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Estate Taxation--Marital Deduction--Power of Appointment Terminable Upon Wife's Incapacity

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Justice Douglas urged that *Brown* v. *Walker* be overruled. He demonstrated little patience with any ruling which followed *Brown* v. *Walker* because "it is an old and established decision",[24] and denied that *Brown* v. *Walker* had any greater claim to sanctity than the "other venerable decisions which history showed had outlived their usefulness or were conceived in error".[25]

Conclusion

The Supreme Court in this well-considered opinion has resolved the confusion which has stemmed from a multitude of decisions regarding the grant of immunity to witnesses in lieu of their Constitutional privilege against self-incrimination. The Court considered this privilege to be one so fundamental and important as to be "one of the great landmarks in man's struggle to make himself civilized."[26] At the same time, the Court recognized the compelling need for successful Congressional investigation as a means of insuring national security and arrived at a decision which, despite the hardships sometimes resulting from a compulsion of testimony pointed out by Douglas, J.,[27] was a just and desirable one.

Charles L. Calk

ESTATE TAXATION—MARITAL DEDUCTION—POWER OF APPOINTMENT TERMINABLE UPON WIFE'S INCAPACITY—Frank E. Tingley, a resident of Rhode Island, left part of his residuary estate in trust for his wife for life with a general power to invade corpus. The trust instrument provided that in the event of the wife's incapacity or the appointment of a guardian, her power to invade corpus was to cease.[1] The Tax Court held that the trust corpus did not qualify for the marital deduction. Upon appeal, the Court of Appeals for the First Circuit *affirmed.*

[24] Id. at 455.
[25] *Ibid.*
[26] Griswold, The Fifth Amendment: An Old and Good Friend, 40 A.B.A.J. 502, 503 (1954). Cited by the Court in the principal case at 350 U.S. 422, 426.
[27] For a further discussion of the undesirable aspects of the granting of immunity, see King, Immunity for Witnesses: An Inventory of Caveats, 40 A.B.A.J. 377 (1954).

[1] The trust instrument also provided that upon incapacity or appointment of a guardian the wife's right to income was to cease. Under local law, without the terminating conditions of the instrument, the wife would be entitled to the income for life, regardless of her capacity. Therefore, the wife's rights are substantially less under the terms of the instrument than under local law. If the court had based its decision upon this provision in the trust instrument the decision reached by the court would be justified. But the court said, and counsel for both parties agreed, that the only issue to be decided was whether the widow's power to invade corpus was exerciseable by her "alone and in all events."

Starrett v. *Commissioner of Internal Revenue,* 223 F. 2d 163 (CA1 1955). The Internal Revenue Code sec. 2056 (b)(5) provides that property devised to a spouse in trust for life with a power of appointment qualifies for the marital deduction[2] if the power of appointment[3] "is exerciseable by such spouse alone and in all events." The sole issue to be determined in this case was whether the widow's power to invade the corpus, which is equivalent to a power of appointment, was exerciseable by her "alone and in all events."[4] The Court held that the power to invade corpus was not exerciseable "in all events" because it was to terminate upon her legal incapacity or the appointment of a guardian.

It was the petitioner's contention that the testamentary limitations—incapacity or the appointment of a guardian—on the surviving spouse's power did not add substantially to the limitation on the power provided under local law, and therefore should be disregarded on the implication that Congress, in requiring that the power must be exerciseable "in all events", did not mean to deny the marital deduction where the terminating condition was by local law. The Circuit Court said, however, that under the law of Rhode Island, upon incapacity or appointment of a guardian, the power of appointment would be *suspended* during the period of disability, however long or short it might be; whereas under the terms of the trust the power of appointment *ceases permanently* upon that event. "Hence," the court concluded, "the terms of the will impose a significant condition in addition to that which would be supplied by the applicable state law."[5]

The purpose of the marital deduction was to equalize tax advantages in the common law and the community property states, and to permit the surviving spouse in the common law state to take a portion of the deceased spouse's estate free of the burden of federal estate taxes.[6] In a community property state the husband has control of the property during his life, but upon his death his surviving spouse gets absolute ownership in one-half of all the community property and only one-half of the property is includible in the deceased spouse's

[2] Bittker, Federal Income Estate and Gift Taxation 1019 (1955). In general, there is allowed as a deduction from the gross estate an amount equal to the value of property passing from the decedent to his surviving spouse, but such deduction cannot exceed one-half of the estate.

[3] Power of appointment is defined in 1954 Internal Revenue Code sec. 2041 (5) as being a power in the surviving spouse to appoint the entire interest in her favor or in favor of her estate.

[4] See note 1, supra.

[5] Id., 223 F 2d at 167.

[6] Pitts v. Hamrick, 228 F 2d 486 (CA4 1955). California Trust Co. v. Riddell, 136 F Supp. 7 (D Cal. 1955). Weyenberg v. U.S., 135 F Supp. 299 (ED Wis. 1955).

estate for estate tax purposes. If a husband in a common law state gives his wife the same control over the property as the wife has in a community property state, i.e., absolute ownership or its equivalent, then the estate tax consequences are the same. Therefore, the underlying problem in the case at hand is whether Mrs. Tingley had, under the terms of the trust instrument, the equivalent of absolute ownership.

In answering this question in the negative the court not only lost sight of the purpose of the marital deduction as stated above, but it resorted to strained reasoning in disallowing the deduction by drawing a distinction between "suspension" of the power under local law and "cessation" of the power under the terms of the trust instrument. It is true that under local law if Mrs. Tingley became incapacitated her power to invade the corpus would be suspended during the period of disability and, should she recover, her power to invade corpus would be restored; whereas under the terms of the trust instrument her power to invade corpus ceased absolutely and forever. But even so, Mrs. Tingley's rights of ownership are not substantially lessened by the terminating conditions of the instrument since, even if Mrs. Tingley did become incapacitated, the possibility that she would recover her sanity and be capable of exercising the power again is negligible. Her control over the corpus is exactly the same as she would have were the terminating provisions omitted, unless she becomes insane *and* recovers. To say that this possibility made her rights substantially less is to remove the decision of the court from the realm of practicality and to deny rights because of remote possibilities. Taxation ought to be, as Justice Douglas once said it was, "eminently a practical matter."[7]

There seems to be no good reason for allowing a near impossibility to defeat the marital deduction if the spouse receives the practical equivalent of absolute ownership and, in allowing the deduction, there would be no clear means of tax avoidance. If the deduction had been allowed here, would there have been any way for the corpus to escape gift or estate taxation in the hands of the wife? The only way the widow could avoid the estate tax on the untaxed portion of the corpus would be for her to consume the corpus during her life, but this chance is taken in every case where the marital deduction is allowed. Of course, the widow might give the entire corpus away, but in such case she would have to pay a gift tax.[8] There is also the chance that the widow might become incapacitated before exercising the power of appointment. Under local law, without the terminating conditions of

[7] Fernandez v. Weiner, 326 U.S. 340, 365 (1945).
[8] 1954 Int. Rev. Code, sec. 2511.

the instrument, the existence of the "suspended" power of appointment would nevertheless cause the corpus to be included in her estate.[9]

However, under the terms of the trust instrument, incapacity would cause Mrs. Tingley's power of appointment to cease forever. No cases have been found to support the view that the corpus would be included in her estate, but it would seem that upon her incapacity the termination of the power of appointment would either be treated as a release or as a lapse and the corpus subjected to the gift tax. It might well be treated as a release of the power since the remainder over is no longer subject to divestment by exercise of the power, and an effective transfer of the property would be made. In such case a gift tax would be payable.[10] If we do not treat the power as released upon incapacity it would have to be treated as a lapse. A lapse has been defined as the "termination or failure of a right or privilege through neglect to exercise it within some limit of time, or through failure of some contingency."[11] If the termination of the power were treated as a lapse, a gift tax would be payable on all but $5,000 or 5% of the corpus.[12] Therefore, if the cessation of the power of appointment were treated as a release of the power there would be no tax avoidance whatsoever; and if treated as a lapse only $5,000 or 5% of the corpus would escape the gift tax. Thus there seems to be no possible loophole for tax avoidance, except that a small portion of the corpus might escape taxation *if* Mrs. Tingley became incapacitated and *if* the termination of the power is treated as a lapse rather than as a release.

If the courts fail to be practical in determining whether the surviving spouse has less rights under trust instruments and wills than under state law, they may well end up rendering decisions as unexpected and unjust as some they have reached in applying the Rule Against Perpetuities,[13] which voids an interest if there is any possibility—however remote—that it will not vest within lives in being plus 21 years. Whatever can be said for judging the validity of future interests by possibilities rather than probabilities, no sound policy is served by turning tax liability upon extremely remote possibilities. Equal protection of the law demands that taxpayers who have substantially the same rights have the same tax liability. If the surviving spouse's rights under state law as the donee of a power of appointment

[9] C. C. H. Letter Ruling, sec. 8044. Hurd v. Commissioner of Internal Revenue, 160 F 2d 610 (CCA1 1947). I. R. C., sec. 2041.
[10] 1954 Int. Rev. Code, sec. 2514 (2)(b).
[11] Wilmington Trust Co. v. Wilmington Trust Co., 15 A. 2d 830, 834 (1940).
[12] 1954 Int. Rev. Code, sec. 2514 (e).
[13] For a discussion of a few of these cases see 51 Harvard L. R. 638, 642-46 (1938).

are not substantially lessened by restrictions on the power written in the trust instrument, and if by allowing the deduction the trust corpus cannot escape estate or gift taxation in her hands, then the marital deduction should be allowed.

Glenn L. Greene, Jr.

MASTER AND SERVANT—LIABILITY OF MASTER FOR SANCTIONED HORSEPLAY OF SERVANT—Appellant had put his servant, the co-defendant, in charge of the restaurant of which he was the owner and operator. While the servant was in charge, he sprayed or poured inflammable fluid used in cigarette lighters on the shirt of the plaintiff who had dozed off at the counter. The plaintiff's shirt was set afire and he suffered severe injuries as a result of the prank. Although the appellant was not present at the time, he had in the past observed such horseplay by his servant and had even engaged in it himself. He stated that this was the first time any injury had occurred as a result. The trial jury found in favor of the plaintiff and returned a verdict of $1,274.50 damages, with the provision that the appellant, proprietor, should pay $1,200.00 of that amount. *Held:* affirmed. Where the proprietor of a restaurant had observed and sanctioned horseplay of his servant and knew or should have known that such horseplay might result in injury to a patron, he is liable for injuries suffered by a patron as a result of similar horseplay engaged in by his servant during his absence. This was said by the Court to follow from the rule that when an employer leaves one in charge of his business during his absence and that one wrongfully does something to injure a patron, which the employer has reason to know he may do, the employer is liable therefor. *Baldwin* v. *Wiggins*, 289 S.W. 2d 729 Ky. 1956).

The theory relied upon by the Court in establishing the employer's liability is somewhat difficult to determine. If the Court means to say that an employer is liable for anything his employee may do when he leaves his employee in charge of his store, this is a striking new imposition of responsibility upon storeowners. Such blanket liability is not grounded in agency. If, however, the Court means to impose such responsibility only where the employer knew or had reason to know of the dangerous acts of the employee, then the theory of the employer's liability is either his own independent negligence in not forbidding the dangerous acts or the application of. what appears to be a new test to determine when a servant's act is within the scope of his employment.

It is a well established principle that a master is responsible for the