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Article 6

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place in the administration of justice.

It is suggested that there be enacted throughout the states a uniform statute patterned after the New York act. Such an act would remove all doubt as to the intention of the legislature. The presumption being abrogated, the question of actual coercion by the husband would properly be a question of fact for the jury.

DEDUCTIBILITY OF CONTINGENT REMAINDERS TO CHARITY

A problem in the field of Federal Estate Tax law upon which the courts are seemingly in disagreement is that of the deductibility of charitable remainders in instances where a contingency exists which might defeat charity's taking.

The differences stem from conflicting interpretations of Sec. 812 (d) of the Internal Revenue Code[1] and Reg. 105, Sec. 81.46.[2]

The yardstick to which the courts first turn in the determination of the deductibility of any charitable remainder is "the certainty of charity's taking and the measureability of its interest by reliable actuarial data and methods."

If charity's interest is a vested remainder after a life estate to an individual, it is of course always deductible because there is no doubt that

[1] 26 U.S.C.A. § 812(d). For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the U.S. by deducting from the value of the gross estate:

(d) Transfers for public, charitable and religious uses. The amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer or power, if the disclaimer is made prior to the date prescribed for the filing of the estate tax return or, in the case of a decedent dying on or before Oct. 21, 1942, if the disclaimer is made prior to Sept. 1, 1944) to or for the use of the United States, any state, territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes. . . .

[2] 26 C.F.R. c. 1 § 81.46.

(a) If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable.

(b) If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

charity will take, and a present value of the interest can be ascertained. This is true because the time for determining the value is fixed by law as the date of decedent's death and the law of probabilities as expressed in mortality tables can be used to measure the remaining term of the life tenant. Tables for the determination of the present value of remainders are contained in Reg. Sec. 81.10 and are based upon a 3½% discount rate applied to the United States Life Tables and Actuarial Tables (1939–1941).

As the transferor hedges his philanthropy by attempting to insure the life beneficiaries or users against various eventualities, possibilities are injected which can defeat the probabilities of charity taking and also make unreliable the computations of the value of charity's interest. It is because of these results that the courts have usually denied the deductibility of charity's interest.

The contingencies which jeopardize the deduction fall into four classifications. The first such contingency is the possibility of a remainderman other than charity surviving the life tenant.

In a recent case on point, the court denied the deduction where a will provided that charity was to take the remainder after a life estate to A, age 78, if B, age 81 and C age 65 did not survive A. Trustworthy actuarial computations were offered as to the value of the charitable remainder claimed, but the unimpressed court said:

> Thus at the time of decedent's death, the charitable institution had but a contingent remainder and the events which will defeat its interest did not appear to have been highly improbable or the possibility that it will not take is not so remote as to be negligible. It is immaterial that an actual value may be placed upon the charitable institution's right to receive the money or that someone might be willing to purchase such right (i.e. market value) or insure it.[3]

A prior decision is almost in direct contradiction to the above mentioned case. Decedent left property in trust granting life estates therein to two elderly persons with remainders over to a slightly younger person and with contingent remainders over to Columbia University in all or one-half the trust fund, dependent upon whether the primary remainderman predeceased both or one of the life beneficiaries. The value of the contingent remainder was deductible, it being ascertainable with the use of actuarial tables. The court said:

> The ultimate vesting in this case depends on the order of survival of three legatees and the value is capable of actuarial computation. It is true that A's survival of B and C would defeat the bequest to Columbia University altogether; yet it had a value and was an 'amount' which courts have recognized in computing estate and succession taxes.[4]

[3] Graff v. Smith, 100 F. Supp. 42, 43 (E.D. Pa., 1951).

[4] Meierhof v. Higgins, 129 F. 2d 1002, 1004 (C.A. 2d, 1942).

The deduction was sustained when successive life estates were left to A, age 50, and B, age 64, with remainder to C, age 84, if he survived, or if not to named charities. The court declared that there was a practical certainty that charity would take and the value of charity's interest was ascertainable.[5]

The second possibility which may jeopardize the charitable deduction is that of marriage, remarriage or child bearing by the life tenant. The earlier line of decisions on this contingency were unfavorable to the taxpayer. *Humes v. United States*,[6] decided in 1928, became a land mark ruling denying this type of deduction and has been consistently followed. However, the Tax Court practically over-ruled the *Humes* case in the *Sternberger*[7] decision in July, 1952. If the Supreme Court follows the Tax Court's rationale, a marked liberalization of the interpretation of Sec. 812 (d) can be expected.

It would appear that the measureability of charity's interest would be controlling rather than the certainty of charity taking and an allowance of the charitable deduction could be expected whenever the possibility of charity's taking can be ascertained by accepted actuarial principles based upon known and reliable data even though there is a definite possibility that charity will not receive any of the estate.

The burden of proving the reliability of the actuarial principles and the applicability of the tables will be on the taxpayer. Actuaries should be employed to make the calculations.

The liberalization of the contingent charitable remainder doctrine is due to the advancement of the science of statistics rather than to a change of view by the courts. A recitation of the facts in the *Humes* case and the *Sternberger* case will serve to make this statement clearer.

In the *Humes* case, the will of the decedent provided that the income from one half of the residue was to be paid to a niece, then 15 years of age until she attained the age of 40 at which time the niece was to be paid the corpus. In the event the niece should die without issue before attaining the age of 40, the corpus was to be paid to a named charity. The executor attempted to value charity's contingent interest by the use of a marriage factor based upon a table for the "Probability of Marriage of Females of the Scotch Peerage," which was based on 4,440 lives. The court ruled that the facts upon which that data was compiled were unrelated to the marriageability of American white females. Justice Brandeis in delivering the opinion of the court said:

[5] Gardiner v. Hassett, 63 F. Supp. 853 (D.C. Mass., 1945).

[6] 276 U.S. 487 (1928).

[7] Estate of Louis Sternberger, The Chase National Bank of the City of New York, Ex'r v. Commissioner of Internal Revenue, 18 T.C. 103 (1952).

Did Congress . . . intend that a deduction should be made for a contingency the actual value of which cannot be determined from any known data? Neither taxpayer, nor revenue officer—even if equipped with all the aid which the actuarial art can supply—could do more than guess at the value of this contingency.[7a]

In the *Sternberger* case, the will provided that the residuary estate be held in trust during the joint lives of decedent's wife and daughter and the life of the survivor of them. Upon the death of the survivor the principal was to be paid to the descendants then living of the daughter, but in the event of no surviving descendants of the daughter, one half of the remainder to be paid to certain charitable organizations. At the time of decedent's death, his widow was 62 years of age and his daughter, a divorcee, was 27 years of age and had no children.

The present value of the charitable remainder was computed by the use of the combined experience mortality table prescribed in Sec. 81.10 of estate tax regulation and the American Remarriage Table published by Casualty Actuary Society in 1932. The probability of a child being born to decedent's daughter was measured by data derived from Vital Statistics of the United States, 1940.

In arriving at their decision, the court adopted the reasoning of the *Maresi* case[8] which did not involve a charitable remainder, but which allowed a deduction for a claim on an alimony agreement, in which decedent had contracted to pay his ex-wife a stipulated sum per month for her life or until her remarriage. The present value of the contract as of decedent's death was computed with the same tables and actuarial principles used in the *Sternberger* case. The method was affirmed by the Circuit Court.

It will be noted that the "Probability of Remarriage Table," "Probability of Marriage Table" and tables from "Vital Statistics of U.S., 1940" were not in existence at the time of the *Hume* decision. It is possible that the legal profession has not been fully aware of the rapid advancement in the science of statistics. The government has compiled data on many subjects during the past twenty years which would probably be recognized now by the courts as reliable data for the valuation of future contingencies.

The court disallowed the deduction in *Robinette v. Helvering*[9] because the taxpayer failed to present any method for the calculation. The courts have denied the deduction where the charitable remainder was contingent upon the life tenant dying without issue and medical testimony indicated that possibilty of issue was extinct solely on the grounds of age.[10] This

[7a] Ibid., at 494.

[8] Commissioner of Internal Revenue v. Maresi, 156 F. 2d 929 (C.A. 2d, 1946).

[9] 318 U.S. 184 (1943).

[10] Farrington v. Commissioner of Internal Revenue, 30 F. 2d. 915 (C.A. 1st, 1929).

is also the case where charity's taking was contingent on decedent's daughter, childless at his death, dying without issue and medical testimony established that the daughter's age and poor health made the possibility of her having issue extremely unlikely, but not impossible.[11]

The deduction was allowed where the remainder to charity was contingent on the daughter having issue, and prior to decedent's death, the daughter had an operation rendering her incapable of bearing children.[12] In another instance, the court allowed the deduction on the basis that the possibility of issue was extinct where charity's taking was contingent on a woman 59 years of age having issue;[13] also, where the life tenants were unmarried sisters aged 67, 63 and 57.[14]

Where decedent gave a life estate to his wife with remainder to their children born before or after his death and in default of issue, the remainder to go to charity and no children had been born before his death and medical testimony established that the wife was not pregnant at the time of his death, the Circuit Court of Appeals overruled the Commissioner's disallowance of the deduction.[15]

The third possible contingency is that charity's interest will be defeated by the action of a third party. Thus, in one instance, the decedent made charitable bequests in his will, conditioned upon his widow giving express consent prior to the issuance of an order of distribution by the probate court. The widow gave her consent and the bequests were paid but the deduction was denied because the requirement of the independent act stripped the bequests of the necessary completeness.[16]

In similar circumstances, decedent, by will, created a trust giving his widow a life estate with power to appoint the remainder by her will, or in default of appointment, the remainder to go to designated charities. The court ruled that no charitable deduction was allowable.[17]

The fourth contingency which jeopardizes the charitable deduction is the possibility that the corpus will be invaded for the benefit of the life tenant. These cases involve situations wherein the transferor grants life estates to individuals with remainder over to charities but permits the trustee or life tenant a discretionary power to invade the principal under certain conditions.

The courts either allow a deduction for the full charitable remainder

[11] Hoagland v. Kavanagh, 36 F. Supp. 875 (E.D. Mich., 1941).

[12] United States v. Provident Trust Co., 291 U.S. 272 (1934).

[13] City Bank Farmers' Trust Co. v. United States, 74 F. 2d 962 (C.A. 2d, 1935).

[14] Ninth Bank and Trust Co. v. United States, 15 F. Supp. 951 (E.D. Pa., 1936).

[15] Allen v. First National Bank of Atlanta, 169 F. 2d 221 (C.A. 5th, 1948).

[16] First Trust Co. of Saint Paul State Bank v. Reynolds, 137 F. 2d 518 (C.A. 8th, 1943).

[17] Davison v. Commissioner of Internal Revenue, 81 F. 2d 16 (C.A. 2d, 1936).

or deny it altogether dependent upon whether the facts indicate that the possibility of corpus invasion is remote. If definite standards are incorporated in the instrument and the life beneficiaries financial position and ways of life indicate that no invasion will in fact be made, the power of invasion will be overlooked.

The *Ithaca Trust Company* case[18] is a landmark decision for the allowance of the deduction. The will provided that any sum could be used from the principal for the widow who had a life estate "that may be necessary to suitably maintain her in as much comfort as she now enjoys." The court ruled that the corpus that could be used was capable of definite ascertainment and the income of the estate was more than adequate to maintain her.

The courts have held that the following invasion phrases establish an ascertainable standard:

"On account of any sickness, accident, want or other emergency,"[19] "By reason of accident, illness or other unusual circumstances should require,"[20] "Care, maintenance and support,"[21] "Sickness, accident, want or other emergency,"[22] "Support, care and maintenance."[23]

If the standard or conditions of invasion are based on whims or unusual desires of the beneficiary, the deduction will be disallowed without regard to the probabilities of invasion. The *Merchants National Bank of Boston* case established this rule which has been constantly followed. Decedent's will permitted invasion of corpus for "the comfort, support, maintenance and/or happiness of my wife" and enjoined the trustee to be liberal in the matter and consider her happiness prior to the claims of residuary beneficiaries, i.e., the charities. The Supreme Court said:

Introducing the element of the widow's happiness and instructing the trustee to exercise its discretion with liberality to make her wishes "prior to the claims of residuary beneficiaries, brought into the calculation elements of speculation too large to be overcome, notwithstanding the widow's previous mode of life was modest and her own resources substantial.[24]

Other powers of invasion phraseology that defeated the deduction are as follows:

[18] Ithaca Trust Co. v. United States, 279 U.S. 151 (1929).

[19] Wells Fargo Bank & Union Trust Co. v. Commissioner of Internal Revenue, 145 F. 2d 132 (C.A. 9th, 1944).

[20] Commissioner of Internal Revenue v. Bank of America, 133 F. 2d 753 (C.A. 9th, 1943).

[21] Estate of Wetherill, 4 T.C. 678 (1944).

[22] Commissioner of Internal Revenue v. Wells Fargo Bank and Union Trust Co., 145 F. 2d 130 (C.A. 9th, 1944).

[23] Michigan Trust Co. et al. Ex'rs, 27 B.T.A. 556 (1932).

[24] Merchants National Bank of Boston v. Commissioner, 320 U.S. 256 (1943).

"Pleasure, comfort and welfare,"[25] "Comfort and pleasure,"[26] "Comfort and support,"[27] "Comfort and convenience,"[28] "Properly care for and maintain,"[29] "Need or desire,"[30] and "For the use and benefit as trustee in sole discretion deemed advisable."[31]

The most liberal ruling to date on power of invasion terminology was handed down on January 23, 1953, in the *Blodget* case. The will of a Massachusetts decedent left the residue of his estate in trust, the trustees "to pay over the net income therefrom to my said sister, . . . and also to pay from principal any amount in their discretion for her comfort and welfare," with a remainder to charity. The court in allowing the deductions said:

> We think that court (Supreme Judicial Court of Massachusetts) on the basis of its prior decisions would hold that 'Comfort and Welfare' as used in the will we are considering meant the physical comfort and state of physical well being to which the life beneficiary had become accustomed, thus interpolating the 'standard . . . fixed in fact and capable of being stated in definite terms of money' set out in words in the will under consideration in the *Ithaca Trust Company* case.[32]

In reviewing the contingent charitable remainder decisions, it would appear that whereas there is still much disagreement and hair splitting among the courts and the deduction is still denied in many cases where charity actually eventually receives the bequests; nevertheless the *Meierhof*, *Sternberger* and *Blodget* decisions offer encouragment to the taxpayers and tend to indicate that the judiciary may approve the avowed congressional policy of not benefiting the national revenue at the expense of charitable institutions.

ASSIGNABILITY AND DESCENDIBILITY OF WILL CONTEST RIGHTS

The right to contest a will is one ordained purely by statute. However, the statutes concerning the survival of the right and whether it is a personal or property right have been fraught with difficulties and misinterpretations. After surveying this probate problem through an investiga-

[25] Henslee v. Union Planters Bank, 335 U.S. 595 (1949).

[26] Industrial Trust Co. v. Commissioner of Internal Revenue, 151 F. 2d 592 (C.A. 1st, 1945).

[27] Estate of Wiggin, 3 T.C. 464 (1944).

[28] Estate of Schumacher, 2 T.C.M. 1018 (1943).

[29] Estate of Holmes, 5 T.C. 1289 (1946).

[30] Gammons v. Hassett, 121 F. 2d 229 (C.A. 1st, 1941).

[31] Newton Trust Co. v. Commissioner of Internal Revenue, 160 F. 2d 175 (C.A. 1st, 1947).

[32] Blodget v. Delaney, Dec. 4677 (C.A. 1st, 1953).