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The Marital Deduction and the Use of Formula Provisions by Richard B. Covey

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to accomodate the capacity for humans to err in a new form and soon will have to accomodate the same element in telephonic credit systems. *Real Property* law, as yet untouched, awaits a whole new era when the now developed land coding and recording systems can be actually installed and made operational with computer aid.

Although the book is the work of twenty authors, repetition and inflation have been kept to a minimum. And though there have been magazine accounts of significant legal applications not mentioned in this book (*e.g.*, the jury verdict prediction service out of Cleveland, and the patent tracing service out of Detroit), the breadth of the book is vast, and, in any event, does not purport to be exhaustive. Neither does the book undertake the many unexplored implications for human interests in the computerized society or for the lawyer-client relationship in an automated legal practice. But as an introductory handbook on a down-to-earth level, the book does its job well. Too bad that, like the computers it describes, the book can only look forward to early obsolescence.

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THE MARITAL DEDUCTION AND THE USE OF FORMULA PROVISIONS. By Richard B. Covey. Indianapolis: The Bobbs-Merrill Company, Inc., 1966. Pp. vii, 115. \$7.50.

Most lawyers are familiar with some of the intricacies of the marital deduction permitted by the federal estate tax statute. This deduction is allowable up to maximum deduction of 50 percent of the adjusted gross estate, for property included in the gross estate of the deceased spouse, whether it passes to the survivor under the decedent's will or by intestacy. It may also apply to other items, such as jointly held property, life insurance, and certain inter vivos transfers, if these items are includible in the gross estate and pass either outright or under defined statutory conditions to the survivor.

Lawyers are equally well aware of the will forms, or so-called formula clauses, which have been developed since passage of the estate tax marital deduction in 1948. These are intended to achieve the maximum marital deduction for the estate by using language which qualifies the exact allowable amount, and no more than that amount, for the deduction. The forms for marital deduction will

clauses may be found in texts, form books, law reviews, and various published lectures of tax and probate or trust law programs and institutes. The only trouble is that most lawyers who use such clauses do not understand them. Frequently the attorney has simply gone to a form book and copied a formula provision into the will without giving proper consideration to its operation after the client's death.

Mr. Covey's short treatise should go a long way toward enabling lawyers to correct their "alarming lack of knowledge" concerning formula provisions. This is the announced purpose of the book (Preface, page v.). For the first time there is included under one cover sufficient explanation for the lawyer to acquire basic knowledge and understanding of the effects of various types of clauses now in use.

The two basic types of formula provisions (the pecuniary dollar amount legacy and the fractional share of the residue clause), as well as the more significant variations of the basic clauses and their effects, are illustrated and explained. The choice of formula clause used in the will may control the proportion of the property distributed in satisfaction of the marital and non-marital shares, subsequent to the initial estate tax valuation. Also, the effectiveness of the testator's attempt to achieve the marital deduction, as well as income tax consequences after death, are often important considerations in the choice of the clause. Apart from the federal tax results, variations of these formula clauses have presented different side effects, sometimes anticipated and sometimes not anticipated by the drafter of the will. Problems have arisen in the state courts concerning the right upon distribution of the property between the surviving spouse entitled to the marital share and the other beneficiaries of the estate. There are also administrative problems for the executor in fulfilling his fiduciary duties (not the least of which is impartiality), problems concerning the allocation of estate income and the allocation of the estate's gains and losses between the different shares, how distributions in kind are to be made under different clauses, the executor's responsibilities, and the like. The book's comparison of the major types of formula provisions clearly shows how each clause operates and the reasons why each provision is or is not proper under particular circumstances.

Since the author practices in New York, he has emphasized New York law. Nevertheless, he has mentioned other possible approaches with some citations to the laws of other states. Eight pages of illustrative samples of each major type of formula clause are provided in the Appendix. One chapter, departing from the subject of formula clauses,

summarizes the post mortem estate planning possibilities in the several tax elections available to the executor; another discusses the use of Section 2013 of the Internal Revenue Code, equalization clauses, and accumulation trusts in relation to estate planning.

Revenue Ruling 64-19, which has probably necessitated review of about as many wills as did the original enactment by Congress of the estate tax marital deduction in 1948, is treated under the heading, "Hybrid Legacy Provisions." Under this ruling, the marital deduction is denied if a dollar amount legacy to the marital share may be satisfied by the executor at values determined for estate tax purposes, unless the will or local law clearly requires that the property used to satisfy the spouse's share is "not less than" the value of such property as fixed for estate tax purposes, or unless the appreciation or depreciation of such property is "fairly representative" of the appreciation or depreciation of the estate as a whole. The mistake of losing the marital deduction under this ruling will not be committed if the drafter of the will reads and understands this chapter, as well as Revenue Ruling 64-19 (which is reproduced in full in Appendix B, page 110).

The author takes issue with those authorities who believe that the dangers in set formulae and the temptation to follow boiler plate forms in disregard of the circumstances of the individual estate dictate their use only as a last resort. He believes instead that such clauses, if properly used as a tool of, and not a substitute for, estate planning, may accomplish the intended objectives of the testator.

Mr. Covey's book deals with what has developed into one of the more intricate and complex areas of estate tax law. As indicated beforehand, Mr. Covey's book serves a valuable function in making more generally available a relatively complete explanation of the marital deduction formula clauses. The drafters of the estate tax marital deduction could hardly have anticipated the complications which stemmed from their effort to do justice in equalizing the tax consequences for the estates of married persons in community and non-community property states. Only by careful consideration of all the property and the affairs of each individual case can the optimum tax result of a minimum of combined taxes paid by the estates of both spouses be had (bearing in mind, however, that sometimes the tax results should be subordinated to other objectives). At this point, there must be some residual misgivings concerning the legal talent expended in the attempt to secure for each estate maximum tax benefits, countered in turn by the Treasury's efforts to prevent abuses. Be that as it may, Congress is not likely in the near future to alter

significantly the estate tax structure. Meanwhile, Mr. Covey's mastery of his subject has been demonstrated and should help lawyers fulfill their duty of properly obtaining maximum marital deductions for their clients.

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BOOKNOTES*

THE COMMUNITY AND RACIAL CRISIS. Edited by David Stahl, Frederick B. Sussman and Neil J. Bloomfield. New York: Practising Law Institute, 1966. Pp. 364. \$7.50.

This collection of materials developed out of a forum conducted by the Practising Law Institute, which brought together law professors, individuals representing various levels of government, and civil rights leaders. The conference produced a fruitful interchange of ideas concerning the problems presented to local governments by the civil rights movement. The discussions placed primary emphasis on the methods of resolving the grievances of minority groups within the framework of government by effective communication between the governmental agencies and various interest groups. The editors have selected the best of this material and compiled it, together with editorial comments, into a useful and timely presentation of the difficulties faced by community leaders. Of particular interest is the section dealing with the relation of the police to minority groups. A host of helpful suggestions contained in the work should prove invaluable to both cities and civil rights groups in their endeavors to eradicate injustice and to prevent violence.

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DAYS OF OUR YEARS WITH LABOR: A CONCISE HISTORY OF THE DEVELOPMENT OF LABOR LAW FROM THE BEGINNING. By Robert C. Knee. Cincinnati: W. H. Anderson Co., 1966. Pp. 160. \$4.95.

This book professes to be and is a broad survey of the field of labor law. Leaving technical, legal discussions to others, Mr. Knee uses his

* Booknotes are descriptive accounts of recent works in the legal field; they are usually written by student staff members. Treatment of a work in this section does not foreclose the possibility of more extended analysis in a subsequent formal book review.