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Divorce and the Estate and Gift Taxes

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NOTES

DIVORCE AND THE ESTATE AND GIFT TAXES

In many respects marriage has been likened to a partnership. This is certainly true today in the sense that marriage involves a rather complex group of rights and duties. It is not strange then that the attorney for a party contemplating divorce must consider many factors in planning the dissolution of this marital partnership and the settlement of these rights and duties; and not to be overlooked are the tax consequences of divorce. Perhaps the desired results may be accomplished by a slight variation in the form, resulting in a substantial tax saving to both parties or a shifting of the tax burden from one to the other. Even if such cannot be accomplished, the extent of the tax burden on either party is an im-

portant factor in considering the amount of alimony or in making an equitable property settlement. It is the purpose of this Note to point out the estate and gift tax provisions of the Internal Revenue Code which must be considered by the attorney, and to discuss their effects.

EARLY DEVELOPMENTS IN THE ESTATE TAX[1]

The first federal estate tax was imposed by the Revenue Act of 1916.[2] By section 202(b) of that Act, the value of property transferred by the decedent in contemplation of death, or intended to take effect in possession or enjoyment at or after his death, was included in the decedent's gross estate unless it was "a bona fide sale for a fair consideration in money or money's worth." In 1924[3] Congress limited the deduction of claims against an estate to those claims incurred or contracted for a "fair consideration in money or money's worth," intending the test under the two sections to be the same.[4] In addition, almost from its inception[5] the estate tax has explicitly included in the decedent's gross estate the value of the interest which the surviving spouse held in the decedent's property in the nature of dower, curtesy, or their statutory equivalents.[6] Common sense might therefore indicate that Congress did not intend that the relinquishment of these property rights[7] of the surviving spouse should constitute a "fair consideration" within the meaning of the statute. However, the courts reached the opposite conclusion,[8] with the incongruous result that while these property

1. Convenience of discussion requires a subdivision of the estate and gift tax problems considered herein; but it must be remembered that, to an extent, sharp delineation is unrealistic. Each subdivision is an integral part of one large problem and is intelligible only when viewed in the light of the whole picture.

2. 39 Stat. 777 (1916).

3. Revenue Act of 1924, § 303(a)(1), 43 Stat. 305 (1924).

4. H. R. Rep. No. 179, 68th Cong., 1st Sess. 28, 66 (1924).

5. Revenue Act of 1918, § 402(b), 40 Stat. 1907 (1918), now Int. Rev. Code § 811(b). The 1918 Act was said to be declaratory of its predecessor, the Revenue Act of 1916, which made no mention of the inclusion of such interests. H. R. Rep. No. 767, 65th Cong., 2d Sess. 21 (1918); see Merrill v. Fahs, 324 U. S. 308, 311 (1945). *But see* Randolph v. Craig, 267 Fed. 993 (M.D. Tenn. 1920).

6. As stated in U. S. Treas. Reg. 105, § 81.14 (1939): "The effect of the provisions is to require the inclusion of the full value of the property, without deduction of the value of the interest of the surviving husband or wife, and without regard to the time when the right to such an interest arose."

7. The term "property rights" will be used throughout this Note to be the equivalent of dower, curtesy, or their statutory substitutes and in contrast to the term "support rights." This terminology is consistent with that used by the Treasury Department in E. T. 19, 1946-2 Cum. Bull. 166-169.

8. McCaughn v. Carver, 19 F. 2d 126 (3d Cir. 1927); Ferguson v. Dickson, 300 Fed. 961 (3d Cir.), *cert. denied*, 266 U. S. 628 (1924); *cf.* Stubblefield v. United States, 6 F. Supp. 440 (Ct. Cl. 1934). *Contra*: Mercantile Trust Co. v. Hellmich, T. D. 3545, III-1 Cum. Bull. 473 (1924).

rights of the surviving spouse were includible in the decedent's gross estate, not includible was the value of property "transferred" in consideration for the relinquishment of these property rights. Similarly, a claim against the estate based upon a promise given in consideration for relinquishment of property rights was deductible. In 1926[9] Congress substituted "adequate and full consideration" for "fair consideration," presumably intending to exclude relinquishment of the surviving spouse's property rights from the definition of consideration.[10] This intent was made explicit in 1932 when Congress added that:

> "For the purpose of this title, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth.' "[11]

By 1932, therefore, it was settled that transfers otherwise includible in decedent's gross estate because, for example, intended to take effect at death, were not to be excluded when made pursuant to an antenuptial promise given for the relinquishment of the surviving spouse's property rights. Similarly, claims against the decedent's estate based upon such an agreement were not deductible.

Deductible Claims Against the Estate Incurred Postnuptially

Where the parties after marriage have voluntarily separated and, as incident to the separation, settle their property rights, the courts have followed the reasoning used for antenuptial agreements and have held that the relinquishment of property rights does not constitute consideration for the settlement.[12] However, where a separation is pursuant to a decree of divorce or legal separation a new factor is introduced, the importance of which becomes apparent upon an examination of the statutory provisions concerned. The Revenue Act of 1932, as well as expressly stating that relinquish-

9. Revenue Act of 1926, § 302, 44 Stat. 70-71 (1926) (inclusions in gross estate) and § 303(a)(1), 44 Stat. 72 (1926) (deductions from gross estate).

10. "There must have been some reason for these successive changes. It seems evident that the purpose was to narrow the class of deductible claims. . . ." Taft v. CIR, 304 U. S. 351, 356 (1938).

11. Revenue Act of 1932, § 804, 47 Stat. 280 (1932), now Int. Rev. Code § 812(b). It seems clear that this amendment was merely declaratory of the change made by the 1926 Revenue Act. See Empire Trust Co. v. CIR, 94 F. 2d 307 (4th Cir. 1938) (the case did have the advantage of hindsight, being decided after the 1932 amendment).

12. Sheets v. CIR, 85 F. 2d 727 (8th Cir. 1938); Nantke v. United States, 35 F. Supp. 450 (W.D. N.Y. 1940); *see* Adriance v. Higgins, 113 F. 2d 1013, 1016, 1017 (2d Cir. 1940).

ment of the spouse's property rights is not consideration for purposes of the estate tax,[13] also revised the section of the Internal Revenue Code defining claims against the estate which were deductible, to make it clear that consideration would be required only for claims based upon a promise or agreement.[14]

Where the property rights are litigated in the divorce action and are determined by the court, it would be difficult to argue that a claim against the estate based upon such a decree was "founded upon a promise or agreement" within the meaning of the statute. Therefore, such claims need not be supported by consideration to be deductible.[15] But where the spouses are content to rely solely on their contract made in anticipation of divorce, and they make no request of the divorce court for an order concerning their property rights, it is equally difficult to escape the mandatory language of the statute, and the courts have uniformly held that a claim based upon such an agreement is not deductible.[16] These two propositions collide where the divorce court, rather than making an independent determination, incorporates a prior agreement of the parties into the decree. Is the claim against the estate founded upon a promise or agreement, or is it founded upon the decree? The ramifications of this question will be covered subsequently in a discussion of the gift tax. However, it may be said that generally the courts have held it to be

13. See note 11 *supra.*

14. Revenue Act of 1932, § 805, 47 Stat. 280-281 (1932), now Int. Rev. Code § 812(b). The Code, prior to the amendment, allowed the deduction of claims ". . . to the extent that such claims . . . were *incurred or contracted* bona fide and for an adequate and full consideration in money or money's worth. . . ." [Emphasis supplied.] Revenue Act of 1926, § 303(a)(1), 44 Stat. 72 (1926). The Amendment was designed to clarify the prior law. As stated in the report of the Committee on Ways and Means:

> "The existing law might be open to a construction under which no claim against the estate would be deductible unless supported by an 'adequate and full consideration in money or money's worth,' but the real intent could hardly have been to deny the deduction of liabilities imposed by law or arising out of torts, and the amendment whereby the requirement of consideration applies only where the liability is founded on contract is designed to clear up any doubt which may be thought to exist."

H. R. Rep. No. 708, 72d Cong., 1st Sess. 48 (1932); see also Sen. Rep. No. 665, 72d Cong., 1st Sess. 51 (1932).

15. Apparently the proposition is so readily accepted that the opposite view has not been urged with any degree of force. In Harris v. CIR, 340 U. S. 106, 110 (1950), the Court indicated that the Commissioner acquiesces in this position. In an earlier case the Commissioner urged the opposite view but his contentions were rejected. See CIR v. State Street Trust Co., 128 F. 2d 618 (1st Cir. 1942).

16. Meyer's Estate v. CIR, 110 F. 2d 367 (2d Cir. 1940), *cert. denied,* 310 U. S. 651 (1939); William Weiser, 39 B.T.A. 1144 (1939), *aff'd,* 113 F. 2d 486 (10th Cir. 1940) (point not discussed); Estate of Eben B. Phillips, 36 B.T.A. 752 (1937).

founded upon the decree,[17] reasoning that ". . . since the divorce court was free to disregard any allowances made in the separation agreement, the allowances were authentically its own, even in cases where it expressly accepted as proper the allowances actually agreed upon."[18]

Antenuptial Settlements and the Gift Tax

The gift tax reaches all transfers of property by gift, with certain exceptions unimportant here,[19] regardless of the form of transfer or the nature of the property.[20] The only indicium in the Code of what constitutes a gift is to be found in section 1002, which states:

> "Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purposes of the tax imposed by this chapter, be deemed a gift. . . ."[21]

The Treasury Regulations state that the tax is not limited to the common law concept of gifts, and a consideration not reducible to a money value, such as love and affection or a promise of marriage, is to be disregarded.[22]

Conspicuously absent is any provision as to whether or not the relinquishment of property rights of a spouse constitutes consid-

17. CIR v. Maresi, 156 F. 2d 929 (2d Cir. 1946); CIR v. State Street Trust Co., 128 F. 2d 618 (1st Cir. 1942); Fleming v. Yoke, 53 F. Supp. 552 (N.D. W.Va.), *aff'd per curiam*, 145 F. 2d 472 (4th Cir. 1944); Estate of Silas B. Mason, 43 B.T.A. 813 (1941); Edythe C. Young, 39 B.T.A. 230 (1939). The cases of Markwell's Estate v. CIR, 112 F. 2d 253 (7th Cir. 1940), *affirming* 40 B.T.A. 65 (1939), and Helvering v. United States Trust Co., 111 F. 2d 576 (2d Cir.), *cert. denied*, 311 U. S. 678 (1940) reach a contrary result. However, they may be distinguished on the ground that the fact that the agreement was incorporated into the decree was not considered. *See* CIR v. State Street Trust Co., 128 F. 2d 618, 621 (1st Cir. 1942). That this distinction may be valid is indicated by the fact that in a subsequent case the Second Circuit grouped its prior decision in the *United States Trust* case, *supra*, with those cases where the agreement was not incorporated into the decree. See CIR v. Maresi, *supra* at 930.

18. CIR v. Maresi, 156 F. 2d 929, 930 (2d Cir. 1946).

19. Int. Rev. Code § 1000(a).

20. Int. Rev. Code § 1000(b).

21. Int. Rev. Code §1002.

22. U. S. Treas. Reg. 108, § 86.8 (1936). This Regulation does except bad business bargains by providing that thansfers of property ". . . made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration. . . ." That this exception was not intended to apply to marital settlements even if made in the heat of divorce litigation was settled by the Supreme Court in Harris v. CIR, 340 U. S. 106, 112 (1950). See also CIR v. Barnard's Estate, 176 F. 2d 233, 236 (2d Cir. 1949).

eration within the meaning of the gift tax. The question first arose when a taxpayer and his prospective bride entered into an antenuptial agreement whereby he made certain transfers to her in return for relinquishment of her property rights. The Board of Tax Appeals[23] held that the transfers were not taxable gifts, reasoning that since Congress specifically amended the estate tax so as to exclude a release of property rights as "consideration," but did not make a similar provision in the gift tax, it was intended that such a release may constitute adequate and full consideration for gift tax purposes.[24]

In the same case on appeal to the First Circuit,[25] a contrary result was reached on two grounds. First, the phrase "adequate and full consideration in money or money's worth," even under the 1926 Revenue Act, excludes the relinquishment of property rights of a spouse; the 1932 amendment to the estate tax was simply declaratory of the existing meaning of that phrase[26] and was added merely from an abundance of caution, and the fact that such a qualification was not explicitly added to the gift tax is immaterial. Second, even if the 1932 amendment of the estate tax did change the prior law, the provisions of that amendment should be read into the gift tax definition of "consideration," for the gift tax was, as a principal purpose, intended to prevent evasion of the estate tax.[27] Since any rights a wife acquires in the taxpayer's property in the nature of dower would be included in his gross estate at his death, allowing an inter vivos transfer releasing those rights to escape the gift tax would defeat that purpose. The two decisions in this case are representative of the split in the lower courts prior

23. Bennet B. Bristol, 42 B.T.A. 263 (1940), *rev'd,* 121 F. 2d 129 (1st Cir. 1941).

24. Whether the value of the rights released was adequate and full consideration for the transfer then becomes a question of fact. *Compare* Bennett B. Bristol, *supra* note 23, *with* John D. Archibold, 42 B.T.A. 453 (1940).

25. CIR v. Bristol, 121 F. 2d 129 (1st Cir. 1941).

26. The court relied here upon Empire Trust Co. v. CIR, 94 F. 2d 307 (4th Cir. 1938). See note 11 *supra.*

27. "In short, the design is to impose a tax which measurably approaches the estate tax which would have been payable on the donor's death had the gifts not been made and the property given had constituted his estate at his death. The tax will reach gifts not reached, for one reason or another, by the estate tax.

"The gift tax will supplement both the estate tax and the income tax. It will tend to reduce the incentive to make gifts in order that distribution of future income from the donated property may be to a number of persons, with the result that the taxes imposed by the higher brackets of the income tax law are avoided. It will also tend to discourage transfers for the purpose of avoiding the estate tax." Sen. Rep. No. 665, 72d Cong., 1st Sess. 40 (1932); see also H. R. Rep. No. 708, 72d Cong., 1st Sess. 28 (1932).

to the decision of the Supreme Court in *Merrill v. Fahs*[28] which, in the same fact situation, adopted in its entirety the reasoning of the First Circuit.

In *CIR v. Wemyss,*[29] a companion case to *Merrill v. Fahs,* the prospective bride of the taxpayer was the beneficiary of a trust, the income of which was to be paid to her until her death or marriages. Because she was reluctant to give up this income, the taxpayer agreed to establish a similar trust for her benefit if she would become his wife. The Tax Court[30] held the transfer a taxable gift and the court of appeals[31] reversed, pointing out that a donative intent is essential to constitute a gift, and that the detriment which she would suffer in the loss of the trust income was adequate consideration to negate such intent.[32] The Supreme Court reversed the court of appeals on the ground that the lack of donative intent is not sufficient to avoid the gift tax except in the case of a transfer in the ordinary course of business.[33] The tax is imposed upon those transfers which deplete the donor's estate.[34]

Postnuptial Agreements and the Gift Tax

Although *Merrill v. Fahs* left no question as to the taxation of transfers pursuant to an antenuptial agreement under the gift tax, considerable disagreement existed as to postnuptial settlements. In *Herbert Jones,*[35] decided prior to the Supreme Court's decisions in the *Merrill* and *Wemyss* cases, the Tax Court held that a transfer pursuant to a postnuptial agreement made in anticipation of divorce was not a taxable gift. The decision was founded upon two alternative propositions: (1) it is error to read the 1932 amendment to the estate tax into the gift tax;[36] (2) where the parties are anticipating divorce, a settlement of their respective rights is reached after bargaining at arm's length and donative intent is

28. 324 U. S. 308 (1945).
29. 324 U. S. 303 (1945).
30. William H. Wemyss, 2 T. C. 876 (1943).
31. Wemyss v. CIR, 144 F. 2d 78 (6th Cir. 1944).
32. *Id.* at 82.
33. "Congress chose not to require an ascertainment of what too often is an elusive state of mind. For purposes of the gift tax it not only dispensed with the test of 'donative intent.' It formulated a much more workable external test, that where 'property is transferred for less than an adequate and full consideration in money or money's worth,' the excess in such money value 'shall, for the purpose of the tax imposed by this title, be deemed a gift. . . .'" CIR v. Wemyss, 324 U. S. 303, 306 (1945).
34. *Id.* at 307.
35. 1 T. C. 1207 (1943).
36. Herbert Jones, 1 T. C. 1207, 1209 (1943).

therefore lacking.[37] Both propositions were sustained thereafter in the Court of Appeals for the Seventh Circuit.[38]

It should be clear that the Supreme Court overruled the first proposition by the *Merrill* case in holding that the 1932 amendment to the estate tax should be read into the gift tax. Nor is the second proposition valid since the decision in the *Wemyss* case, which held that donative intent is not a proper test for purposes of the gift tax. Encouraged by this fact, the Treasury Department promulgated a ruling, E.T. 19,[39] which extended the theories of the *Merrill* and *Wemyss* cases to postnuptial agreements, as stated in this excerpt from the headnote of E.T. 19:

> "Transfers of property pursuant to an agreement[40] incident to divorce or legal separation are not made for an adequate and full consideration in money or money's worth to the extent that they are made in consideration of a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or other marital rights in the transferor's property or estate. . . ."

A distinction should be drawn at this time to add clarity to later developments. It is to be remembered that the Revenue Act of 1932 actually made two amendments to the estate tax. One amendment defined consideration, wherever used in the estate tax, to exclude relinquishment of property rights;[41] the other required consideration for deductible claims only when the claim was founded upon a promise or agreement.[42] It was only the definition of consideration which the *Merrill* case read into the gift tax, and no attempt was made to decide when any consideration would be required.

The Tax Court refused to recognize the *Merrill* and *Wemyss* cases as controlling in the case of postnuptial settlements, distinquishing those cases solely on the basis that they involved antenuptial agreements and reverting to their argument that the parties

37. *Id.* at 1210.
38. See Lasker v. CIR, 138 F. 2d 989 (7th Cir. 1943).
39. E. T. 19, 1946-2 Cum. Bull. 166.
40. Although the Treasury Department limited the application of E. T. 19 to transfers "pursuant to an agreement," such is not indicative of its acquiescense in the view that the gift tax should also contain the estate tax provision requiring consideration for only those deductible claims founded upon a promise or agreement. Rather, it was more in the nature of a refusal to rule on that question. See Brief for Respondent, p. 58, Harris v. CIR, 340 U. S. 106 (1950), where the Commissioner urged that the Court not read the limitation into the gift tax.
41. Revenue Act of 1932, § 804, 47 Stat. 280 (1932), now Int. Rev. Code § 812(b).
42. Revenue Act of 1932, § 805, 47 Stat. 280 (1932), now Int. Rev. Code § 812(b).

dealt at arm's length without donative intent.[43] This court failed to recognize, at least since the *Merrill* and *Wemyss* decisions, that lack of donative intent is not what is sought.[44] Rather, it is the consideration received by the donor, and, for this purpose, the relinquishment of property rights by the spouse is not consideration to any extent.

Strong disapproval has been expressed of the distinction drawn by the Tax Court between antenuptial and postnuptial settlements.[45] Since the primary purpose of the gift tax was to prevent the tax-free depletion of the donor's estate by an inter vivos transfer, it has been reasoned that the significant question is whether the transfer, if not actually made during the donor's lifetime, would constitute a deductible claim under the estate tax.[46] This, as was seen in the discussion of the estate tax,[47] depends upon whether the claim was founded upon an agreement or a court decree. While this reasoning is certainly within the spirit of the *Merrill* case, it goes well beyond its holding, which merely defined the common phrase, "consideration in money or money's worth," in the same manner as it is defined in the estate tax. What has been introduced into the gift tax is a limitation on the requirement of consideration which does not appear in the gift tax.[48]

43. See *e.g.*, Clarence B. Mitchell, 6 T. C. 159 (1946); Edmund C. Converse, 5 T. C. 1014 (1945), *aff'd on other grounds,* 163 F. 2d 131 (2d Cir. 1947). In Edward M. McLean, 11 T. C. 543 (1948), the Tax Court expressly held that E. T. 19 was invalid to the extent that it taxes transfers pursuant to a postnuptial agreement made in consideration for the release of the spouse's property rights.

44. The reasoning of the majority of the Tax Court was not without dissent. See dissenting opinions in Norman Taurog, 11 T. C. 1016, 1022 (1948); Edmund C. Converse, 5 T. C. 1014, 1016, 1019 (1945).

45. "This distinction without a difference seems to have developed in the Tax Court which early became committed to a different view . . . and then felt unwilling to accept what we think is the clear import of the Supreme Court's analysis." CIR v. Barnard's Estate, 176 F. 2d 233, 235 (2d Cir. 1949).

46. *Ibid.*

47. See notes 15-18 *supra* and text thereto.

48. For those to whom such judicial legislation is distasteful, perhaps the approach suggested by Justice Frankfurter in his dissent in Harris v. CIR, 340 U. S. 106, 115 (1950) would be more palatable. He would hold that a transfer pursuant to a divorce decree is not subject to the gift tax reasoning that ". . . a gift tax is an exaction which does presuppose the voluntary transfer of property and not a transfer in obedience to law."

One writer has suggested a constitutional basis upon which transfers pursuant to a divorce decree must necessarily be free of the gift tax: "The validity of the gift tax has been sustained [Bromley v. McCaughn, 280 U. S. 124 (1929)] on the theory that it is an excise on the transfer of property, rather than a direct tax on the property itself, which would be void for failure of proper apportionment. An excise taxes the exercise of a privilege; and privilege, in this sense, implies alternative. State law and court order, however, [leave] no alternative to the [taxpayer]." 41 Col. L. Rev. 1274, 1278 (1941). It may be argued that such reasoning is hypertechnical; yet it does lend legal

In *Harris v. CIR*,[49] the first case involving a postnuptial settlement to come before the Supreme Court, the Court not only gave approval to the "agreement or decree" test as developed in the estate tax cases but also approved its incorporation into the gift tax. The separation agreement in the *Harris* case, which was incorporated into the decree, provided that it was not to become effective until and unless a divorce was granted, and that it should be submitted to the court for approval but should survive any dercee which might be made. The Supreme Court made it clear that the fact that the agreement was to survive the decree was unimportant, for the statute is concerned with whether the transfer is effected by the parties or by the court decree, and not with the means by which the transfer may be enforced.[50] The Court, however, in finding that the transfer was effected by the decree rather than by the agreement, relied on the fact that the agreement was conditioned upon the entry of the decree.[51]

Whether the Court intended this to be the sole determining factor is not clear. A subsequent decision in the Tax Court has so interpreted the *Harris* case, and held that where the agreement is incorporated into the decree, but is *not* conditioned in some manner upon the entry of the decree, it is a taxable gift.[52] Admittedly, if any other circumstances are factors to be considered in determining whether the transfer was effected by the decree or the agreement,

theory to the natural feeling that a transfer required by a divorce court is not a proper incident for the imposition of a gift tax.

49. 340 U. S. 106 (1950).

50. Harris v. CIR, 340 U. S. 106, 111 (1950). As set forth in a footnote in the dissenting opinion, in several states the agreement survives the decree even though not so specified in the agreemnt. *Id.* at 119 n. 4. Were the Court to rule otherwise on the effect of survival of the agreement, the taxability of the transfer would often turn on state law, a result to be avoided to preserve uniformity in the application of federal tax laws.

51. After pointing out that the agreement was conditioned upon entry of the decree, the Court said: "Even the Commissioner concedes that that result would be correct in case the property settlement was litigated in the divorce action. . . . Yet without the decree there would be no enforceable, existing agreement whether the settlement was litigated or unlitigated. Both require the approval of the court before an obligation arises. . . . In each case it is the decree that creates the rights and the duties; and a decree is not a 'promise or agreement' in any sense—popular or statutory." Harris v. CIR, 340 U. S. 106, 110 (1950).

52. George G. McMurtry, 16 T. C. No. 23 (Jan. 24, 1951). The Tax Court stated that its decision was supported by CIR v. Barnard's Estate, 176 F. 2d 233 (2d Cir. 1949). It is true that in the latter case the agreement incorporated into the decree was in no way conditioned upon the entry of a decree. Upon comparing the Second Circuit's decision in that case with its decision in Harris v. CIR, 178 F. 2d 861, 865 (2d Cir. 1949), *rev'd*, 340 U. S. 106 (1950), however, it appears that the underlying theory of the Second Circuit has been that the transfer must be "founded" solely upon the decree. This theory was overruled by the Supreme Court in the *Harris* case.

they were not suggested in the *Harris* case. That the Supreme Court may have left several things unsaid is indicated by the fact that the Court laid no stress on the fact that the agreement was incorporated into the decree. It is not likely that the Court would abandon such a long established requirement without mentioning it. In addition, the Court relied upon and approved[53] the Second Circuit's decision in *CIR v. Maresi*.[54] In that case, it was held that a claim against the estate was deductible solely on the basis that it was incorporated into the divorce decree.[55] Regardless of whether or not the Tax Court has erroneously interpreted the *Harris* case, until the Supreme Court again considers the question it would seem that prudence requires that the postnuptial agreement not only be incorporated into the decree but that it be conditioned upon the entry of the decree.

Also left in a questionable status by the *Harris* case is the extent of incorporation required. Justice Frankfurter in his dissenting opinion[56] pointed out that while the divorce court approved the agreement as a whole, it ordered only certain of the transfers provided for in the agreement to be made. Yet the majority did not remand the case for a determination of the tax on the transfer not specifically ordered. Thus it would appear that mere approval by the divorce court is sufficient.

Finally, there remains the problem of the extent to which the courts will look behind the decree. It seems quite improbable that the courts will relitigate the propriety of the amount of the award, even though the decree merely incorporates the agreement of the parties. No such attempt was made in the *Harris* case and it would seem that, though lack of donative intent is not a proper criterion for gift tax purposes,[57] it may be fairly assumed that the husband gave up no more than necessary.[58] The Bureau has indi-

53. Harris v. CIR, 340 U. S. 106, 110 (1950).

54. 156 F. 2d 929 (2d Cir. 1946).

55. That this was the sole issue upon which the court determined whether it was a deductible claim is indicated by the following language: ". . . we must therefore here decide whether, because the decree of divorce incorporated by reference the separation agreement, Helen G. Maresi's claim against the estate was 'founded upon a promise or agreement.' . . . At first blush the distinction [between those agreements incorporated into the decree and those which are not] seems a little formal, but on consideration it appears to be sound." CIR v. Maresi, 156 F. 2d 929, 930-931 (2d Cir. 1946).

56. Harris v. CIR, 340 U. S. 106, 119 n. 3 (1950).

57. CIR v. Wemyss, 324 U. S. 308 (1945); see note 29 *supra* and text thereto.

58. It must be granted that this assumption will not be valid in every case. However, the additional taxes which would be derived from the exceptional cases would seem to be overshadowed by the large administrative task which would be entailed.

cated that it will not attack the jurisdictional basis of the decree.[59] Still unsettled, however, is the question of whether incorporation of an agreement settling the property rights of the spouses will be sufficient protection against gift, or estate, taxation where the divorce court has power only to award alimony in the absence of such an agreement.[60]

POSTNUPTIAL TRANSFERS INCLUDED IN THE GROSS ESTATE

Section 811 of the estate tax provided for the inclusion in the decedent's gross estate of certain transfers[61] except those constituting a bona fide sale for an adequate and full consideration in money or money's worth.[62] As noted before, the disqualification of the release of property rights of the spouse as consideration applies to the whole of the estate tax.[63] However, in the inclusion provisions of the estate tax[64] there is no limitation which would require consideration only for those transfers "founded upon a promise or agreement," as in the provisions for deductible claims.[65] After discussing the judicial incorporation of that limitation into the gift tax,[66] little remains of the problem of whether it will be read into section 811 of the estate tax for postnuptial transfers.[67] As was true in the gift tax, the primary purpose for the inclusion of these transfers in the decedent's gross estate is to prevent the tax-free depletion of the decedent's estate. It would not further this purpose to include an inter vivos transfer made during the decedent's life pursuant to a divorce decree where such a transfer, if not made until after decedent's death, would constitute a deductible claim against the estate.

59. See G. C. M. 25250, 1947-2 Cum. Bull. 32.

60. The same question would apply where the husband was awarded alimony in a state where the wife has no obligation to support the husband. *Cf.* Clarissa H. Thomson, P-H 1947 TC Mem. Dec. ¶ 47,194 (1947) (settlement taxable).

61. See Int. Rev. Code §§ 811(c)(1)(A) (in contemplation of death), 811(c)(1)(B) (in which the decedent has retained certain rights for his life), 811(c)(1)(C) (intended to take effect at or after decedent's death), 811(d) (revocable transfer), and 811(f) (property with respect to which the decedent has exercised a general power of appointment under certain circumstances).

62. *Ibid.*

63. See notes 11 and 41 *supra* and text thereto.

64. See note 61 *supra.*

65. Int. Rev. Code § 812(b); see note 14 *supra* and text thereto.

66. See notes 46-49 *supra* and text thereto.

67. Apparently, the only case where such a factual situation has arisen was Helvering v. United States Trust Co., 111 F. 2d 576 (2d Cir.), *cert. denied,* 311 U. S. 678 (1940) (transfer includible). However, the problem was not considered.

SUPPORT OF THE WIFE AND CHILDREN

Often as important as the settlement of the property rights of the parties, upon the dissolution of a marriage, are the provisions made for the support and maintenance of the wife and children. In E.T. 19,[68] the Treasury Department took the position that for both estate and gift tax purposes, a release of support rights by the spouse may constitute a "consideration in money or money's worth." This settled the question of whether support rights were included within the meaning of the phrase, "other marital rights in the decedent's property or estate," as used in section 812(b),[69] a dispute which existed between the Board of Tax Appeals[70] and the Second Circuit.[71] The Commissioner will review the facts of each case to determine the reasonable value of such support rights. However, that the payments to the wife extend beyond the period of their joint lives and, hence, beyond the period of the husband's duty to support, does not necessarily result in a tax.[72] The Commissioner will determine whether the aggregate amount paid and payable over the whole period exceeds the normal aggregate support rights which would ordinarily terminate upon the husband's death.[73]

So far as the obligation of the husband to support his minor children is concerned, the courts have unanimously agreed that to the extent that a transfer is made, or a claim against the estate is based, upon the assumption of the husband's duty to support his minor children, it is supported by consideration in money or money's worth.[74] Whether the consideration is "adequate and full" is determined in the same manner as in the case of the husband's duty to support his wife.[75]

68. E. T. 19, 1946-2 Cum. Bull. 166, 168.

69. See note 11 *supra* and text thereto setting out the section.

70. The Board of Tax Appeals held that support rights were not included in the phrase, Estate of George Brokaw, 39 B. T. A. 783 (1939), *rev'd sub nom.* Helvering v. United States Trust Co., 111 F. 2d 576 (2d Cir.), *cert. denied,* 311 U. S. 678 (1940); Edythe C. Young, 39 B. T. A. 230 (1939) (alternative holding).

71. The Second Circuit held that support rights were included in the phrase. CIR v. Maresi, 156 F. 2d 929 (2d Cir. 1946); Helvering v. United States Trust Co., 111 F. 2d 576 (2d Cir.), *cert. denied,* 311 U. S. 678 (1940); Meyer's Estate v. CIR, 110 F. 2d 367 (2d Cir. 1940), *cert. denied,* 310 U. S. 651 (1939).

72. E. T. 19, 1946-2 Cum. Bull. 166, 168.

73. For an interesting discussion of the valuation of the wife's right to support where such rights are to terminate on remarriage, see Wolfe, *Something New in Gift and Estate Taxes,* 25 Taxes 217 (1947).

74. CIR v. Weiser, 113 F. 2d 486 (10th Cir. 1940); Helvering v. United States Trust Co., 111 F. 2d 576 (2d Cir.), *cert. denied,* 311 U. S. 678 (1940); Estate of Eben B. Phillips, 36 B. T. A. 752 (1937).

75. See Estate of Eben B. Phillips, 36 B. T. A. 752 (1937).

As was seen in the previous discussion of *Harris v. CIR*,[76] where a transfer or a claim against the estate is founded upon a decree rather than a promise or agreement, there is no requirement of consideration. It was also pointed out that in the case of the settlement of property rights of the parties, the courts will probably not collaterally attack the amount of the award for the wife, even where the divorce court merely incorporated the agreement of the parties into the decree.[77] However, if the underlying reason for not relitigating that question is that when the husband negotiates a separation agreement in anticipation of divorce he will give up no more than required by law, perhaps the courts will be more inclined to look behind the provisions for the support of his minor children and make an independent valuation of the husband's duty. Such provisions are likely to be based upon parental love rather than arm's length bargaining.[78]

Insurance Proceeds

It is not uncommon upon divorce to employ the use of an insurance policy on the husband's life, as a security device or as an outright transfer, to provide continuing payments to the wife after the husband's death. The gift tax consequences of such a transfer are not different from any other transfer of property and will turn upon whether the transfer was pursuant to an agreement or a decree.[79] On the other hand, proceeds of an insurance policy are included in the husband's gross estate for estate tax purposes where such proceeds are payable (1) to the executor,[80] or (2) to other beneficiaries when the premiums are paid directly or indirectly by the husband, or the husband, at the time of his death, possessed any of the incidents of ownership of the policy.[81] An exception is made in the situation where the husband pays the premiums but has transferred the policy in a manner not constituting a gift under the Code.[82] The Code does not define the word "transferred," but in effect it must mean "transferred all of the incidents of ownership," because if less is transferred, it will be included in the gross estate as

76. 340 U. S. 106 (1950); see note 49 *supra* and text thereto.
77. See note 49 *supra* and text thereto.
78. *Cf.* Hooker v. CIR, 174 F. 2d 863 (5th Cir. 1949), *affirming* 10 T. C. 388 (1948).
79. Probably no gift tax will be imposed unless the husband has transferred all of the incidents of ownership of the policy, on the basis that the gift is not complete. *Cf.* Estate of Sanford v. CIR, 308 U. S. 39 (1939).
80. Int. Rev. Code § 811(g)(1).
81. Int. Rev. Code § 811(g)(2).
82. Int. Rev. Code § 811(g)(3).

a policy in which the husband possesses an incident of ownership at the time of his death. Thus, it would appear that where the husband transfers the policy, including all of the incidents of ownership, pursuant to an order of the divorce court, or in consideration for the release of support rights with a value not less than the value of the policy, the proceeds will not be included in the husband's gross estate.

Where the policy on its face is payable to a beneficiary other than the executor, but it is found to be merely security for an obligation of the husband, the proceeds will be treated as though received by the executor and will be included in the gross estate.[83] The ultimate result, however, will be the same as where the husband made an outright transfer, as the wife's claim against the estate will be deductible if founded upon a divorce decree[84] or the release of support rights.

83. Estate of Silas B. Mason, 43 B. T. A. 813 (1941).
84. *Ibid.*