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as the purpose of travel would be considered in determining the applicant's right to a passport.

Procedurally, the extension of the practice of declaring statutes involving other than first amendment freedoms unconstitutional on their face does not seem too extreme under the facts of this particular case, but this extension is significant, and it possibly heralds such judicial determination of statutes in many other situations, despite the time-old rule to the contrary.⁵⁵

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Estate Tax Deduction: The Widow's Allowance

I. MARITAL DEDUCTION

Allowances for the support of a widow granted by state law from a decedent's estate were deductible for federal estate tax purposes under section 812(b) of the 1939 Internal Revenue Code.¹ In 1950, such allowances were subjected to the restraints of section 2056 of the 1954 Internal Revenue Code.² Section 2056 provides for a deduction from the decedent's gross estate of all interests in property passing from the decedent to his surviving spouse. Limitations on this deduction are set forth in succeeding subsections. No deduction is allowed for any terminable interest—*i.e.*, an interest that will fail upon the occurrence or nonoccurrence of an event and that will be possessed and enjoyed by another person upon such failure.³ The deduction cannot exceed fifty per cent of the adjusted gross estate.⁴ Community property held at the time of the decedent's death is not included in the adjusted gross estate for purposes of computing the limitation.⁵ Thus, marital deductions in community property states are limited to approximately one-half the value of the decedent's separate property.⁶

⁵⁵ See text accompanying note 54 *supra*.

¹ In order to receive a deduction under the 1939 code, the taxpayer was required to show that the allowance was authorized by state law, limited to the period of the settlement of the estate and not in excess of what was reasonably required and actually expended. Treas. Reg. 105, § 81.40 (1950).

² Section 812(b) of the 1939 Internal Revenue Code was repealed in 1950 because it had resulted in discrimination in favor of estates located in states which allowed liberal allowances. S. Rep. No. 2375, 81st Cong., 2d Sess. 57 (1950).

³ Int. Rev. Code of 1954, § 2056(b)(1).

⁴ Int. Rev. Code of 1954, § 2056(c)(1).

⁵ Int. Rev. Code of 1954, § 2056(c)(2)(B)(i).

⁶ The adjusted gross estate is calculated by subtracting deductions allowed by §§ 2053 and 2054 of the code. Thus, the maximum deduction will be less than one-half the value of decedent's separate property. Note, 18 Sw. L.J. 117, 118 (1964).

Section 2056 applies to all interests in property passing from the decedent to his surviving spouse, including widow's allowances. One issue arising in litigation concerning deductions of widow's allowances involves the terminability of the widow's interest.⁷ Can the widow's right to an allowance terminate under state law?⁸ Is the question of terminability to be viewed as of the moment of the decedent's death or at the time the state court orders payment of an allowance?

II. CONFLICT IN VIEWING TERMINABILITY

Conflict has arisen in the federal courts of appeals as to the point in time that terminability is to be viewed. Terminability has been viewed both as of the moment of the decedent's death⁹ and as of the time of the court award.¹⁰

The Ninth Circuit adopted the former view in *Cunha's Estate v. Commissioner*,¹¹ which dealt with an award made under the California Probate Code.¹² By California case law, the widow's right to receive payments is dependent upon her status as a widow; her right to an allowance terminates upon her death or remarriage.¹³ The widow in *Cunha* had received the full amount of the award because she sur-

⁷ It is of interest to note that cases which have decided claims for reductions of widows' allowances inevitably turn on the defeasibility of the widow's allowance under the state law. It has been held that the interest will be nondeductible only if all three conditions of § 2056(b)(1) have been met, including (A) and (B) which disallow the deduction only if another person will receive an interest in the property for less than full consideration and possess or enjoy such property after termination of the widow's interest. *Cunha's Estate v. Commissioner*, 279 F.2d 292, 296 (9th Cir. 1960). Therefore, it would seem that the allowance still would be deductible in one particular situation even though the widow's interest has been held terminable. A will bequeathing to all beneficiaries specific dollar amounts and leaving the widow as the sole residuary legatee would not fall within § 2056(b)(1)(A) or (B). In this situation, termination of the widow's interest would not increase the amount received by any other beneficiary, but would increase only the residuary estate going to the widow.

⁸ The terminability of the interest that the widow receives is determined by state law. *Riggs v. Del Drago*, 317 U.S. 95 (1942). In order to qualify for a deduction, the widow's interest must be a vested right of property which will not terminate upon any contingency. Rev. Rul. 83, 1953-1 Cum. Bull. 395.

⁹ *Cunha's Estate v. Commissioner*, 279 F.2d 292 (9th Cir. 1960) is the best example of this view. See text accompanying notes 11-13 *infra*.

¹⁰ *United States v. First Nat'l Bank & Trust Co.*, 297 F.2d 312 (5th Cir. 1961) is the leading case for this view. See text accompanying notes 14-20 *infra* and note 13 *infra*.

¹¹ 279 F.2d 292 (9th Cir. 1960).

¹² The widow, widower, minor children, and adult children who have been declared incompetent by order of court are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate, which in case of an insolvent estate, must not continue longer than one year after granting letters. Such allowance must be paid in preference to all other charges, except funeral charges, expenses of the last illness and expenses of administration, and may, in the discretion of the court or judge granting it, take effect from the death of the decedent. Cal. Prob. Code § 680.

¹³ *In re Blair's Estate*, 42 Cal. 2d 728, 269 P.2d 612 (1954).

vived the period over which payments had been ordered and had not remarried. The court relied upon the legislative history of section 2056 in ruling that terminability was viewed as of the decedent's death.¹⁴ Because the widow's allowance would have terminated upon her death or remarriage, the court held that the allowance was terminable and nondeductible.

*United States v. First Nat'l Bank & Trust Co.*¹⁵ represents the view that terminability is to be viewed at the time of the court award of the allowance to the widow. The estate was administered under Georgia law which provides that an application for a widow's allowance must be filed within three years of the decedent's death and during her widowhood.¹⁶ The code further provides that the widow owns the property in fee once the property is set aside for her support.¹⁷ The court held that terminability was to be viewed at the time of the court award, and, when so viewed, the interest was indefeasibly vested and thus deductible from decedent's estate.¹⁸ The authority for viewing terminability at the time of the court award is found in two cases cited by the court—*Estate of Rudnick*¹⁹ and *Estate of Gale*.²⁰

III. JACKSON V. UNITED STATES²¹

Fourteen months after the death of her spouse, the widow-executrix

¹⁴ The Senate propounded the belief that the situation was to be viewed as of the date of the decedent's death. S. Rep. No. 1013, 80th Cong., 2d Sess. pt. 2 at 10 (1948).

¹⁵ 297 F.2d 312 (5th Cir. 1961).

¹⁶ [T]he provisions for the support of the family, to be ascertained as follows: Upon the death of any person testate or intestate . . . and leaving a widow . . . it shall be the duty of such appraisers . . . to set apart and assign to such widow . . . , either in property or money, a sufficiency from the estate for . . . support and maintenance for the space of 12 months from the date of administration All applications for a year's support from the estate of a decedent shall be filed within three years from the date of the death of such deceased, and in addition thereto, application for a year's support by a widow, or for the benefit of a widow, must be made and filed during her widowhood and during her lifetime. . . . Ga. Code Ann. § 113-1002 (Supp. 1958).

¹⁷ "Where property is set apart as a year's support for the benefit of the widow alone, she shall thereafter own the same in fee, without restriction as to use, incumbrance, or disposition." Ga. Code Ann. § 113-1023 (Supp. 1958).

¹⁸ 297 F.2d 312, 317 (5th Cir. 1961). For convenience, the approach of the Fifth Circuit in viewing the terminability at the time of the court award will be referred to as the court-award view; while that of the Ninth Circuit in viewing the terminability of the widow's interest will be spoken of as the time-of-death view.

¹⁹ 36 T.C. 1021 (1961).

²⁰ 35 T.C. 215 (1960). The Fifth Circuit also cited *United States v. Quivey*, 292 F.2d 252 (8th Cir. 1961) and *United States v. Crosby*, 257 F.2d 515 (5th Cir. 1958). An examination of these two cases shows that they stand for the proposition that the terminability of the widow's interest is to be viewed as of the time of the decedent's death. The court apparently cited these cases for the proposition that the widow's interest is determined by state law.

²¹ 376 U.S. 503 (1964).

was awarded \$3,000 per month under the California Probate Code.²² The award was for a period of two years and was retroactive to the date of decedent's death. Thus, at the time of the award, \$42,000 of the total award of \$72,000 had already vested. The full \$72,000 was claimed as a marital deduction on the federal estate tax return filed on behalf of the estate. The deduction was disallowed by the Commissioner, as was a claim for refund after payment of the deficiency. Suit was brought for refund in a federal district court. The district court granted summary judgment for the Commissioner²³ on the authority of *Cunha's Estate*. The court of appeals affirmed²⁴ and certiorari was granted to resolve the conflict between *Jackson* and *First Nat'l Bank & Trust Co.*²⁵

The Supreme Court, in affirming the court of appeals, expressly adopts the view of *Cunha's Estate*²⁶ for three reasons: (1) such an approach reflects Congress' intent to view marital deduction situations as of the date of decedent's death, (2) it follows the rule uniformly adopted in other marital deduction situations and (3) the view of the *First Nat'l Bank* case results in a fractionalization of interest.²⁷

The Court found the intent of Congress in two sources. First, the Court noted the Senate's explicit admonition that terminability was to be viewed as of the time of the decedent's death.²⁸ Secondly, the logical interpretation of section 2056 is that the interest is to be examined at the time of decedent's death because Congress found it necessary to make a specific exception in 2056(b)(3) in order to allow the interest to be viewed at a time subsequent to decedent's death in certain situations.²⁹

²² See note 12 *supra*.

²³ 376 U.S. 503, 505 (1964).

²⁴ 317 F.2d 821 (9th Cir. 1963). On appeal, petitioner dropped her claim for the full \$72,000 and claimed only the \$42,000 that had accrued at the time of the court order.

²⁵ 376 U.S. 503, 505 (1964).

²⁶ "We prefer the course followed by . . . the Ninth Circuit in *Cunha's Estate* . . ." *Id.* at 508.

²⁷ The state court order granting an allowance is normally an award for monthly payments to the widow for a specified period of time retroactive to the date of the husband's death. Therefore, if the terminability of the allowance is viewed as of the time of the court award, the interest to the extent of the monthly payments for the period from the date of death to the court order is nonterminable because during that period no event has occurred which defeated the widow's right to an allowance. As to the payments for the remaining period of time, however, the interest is terminable because it will fail upon the occurrence of an event. The court-award view, applied in *First Nat'l Bank & Trust Co.*, fractionalizes the allowance into terminable and nonterminable parts. The amount of each part depends in each case on the length of time that has passed from the time of decedent's death to the time of the court order granting an allowance.

²⁸ 376 U.S. 503, 508 (1964). "[T]he situation is viewed as at the date of the decedent's death. . . ." S. Rep. No. 1013, 80th Cong., 2d Sess., pt. 2 at 10 (1948).

²⁹ 376 U.S. 503, 508 (1964).

[A]n interest passing to the surviving spouse shall not be considered as an

The second consideration upon which the Court based its holding was the fact that examination of the interest at the time of decedent's death is the rule uniformly followed in other marital deduction situations.³⁰ The best examples of this proposition among the cases cited by the Court are *United States v. Mappes*³¹ and *Starrett v. Commissioner*.³² The *Mappes* case held nondeductible the residuary estate bequeathed the taxpayer upon the condition that she survive the administration of the estate. Although the taxpayer did, in fact, survive administration, the court ruled that the terminability had to be viewed at the instant of the testator's death, and disallowed the deduction. In *Starrett*, the court held nondeductible property left the wife in a testamentary trust which gave her the power to demand corpus. The will provided that upon the legal incapacity of the wife or upon the appointment of a guardian for her, her right to receive income and her power to demand corpus terminated. The widow never became legally incapacitated and no guardian ever was appointed for her, and she exercised her power to have the principal paid over to her. The court ruled that the power in the widow was to be viewed as of the date of the decedent's death. So viewed, the interest was held not to be exercisable by the widow in all events because of the terminating provision in the will and therefore nondeductible.

The view followed by the Fifth Circuit was also rejected because of the uncertainty that fractionalization of interest produces. The Court stated that "it is difficult to accept an approach which would allow a deduction of \$42,000 on the facts of this case, a deduction of \$72,000 if the order had been entered at the end of two years from [decedent's] death and none at all if the order had been granted immediately upon his death."³³ This does appear to be an undesirable result.³⁴ It seems grossly inequitable to base the amount of the deduction on such a variable as the time of the award of the allowance.

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 six months after the decedent's death, or only if it occurs as the 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.

Int. Rev. Code of 1954, § 2056(b)(3).

³⁰ 376 U.S. 503, 508 (1964).

³¹ 318 F.2d 508 (10th Cir. 1963).

³² 223 F.2d 163 (1st Cir. 1955).

³³ 376 U.S. 503, 507 (1964).

³⁴ Fractionalization has been criticized as the chief defect of the court-award approach. Comment, *Deductibility of the Widow's Allowance Under the Marital Deduction*, 36 N.Y.U. L. Rev. 1188, 1198 (1961).

IV. CONCLUSION

The conclusion reached in the *Jackson* case seems inevitable after a study of the reports accompanying the enactment of section 2056.³⁵ The decision illustrates, however, that the deduction of widow's allowances under section 2056 results in tax discrimination among the states.

The deductibility of widow's allowances now depends entirely upon the state statutes and the case law construction of these statutes. In only a few jurisdictions has the deductibility of widow's allowances been litigated. Only two, Illinois³⁶ and Missouri,³⁷ have allowances which qualify. In both states, the right to an allowance vests indefeasibly upon the decedent's death. In seven jurisdictions the deduction has been disallowed. California³⁸ and Oklahoma³⁹ allowances terminate upon the widow's death or remarriage. In Nebraska,⁴⁰ the widow's allowance terminates upon her death. The probate courts of Connecticut⁴¹ and Iowa⁴² have the power to modify or terminate the widow's allowance upon petition by an interested party. In North Carolina⁴³ allowances are not granted if the widow dies before the court order, but in Georgia⁴⁴ the allowance is granted only if the application for such allowance is made before the widow dies or remarries. The deductibility of allowances granted under Texas law is uncertain. The issue has not been litigated.⁴⁵

³⁵ See note 14 *supra*.

³⁶ *Molner v. United States*, 175 F. Supp. 271 (N.D. Ill. 1959).

³⁷ *Bookwater v. Phelps*, 325 F.2d 186 (8th Cir. 1963).

³⁸ *Cunha's Estate v. Commissioner*, 279 F.2d 292 (9th Cir. 1960).

³⁹ *Darby v. Wiseman*, 323 F.2d 792 (10th Cir. 1963).

⁴⁰ *United States v. Quivey*, 292 F.2d 252 (8th Cir. 1961).

⁴¹ *Second Nat'l Bank v. United States*, 222 F. Supp. 446 (D. Conn. 1963).

⁴² *United States v. Schafer*, 292 F.2d 629 (8th Cir. 1961).

⁴³ *Wachovia Bank & Trust Co. v. United States*, 234 F. Supp. 897 (M.D.N.C. 1964).

⁴⁴ The Fifth Circuit has recognized that *Jackson* overruled *First Nat'l Bank* and ruled that the widow's interest was terminable under Georgia law. *United States v. Edmondson*, 331 F.2d 676 (5th Cir. 1964).

⁴⁵ The Texas Probate Code provides that the court shall fix an allowance for the support of the widow. Tex. Prob. Code Ann. § 278 (1955). This has been held to be a matter of right, *Chifflet v. Wilson*, 74 Tex. 245, 11 S.W. 1105 (1889), and an absolute grant, *Pace v. Eoff*, 48 S.W.2d 956 (Comm. of App. 1932). The problem under Texas law arises from the fact that the widow is not to receive an allowance if she has separate property adequate for her maintenance, Tex. Prob. Code Ann. § 288 (1955), or if an adequate provision has been made by the will of the testator, *Trousdale v. Trousdale*, 35 Tex. 756 (1872). But once it has been determined that the widow's right to an allowance is not barred by either of these two conditions, the allowance apparently will not be terminated by a subsequent event or occurrence such as her death or remarriage.

Under the Fifth Circuit court-award approach, a Texas allowance would have clearly been a nonterminable, deductible interest because the grant of an allowance has been held to be absolute, *Pace v. Eoff*, *supra*, and no occurrence or event subsequent to the court award has been held to terminate the allowance. However, as a result of *Jackson*, the issue of terminability is much less certain. It is to be noted that the factors which will defeat a widow's right to an allowance in Texas appear to be distinguishable from the factors causing