Washington and Lee Law Review

Volume 35 | Issue 2 Article 16

Spring 3-1-1978

Xi. Tax

of ILA activities.

In summary, the decision of the Fourth Circuit Court of Appeals in *Humphrey v. International Longshoremen's Association*[64] signifies that petitions by the Board for temporary injunctive relief pursuant to section 10(*l*) of the NLRA are to be favorably received by the district courts. District court denials of injunctive relief will be reversed by the circuit court unless the Board patently lacks "reasonable cause to believe" that the charged unfair labor practices are true.[65] Moreover, the narrow view of the work preservation doctrine evident in previous decisions by the Fourth Circuit[66] continues. Whenever a traditional work function is displaced to some extent by technological innovations and the employees performing that function do not seasonably assert their claim to the work through a valid work preservation clause, the work will be held to be no longer within the traditional work of the employees. Further, efforts to reacquire that lost portion will be held to be unlawful work acquisition measures prohibited by sections 8(b)(4)(ii)(B) and 8(e) as secondary boycotts.

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XI. TAX

The amount of the estate tax liability of a married decedent's estate[1] may be reduced through the marital deduction allowed the surviving spouse.[2] This deduction allows the executor to reduce the taxable value of the estate by deducting from the estate all property that passed from the decedent to the spouse.[3] When used to its fullest extent, the marital deduc-

[64] 548 F.2d 494 (4th Cir. 1977).

[65] *Id.* at 497-98.

[66] *See, e.g.*, George Koch Sons, Inc. v. NLRB, 490 F.2d 323 (4th Cir. 1973).

[1] I.R.C. § 2001 provides for the taxation of a decedent's estate.

[2] I.R.C. § 2056. The value of the decedent's gross estate includes the value of all of the decedent's property, real or personal, tangible or intangible. I.R.C. § 2031(a). The value of the decedent's taxable estate is determined by deducting from the decedent's gross estate the exemptions and deductions provided for in §§ 2052 through 2056. I.R.C. § 2051. Included among the deductions is the marital deduction of an amount equal to the value of any interest in property which passes from the decedent to the surviving spouse. I.R.C. § 2056(a).

[3] The marital deduction is a device intended to equalize the effect of federal estate taxes in community property and common-law property jurisdictions by allowing spouses in common-law jurisdictions to share the tax burden on the property owned by both individuals. S. REP. No. 1013, 80th Cong., 2d Sess. 26, *reprinted in* [1948] U.S. CODE CONG. & AD. NEWS 1163, 1188; *see* United States v. Stapf, 375 U.S. 118 (1963); C. LOWNDES, R. KRAMER & J. MCCOND, FEDERAL ESTATE AND GIFT TAXES § 17.1 (3d ed. 1974) [hereinafter cited as LOWNDES]; 4 J. MERTENS, THE LAW OF FEDERAL GIFT AND ESTATE TAXATION § 29.01 (1959) [hereinafter cited as MERTENS-ESTATE]; Anderson, *The Marital Deduction and Equalization*

tion reduces the taxable value of the decedent's estate by fifty percent.[4] Before the marital deduction provision is applied, however, an absolute or non-terminable interest in the property must pass from the decedent to the spouse.[5] The non-terminable interest requirement insures that property exempt from tax liability in the decedent's estate under the marital deduction will be controlled by the spouse at her death and taxable as a part of the spouse's estate at that time.[6]

The definitional requirements of a terminable interest have been a source of litigation since the establishment of the marital deduction in

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Under the Federal Estate and Gift Taxes Between Common Law and Community Property States, 54 MICH. L. REV. 1087 (1956) [hereinafter cited as Anderson]; Baker, *The Marital Deduction and the Terminable Interest Rule*, 40 TENN. L. REV. 195 (1973) [hereinafter cited as Baker]; Surrey, *Federal Taxation of the Family—The Revenue Act of* 1948, 61 HARV. L. REV. 1097, 1156 (1948). In community property jurisdictions the holdings of a married couple which were acquired during the marriage are attributed in equal shares to each spouse. Poe v. Seaborn, 282 U.S. 101, 111 (1930). When one of the married couple dies, the decedent's estate only includes one-half of the couple's holdings. *Id.* The remaining one-half is owned by the spouse and does not pass through the decedent's estate. The estate tax is, therefore, limited to one-half of the couple's property. In common-law jurisdictions, however, the total value of such property is considered to be in the estate of the spouse who held title. Since title to all of the couple's property was in the decedent, all of the property would have passed through the estate and been subject to taxation. *See* Baker, *supra* at 195. The marital deduction allows the estate to treat one-half of the decedent's property as if it was owned by the spouse so that the property is not taxed as a part of the decedent's estate. By allowing the deduction of the property passing to the spouse from the value of the decedent's gross estate, taxpayers are treated more equally than they had been under the property laws of the respective states. *Id.*; *see* LOWNDES, *supra*, at § 17.2; MERTENS-ESTATE, *supra*, at § 29.57. For an explanation of what interests may be included under the marital deduction provision see note 5 *infra*.

[4] The maximum amount deductable under I.R.C. § 2056(a) is fifty percent of the adjusted gross estate. I.R.C. § 2056(c)(1).

[5] No deduction is allowed for interests that will terminate or fail because of a lapse of time, the occurrence of an event or contingency, or the failure of an event or contingency to occur. I.R.C. § 2056(b)(1). This provision was included in the legislation to further insure equal tax treatment of community property and common-law jurisdictions. In community property jurisdictions the spouse receives absolute ownership of one-half of the community property. Consequently, to achieve equal treatment the terminable interest rule requires the decedent to pass to the spouse all interest in the property. *See* United States v. Stapf, 375 U.S. 118, 128 (1963); S. REP. NO. 1013, 80th Cong., 2d Sess. 28, *reprinted in* [1948] U.S. CODE CONG. & AD. NEWS 1163, 1190; Anderson, *supra* note 3, at 1101; Baker, *supra* note 3, at 196; Sugarman, *Estate and Gift Tax Equalization—The Marital Deducation*, 36 CAL. L. REV. 223, 230 (1948). The terminable interest rule prevents the testator from bequeathing the spouse a limited interest in avoidance of estate tax at his death which, in turn, would avoid estate tax on the property or the equivalent in the spouse's estate if the limited interest would fail prior to her death. *See* Allen v. United States, 359 F.2d 151, 154 (2d Cir.), *cert. denied*, 385 U.S. 832 (1966).

[6] Postponement of the payment of the tax through the marital deduction is intended to subject the property of the marital community to an estate tax only once in the estate of either spouse. Reilly v. Commissioner, 239 F.2d 797, 799 (3d Cir. 1957). To insure that the property or the equivalent will eventually be taxable in the surviving spouse's estate, the testator must convey an absolute interest in the property to the spouse. *See* note 5 *supra*.

1948.[7] The Fourth Circuit recently decided whether the value of a gift in a will provision was deductible under the marital deduction. The provision allowed the decedent's spouse either to take sufficient property under the will to maximize the marital deduction allowed the estate or to reject the bequest and allow the property to pass into a residuary trust. In *Estate of Mackie v. Commissioner*,[8] the Internal Revenue Service (IRS) had denied the marital deduction sought by the executrix of the decedent's estate[9] and determined that there was a corresponding deficiency[10] in the amount of the estate tax paid. The will gave the spouse a right to accept or reject the bequest, and provided that if the spouse did not affirmatively elect to take under the will within four months, the marital share would be assumed to have been rejected.[11] The IRS argued that because the bequest could lapse through non-acceptance, the bequest was a non-deductible terminable interest under section 2056 of the Internal Revenue Code (I.R.C.).[12] After paying the additional estate taxes, the executrix of the estate sued in the Tax Court to recover the amount.[13] The Tax Court held that the property passed through the election provision of the will and, therefore, was includ-

[7] *See, e.g.*, Jackson v. United States, 376 U.S. 503 (1964); Virginia Nat'l Bank v. United States, 443 F.2d 1030 (4th Cir. 1971); Estate of Green v. United States, 441 F.2d 303 (6th Cir. 1971); Allen v. United States, 359 F.2d 151 (2d Cir. 1966); First Nat'l Exchange Bank v. United States, 335 F.2d 91 (4th Cir. 1964).

[8] 545 F.2d 883 (4th Cir. 1976).

[9] The interest the IRS alleged was terminable in the *Mackie* will was bequeathed under clauses stating the testator's intent to maximize the deduction, giving the spouse all of the property selected, giving the spouse the right to accept or reject the bequest, and providing that if the spouse did not affirmatively elect to take under the will within four months, the marital share would be assumed to have been rejected. *Id.* at 884. *See generally*, Barnes, *New Tax Court Decisions Broaden Estate Tax Planning Potential of Marital Deduction*, 45 J. TAX. 292, 293 (1976). The will also provided that if the spouse's bequest was rejected, the proceeds would pass into a residuary trust which would distribute the income to the spouse and children of their marriage. The children retained a remainder interest in the trust. 545 F.2d at 884.

[10] Notice must be given by the IRS to the taxpayer of a tax deficiency assessment. I.R.C. § 6212. The taxpayer then has ninety days from the notice's mailing date to petition the Tax Court for a redetermination of the deficiency. I.R.C. § 6213(a). Until the appeal time has expired, the IRS is barred from levying on the deficiency. *Id.*

[11] 545 F.2d at 884.

[12] For the definition of a terminable interest see note 5 *supra*.

[13] A taxpayer may contest the assessment of a deficiency through administrative procedure established by the Internal Revenue Service. After the assessment is determined, the taxpayer may appeal the decision to the Audit Division in his District Office and ultimately to the Appellate Division Conference. J. CHOMMIE, THE LAW OF FEDERAL INCOME TAXATION § 295 (1973) [hereinafter cited as CHOMMIE]. If an agreement is not reached within the administrative process, judicial relief is possible. *Id.* at § 296. The taxpayer may petition the United States Tax Court for a redetermination of the deficiency. *See* I.R.C. § 6213(a). *See generally* 9 J. MERTENS, THE LAW OF FEDERAL INCOME TAXATION §§ 50.01-.119 (1977) [hereinafter cited as MERTENS-INCOME]. Alternatively, the taxpayer may elect to pay the tax, file a refund claim, and if the refund is not paid sue the United States in either federal district court or the United States Court of Claims. *See* 28 U.S.C. § 1346(a)(1) (1970); CHOMMIE, *supra*, at § 296. *See generally* 10 MERTENS-INCOME, *supra*, at §§ 58A.19, .25-.26.

able in the estate marital deduction.[14] The IRS appealed.[15]

The Fourth Circuit affirmed the Tax Court's decision and held that because the spouse could elect to take an absolute interest in the property under the will at the time of the decedent's death[16] the interest, once accepted, was non-terminable and, therefore, qualified for the marital deduction.[17] The court reasoned that the provision of the will requiring formal acceptance of the bequest was not a bar to the deduction because the acceptance provision put the spouse in the same position as a disinherited spouse with a statutory right of election against the will.[18] Because the spouse's interest was non-terminable,[19] the court held the executrix should be permitted to include the property passing under the provision as a part of the marital deduction.[20]

The Fourth Circuit analogized the spouse's right of election created by the will to a spouse's statutory right of election against a will.[21] Where a statutory right of election exists, a spouse is allowed to elect between the bequest under the will or the spouse's share established by statute.[22] The will in *Mackie* allowed the spouse to elect either the bequest of one-half of the decedent's property, or the interest provided in the residuary trust.[23] Both situations require an acceptance by the spouse of the alternative disposition of the decedent's property and allow the spouse to determine under which alternative the decedent's estate will be settled. Whatever interest chosen, however, would vest absolutely in the surviving spouse.

Under section 2056(b) terminable interests are non-deductible under the marital deduction if the interest will pass from the decedent to any beneficiary other than the surviving spouse after the spouse's interest failed.[24] Bequests that are contingent upon the occurrence[25] or nonoccurr-

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[14] Estate of Mackie v. Commissioner, 64 T.C. 308, 314 (1975).

[15] 545 F.2d at 884.

[16] *Id.* The determination of whether an interest is terminable is made as of the time of the decedent's death. The interest is not terminable if at that time the spouse's interest is absolute and not subject to any contingencies. *See* Jackson v. United States, 376 U.S. 503, 508 (1964) (widow's allowance was terminable; interest conditioned on widow not dying or remarrying); First Nat'l Exchange Bank v. United States, 335 F.2d 91, 93 (4th Cir. 1964) (widow's alternative rights to take under decedent's will or renouce will and claim dower vested at time of decedent's death); Estate of Ray v. Commissioner, 54 T.C. 1171, 1174 (1970) (spouse's bequest was contingent because spouse required to execute an agreement). *Compare* LOWNDES, *supra* note 3, at § 17.5 *and* MERTENS-ESTATE, *supra* note 3, at § 29.23 *with* 22 SW. L. J. 548 (1968).

[17] 545 F.2d at 884.

[18] *Id.* Mackie died testate in North Carolina and under applicable state law a spouse could reject a deceased spouse's will whenever the share is less than the spouse's intestate share. N.C. GEN. STAT. § 30-1 (1976).

[19] 545 F.2d at 884.

[20] *Id.*

[21] *Id.*

[22] *See* note 18 *supra.*

[23] For a summary of the provisions in decedent's will see note 9 *supra.*

[24] I.R.C. § 2056(b)(1). Section 2056 provides for exceptions to the terminable interest rule in cases where the spouse's interest is conditional on survival for at least six months, where

ence[26] of a subsequent act, or which are limited in duration[27] are terminable interests under section 2056(b).[28] In contrast, however, the interest the spouse received under the decedent's will in *Mackie* was not a terminable interest since the spouse obtained absolute ownership after the election was made.[29] The issue in *Mackie* was whether the acceptance provision in the will rendered the spouse's otherwise absolute interest in the bequest a non-deductible terminable interest.

The IRS formerly refused to allow deduction from the gross estate of any property which required formal acceptance. The deduction of a widow's statutory allowance was upheld in *Estate of Rensenhouse v. Commissioner,*[30] although after election of the allowance, the spouse was required by statute to petition the appropriate probate court. The IRS argued that because the spouse might fail to petition the court, the allowance was terminable and not properly in the marital deduction.[31] In *Rensenhouse* the Tax Court refused to characterize the requirement that acceptance be made through proper legal procedures as a contingency to the existance of the right that would establish the statutory interest as terminable.[32] Subsequently in Revenue Ruling 76-166,[33] the IRS conceded that absolute interests created by state law were not terminable merely because formal legal action was required to effect their acceptance.[34]

The rule that absolute interests are not terminable for the sole reason

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the spouse takes a life estate with a power of appointment, or where the spouse takes proceeds under the decedent's life insurance policy with a power of appointment over payments. I.R.C. § 2056(b)(3), (5), (6). *See generally* S. REP. No. 1013, 80th Cong., 2d Sess. 15-18 (Part 2), *reprinted in* [1948] U.S. CODE CONG. & AD. NEWS 1163, 1237-40.

[25] *See, e.g.,* Allen v. United States, 359 F.2d 151 (2d Cir. 1966) (bequest conditional on execution of arrangement to devise property); Estate of Ray v. Commissioner, 54 T.C. 1171 (1970) (bequest contingent on reciprocal devise).

[26] *See, e.g.,* Jackson v. United States, 376 U.S. 503 (1964) (allowance contingent on widow not remarrying); Brown v. United States, 72-2 U.S. Tax Cas. ¶ 12,887 (bequest contingent on spouse not remarrying).

[27] *See, e.g.,* Sutton v. Commissioner, 535 F.2d 254 (4th Cir. 1974) (payment fund for life is terminable interest); Estate of Neugass v. Commissioner, 65 T.C. 188 (1975) (life estate in decedent's art collection is terminable interest).

[28] The terminable interest rule was intended to encompass a wide variety of contingent interests provided for in wills. S. REP. No. 1013, 80th Cong., 2d Sess. 7 (Part 2), *reprinted in* [1948] U.S. CODE CONG. & AD. NEWS 1163, 1229. For a discussion of terminable interests see note 5 *supra.*

[29] 545 F.2d at 884.

[30] 31 T.C. 818 (1959).

[31] *Id.* at 820-21.

[32] *Id.* at 821.

[33] 1976-1 C.B. 287.

[34] *Id.* Revenue Ruling 76-166 dealt with an Arizona homestead and exempt property allowance which was in addition to any property passing to the spouse either by intestate succession, or by the decedent's will. *See* ARIZ. REV. STAT. §§ 14-2401, -2402 (Supp. 1977). The allowance required the spouse to survive the decedent by 120 hours and elect to accept the allowance. The Commissioner ruled that such requirements did not impose any substantial conditions which would alter the spouse's right to the allowance and, therefore, the allowance was includable in the estate marital deduction. 1976-1 C.B. 287, 288.

that positive action is required for acceptance, applies equally to statutory[35] and testamentary interests.[36] Both involve absolute interests predicated on acceptance by the elector. In either case the view of the acceptance requirement as a contingency would bar the application of the estate marital deduction to the interest.

The Fourth Circuit's analysis in *Mackie* was based on the analogy drawn between a spouse's statutory right of election against a will and the spouse's right of election created by the Mackie will. The analogy was proper in light of the elections' factual similarity, the IRS's prior position on each election, and the legislative history and policy behind the marital deduction.

On a factual basis, the two elections are similar. In each the spouse is given an absolute interest in the particular property at the moment of the decedent's death,[37] and under either statute or will, the interest must be accepted by the spouse before the transfer is completed.[38]

The IRS's previous position provides authority for the election analogy.[39] Revenue Ruling 76-166 established that an absolute interest created by state law was not terminable because a formal act of acceptance was required. A similar position has also been applied by the Fourth Circuit to will created interests in cases holding that a legatee's acceptance was not a contingency which would bar the application of the legacy to the marital deduction.[40]

Finally, the change in position taken by the IRS in ruling the acceptance provision in *Mackie* caused the spouse's interest to be terminable has no statutory or historical basis.[41] The definition of a terminable interest is

[35] *See, e.g.*, Estate of Rensenhouse v. Commissioner, 31 T.C. 818 (1959); Rev. Rul. 76-166, 1976-1 C.B. 287.

[36] *See* Guiney v. United States, 295 F. Supp. 789 (D. Md. 1969), *rev'd on other grounds*, 425 F.2d 145 (4th Cir. 1970). *Guiney* involved a testator who had established a marital trust and then granted by will to his spouse a general power of appointment through which the spouse could by written demand receive $3,000 per year from the trust. Although the court ruled that the trust was improperly established and, thus, terminable, the IRS conceded that the spouse had an absolute right to demand the first $3,000 on the death of the testator. 295 F. Supp. at 797. The executor was accordingly allowed to apply the absolute interest received from the testator to the estate marital deduction even though written acceptance was required. *Id.*

[37] *See* Mackie v. Commissioner, 64 T.C. 308, 310 (1975).

[38] *See* Brief for Appellant at 34, Mackie v. Commissioner, 545 F.2d 883 (4th Cir. 1976).

[39] I.R.C. § 7805(a) authorizes the Commissioner to issue revenue rulings dealing with the IRS's interpretation of specific code sections. CHOMMIE, *supra* note 13, § 6 at 13-14. Revenue Rulings do not have the effect of law, but are persuasive interpretations of code sections. *See* Idaho Power Co. v. Commissioner, 477 F.2d 688, 696 (9th Cir. 1973), *rev'd on other grounds*, 418 U.S. 1 (1974); Redwing Carriers, Inc. v. Tomlinson, 399 F.2d 652, 657 (5th Cir. 1968); Gearhart v. United States, 269 F. Supp. 309 (E.D. Va. 1967). The ruling is subject to further modification by subsequent legislation, court decisions, regulations, and rulings. 1976-1 C.B. iii.

[40] *See* note 36 *supra*.

[41] Neither the Commissioner's brief nor the legislative history of § 2056, the marital deduction, indicate that there is a distinction between acceptance of statutorily created