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Volume 51 | Issue 4 Article 4

June 1949

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Recommended Citation

H. D. Battle, *The Drafting and Revision of Wills and Trust Instruments Under the Revenue Act of 1948*, 51 W. Va. L. Rev. (1949).
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THE DRAFTING AND REVISION OF WILLS AND TRUST INSTRUMENTS UNDER THE REVENUE ACT OF 1948*

H. D. BATTLE**

THE Revenue Act of 1948,[1] enacted April 2, 1948, gave the first substantial reduction in personal taxes in the last twenty-three years. The Commissioner of Internal Revenue has recently stated the Act will reduce collections of estate and gift taxes by at least 25%. This reduction does not result from across the board decreases in tax rates – in fact the rates are unchanged; but rather from the introduction into our tax structure of the community property concept.

Income taxes, gift taxes and estate taxes are each affected by this Act. Considerably more publicity has been given to the income tax sections of the new Act than to the gift and estate tax provisions. Because of the necessity of filing current returns, taxpayers must keep up with changes in the income tax laws. No such reason impels familiarity with gift and estate tax laws but slight reflection indicates clearly the importance of immediate study of the new law in respect to the so-called death taxes. Income tax returns may be amended, but death freezes an estate so far as estate taxes are concerned. In recognition of this situation the trust companies, particularly in the large cities, were quick to seize upon this legislation as a means of getting their customers to draft new wills or trust instruments. Many advertised in letters and pamphlets that estate taxes might be cut in half by taking advantage of the Act.

Many new trusts were created and many wills were revised. In June one New York paper headlined *Will Revision Rushed—Estate Holders Juggle Legacies to Trim Taxes—Lawyers Help to Save Millions under the New Law. It Doesn't Aid All.* The article went on to say, "Never before have lawyers been so busy advising so many people how to leave their property when they die." It reported that one large law firm had examined 100 wills and had recommended changes in virtually all of them; that another firm had examined eighty wills, recommending changes in

* Address delivered at the sixty-second meeting of the West Virginia Bar Association, at White Sulphur Springs, West Virginia, August 21, 1948.

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[1] Revenue Act of 1948, c. 168, Pub. L. No. 471 (H. R. 4790), 26 U. S. C. A. (1948).

fifty-one; and that a third firm had recommended changes in only eight out of seventy-five wills examined.[2]

You will see that each estate presents a different problem. Each must stand on its own bottom. I will undertake later in this discussion to explain how many taxpayers may save substantial sums by availing themselves of this new legislation, why some will not be benefited, and some may even lose by conforming with this new Act.

This Act affects every *married* person who has an estate of a value in excess of $60,000, that amount being the present exemption for Federal estate tax purposes. Single persons irrespective of the size of their estates are not directly affected. Hence if you have a client, who is married and has an estate of over $60,000, such client is vitally interested in this new tax act. I won't even suggest that some of you lawyers may be so affluent. The savings under the Act may be quite substantial. Take for example an estate of $120,000 – twice the exemption of $60,000. If the Act is not availed of, the Federal estate tax would be over $9,000. This entire tax may be wiped out by setting up the estate in conformity with the new Act.

Now, this money will be saved by some people and it is our responsibility, as lawyers, to advise our clients properly so that if they desire they may avail themselves of substantial potential savings. The drafting of wills and trusts is one of the most important jobs a lawyer is called upon to perform. We, lawyers, have a responsibility in the preparation of any paper. We vouch for its completeness, accuracy and validity. A deed or contract drawn by a lawyer is supposed to cover the situation thoroughly. Our responsibility in drafting a will is tremendous, for not one word can be changed after the death of the testator.

> "The Moving Finger writes; and, having writ,
> Moves on: nor all your Piety nor Wit
> Shall lure it back to cancel half a Line,
> Nor all your Tears wash out a Word of it."[3]

If we are to take any steps along this line to help our clients in respect to wills heretofore drawn, immediate action is highly advisable. We can ill-afford to procrastinate concerning a matter so important and so uncertain. After death it is too late.

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[2] The Wall Street Journal, June 7, 1948, p. 1, col. 6.
[3] The Rubaiyat of Omar Khayyam (Fitzgerald) 19.

If the estate of a client may be affected by Federal estate taxes and state inheritance taxes, counsel should have sufficient knowledge of the tax laws, no matter how complicated, to advise the client properly; otherwise, the lawyer has no moral right to draft the testament or trust instrument. The preparation of income tax returns and the contest of taxes actually assessed, either income or estate, may be the province of the specialist, but wills and trusts are from time to time drawn by every lawyer. It is not proper, in my opinion, to pass off our responsibility to an expert accountant or tax consultant, though their services may help us. But a will or trust drawn by us is our responsibility — and no one elses.

Now, as I approach a discusion of the law itself, I want it distinctly understood that I do not come here as an expert. I come here merely as a country lawyer who occasionally does have to draw a will involving an estate of over $60,000. If any of you are thoroughly familiar with this law, I will probably tell you nothing new. If you are not, I hope to point out to you the fundamentals of the law in the hope that when a particular estate or trust is presented to you, you may in a general way know how to handle the matter.

Prior to the Revenue Act of 1948, there had been constant increases in gift taxes and estate taxes. The share-the-wealth philosophy of the New Deal had resulted in taxes which in some instances virtually confiscated an estate. A person with a large estate could ill-afford to die without leaving a substantial part of his estate in liquid assets for the payment of Federal estate and state inheritance taxes.

Not only was that true, but we had community property laws in certain states.[4] In those states property acquired by husband or wife after marriage is regarded as owned by them in community, share and share alike. Taxes on gifts of such property were split between the husband and wife. Upon the death of one spouse only one-half of the community property was included in his or her estate for purposes of estate taxes. This resulted in considerably higher gift and estate taxes in non-community property states, such as West Virginia, where such taxes were assessed against the party (or his or her personal representative) who

4 Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Oklahoma, Oregon and Nebraska.

West Virginia Law Review, Vol. 51, Iss. 4 [1949], Art. 4

had actually owned the property involved, without regard to marital status. This disparity followed largely from the higher tax rates applicable as the value of the taxable property increased. In other words, the tax being on a graduated scale, the rate increased with the value of the taxable property. Estate tax rates vary from zero to 77 per cent, and gift tax rates from zero to 57-3/4 per cent.[5]

The Revenue Act of 1948 to a large extent eliminates this inequity. It adopted the community property concept and made it applicable throughout the United States. This means that in computing gift taxes and estate taxes, each spouse may be considered as owning one-half of the gift or estate.

In estate planning there are some general considerations which should be borne in mind. It is usually beneficial to equalize the estates of the husband and the wife. It is true that by giving or devising property to a spouse, such spouse may be liable for a second tax; but that second tax in most cases is very much less than the tax would have been had it been paid by the donor or testator, whom we will assume had a very much larger estate than the beneficiary. However, it is essential to consider the estate of the original owner as well as the estate of the donee-spouse to insure a sound conclusion.

Also it is quite important taxwise to get property out of the hands of an older person and into a younger person. The life expectancy of the younger person being greater, postponement in the payment of the tax inures to the benefit of the taxpayer through continued use of the money involved. But if such transfers are made "in contemplation of death" the property transferred is included in the taxable estate of the donor.

GIFTS INTER VIVOS

May I first consider with you the disposition of the corpus of an estate *during life,* in other words, *gifts.* The provision of the new Act relating to gifts became effective on April 2, 1948. Under the old law, there was an exemption of $30,000 and an annual exclusion of $3,000 available to each donor.[6] The tax in its en-

[5] Gift taxes are usually 25% lower than estate taxes on the same property.

[6] The law excludes the first $3,000 of gifts to any one person made during the calendar year, other than gifts in trust or gifts of future interests. The law also provides for an *exemption* of $30,000, which may be taken in one year or spread over the several years in which the donor makes gifts. This *exemption,* unlike the annual *exclusion,* is cumulative.

tirety was charged to the owner of the legal title to the property given away. This exemption and the annual exclusion as such were not changed by the new law, but a new term known as the "martial deduction" was introduced in respect to gifts between husband and wife.[7] This phrase means that when property owned by a married person is given to his or her spouse it may be assumed that the donor owned half of it and the donee owned half of it. The same concept is applied in respect to gifts by a married person to third parties.[8] In other words, if a married person makes a gift to anyone other than his or her spouse, the value of the property transferred may be charged one-half to the husband and one-half to the wife, irrespective of which one actually owned the property. Therefore a husband and wife may obtain a joint exemption of $60,000 and an annual exclusion of $6,000, rather than each an exemption of $30,000 and each an annual exclusion of $3,000. This change might prove highly beneficial where only one spouse, either through choice or because of financial condition, makes gifts of property to third persons. The right to split the property as between husband and wife is conditioned under the statute upon each spouse being a citizen of the United States and upon both spouses consenting to such division by filing a proper return with the Commissioner of Internal Revenue.[9]

These gifts of corpus during life to persons other than the spouse of the donor may be outright or in trust,[10] but the donor may not under the statute retain in his spouse a power of appointment, and still obtain the gift splitting benefit available under the Act.[11]

Of equal importance is the matter of gifts during life between husband and wife. This is of interest particularly where one spouse has a smaller estate than the other. In fact, that would be virtually the only case in which from a tax standpoint gifts should be made, and even then the marital deduction available at the death of the donor — assuming he dies first — eliminates much of the

[7] 62 STAT. 125, 26 U. S. C. A. § 1004 (a) (3) (1948).

[8] 26 U. S. C. A. § 1000 (f) (1) (A) (1948).

[9] 26 U. S. C. A. § 1000 (f) (1) (A) & (B) (1948).

[10] Caveat: The donor must "absolutely, unequivocally, irrevocably, and without possible reservations, part with all of his title, and all of his possession, and all of his enjoyment of the transferred property" as held in the recent cases of Commissioner v. Church, 69 Sup. Ct. 322, and Spiegel's Estate v. Commissioner, 69 Sup. Ct. 301, both decided by the Supreme Court of the United States on January 17, 1949.

[11] 26 U. S. C. A. § 1000 (f) (1) (A) (1948).

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West Virginia Law Review, Vol. 51, Iss. 4 [1949], Art. 4

incentive for making such transfers. In respect to income taxes, there is no occasion to make transfers between husband and wife as a means of splitting the donor's income, for that has been done for us by the new law. In respect to estate taxes, a person may under the new Act leave half of his estate to his spouse without any estate tax being assessed on that half. On a large estate, that is probably all the owner wants to go that way. Therefore, why should he divest himself of the property during lifetime? Why not have him keep it until death and then transfer it to his spouse with the benefit of the marital deduction? That isn't always going to be true particularly where state inheritance taxes are high, but by and large the incentive for making *inter vivos* transfers between husband and wife to avoid Federal estate taxes has been very much reduced, and I am confident you are going to see less rather than more of such transfers.

Under the new law when a husband or wife makes a gift to his or her spouse only one-half of its value is chargeable to the donor in computing his or her exemption or annual exclusion, or if these have been exceeded, in computing the gift tax. If gift taxes have to be paid on the transfer to the spouse, it will be found that no Federal tax savings results if the property involved would be included in the marital deduction at the death of the donor, had the gift not been made. If so includable and if the donor dies before the donee, the gift tax is a complete loss to the estate, except some savings in state inheritance taxes may result. However, if the spouse with the smaller estate dies first, the other spouse is thereby deprived of the marital deduction, and gifts made while both the husband and wife were living would have been beneficial.

The gift may take the form of an outright gift to the spouse, in which event that is all there is to it; provided the return is filed. It may also take the form of a gift in trust for life. Such gift in trust to qualify for the marital deduction is subject to a good many limitations: the trust must expressly provide, first, that the donee spouse is entitled for life to *all* of the income, not a part of it, but all of it; second, that the income be payable annually or at more frequent intervals; and third, that such donee spouse have the exclusive power to appoint the entire corpus free of the trust exercisable in favor of the donee spouse or her estate, or in favor of either, whether or not in each case such power is also exercisable

in favor of others.[12] It may therefore provide that the donee may during life appoint herself or himself thereby terminating the trust; or at death that the donee may by will appoint his or her estate or children or any third person. The trust instrument may contain no power in anyone else, including the donor, to appoint any part of the trust property, nor may the donor retain any interest whatsoever therein.[13]

It is not unusual for a trust to provide that the income from the corpus shall be paid to donor's spouse for life and thereafter that the corpus or income shall go to the children of the donor. Such a trust does not comply with this new Act and no marital deduction would be allowed. On the other hand under such a trust, no Federal estate or West Virginia inheritance taxes are payable upon the trust res upon the death of the donee spouse.

The purpose of the limitation vesting the sole power of appointment in the wife is to make the trust res subject to Federal estate taxes upon the death of the donee spouse at which time the trust property would also be subject to West Virginia inheritance taxes. By taking advantage of the Act the payment of estate taxes may be postponed until the donee spouse dies, but the property is still subject to gift taxes less the marital deduction when the trust is established, and to estate and inheritance taxes upon the death of the donee spouse.

Assuming it is advisable taxwise, to make such gifts, may we consider by way of illustration, a gift either outright or in a *proper* trust of property of a value of $66,000 from one spouse to the other. Under the old law the deduction of the exemption of $30,000 and the annual exclusion of $3,000, would leave $33,000 subject to the gift tax, which would amount to $2,655. Under the new law the entire tax may be avoided by treating the property as having been owned one-half by each spouse. The donor has therefore, taxwise, given to his spouse property of a value of only $33,000 which does not exceed the aggregate of his exemption and annual exclusion — assuming the donor has not theretofore made gifts to his spouse.

By way of further illustration, consider a gift of property of a value of $100,000 from one spouse to the other. Under the old law, after deducting the exemption of $30,000 and the exclusion of $3,000, there would remain $67,000 subject to the gift tax which

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[12] 26 U. S. C. A. § 1004 (a) (3) (E) (1948).
[13] See note 10 *supra*.

would amount to $8,600. Under the new law the $100,000 may be split in half because of the marital deduction, leaving the sum of $50,000 subject to the gift tax. From that amount the exemption of $30,000 and the exclusion of $3,000 would be deducted, leaving the taxable value of the gift at $17,000, the gift tax upon which would be only $950. The new Act therefore makes possible a net savings in gift taxes of $7,650 in respect of a gift of property having a value of $100,000, if the marital deduction is availed of.

TRANSFERS AT DEATH

I now pass to the consideration under the new Act of estate taxes on property passing at death. The pertinent provision became effective on January 1, 1948. No change was made in respect to taxes on property passing to persons other than the spouse of the decedent. Therefore this discussion relates only to property passing at death to a surviving spouse. Here also a marital deduction is allowable whereby one-half of the property passing at death to the surviving spouse is treated as having been theretofore owned by such spouse. The transfer may be outright or in trust for life. If in trust for life, here as in the case of gifts, all of the income from the corpus must be payable to the surviving spouse annually or at more frequent intervals, and "with power in the surviving spouse to appoint the entire corpus free of the trust (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the corpus to any person other than the surviving spouse."[14]

Further refinements and limitations pertaining to the marital deduction in respect to property passing outright or in trust for life to a surviving spouse are:

1. The decedent must have been a citizen of the United States.

2. It is immaterial whether the property passes to the surviving spouse by testamentary disposition, or by descent or through dower or curtesy.

3. The deduction is allowed only in respect to property, the value of which is included in determining the gross estate.

4. The marital deduction is limited to fifty per cent of the value of the adjusted gross estate of the decedent. The "adjusted

[14] 26 U. S. C. A. § 812(e)(1)(F) (1948).

gross estate" is defined by the Act as the gross estate less administration and funeral expenses, debts and mortgages, and allowances for the support of the surviving spouse until the estate is settled.[15]

I further point out that under the new Act property passing between spouses is subject to the estate tax irrespective of whether it was previously taxed within the preceding five years. Under the old law, if a person died and left his estate to his spouse, and she died within five years, there was no second Federal estate tax. The new law eliminates that, both in respect to estates which have obtained the marital deduction and those which have not.[16]

To apply the new Act more concretely: If a decedent leaves one-half of his estate outright, or in a *proper* trust, to his spouse, such one-half is not subject to Federal estate taxes at the time of his death. The other one-half of the property is subject to estate taxes and may be disposed of in any manner whatsoever. It may even be devised to a separate trust under which the income is made payable to the surviving spouse for life and thereafter the income or corpus passes to testator's children. If a decedent leaves *all* of his estate outright, or in a *proper* trust, to his spouse, only one-half of it is subject to estate taxes. But here again, as in the case of gifts in trust, if all of the property is left in a trust which simply provides that the income be paid to the surviving spouse for life and thereafter the income or corpus be distributed to testator's children, the marital deduction is denied — the trust not complying with the Act.

In some trusts it is provided that all of the income shall be payable to the spouse and that under certain circumstances the trustees may invade the principal for the benefit of the spouse. Such a provision does not affect the situation in respect to the marital deduction.

Recently an attorney about to redraft a will inquired of the Commissioner of Internal Revenue whether the naming of takers in default of the execution of the power of appointment by the surviving spouse would defeat the right to an estate tax marital deduction for the interest in property passing to the trust. The suggested language of the will was:

> "Upon the death of my wife, my trustees shall pay over the then corpus of said trust to such person or persons, in

[15] 26 U. S. C. A. § 812(e)(2)(A) (1948).
[16] 26 U. S. C. A. § 812(c) (1948).

such shares and in such manner, whether outright or lesser estates, in trust or otherwise, as my wife may by last will and testament appoint, and in default of such appointment or in so far as she shall not effectually appoint all of such corpus, then to my issue then living in equal shares per stirpes."

The Commissioner replied that such provision was permissible, saying:

> "The naming of takers in default will not defeat the right to a marital deduction for the interest in property passing to a trust which otherwise satisfies the requirements of section 812 (e) (1) (F)."[17]

Many published articles on this subject say the estate tax may be cut in half by availing of the marital deduction. This may be true as far as it goes, but we must go further to obtain a complete tax picture. Major consideration must be given to state inheritance taxes.[18] It may be fairly assumed that at the death of the first spouse, inheritance taxes will be the same with or without the marital deduction in non-community property states such as West Virginia. Hence at that stage, no particular account need be taken of state taxes. But what about the inheritance taxes payable upon the death of the second spouse? That is where the shoe pinches. Often these taxes may have been avoided, for instance by the original owner leaving the property to a third person or in a trust for the wife for life in which she has no power of appointment. But if the property is left to the wife outright or in a trust complying with the marital deduction provision of the Revenue Act, inheritance taxes must be paid at her death — if she still has the property or trust interest. Reduced to its simplest terms, the equation here is estate tax savings through marital deduction less inheritance taxes upon death of widow equals net savings. Of course other factors hereinafter adverted to play a part, but I wish to emphasize the importance of state inheritance taxes payable upon the death of the spouse last dying. In several estates which I have had occasion to consider, such taxes have been the chief reason for advising against availing of the marital deduction.

May I illustrate these principles by a few hypothetical cases. I will use the adjusted gross value of the estate as the basis for the

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[17] CCH FED. ESTATE & GIFT TAX REP., 6019.

[18] To date no state has amended its inheritance and estate tax laws to provide for a marital deduction, although Oklahoma is presently considering such legislation.

calculations. Starting at the beginning, an estate of $60,000, or less, is of course, exempt from Federal estate taxes. It would only be necessary to consider the effect on the beneficiary's estate of the property passing to him or her.

Suppose an estate of a married person is valued at $120,000. If the estate qualifies for the marital deduction of one-half of the estate, $60,000, plus the exemption of $60,000, there would be no estate tax payable. In other words, the decedent may leave $60,000 outright to his spouse, or in a proper trust, and $60,000 in any way he chooses. Under the old law, or even now if the estate does not qualify for the marital deduction, $60,000 would be subject to estate taxes, which would amount to approximately $9,400. This $9,400 is not in its entirety saved, because when the wife dies, if she still has the $60,000, her estate is subject not only to the Federal estate taxes, which in that instance would amount to nothing if she had no other estate, but would also be subject to the West Virginia inheritance taxes. The latter taxes might have been avoided if the property had been left in a trust containing no power of appointment in the wife or if the property had been left to a third person. May we assume the wife dies leaving two children. Her estate would have to pay, upon her death, on the $60,000 left to her by her husband, $1,500 in West Virginia inheritance taxes.[19] So the savings would be the $9,400 less the $1,500, or a net savings of $7,900.

Now, take a more complicated situation; assume the husband has an estate of $500,000, the wife an estate of $200,000. Assume each now has a will creating a trust which provides that the income from corpus shall be payable to the surviving spouse, for life, and upon the death of such spouse the corpus shall go to testator's children. These trusts, of course, do not fulfill the requirements of the marital deduction section of the law. Assuming average deductions, we find that the Federal estate tax on the husband's estate of $500,000 is $114,300, and on the wife's estate, $30,000, making a total Federal tax of $144,300.

Should these wills be changed? First, in respect to the wife's will: since she owns very much less property than her husband, it would be costly to change her will so as to vest a greater amount of property in her husband taxable at his death. But what about the husband's will? If the husband predeceases the wife, leaving

[19] W. VA. CODE, c. 11, art. 11, § 2 (1931).

her one-half of his property, she would have a total estate of $450,000, consisting of her own estate of $200,000 and the property received from her husband valued at $250,000. By giving the wife one-half, the estate tax on the husband's estate is reduced from $114,300 to $44,000. However, the tax on the wife's estate is increased from $30,000 to $98,000. If the husband avails himself of the marital deduction, the total tax against both estates would be $142,000, as compared with $144,300 if the husband does not avail himself of the marital deduction. The savings of $2,300 is not substantial. The factor entitled to consideration is that if the tax of $114,300 against the husband's estate is paid at his death, then that money is taken out of the estate. If, on the other hand, only $44,000 is paid at his death, $70,300 will remain in the estate to be used by the wife for her life. It is the postponement of the payment of the $70,300 which is of vital interest.

But we must go one step further and consider the West Virginia inheritance tax. By placing the $250,000 in the wife's estate, the West Virginia taxes against her estate are increased approximately $20,000,[20] assuming she owns the property at her death. Further considerations are the likelihood of the wife not having all or part of the $250,000 at her death, thereby reducing the West Virginia tax; and the life expectancy of the wife. Using 3% as the normal return, the wife would receive $2,109 a year on the $70,300. If her life expectancy is ten years, she would receive $21,090. This sum would more than offset the additional state tax. These considerations may prove decisive in determining whether the wills should be changed. But generally speaking where both husband and wife have substantial estates, are of about the same age, and the survivor is unlikely to consume corpus before death, no great tax savings result from availing of the marital deduction, and no change in their wills is recommended.

A very different picture is presented if the wife has no property of her own. Assume the husband has an estate valued at $500,000, the wife nothing. If the marital deduction is not availed of, the estate tax upon the husband's estate would be $114,300, as mentioned before. But, if the marital deduction is availed of, the tax would be $44,000 upon the husband's estate, and $44,000 upon the wife's estate. The additional West Virginia tax against the

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[20] Exact amount of tax depends on relationship of beneficiaries to decedent. W. VA. CODE, c. 11, art. 11, §§ 2, 3 (1931).

Battle: The Drafting and Revision of Wills and Trust Instruments Under th

wife's estate would be $13,200, making total taxes of $101,200, as compared with the total tax of $114,300, if the marital deduction is not availed of.

In this situation a tax savings of over $13,000, plus the use of the $44,000 by the wife for her life, and also the power in the wife to consume or give away property so as to reduce her tax, would result from complying with the marital deduction provisions of the Act. So, under these circumstances where the wife has nothing, the marital deduction results in a substantial savings and the husband's will should be changed if he wants to take advantage of the available benefits.

Concluding Observations

It is apparent that each estate has to be approached by calculating the Federal and state taxes on the husband's estate and on the wife's estate, without the marital deduction; and next a separate calculation of such taxes with the marital deduction must be made. Then add to the tax savings, if any, resulting from the marital deduction, the probable value of the use of the tax money, based on the life expectancy tables, the payment of which is postponed until the death of the surviving spouse. As the concluding step in your calculations, and a very important one, deduct the additional state inheritance taxes payable at the death of the surviving spouse upon the property passing to her. Only after all these calculations have been made can you fairly judge whether advantage or disadvantage would result from availing of the marital deduction. Even then many intangible factors such as the probability of the wife consuming or giving away corpus must be considered.

In conclusion, may I leave with you these general obserations:

1. Generally speaking, equalizing estates of husband and wife will save taxes. Certainly this is true if such reduction may be accomplished by tax-free gifts during life, and will probably be true if a proper testamentary disposition entitling a decedent to the marital deduction is made.

2. Each estate is different. No two are alike. Careful calculations of the various situations and taxes both state and Federal are essential. Do not forget that to a certain extent the savings through the marital deduction may be offset by the loss resulting

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West Virginia Law Review, Vol. 51, Iss. 4 [1949], Art. 4

from additional state inheritance taxes payable on the estate of the spouse last dying.

3. The financial needs of the surviving spouse, the probability of such spouse consuming the property before death or giving it away, the likelihood of decrease or increase in market values and the probable income taxes payable by the surviving spouse are all pertinent factors in this highly speculative tax picture.

4. Periodic consideration of wills is necessary. There may be changes in the law. There may be changes in the value of the estate of the husband or the wife. Wills may be drawn upon the assumption that the husband will die first, and the wife may cross you up and die first. A divorce would materially affect the situation. Any significant changes in the affairs of the couple may substantially alter the tax situation.

Of course, whenever a will or trust is drawn, the testator or the donor of the gift is the final arbiter of its provisions. It is not the will or trust of the lawyer. The testator may not desire to give one-half of his property to his wife. He may not be willing to give her a broad power of appointment. One testator remarked when this law was explained to him, "Nothing doing. My wife would give all my property to her relatives." Another, with a younger wife, feared she would take a second honeymoon on his money, so he didn't care for the marital deduction.

Finally, I repeat that nothing I have said here will exactly fit situations which will be presented to you. If I have given you a bird's-eye view of the new law and have impressed you with the absolute necessity of examining this law carefully in respect of wills heretofore drawn by you and of examining it again whenever you draw a new trust instrument or will, the purpose of this talk will have been accomplished.

Remember that old maxim, "Ignorance of the law excuses no one," applies not only to clients but also to lawyers.