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THE MARITAL DEDUCTION AND ITS USE
IN MINNESOTA

Harry A. Blackmun*

"Let's choose executors and talk of wills:
And yet not so, 'for what can we bequeath
Save our deposed bodies to the ground?""

King Richard II
Act III, Scene II, Line 148

Mr. Shakespeare's lines found new application in the discouraged talk of estate-planning clients and their attorneys in the days prior to the Federal Revenue Act of 1948. Increasing tax burdens of all kinds, the belief that an estate often was the product of years of common effort, sacrifice, and frugality by both husband and wife even though it might actually stand in the husband's name alone, and the feeling that all was not uniform in the application of Federal death taxes provided much in the way of dissatisfaction and despair for the noncommunity-property state individual who hoped to rescue something for his dependants after the expenses and taxes of death had taken their eager toll.

The 1948 act was intended to provide some relief. It has been the subject of much discussion and analysis. It is the purpose of this article to outline briefly the provisions of the Federal estate and gift tax statutes apart from the marital deduction, to show how those statutes were changed when the marital deduction was introduced, and to raise for the lawyer's consideration some of the resulting factors and problems which today present themselves in Minnesota estate planning.

The Federal Estate Tax Apart from the Marital Deduction

This is an excise tax upon the transfer of property or interests therein, at the transferor's death. It is applied to the value of the net estate, which is defined as the gross estate less deductions. Thus, Section 811 of the Internal Revenue Code determines the value of the gross estate by including the value of all property (except real property outside the United States) to the extent of any interest therein.

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1. Unless otherwise noted herein, section references are to the United States Internal Revenue Code, as amended by this Act; committee report references relate to Report No. 1013 of the Senate Committee on Finance upon the Revenue Bill of 1948; and regulation references are to Regulations 105, as amended.

(a) of the decedent;
(b) of the surviving spouse existing as dower or curtesy or in lieu thereof;
(c) and (d) of which the decedent at any time made certain transfers specified as taxable;
(e) held by the decedent and another in joint tenancy or as tenants by the entirety, or deposited in a joint bank account (with certain exceptions and reductions);
(f) with respect to which the decedent has a general power of appointment (such being specifically defined) and exercises it or releases it in a certain manner; and
(g) consisting of insurance on the life of the decedent receivable by his estate or, with specified exceptions, by other beneficiaries.

By Section 812 the value of the net estate is determined by deducting from the value of the gross estate

(a) a specific exemption of $100,000 for the primary tax under Section 810, and of $60,000 for the additional tax under Section 935;
(b) funeral expenses, administration expenses, and certain claims and liens on items in the gross estate, as are allowed by the laws of the jurisdiction, and certain uncompensated losses (these Section 812(b) items perhaps may be loosely characterized as "probate deductions");
(c) the value of certain property previously taxed (with specified restrictions); and
(d) certain transfers for public, charitable or religious uses.

Against the net estate so determined, the respective rate schedules of Sections 810 and 935 are applied. Any available credits for state death taxes, Federal gift taxes, and foreign death duties are then deducted.

The Federal Revenue Act of 1948

This act, passed over presidential veto, became law April 2, 1948. It is applicable to estates of decedents dying after December 3, 1948. Reasonable maintenance of dependents during administration is also allowable as a deduction for estates of decedents dying before September 24, 1950. It is eliminated as a deduction for later decedents. Revenue Act of 1950 § 502. For such later decedents, may reasonable maintenance paid during administration to a surviving dependent spouse now qualify as a marital deduction?

31, 1947. It has been characterized as a tax-equalization bill "designed to produce uniform treatment for residents of common-law and community-property States."^6

The Marital Deduction

The marital deduction with which we are here concerned is simple in theory but technical and rather complex in application and expression.

As set forth above, Section 812 defines the net estate as the difference between the gross estate and specified deductions: namely, (a) the specific exemption, (b) miscellaneous routine items or "probate deductions," (c) previously taxed property, and (d) transfers for public, charitable or religious uses. With the passage of the 1948 act, Section 812 is changed only to add a new subdivision (e) to the list of deductions. This is the marital deduction. It is therefore apparent, and should be kept in mind, that the marital deduction does not involve a change in the basic structure of the act, or in the gross estate, or in the applicable rates, or in the specific exemptions. It is merely a new deduction making possible a smaller net estate and, therefore, less tax.

The deduction is defined in Section 812(e)(1)(A) as "An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse * * *." Superficially, this definition is simple enough. Even those parts of it which appear to need definition, are rather adequately explained. Thus, the term "value" here embraces the same values, that is death or option, as are employed in the determination of the gross estate. Further, the statute is amazingly specific in spelling out when property passes from a decedent to a third person; it does so by bequest or devise, inheritance, statutory interest in lieu of dower or curtesy, inter vivos transfer, joint ownership with right of survivorship, the exercise or release or nonexercise of a power of appointment, and life insurance proceeds. Finally, the determination of when a person is a "surviving spouse" is made as of the date of death of the decedent and not as of some other date, such

5. An interesting constitutional question is perhaps presented by the retroactive character of this legislation where a husband and wife died successively between December 31, 1947, and April 2, 1948, and the aggregate Federal estate tax for both estates exceeds what the aggregate tax would have been under the old law.
as when a transfer, subject to death taxes, might have been made.\(^9\)

Limitations Upon the Deduction

To the foregoing simple and broad definition of the marital deduction the act has drawn several positive limitations or restrictions:

1. The marital deduction itself cannot exceed 50 per cent of the "adjusted gross estate."\(^1\)\(^0\) This is a new term and is defined\(^1\)\(^1\) as the difference between the gross estate and the deductions allowable under Section 812(b) or what have been referred to above as the "probate deductions." This limitation, however, applies to the marital deduction in the aggregate and does not limit each qualified deductible item to 50 per cent of its value. From the foregoing, it is apparent that even if the decedent's entire taxable estate passes to the surviving spouse, the excess over the specified 50 per cent is, nevertheless, not available as a marital deduction and is, in effect, taxable.\(^1\)\(^1\)

2. Any item qualifying as marital deduction property must itself be in the gross estate.\(^2\)\(^2\) Thus, property may actually have passed from a decedent to his surviving spouse but be nondeductible: examples of this are an inter vivos gift by the decedent to his spouse which is not subject to estate taxation, nontaxable joint tenancy property, and real estate outside the United States inherited by the spouse from the decedent.

3. Amounts received by the spouse by way of claim against the estate or as a representative's fee or, prior to the Revenue Act of 1950, by way of reasonable probate maintenance, being already deductible under Section 812(b), cannot also qualify as marital deduction items.\(^3\)\(^3\)

4. Any encumbrance on the marital deduction property which operates to reduce the gross estate, or any obligation incurred by the spouse and imposed by the decedent with respect to the passing of the interest to the spouse, also serves to reduce the deduction.\(^4\)\(^4\)

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9. Sen. Rep. No. 1013, 80th Cong., 2nd Sess., pt. 2, p. 6 (1948). When we have simultaneous deaths of the husband and wife and property of the kind which, while includable in the decedent's gross estate, nevertheless, under the Uniform Simultaneous Death Act in effect in Minnesota, 2 Minn. Stat. § 525.90 (1949), passes under the spouse's will or to her heirs, we have "survivorship" for purposes of the deduction with regard to that property. 26 Code Fed. Regs. § 81.47a(a) (Cum. Supp. 1950).


(5) Any death tax which affects the value of the interest passing to the spouse must be taken into account.\textsuperscript{15} It is because of this provision that a careful draftsman, whenever possible, avoids situations where death taxes are payable by the spouse or from the property she receives. Otherwise, except in cases of adequate excess over the marital deduction, one is driven to the intricacies of complicated formulas and the interdependence of three possible variables, viz., the State death tax, the Federal estate tax, and the amount of the marital deductions. To one unversed in mathematical computations the realization, for the first time after the death of the decedent, that the State tax depends on the Federal tax which in turn depends upon the marital deduction which depends upon the amount of both Federal and State taxes can be rather horrible.

(6) Where an interest passing to a surviving spouse may be (not is) satisfied out of assets with respect to which no marital deduction would be allowed, then the value of the interest passing to the spouse is, for purpose of the marital deduction, reduced by the value of such assets.\textsuperscript{16} Definite specification of which assets go to the spouse is therefore in order.

(7) If the spouse disclaims property which would otherwise have passed to her and have qualified as a marital deduction, the deduction is lost.\textsuperscript{17}

(8) If a third person disclaims and, as a result, the property disclaimed is received by the spouse, a marital deduction is not thereby obtained.\textsuperscript{18} Thus, the deduction cannot be created, but can be destroyed, by a disclaimer. The reason for this distinction is not obvious.

(9) Certain “terminable interests,” although passing to the spouse, do not qualify as marital deduction property.\textsuperscript{19} This of course again demands a definition of terms. A terminable interest is in general what the word imply, that is, something which terminates or fails by its own nature or by an event or failure of an event provided for by the terms of the transfer.\textsuperscript{20} Examples of terminable interests are a life estate (but not a remainder after a life

\begin{itemize}
\item \textsuperscript{15} Int. Rev. Code § 812(e) (1) (E) (i).
\item \textsuperscript{16} Int. Rev. Code § 812(e) (1) (C).
\item \textsuperscript{17} Int. Rev. Code § 812(e) (4) (A).
\item \textsuperscript{18} Int. Rev. Code § 812(e) (4) (B).
\item \textsuperscript{19} Int. Rev. Code § 812(e) (1) (B). Emphasis must be given the word “certain” for, as will be seen, not all terminable interests are so disqualified.
\item \textsuperscript{20} But the act specifically excludes from the definition of terminable interest the ownership of a bond or note or similar contractual interest the discharge of which does not have the effect of an annuity for life or for a term.
\end{itemize}
estate), joint tenancy (but not a tenancy in common), a leasehold
interest, a patent, a copyright, an annuity, most programmed insur-
ance, and a bequest to a legatee so long as she resides in a designated
place.

Having established this definition, the act then says that a ter-
minal interest passing to the surviving spouse shall not qualify as a
marital deduction if either (i) an interest in the property passes or
has passed (except for an adequate consideration) from the decedent
to any person other than the spouse or her estate and such person
(or his heirs or assigns) may (not must) possess or enjoy any part
of the property after the termination of the interest passing to the
spouse, or (ii) if the interest is to be acquired for the spouse, pur-
suant to the decedent's directions, by his representative or a
trustee.21 In order to help clarify these rather involved definitions
the following are given as examples of disqualified interests:

(a) A devise to the spouse for life with remainder to a child.22

(b) A devise to the spouse and a child as joint tenants with
right of survivorship.23

(c) An annuity purchased for the spouse by the decedent’s
executor pursuant to directions in his will.

On the other hand, the mere fact of terminability of the interest is
not of itself fatal. Thus, a bequest of a patent or a leasehold24 to the
surviving spouse or a husband's own inter vivos purchase of an
annuity for himself for life and then for his wife, with any remain-
ing refund then due payable to the estate of the survivor may all
qualify.

Exceptions to the Disqualification of certain Terminable Interests

The statute makes certain exceptions to the terminable interest
exception and thus nullifies the disqualification which would other-
wise exist:

(1) The survivorship clause making a spouse's interest under a
will dependent upon survivorship for a given period, presumably
to avoid a double probate or devolution to her heirs or duplicate
taxation, has been a common testamentary provision. Does the bar
on terminable interests make such a provision now inadvisable? The
statute25 excludes from the definition of a terminable interest one

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23. Ibid.
24. Where the fee is not held by a third person through conveyance
from the decedent except for an adequate consideration.
which depends on the death of the spouse only if it occurs within a period not exceeding six months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of both, or only if it occurs in the case of either of such events, and such termination does not in fact occur. Thus, a survivorship clause with a five-month limitation does not disqualify the interest as a marital deduction if the spouse survives the designated period.

(2) Trust provisions for the benefit of the spouse. One might well ask whether the terminable interest disqualification renders the use of the trust device infeasible where the marital deduction is an important factor. The statute recognizes this complication and provides that an interest passing from the decedent in trust shall be considered as passing only to the surviving spouse if the following requirements are met:

(A) The spouse is entitled “to all of the income from the corpus of the trust.” The resultant concern as to whether such inept language means gross income or net, whether it is before or after capital gains and losses, and whether the presence of the usual trust provisions for amortization, allocation of stock dividends, depreciation and depletion directions, power of the trustee to allocate receipts between income and corpus, retention powers, and the like, was fatal appears resolved by the Regulations which say this requirement is satisfied if the spouse is given “substantially that degree of beneficial enjoyment of the trust property during her life which the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust.”

(B) The spouse is entitled to that income for life. Does this mean from the date of death of the decedent or from the date of establishment of the trust by the formal assignment of the property by probate decree to the trustee? Again the Regulations are helpful and say that this requirement is satisfied even though the spouse is not entitled to income prior to distribution unless the representative is directed or authorized to delay distribution beyond a reasonable period.

26. This appears to be unlimited as to time; a more concise and far less troublesome definition might well be provided.
27. Int. Rev. Code § 812(e) (1) (F).
29. Ibid. Compare the doctrine of In re Trust under Will of Koffend, 218 Minn. 206, 221, 15 N. W. 2d 590 (1944).
(C) The income is payable annually or more frequently.

(D) The spouse has the power to appoint the entire corpus free of the trust to herself or her estate or either.

(E) No third person has power to appoint any part of the corpus to anyone other than the spouse.

(F) The power, under the terms of the trust, whether exercisable by will or during lifetime, is exercisable by the spouse alone and in all events.

It is evident that in spite of these qualifications the trust device still has great possibilities in estate planning. The requirements of the statute however must be meticulously met. It should be noted that it is not necessary that the spouse’s power of appointment in fact be exercised; it is sufficient if she has it and a gift over in the event of her nonexercise of the power is not fatal to the deduction. The requirement that all the income of the trust go to the spouse makes it necessary that the marital trust be a separate one. Trust income cannot be divided in the hope that part of the trust will then qualify as a marital deduction. It is all or none.

30. Ibid. This does not mean that the spouse may contract not to exercise the power.

31. Ibid.

32. Int. Rev. Code § 812(e) (1) (G).
From this it is seen that the following arrangements of insurance on the decedent's life may qualify as marital deduction property:

(a) A policy payable outright to the surviving spouse with or without option settlements being available to her.

(b) A policy the proceeds of which, by the decedent’s direction, are held by the insurer with interest payable monthly to the surviving spouse and with principal payment at her death only to her estate. \(^3\)

(c) A policy the proceeds of which, by the decedent’s direction, are held by the insurer on a 20-year installment certain basis, with the surviving spouse named as primary beneficiary and another person as secondary beneficiary but with the spouse having the absolute right of withdrawal.

(d) A policy payable directly to a qualified trust.

Where the policy by the insured’s direction is payable outright half to the surviving spouse and half to a third person, the spouse’s half qualifies. \(^4\)

The effect of the 1948 act upon the deduction for previously taxed property must be observed. Prior to the act the identity or relationship of the two successive decedents was not material. Now the deduction is wholly denied, even though the deaths occur within five years of each other, where the two decedents are husband and wife and both die after December 31, 1947. \(^5\)

The Federal Gift Tax

Prior to the 1948 act a gift from one spouse to another enjoyed no different status than any other gift. The taxable year was the calendar year. The tax attached to net gifts and for each taxable year was the excess of the tax computed on the aggregate of all net gifts for that and preceding calendar years over the tax upon the aggregate of net gifts for only the preceding calendar years. By this device increasing rate brackets were made effective. Net gifts were defined as the total gifts less deductions consisting of a specific exemption of $30,000 and certain public and charitable gifts. An annual exclusion, now $3,000 per donee, exclusive of gifts of future interests in property, was and still is carved out.  

33. Telegraphic ruling, April 14, 1948.
35. Int. Rev. Code § 812(c). The restriction is similar where the first tax was a gift tax. But see note 5 supra.
The marital deduction provisions of the 1948 act are made applicable to gifts made after April 2, 1948. They have two distinct applications:

(1) Gifts from one spouse to another. Here half the value of the property interest passing to the spouse, that is, one-half of each particular gift item, qualifies as a marital deduction. Limitations, comparable to those in the estate tax law, relative to certain terminable interests and the like, appear in the gift tax statutes; however, the creation by the donor of a joint tenancy with himself and his spouse is entitled to the marital deduction in spite of the interest possessed and retained by the donor which may blossom into full ownership again upon his surviving the donee spouse.

(2) Gifts by a married person to a person other than the spouse. Here each such gift may be treated as made half by each spouse provided that (a) at the time of the gift each is a resident or citizen of the United States, (b) the spouse does not have a power of appointment over the property, (c) the two individuals concerned must be married when the gift is made and must not remarry during the balance of the calendar year, and (d) each consents in the manner prescribed to the division with respect to all gifts made in the calendar year by either while married to each other.

Minnesota Estate Planning

With the heavy Federal rates making themselves readily felt when the gross estate reaches $100,000 or more, the necessity of married persons planning that estate in the light of the marital deduction provisions of the Federal law is at once apparent. Indeed, it is only an accident when an estate plan formulated before April, 1948, happens to produce a fairly reasonable result now. This is obvious when one examines particular situations:

37. Int. Rev. Code § 1004(a) (3) (A). Note the distinction from the estate tax situation where the 50 per cent limitation applies to the adjusted gross estate which is an aggregate concept. There the full value of each qualified asset is a marital deduction until the 50 per cent limit is reached.
38. Int. Rev. Code § 1004(a) (3) (B) and (C).
39. Int. Rev. Code § 1004(a) (3) (D). The net effect of a transfer by a husband to himself and his wife as joint tenants is that one-quarter of the value of the property enters into the determination of net gifts. Only half of the value qualifies as a gift, 26 Code Fed. Regs. § 86.2(a) (Cum. Supp. 1950), and half of that half is a marital deduction. Under the Minnesota gift tax law, which recognizes no marital deduction, one-half of the value of the joint tenancy property is still the standard.
41. Fortunately, the mess produced by some of these old plans can usually be alleviated in part in Minnesota by the spouse's renunciation of the will and her taking her statutory interest under 2 Minn. Stat. § 525.212.
(1) Suppose H has an estate of $120,000 and there is no property in W's name. Prior to the 1948 act a frequently used and simple plan was for H to establish a testamentary trust which provided that the net income should be paid to W for life and that the principal should be distributed after her death to the children when they attained designated ages. At H's death the minimum Federal estate tax was $9,340 and no tax was incurred at W's subsequent death. Thus the property came down to the children's generation with a total Federal tax bill of $9,340. The same plan under the marital deduction system now produces the same tax, but if H's estate is so arranged to take full advantage of the marital deduction, and assuming that W survives him and does not consume principal and that only the marital property is taxable at her death, no Federal tax is incurred at either death (the $60,000 specific exemption eliminating each net estate) and the property comes to the children's generation undiminished by Federal estate tax. A savings of over $9,000 or about 7½ per cent of the entire $120,000 estate is effected.

(2) Now suppose H's estate is 200,000, leaving the other facts the same. An even greater savings in dollars is possible. Under the first plan the minimum Federal taxes would be $31,500 for the two deaths. Under the new plan a tax of $4,800 is incurred at each death, making a total of $9,600. A savings of $20,900 has been effected for the children.

The foregoing examples, however, should not be regarded as representative. The spouse may have an independent estate and other factors, mentioned below, may well produce cross effects and very adverse results. For example: H has an estate of $400,000. W has one of $200,000. If H dies first and his estate is planned so as to take advantage of the entire available marital deduction, that is, 50 per cent of his adjusted gross estate, we have a minimum Federal tax of $31,500 at his death. Even assuming that the nonmarital property is disposed of by H so as not to be taxable in W's estate at her later death, nevertheless she has a taxable estate of $400,000 and incurs a minimum Federal tax at her death of $87,700. This

(1949). This way out is unsatisfactory at best. It often encounters the obstacle of a consent signed when the will was drawn, and on many occasions is distasteful to the surviving spouse. In spite of indications to the contrary, In re Estate of Overvold, 186 Minn. 359, 368, 243 N. W. 439, 442 (1932); In re Estate of McBride, 195 Minn. 319, 263 N. W. 105 (1935), one wonders just how valid these consents, where given without consideration and under circumstances substantially different from those prevailing at the testator's death, should be.
makes a total of $119,200 for the two estates.\footnote{42} Had H used a marital deduction of only $100,000 the Federal tax at each death would have been $59,000 or a total of $118,200. Thus full use of the deduction reduced the property coming to the children by $1,000. Even these figures do not tell the full story for they do not take into consideration the other factors discussed below.

If the best possible use of a marital deduction is desired, the usual starting point is to determine the size of each spouse's estate and to prepare the plan so that the two net estates after the marital deduction for the first decedent are approximately equal; being thus in balance, neither estate reaches a higher bracket that the other. Under this procedure in the last example a marital deduction of $100,000 and no more is indicated. This, however, is only a starting point and is by no means the answer to the problem.

The following factors among others must be considered:

(1) The cross effect of the Minnesota inheritance tax. There is no marital deduction in the Minnesota law. The law brackets for the surviving spouse increase from 1 per cent to 12 per cent. In contrast, the Federal estate brackets are comparatively broad, particularly beyond $120,000 of net estate; from $120,000 to $560,000 there is a gross spread before credit for state death taxes of only 4 per cent and a minimum tax spread of only 1.6 per cent. Thus it is possible by careless use of the marital deduction to incur greater state tax which may largely offset the marital benefit.

(2) The cross effect of the Minnesota estate tax.

(3) The benefit to be achieved from the use of the property during the lifetime of the survivor. If it is anticipated that the spouse will survive the testator for a substantial period of time, full use of the marital deduction may well be indicated. The spouse will have for her life the benefit of the earnings of the money which, but for the marital, would have been paid out as Federal estate tax at her husband's death. This income benefit may often outweigh any increase in total Federal tax for the two deaths which, because of her independent estate, the marital deduction may have occasioned.

(4) The comparative ages of the two spouses. If there is a great difference in their ages the deferral of tax by the use of the marital deduction in the elder's estate looms more important.

(5) The possibility of the spouse's consumption or disposal of the marital deduction property during her lifetime. To the extent...
she does consume or dispose of the marital property during her period of survivorship, that property is never subjected to Federal death duties. Thus, if the situation is one where the survivor is going to live from principal, it is better that she do so from tax-free principal than from property already subjected to tax at her spouses's death. This factor suggests giving priority for principal invasions to a marital trust, as distinguished from the nonmarital trust, and for the use of qualified insurance programs calling for installment rather than interest payments.

(6) The confidence the testator has in his spouse's ability to handle property. Outright distributions to the spouse in order to obtain the marital deduction entail responsibility and the testator must realize that such an arrangement vests complete control in the spouse. Even the use of a qualified trust or programmed insurance gives the spouse at least testamentary control. Her spending tendencies, her subjectibility to the demands of grasping relatives and acquaintances, her sales resistance, and the testator's desire to relieve her of investment worries may all provide a brake to the use of the marital. The payment of more Federal tax may involve less real risk for the children's generation.

(7) The possibility of the spouse's remarriage. This usually involves the creation of certain rights in her new spouse to the marital property. The tax savings possible through the marital deduction may not be worth this risk.

(8) Business reasons for the deferral of the tax. The unliquid character of the testator's estate and the problems which customarily accompany a valuable but closely held corporate interest may be dominant reasons for full use of the marital deduction and consequent deferral of a large portion of the tax to the death of the surviving spouse even though the aggregate tax for the two estates is thereby increased.

(9) Peculiar income tax situations. Federal income tax rates, wholly apart from the additional burden of state income taxes, are often a more important factor than the death duty. The impact of income taxes upon the decedent's estate, the surviving spouse and other beneficiaries may well determine the extent of the use of the marital deduction.

(10) The gamble as to future death tax rates. For the decedent the rates are fixed at his death. What the applicable rates will be at the later death of his spouse is problematical. A belief that we are due for increased rates can be a factor arguing for less use of the marital.
(11) Increased administrative expenses in the second estate. The use of the marital deduction, particularly where outright bequests to the spouse are employed, increases the size of her estate and consequently the attendant costs, such as attorneys' and representatives' fees, bond premiums, etc., at her death. These may be substantial, and they tend to offset the benefit of the marital deduction for the first estate.

(12) Contemplated charitable gifts. The accurate placing of these, as between the two estates, now assumes more importance than ever.

(13) What the client wishes. What the testator wants to do with his estate and how he wishes to protect and provide for the objects of his bounty is still the most important thing. While taxes are important and have certainly clouded a situation which fifty years ago was concerned only with putting the testator's wishes on paper, they necessarily are secondary and they still do not normally consume the entire estate. Perhaps there is too much temptation in these days of high taxes to stress unduly any tax benefit and to overlook the fundamental importance of the testator's desire.

The foregoing are only some of the pertinent factors which affect the use of the marital deduction. There are others and each case will bring to light certain ones individually pertinent to it. There are naturally some risks involved in most of these factors but the exercise of good judgment in evaluating those risks is part of what the client purchases when he seeks and obtains adequate legal service.

One cannot overemphasize the lawyer's broadening duties and responsibilities in estate planning. No longer can he be content with a sentence or two of directions from his testator and then assume that he can produce a fairly satisfactory plan. He must investigate and ascertain all of the pertinent facts or he will finish with an ill-advised plan. The needed facts are obvious. He must know in detail the nature and value of all the husband's property which could possibly enter into the gross estate. He must know in detail the nature and value of all the wife's property. He must know the location of all real estate and the manner in which title thereto is held. He must know the location of all bank accounts and how they are carried. He must know how each security is issued. He should examine each savings bond. He must study each inter vivos trust and all existing contracts. He must know what gifts have been made and which could be challenged for death duty purposes. He should know and examine each gift tax return which has been
filed. He must examine every insurance policy and annuity contract or, better yet, work with the client’s insurance adviser. He must be aware of any existing power of appointment. He must know what inheritances are anticipated. He must know what the spouse’s own estate plan it. He must have some idea of the character of each member of the testator’s family and that person’s ability to handle financial matters. All of this is necessary and in addition to the basic knowledge, which we must assume that the lawyer has always had, of the testator’s wishes and the law.

Only by having these facts can the lawyer begin to apply the intricacies of the marital deduction, to examine its possibilities in the case, and to acquire a sparkling interest in the results it enables him to achieve. The marital deduction provides a real challenge to the lawyer who is a student of the law. It opens a new avenue of thought and of possibilities and of ingenuity, something which perhaps has been too rare in day to day legal practice of the last quarter century. It takes work to master the marital deduction and more work and a great amount of pencil pushing to apply it successfully. Does it mean that a lawyer is now called upon to devote more time to a testamentary problem than the eventual fee will warrant? Perhaps, but there is always available the satisfaction of a job well done, a client well satisfied at the obvious ingenuity of his attorney, and a reputation gained that will produce more of the same kind of work and a thriving probate practice. The days of the lazy will draftsman are over, and the lawyer who is not aware of that fact had better be concerned for himself and his profession.

SUMMARY

The marital deduction is an apt and excellent tool for estate planning in Minnesota and elsewhere but, as with any tool, it requires both the proper raw material of an adequate fact situation and a good craftsman. The lawyer can retain his assumed position as the latter only by intelligent industry and a willingness to devote the time and energy which is required to gain complete knowledge of the scope and capacities of this legal tool and of its dangers and limitations. It is not a legal device which he can properly employ with his customary dependence upon his legal judgment and training acquired in law school and through years of so-called practical professional experience. Here is one of those rarely presented new legal tools of real substance and of fairly general application. Correctly invoked and properly used it affords simultaneously correct client care and professional satisfaction. Absent these, it can be a boomerang which harms both attorney and client.