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# Estate Tax Liability and the Marital Deduction

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lawful manner, there can be no doubt in the ordinary situation as to who has the right of way when the paths of vehicles intersect.

But as shown above, various extraordinary situations have arisen requiring a modified application of the right of way rules. In these cases the courts have attempted to balance the interests of safety and certainty with those of reasonableness and fairness. In most cases such a balance has been achieved, but in others there is great need for adjustment.

SHELDON PORTMAN

# *Estate Tax Liability and the Marital Deduction*

T DIES testate in 1952 survived by his wife and two children. The widow, however, renounces the will and elects to take one-third of the estate as provided in Ohio by the statutes of descent and distribution and the election statute. The value of the estate after payment of all proper charges except the federal estate tax is $2,000,000. A controversy arises as to whether the widow is entitled to receive one-third of the estate after the payment of all proper charges against the estate including the federal estate tax, or whether the widow is entitled to receive one-third of the estate after the payment of all proper charges against the estate without deducting from the share of the widow any charge for the payment of the federal estate taxes.

In the United States Revenue Act of 1948, Congress amended the Federal Estate Tax Law and provided a marital deduction.[1] Basically, this allows a deduction, from the gross estate[2] of the decedent in determining the taxable estate, of that property passing[3] outright to the surviving spouse. The deduction is limited to one-half of the adjusted gross estate.[4]

In the example given above, the amount of the marital deduction and therefore the value of the taxable estate and the amount of the federal estate tax would vary depending upon whether the widow's share of the estate must bear its proportionate share of the federal estate tax. If the share of the widow is computed without being burdened with any part of the federal estate tax, its value will be $666,667; the amount of the marital deduction will be $666,667; and the total federal estate tax will be $356,533. If the widow must pay her proportionate share of the estate tax, her share becomes $529,425; the marital deduction correspondingly $529,425; and the total federal estate tax $411,724.

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[1] INT. REV. CODE § 812 (e) (1).

[2] INT. REV. CODE § 811.

[3] INT. REV. CODE § 812 (e) (3).

Thus it is observed that when the share of the widow bears its proportionate burden of the estate tax, the total tax increases by $55,191, the widow's share and that of each child is 33.3% of the estate after the deduction of the federal estate tax ($529,425) Where the widow is not required to bear any portion of the tax, the total tax is smaller; she receives 40.56% of the estate after deduction of the estate tax ($666,667) while the share of each child becomes 29.72% ($488,400) The widow in this latter determination receives 10.84% ($178,267) more than each of the children.

The provision of the Internal Revenue Code granting the marital deduction is considered only in the computation of the Federal Estate Tax; it does not determine who shall bear the burden of the tax. In *Riggs v. Del Drago*,[5] the United States Supreme Court said: " Congress did not contemplate [in providing for the marital deduction] that the Government would be interested in the distribution of the estate after the tax was paid Congress intended that state law should determine the ultimate thrust of the tax." Thus it is clear that the states must resolve the question of by whom the tax is to be borne.

If state statutes dealing with payment of the tax specifically so provide, the question of by whom the federal estate tax should be paid may be answered by a specific provision in the will of the decedent. In some jurisdictions the point does not appear to have been disputed in the absence of such statutory provision. In the absence of such a provision in the will, in the case of intestacy or in the case of renunciation of the will by the survivors, various solutions have been effected by both legislative enactment and judicial decision by the states.

At present 16 states[6] have so-called apportionment statutes that distribute the burden of the estate tax among the various beneficiaries according to the value of the interests they receive from the estate. Eight of these specifically provide,[7] or have been interpreted[8] as providing for exemption of that portion of the estate included in the marital deduction from liability for

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[4] INT. REV. CODE § 812 (e) (2)

[5] Riggs v. Del Drago, 317 U.S. 95, 98, 63 Sup. Ct. 109, 110 (1942) See also: Fernandez v. Wiener, 326 U.S. 340, 66 Sup. Ct. 178 (1945).

[6] Ark., Cal., Conn., Del., Fla., Md., Mass., Neb., N.H., N.J., N.Y., Ore., Penna., Tenn., Tex., Va.

[7] NEB. REV. STAT § 77-2108 (Cum. Supp. 1953); N.J. STAT. ANN. § 3A.25-33 (1953); N.Y. DECEDENT'S ESTATE LAW § 124 (3) (e) (Supp. 1953)

[8] CAL. PROB. CODE ANN. § 970-972 (1944), *In re* Buckhantz's Estate, 120 Advance Cal. App. 121, 260 P.2d 794 (1953); CONN. REV. GEN. STAT. § 2075-2081 (1949), *In re* Jerome's Estate, 139 Conn. 285, 93 A.2d 139 (1952); DEL. CODE ANN. tit. 12, § 2901 (1953), Wilmington Trust Co. v. Copeland, 94 A.2d 703 (Del. 1953); FLA. STAT. ANN. § 734.041 (Supp. 1953), *In re* Fuch s Estate, 60 So.2d 536 (Fla. 1952); PA. STAT. ANN. tit. 20, § 881-884 (Supp. 1953), *In re* Anderson s Estate, 68 Montg. 348, 66 York 145 (1953)

any portion of the tax. Five more[9] have statutes similar to those just mentioned and would probably be interpreted to relieve the surviving spouse from liability for the tax on property included in the marital deduction. The Texas statute[10] seems to indicate that such property must bear its proportionate share of the tax. Maryland[11] exonerates a surviving spouse from payment of any part of the tax where the portion of the estate of the decedent not passing to the spouse is sufficient to discharge the tax, except that no such exoneration is allowed where the surviving spouse renounces the will. The Oregon statute[12] is similar to that of Maryland.

In those states not having proration (apportionment) statutes, where the courts have considered the question of whether property qualifying under the marital deduction is exempted from the federal estate tax, the decisions are in conflict. Illinois,[13] North Carolina[14] and Wisconsin[15] have required the surviving spouse to pay a portion of the tax, while Kentucky[16] and Ohio[17] have exempted the surviving spouse from such contribution.

The Illinois case,[18] applying the rule of cases[19] decided prior to enactment of the marital deduction provision, held that the federal estate tax is a debt of the estate to be paid out of the estate as a whole, and that the widow's share must bear its proportionate burden of the tax. Essentially the same rationale was applied by the North Carolina court[20] in requiring the dissenting widow (*i.e.*, a widow who renounces the will and under applicable election statutes elects to take under the statues of descent and distribution) to pay her proportionate part of the federal estate tax. The share of the widow is determined after the payment of all debts of the estate including federal estate taxes.[21]

The most recent state decision on this problem was made by the Supreme Court of Wisconsin.[22] Agreeing with Illinois and North Carolina, the

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[9] ARK. STAT. ANN., tit. 63, § 150 (1947); MASS. ANN. LAWS c. 65A, § 5; N.H. REV. LAWS c. 88-A as added by laws of 1943, and amended by laws of 1947, c. 102; TENN. CODE ANN. § 8350.7 (*Williams Supp.* 1952); VA. CODE ANN. § 64-151 (Supp. 1952).

[10] TEX. REV. CIV. STAT. ANN., Art. 3683a (1952).

[11] MD. ANN. CODE GEN. LAWS Art. 81, § 161 (1951)

[12] ORE. LAWS OF 1949 c. 475 § 2 as amended by laws of 1951, c. 386.

[13] Northern Trust Co. v. Wilson, 344 Ill. App. 546, 101 N.E.2d 604 (1951).

[14] Wachovia Bank v. Green, 236 N.C. 654, 73 S.E.2d 879 (1953).

[15] Uihlein v. Uihlein, 264 Wis. 362, 59 N.W.2d 641 (1953).

[16] Lincoln Bank and Trust Co. v. Huber, 240 S.W.2d 89 (Ky. 1951).

[17] Miller v. Hammond, 156 Ohio St. 475, 104 N.E.2d 9 (1952).

[18] Northern Trust Co. v. Wilson, 344 Ill. App. 546, 101 N.E.2d 604 (1951).

[19] First Nat. Bank of Chicago v. Hart, 383 Ill. 489, 50 N.E.2d 461 (1943).

[20] Wachovia Bank v. Green, 236 N.C. 654, 73 S.E.2d 879 (1953).

[21] North Carolina subsequently amended her statutes to provide that where a married man dies testate leaving a widow but no children and the widow dissents from the

court designated the estate tax a charge against the entire estate and did not allow the property qualifying under the marital deduction to escape the burden of the tax. The rationale of the opposing view was expressly repudiated as being "untenable," on the grounds advanced by the dissent in the Ohio case — that the federal estate tax itself and the doctrine of *Riggs v. Del Drago* negatived any intention by Congress that property constituting the marital deduction should not bear any portion of the tax, and that the distribution of the estate between the children and the widow is inequitable when determined under the opposing theory.

The highest court of Kentucky[23] exempted the dissenting widow from payment of any part of the estate tax, reasoning that Congress in creating the marital deduction intended to eliminate from the tax burden all those allotments that did not create or add to the tax, and that since the marital deduction is taken before arriving at the net taxable estate, it should not be burdened with any portion of the estate tax.[24] A prior rule of "equitable apportionment relative to the imposition of the federal estate tax" was applied to exempt the widow's share from the tax. This case may be of doubtful value as a precedent because the court, in affirming the decision of the trial court, noted that all parties were satisfied with the decision since it resulted in the lowest tax and apparently was appealed only to obtain a final determination.

Where the widow renounced the will and took her statutory one-third share of the decedent's estate, the Ohio Supreme Court held, in *Miller v. Hammond,*[25] that the surviving spouse was entitled to a credit for the marital deduction and that the widow's portion should not be burdened with any part of the federal estate tax. The court relied upon *Industrial Trust Co. v. Budlong,*[26] interpreting that case to hold: "In the absence of a testamentary direction to the contrary, the federal estate tax on all the property within the testamentary estate will be paid from the residue while all non-testamentary interests will bear only the burden of the estate taxes attributed to them."[27] The rationale of the Kentucky case was approved and that case was cited as authority for the recognition of a common law rule of equitable

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will, her share is one half of the personal estate of the testator after all debts exclusive of the federal estate tax have been paid, thus making the rule in North Carolina exactly opposed to the decision in the *Green* case, in that specific fact situation. N.C. GEN. STATS. § 28-149 subs. 3 (c) (Supp. 1953)

[22] Uihlein v. Uihlein, 264 Wis. 362, 59 N.W.2d 641 (1953)

[23] Lincoln Bank & Trust Co. v. Huber, 240 S.W.2d 89 (Ky. 1951)

[24] The Kentucky court relied upon *In re* Peters Will, 204 Misc. 333, 88 N.Y.S.2d 142 (1949), *aff'd* 275 App. Div. 950, 89 N.Y.S.2d 651 (1949), which was decided under the New York *apportionment statute.*

[25] 146 Ohio St. 475, 104 N.E.2d 9 (1952)

[26] 77 R.I. 428, 76 A.2d 600 (1950)

[27] Miller v. Hammond, 156 Ohio St. 475, 493, 104 N.E.2d 9, 18 (1952)

apportionment. The court also seemed impressed by the fact that its decision resulted in a lower tax and was therefore "equitable."

The dissent vehemently attacked the reasoning of the majority. The majority adopted the Kentucky view that Congress intended that the marital deduction should exempt the widow from any share of the tax. The dissent points out that *Riggs v. Del Drago*[28] and the federal estate tax law itself[29] negative this conclusion. The decision was assailed by the dissent as amending the statutes of descent and distribution by giving the widow more than her one-third share of the assets remaining after the debts of the estate are paid, which debts have been held in Ohio to include the federal estate tax.[30] The dissent criticized the Kentucky equitable apportionment rule as being peculiar to that jurisdiction. Although the majority considered the computation of the tax inequitable when it resulted in a larger total tax, the dissent revealed the gross inequity of this decision: the widow received more ($198,000 more) as her share ($178,267 in the example) than either of the children received in their supposedly equal one-third shares.[31]

The Court of Appeals of Cuyahoga County, on January 20, 1954, reversed the decision of the Probate Court of that county, applied the doctrine of the *Miller* case and relieved the dissenting widow from liability for the estate tax. It was held[32] that the term "net estate" in the Ohio statute limiting the share of the surviving spouse to one-half of the net estate[33] meant the same quantity of an estate as described in the statute of descent and distribution.[34] Therefore the *Miller* case which had construed the latter statutes controlled. The reasoning of the *Miller* case was not discussed.

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[28] 317 U.S. 95, 63 Sup. Ct. 109 (1942).

[29] INT. REV. CODE § 812(e)(1)(E) "(E) In determining for the purposes of subparagraph (A) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this subsection — (i) there shall be taken into account the effect which a tax imposed by this chapter, or any estate, succession, legacy or inheritance tax has upon the net value to the surviving spouse of such interest; . . . ."

[30] Comm'n v. Lamprecht, 107 Ohio St. 535, 140 N.E. 333 (1923)

[31] It is interesting to note that Judge Taft who dissented in the *Miller* case, wrote the majority opinion in the subsequent case of *McDougal v. Bank*, 157 Ohio St. 45, 104 N.E.2d 441 (1952), where apportionment between probate and non-probate assets included in the taxable estate was decreed on the grounds of a common obligation. In this case Taft reiterates his convictions expressed in the *Miller* case, though he distinguishes that case. *Query* whether there was any less of a common obligation to pay the tax in the Miller case.

[32] Campbell v. Lloyd, Court of Appeals, Cuyahoga County, No. 22947

[33] OHIO REV. CODE § 2107.39 (OHIO GEN. CODE § 10504-55).

[34] OHIO REV. CODE § 2105.06 (OHIO GEN. CODE § 10503-4)

[35] Campbell v. Lloyd, Supreme Court of Ohio, No. 33, 911, *motion to certify granted.*

[36] See: *"Taxation,"* 4 WEST. RES. L. REV., 259, 262.