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Estate Planning - Marital Deduction - Formula Gifts

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is a statute which says this is negligence per se. While some fault can be imputed to the owner in such a case, still a thief has intervened and stolen the car. Yet, the owner has contributed to the accident by his negligence which, in a sense, placed the automobile in the thief's hands, and thus put the thief in "control." The ever-increasing number of highway accidents would be the policy basis for finding jurisdiction in this case. It would not seem to offend "fundamental fairness" to impose jurisdiction over this negligent owner, who presumably knows the serious consequences of highway accidents. The *Hess* case designated automobiles as "dangerous instrumentalities;"³⁶ certainly their vast increase in number, speed and size has not decreased their dangerousness.

The fifth situation involves theft of the automobile without any fault of the owner. The control doctrine would not confer jurisdiction in this case, because it would be unreasonable, and unfair (and thus offend due process) to hold the owner responsible where there is no basis to impute a method of "control." Only by adopting a doctrine of absolute liability could jurisdiction be imposed on a nonresident, nonnegligent owner. This doctrine has been cautiously applied and sparingly used because of its dire consequences on innocent parties. At present, the automobile situation does not appear to have reached the point where imposition of this doctrine is necessary. However, since solutions to jurisdictional problems are found as the problems become acute, a steady increase of automobile accidents may force a further broadening of rules governing acquisition of jurisdiction.

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ESTATE PLANNING—MARITAL DEDUCTION—FORMULA GIFTS.

Estate of Althouse (Pa. 1961).

In order to obtain the maximum marital deduction available under the Internal Revenue Code of 1954,¹ testator created two trusts in his will:

36. *Hess v. Pawloski*, 274 U.S. 352, 356, 47 S. Ct. 632, 633 (1927).

1. Int. Rev. Code of 1954, § 2056: "(a) Allowance of marital deduction — For purpose of the tax imposed by section 2001, the value of the taxable estate shall . . . be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse but only to the extent that such interest is included in determining the value of the gross estate . . . (c) Limitation on aggregate of deductions — (1) General rule — The aggregate amount of the deductions allowed under this section . . . shall not exceed 50 percent of the value of the adjusted gross estate."

one, called "Trust A," for his wife; the other, called "Trust B," for his children. In Trust A, testator gave his wife a life estate with power to appoint the remainder by will. In default of appointment, the principal was to pass to Trust B. To Trust A the testator devised and bequeathed "so much of my estate of whatsoever nature and wherever situate, together with other property included in my adjusted gross estate qualifying for the marital deduction which passes or has passed from me to my wife, shall equal the maximum marital deduction as provided in Section 2056 of the Internal Revenue Code, or such other corresponding provision as may be in effect at the time of my death . . ." To Trust B, testator gave, devised and bequeathed "all the rest, residue and remainder of my estate not hereinbefore provided for." Between the date of testator's death and the date of distribution, the assets of the estate increased substantially in value. The Orphans' Court of Montgomery County decided that the marital deduction trust should share ratably in the increase. The Supreme Court of Pennsylvania reversed, *holding* that the marital deduction trust was pecuniary and not residual.² *Estate of Althouse*, 172 A.2d 146 (Pa. 1961).

Tax considerations, which were once so pressing as to induce the Pennsylvania legislature to adopt a wholly unfamiliar community property system,³ enter into the drafting of wills in which a surviving spouse is to share. The Internal Revenue Code, in attempting to equalize the incidence of estate taxes between common law and community property states, permits half of the decedent's estate to pass tax free to his spouse.⁴ Planning to take advantage of this privilege is complicated by the fact that the estate, for federal estate tax purposes, includes many things such as life insurance and living trusts which do not pass under the will or in intestacy, and is based upon the net estate before taxes.⁵ A simple gift by will of half the testator's estate risks giving the spouse less than the full marital deduction, with a consequent and unnecessary diversion of funds from the natural objects of the testator's bounty and increased liability to the federal government.⁶

2. A pecuniary legacy is not affected by increases or decreases in the size of the estate unless an abatement becomes necessary. § 14 (9) and (10), Wills Act of 1947, and § 751, Fiduciaries Act of 1949, 20 PA. STAT. ANN. §§ 180.14 and 320.751 (1950).

3. These were declared "utterly unconstitutional" in *Willcox v. Penn Mutual Life Insurance Co.*, 357 Pa. 581, 55 A.2d 521 (1947).

4. In *re Rosenfeld Estate*, 376 Pa. 42, 101 A.2d 684, 685 (1954). Lefever, *The Marital Deduction*, 89 TRUSTS AND ESTATES, 644 (1950). "The theory is that the husband and wife each has an undivided one-half interest in property owned by them. Consequently when the husband makes a gift to the wife, under the marital deduction, it is assumed that he only owns half of the community from which he gives and, therefore, he is taxed only on one-half of the total." *Ibid.*

5. Casner, *Estate Planning — Marital Deduction Provisions of Trust*, 64 HARV. L. REV. 582, 591 (1951). BOWE, *ESTATE PLANNING AND TAXATION*, §§ 2.22-2.26 (1957).

6. See *Will of Uihlein*, 264 Wis. 362, 59 N.W.2d 641 (1953), discussed in 52 MICH. L. REV. 1098 (1954); *Campbell v. Lloyd*, 162 Ohio St. 203, 122 N.E.2d 695 (1954), *cert. denied* 349 U.S. 911 (1955).

Draftsmen have worked long and hard preparing a formula that would achieve the maximum tax saving;⁷ but the testator, in adopting such a formula, must always make an election between giving his wife a certain sum or a share of the residue of his estate.⁸ If he gives his wife a residual gift equal to the maximum marital deduction, her share will be diminished by any decline in the value of assets before distribution, as well as by any failure to realize the values fixed by the tax assessors.⁹ It is therefore sometimes advocated that a non-residual, or pecuniary legacy, be given in terms of the formula, so that the widow will be protected in a declining market. Such a choice, however, carries the risk, as demonstrated in the present case, that the market will rise, and the widow will object that she has not received equal treatment with the other heirs. What is said here of the widow is, of course, also true in the case of a widower. Once the choice has been made by the testator, the beneficiaries must be bound by it (except to the extent that the widow may have an election to take against the will), because it is not the function of the court, like a Monday morning quarterback, to reform the testator's plan when subsequent events have made it seem unwise.

In deciding that the testator in the instant case intended a pecuniary bequest, the court followed a New Jersey precedent,¹⁰ which discovered the intent from the arrangement of the gifts in the will: first a gift to the marital deduction trust, then a gift of "the remainder" to the other beneficiaries. A gift of "that part" of the residuary estate to be determined by a formula, would show an intent to make a residuary bequest, as a surrogate's court in New York has held.¹¹ That same court has reached a like result where the will authorized distribution in kind, and specified that assets distributed to the marital deduction trust were to be taken at the value finally determined for federal estate tax purposes.¹² Other formulae are to be found in the literature.¹³

There is no doubt in this case that testator had made an election. The language of the will discloses that he had had professional advice, and suggests that his counsel was familiar with the very ample professional literature on marital deduction gifts. It is not a case in which

7. Casner, *Estate Planning — Marital Deduction Provisions of Trusts*, 64 HARV. L. REV. 582, 584 (1951).

8. Edmonds, *Hints on Marital Deduction Problems*, 89 TRUSTS AND ESTATES 669, 670 (1950). "A bequest based on a percentage of the adjusted gross estate, such as a formula type bequest, will usually effect a greater tax saving and more nearly carry out a testator's wishes than one based on a percentage of residue, a pecuniary legacy, or a specific bequest."

9. Smith, *Marital Deduction in Estate Planning*, 32 TAXES 15, 16 (1954). In a survey conducted by the author, however, he found that leading trust companies favored the residency type formula gift over the pecuniary type by a ratio of six to one.

10. Estate of Kanter, 50 N.J. Super. 582, 143 A.2d 243 (1958).

11. Estate of Inman, 22 Misc.2d 573, 196 N.Y.S.2d 369 (1959).

12. Estate of Bing, 23 Misc.2d 326, 200 N.Y.S.2d 913 (1960).

13. Casner, *Estate Planning — Marital Deduction Provisions of Trust*, 64 HARV. L. REV. 582 (1951).