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cially low basis "ordinary" assets should not be transferred to satisfy the wife's right of support or to satisfy a decree if it can be avoided. An outright gift of such property to the wife is likely to be preferable taxwise.

(c) In most instances it will be desirable to fix specifically the value of support rights by negotiated agreement and to incorporate a finding of such value into the divorce decree.

SOME WILL DRAFTING POINTERS ON MARITAL DEDUCTION

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The federal estate tax is a tax on the right to transfer property. Death is the taxing event. The transfers taxed include those becoming effective at death, e. g. by will or joint tenancy, and some lifetime transfers prompted by the certainty of death, e. g. transfers in contemplation of death. Within the threat of the tax is any property or interest in property of the deceased person. Property includes life insurance, co-owner saving bonds, tenancies with right of survivorship and other non-probate property, as well as all probate property. These are included in the gross estate.

The tax, fortunately, is not computed on the gross estate but only on the net estate. The net estate is equal to the gross estate less the specific exemption and deductions. The specific exemption, since 1942, is only $60,000. There is no exemption for life insurance. Deductions from the gross estate are allowed for debts, claims (including the $2,000 Colorado widow's support allowance), funeral expenses and expenses of administration.

The specific $60,000 exemption means that a family with less than $60,000 of worldly goods, including life insurance, has no federal estate tax problem. The higher prices since 1942 have swept many families into the range of the federal estate tax. Middle class married couples have not received any reduction in estate tax rates, but they have received the tax relief afforded by the "marital deduction" created by Congress in 1948.

The marital deduction was created by Section 812 (e) of the Internal Revenue Code. Just to set it out would take four pages of this size print. Many more pages of regulation interpret it.[1] Within the limits of space, therefore, the marital deduction can only be defined and a few will-drafting problems considered.

The marital deduction is a deduction from the gross estate. It

[1] Regulation 105, Section 81.47.

is in addition to deductions for claims, funeral and administration expenses. The amount of the deduction is not fixed. It can be $100 or $1,000,000.

The basic idea behind the marital deduction is simple, but its application extremely technical. The basic idea is that a married couple is treated as if each spouse owns one-half of the other's property. A marital deduction is given, therefore, in an amount equal to the value of any interest in property which passes or has passed from the decedent to his or her surviving spouse either outright, or practically outright. Practically outright may include a life estate or a trust, if and only if, it exactly qualifies under the statutory rules.[2] The marital deduction, however, is limited to an amount not to exceed 50 per cent of the decedent's adjusted gross estate. Adjusted gross estate, a new term, is the gross estate less the claims, funeral and administration expenses.

In 1940 Mr. Justice Frankfurter in *Helvering & Hallock,* an estate tax case, said:[3] "Distinctions which originated under a feudal economy when land dominated social relations, are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth."

Now an estate tax saving by way of the 1948 marital deduction may depend on whether our state adopted the Rule in *Shelley's Case.*[4] A marital deduction is easily won with outright devises and legacies to the surviving spouse. Man and wife joint tenancy is also an easy avenue to marital deductions.

These easy methods of transfer may have disadvantages. To illustrate: John has $100,000 in property and life insurance. His life insurance and will leave everything outright to his wife, Mary, and nothing for their three married children. At his death the claims and expenses are $10,000. No federal estate tax will be payable; but a return must be filed. The marital deduction equals 50 per cent of $100,000 less $10,000 or $45,000, but the specific exemption also is $60,000.

But on Mary's death there will be no marital deduction and only a $60,000 exemption. To make things worse the 1948 law wiped-out, as to a pre-deceased spouse's property, the deduction for property previously taxed within five years.[5] So John's outright gifts to Mary may merely postpone the estate tax until her death. At her death there may be higher estate tax rates and the $60,000 specific exemption may be reduced.

The marital deduction is not available to every surviving spouse. If husband John, by will, trusts and life insurance beneficiary agreements, leaves a $120,000 estate to pay the income to his widow Mary, for her life and on her death to pay the principal to

[2] I.R.C. Sec. 812(e)(1)(B)(C)(D) & (F).
[3] 309 U. S. 106.
[4] The Rule is assumed to be in force in Colorado. Barnard v. Moore, 71 Colo. 401, 406 (1922).
[5] I.R.C. sec. 812 (c).

their three children equally, no marital deduction will be available. About $9,500 estate tax would be payable on the $60,000 net estate after the $60,000 specific exemption. There is an advantage in this. No estate tax will be payable on Mary's death; no worry will be spent on possible higher estate tax rates or the reduction of the $60,000 specific exemption.

To get the greatest benefit, an estate plan should combine the advantages of the two illustrations. About one-half of the property should go to the surviving spouse outright, or so it will qualify for marital deduction; the other half should be protected from the second death taxes on the death of the surviving spouse.

DO'S AND DON'TS IN WILL-DRAFTING

There are a growing number of families with over $120,000 and many fewer with a million. These are the middle class—farmers, ranchers, oil men, doctors, tradesmen. Some will-drafting comments therefore may prove helpful:

(1) Don't use joint or mutual wills. There are legal problems,[6] and the surviving spouse may lose any marital deduction.[7]

(2) Drafting the clause on payment of death taxes and claims requires special attention. Section 812 (e) (1) (E) requires that the value of the interest passing to the surviving spouse be reduced by any estate or inheritance tax to be paid by the spouse or out of her interest, and also reduced by any encumbrances upon her interest or property, or any obligation imposed by the decedent and incurred by the surviving spouse with respect to the passing of such interest.

To get the full marital deduction, some property not passing to the surviving spouse must be charged with the payment of all death taxes. The tax articles and law reviews are arguing about how the best clauses are to be drawn. Marital deduction property clauses couched in terms of decedent's gross estate have been criticized.[8] It is almost impossible to draft a clause that will not require algebraic computation. Careful attention should be given to estate taxes on life insurance and non-probate property. Cautious drafting also will meet I. R. C. Section 826 by including a sentence on waiver of reimbursement.

A careful search of the post-1948 tax, will, and estate planning literature yielded no suggestion on the payment of claims, funeral and administration expenses. The Treasury administrative policy is clear but unpublished. Unless the will clearly charges all the before-death claims and after-death expenses against property passing to the surviving spouse, the revenue agent will reduce the

[6] 10 Rocky Mtn. L. Rev. 287 (1938); 18 Rocky Mtn. L. Rev. 367-377 (1946); 61 Harv. L. Rev. 675 (1948).

[7] I.R.C. Sec. 812 (e) (1) (B); Reg. Sec. 81, 47 a.

[8] Two good articles are Casner, *Estate Planning under the Revenue Act of 1948*, 62 Harv. L. Rev. 413, 433 (1949); Gutkin and Beck, *Will Clauses and the Marital Deduction*, 26 Taxes 1009 (1948).

value of her qualified marital deduction interest by at least a pro-rata portion of claims and expenses. The Code talks about where her " . . . interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent . . . ". Are unsecured before-death claims encumbrances? Are funeral expenses, the $2,000 widow's support allowance, and administration expenses " . . . imposed by the decedent with respect to the passing of such interest . . . ?" Careful drafting can avoid worry about the answers to these questions.

A TRUST MAY QUALIFY FOR THE DEDUCTION

(3) Family and practical considerations are often against a surviving spouse taking her inheritance outright, in which case a trust is still the most effective device. The trust for the spouse can qualify for the marital deduction. The law of future interests is now being studied and enforced by the Treasury Department. A check-list may help the draftsman avoid a few marital deduction pitfalls:

a) The surviving spouse must have for life all the income from the corpus of the trust, payable at least annually, and a power to appoint the entire corpus in favor either of herself or her estate. This power she must have alone.

b) This means all the income must be paid out, it cannot be accumulated.

c) If a power of invasion is given, the spouse *alone*, not a trustee, shall say when she needs principal. However, a power of invasion during her life need not be given. She must have *either* a power to appoint all during life, *or* at death.

d) Her power cannot be exercisable *only* in favor of children, friends, or charity. It must be exercisable in favor of either herself or her estate. To qualify it may be exercisable in favor of her estate, her children and charity.

e) In default of her exercise of her power, the unappointed corpus can pass as provided in the decedent's will. The Regulations specifically approve this.[9]

f) The surviving spouse must be entitled to all the income "for life". Neither her interest in the income, nor in the property, nor her power to appoint can be conditioned on her not remarrying. There will still be husbands preferring to support Uncle Sam's nephews to their widow's second husbands.

g) The trustee may not, subject to certain permissions, hold unproductive property. Nevertheless, the surviving spouse may have the family home in the trust so long as she has the beneficial use of it.

h) For ease and economy of investment, separate trusts may be considered. The Regulations say that a will may create

[9] Reg. 105, Sec. 81.47 a (c).

more than one trust and that an individed interest in property may constitute the corpus of a trust. Often a will has one trust for the widow and one or more for the family. The hazard of running afoul I. R. C. Sec. 812 (e) (1) (B) and (C) has prompted lawyers not to give the trustee authority to consolidate the widow's trust with any other trust. Better practice points to a self-contained trust for the surviving spouse. However, all powers need not be set out in full; those free of any hazard can be incorporated by reference.

i) Trustees have usually been given a power to decide how receipts and disbursements shall be credited as between income and principal. This may give the surviving spouse a tiny bit less than all the income. Also, it gives the trustee a tiny power to appoint principal. The Regulations show a reasonable interpretation of this usual administrative power. But the trustee may not be directed to pay any undistributed income at the death of the surviving spouse to another named by the decedent. The surviving spouse must have at least a power to appoint to her estate. On her failure to appoint it may go as the decedent directs.

OTHER DESIRABLE CLAUSES

(4) Some spendthrift clauses can be used. The trust can provide that her right to the income shall not be subject to assignment, alienation, pledge, attachment or claims of creditors. It will be disqualified for marital deduction if her absolute right to income becomes discretionary in the trustee when she attempts to assign or a creditor attempts to attach.[10]

(5) Often the marital deduction is desired even if husband and wife die in, or as the result of, a common disaster. When the marital deduction is desired, a clause must be drafted to prevent the operation of the Simultaneous Death Statute.[11] The clause should establish the presumption that the surviving spouse survives. But in common disaster situations, the marital deduction is not always desired. By escaping estate taxes, the marital deduction interests of the surviving spouse invite a possible second death tax, as well as double administration expenses. Only a computation can tell what balance should be struck between saving estate taxes in one estate and paying second death taxes and additional administration expenses in the second estate.

(6) A surviving spouse may elect against a fair testamentary trust and receive one-half of the deceased spouse's property and estate, both real and personal.[12] If she elects to take her statutory one-half, it will qualify for marital deduction,[13] but the marital de-

[10] I.R.C. Sec. 812 (e) (1) (B); Reg. 105, Sec. 81.47 a (c).
[11] COLO. STAT. ANN., C. 176, sec. 12 (1) (1935) as amended S.L. 1943, p. 657.
[12] COLO. STAT. ANN., C. 176, sec. 37 and 226 (1935).
[13] Reg. 105, Sec. 81.47 a (f).

duction value of her statutory one-half may be reduced by one-half of all claims and funeral and administration expenses,[14] and a pro-rata portion of the death taxes. This may increase the amount of estate tax to be paid. No one knows the situation that will face the surviving spouse. Why not give her a fully free choice? A clause can say that if the surviving spouse elects the statutory one-half, all death taxes, claims, widow's support allowance, funeral and administration expenses shall be charged against, and paid from, the remaining one-half of the estate. Such a clause would increase the value of the marital deduction.[15]

(7) A disclaimer clause can do no harm; it may save many dollars. The law has always allowed a surviving spouse—the all or nothing choice—to disclaim everything under the will and also, if she wishes, to waive her statutory one-half. The Code [16] and the Regulations [17] make it clear that a surviving spouse may promptly disclaim any interest. The disclaimed interest does not qualify for marital deduction. The recommended disclaimer clause can give her a right to disclaim all or any part of the gifts, or only a part of a gift, and say what shall be done with the disclaimed gifts or interest. It may be better for a surviving spouse to accept less marital deduction property and thereby avoid high income taxes or subject the property to a heavy second death tax.

Future interests has not recently been the favorite subject of most lawyers. The new marital deduction provisions have been called " . . . masterpieces of obscure and obtuse statement . . . ". Together they challenge every lawyer with a middle class client who wants to get the greatest tax benefit from the marital deduction.

"YOUR FEDERAL INCOME TAX"

The 1949 edition of the Bureau of Internal Revenue booklet, *Your Federal Income Tax,* is obtainable for 25c at the regional office of the U. S. Department of Commerce, 210 Boston Bldg., Denver. This is a 138 page publication billed as "written to help in solving most of the 1949 income tax problems of the average taxpayer," and covers the latest laws, bureau rulings and court decisions. It is equipped with a detailed index for quick reference and, in response to requests, has added chapters this year on installment sales and appeals procedure.

Another "official government tax book", available at the same place and price, is the 93 page *Bulletin F—Income Tax Depreciation and Obsolescence.* This is still in its 1948 edition, but from it, it is alleged, "taxpayers and their counsel may obtain the best available indication of the practices of the Bureau of Internal Revenue" on this subject, which, if true, is quite a bargain.

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[14] Hanna v. Palmer, 6 Colo. 156 (1882).
[15] See: I.R.C. Sec. 812 (e) (1) (E).
[16] I.R.C. Sec. 812 (e) (4) (A).
[17] Reg. 105, Sec. 81.47 a (e).