



3-1-1947

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Recommended Citation

James F. Thornburg, *Happy Hunting Ground of the Infernal Revenue Bureau*, 22 Notre Dame L. Rev. 237 (1947).

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NOTRE DAME LAWYER

A Quarterly Law Review

VOL. XXII

MARCH, 1947

No. 3

THE HAPPY HUNTING GROUND OF THE INFERNAL REVENUE BUREAU*

Mr. Chairman and, if my olfactory sense has not betrayed me, gentlemen of the bar:

The Federal government has taxed about everything but your patience — so glaring an oversight, so tempting a loophole, that I hasten to exploit it in full measure this afternoon.

Right here and now I insist on denying any sneaking and slanderous suspicion you may hold that I am lacking in proper respect and esteem for the Internal Revenue Bureau. On the contrary, I hold more than a passing fancy for the bureau. In all truth, I idolize the bureau as a modern Robin Hood who takes from the rich only to scatter its loot among the good, the poor and the deserving — namely: US LAWYERS.

Why, the bureau is probably today's greatest single trouble-maker in the courts of the nation. As a lawyer I dearly love a first class trouble-maker. Moreover, the bureau is the only litigant who habitually pays a substantial part of the fees of the opposition attorney.

*This address was presented to the Section on Taxation of the Indiana State Bar Association mid-winter meeting of 1946 at Indianapolis. Mr. Thornburg is an instructor in Federal Taxation at the University of Notre Dame School of Law.

When dealing in the estate tax field, you and I do not accept this bounty with the courtesy and deference which we are accustomed to show toward one who pays us a hard cash fee. With a good deal of self-righteous indignation, we bellow that our fees are a legal and justified deduction in computing the net estate for tax purposes — forgetting that, in substantial measure, it comes from the government's inheritance in the estate of our deceased client.

Moreover, the people who populate the bureau aren't such bad folks, at least, they come from good stock. One of their ancestors even wrote a part of the new testament, which may account for their present day inordinate curiosity about wills. That was St. Matthew. In his younger days, he was a tax collector, but, of course, that was before he got religion.

During life the tax collector shears your wool. Death taxes are but a post mortem collection of the remaining fuzz, the last rite of our revenue system in this modern shrivelization.

Nevertheless, from a taxation standpoint, the high cost of living is only a little greater than the high cost of dying. Taxation has made death a luxury.

The happy hunting ground is now the private game preserve of the government where the elusive buck, your buck incidentally, is stalked with patience and consumed in haste. Not even the great beyond is beyond the reach of the tax collector.

Death taxes are of many kinds and carry many labels. Like French pastries, they are varied in design, colorful of composition, and equally indigestible. The labels most frequently associated with taxes imposed as an incident of death are estate, inheritance, succession, transfer and death taxes, although for convenience of reference we may group all of them under the generic term, death taxes.

All among these taxes may be reduced into two basic forms of taxation. One is the estate tax, being the type presently

used by the Federal government and with which we are primarily concerned this afternoon, and the other is the inheritance tax, the most popular form employed by the several states.

Mr. Randolph Paul has summarized briefly a distinction repeatedly suggested by the courts: "The federal estate tax is upon the (decedent's) right to *transmit* property, whereas an inheritance tax is upon the right (of the beneficiary) to *receive property*." ¹

At last count forty-seven states had death taxes of one type or another. Of these, Alabama, Arkansas, Georgia and Florida have imposed estate taxes only to the extent of absorbing the credit against federal estate tax. Nevada imposes no death tax at all.

In 1939, a modestly normal year by the new deal calendar, these states produced \$132,000,000 of revenue from death taxes alone.

By comparative standards, the Indiana inheritance tax is not a tax at all but a government subsidy. It is characterized by what it doesn't tax rather than by what it divines to tax. As you will recall, insurance payable other than to the estate of the decedent is not taxable. Real estate held by husband and wife in tenancy by the entireties is exempt in the estate of the first spouse to die. The great state of Indiana is no grave robber — our commonwealth is more like a short change artist, taking a little here and a little there from the windfalls of the living.

Before tackling that saint of sinners, the Federal government, a word or so about the mental approach to what may be called the "academics" of taxation.

First and foremost, as Mr. Paul has adequately said, you cannot "trust the literal language of taxing statutes." ²

¹ Randolph E. Paul, FEDERAL ESTATE AND GIFT TAXATION, Vol. 1, Sect. 1.05.

² *Supra*, note 1, Sect. 1.08.

“Legislative words are not inert, but derive vitality from the obvious purposes at which they are aimed.”³ The U. S. Supreme Court, as early as 1918, suggested in connection with an income tax case that words are the “skin of a living thought, affording a wide range for the delicate process of adaptation to specific fact situations.”⁴ Liberality in the judicial construction of revenue laws is “running riot.” Thus, it isn’t as much a problem of taking the law as you find it as it is finding the law at all.

The second essential of tax study is the terse admonishment of Mr. Justice Holmes that “. . . A page of history is worth a volume of logic.”⁵ This, I think, implies an appreciation of the empirical, a viewing of schemes for tax avoidance with the earthy objectivity of the town-pump skeptic.

Yet one cannot be assured that the pleasurable experience of administrative or judicial sanction for a given device will necessarily repeat itself a second time or withstand slight variations of fact. The painter does not become an artist merely by copying, however perfectly, the tested canvas of Whistler’s Mother. Rather, he must prick his imagination and enjoy a wholesome curiosity concerning the nature and whereabouts of Whistler’s Old Man. So it is with a tax practitioner.

Lastly, the mind must be alert to the future and indulge a little in the witches’ brew of divining. It is quite as important, in reading a judicial decision, to know how the judge “got there” as it is to know how he said he “got there.” This requires an ear which is attuned to overtones, an olfactory sense which detects both the rat and the cheese that draws him, a sensitive understanding of the *mores*, the inarticulate feelings, the jealousies and resentments of the masses. In short, to understand taxation one must be like a woman — “With a sense of rumor.”

³ Griffiths v. Comm., 308 U. S. 355, 358 (1939).

⁴ Towne v. Eisner, 245 U. S. 418, 425 (1918); and *supra*, note 1, Sect. 1.08.

⁵ New York Trust Co. v. Eisner, 256 U. S. 345 (1921).

Now let's see what the Federal government is doing to help private property lose its privacy. On September 8, 1916, Congress enacted our first estate tax. Previously the Treasury, upon occasion, had tentatively licked the sweet honey of heirship through stamp and inheritance taxes. In its first full calendar year of operation the 1916 estate tax drew over \$6,000,000 from the American cornucopia. A peak yield of more than \$154,000,000 was reached in 1921 under the old law, but, with reduced rates, this revenue source gradually declined to about \$34,000,000 in 1933. By then the American cornucopia was no longer overflowing with the goodness of our native farms and orchards, the luxury produced by our engineering genius. Down in Washington they spoke of it as the clogged economic cornucopia but out here we Hoosiers just called it the constipated horn of plenty. With one swift promise of the more abundant life here on earth, the administration promptly shifted its gaze to the hereafter. Up went the rates and down came the exemptions. Moreover, a substantial gift tax was enacted to catch those who would distribute their accumulation in advance of the grim reaper. So it was that in 1934 the yield was over \$113,000,000 as compared with the paltry \$34,000,000 of 1933. By 1936 the combined gift and estate taxes jumped to \$379,000,000. In 1942 they carved out well over \$432,000,000. It has been reported that, for the year ending in 1945, the yield approximated \$643,000,000.

The bitter purgative of taxation has done its work on the horn of plenty.

Turning, for a very brief moment, from the cold calculus of astronomic figures to the more frigid abstractions of legal sophistry, we examine the constitutional aspect of the federal estate tax. Someone has said that the modern day Supreme Court has chloroformed the magic rabbits which its predecessors pulled out of the constitutional hat. One thinks — sometimes — that the court, in recent years, may have inhaled a little of the chloroform itself. However,

the saying is especially true in this field of taxation for the court has repeatedly sustained the constitutionality of this sort of taxation and the statutory minutia thereof.

As early as 1874, the court upheld the constitutionality of a federal succession tax imposed as a part of the Civil War revenue laws. The ground of contention was that the tax was direct and, hence, would have to be apportioned among the several states as required by the Constitution. The court, however, held that this tax was an excise and, accordingly, exempt from apportionment.⁶ All lawyers, I believe, agree with the decision. But, of course, lawyers are seldom heavy taxpayers.

The next decision of importance from the U. S. Supreme Court was the case of *Knowlton v. Moore*,⁷ involving a federal inheritance tax enacted during the Spanish-American War. The court reiterated its position that the fundamental nature of such a tax was that of an excise.

Incidentally, for anyone who may be interested in a thorough history of this type of taxation and a more refined approach to this general subject, I recommend a reading of the opinion given in the *Knowlton v. Moore* case.

With brisk words and a characteristic conservation of language, Mr. Justice Holmes disposed of the general constitutional questions originally presented by the present federal estate tax law.⁸

Although there may be unconstitutional provisions within the minutia of the present estate tax law, as well as an issue of larger constitutional scope to be noted later, I think it fair to say that the taxpayer should seek his comfort through other media, both legal and practical.

The present federal estate tax structure is unbelievably complicated. If proof be necessary, I submit as exhibit "A"

⁶ *Scholey v. Reu*, 23 Wall 331 (1874).

⁷ 178 U. S. 41 (1900).

⁸ *Supra*, note 5.

the present federal estate tax return or form. There was a time when a lawyer merely filed a return. Today we return a complete file.

As you well know, it is not one tax but actually two, with different credits and exemptions as to each.

One of these is called the "basic" tax. For the purpose of the "basic" tax, we first find the "net estate" of the decedent. Then we deduct \$100,000, being the exemption allowed for the exclusive purpose of the "basic" tax. The tax is then calculated on graduated rates from 1% on the first \$50,000 of the remaining taxable net estate to 20% on taxable net estates amounting to more than \$10,000,000. For most estates, the "basic" tax is nothing to be concerned about.

As against the "basic" tax, as thus computed, a credit is allowed up to 80% of the "basic" tax for amounts paid to state governments as death levies.

The other estate tax is known as the "additional" tax. Here again the first step is to compute the "net estate" of the decedent. This time, however, we deduct only \$60,000, being the exemption allowed in the case of the "additional" tax. Then we compute the tax on the basis of graduated rates.

The rate begins at 3% on the first \$5,000 of taxable estate, rapidly ascending to 30% on the taxable net estate in excess of \$100,000. From that point on, the rates gleefully leap and jump to a top rate of 77% for taxable estates in excess of \$10,000,000.

Having, in this manner, calculated the "basic" tax and "additional" tax, one would think that the government mathematicians would be satisfied with their mumbo-jumbo. No, there are two further mathematical steps. Subtract the gross "basic" tax, that is, the basic tax undiminished by the 80% credit, from the "additional" tax. Then add to the result thus obtained the difference between the actual credit

allowed for state taxes and the gross "basic" tax. If, by that time, you haven't given up, you will when the tedium of the mathematics wears off and the true significance of the tax soaks in.

Well, here is the true significance in the simplest form:

1. On a net estate of \$80,000, the maximum federal estate tax is \$1,600 — quite modest, isn't it?

2. Given a net estate of \$100,000, the top federal tax is \$4,800 — which, of course, is less than 5%.

3. On an estate of \$120,000 the highest tax is \$9,500 — less than 8%.

Up to this point, the tax is within the boundaries of the reasonable. From here on, death becomes a luxury.

4. On an estate of \$160,000 — a maximum tax of \$20,700 or about 13% of the estate.

5. Take an estate of \$200,000 — the top tax is \$32,700 or 16%.

Perhaps one or two further illustrations will serve as additional proof.

6. An estate of \$310,000 carries a top cost of \$65,700 or about 21%.

7. Lastly, an estate of \$500,000. The maximum tax is more than 25% of the estate, \$126,500 to be exact.

Let's take Mr. U. S. Taxpayer who is possessed of wife, two children and more than an average accumulation of the goods of this world.

We shall assume his net estate, after payment of all debts but before taxes, to be \$300,000. Realizing that his good and frugal wife would look to the needs and education of the children, he composed a simple will leaving his entire estate to his wife.

We now painlessly kill off Mr. Taxpayer to see what "out-of-this world" treatment his worldly goods receive. The

Indiana inheritance tax, with credit for payment within 12 months is \$8,645. The federal estate tax is \$59,100 and must be paid within 15 months. Thus the widow must raise a minimum cash sum of \$67,745. To this, in the average estate, must be added the requisite cash for family support during the period of administration, for the husband's state and federal income taxes, if any, accrued to date of death, for the expenses of last sickness and funeral, for the costs of administration and for the payment of debts. Therefore, the immediate overall cash need ordinarily would far exceed the cash required for the estate tax obligation.

It is seldom indeed that decedent will have this amount of cash or liquid securities available. From what source will the widow derive the balance? The answer, of course, necessarily depends upon the particular circumstances but, very probably, she will be forced to use insurance proceeds which, if retained in proper form, may well be the best asset of the husband's estate. She may experience the shrinkages incidental to a forced sale of either real or personal property. This is especially true if the husband's business happened to be a small, closed enterprise, for which no general and ready market is available.

Let us assume, however, that the wife successfully passes the liquidity hurdle without shrinkage. She is now possessed of an estate amounting to \$232,255.

Justifying the confidence of her husband, she lives within the income from the estate. However, she passes away at any given date more than 5 years after the death of her husband (the property being exempt from a further federal estate tax under prescribed rules for the 5 year interval). The property passes to the two children in equal shares either by her will or by operation of law, it matters not which.

The Indiana inheritance tax would be about \$5,428. The federal estate tax would approximate \$40,402; or a total of

\$45,830 of taxes, state and federal, upon the event of the wife's death.

In a period of 5 years and one day, the original estate has shrunk from \$300,000 to \$186,425, or about 38%, and the shrinkage is a tax shrinkage only.

Could the husband have prevented any substantial part of this shrinkage?

It is impossible within the confines of this discussion to treat with all of the potential sources of tax saving which might have been available to the husband under the particular circumstances of his estate and family. We, however, will consider a few relatively simple principles of which he might have availed himself to the benefit of his family.

Let us assume that the husband conveniently might have made gifts in the first three years of the 5 year period preceding his death. He objected to paying any gift tax, although that may have been unwise upon his part, so we will presume that he made permissible tax-free gifts only. In each of the three years, he gave his wife \$3,000. He followed a like policy in respect of each child. In addition, he gave his wife an extra \$30,000 in one of those years. Thus, he would have donated a total of \$57,000 in money or property to his family without incurring gift tax and, unless made in contemplation of death, these gifts will be exempt from estate tax.

Another expedient would be for the husband to create a trust by his will whereby the income from the balance of his estate would be paid to his widow for her lifetime, with adequate provisions enabling an independent trustee to use principal, if necessary, for the welfare of the widow and children as well as for the education of the latter. The principal could be distributable to the children, if the father should so wish, in equal shares upon the decease of their mother. In this way and under the present law, there would be no

estate or inheritance tax at the death of the wife in respect of the trust property. By this expedient, the husband's fundamental objectives for the care of his family have been realized and one complete set of taxes eliminated.⁹

If this husband and father had followed these two simple plans with effect, his estate upon ultimate distribution to the children would have been about \$252,000 as opposed to \$186,500; a 16% shrinkage as compared to 38% without the use of these devices.

Having seen the revenue yield of the present federal estate tax and reviewed its burden upon the individual citizen and his family, the mind will settle, I believe, upon these general conclusions.

First, the revenue yield from federal gift and estate taxes is relatively inconsequential. Of an approximate total revenue of forty-four billions of dollars reported for the fiscal year ending in 1945, only an estimated six hundred and forty-three millions was derived from this source. This represents less than 1½% of the total revenue enjoyed by the Federal government for the fiscal year ending in 1945.

Second, even if the true purpose of the federal estate tax is primarily that of revenue, the severity of the burden upon a relatively small number of individuals and their families is out of all proportion to the comparatively meager gross realization enjoyed by the Federal government. As against this small yield we must offset the cost of administering this complicated piece of taxing machinery. Although no statistical data has been uncovered, the imagination would not be upset by even a staggering estimate of administration costs.¹⁰ Virtually every federal estate tax return is carefully audited by an agent in the field (as indeed is proper), a costly fac-

⁹ A form of will, embracing testamentary trusts, for U. S. Taxpayer is reproduced immediately following this article.

¹⁰ Since the law is administered in some major part by government offices and personnel whose devotion is not alone to gift and estate matters, a careful time and cost accounting would be requisite to a fair allocation of expense.

tor of itself. Troublesome valuation questions, in so many instances at best a compromise between rough opinion and elaborately unrealistic formulae, consume endless hours of protest conferences with the office of the Internal Revenue agent in charge and the technical staff. The great volume of litigation in these fields must shower the government with constant, untold expense. When the manifold items of cost and expense directly and indirectly related to these sources of revenue are fully explored, it may be doubted that any net realization is experienced.

These observations give rise to the final conclusion that the fundamental purpose of these taxes is regulatory with revenue, if any net realization there be, appearing as an added attraction only. These taxes are manifestly an instrument of social adjustment and must be appraised as such.

Assuming that the costs of administration could be ascertained and that such costs indicated comparatively little or no net revenue has been realized from these exactions over a representative interval of time, an interesting constitutional issue might be tendered. Taxation of any kind is an exaction made for the support of the government. If the government habitually receives no support, and cannot reasonably anticipate support in light of experience, from the exaction, the exaction ceases to be tax. Especially is this true where the historical reasons for the exaction clearly indicate a regulatory intention.¹¹ Where regulatory powers otherwise forbidden to the Federal government are exercised through statutory language invoking the taxing power, some of the decisions have been alert to these unconstitutional ex-

¹¹ During the era of President Theodore Roosevelt it was argued that heavy death taxes were a necessary measure to prevent the evil of concentrated wealth in an economic oligarchy of few families, a wealth which menaced government itself. With the present day income tax structure, it is doubtful if accumulations of wealth will be realized to an extent menacing government. The menace, if any, probably should be looked for among those combined concentrations of enormous manpower and wealth presently exempt from income taxation.

cesses.¹² Other decisions, however, have failed to disclose so jealous a regard that constitutional exactions shall be exactions in the primary pursuit of revenue.¹³ Even those decisions which have required that the taxing power be exercised for revenue raising purposes appear to have been rationalized on the rather formal basis that the statute spoke too loudly and clearly its regulatory intent. The formal approach, it is submitted, should be obliterated in this type of inquiry to the same extent to which formalism has been abandoned in the courts at the request of the government, and over the objection of the taxpayer, in tax cases involving niceties of property law. If the tax does not produce net revenue of consequence and cannot reasonably be anticipated to produce net revenue in light of actual experience, over a fair interval of time, it is difficult to say that it is a revenue measure, even though the statutory language loudly bespeaks a revenue raising intent and is silent with respect to its true regulatory purpose.

The federal estate tax cannot be sustained on the theory that a man transmits his property by the consent of the Federal government. The premise is legally unsound and, in my opinion, practically unsound, for it assumes without justification that the citizen and his property exist for and at the pleasure of his government whereas government is created by and should be the servant of its citizenry.

In part, at least, death taxes are based on the vague and fallacious notion that wealth of itself is a vicious thing. Wealth, in the last analysis, is merely saved labor or the fruits of saved labor. It is vicious only when it is at the disposal of a vicious or improvident person. It may be, and usually is, useful in the hands of a person of judgment and character. Government, after all, is made up of natural

¹² U. S. v. Constantine, 296 U. S. 287; U. S. v. Butler, 297 U. S. 1; Bailey v. Drexel, 259 U. S. 20; Hill v. Wallace, 259 U. S. 44; Trusler v. Crooks, 269 U. S. 475; Carter v. Carter Coal Co., 298 U. S. 238.

¹³ McCray v. U. S., 195 U. S. 27; Sonzinsky v. U. S., 300 U. S. 506.

persons, sometimes provident and of good character, sometimes the reverse. In the field of production, the government has failed to disclose a greater initiative, a more intensive production or a greater enterprise than its citizens. Accordingly, it is not to be presumed that the government will necessarily make a better and more productive use of these funds in the social good than would the family or beneficiaries of the deceased. The ultimate, forced liquidation of relatively small production enterprises for the purpose of paying taxes does not of necessity mean that the purchaser will operate the enterprise in the social interest whereas the family of the decedent would have failed to do so.

In grammar school days, we marvelled at the story about Washington throwing a dollar across the Rappahannock — why that was nothing, today Washington is throwing billions of them. With this record of indiscriminate pitch and toss, it is not beyond possibility that the rates will again go up and the exemptions come down.

Gentlemen, our ancestors fought our first rebellion against taxation without representation — let us fight the next one for a little representation without taxation.

James F. Thornburg.

LAST WILL AND TESTAMENT OF U. S. TAXPAYER

I, ULYSSES S. TAXPAYER, a resident and domiciliary of Tax on Taxville, County of Confusion, State of Consternation, do make, publish and declare this my last will and testament, hereby revoking any and all wills and codicils thereto by me heretofore made.

ARTICLE ONE

Provision as to Taxes, Indebtedness and Expense

I direct that all just debts and expenses of mine and of my estate shall be paid by my executor from my general

estate. My executor, in its sole discretion, may pay any and all transfer, estate, inheritance and death taxes, whether imposed by reason of property, insurance or successions passing under this, my will, or by reason of life insurance payable to a named beneficiary or beneficiaries or otherwise imposed, from my general estate. My executor, in its sole discretion, shall determine whether or not such taxes shall be apportioned to the various bequests, legacies and devises, whether the same be absolute or in trust, hereinafter made or to insurance proceeds or benefits payable to named beneficiaries or to property or successions passing independent of this, my will; and in the event that the executor does allocate and apportion any such tax to one or more recipients, to determine, in its discretion, the method of apportionment and the amount payable by such recipient. My executor, in its sole discretion, may enforce or refrain from enforcing contribution or reimbursement to my estate for the amount of any and all such taxes from named beneficiaries under policies of insurance upon my life or from recipients of property or successions passing either under or independent of this, my will.

The executor, in its sole discretion, may use the income derived from this estate during the period of administration, or so much thereof as it sees fit, for the discharge of the obligations and taxes hereinabove mentioned.

ARTICLE TWO

Absolute Gifts and Bequests of Tangible Personalty and Devises of Realty

(Here insert those absolute, specific bequests and legacies of personalty desired by testator, i.e., bequests of non-business tangible personalty such as household goods *et cetera* and also such absolute devises as may seem desirable, i.e., summer cottage located out-of-state, etc.)

ARTICLE THREE

Testamentary Trusts Created

I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, of whatever kind and nature and wheresoever situated, which I may own, or in which I may have an interest or which I shall have the right to dispose of at the time of my demise to the "We Do Not Draw Wills or Give Tax Advice Bank & Trust Company of Tax on Taxville," as trustee of the trust and for the uses and purposes following:

ITEM I

Provisions Relating to Distribution

A. If one or more dwelling houses, either urban or rural, together with the grounds and appurtenances thereunto belonging, or an interest therein, shall pass to or devolve upon the trustee under the terms of this Article Three, my said wife, if she shall survive me at my demise, shall be entitled to the use and possession during her natural life of such dwelling house, its grounds and appurtenances, owned by the trustee as she shall select for her residence. Should my wife, for any reason fail to make such selection within a reasonable time, the trustee in its discretion may make such selection on her behalf. No rental or other charge or expense for the use and possession thereof shall be exacted by the trustee from my said wife. The trustee, in its discretion, may pay taxes, assessments, upkeep and maintenance, charges and expenses in respect of the grounds and improvements, and also such capital expenditures and improvements with respect thereto as it sees fit, not alone to the extent of the interest of the trust therein, but also with respect to any undivided interest which my said wife or one or more of my descendants may independently own therein; and the same may be paid either from income or corpus, or both, as the trustee sees fit. The trustee, during the natural

life of my wife, shall not sell such dwelling house property so selected by her as a residence without her consent in writing first obtained. The trustee, with her consent, may sell such dwelling house accommodation and shall hold the proceeds from such sale in trust. The trustee, in its discretion, may apply an amount of money from this trust, but not to exceed the amount of the proceeds derived from such sale, to the purchase of another dwelling house to be selected by the trustee with the advice of my said wife. Title to any property so acquired shall be held by the trustee and the property shall be held and managed by the trustee and enjoyed by my wife in accord with and subject to the provisions hereof which govern the management and use of the property originally selected by my wife as a residence. Any such dwelling house, whether originally selected by my wife or subsequently acquired under the terms hereof, may be rented or leased by the trustee upon such terms as the trustee in its discretion may determine and the gross income derived therefrom shall be treated in like manner as is the gross income from any other item of corpus of the trust.

B. In the event that my wife, Lucy Budget Taxpayer, survives me at my demise, the trustee shall pay to my wife for and during her natural life the entire net income derived from all and every item of property, asset and estate at any time passing to, devolving upon or acquired by the trustee.

(Alternative provision which may be used in lieu of the foregoing Paragraph B):

In the event that my said wife and also one or more of my descendants shall survive me at my demise, then for and during the natural life of my said wife, the net income derived from all corpus held by the trustee may be paid by the trustee to one or more or all of the following persons, namely: my said wife; one or more or all of my descendants, whether living at the time of my demise or at any time there-

after born; as the trustee in its sole discretion shall determine upon the occasion of each payment of income by it and in such quantitative proportions as between them, if any payment is made to more than one person, as the trustee sees fit upon the occasion of each such payment of income. If at my demise or at any time subsequent to my demise but while my said wife remains in life there shall be no descendant of mine living, the trustee shall pay all net income to my said wife for and during her natural life.

C. At the time of the demise of the last to die as between my said wife and myself, all and every item of property, asset and estate then held by the trustee shall be allocated by the trustee to such total number of identical but separate trusts as will provide one co-equal trust for each child of mine who survives the demise of the last to die as between my said wife and myself plus one co-equal trust for the then living descendants (in the aggregate) of each child of mine who fails so to survive the demise of the last to die as between my said wife and myself. For purposes of reference and designation, a trust provided for a child of mine shall bear the name of such child, and a trust provided for the descendants of a deceased child of mine shall bear a descriptive name to be selected by the trustee.

D. In the event that one or more of my children shall fail to survive the demise of the last to die as between my said wife and myself but shall leave one or more descendants who do so survive the last to die as between my said wife and myself, the corpus of one such trust shall be paid and distributed by the trustee free from trust restraints in equal parts *per stirpes*, and not *per capita*, to the descendant or descendants, who so survive the demise of the last to die as between my said wife and myself, of each child of mine who fails so to survive.

E. In the event that one or more of my children survive the demise of the last to die as between my said wife and

myself, one such trust shall be held by the trustee for each such child of mine who so survives the demise of the last to die as between my said wife and myself and the net income derived from the trust of each such child of mine shall be paid by the trustee to that child for and during his or her natural life.

F. I hereby confer and invest in each child of mine who survives the demise of the last to die as between my said wife and myself, the power to name, appoint and designate by his or her last will and testament one or more or all of the following persons, to wit: a descendant or descendants of the appointer; the widow or widower of the appointer; a descendant or descendants of mine; to take and receive as to income or principal, or both, in trust or free of trust, so much or all of the corpus held by the trustee, irrespective of the trust or trusts in which held, from which such child of mine at his or her demise is entitled or, in the discretion of the trustee, might be entitled to receive or enjoy the benefits of net income, in estates of such character and duration and in such quantitative proportions as he or she shall direct by his or her said will; provided, however, that nothing herein contained shall permit or authorize him or her to exercise this special power of appointment in favor of himself or herself, his or her estate, his or her creditors or the creditors of his or her estate, or in such manner as to create in any person another power to appoint. In the exercise of such power, the appointer may impose or provide lawful terms, annuities, conditions, charges or contingencies, provided, however, that the same must not cause the appointment to benefit any person not an object of the appointer's power; impose lawful spendthrift restrictions upon any appointment; and may exercise the special power of appointment herein conferred by a will executed at any time, whether prior or subsequent to the date of the execution of this, my will.

G. 1. In the event that a child of mine survives the demise of the last to die as between my said wife and myself and thereafter departs this life without having disposed of all of the corpus of every trust subject to disposition by him or her through the exercise of the special power of appointment hereinabove conferred, then to whatever extent corpus subject to the power of such child is not appointed or is not effectively appointed, and irrespective of the reason or cause for such failure of appointment or ineffective appointment, and whether such failure be in part or in whole, all of the corpus subject to the power of such child, if it be all, or that part of the corpus subject to the power of such child, if it be a part, which shall not have been appointed or effectively appointed by such child, shall be distributed by the trustee free from trust restraints, to such descendant or descendants of such child as survive the demise of the last to die as between my said wife and myself, in equal parts *per stirpes*, and not *per capita*, as between such descendants; but if there shall be no descendant of such child who so survives the last to die as between my said wife and myself, then the same shall be distributed by the trustee to the then living widow or widower, if any, of such child of mine, and, if also there shall be no widow or widower of such child of mine then living, the same shall be distributed in equal parts *per stirpes*, and not *per capita*, to such descendant or descendants of mine as survive the last to die as between my said wife and myself.

2. No person to whom an appointment is made under the foregoing paragraph F by a child of mine shall be entitled to receive any interest, right or property which is being distributed under this Paragraph G by reason of such child's failure to appoint or ineffective appointment unless the person to whom the appointment is made shall bring the interest to which he or she was appointed by such child of mine into the fund to be apportioned under this Paragraph G.

H. The trustee, in its sole discretion, at any time and from time to time may pay to or for any person entitled to receive or enjoy the benefits of net income, whether at the discretion of the trustee or as a matter of right, under a trust created by this, my will, so much or all, as the trustee sees fit, of the corpus of the trust or trusts from which such person, to or for whom the payment of corpus is made, is entitled or, in the discretion of the trustee, might be entitled to receive or enjoy the benefits of net income at the time when such a payment of corpus is made by the trustee.

1. This power and privilege of the trustee shall be without restriction or limitation and the reasons or motives of the trustee in the exercise or non-exercise thereof, shall not be the subject of inquiry or control by any person or court. However, it is my opinion, and I express it as directory rather than as mandatory, that among other instances, the trustee should exercise its power in favor of a beneficiary whenever the trustee may deem it necessary or proper for the care, comfort or maintenance of the beneficiary or to meet expenses occasioned by illness, misfortune, act of God or other emergency, distress or need which may descend upon or affect the beneficiary.

2. Where applicable, it is my opinion and again I express it as directory rather than as mandatory, that corpus should be used as an educational resource to be expended by the trustee for the purpose of providing a beneficiary with a preparatory, collegiate and post-graduate education of such character and extent as the aptitudes, interest, academic record and industry of such a beneficiary may warrant in the opinion of the trustee, but if such beneficiary fails to disclose an aptitude, interest or desire for higher education, the trustee, in its discretion, may desire to use corpus to establish such beneficiary in a business undertaking.

3. In the case of my wife, it is my opinion, and again I express it as directory rather than as mandatory, that corpus should be liberally invaded whenever necessary or advisable in the opinion of the trustee to supplement her income and provide her with a comfortable and secure living that will enable her as nearly as may be, to maintain a status of life similar to that existing at the time of the execution of this, my will.

4. In respect of my children, it is my opinion and again I express it as directory rather than as mandatory, that the trustee, in the absence of facts and circumstances militating against the advisability thereof, should pay and distribute corpus to my children gradually as they mature and on substantially the basis following: One-fourth in value of corpus between the twenty-fifth (25th) and thirtieth (30th) anniversary of birth; an additional one-fourth on the thirty-fifth (35th) anniversary of birth; an additional one-fourth on the fortieth (40th) anniversary of birth; and the residuum on or after the forty-fifth (45th) anniversary of birth. I fully appreciate that circumstances may exist in the future which would render advisable an earlier, a later, or no distribution to either or both of my children and accordingly, the matter is reposed with the discretion of the trustee.

5. It is my opinion, and again I express it as directory rather than as mandatory, that the distribution probably should not be made of stock, bonds or evidences of indebtedness of a "controlled corporation" until such time as corporate deadlock or management difficulties with respect to a controlled corporation would not be likely to result from an outright distribution.

I. Should any beneficiary die at a time when income payable to such beneficiary has been received by the trustee,

is due to or is in the hands of the trustee but unpaid to the beneficiary, such income shall accrue to the benefit of and be payable to the beneficiary or beneficiaries, if any there be, who by the terms of this, my will, succeed to the interest of the beneficiary so departing this life.

J. 1. Notwithstanding anything to the contrary contained in this, my will, the trustee in its sole discretion and in respect of each trust created by this, my will, may postpone distribution to any person of any part or all of the corpus held by the trustee either until all and every share of stock, bonds and evidences of indebtedness of a "controlled corporation" which at the time of my decease or thereafter may be a part of corpus held by trustee shall be sold or disposed of by the trustee or until the time farthest removed for the termination of a trust, whichever shall the sooner occur, and the trustee shall be under no obligation to sell or dispose of the same in order to provide assets with which to make distribution of corpus either at or after the time when such a person, in the absence of this Paragraph J, would be entitled to distribution thereof.

2. Any part of the corpus (irrespective of whether or not there shall then be shares of stock, bonds or evidences of indebtedness of a "controlled corporation" held by the trustee) which, but for the provisions of this sub-paragraph 2 of Paragraph J, would be distributable free from the restraints hereof to a person prior to the twenty-first (21st) anniversary of his or her birth may be held by the trustee in its discretion for the benefit of such a person until the twenty-first (21st) anniversary of his or her birth or until the demise of such person prior in time to the twenty-first (21st) anniversary of his or her birth or until the time farthest removed for the termination of a trust, whichever shall the sooner occur.

3. It is my intention that the provisions of this Paragraph J shall relate to and govern the time of distribution

only and remaining in life until the time of actual distribution by the trustee shall not be a condition precedent to the vesting in interest of any estate which by other terms of this, my will, previously would vest in interest, and, furthermore, a failure to remain in life until the time of actual distribution by the trustee shall not be a condition subsequent divesting an estate otherwise vested in interest.

4. The net income derived from as much of the corpus of a trust as would have been distributed to a beneficiary had distribution not been postponed hereunder shall be paid by the trustee, subject to all powers and privileges of the trustee to make a different payment or treatment thereof granted by this, my will, to such beneficiary or to such person or persons who from time to time may succeed to the interest of such beneficiary.

K. Subject only to any applicable limitations or restrictions imposed by law and notwithstanding anything to the contrary contained in this, my will, the trustee, in its sole discretion, at any time and from time to time may accumulate and add to the principal of any trust all or any part of the income therefrom which otherwise would be paid to a beneficiary and any income so accumulated and added to principal shall be held, managed and distributed by the trustee in accord with all of the terms and conditions of this, my will, governing the holding, management and distribution of the principal from which such accumulated income was derived.

L. Any income payable under any trust to a minor beneficiary or a beneficiary under other legal disability may, in the exclusive discretion of the trustee, be paid by the trustee without order of court in any one or more of the following methods, to wit:

1. By direct payment to such beneficiary; or
2. To the legal guardian of such beneficiary; or

3. To a relative or other person who shall have accepted the responsibility for the care of such beneficiary and be actively engaged in discharging that responsibility whether by reason of legal duty or otherwise, provided, however, that any payment thus made shall be for the exclusive use and benefit of such beneficiary; or

4. Be expended by the trustee, as such, for the benefit and use of such beneficiary;

5. All or any part of the income may be accumulated and added to principal in accord with the above and foregoing Paragraph K.

6. The voucher of the person in whose custody such beneficiary may be, or of the beneficiary when paid direct to the beneficiary, or of the legal guardian or of any person to whom money is paid for the use and benefit of a beneficiary shall be a sufficient voucher for the trustee but the trustee in its discretion may require such reports and take such steps as it deems requisite to satisfy itself of or enforce the due application of such money to the use of the proper persons.

M. Neither the principal nor the income of any trust created by this, my will, prior to the date farthest removed for the termination of such trust or other distribution free from such trust by and under the terms thereof, shall be subject to assignment or other anticipation by the beneficiaries thereof or any one or more of them, nor shall the same be subject to attachment, execution, garnishment, sequestration, or other seizure under any legal, equitable or other process; but if and in the event that any portion of the principal or income or interest of any beneficiary under any such trust should, because of any debt incurred by or other claim against any beneficiary, or by reason of any sale, assignment, transfer, encumbrance, anticipation, bankruptcy or other disposition, voluntary or involuntary, made or attempted by any beneficiary, or by reason of any seizure, at-

tachment, execution, assignment by operation of law, garnishment, sequestration, writ or other process, legal or equitable, become payable or, in the sole opinion of the trustee, be likely to become payable to any person or persons other than the beneficiary for whom the same is intended, as in such trust provided, then and in such case the trustee, in its sole discretion, anything in this will contained to the contrary notwithstanding, may pay such principal or income, as the case may be, to one or more or all of the following persons to wit: a descendant or descendants of mine; and in such quantitative proportions as between them as the trustee sees fit; and such payments by the trustee shall be and constitute a full and complete discharge and acquittance to it in respect thereof.

ITEM II

Administrative Provisions

A. Except as otherwise provided in Paragraph B of this Item II, the trustee, until after actual delivery of the corpus of each trust pursuant to the terms thereof, shall have with respect to any and all property forming such trust estate, which shall be deemed to include that held for minors and others under legal disability, full power and authority in its discretion to do all such acts, take all such proceedings and exercise all such rights, powers and privileges as an absolute owner thereof might do, take and exercise, including, but not by way of limitation, the powers:

1. To retain and enjoy complete custody, possession, control and management of any and all property forming the trust estate; to invest and reinvest the trust property as and when deemed proper in any security or investment, be it real or personal property, irrespective of whether or not the investment be authorized or permitted by law, order, regulation, or directive, state or federal, as an investment proper for trustees; to hold and continue to hold non-income producing property,

real or personal; at any time and from time to time to reduce any trust estate or any fraction thereof to cash or bank deposits and hold the same uninvested for such period of time as the trustee in its discretion deems advisable notwithstanding directions otherwise contained in this, my will, to pay net income to any person or persons; to purchase realty sold on foreclosure brought and instituted by the trustee or by others; to sell, at public or private sale, mortgage, improve, lease, exchange, and grant options to purchase any property forming the corpus of any trust, upon such terms and conditions as to credit or otherwise as the trustee deems proper; to deposit any trust property with any protective or reorganization committee; to delegate discretionary power thereto; to pay such part of the expenses and compensation of said committee as the trustee deems proper; to vote upon any proposition or election at any meeting of stock or security holders and to grant proxies, discretionary or otherwise, to vote at any such meeting; to consent to plans of reorganization, merger, consolidation, and to vote with respect thereto; to borrow money and to pledge or mortgage property, real or personal, upon such terms as to security, maturity and interest as the trustee sees fit; to adjust, settle and compromise claims against or in favor of any trust estate; to make distribution of the corpus of any trust when the trustee is privileged or required to make distribution, to the person or persons entitled thereto under the terms thereof, either in kind or in cash, or partially in kind and partially in cash, at the discretion of the trustee; to make all evaluations of corpus necessary or incidental to allocating corpus to the several trusts and to make all evaluations of corpus necessary or incidental to distribution when the trustee is privileged or required to make distribution thereof, which evaluations shall be binding on all persons concerned; to cause any securities

or other property which may comprise any trust estate or any part thereof to be registered in the name of the trustee, or in its own name, or in the name of its nominee without disclosing the trust, or to take and keep the same unregistered and to retain them or any part of them in such manner that they will pass by delivery; to carry out and perform any and all contracts extant at my demise with respect to the retirement or liquidation of any interest which I may then have in any partnership, corporation, business unit or entity; to collect all sums of money or property due any trust estate and to give full and complete releases therefor; to join, participate in and execute any voting agreement or voting trust with respect to any stock or security forming a part of the corpus of any trust; to deposit with a committee, trustee, or other fiduciary, under such a voting agreement, or voting trust, any stock or security forming a part of the corpus of any trust and to accept in lieu of the stock or security thus deposited a participating certificate or certificates or receipt evidencing such deposit and to do all such things and acts with respect thereto as an absolute owner might do; to appoint and use the services of agents, brokers, attorneys, accountants and persons, natural or legal, in other capacities and pay compensation for such services; to delegate administrative powers to, deposit property, real and personal, with and invest title in any corporation qualified to perform fiduciary service either within or beyond the territorial boundaries of Indiana and irrespective of where situated; to receive and accept assets by testamentary or *inter vivos* gift from any person; to enter into leases or other contracts which will or may endure beyond the existence of any one or more or all of these trusts; to permit one or more or all of the beneficiaries under the several trusts to reside in any residential property held by the trustee either with or without

rental charge and without regard to who may be beneficially interested in the trust or trusts holding the property as corpus; and, parties dealing with the trustee shall not be obligated to look to the application of any money or property paid to or delivered over unto the trustee.

B. 1. The trustee shall not have the right or power to invest any of the trust funds or property in any property owned by the trustee in its individual capacity or in which or the sale or exchange of which the trustee in its individual capacity shall have any direct or indirect interest. The trustee in its individual capacity shall not have the right or power to purchase or borrow of and from any trust estate.

2. If, at my demise or thereafter, stock of a "controlled corporation" shall be held or owned by a trust estate, it is my opinion, and I express it as directory rather than mandatory, that the trustee should keep and retain all stock of such corporation during the existence of these trusts or make a disposition of the same in its entirety. However, appreciating that the fortuitous nature of the future renders any restriction upon the disposition thereof unreasonable, the sale or disposition of said stock or any part thereof subject to the limitations herein otherwise contained is lodged with and shall be in the exclusive discretion of the trustee.

C. The trustee in respect of each trust shall be excused from performing any of the duties imposed upon it and shall be exempt from all liability for failure to perform any of the duties imposed upon it by the terms of an Act of the General Assembly of the State of Indiana entitled "An Act concerning accounting by trustees under wills, deeds and agreements, court procedure, hearing, judgment, appeal and costs thereon, and to repeal all acts and parts of acts in conflict therewith including an act concerning inventories and intermediate and final accountings by trustees approved March 9, 1937," approved March 5, 1945, being Chapter

157 of the Acts of 1945, and all acts amendatory thereof and supplemental thereto, unless from time to time directed in writing so to comply by an adult beneficiary then entitled to receive or enjoy the benefits of net income thereunder.

The trustee, however, shall keep and maintain accurate and full books and records of account and, at least once in each calendar year, shall render a full accounting to each beneficiary then entitled to receive or enjoy the benefits of net income under each trust.

D. The trustee in its sole discretion, for all purposes and with respect of any and all receipts and disbursements shall have the right and power at any time and from time to time to determine whether a receipt or a disbursement shall be apportioned between income and principal; and, if apportioned, to determine the method of apportionment; or, if not apportioned, to credit a receipt to or charge a disbursement against either principal or income and either to apportion expenses and disbursements as between the several trusts in such manner as the trustee determines or charge the same against a particular trust or trusts or against all the trusts; each of which determinations by the trustee shall be binding and conclusive upon all beneficiaries under all the trusts whether or not *in esse* as of the time of any such determination.

E. The assets passing to or devolving upon the trustee shall be allocated to the several trusts which may be created pursuant to the terms of this, my will, in such manner and fashion as the trustee in its sole discretion shall determine. It, however, is my opinion, and I express it as directory rather than as mandatory, that all assets held by the trustee should be allocated to the several trusts in such manner that each trust shall have an undivided fractional interest in each and every item of property which at the time of my demise or thereafter may be or come into the hands of the trustee

and the quantitative extent of the undivided fractional interest of any given trust in each item of property should be equal to whatever fractional part of the aggregate corpus passing to or devolving upon the trustee is represented by such given trust.

F. The laws of the State of Indiana shall in all things govern each trust.

ITEM III

Definitions

A. The "descendants" of any given person shall mean and embrace all and every human being, natural and adopted, in each direct descending line from such given person to the remotest degree unto infinity, including the descendants, as thus defined, of any adopted person in each such descending line.

B. Wherever in this, my will, reference is made to a "controlled corporation," such reference shall mean and include Lucrative Lastex Corporation, and also any corporation, business unit or entity, the voting stock of which at the time of my demise is owned or controlled by me or by my wife or my descendants or by a trustee(s) or other person(s) under a voting or other trust or agreement, or by one or more of the foregoing, in such extent or amount as to enable me or my wife or my descendants or any one or more of us to enjoy a controlling interest in or have a substantial control, direct or indirect, over such corporation, business unit or entity; and such reference shall embrace any corporation into which said named corporation or a corporation of the above defined type may thereafter be merged, with which it thereafter may be consolidated, or which thereafter succeeds to its business or assets by purchase, reorganization or otherwise.

ITEM IV

Provisions Relating to the Trustee

A. In no event shall a trust fail for want of a trustee, as the trusteeship shall devolve upon the Judge of the court then having jurisdiction over the administration of such trust, but if no court then shall have taken jurisdiction of such trust, upon the Judge of the County of Confusion Probate Court, *ad interim* before the appointment of a successor corporate trustee. If the appointment of a successor trustee is necessary, the Judge of the Court upon whom the trusteeship temporarily devolves shall appoint a successor corporate trustee.

B. Each successor trustee shall have all of the rights, powers, privileges and immunities of its predecessor trustee.

C. Each and every trustee acting hereunder shall have the absolute right to resign at any time.

D. Each corporate trustee administering these trusts shall be entitled to compensation for its services and such compensation shall be reasonable, but not more than the usual charge for such services made by banks and trust companies in Tax on Taxville.

E. In the event that any corporate trustee hereof shall at any time merge or consolidate with or shall sell or transfer all or substantially all of its assets and business to another corporation, state or federal, the corporation resulting therefrom shall be trustee hereof in lieu of its predecessor in interest without the execution of any instrument and without action on the part of any court or person whatsoever; providing such successor corporation shall be qualified under the laws of the State of Consternation to undertake the duties of trusteeship.

ITEM V

Provisions Relating to Termination

A. Each trust shall terminate upon distribution pursuant to the terms and free from the restraints of such trust of

the entire corpus thereof. Notwithstanding anything to the contrary elsewhere contained in this, my will, each trust unless sooner terminated pursuant to the terms thereof or by the requirement of applicable law, shall cease and determine twenty-one (21) years after the date of the death of the last to survive of such of the following named persons who may be living at the time of my demise:

Lucy Budget Taxpayer

Rob A. Taxpayer

Lotta Taxpayer

B. The complete and full right of alienation of any property held under the terms of a trust shall not be suspended in any event longer than the date above fixed for the termination of such trust.

C. The interest of each and every beneficiary under a trust not vested in interest at my demise must vest in interest by the time hereinabove fixed for the termination of such trust, otherwise such beneficiaries whose interests are not then vested in interest shall take nothing under such trust.

D. Upon the termination of a trust or the distribution of a portion of the corpus thereof, the trustee shall do all such acts and things as may be necessary to provide the distributee or distributees with evidence of the legal title to the corpus or such portion thereof as shall have been distributed free from the restraints of such trust.

ARTICLE FOUR

Acceleration Clause

A. In the event that my said wife shall elect to take under the law in lieu of taking under the provisions of this, my will, all gifts, devises and bequests hereinbefore made in favor of my said wife, whether absolute or in trust, shall be vacated and all such gifts, devises and bequests shall be

treated in the same manner as though my said wife had departed this life prior in time to my demise and I hereby direct that all remainders which, under the terms of any trust, are to take effect upon the demise of my wife shall be accelerated and vest in interest and in enjoyment in the same manner and in the person or persons who would have been entitled thereto had my said wife departed this life prior in time to my demise.

ARTICLE FIVE

Provisions Relating to the Executor

A. I hereby nominate and appoint the "We Do Not Draw Wills or Give Tax Advice Bank & Trust Company of Tax on Taxville" as executor of this, my last will and testament.

B. My executor shall be entitled to compensation for services performed herein as such executor and such compensation shall be reasonable but not more than the usual charge for such services made by banks and trust companies in Tax on Taxville.

C. In addition to powers herein previously conferred and conferred upon executors by law, the executor of my estate hereinabove named, as well as a successor or successors thereto, shall have, with respect of all property of my estate until after distribution thereof in accord with the terms of this, my will, powers equivalent to those powers conferred upon the trustee by my said will, to be exercised by the executor subject only to limitations equivalent to any limitations imposed upon the trustee by my will.

IN WITNESS WHEREOF, *et cetera*.