the Colorado Income Tax Law [8] has not been amended to parallel Sec. 167 (c) of the federal law.

Our focus of attention is on estate taxes. Unfortunately, we find no counterpart of Code Section 167 (c) in the estate tax chapter of the code. On the contrary, we find the dragnet trap amendment of the Technical Changes Act of 1949 taxing practically all transfers intended to take effect in possession or enjoyment at or after death.

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[6] 335 U. S. 632 (1949).
[7] 317 U. S. 154 (1946).
[8] Colo. Sec. 13(c), Reg. p. 151, Art. 13 (c).

Every trap is designed to catch certain victims. Let us block out the arrangements that will be trapped:

(1) The decedent transferred property in trust, to pay the income to his wife during her life, and at her death to pay the corpus to the decedent if living, and if not, to his children. The decedent was survived by his wife. The value of the transferred property, less the outstanding life estate in the wife, is includible in the decedent's gross estate since the children cannot obtain possession or enjoyment of the property, through ownership of their interest, except by surviving the decedent.

(2) The decedent transferred property in trust to accumulate the income during his life and at his death to distribute the principal and accumulated income to his son or the son's estate. While the decedent retained no right or interest in the property, the transfer is taxable since possession or enjoyment of the property cannot be obtained except by surviving the decedent.

(3) The decedent transferred property in trust, to accumulate the income until his son reached the age of 30, or until the decedent's prior death. Upon the first to occur of these events the son was to receive the corpus. The decedent's death in fact occurred before his son attained the age of 30. The transfer is taxable under Section 811 (c) (3) (B) since the son could obtain possession or enjoyment only by surviving the earlier to occur of the decedent's death or the son's attaining age 30, and since the decedent's death in fact occurred first.

Now for two arrangements that are not supposed to be trapped:

(1) The decedent transferred property in trust, providing for an estate for life in his daughter, and a remainder to the children of the daughter. No part of the property is includible under this section. The daughter can possess and enjoy the property through ownership of the life estate without surviving the decedent. The same is true of the daughter's children with respect to their remainder interest.

(2) The decedent transferred property in trust providing for accumulation of the income during his life, and at his death to pay the entire fund to his children or their issue. His wife was given the unrestricted power to alter, amend, or revoke the trust. The wife survived the decedent and did not in fact exercise her power during the decedent's life. Under the last sentence of Section 811 (c) (3), the transfer is not taxable since possession or enjoyment of the property was obtainable during the decedent's life through the exercise of the wife's power which was a power of appointment as defined in Section 811 (f) (2) of the Internal Revenue Code, and was in fact exercisable immediately prior to the decedent's death.

Between these two extremes is the field for caution. Seemingly unimportant trust clauses deserve careful drafting to avoid having the trust corpus subjected to estate taxation on the basis

of a theory not readily perceived. Often the clause may even be unessential to the grantor's purpose of setting up a trust for his children. Even careful and informed drafting can give no absolute assurance against new Congressional demands for revenue.

TRANSFERS PRIOR TO 1949

Let us try to distill from the 1949 amendment a few guide rules to map a course free from tax traps for our clients. First, let us say a word about pre-October 8, 1949 transfers taking effect at death. The Technical Changes Amendment prevents the application of the *Spiegel* case[9] to transfers made before October 8, 1949, the date upon which the Conference Committee agreed to the contents of the Technical Changes Act. In addition it limits application of *Helvering v. Hallock* and *Klein v. U. S.*[10] with respect to pre-October 8, 1949 transfers. The application of the *Spiegel* case is prevented as to transfers made before October 8, 1949 by the removal of possibilities of reverter by operation of law from consideration, as a ground for taxing irrevocable lifetime transfers. Therefore, if a transferor has in the past transferred property into an irrevocable trust and has provided for payment of remainders to his children or their issue after his death, the fact that if he should leave neither children nor grandchildren surviving him at the date of his death and that the property would return to his estate by operation of state law, will not alone make the transfer taxable if he is in fact survived by either children or grandchildren.

Application of the *Hallock* and *Klein* cases is also limited as to pre-October 8, 1949 transfers. In these cases it was provided that the express retention of a reversionary interest will not make a transfer taxable unless the value of the reversionary interest is worth more than five per cent of the value of the property transferred. The value of such reversionary interest is to be determined as of immediately before the death of the decedent.

EFFECT OF 1949 AMENDMENT

Second, let us consider the effect of the amendment on transfers made after October 8, 1949. The prospective influence of the amendment is to give full force and effect to the *Klein, Hallock* and *Spiegel* cases and to several others as well, for all future interests, i.e., those made after October 8, 1949. Let us spell this out. The prospective application of the amendment keeps and affirms the pre-existing rule that only when the death of the transferor is the operative factor ending his reversionary interest and conferring an interest in the estate on the beneficiary, does the property transferred become includible in the estate of the transferor. In addition, by abolishing the doctrine of *Reinecke v. Northern Trust Company,* an estate tax can be levied on a parent-transferor, even though the parent parted with *all his interest,* present and pros-

[9] Spiegel's Estate v. Commissioner, 335 U. S. 701 (1949).
[10] 283 U. S. 231 (1931).

pective, in the property. You recall the old estate tax regulation which established the test in determining whether a transfer is taxable as one intended to take effect at death. That test was contained in the requirement that "the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise)." In other words, under the prospective amendment, it is no longer necessary for the transferor to have even a reversionary interest. We now look only to the persons who are to receive the possession or enjoyment to determine whether or not the tax applies. If any person must survive the transferor to obtain possession or enjoyment, the interest passing to such person is taxable. There is one exception to this. The law specifically provides that there is no basis for taxing any interest of which possession or enjoyment could be obtained by any beneficiary during the decedent's life through the exercise of a power of appointment as defined in Section 811 (f) (2), which, in fact was exercisable immediately prior to the decedent's death. This has reference to transfers by the decedent under which he grants a power of appointment to others and makes it exercisable by them alone. This seems to overrule the decision of the Supreme Court of *Goldstone v. U. S.*[11]

We do not have time to consider specific trust provisions as to whether or not they will or will not be subjected to the Federal Estate Tax. In fairness to our life underwriter friends, let us point to a tax trap in their field. The 1949 amendment and its effect on intervivos gifts of life insurance must await the developing decisions of the Tax Court and the District Courts. But there are some decisions on the payment of life insurance premiums which point to a tax trap. You recall the cases holding that the payment of a premium on a policy by one other than the owner constitutes in part a gift of a part interest, and therefore does not come within the annual gift tax exclusion, except to the extent that such payment increases the cash surrender value.[12] These cases suggest the likelihood that the Commissioner will take the position that a gift of a policy by an insured (even it found not to be made in contemplation of death) may nevertheless be held to be, at least in part, a transfer taking effect at death, since to the extent that the proceeds exceed the cash surrender value, the possession and enjoyment of the gift can be obtained only by the donee surviving the decedent. Such a tax gathering construction of the Technical Changes Act certainly should not justify inclusion of more than the difference between the cash surrender value and the face amount of the policy. We all know that the donee has immediate possession and enjoyment of the cash surrender value. The Commissioner might well be successful in taxing the excess which comes into possession and enjoyment on the donor-insured's death.

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[11] 325 U. S. 687 (1945).

[12] Chittenden v. Hassett, District Court of Mass., 42-1 U.S.T.C. Para. 10,047.