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Pennsylvania Comments on Current Estate Tax Problems in Qualifying Property for the Marital Deduction

J. Brooke Aker

PENNSYLVANIA COMMENTS ON CURRENT ESTATE TAX PROBLEMS IN QUALIFYING PROPERTY FOR THE MARITAL DEDUCTION

BY J. BROOKE AKER*

INTRODUCTION

PROBABLY the most important single section of the 1954 Internal Revenue Code to the estate planner and to the attorney who settles the estate is section 2056—the marital deduction provision. Since its enactment into the estate tax law in the Revenue Act of 1948, much has been written about it, and it has been before the courts a number of times in many different forms.

The purpose of this article is to summarize some of the current problems that arise in qualifying property for the marital deduction. With this limitation in mind, three of the current problems in this area of the law are not herein dealt with because they are concerned with the extent to which qualified property interests will be allowed as a marital deduction rather than how to qualify the property. These are: (1) the effect on a formula type marital deduction provision of an election by the personal representative under Internal Revenue Code 642(g), to take administration expenses against estate income on Form 1041 rather than on the estate tax return Form 706;[1] (2) whether or not the amount allowed as a marital deduction will be reduced by federal and state death taxes;[2] and (3) whether the type of marital deduction clause used causes the estate to realize capital gain when the assets distributed in kind, in satisfaction of the marital bequest, have appreciated in value between the date of death and the date of distribution.[3]

The discussion which follows, since it deals only with property which qualifies, is applicable regardless of which type of marital deduction clause is involved.

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* A.B., 1949, Bowdoin College; LL.B., 1952, Harvard Law School. Member of the Montgomery County and Pennsylvania Bar Associations. Co-Editor of the Fiduciary Review and Fiduciary Reporter.

1 REV. RUL. 643, 1955-2 CUM. BULL. 386; REV. RUL. 225, 1955-1 CUM. BULL. 460; Bell Estate, 7 Fid. Rep. 1 (1956-Chester Co.).

2 Merchants National Bank and Trust Co. of Indianapolis v. United States, 246 F.2d 410 (7th Cir. 1957); *petition for cert. filed,* 26 U.S.L. Week 3098 (U.S. Sept. 18, 1957) (No. 479); Estate of Babcock v. Commissioner, 234 F.2d 837 (3rd Cir. 1956), *reversing* 23 T.C. 888 (1944); Weyenberg v. United States, 135 F. Supp. 299 (E.D. Wisc. 1955); Estate of Charles Juster, 25 T.C. 669 (1955); Estate of Rosalie C. Morrison, 24 T.C. 965 (1955); see also ESTATE TAX APPORTIONMENT ACT OF 1951, PA. STAT. ANN. tit. 20 §§ 881-887 (1951).

3 REV. RUL. 56-270, 1956-1 CUM. BULL. 325.

For lack of any logical pattern, the items are simply listed seriatim, and where applicable or feasible, brief comments are included on the probable disposition of these same problems had they arisen in Pennsylvania. It is believed that such Pennsylvania annotations are of benefit because most of what is written on the marital deduction is prepared for nation-wide reading without emphasis on the variety of results which might obtain when the decision rests on the status of local law.

MUTUAL WILLS

What effect does the execution by husband and wife of joint or mutual wills which make provisions for others at the death of the survivor have on the right to the marital deduction? [4]

There seems to be no question but that if there is an agreement, either in the will itself or underlying it, which the state court will enforce with respect to the surviving spouse, then as to property owned individually by the spouse first to die, the marital deduction will not be allowed. This is so because all rights of the surviving spouse terminate at his death, the property then passing to other persons under the terms of the enforceable agreement, and because such restrictions were imposed by the decedent on his own property.[5]

The litigation in this area concerns itself with property owned jointly by the spouses. The leading cases are *Estate of Emmet Awtry v. Commissioner*,[6] and *Estate of Gust M. Peterson.*[7] In these cases the Tax Court held that the instrument in question evidenced an intent by the parties to include jointly held property, and since under the applicable state laws of Iowa and Nebraska the agreement would be enforceable against the survivor, no marital deduction was allowed.

On appeal to the Eighth Circuit, both decisions [8] were reversed—the *Peterson* case by stipulation of counsel in reliance on the *Awtry Estate.* The *Awtry* case involved a double test: (1) by Iowa law the survivor obtained title to the joint property by virtue of the deeds and contracts creating the joint tenancies, without regard to the all-inclusiveness of the testamentary agreement; and (2) the restrictions existing with respect to the joint property were voluntarily imposed by the survivor in entering into the agreement. The

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[4] See Jan. 1955 FIDUCIARY REVIEW 3 (definition of joint and mutual wills).
[5] Estate of Charles Elson, 28 T.C. 48 (1957).
[6] 221 F.2d 749 (8th Cir. 1955), *reversing* 22 T.C. 91 (1954).
[7] Estate of Peterson v. Commissioner, 229 F.2d 741 (8th Cir. 1955), *reversing per curiam* 23 T.C. 1020 (1955).
[8] See notes 6 and 7 *supra.*

court thus allowed the marital deduction even though under state law, the contract would be enforced and the surviving spouse's rights would terminate at her death. The court had this to say:

> "There is nothing . . . which requires us to hold that a restriction voluntarily placed by a beneficiary upon her own property turns an absolute interest into a terminable one."

> "We conclude that Mrs. Awtry acquired title to the joint tenancy property through the joint tenancy contracts, that the will as a testamentary instrument in no way affects the title to the joint tenancy property, and that the joint tenancy property did not by reason of anything done by Mr. Awtry pass to others than his surviving spouse." [9]

The Court's solicitous attitude toward restrictions, self-imposed by the survivor, is not always followed in other areas of the marital deduction problem.[10]

The court in *Awtry v. Commissioner* posted one warning flag. "The contractual restrictions now relied upon by the Commissioner were not imposed by Mr. Awtry in connection with the creation of the various joint tenancies. If the contract now relied on was part of the consideration for the joint tenancies, there would be more merit in the Commissioner's present position." [11]

However, the mere fact that property is placed in joint names after the execution of the joint or mutual wills does not, of itself, disqualify that property. At least it would so seem since the *Peterson* case involved such property, about which the lower court made specific mention, and the government made no comment in agreeing that the case be reversed in light of *Awtry v. Commissioner.*

Pennsylvania Comment: The same result would obtain in Pennsylvania, since title to any jointly held property would pass to the survivor irrespective of the testamentary contract, even if the contract will be enforced as to such property. The result may even be somewhat easier to reach because in Pennsylvania the execution of a joint or mutual will, without more, will not of itself be construed as creating an enforceable contract and the survivor is free to dispose of the property as he wishes.[12]

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[9] 221 F.2d at 760.

[10] Compare the cases cited under "Spouse's Compromise", *infra,* particularly Estate of Webb 27 T.C. 76 (1957).

[11] 221 F.2d at 759.

[12] See note 4 *supra.*

LIFE INSURANCE PROCEEDS

Life insurance proceeds may be made payable to the surviving spouse in a variety of ways which will qualify for the marital deduction. Proceeds payable in a lump sum, or retained by the insurance company with either interest on the proceeds or stated installments payable to the widow for life, with the principal remaining at her death payable to her estate, will qualify.[13] This is apparently true even though the surviving spouse must comply with certain procedural formalities, such as submitting proofs of death, before she obtains the first payment.[14]

The other large category of payment options which qualify is the retention of proceeds by the insurer with at least annual installment or interest payments to the surviving spouse with a power of appointment over the proceeds remaining at her death. For this type of option to qualify, the option must meet *all* five of the conditions specified in Internal Revenue Code section 2056(b) (6).[15]

If only a portion of the proceeds meet the stated requirements, the deduction will be limited to that portion, and if varying portions of the proceeds qualify under some requirements but not all, then the deduction will be limited to the smallest portion.[16]

However, it must be noted that these proposed regulations are subject to change before they become final and the language above referred to is broader than need be under the statute. Under the statutory language some writers have evidenced concern as to whether or not the specific portions must be identical.[17]

When the proceeds were retained with payments to the widow for ten years certain and thereafter for life, but if the widow died before ten years, the balance of the period certain payments went to contingent beneficiaries, one court has held that the value of the life estate qualified for the marital deduction since, although it was a terminable interest, no part of that interest would ever inure to anyone else.[18] The value of the period certain payments was held not to qualify because third persons might benefit by that terminable

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[13] Tent. Treas. Reg. 20.2056(e)-2(a)(3).

[14] *Id.* 20.2056(b)-6(d); INT. REV. CODE OF 1939 § 81.47a(d).

[15] Tent. Treas. Reg. § 20.2056(b)-6(a); INT. REV. CODE OF 1939 § 81.47a(d).

[16] *Id.* § 20.2056(b)-6(b).

[17] See 11 J. AM. SOC'Y. C. L. U. 91 (Winter 1956).

[18] Estate of Reilly v. Commissioner, 239 F.2d 797 (3rd Cir. 1957), *reversing* 25 T.C. 366 (1955).

interest. This would hold true even though the widow had a life expectancy of more than ten years.[19]

Various problems arise as to what constitutes a qualifying power of appointment.[20] The power to appoint must exist after decedent's death; power to alter beneficiaries only prior to decedent's death, which power was never exercised and which ceased on decedent's death, was held not sufficient.[21] Conversely, the power of appointment must exist immediately at decedent's death. This requirement is frequently violated by the insertion of a provision that the wife's rights are contingent upon filing proofs of death or some similar procedural matter. Thus, in *Eggleston v. Dudley* [22] insurance proceeds were held not to qualify for the marital deduction when the proceeds were payable to the surviving wife or her estate *unless* she died prior to the time the company received proof of death, in which event the proceeds were payable to the decedent's estate. The proposed regulations attempt to draw the line in this manner.[23]

> "If the power is exercisable from the moment of the decedent's death, the contract is not disqualified merely because the insurer may require proof of the decedent's death as a condition of making payment to the appointee. If the submission of proof of the decedent's death is a condition to the exercise of the power, the power will not be considered 'exercisable in all events' unless in the event the surviving spouse had died immediately following the decedent, her power to appoint would have been considered to exist at the time of her death, within the meaning of section 2041 (a) (2)." [24]

If the interest of the surviving spouse in the proceeds is established by a state court as the result of an adversary proceeding, whether or not appealed to the highest state court, that determination will control the tax determination.[25]

If the proceeds are payable to the widow under a payment plan which does not qualify, but under the terms of the insurance policy the widow has the option to elect another mode of payment which will qualify, is the decedent's estate entitled to a marital deduction for such proceeds? The answer

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[19] REV. RUL. 55-733, 1955-2 CUM. BULL. 388.

[20] REV. RUL. 55-277, 1955-1 CUM. BULL. 456 stated that a power in a widow to direct payment "to her executors, administrators, or assigns" qualified as the equivalent to the statutory power of appointment.

[21] Estate of White v. Commissioner, 22 T.C. 641 (1954).

[22] 154 F. Supp. 178 (W.D. Pa. 1957).

[23] Tent. Treas. Reg. § 20.2056(b)-6(e)(2).

[24] INT. REV. CODE OF 1939 § 81.47a(d).

[25] Estate of Wynekoop v. Commissioner, 24 T.C. 167 (1955); *cf.* Eggleston v. Dudley 154 F. Supp. 178 (W.D. Pa. 1957), where the court said, "There must be a uniform interpretation of the tax laws of the United States, and the laws of the local jurisdiction cannot control the interpretation of a Federal Act."

is clearly yes, at least if the option is so exercised. With respect to a power not so exercised, the following sentence is quoted from the Senate Committee Report on the 1948 amendment to Section 812(e) of the 1939 Code: "It is also immaterial whether any such mode of payment is determined by an option exercised by the decedent or *exercised* by the surviving spouse." (Emphasis supplied.) It is suggested that the allowance of the deduction would be proper regardless of whether the widow exercised the option since the decedent gave her property including the power to acquire such property for her own use and the *existence* of such right makes the proceeds taxable in her estate under Internal Revenue Code section 2041.[26]

If it has been determined that the proceeds qualify for the marital deduction, an additional problem may arise as to valuing how much qualifies when the policy was pledged by the decedent as collateral security for a debt of the decedent still outstanding at his death. This involves a problem of determining the primary source of payment of the debt (the insurance proceeds or the general estate).[27] The mechanics of the computation are illustrated by *Estate of Coffin v. Commissioner*[28] where the court stated that "the proper way to value the one-third interest is to apply against it a pro-rata amount of the indebtedness for which the policy was assigned as security."

Pennsylvania Comment: In Pennsylvania, the surviving spouse's rights in life insurance proceeds are limited to the terms of the contract.[29] For this reason, the expansion of those rights by application to the court, as was done in *Wynekoop v. Commissioner*[30] referred to above, is not likely. Therefore, the result in Pennsylvania will be the same as in the cases cited.[31]

FAMILY EXEMPTION

Under section 211 of the Fiduciaries Act of 1949 the surviving spouse may "retain or claim," as a family exemption, real or personal property "to the value of seven hundred and fifty dollars." When the exemption is retained or claimed, does that property qualify for the marital deduction?

The marital deduction, as provided in Internal Revenue Code section 2056(a) is limited to ". . . an amount equal to the value of any interest in

[26] *Cf.*, however, Estate of Shedd v. Commissioner, 23 T.C. 41 (1954), *affirmed* 237 F.2d 345 (9th Cir. 1956) (discussed below under "Provision for Takers in Default of Exercise of Powers of Appointment"), *cert. denied*, 352 U.S. 596 (1957).
[27] Estate of Gwinn v. Commissioner, 25 T.C. 31 (1955).
[28] Section 54338 P-H Memo T.C. (1954).
[29] PA. STAT. ANN. tit. 20 § 301.11(a), PA. ESTATES ACT OF 1947 § 11(a).
[30] See note 25 *supra*.
[31] For Pennsylvania authorities on valuing policies pledged as collateral security see February 1955, FIDUCIARY REVIEW; Biron Estate 4 D. & C. 2d 729, 6 Fiduc. Rep. 46 (1955); Yoskin Estate 71 Montg. 259, 5 Fiduc. Rep. 120 (1955).

property which passes or has passed from the decedent to his surviving spouse . . . ." The key words in this phrase are "passes" and "passed," and Internal Revenue Code section 2056(e) contains a special definition of "passing." Thus, although there might be some conceptual question as to whether an intestate interest "passes" from the decedent, section 2056(e)(2) specifically defines such an interest as one of those to be considered as passing from the decedent. A similar question might arise as to whether a spouse's elective share "passes" from the decedent, but here again specific provision is made in section 2056(e)(3).

The language of Internal Revenue Code section 2056(e) is identical with that of section 812(e) (3) of the 1939 Internal Revenue Code as amended. Subsection (e) was added to section 812 by the Revenue Act of 1948, and concerning the addition the Senate Committee Report stated:

> "Neither the payments made in satisfaction of such a claim or debt nor the amounts expended in accordance with the local law for support of such surviving spouse during the settlement of the estate pass to such surviving spouse from the decedent within the meaning of section 812(e)(3)."

This prohibition was not of importance, however, since under section 812(b)(5) there was a specific provision allowing deduction for such amounts in their own right. However, in 1950 this deduction was removed for the estates of decedents dying after September 23, 1950. In deleting that deduction, the House Ways and Means Committee Report on the Revenue Act of 1950 suggested that such support payments "will be allowable as a marital deduction subject to the conditions and limitations of section 812(e)."

In 1953 the "bible" concerning this problem was issued. Revenue Ruling 83, 1953-1 Cumulative Bulletin 395 stated that in order for an allowance for support during the settlement of the deceased spouse's estate to qualify for the marital deduction, the allowance "must constitute a vested right of property such as will survive, in the event of her death as of any moment or time following decedent's death, as an asset of her estate."

Under this state of the law two cases arrived at apparently opposite conclusions. *Estate of Rensenhouse,*[32] decided that amounts paid to a widow under Michigan law for her maintenance during administration did not qualify for the marital deduction because such payments did not fall into any of the categories spelled out in section 812(e)(3) of the 1939 Code. This case is on appeal to the Sixth Circuit. In *King v. Wiseman,*[33] the court concluded

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[32] 27 T.C. 10 (1956).

[33] 147 F. Supp. 156 (D.C. Okla. 1956).

"that under the Oklahoma statutes the allowance given to a widow when approved and authorized by the Probate Court vests in the widow an absolute indefeasible right to said allowance and that it should all be included in the marital deduction."

The *King* case did not make clear whether the court could make such an award after the surviving spouse died, so that the right to the allowance was vested at death even without affirmatively claiming it, or whether the court construed Revenue Ruling 83 as meaning "in the event of her death as of any moment or time following award of the allowance." The Commissioner has attempted to close the latter possibility in section 20.2056(e)-2(a) of the proposed estate tax regulations, by inclusion of the following sentence:

> "An allowance or award paid to a surviving spouse pursuant to local law for her support during the administration of the decedent's estate constitutes a property interest passing from the decedent to his surviving spouse if the executor or administrator of the surviving spouse's estate could under local law have caused the allowance or award to be paid to her estate in the event of her death immediately after the decedent's death."

Although the language of the 1939 and 1954 Codes is identical on this point, this sentence is new in the proposed regulations. It was not in the 1939 regulations, but they were identical to the present regulations in all other particulars.

In Pennsylvania it is quite clear that if the claim is not made personally by the surviving spouse prior to her death, it may not be made by her personal representative.[34] Since "title does not vest until claim is made" it seems clear that no deduction would be allowed under the proposed regulations but would be deductible if the second possible rationale for the decision in *King v. Wiseman* is proper. It is understood that the federal estate tax agents from the office of the Director of Internal Revenue for the Philadelphia District are not allowing the deduction for estates of Pennsylvania decedents.

Also in 1956, Revenue Ruling 56-26[35] was issued which adds more complication. It reaffirms Revenue Ruling 83, but points out that the interest is not disqualified unless the property would pass to someone other than spouse or spouse's estate. "For example, if the decedent died intestate and one-third of his estate passed to his surviving spouse as absolute owner under the intestacy laws of the jurisdiction, then one-third of any amounts paid out of the estate, pursuant to local law, for the support of such spouse, is a deductible interest since, to that extent, it in effect merely represents an advancement

[34] Kornman Estate, 6 Fiduc. Rep. 666 (1956).
[35] Int. Rev. Bull. 1956-5, p. 10.

from property which is already indefeasibly hers, and will pass to her, or to her estate, in any event." This, of course, makes the deductibility of support payments dependent on the fortuitous event as to whether the testamentary share of the surviving spouse which qualifies for the marital deduction is contained in the residuary clause or not.[36]

SPOUSE'S COMPROMISE

When a spouse compromises a will contest, what effect does the compromise have upon the right to a marital deduction?

It seems clear that any interest the surviving spouse assigns or surrenders under the terms of the compromise will not qualify for the marital deduction.[37] *Tebb Estate*[38] was decided under Regulation 81.47a(g), but section 20.2056(e)-2(d) is almost identical, with only inconsequential changes in this respect.

With respect to whether or not any property acquired by the spouse under a compromise qualifies for the marital deduction, the regulations state that the deduction will be allowed "only if the assignment or surrender was a bona fide recognition of enforceable rights of the surviving spouse in the decedent's estate." Although the regulations then go on to spell out what effect a court decree has on determining whether the claim was bona fide, it is clear that court action is not always necessary. In *Barrett v. Commissioner*,[39] the surviving husband's claim was settled out of court. In allowing the deduction, the court said, with respect to the 1939 Regulations:

> "A will contest can exist without full-blown legal proceedings and we have no doubt that the executor in this case recognized the threat made on his sister's will . . . . We find nothing in the statute or in logic that would deny similar treatment to a settlement payment made in advance of the contest where there is a sufficient basis for a reasonable belief that only such payment would avoid a serious and substantial threat to the testamentary plan provided by the decedent."[40]

Two limitations are worthy of note: (1) In addition to the bona fides of the claim, the interest received under the compromise must still meet all the requirements to qualify for the deduction. Thus, in *Klienman v. Commissioner*,[41]

[36] *Cf.* generally, Estate of Nelson v. Commissioner, 232 F.2d 720 (5th Cir. 1956), *affirming* 24 T.C. 30 (1955); REV. RUL. 55-419, 1955-1 CUM. BULL. 51.
[37] Tent. Treas. Reg. § 20.2056(e)-2(d); INT. REV. CODE OF 1939 § 81.47a(g); Tebb Estate v. Commissioner, 27 T.C. 76 (1957).
[38] See note 37 *supra*.
[39] 22 T.C. 606 (1954).
[40] *Id.* at 611.
[41] 25 T.C. 1245 (1956).

when the wife compromised her contest and agreed to receive fifty dollars per week for life, the court denied the marital deduction, stating that "the widow's interests under the will and under the agreement were both terminable and no marital deduction is allowed for either." (2) The interest compromised must, itself, have qualified for the deduction.[42]

Pennsylvania Comment: The same result would have been obtained in Pennsylvania in all of the above-cited cases.

POWER TO INVADE

Is a power to invade principal sufficiently equivalent to a power to appoint or to absolute ownership to qualify the property subject to such a power for the marital deduction?

There is no specific mention in the Internal Revenue Code itself of power to invade as qualifying for the marital deduction. However, proposed regulations section 20.2056(b)-5 describes what will qualify under the life estate with power of appointment provision of the Code. Section 20.2056(b)-5(a)(1)-(5) sets forth the requisite conditions, and subsection (e) states in determining whether or not those conditions have been met, ". . . regard is to be had to the applicable provisions of the law of the jurisdiction under which the interest passes. . . ." This, of course, again indicates that identical gifts in different states may produce varying results in the right to a marital deduction.

Section 20.2056(b)-5(g) of the proposed regulations states that no power of appointment will qualify unless it falls within one of the enumerated catgories. And subparagraph (g)(1)(i) sets forth the following category:

> "A power so to appoint fully exercisable in her own favor at any time following the decedent's death (as, for example, an unlimited power to invade); . . . ."

This is substantially identical with section 81.47a(13)(i) of the 1939 regulations. The 1954 proposed regulations go further, however, and include section 20.2056(b)-5(g)(3) which points out some of the restrictions on a power to invade which will disqualify the right to the marital deduction:

> "Likewise, if there are any restrictions, either by the terms of the instrument or under applicable local law, on the exercise of a power to consume property (whether or not held in trust) for the benefit of the spouse, the power is not exercisable in all events. Thus, if a power of invasion is exercisable only for

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[42] REV. RUL. 279, 1953-2 CUM. BULL. 275. See successive stages of litigation in Crosley v. United States, 148 F. Supp. 810 (N.D. Fla. 1956).

the spouse's support, or only for her use, the power is not exercisable in all events. In order for a power of invasion to be exercisable in all events, the surviving spouse must have the unrestricted power exercisable at any time during her life to use all or any part of the property subject to the power, and to dispose of it in any manner, including the power to dispose of it by gift (whether or not she has the power to dispose of it by will)."

The problems concerning powers of invasion thus seem to center around these main qualifications: (1) whether the surviving spouse's right to invade is "unlimited," (2) is exercisable "in all events," or (3) is only for her benefit. An additional problem under the 1939 Code was the requirement that a trust exist.[43] In *Estate of Pipe v. Commissioner,*[44] the deduction was denied because there was no trust. Since the 1954 Code now allows a legal life estate to qualify, it will no longer be necessary to try to find an implied trust or that the rights equal absolute ownership.[45]

The spouse's right to invade is not unlimited if it is restricted to some standard imposed either by the testator or by applicable state law. The greatest divergence of results in the cases on this point stem from the imposition of restrictions by the applicable state law. Thus, if the testator gives the surviving spouse the broadest, most unlimited power to invade imaginable, the marital deduction may be denied on the basis that state law would limit the exercise of the power to a reasonable, good faith, honest judgment exercise which is not "unlimited."[46] Compare, however, *Estate of Ellis v. Commissioner,*[47] and *Miller v. Dowling,*[48] where similar broad powers were held to qualify. *Ellis' Estate* was criticized in *Pipe Estate*[49] and is on appeal to the Third Circuit.[50]

The "unlimited right" must exist "in all events" from the moment of decedent's death until the death of the surviving spouse. Thus, in *Estate of Tingley v. Commissioner,*[51] an unlimited power to invade which would cease "in case of her legal incapacity from any cause or upon the appointment of a guardian, conservator, or other custodian" was found not entitled to a marital deduction because "conditions short of legal incapacity could bring about the appointment of a guardian, conservator, or other custodian of the estate of the

[43] Estate of Melamid v. Commissioner, 22 T.C. 966 (1954).
[44] 241 F.2d 210 (2nd Cir. 1957), 23 T.C. 99 (1954).
[45] *Cf.* Estates of Evilsizor v. Commissioner, 27 T.C. 81 (1957), where the deduction was denied because under state law a power to dispose of assets did not enlarge a legal estate to a fee.
[46] Matteson v. United States, 147 F. Supp. 535 (S.D.N.Y. 1956); Estates of Taruer v. Commissioner, 26 T.C. 490 (1956); Estate of Pipe v. Commissioner, 241 F.2d 210 (2nd Cir. 1957).
[47] 26 T.C. 694 (1956).
[48] 56-2 U.S.T.C. 11.646 (1956).
[49] See note 44 *supra.*
[50] See generally REV. RUL. 55-395, 1955-1 CUM. BULL. 458 and Estate of McGehee v. Commissioner, 28 T.C. 44 (1957).
[51] 223 F.2d 163 (1st Cir. 1955), *affirming* 22 T.C. 402 (1954).

widow and the decedent chose to cut off his wife's rights should any such event occur." The court intimated, but did not hold, that if the forfeiture of the right had been limited to legal incapacity the deduction would have been granted.[52]

In this connection, it should be noted that the last sentence of proposed regulation section 20.2056(b)-5(g)(3) goes far beyond the 1939 regulations and the cases when it says that an unlimited power to invade for use of the wife alone is not enough and will not qualify for the marital deduction because it is not "exercisable in all events" since the surviving spouse has no power to give the property subject to the power to third persons.

Even though the power to invade is unlimited and is exercisable in all events, invasion should be permitted only for the sole benefit of the surviving spouse or at her sole direction.[53]

When some assets qualify for the marital deduction and some do not, it is important to segregate and identify those which do, or no deduction will be allowed.[54]

Pennsylvania Comment: The Pennsylvania view is expressed in *Ellis' Estate* which involved a trust created by a Pennsylvania decedent. State law will not impose restrictions on an otherwise unlimited power to invade so as to disqualify the gift for the marital deduction.[55]

POWER OF APPOINTMENT OVER LESS THAN WHOLE

The denial of the deduction for a trust under the 1939 Code where the right to income and power to appoint existed over less than the whole was removed by the inclusion in section 2056(b)(5) of the 1954 Code of the words "or a specific portion thereof." Under the present rules the "specific portion" may vary for each of the five requirements listed in proposed regulation section 20.2056(b)-5(a), provided some portion meets all five requirements, and the marital deduction will be available to the smallest such portion according to proposed regulation section 20.2056(b)-5(b). As noted above, however, these proposed regulations are subject to change before they are finally promulgated and the language above referred to is broader than need be under the statute. Under the statutory language some writers have evidenced concern as to whether or not the specific portions must be identical.[56]

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[52] *Cf.* REV. BULL. 55-395, 1955-1 CUM. BULL. 458.
[53] Estate of Wheeler v. Commissioner, 26 T.C. 466 (1956).
[54] Estate of Tingley v. Commissioner, 223 F.2d 163 (1st Cir. 1954), *affirming* 22 T.C. 402 (1954).
[55] The cases to support this proposition are all summarized in HUNTER, ORPHANS' COURT COMMONPLACE BOOK, "Powers of Disposal and Consumption."
[56] See 11 J. AM. SOC'Y. C. L. U. 91 (Winter 1956).

Note the definition of "specific portion" in proposed regulation section 20.2056(b)-5(c). To qualify, the interest must be established as a fraction or percentage of the whole "so that such interest or share in the surviving spouse reflects its proportionate share of the increment or decline in the whole of the property interest to which the income rights and the power relate." If the widow's rights are expressed in terms of a specific sum, then the regulations indicate that the Commissioner will disallow the deduction "unless it is shown that the effect of local law is to give the spouse rights which are identical to those she would have acquired if the size of the share had been expressed in terms of a definite fraction or percentage."

This new "portion theory" therefore would now allow the marital deduction in some cases where it was previously denied.[57]

These earlier cases are important, however, for two general principles they establish: (1) the liberalization of the 1954 Code rules regarding marital deductions will not be applied retroactively; and (2) the determination that state law would expand the "specific sum" bequest into the equivalent of a "specific portion" under that section of proposed regulation, section 20.2056 (b)-5(c), so as to qualify it for the marital deduction, must be the result of a true adversary proceeding, and not merely a decree obtained by what amounts to a consent decree for the purpose of maintaining the claim for marital deduction.[58]

Pennsylvania Comment: Under the existing law, the application of state law becomes important only in determining whether a gift to the wife of a "specific sum" from a trust corpus would be construed as a gift of a "specific portion" so as to qualify for the marital deduction.

There is no absolute answer to this problem in Pennsylvania. Since a factor in each instance is the testator's intent, the result will vary depending on the provable facts of any particular case.[59] Analogy may be drawn to those

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[57] Estate of Shedd v. Commissioner, 237 F.2d 345 (9th Cir. 1956), *affirming* 23 T.C. 41 (1954); Estate of Sweet v. Commissioner, 234 F.2d 401 (10th Cir. 1956), *affirming* 24 T.C. 488 (1955); Estate of Hoffenberg v. Commissioner, 22 T.C. 1185 (1954); Estate of Warner v. Commissioner, ¶ 56,278 P-H Memo T.C. (Dec. 26, 1956); *cf.* Estate of Barry v. Commissioner ¶ 56,097 P-H Memo T.C. (April 27, 1956), where the separate trust theory was sustained.

[58] Estate of Sweet v. Commissioner, *supra* note 57, where the marital deduction was denied for failure to give the surviving spouse powers over the entire corpus, even though a state court had previously held that there were two trusts created; *cf.* Krebs' Estate, 5 D. & C. 2d 769, 5 Fiduc. Rep. 658 (1955).

[59] Henderson's Estate, 323 Pa. 305, 185 Atl. 819 (1936); Klenke's Estate, 210 Pa. 575, 60 Atl. 167 (1904); Pittman's Estate, 182 Pa. 355, 38 Atl. 133 (1897); Crawford's Estate, 9 Dist. Ct. 378 (1900); Gray Estate, 8 D. & C. 2d 593, 7 Fiduc. Rep. 302 (1957); Mitchell v. Clippenger's Heirs, 7 Cumb. L. J. 121, 7 Fiduc. Rep. 112 (1957); *cf.* Johnson Estate, 80 D. & C. 23, 3 Fiduc. Rep. 209 (1953) and McOwen Estate, 76 D. & C. 52, 1 Fiduc. Rep. 289 (1951).

cases where a legacy of specific stock is held to include additional shares issued as stock split prior to death.[60]

Although no one would base a prospective estate plan on the assumption that a "proposed" estate tax regulation is not valid, if the practitioner finds it necessary to argue with the Revenue Service on this point, it is suggested that this section 20.2056(b)-5(c) of the regulations is not warranted by the statutory language. The statute speaks in terms of a "portion" and these regulations attempt to equate that word with "fractional or percentile share," which is not necessarily true. "Portion" is not necessarily synonomous with "proportion."

FORMAL LIMITATION ON MARITAL DEDUCTION TRUST

1. Survival for Specified Period

Husband and wife, in making plans for the testamentary transfer of property to each other, often wish to provide for what has become known as the possibility of "simultaneous death." This is prompted by a natural desire to avoid passing property to a spouse who dies shortly thereafter, thus incurring double death taxes and double administration expenses. This problem is normally solved by providing that the spouse must survive for a specified period in order that she may take. What effect does such a provision have upon whether or not the property so transferred qualifies for the marital deduction?

The 1954 Internal Revenue Code in section 2056(b)(3) provides the criteria:

> ". . . an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail on the death of such spouse if—
>
> (A) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding 6 months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either such event; and
>
> (B) such termination or failure does not in fact occur."

To obviate the necessity of proving that the second spouse died "as a result of a common disaster" and to guard against the possibility of the survivor dying shortly after the first to die but from entirely unrelated causes, most draftsmen have come to rely on expressly conditioning the bequest to the

[60] McFerren Estate, 365 Pa. 490, 76 A.2d 759 (1950); *cf.* Carlson Estate, 78 D. & C. 571 (1952). With respect to whether or not a "specific sum" bequest would be the equivalent of a "specific portion" of a trust when two or more specific sums in trust exhausted the estate, and there was no residue, see Sowden Trust, 6 Fiduc. Rep. 619 (1956), and Paul Trust, 6 Fiduc. Rep. 441 (1956).

surviving spouse upon survival for some period of time up to but not exceeding six months.[61]

Some draftsmen have used other language, however, usually with the adverse result of losing the right to the marital deduction. An example is contained in Revenue Ruling 54-121, 1954-1 Cumulative Bulletin 196, which ruled that a provision under which the widow was entitled to life insurance proceeds only if she was alive when proofs of death were received by the insurance company destroyed the right to the marital deduction.

The following is example four from the "proposed" estate tax regulations section 20.2056(b)-3(d):

> "A decedent devised and bequeathed his residuary estate to his wife if she was living on the date of distribution of his estate. The devise and bequest is a nondeductible interest even though distribution took place within six months after the decedent's death and the surviving spouse in fact survived the date of distribution."

This example covers exactly the same problem that arose in the much litigated case of *Kasper v. Kellar*.[62] There testator bequeathed $100,000 to his wife "if living at the time of the distribution of my etsate." The case arose under the 1939 Internal Revenue Code section 812(e)(1)(D) which is identical to 1954 Internal Revenue Code section 2056(b)-(3) above quoted. The regulations under the 1939 Code concerning this problem were almost identical for the proposed regulations for the 1954 Code except that example four is new.

In *Kasper v. Kellar* the District Court held for the estate, relying on the fact that the estate assets were actually distributed within six months of the decedent's death and the wife did so survive. On appeal to the Court of Appeals for the Eighth Circuit the court said:

> "As of the date of the decedent's death there was no certainty that within the six-months' period the spouse's interest would become absolute inasmuch as it was possible that distribution might not have been made within six months of death." [63]

The court, however, entered the following decree:

> "On the basis of what has been said, the judgment is reversed and the cause is remanded, for a determination, on the present record or otherwise, as the court may deem appropriate, of whether, under the wills-and-property law of South Dakota, the language used and the intention and the circumstances in-

[61] Fiduciary Review, July 1955 and July 1941.
[62] 217 F.2d 744 (8th Cir. 1954).
[63] *Id.* at 747.

volved would be regarded as having had the legal effect of vesting and making undefeasible in the widow, as of the time of the testator's death, the property devised and bequeathed to her." [64]

Before a decision was reached on the remand, *California Trust Co. v. Riddell,*[65] and *Street v. Commissioner,*[66] were both decided against the estate on similar "survival" requirements, both relying on *Kasper v. Kellar.*

On February 28, 1956 the District Court for Western District of South Dakota held on the remand in *Kasper v. Kellar:*

> "It is my opinion that under the wills-and-property law of South Dakota, the language used by Chambers Kellar in his will, and the intention and the circumstances involved, would be regarded as having had the legal effect of vesting and making undefeasible in the widow, as of the time of the testator's death, the property devised and bequeathed to her." [67]

The District Court thus again granted the estate the right to claim the marital deduction.

On October 23, 1956, in reliance on this latest chapter in *Kasper v. Kellar,* the District Court in Montana [68] ruled that, in the absence of proof of collusion in a state court decree, under a will directing that the wife's rights would fail if she were not living "at the time decree of distribution of my estate is made hereunder," that the wife's rights would fail only if she predeceased her husband, then the estate was entitled to a marital deduction.

As noted before the 1954 and 1939 Codes contain identical language on this point. For this reason it is difficult to see how the Commissioner will sustain example four above quoted in states following South Dakota and Montana law, assuming the latest District Court decision stands.

In instances when the wife's individual estate is substantially smaller than her husband's, it may be desirable to establish a presumption that she survive any simultaneous death situation. This can be effected by a simple statement: "if my wife and I die under circumstances which render the order of our deaths uncertain, it shall be conclusively presumed that my wife survived me." Such a presumption will be effective for purposes of the marital deduction [69] and is permissible in Pennsylvania which would otherwise presume that each spouse survived the other.[70]

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[64] *Id.* at 748.
[65] 136 F. Supp. 7 (S.D. Calif. 1955).
[66] 25 T.C. 673 (1955).
[67] Kasper v. Kellar, 138 F. Supp. 738, 744 (W.D.N.D. 1956).
[68] Steele v. United State, 146 F. Supp. 316 (D.C. Mont. 1956).
[69] Tent. Treas. Reg. § 20.2056(e)-2(e).
[70] PA. STAT. ANN. tit. 68, § 521.

Pennsylvania Comment: Although the Circuit Court in the *Kasper* case [71] listed Pennsylvania as one of the states which would agree with South Dakota in vesting the wife's rights at death, a review of Pennsylvania authorities would seem to be in order.

In stating that Pennsylvania would reach the same result, the court in the *Kasper* case relied on *Wengerd's Estate* [72] and *Martin's Estate.*[73] Later cases indicate that such is no longer the rule in Pennsylvania.

Wraught Estate [74] held that a widow's interest in her husband's estate conditioned on her survival until "settlement of my estate" did not vest until actual distribution and the wife's death prior to distribution caused her interest to lapse. The court limited *Wengerd's Estate* to its facts which involved unwarranted delay by the personal representative in making settlement. The court stated, ". . . but, as in *Wengerd's Estate,* any such attempt would certainly not be allowed by a court to defeat a legatee's rights." [75]

The same court that decided *Martin's Estate,*[76] two years later decided *McElroy's Estate,*[77] holding that a wife's legacy to her husband conditioned "should my husband be deceased before distribution is made," lapsed when the husband died before receipt of the funds. The court said:

> "In our opinion *Wraught's Estate* is to be construed as substituting the rule of intent in place of the rule that a contingency depending upon settlement or distribution of a legacy is always ineffectual. If the testator's intent, that the vesting of the legacy be contingent upon the legatee's survival at the time designated, can be found, it must control in the absence of arbitrary delay." [78]

It is thus apparent, in view of *Kasper v. Kellar* that Pennsylvania testators who condition bequests or devises to a spouse upon survival until "distribution" will lose the benefit of the marital deduction.

2. *Power of Trustee to Allocate Receipts and Expenses to Income or Principal*

Proposed estate tax regulations section 20.2056(b)-5(f)(4) provide as follows:

> "Provisions granting administrative powers to the trustees will not have the effect of disqualifying an interest passing in trust unless the grant of powers

[71] 217 F.2d at 747.
[72] 143 Pa. 615, 22 Atl. 869 (1891).
[73] 57 Montg. 304 (1941).
[74] 347 Pa. 165, 32 A.2d 8 (1943).
[75] 347 Pa. at 168.
[76] See note 73 *supra.*
[77] 59 Montg. 304 (1943).
[78] *Id.* at 311. To the same effect are the more recent cases of Golling Estate, 5 Fiduc. Rep. 320 (1955) ("not living at the time of distribution of my estate"); Wieand Estate, 7 Fiduc. Rep. 200 (1956) ("living at the time of distribution"); and Tyson Estate, 7 Fiduc. Rep. 206 (1957) ("die before the division of my estate").

evidences the intention to deprive the surviving spouse of the beneficial enjoyment required by the statute. Such an intention will not be considered to exist if the entire terms of the instrument are such that the local courts will impose reasonable limitations upon the exercise of the powers. *Among the powers which if subject to reasonable limitations will not disqualify the interest passing in trust are the power to determine the charges which shall be made against income and corpus,* the power to apply the income or corpus for the benefit of the spouse, and the power to retain the assets passing to the trust . . . ." [79] (Emphasis supplied.)

This section of the proposed regulations is substantially identical to 1939 regulation section 81.47a(c)(6) with the one important exception that the new proposed regulations have omitted or deleted the words "*the power to allocate receipts between income and corpus,*" which words appeared in the 1939 regulations just preceding the reference to the power to determine the allocation of charges.

Whether these words were omitted by mistake or were intentionally deleted is not clear, but the result is that the only remaining guides for what constitute permissible directions concerning allocation of receipts is proposed regulation section 20.2056(b)-5(f)(3), which technically appears to refer only to allocation rules stated in the instrument, and the general provision in section 20.2056(b)-5(f) that a trust which meets the income requirements will qualify,

> ". . . unless the terms of the trust and surrounding circumstances considered as a whole evidence an intention to deprive the spouse of the requisite degree of enjoyment. In determining whether a trust evidences that intention, the treatment required or permitted with respect to individual items must be considered in relation to the entire system provided for the administration of the trust."

The result will probably be that despite the deleted language, power to allocate items of receipt will not disqualify a trust provided, as is required with respect to allocation of charges, that "the entire terms of the instrument are such that the local courts will impose reasonable limitations upon the exercise of the powers."

This is, of course, a problem of the settlor's intent and the result may vary depending on the provable facts.

Pennsylvania Comment: Authority to grant the trustee power to allocate receipts and expenses to income or principal is specifically given to settlors by section two of the Principal and Income Act of 1947. At least two reported

[79] For permissible allocation rules to be spelled out in the will itself (rather than granting discretion to the trustee), see Tent. Treas. Reg. § 20.2056(b)-5(f) (3), which is substantially identical to 1939 regulation § 81.47a(c)(5).

cases have held that on their facts the settlor granted the trustees an absolute discretion free of the normal rules of apportionment.[80] However, with respect to certain other discretionary powers granted to a trustee, the courts have exercised control to make certain that the exercise of such discretion was within "reasonable judgment." [81] Analogies might be drawn to those cases where the court reviewed the trustee's exercise of a discretionary power to terminate,[82] to pay principal for maintenance,[83] or to hold or apply income for maintenance.[84]

3. Power of Appointment May Be Exercised Only by a Will Executed After Decedent's Death

This permissible limitation is granted in proposed estate tax regulations section 20.2056(b)-5(g)(4):

> ". . . if the power [of appointment] is in existence at all times following the decedent's death, limitations of a formal nature will not disqualify an interest . . . . Examples of formal limitations on a power exercisable by will are that it must be exercised by a will executed by the surviving spouse after the decedent's death. . . ."

This language is identical to that contained in the previous regulations, section 81.47a(c)(16).

4. Power of Appointment May Be Exercised Only by Specific Reference Thereto

As in the foregoing limitation in paragraph 2, *supra,* proposed regulations section 20.2056(b)-5(g)(4) also give this example of a formal limitation permissible on a power of appointment exercisable by will: ". . . that exercise must be by specific reference to the power." This, too, is a repeat of section 81.47a(c)(16) of the 1939 regulations.

5. Provision for Takers in Default of Exercise of Power of Appointment

When the interest passing to the surviving spouse is a right to income for life plus a power of appointment, what effect will a gift over in default of appointment have on the right to the marital deduction?

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80 Hood Trust, 7 Fiduc. Rep. 223 (1957); Sinkler Trust, 3 D. & C. 2d 241, 5 Fiduc. Rep. 337 (1954).

81 Forrish v. Kennedy, 377 Pa. 370, 105 A.2d 67 (1954); Baker Trust, 5 Fiduc. Rep. 431 (1955).

82 HUNTER, ORPHANS' COURT COMMONPLACE BOOK, "Trusts", § 10.

83 *Id.* at § 11.

84 *Id.* at § 12.

It will have no effect. The gift over in default of appointment has always been a permissible limitation on the power of appointment. It was expressly permitted in a Letter Ruling issued April 19, 1948,[85] was incorporated into the 1939 Regulations section 81.47a(c)(14), and was repeated in Revenue Ruling 55-394, 1955 Cumulative Bulletin 458.[86]

The permission is presently granted in proposed regulation section 20.2056(b)-5(g)(2) as follows:

> "An interest passing in trust will not be regarded as failing to satisfy the condition [in Internal Revenue Code section 2056(b)(5) that the surviving spouse must have the power to appoint the entire interest or the specific portion to either herself or her estate] merely because takers in default of the surviving spouse's exercise of the power are designated by the decedent. The decedent may provide that, in default of exercise of the power, the trust shall continue for an additional period."

As pointed out in *Estate of Shedd v. Commissioner*,[87] however, the permissible use of takers in default of appointment is limited to cases where there is a qualified power of appointment. In the *Shedd* case the power of appointment did not qualify, and although the surviving widow did exercise her power and appointed to herself less than a year after her husband's death, such appointed property did not qualify because as of the moment of her husband's death, the surviving spouse received no property which qualified, but only a power to acquire such property if she exercised that power. Thus, assets which pass to the surviving spouse only if that spouse exercises a power of appointment to defeat the rights of designated takers, in default of appointment will not qualify for the marital deduction unless the power of appointment itself qualifies under the requirements of Internal Revenue Code section 2056(b)(5). This is illustrated by the following statement from proposed regulations section 20.2056(b)-5(b):

> "Further, if the surviving spouse has no right to income from a specific portion of a property interest but a testamentary power of appointment which meets the necessary conditions over the entire interest, then none of the interest qualifies for the deduction."

6. *Imposition of Spendthrift Provision*

> "An interest passing in trust will not fail to satisfy the condition . . . that the spouse be entitled to all the income merely because its terms provide that the right of the surviving spouse to the income shall not be subject to assignment, alienation, pledge, attachment or claims of creditors." [88]

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[85] CCH Est. & Gift Tax Rep., ¶ 2070.70.
[86] *Id.* at ¶ 8034.
[87] 237 F.2d 345 (9th Cir. 1956), *affirming* 23 T.C. 41 (1954).
[88] Tent. Treas. Reg. § 20.2056(b)-5(f)(7).

This is substantially identical to section 81.47a(c)(10) of the 1939 regulations.

Pennsylvania Comment: This is especially true in Pennsylvania where a spendthrift trust may, under proper circumstances, be terminated.[89]

CONCLUSION

In reviewing these permissible limitations which may be imposed on a marital deduction trust, two points should be kept in mind.

First, the enumeration in the proposed regulations of these various permissible limitations is handled on an individual basis. That is, each limitation by itself is stated not to destroy the right to the marital deduction. But nowhere in the regulations does it state whether any combination, or even all, of these limitations if imposed upon a marital deduction trust would be permissible or not. It is the familiar problem of whether or not the sum of several zeros becomes one.

Second, it is the existence of, not the ability of the surviving spouse to exercise a qualified power of appointment which is the determining factor. Thus, the marital deduction is allowable for a trust providing for income to wife for life with a general power of appointment, even though the wife never could have exercised the power because she was totally incompetent "at all times from the date of the creation of the trust to the date of her death." [90]

1. *Incompetent Spouse*

When a taxpayer's spouse has been formally adjudicated an incompetent, advantage may still be taken of the marital deduction by making the bequest to the duly appointed guardian. Any property, which would qualify if bequeathed or devised to the spouse, will still qualify if bequeathed or devised to the guardian of a spouse who has been formally adjudicated an incompetent.[91]

2. *Effect of Interlocutory Divorce*

The decedent-husband's estate will be entitled to the marital deduction if he dies before an interlocutory divorce decree becomes final, provided that under the applicable state law the divorced mate retains the status of spouse.[92]

89 PA. STAT. ANN. tit. 20 § 301.2, ESTATES ACT OF 1947, § 2. See Timmins Trusts, 7 Fiduc. Rep. 453 (1957); Keen Estate, 80 D. & C. 377, 1 Fiduc. Rep. 360 (1951); Goward Estate, 1 Fiduc. Rep. 93 (1950); *cf.* Close Estate, 83 D. & C. 136, 3 Fiduc. Rep. 113 (1952); Rebmann Trust, 2 Fiduc. Rep. 288 (1952); and HUNTER, ORPHANS' COURT COMMONPLACE BOOK, "Trusts", §§ 5(o) and 13(f).

90 REV. RUL. 55-518, 1955-2 CUM. BULL. 384.

91 CCH Est. & Gift Tax Rep. ¶ 2070.30.

92 See dicta in Eccles v. Commissioner, 208 F.2d 796 (4th Cir. 1953), *affirming* 19 T.C. 1049.

Pennsylvania Comment: This problem will not arise in Pennsylvania since there is no provision for interlocutory divorce and under section 7(2) of the Wills Act of 1947, immediately upon divorce "all provisions in the will in favor or relating to his spouse so divorced shall thereby become ineffective for all purposes."

3. *Unproductive Property*

The proposed regulations perpetuate two exceptions to the general requirement that in order for property to qualify for the marital deduction it must be income producing property. Both are found in proposed estate tax regulations section 20.2056(b)-5(f)(4) which is substantially identical to 1939 regulations section 81.47a(c)(6).

The first deals with property in general:

> ". . . a power to retain trust assets which consist substantially of unproductive property will not disqualify the interest if the applicable rules for the administration of the trust require, or permit the spouse to require, that the trustee either make the property productive or convert it within a reasonable time. . . ."

The second deals with the retention of the home residence and other personal effects of a sentimental value:

> ". . . Further, a power to retain a residence for the spouse or other property for her personal use will not disqualify the interest passing in trust."

Pennsylvania Comment: With respect to the first exception, section fourteen of the Fiduciaries Investment Act of 1949 would probably so qualify under the above quoted language to protect the right to the marital deduction in non-income producing property received in kind, in the absence of specific authority to retain same. However, if the trustee is given specific authority to retain such property, then under section eighteen of the Fiduciaries Investment Act of 1949 the trustee would be protected and the surviving spouse could not force a conversion. It is therefore generally advisable in setting up a marital deduction trust to provide that the spouse may force conversion of non-qualifying property.

4. *Absence of Property to Pay Surviving Spouse*

When the total of administration expenses, debts of decedent, and death taxes is so large that the result is that nothing remains for distribution to the surviving spouse, the marital deduction will be disallowed.[93] Although the facts are not clear, this apparently would mean that if the marital deduction

[93] Estate of Hohensee v. Commissioner, 25 T.C. 1258 (1956); Estate of Wheeler v. Commissioner, 26 T.C. 466 (1956).

were allowed and the surviving spouse would receive nothing, then the government asserts its priority status as against other creditors and distributees and claims the full amount of the tax after disallowing the marital deduction.

Pennsylvania Comment: See section 751 of Fiduciaries Act of 1949 for the order of abatement, which demonstrates the vulnerable position of the widow when she receives her share solely from the residue.[94]

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[94] For a discussion of the priority of the federal government for unpaid taxes see FIDUCIARY REVIEW, JUNE 1955.