AN ANALYSIS OF ESTATE ADMINISTRATION AND PLANNED REDUCTION IN FEDERAL ESTATE TAXES AND COSTS FOR ESTATES VALUED AT LESS THAN $120,000

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PREFACE

This study was concerned with an analysis of estates valued between $60,000 and $120,000. The primary objective was to determine whether a savings in federal estate taxes and attorney fees could be obtained when certain estate planning techniques were employed. Information from 1972 probate files for estates in Tulsa County, Oklahoma, was used for the empirical data in this study.

I want to express my appreciation to Dr. Dale E. Armstrong, my major adviser, for his guidance and assistance throughout this study. I also appreciate the assistance given me by the other committee members, Dr. William S. Houston, Dr. Gerald M. Lage and Dr. Ivan Chapman.

A note of thanks is extended to the office of the Clerk of the Probate Court for Tulsa County, where I was allowed to spend many hours perusing their files to obtain the information needed for this study. Dorathea and Garland Holeman provided invaluable services in typing and proofing the rough draft and Audry Jones was most helpful in preparing the final copy.

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CHAPTER I

INTRODUCTION

Significance of the Study

The people of the United States have been subject to a federal estate tax since the Revenue Act dated September 8, 1961.[1] The current rates and exemptions were established in 1942. The minimum rate is 3% on the first $5,000 of the taxable estate which increases to a maximum of 77% of the taxable estate exceeding ten million dollars. The amount exempt from federal estate tax is $60,000. Significant legislation affecting the tax exemption of estates was included in the Revenue Act of 1948. A marital deduction was established in an amount equal to the value of property passing to the surviving spouse, but limited to one-half of the adjusted gross estate. The effect of this provision is to exempt taxable estates up to $120,000 from federal estate tax as long as property valued at $60,000 or more passes to the surviving spouse.[2]

It should be noted that the federal law provides for an estate tax. A distinction is made between an estate tax and an inheritance tax. An estate tax is a tax on the transfer of property at death; whereas, the

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[1] William Raymond Green, The Theory and Practice of Modern Taxation (Chicago, 1933), pp. 165-182.

[2] Federal Estate and Gift Tax Reporter (New York, 1942), Sec. 810, 1939 Internal Revenue Code; (New York, 1948), Sec. 812 (e), 1939 Internal Revenue Code.

inheritance tax is a duty charged on property rights and benefits acquired by virtue of another's death.[3] Consequently, an estate tax is easier to determine than an inheritance tax because it does not depend upon the interpretation of a will and the identification of rightful heirs.

During the period between 1949 and 1966, the number of estate tax returns filed in the United States increased significantly. In 1949, there were 24,552 estate tax returns filed compared to a total of 97,339 estate tax returns filed in 1966.[4] This is an increase of approximately 296% whereas the increase in the number of deaths recorded was only 29% (1,443,607 deaths in 1949 compared to 1,863,149 deaths recorded in 1966).[5] Thus the increase in taxable estate tax returns filed is increasing at a greater rate than the rate of deaths. Unfortunately, a substantial portion of the increase in the number of filings is due to the decreasing value of the dollar. In other words, the $60,000 exemption is not as large in real terms today as it was in 1942 when it was initiated. One index of the purchasing power of the dollar, using 1967 = $1.00, shows 1940 with an index of 2.381; 1950, 1.387; and 1971, 0.824.[6] By computing the ratio of 0.824/2.381, the $60,000 specific exemption in terms of the 1940 dollar, is converted to approximately $21,000 in terms of purchasing power in 1971. Since Congress has not

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[3]John Wendell Beveridge, The Law of Federal Estate Taxation (Chicago, 1956), pp. 1-2.

[4]Statistics of Income 1965, Fiduciary, Gift and Estate Tax Returns (Washington, D. C., 1967), p. 87.

[5]World Almanac and Book of Facts (New York, 1951), p. 435; (1970), p. 72.

[6]Ibid.,(1973), p. 126.

adjusted the $60,000 exemption to reflect annual inflation increases, it becomes more desirable for individuals to plan their financial affairs to avoid unnecessary tax erosion of their estates.

Given the existing provisions of the Internal Revenue Code, it is possible to minimize federal estate taxes through planning for the proper use of the marital deduction and preferred forms of property and insurance ownership. In Oklahoma, probate fees for an estate have been traditionally a function of the value of the gross estate. Thus any planning which reduces the valuation of the gross estate results in a reduction of probate fees as well as the federal estate tax.

Estate planning is a sensitive subject for most people. Initiating a plan for optimum financial arrangements in the event of one's own death is avoided because of this sensitivity. However, opening a savings account, taking title to a home, acquiring insurance or drawing a will are steps in providing an estate for designated heirs. As a result, several different individuals, some professional and some with few credentials, participate in developing a person's estate. Much of the so-called estate planning being done today is conducted by life insurance and mutual fund sales people.[7] Many of those people who have seen an attorney for estate planning, acknowledge that the extent of their estate planning consisted of an explanation of the contents of their will.[8]

Professional accountants are additionally trained in taxation and

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[7]Victor I. Eber, "The Personal Audit: The First Step in Lifetime Financial and Estate Planning," Estate Planning,1(Autumn, 1973), p. 30.

[8]Irving Kellogg, "The CPA as Estate Planner," Journal of Accountancy, 137 (June, 1973), p. 58.

the business of calculating and communicating numbers. They have the opportunity to perform a social service in preserving family financial security. Tax return preparation and periodic consultations for handling investments and tax-oriented transactions are normal contacts between the client and the professional accountant. Unlike the attorney who performs specific assignments, the client's professional accountant establishes a routine of continuing service to his client. Because of this contact with his client, the professional accountant is in a position to motivate his clients to undertake estate planning. Effective estate planning often requires the skill and knowledge of an attorney, trust officer and life underwriter as well as the accountant. Other professionals believe the accountant has a responsibility to initiate an estate planning program when his client is in need of such a service.[9] But few professional accountants initiate a comprehensive financial or estate plan.[10]

One reason for the professional accountant's reluctance to initiate comprehensive estate planning is the belief that it will be difficult to charge a fair fee for the work and time involved, since the client will not experience any immediate benefits.[11] The lack of information demonstrating that the fees paid for estate planning will save money, not cost money, is a contributing factor to the reluctance of the accountant to motivate his clients to engage in estate planning.

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[9]Edward Earl Milam, "A Study of the Accountant's Role in Estate Planning" (unpublished dissertation, Louisiana State University, August, 1971), p. 115.

[10]Victor I. Eber, p. 31.

[11]Ibid., p. 31.

Over fifty percent of the estate tax returns filed in the United States in 1966 had a gross valuation between $60,000 and $120,000.[12] In those estates where the maximum marital deduction was used, there was no federal estate tax liability. However, the surviving spouse, in most cases, would succeed to a taxable estate. The question is whether this size of an estate could have availed itself of estate planning tools so that the benefits, which consist of the federal estate tax and probate or administrative costs saved, exceeded the cost of developing the estate plan. If a net savings could not be generated for the representative case, then estate planning for gross estates in the range of $60,000 to $120,000 would have to be justified on the basis of social benefits, which would be largely determined by each client and his unique situation. Under these circumstances the professional accountant would have good reason for being reluctant to initiate a comprehensive estate plan. On the other hand, if it can be shown that the monetary benefits from estate planning exceeded the cost of planning for these estates within the $60,000 to $120,000 range, the professional accountant would be provided with some evidence that economic benefits accrued to the client and any unique social benefits would add to the worth of estate planning. In this situation, the professional accountant would be apt to motivate his clients to begin estate planning. In fact, this could become a distinct service paralleling the income tax consultation and preparation performed by the professional accountant.

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[12] Statistics of Income, 1965, Fiduciary, Gift and Estate Tax Returns, p. 88.

Objectives of the Study

The objectives of this study were: (1) to identify estate planning techniques having the potential to reduce federal estate tax and administrative costs of estates valued from $60,000 to $120,000; (2) an analysis of actual 1972 estates within this range which had been filed for probate or judicial determination in Tulsa County, Oklahoma; and (3) testing the effectiveness of the above estate planning techniques in reducing federal estate tax and attorney fees.

Organization of the Study

The first chapter contains an introduction and discussion of the significance of the study as well as the objectives, organization and limitations of the study. Chapter two and three consist of a description and an analysis of those estate planning procedures applicable to estates with a net value of less than $120,000. Also included is a discussion of the procedures involved in administering an estate.

The fourth chapter is a presentation of information regarding the administration of the estates in the study and methods used by the testators to transfer the property of their estates. In chapter five, an estate planning technique utilizing testamentary trusts was imposed upon the actual estate cases. Some deviations were explored and comparisons were made to determine the possible savings in federal estate taxes and attorney fees.

Chapter six presents a format, with a discussion of possible alternatives, that may be used when planning is undertaken for estates valued between $60,000 and $120,000. The seventh chapter includes a summary and recommendations for further study.

Discussion of the Research Procedure

The research procedure consisted of two phases. The first phase was an in-depth study of the federal estate tax law regarding the form of ownership of property by two or more persons commonly referred to as joint tenants with rights of survivorship, the ownership of life insurance, the qualification of the marital deduction, the use of cross-testamentary trusts, and the gift tax provisions which complemented the estate tax provisions. The second phase consisted of the selection of cross-testamentary trusts as the recommended estate planning technique. This technique was used for the qualified cases in the study and a comparison was made to indicate the effectiveness of cross-testamentary trusts to save federal estate taxes and costs.

The sources of material for the first phase were the Federal Estate and Gift Tax Code, the Federal Tax Regulations and applicable published court decisions. Additional sources were many articles and texts concerned with various phases of estate planning and discussions with certain accountants and attorneys who have done counseling with regard to estate planning and/or have participated in the preparation of federal estate tax returns and final determination of federal estate taxes due. These interviews functioned as a safeguard against techniques that appeared feasible in principle, but have failed in practice. This was important because the Revenue Code may be variously interpreted by those involved with its enforcement. In the most complex areas the various interpretations did not coincide and required court action to resolve. Since this study was concerned with prospective estate planning, it considered only those techniques wherein the interpretations had been consistent.

The data from the actual estates used in the second phase were obtained from the files of 1,640 estates entered for probate during 1972 in Tulsa County, Oklahoma. Since the first $60,000 of the gross estate was exempt from federal estate tax, the study was not concerned with estates valued at less than $60,000. The upper limit of $120,000 was chosen, because full use of the marital deduction would exempt the first estate from federal estate tax up to $120,000 and because the federal estate tax brackets were uniform up to this amount.[13] Eighty case files were finally identified as meeting this range criterion.

The population for the second phase consisted of those eighty estates described above. Tulsa County, Oklahoma, was chosen as the area for this study because it was one of two metropolitan areas readily accessible to the investigator. A metropolitan area was considered necessary to provide a sufficient number of estates to be meaningful. The basic research hypothesis was that appropriate planning techniques, namely cross-testamentary trusts, applied to estates which were valued between $60,000 and $120,000 reduced federal estate taxes and administration costs net of the cost of planning.

Estate tax planning results in unique studies of given estates in an effort to reflect the personal needs and desires of the individual estate owner. The personal desires could not be generalized, whereas some generalizations regarding personal needs based upon the amount of wealth was made. The concern of this paper was optimum estate planning for a family unit, consequently certain a priori assumptions were applied. First, it was assumed the husband was the estate owner and,

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[13]See Appendix A.

for estates valued up to $120,000, his prime concern was to conserve his estate for the benefit of himself, his spouse and his children. Thus gifts to third parties were not recommended. A second assumption was that any non-tax considerations were secondary to minimizing federal estate taxes and probate costs. This assumption allowed one to concentrate on the maximum savings of tax and costs possible while conserving the estate. Thirdly, the gross estate value, as shown in the probate file, was assumed to be the entire wealth of the husband and wife unit and that the original owner was the husband. The planning began in the husband's will and made provisions for the wife as the survivor of her husband. This generally followed the traditional circumstances and results of life expectancy studies. The fourth assumption was that estate planning was an ongoing process and ample time was available to complete any planning procedures recommended. Lastly, it was assumed probate costs generally followed a minimum fee schedule adopted by a state's bar association. Consequently, the fee schedules for Oklahoma in Appendix B, on page 184, were used to determine the attorney fees for probating an estate or terminating a joint tenancy in the event of death.

In addition to the assumptions required to generalize estate planning procedures, further assumptions were made with respect to the data that were used for this study. The estate planning files of the attorney and accountant were confidential and the returns filed with the taxing authorities were not available to the public. However, files of the estates submitted for probate were a matter of public record. These files provided information regarding the fair market value of the probate assets of the estate, and generally, an accounting of the estate assets and monies received and spent by the executor/administrator of the estate until a final determination was made by the court. As previously indicated the probate files of Tulsa County, Oklahoma, for 1972 were examined. Seventy-three cases, out of a total of 1,640 cases, were found that reflected total assets valued within the range of $60,000 to $120,000. Seven other cases apparently had estates valued within this range, but data regarding total assets were missing.

Data regarding the administration of the cases were extracted in an effort to compile information regarding circumstances surrounding the estates in the range of $60,000 to $120,000. Such information as the number of decedents who died testate (had a will) versus intestate was compiled. An examination was made of the extent to which decedents held their property in joint tenancy and the general categories of investment property. For instance, did cash, stocks and bonds, real estate, or life insurance represent a relatively large portion of the estates? Information was derived regarding the distribution of the estate to the heirs according to the provisions of the will versus those that would have been made according to the Oklahoma laws of descent. In addition, information was compiled regarding the length of time the estate was involved in probate.

After deriving information regarding general characteristics of the estates under analysis, computations were made to determine the federal estate tax and attorney probate fees that would apply if provisions for cross-testamentary trusts were included in the husband's will. Basically our assumptions indicated the husband's ownership of property which was transferred to the wife before being transferred to lineal descendants. Thus the property was subject to a potential federal estate tax and administration fees in both estates before reaching the lineal descendants. It was the taxes and fees in both estates that were considered. Of the 73 cases, nineteen pertained to women who were predeceased by their husbands and twenty-three were men who were survived by their wives. These forty-two cases, plus two which involved a husband and wife whose deaths were only four months apart and their estates were closed simultaneously, were those chosen for the comparison between the federal estate taxes and attorney fees that were payable by the estates as filed and those payable by the estates if cross-testamentary trust provisions were in effect. A tabulation of the amounts compared and the resulting savings was prepared for each estate.

The population of this study consisted of the 73 cases, which reflect assets within the range of $60,000 to $120,000. The two estates, mentioned previously that were closed simultaneously, were included in the 73 count as one case. Thus there were thirty cases eliminated in the test for tax and cost savings. These cases did not meet the assumptions in the following ways:

(1) Four cases had assets valued in the low sixties and after expenses on the husband's estate, the net estate of the wife fell below $60,000.

(2) Five cases pertained to decedents who had never married.

(3) In four cases the decedent was a male with no surviving spouse.

(4) Seven cases involved females who were survived by their husbands.

(5) In five cases, the decedent was a male with a surviving spouse, but less than half of the property was transferred to the wife. Three of the cases were attributable to provisions

of a will, but two occurred because the husband died intestate (had no will) and, consequently, the wife received only a third of her husband's estate by virtue of the Oklahoma laws of descent.

(6) Five of the cases lacked certain information regarding the devisees and legatees or federal estate tax information.

Statistically valid generalizations about estate planning for purposes of reducing federal estate taxes and probate costs are restricted to those estates in Tulsa County, Oklahoma, and included in the population of this study. However, this study serves as a beginning in empirical testing of estate planning and, thus, becomes a part of a data base from which valid generalizations relevant to estate planning can be developed.

This study provides some empirical evidence of the federal tax and probate cost savings which can be expected from estate planning for estates valued between $60,000 and $120,000. With this type of information, the public accountant has some objective information which he can utilize when encouraging estate planning for his clients. In addition, this information may influence accountants to urge estate planning for a greater number of their clients, because a savings can be shown for estates with a value below that previously thought.

From this study a basic format for proceeding with estate planning of an estate valued between $60,000 and $120,000 was developed. The purpose of the format has been to establish an awareness of contributing factors to the minimization of federal estate taxes and attorney fees for the two estates of a husband and wife. A comparison between this format and the results of the estate as it exists before the estate planning is undertaken would reflect the possible savings in federal estate tax and attorney fees. A computation should also be made of the federal estate taxes and attorney fees that apply to the estate plan reflecting the testator's personal desires and planning procedures which are not contradictory to those desires. The cost in terms of federal estate tax and attorney fees that arise because of the personal desires of the testator can be determined. The testator would then have the opportunity to decide whether his personal desires regarding the distribution of his estate is worth the cost.

CHAPTER II

PLANNING FOR THE FEDERAL ESTATE TAX AND PROBATE COSTS - MARITAL DEDUCTION AND TRUSTS

Nature of the Federal Estate Tax

The federal estate tax is an excise tax based on the fair market value of assets transferred at death. It is not a tax on the property itself or a tax on the right of an heir to receive the property. The amount of tax is determined by applying the estate tax rates to the value of the taxable estate. The tax is not affected by the relationship of the beneficiaries to the decedent.

Basically, the gross estate includes the value of all property to the extent of the decedent's interest in it at the time of his death and the value of property transferred to others during his lifetime if the transfer was made within three years before death and in contemplation of death. Also included is the value of certain other types of property interests such as jointly held property[1] to the extent of the decedent's contribution to purchased joint estates, life insurance proceeds[2] if the decedent or his estate had any incidents of ownership

[1]See discussion of joint interests beginning on p. 56 of this study.

[2]See discussion of life insurance proceeds beginning on p. 66 of this study.

at the time of his death and property over which the decedent had a general power of appointment given to him by another, and annuities.[3]

The decedent's gross estate is reduced by certain allowable deductions in arriving at the taxable estate. These deductions include a specific exemption of $60,000, funeral expenses, expenses incidental to the administration of the estate, losses incurred due to casualty or theft during administration, debts of the decedent and enforceable claims against his estate, certain mortgages and liens, a marital deduction[4] for value of certain property passing to the decedent's surviving spouse, and certain transfers for charitable use.[5]

The rates applied to the taxable estate range from 3% on the first $5,000 to 77% on the entire taxable estate in excess of $10,000,000.[6] The tax computed at these rates is reduced by various credits allowed for certain other taxes paid, such as state inheritance, estate and gift taxes, federal gift taxes, foreign death duties, and federal estate taxes paid by prior estates on previous transfers to the decedent.[7] These credits are subject to various limitations. For instance, the credit for state inheritance, estate and gift taxes is allowed to

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[3]For a detailed explanation of the method of ascertaining the value of the gross estate, see IRC 1954, Sec. 2031 through 2044, and the regulations thereunder.

[4]See discussion of the marital deduction on pp. 24 of this study.

[5]For a detailed explanation of the method of ascertaining the value of the taxable estate, see IRC 1954, Sec. 2051 through 2056, and the regulations thereunder.

[6]Refer to Appendix A for the federal estate tax rate schedule.

[7]For a detailed explanation of the credits against tax, see IRC 1954, Sec. 2011 through 2016, and the regulations thereunder.

the extent it is actually paid to the state, but limited in amount to that derived from the table for computing the maximum credit for state death taxes.[8]

The estate tax applies to the estate of any person who dies leaving property with a taxable situs within the United States. Its application varies between estates of persons considered residents or citizens of the United States and estates of those considered non-residents. For the purposes of this study, only United States citizens were considered.

The date of valuation of the property in the decedent's estate can be one of two dates. The executor may value property as of the date of the decedent's death or elect the alternate valuation date which is six-months after death in the case of decedents dying after December 31, 1970.[9] If the alternate valuation date is elected, all property included in the gross estate is to be valued as of six months after the decedent's death, except property sold or otherwise disposed of during the six-month period which is to be valued as of the date of disposition.[10]

Nature of the Federal Gift Tax

The federal gift tax supplements the federal estate tax. It taxes lifetime transfers based on the fair market value of the property at

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[8]Refer to Appendix A for the maximum state death tax credit schedule.

[9]As amended by Sec. 101 (a) of P.L. 91-614, enacted December 31, 1970. Previously the alternate valuation date was one year after death.

[10]The alternate valuation provisions are found in IRC 1954, Sec. 2032 and the accompanying regulations.

the time of the gift. The gift tax law taxes every transfer of property by individuals to the extent they are not supported by an adequate and full consideration in money or money's worth, and to the extent they are not specifically deductible or excludible.[11] The intent and purpose of the gift tax is the deterring of gifts to avoid estate taxes, although the rates are only three-fourths of the estate tax rates.[12]

There are specific exclusions provided by law. Each year a donor may exclude the first $3,000 in gifts of present interests,[13] to each donee.[14] In the case where the husband makes the gift to a third person, the wife can consent to the gift, and, in essence, treat the gift as being made one-half by each and each spouse claims the $3,000 annual exclusion. The effect is that each year a husband and wife can give $6,000 or less to their children, or anyone else for that matter, without incurring a gift tax liability. In addition to the annual exclusion, each donor is allowed a lifetime specific exemption of $30,000. Gifts which otherwise would be taxable can be applied to this specific exemption until it is reduced to zero. This can occur in one year or many years, however, once the full $30,000 exemption has been exhausted,

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[11]For a detailed explanation of transfers in general, see IRC 1954, Sec. 2511, and the regulations thereunder.

[12]Refer to Appendix A for the federal gift tax rate schedule.

[13]The annual exclusion of $3,000 is not available if the gift is that of a future interest. See Regs. Sec. 25.2503-3 for a discussion of future interests. Detailed discussion herein is beyond the scope of this study.

[14]1954 IRC Sec. 2503 and the regulations thereunder.

no further lifetime exemption is available.[15]

The gift tax law also allows a deduction for transfers between spouses, commonly referred to as the marital deduction. It is a deduction, subject to certain limitations and conditions, allowable for one-half the value of any property interest transferred by gift between a husband and wife.[16] For gifts made after December 31, 1970, the gift tax is imposed on a calendar quarter basis rather than a yearly basis.[17]

The gift tax computation is cumulative in nature. The tax rate schedule is applied to all taxable gifts made during one's lifetime. For example, assume a husband and wife who have had a program of making gifts totalling $15,000 annually to their one son. Each year they have a $6,000 annual exclusion by virtue of the wife consenting to the gift, thus $4,500 is taxable for each spouse. In the first six years, there would be no taxable gifts, because they elected to use their specific exemption of $30,000 each. In the seventh year, the specific exemption remaining for each is $3,000, thus $1,500 would be taxable. Each would incur gift taxes for the seventh, eighth, and ninth years as follows:

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[15] 1954 IRC Sec. 2521 and the regulations thereunder. It should be noted this exemption is available to each donor with no reference to the number of donees, whereas the annual exclusion is available to the donor for gifts to each donee. If qualified gifts were made in one year to ten grandchildren by one donor the annual exclusion would be as much as $30,000.

[16] 1954 IRC Sec. 2523 and the accompanying regulations.

[17] Secs. 102 (a)(2) (A) and (B) of P.L. 91-614 enacted December 31, 1970.

	7th Year	8th Year	9th Year
Taxable gifts to date	$ 1,500.00	$ 6,000.00	$10,500.00
Gift Tax	33.75	165.00	416.25
Credit for gift tax previously paid	-0-	33.75	165.00
Gift Tax due	$ 33.75	$ 131.25	$ 251.25

The completion of the transfer of property by gift does not necessarily eliminate the value of that property from the donor's gross estate. Under the federal estate tax law, there are provisions, for a backward look into a deceased transferor's life, called transactions in contemplation of death.[18] Under these provisions, any transfers made within three years before the decedent's death will be included in his gross estate unless shown they were not made in contemplation of death or the transfer constituted a bona fide sale. Any transfer made more than three years before the decedent's death is excluded from this provision. Congress enacted this provision to reach substitutes for dispositions by will. Otherwise, an estate owner on his deathbed could transfer his entire property to others without subjecting the property to estate taxes.

It should be noted that any transfer made within the three-year period is presumed to be made in contemplation of death unless the decedent's representative can show differently. This places the burden of proof on the decedent's representative. Unfortunately, a precise definition of the words "in contemplation of death" does not

[18]IRC 1954, Sec. 2035, and the accompanying regulations.

exist.[19] The Internal Revenue Service contends a gift is prompted by the thought of death if made to avoid death taxes, as a substitute for a testamentary disposition, or for any other motive associated with death.[20] Generally it is difficult for the decedent's representative to gather enough evidence of motives associated with life to rebut the statutory presumption that the transfer was made in contemplation of death.

In the event a gift is made and gift tax paid thereon, a credit against the estate tax is allowed for the gift tax paid when the property is included in the gross estate under the "in contemplation of death" provision. Thus when gifts are a desirable part of an estate plan, they should be made rather than avoided purely because of this provision, because the tax paid reduces the gross estate value and a credit for the gift tax paid is allowed as a credit against the federal estate tax.

Ordinarily, an important aspect of estate planning is the use of lifetime gifts. Consideration should be given to making lifetime gifts

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[19] The United States Supreme Court defines them as: ".....that the thought of death is the impelling cause of the transfer, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited and its purpose thwarted by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is near at hand.

If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts inter vivos which spring from a different motive." U. S. v. Wells, 9 AFTR 1440.

[20] Regs. Sec. 20.2035 - 1 (c).

to the point where gift and estate tax rates are equalized. However, this study was concerned with the feasibility of estate planning for estates of $120,000 and less and where the testator's desire was to retain control and the benefits of his entire estate for himself and his wife during their lifetimes. Thus taxable gifts were not an issue. Discussion of federal gift taxes is included, however, because no estate plan is complete if the testator is not told the general tax elements involved in making gifts. If the testator is rather young, it may develop that his estate grows to that point where gifts would be a feasible way of reducing the value of his gross estate. A surviving spouse who would not qualify for a marital deduction, may find it advantageous to make gifts to lineal descendents, thus reducing the gross estate, rather than defer the transfer of assets until they pass through the estate.

Administration Procedure

A person's estate must generally be administered whether he dies with a will, testate, or without a will, intestate. The administration process is basically the same in either instance, however, the intestate decedent gives up the right to choose his successors and the manner of their succession.

Where a decedent dies testate, the first step is finding the executed will. The will usually names a person or corporation as executor. Although not necessary, the naming of an executor can generally save time and expense. The executor is the logical person to petition for the probate of the will. Ordinarily the executor, if not an attorney himself, needs to hire an attorney to advise him and to handle the legal work involved.

To probate the will means the court will adjudge matters of genuineness, proper execution, and testamentary capacity and also establish that the will offered for probate has not been revoked. When this is completed, the estate is ready to be administered. Where there is no will, or if the will fails to appoint an executor, an administrator will be appointed by the court and the subsequent procedures of estate administration vary only slightly.

The first step taken by the executor or administrator in the administration of the estate is to ascertain the existence and valuation of the assets of the estate. He must take inventory and have the estate appraised. This is not necessarily an easy task because it involves locating and identifying all the decedent's belongings. The attorney helps the executor to file the appropriate preliminary tax notices, to obtain tax releases and to open an estate bank account. Sufficient funds must be placed in this account to meet the present debts and expenses of the estate, especially those liabilities involved in the last illness and the funeral. During the administration of the estate, the assets must be managed which could involve sales of property, collection of rents, payment of continuing expenses and debts, and distribution of outstanding assets. During the period of administration, the personal representative has to account periodically for receipts and disbursements. The complexity of administering the estate depends upon its size, types of property involved, and general liquidity of the assets, to name just a few.

Both time and expense are involved in administering an estate. One source reports that approximately three-fourths of the testate and intestate cases in their study covering 659 estates were completely administered within fifteen months.[21] Probate court expenses will include court fees and costs, appraisal fees, personal representative fees, and attorney fees. The court costs and appraisal fees ordinarily are not significant expenses in estate administration.[22] The personal representative fee can be significant, however, a fee is often not paid because the executor or administrator is a very close family member who participates as an heir to the estate and waives his right to a fee.[23]

An attorney who has been employed in the administration of the estate is entitled to a reasonable compensation to be paid by the executor or administrator as part of his duty. Local court rules generally determine the extent of these fees. Attorney fees are a significant expense of the administration of an estate and there is a direct correlation between the attorney's fee and the size of the estate. For these reasons only the attorney fees were considered as the probate cost to be minimized in this study.

Since the estates analyzed in this study have a situs in Tulsa County, Oklahoma, the attorney fees were determined by using the

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[21]Marvin B. Sussman, et al., The Family and Inheritance (New York, 1970), p. 238. Norman F. Dacey, How To Avoid Probate (New York, 1965), p. 6, refers to an up-to-date survey that stated ".....overwhelmingly, the time indicated was two to five years." However, the source of this survey was not referenced.

[22]ibid., pp. 241 and 242. Over 90% of the cases had court costs of $100 or less and appraisal fees, likewise, were $100 or less in nearly 90% of all cases with fees listed.

[23]Marvin B. Sussman, p. 243. For estates in this sample, no personal representative's fee was listed in 60% of the testate cases and three-fourths of the intestate cases.

minimum fee schedule as approved and adopted by the House of Delegates of the Oklahoma Bar Association at its meeting December 4, 1970.[24]

A brief description of the federal estate and gift tax laws and the administration procedures for an estate have been given. The following topics are presented in detail because they are most commonly involved in estate planning and are especially applicable to estates valued at more than $60,000 but less than $120,000.

Marital Deduction

Introduction

Both common law and community property jurisdictions are found in the United States. Prior to 1942, community property was includible in the gross estate to the extent that the decedent had an interest in the property. In a community property jurisdiction, only one-half of a husband and wife's economic wealth was subject to the estate tax on the death of the first spouse. Subsequently, when the second spouse died, the remaining one-half was subjected to estate tax. If the jurisdiction was subject to common law, however, the whole estate was taxed at the husband's death, assuming the couple's wealth was in his hands. If he predeceased his wife, that property passing to her was taxed again at her death. Thus Congress enacted a statute attempting to conform estate taxation of community property jurisdictions roughly to tax results in a common law jurisdiction.[25]

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[24] Refer to Appendix B for the pertinent excerpts from the Minimum Fee Schedule of the Oklahoma Bar Association, see p. 184.

[25] Revenue Act of 1942. Sec. 402.

This legislation led to further inequities and in 1948, Congress gave statutory recognition to local law differences between community property and common law jurisdictions and created a new tax rule independent of local property rules.[26] This new tax rule is referred to as the marital deduction.

Although the marital deduction was intended to equalize tax results in community property and non-community property jurisdictions, the estate planner in the community property state has substantial advantages over his counterpart in common law jurisdictions.[27] In common law states, such as Oklahoma, estate planning is necessary if the full advantage of the marital deduction is to be taken and still avoid a second tax on the property in the surviving spouse's estate to the greatest extent possible. Consideration must be given as to how and to what extent the marital deduction should be used.

General Requirements for the Marital Deduction

Basically, the marital deduction permits the value of a taxable estate to be reduced by the value of the property passing to the

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[26] Revenue Act of 1948. Sec. 361. The 1949 Federal Tax Service (New York, N.Y.) Para. 24,211 states: "The Revenue Act of 1948 effects a revolutionary change in the theory of estate taxation. It attempts to put residents of community and non-community property states on an equal tax basis by recognizing that state law in the community property jurisdictions effectively divides ownership of property acquired during marriage between the spouses. To achieve this result in other jurisdictions - the so-called 'common law' states - the act permits, within certain limitations as explained below, the transfer at death from the decedent spouse to the surviving spouse of up to one-half of the decedent's estate without tax."

[27] Harold G. Wren, "Drafting with a View to Taking Advantage of the Marital Deduction," 1969 Institute on Estate Planning (Indianapolis, 1969), Para. 69.702.

decedent's surviving spouse.[28] The total marital deduction, however, shall not exceed fifty percent of the value of the adjusted gross estate.[29] Certain requirements must be met to qualify for the marital deduction. First, the decedent must have been a citizen or resident of the United States. Second, marital status must exist at the time of death. Third, a property interest qualifies for the estate tax marital deduction only if it is included in the decedent's gross estate. Fourth, and last, the property interests passing to the spouse must be within the definition of a "deductible" interest. Generally a "deductible" interest means that, to the extent the property interest is not consumed or given away during the remainder of the surviving spouse's life, the property interest will be includible in the surviving spouse's gross estate.[30] Property interests, which pass to the surviving spouse, qualify for the marital deduction, and continue to exist as the surviving spouse's property, will be subject to federal estate tax in the second spouse's estate. Thus, the marital deduction allows a deferment of tax on one-half the estate value until the second spouse dies. Since the estate tax rates are progressive, the desire is to remove property from the highest estate tax bracket of the deceased which subsequently becomes subject to the lower estate tax bracket of the surviving spouse. Obviously this assumes that the spouse with the greater portion of the combined holdings of the husband and wife will die first. The possibility that the order of death may be reversed increases the

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[28] IRC Sec. 2056 (a).

[29] IRC Sec. 2056 (c) (1).

[30] Norman R. Milefsky, "The Estate Tax Marital Deduction, Pitfalls, Problems and Planning," The Tax Adviser, 3(1972), pp. 469-470.

complications in estate planning. Nevertheless, planning should proceed primarily on the assumption the spouse with the larger estate will die first. Naturally, this assumption would not apply where the facts of a particular situation indicate otherwise.

Overqualification of the Marital Deduction

Since property passing to the surviving spouse, which remains intact with no change in ownership, will be includible in the spouse's taxable estate, part of estate planning is a determination of the savings that can be obtained through the use of the marital deduction. Note that the marital deduction is limited to fifty percent of the adjusted gross estate. Thus property passing to the surviving spouse having a value in excess of the limitation could be subject to federal estate tax in the first estate and again in the second estate.

Example: Husband (H) and wife (W) have a combined adjusted gross estate of $200,000 which for federal estate tax purposes is attributable entirely to H. H dies leaving his entire estate to W.

Adjusted gross estate	$200,000
Maximum marital deduction	100,000
	100,000
Exemption	60,000
Taxable estate	$ 40,000
Federal estate tax	$ 4,800

Assume W dies ten years later[31] and the property has remained intact with no change in ownership:

Adjusted gross estate ($200,000 less $4,800)	$195,200
Exemption	60,000
Taxable estate	$135,200
Federal estate tax	$ 31,260

In this example one-half of the estate, or $100,000 does not qualify for the marital deduction, resulting in $40,000 being taxed in H's estate and the $100,000 less the $4,800 federal estate tax paid in H's estate is again taxed in W's estate. This is an overqualification of the marital deduction and is costly in terms of federal estate taxes not to mention probate fees. One aspect of estate planning is to avoid such overqualification of the marital deduction, or at least, indicate the cost in federal estate taxes and probate fees that are generated by such actions. Since this study was concerned with the estates for husbands and wives which did not exceed $120,000 in value, it is obvious that the marital deduction and the $60,000 statutory exemption can eliminate the federal estate tax on the first estate. However, if the husband owns the entire estate, dies first, and passes all of it to his wife, the potential federal estate tax on her $120,000 estate is $9,500.00.

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[31]IRC Sec. 2013 (a) provides for a credit against the estate tax for all or a part of the estate tax paid with respect to the transfer of property to the present decedent from a person dying within ten years before, or within two years after, him. If the prior decedent predeceased him by more than two years, the credit allowable is reduced by 20% for each full two years by which the death of the transferor preceeded the decedent's death. Estate planning calculations avoid these complex computations by assuming the subsequent death occurs at least ten years later.

Proper Use of the Marital Deduction

One facet of estate planning should be a consideration of the proper use of the marital deduction. Sometimes the best results are achieved by taking only part or none of the marital deduction.[32] The personal circumstances of the testator must be analyzed and the estate plan developed accordingly. However, for the purpose of this study, we were considering the combined property of a husband and wife not in excess of $120,000, who desired to have the maximum amount reach their children. In Table I on the following page, the combined property of the husband and wife results in a value, before the marital deduction and exemption, of $120,000. The first line indicates the maximum federal estate tax and administration costs of $17,900 on both estates where the entire property is owned by one spouse and left entirely to the surviving spouse. Note the overqualification of the marital deduction. Although all of the property is transferred to the surviving spouse, and unless dissipated, is taxed in the subsequent estate, $60,000 provides no federal tax benefit whatever to the first estate. In addition, probate expenses accrue in both estates and, in effect, apply twice to the same property. The second line reflects the federal taxes and administration costs incurred when the overqualification of the marital deduction is avoided. On a $120,000 estate, federal taxes

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[32] Edward J. Schnee, "An Analysis of the Optimum Marital Deduction," The Tax Adviser, 5 (1974), pp 222-230. In this article, the author used a simulation model and concluded that to determine an optimal transfer to the surviving spouse, several factors need consideration; specifically, rates of return, size of estate, and remaining life of spouse. Since these were factors beyond the scope of this study and there was no evidence in the literature that such factors were used in determining the desired transfer to the surviving spouse in current estate planning practices, it was not pursued in this study.

TABLE I

WORK SHEET FOR DETERMINING THE MOST EFFECTIVE USE OF THE MARITAL DEDUCTION
ASSUMES THE SPOUSE WITH THE LARGEST SHARE OF PROPERTY DIES FIRST

	(1) Combined Estate	(2) Husband's Property A.G.E.*	(3) Marital Deduction	(4) Specific Exemption	(5) Estimated Probate Expense	(6) Federal Tax	(7) Combined Tax and Probate on "H's"	(8) Col. 1-2 Wife's Property	(9) Col. 3 From Husband	(10) Specific Exemption	(11) Probate Expense	(12) Federal Tax	(13) Combined Tax and Probate on "W's"	(14) Total on Combined Property
1)	$120,000	$120,000	$120,000**	$ 60,000	$ 4,900	$ -0-	$ 4,900	$ -0-	$120,000	$ 60,000	$ 4,700	$ 8,300	$ 13,000	$ 17,900
2)	120,000	120,000	60,000	60,000	4,900	-0-	4,900	-0-	60,000	60,000	2,500	-0-	2,500	7,400
3)	120,000	100,000	50,000	60,000	4,300	-0-	4,300	20,000	50,000	60,000	2,900	300	3,200	7,500
4)	120,000	100,000	40,000	60,000	4,300	-0-	4,300	20,000	40,000	60,000	2,500	-0-	2,500	6,800
5)	120,000	80,000	40,000	60,000	3,500	-0-	3,500	40,000	40,000	60,000	3,300	1,200	4,500	8,000
6)	120,000	80,000	20,000	60,000	3,500	-0-	3,500	40,000	20,000	60,000	2,500	-0-	2,500	6,000
7)	120,000	60,000	30,000	60,000	2,700	-0-	2,700	60,000	30,000	60,000	3,700	2,500	6,200	8,900
8)	120,000	60,000	-0-	60,000	2,700	-0-	2,700	60,000	-0-	60,000	2,500	-0-	2,500	5,200

*Gross estate after allowable expenses such as estimated probate expenses.
**Maximum of $60,000 allowed as marital deduction.

are eliminated completely and administration expenses are reduced in the second estate so that the children would get $112,600 ($120,000 - 7,400) or $10,500 more than under the first arrangement, merely because the overqualification of the marital deduction is avoided.

Lines 3 - 8 indicate various situations where the husband and wife each have property of their own. Lines 3, 5, and 7 reflect use of the maximum marital deduction allowable, whereas lines 4, 6, and 8, as well as line 2, depict the "best" marital deduction. The smallest total tax in the two estates occurs when the marital deduction equalizes the two estates, i.e., (Col. 2 - Col. 8) ÷ 2.

Where the value of the adjusted gross estate does not exceed $120,000, the determination of the proper use of the marital deduction means the difference between incurring a federal estate tax liability on the second estate or not. (Lines 2, 4, 6, and 8, Col. 12).

Formula Bequests Used to Avoid Overqualification

It has been demonstrated that an overqualification of the marital deduction is disadvantageous and should be avoided for purposes of minimizing estate taxes and administration costs. To meet the problems of obtaining the maximum marital deduction through simple division of the estate, despite changes in the estate after execution of the will, formula bequests were developed. A formula bequest clause acts, with respect to marital deduction property, as an automatic adjuster of a testator's estate when its value and character change during his lifetime. Hopefully, the formula bequest clause reduces the risk resulting from failure to review the estate plan. However, this should not give the impression that the use of a formula bequest clause precludes all need for reviewing the estate plan periodically.

There are two basic forms for a formula bequest clause. One form is commonly called a pecuniary marital bequest and the other a fractional share of the residuary estate bequest. A pecuniary formula bequest is usually expressed as an amount equal to one-half of the adjusted gross estate as determined for Federal estate tax purposes. This amount shall be reduced by the value of all other property passing to the surviving spouse under any other provision of the will or outside the will which are included in the gross estate and qualify for the marital deduction. The result of these provisions is to establish the value of the property passing to the surviving spouse equal to the maximum marital deduction allowable under the Internal Revenue Code.

The formula pecuniary bequest, once determined, becomes a fixed charge against the probate estate. If a pecuniary formula bequest is used and the executor is given the power to select the properties to satisfy the bequest, there is a danger the marital deduction may be denied.[33] This danger can be avoided with the use of a fractional share formula, discussed below, or a pecuniary formula with a direction that assets distributed in kind are to be valued at the date of

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[33]Rev. Proc. 64-19, 1964-1 CB682, applies to the allowance of the marital deduction in cases where there is some uncertainty as to the ultimate distribution to be made in payment of a pecuniary bequest in trust where the governing instrument provides that the executor or trustee may satisfy bequests in kind with assets at their value as finally determined for federal estate tax purposes. Whether, by virtue of the provisions of the will or trust, or by virtue of applicable state law, it is not clear that the discretion of the fiduciary to make distributions is limited, then the interest in property passing to the surviving spouse is not ascertainable as to the date of death and, thus, a marital deduction is denied.

distribution. This provision will result in the estate realizing a gain or loss upon the disposition of appreciated or depreciated property. Such income tax effects are beyond the scope of this study and are mentioned only in passing. Other transfers which would avoid the danger of the marital deduction being denied are transfers of specific assets, transfers solely in cash and transfers where the executor has no discretion to select assets to be distributed in kind.[34]

The other basic form is the fractional share marital bequest. Technically, the fractional formula bequest provides that the residuary estate shall be multiplied by a fraction in which the numerator is one-half the value of the adjusted gross estate as finally determined for federal estate tax purposes, less the value of other property passing to the surviving spouse, by bequest or otherwise, but only to the extent included in the gross estate and qualifying for the marital deduction, and the denominator is the residuary estate. Obviously, the cancellation of the two terms in the formula leaves only the numerator. Again, as with the pecuniary formula bequest, the result is to establish the value of the property passing to the surviving spouse equal to the maximum marital deduction allowable under the Internal Revenue Code. A fractional formula bequest avoids the danger of being unascertainable and thus denied as a marital deduction; however, such a bequest will

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[34]Norman R. Milefsky, p. 23.7, states: "The purpose of Rev. Proc. 64-19 is to prevent the executor from satisfying the marital bequest with property which has decreased in value since the date of decedent's death, or alternative valuation date, if applicable, while satisfying the other bequests with property which has increased in value. In such a case, the deceased's estate would receive a maximum marital deduction while the surviving spouse would receive property worth less than the marital deduction, thus, she would receive property with a built-in capital loss and there would be a reduction in her eventual estate tax liability."

share in the appreciation or depreciation of the estate assets. This raises some income tax considerations in post-death planning.[35]

Examples of some common forms for the pecuniary formula clause and the fractional share clause in a will are as follows:[36]

Pecuniary formula - "If my wife, W, survives me, I give to her (or to the X Trust in trust for her benefit) an amount equal to the maximum estate tax marital deduction (allowable in determining the Federal estate tax payable by reason of my death) minus the value for Federal estate tax purposes of all items in my gross estate which qualify for said deduction and which pass or have passed from me to my said wife (the words "pass or have passed" shall have the same meaning as such words shall have under the provisions of the Internal Revenue Code in effect at the time of my death) under other provisions of this will, by right of survivorship with respect to jointly owned property, under settlement arrangements relating to life insurance proceeds, or otherwise. In making the computations necessary to determine the amount of this pecuniary estate tax marital deduction gift, values as finally determined for federal estate tax purposes shall control."

Fractional share - "If my wife, W. survives me, my executor shall divide my residuary estate into two separate trusts. One trust, called "Trust A,' shall be that fraction of my entire

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[35]ibid., p. 23.8. This author indicates a belief that the fractional share marital bequest permits greater post-death income tax planning than the pecuniary marital bequest.

[36]Harold G. Wren, Para. 69.722.1 and 69.722.3.

residuary estate which will secure for my estate the maximum marital deduction allowable under the federal estate tax law. The numerator of this fraction shall be one-half of my adjusted gross estate (as defined in the Internal Revenue Code) less the value of all property finally allowed as a marital deduction for property passing to my wife, other than property passing under this paragraph, and the denominator shall be the value of my entire residuary estate, all based on values as finally determined for federal estate tax purposes."

To avoid decreases in the maximum marital deduction, the will should provide that death taxes are to be borne by the non-marital bequests. Local law determines the effect death taxes have on the property passing to the surviving spouse unless there is a specific provision to the contrary in the will. The planner should decide exactly who is to be responsible for death taxes and make sure the testator's will clearly states that any properties passing to the surviving spouse will be free from any death tax claims.

A formula bequest can offer estate tax benefits by avoiding over-qualification of the marital deduction, however, some argue that it may introduce unnecessary complexity into an estate.[37] Therefore, the

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[37] Joseph Trachtman, Estate Planning (New York, 1965), pp. 40-55. Trachtman was a strong opponent to the use of formula clauses. James B. Lewis, "The Marital Deduction and Split Gifts," The Practical Lawyer, 18 (December, 1972), p. 23. Lewis indicates interpretation and classification of formula bequests in the state probate courts has been an uncertain process. Harold G. Wren, p. 7.14 suggests formula clauses probably should not be used where the estate is small. However, formula clauses have worked fairly well and if properly drafted, have not caused undue restrictions on the administration of decedents' estates.

draftsman must be aware of the effects of each type of formula bequest, as well as the desires and needs of the estate owner, before he can discern the type of bequest most satisfactory for a particular estate owner.

The formula bequest is an attempt to provide against over-qualification of the marital deduction on a prospective basis. However, it was demonstrated that the maximum marital deduction allowable is not necessarily the preferred amount in terms of minimum federal estate taxes and administrative costs. An ingenious method devised to provide a determination of an amount qualifying for the marital deduction in the preferred amount has been suggested. The husband's will provides for an appraisal of the wife's estate as of his death and the amount of property passing to the wife is then conditioned on that appraisal.[38] It appears this is merely a suggestion which has not been put to an empirical test. Some practical arguments against it are: 1) having an appraisal may be costly; 2) it may complicate the executor's duties unnecessarily; and 3) it is likely to delay settlement of the estate.

Preservation of the Marital Deduction

Further considerations regarding the marital deduction include a common disaster clause in the will. State laws often create the presumption that the testator was the survivor, where circumstances

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[38]Federal Taxes, Estate & Gift Taxes (Englewood Cliffs, 1973), Para. 110,310. "The suggested clause may read: I direct that an appraisal be made to determine the value of my wife's adjusted gross estate as of the time of my death, and the amount (of the marital deduction bequest or devise) shall equal one-half of the excess of my adjusted gross estate as thus appraised." Theoretically this would give more accurate results than periodic estimates.

surrounding the deaths make it impossible to determine which spouse died first. Where the testator's estate is more than twice the size of his spouse's, a "common disaster clause" in the testator's will appears desirable. This clause states that in the event it is impossible to determine who died first, it shall be presumed the testator's wife survived the longest. Such a clause will preserve the marital deduction for the testator's estate. Note that such preservation of the marital deduction is only possible where the order of deaths is incapable of proof.[39]

On the other hand, when use of the marital deduction will not result in substantial overall savings, but basically being utilized to defer the payment of estate taxes until the second spouse dies, then a conditioned-on-survivorship clause may be useful. Thus a bequest to a surviving spouse may depend upon whether or not she survives the deceased for a period not exceeding six months. If she lives beyond the six-month period then the property will pass to her and it will be allowable as a marital deduction for the deceased's estate. If she dies before the six-month period, then no property passes to her under

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[39]Regs. Sec. 20.2056 (e) - 2 (e). Harold G. Wren, p. 7.43 related the following illustration of the use of survival clauses; ".....in the case of the deaths of Mr. and Mrs. Stephen R. Curries, who were last heard from thirty minutes after a plane they had chartered left San Juan, Puerto Rico, on January 18, 1967, for a seventy mile flight to the Virgin Islands.

Since the bulk of the property was in W's name (the value of her fortune had been estimated at $200 million), W's will provided that one-half of her property should pass to H, and one-half to a charitable foundation. H's will provided that one-half of his estate should pass to three minor children, and half to the same charitable foundation. Both wills contained provisions that if H & W died simultaneously, H should be deemed to have survived W. These clauses preserved the marital deduction in W's estate."

the will and the marital deduction for same will not be allowed.[40]

Table II depicts the effect of a conditioned-on-survivorship clause for the husband and wife whose combined estates do not exceed $120,000. Except in the situation where each owns one-half of the estate, the loss of the marital deduction gives rise to some federal estate tax which is not offset by the decline in administration costs in the wife's estate. Based on this illustration the clause has no practical application as long as the combined estates are valued at no more than $120,000, because the marital deduction eliminates the federal estate tax. Note, however, the overall cost when the combined estates are valued at $450,000 with the husband's estate valued at $300,000 and the wife's at $150,000. If he dies first and she dies within six months of his death and the marital deduction is allowed, because the conditioned-on-survivorship clause is not included in the will then the federal tax and administration costs for the two estates would be:

H's adjusted gross estate	$300,000	
Preferred marital deduction	75,000	
Taxable estate before $60,000 exemption	$225,000	
Federal estate tax (top tax bracket: 30%)	$ 40,200	
Probate costs	10,500	
		$50,700
W's estate	$150,000	
From H's estate	75,000	
Taxable estate before $60,000 exemption	$225,000	
Federal estate tax (top tax bracket: 30%)	37,400	
Probate costs	7,900	
		45,300
Total Federal estate tax and administration costs		$96,000

[40]Sec. 2056 (b) (3). Rev. Rul. 70-400, 1970-2 CB 196 further describes the six month limitation period.

TABLE II

EFFECT OF CONDITIONED-ON-SURVIVORSHIP CLAUSE FOR ESTATES WITH COMBINED PROPERTY OF $120,000 - WIFE DIES WITHIN SIX MONTHS OF HUSBAND

Husband's Property A.G.E.	Marital Deduction*	Specific Exemption	Estimated Probate Expense	Federal Estate Tax	Wife's Property	From Husband	Specific Exemption	Estimated Probate Expense	Federal Estate Tax	Total on Combined Property
1) $120,000	$ 60,000	$ 60,000	$ 4,900	$ -0-	$ -0-	$60,000	$ 60,000	$ 2,500	$ -0-	$ 7,400
1a) 120,000	-0-	60,000	4,900	9,500	-0-	-0-	60,000	-0-	-0-	14,400
2) 100,000	40,000	60,000	4,300	-0-	20,000	40,000	60,000	2,500	-0-	6,800
2a) 100,000	-0-	60,000	4,300	4,800	20,000	-0-	60,000	900	-0-	10,000
3) 80,000	20,000	60,000	3,500	-0-	40,000	20,000	60,000	2,500	-0-	6,000
3a) 80,000	-0-	60,000	3,500	1,600	40,000	-0-	60,000	1,700	-0-	6,800
4) 60,000	-0-	60,000	2,700	-0-	60,000	-0-	60,000	2,500	-0-	5,200

*The preferred marital deduction as determined in Table I. Lines 1, 2, 3 and 4 coincide with Lines 2, 4, 6 and 8 of Table I.
Lines 1, 2, 3 and 4 indicate the effect without the conditioned-on-survivorship clause and lines 1a, 2a, 3a and 4 reflect the results if the clause were in effect.

If a conditioned-on-survivorship clause is included in husband's will, then the marital deduction will not be allowed on his estate and the results would be:

H's adjusted gross estate and taxable estate before $60,000 exemption	$300,000	
Federal estate tax (top tax bracket: 30%)	$ 62,700	
Probate costs	10,500	
		$73,200
W's adjusted gross estate and taxable estate before $60,000 exemption	$150,000	
Federal estate tax (top tax bracket: 28%)	$ 15,900	
Probate costs	5,600	
		$21,500
Total Federal estate tax and administration costs		$94,700

In this situation, $1,300 could be saved by foregoing the marital deduction in the husband's estate. This savings results because the estates are of sufficient size to reach a large estate tax bracket, i.e., $160,000 to $310,000, so that the top estate tax bracket is 28% to 30%, thus use of the marital deduction results in an estate tax savings of $1,000 (62,700 + 15,900 - 40,200 - 37,400) whereas the probate costs on the $75,000 in the wife's estate and received from the husband's estate would be $2,300 ($7,900 - 5,600). In this example, the advantage of the marital deduction would be realized if the wife survives her husband for a number of years, because the federal estate tax on his estate with the marital deduction is $40,200 compared to $62,700 without the marital deduction. Thus the widow or other beneficiaries would have an additional $22,500 to use during the period the widow survives her husband. In this situation the conditioned-on-survivorship clause should be utilized.

Qualifying Property for the Marital Deduction

Once the planner and testator have determined the extent to which the marital deduction shall be used, care must be taken to avoid the application of the "terminable interest rule" to the property passing to the surviving spouse.[41] Basically, the terminable interest rule denies the marital deduction for a property interest passing to the surviving spouse if the interest may terminate or fail upon the lapse of time, the occurrence of an event or contingency, or the failure of an event or contingency to occur; an interest in the same property passed from the decedent at any time for less than full monetary consideration to some one other than the wife; and, as a result, such other person or his heirs may possess or enjoy any part of the property after the termination or failure of the interest passing to the wife.[42]

Despite the precise language of the terminable interest rule, much litigation arises in determining terminable interest classification because "property" and "interest" do not lend themselves to precise definitions. The theory is that an interest in property passing to the surviving spouse shall not be allowed as a marital deduction on deceased's estate if the limited interest in that property may terminate on or before the spouse's death and thus escape inclusion in the gross estate of the second spouse to die.

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[41]Reg. Sec. 20.2056(b)-1(a) states: ".....no marital deduction is allowed with respect to certain property interest, referred to generally as 'terminal interests,' passing from a decedent to his surviving spouse."

[42]Reg. Sec. 20.2056(b)-1(b) defines terminable interest. Reg. Sec. 20.2056 (b) 1-(c) identifies nondeductible terminable interests and (d) sets forth the exceptions.

Two examples of a terminable interest are: 1) The decedent by his will devised land to his wife and daughter as joint tenants. Because the daughter may, if she survives the wife, possess such property after the termination of the wife's interest, the latter's interest is a terminable one.[43] In joint and mutual wills property passes from one spouse to the other; then, on the survivor's death, the balance passes to third persons. If under local law the survivor has no right to change the ultimate dispositive provisions, the bequest to the surviving spouse is a terminable interest which will not qualify for the marital deduction.[44]

Conclusions Regarding the Marital Deduction

A most valuable tool available to the estate planner is the estate tax marital deduction. The planner must realize there is no single best way to utilize the marital deduction. First, and foremost, the testator's wishes should be fulfilled, however, the planner can determine the most efficient use of the marital deduction in terms of minimum federal estate tax and administrative costs. Thus, the testator can learn the cost that will be incurred if he desires provisions which result in something less than the most efficient use of the marital deduction.

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[43] Federal Estate and Gift Tax Reporter, Vol. 1 (New York, 1971), Para. 2081.03, Example (2).

[44] Ibid., Para. 2081.06

Trusts

Introduction

The trust is a written agreement wherein the owner of property, called the trustor, transfers title to a trustee for the benefit of persons, called the beneficiaries, designated by the trustor. The trustee may be a person, a corporation, or a combination of the two. The trustor specifies various terms of the trust which the trustee is legally bound to administer. If the trust is revocable, the trustor may terminate or alter the agreement. If it is an irrevocable trust, the trustor cannot get his property back, nor can he amend, alter, revoke or terminate the trust. Basically there are two kinds of trusts, the testamentary and inter vivos. The testamentary trust is established under the provisions of a last will and testament. It does not become effective until the will has been probated. The inter vivos trust is created and becomes effective while the trustor is still living.

Trusts can be highly beneficial in different circumstances. Sometimes, trusts can be used to achieve income tax savings and estate tax savings. The fact that assets held in trust are administered outside the jurisdiction of the probate court may result in savings if the trustee fees are less than the probate costs. In addition, trusts are most helpful, if not a practical necessity, when beneficiaries are minors, or dependents are incapacitated, or the beneficiary does not have the desire and/or ability to cope with the management of investments.

Studies indicate that trusts are more commonly used by the wealthy than by less wealthy persons. Typically, as few as one in ten decedents with adjusted gross estates of less than $100,000, bequeathed property in trust whereas this number increases sharply as the value of the estate rises to the $400,000 - $500,000 range.[45] The low percentage for less than $100,000 estates appears to be very small considering the apparent usefulness of trusts. Either the less wealthy estate owner is not aware of the uses of the trust instrument or a trust simply does not lend itself to the estate plan of the smaller estate owner. It is believed the former is more generally the case. In addition, less wealthy husbands, who created testamentary trusts, appeared to create spouse-children trusts more frequently than wealthier husbands.[46] This follows the presumption of this study that the decedent whose estate was valued at less than $120,000 would have, as his primary objective in estate planning, the desire to provide financially for his wife and children and it took his entire estate to achieve just that.

Use of Testamentary Trusts

It is not uncommon for wills and life insurance beneficiary designations to provide: "Everything to my spouse, if living and if not in equal shares to our children." If there is a surviving spouse, the decedent's estate will qualify for the maximum marital deduction allowable, however, overqualification of the marital deduction occurs, and whatever portion of that estate is not dissipated during the surviving spouse's lifetime, will be includible in her estate, subject to both

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[45] Gerald R. Jantscher, Trusts and Estate Taxation (Washington, D.C. 1967), p. 81. This study is based on a sample of federal estate tax returns in 1957 and 1959. Similar trends are referred to with regard to earlier studies conducted by Joseph A. Peckman on estate tax returns filed in 1945 and 1951.

[46] Ibid., p. 95.

estate taxes and probate administration. The testamentary trust can be used as a means of avoiding the disadvantages of overqualifying the marital deduction, and still give the surviving spouse an income over and above that which would be received from the transfers which qualify for the marital deduction. It is a means of benefiting two or more generations without incurring any transfer tax except on the initial transfer. In addition, probate costs are avoided in the surviving spouse's estate.

The type of plan to be described is a marital/non-marital trust plan, also commonly referred to as an "A-B" trust plan. This method utilizes a generation skipping trust, also referred to as a bypass trust. Upon the death of the first spouse, one-half of the adjusted gross estate goes into a marital trust and the balance of the estate goes into a non-marital trust. If a formula bequest is used properly, the assets transferred to the marital trust will equal the maximum marital deduction allowable for federal estate tax purposes. In order to qualify for the marital deduction, the surviving spouse must have control over the assets in the marital trust. Consistent with the assumed desire that the surviving spouse enjoy the benefits of the entire estate and still reduce death taxes and costs, the marital trust will provide that the spouse receive all of the net income, have an unlimited right to withdraw the principal and at her death, a general testamentary power of appointment.[47] It can be further stipulated, that if

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[47]The term "power of appointment" refers to a power given to the possessor by another. It does not refer to a power created and retained by the same person. The power authorizes its possessor to control, with certain limitations, the ultimate disposition of the property subject to the power. In some instances, the power of appointment vested in the donee resembles complete ownership of the property. Thus, without special tax treatment, a power of appointment could be used to prevent the application of estate taxes to the estate of the donee.

the surviving spouse does not provide for the disposition of the trust's remaining assets in her will, then they will be transferred to the non-marital trust. In this manner, the assets transferred to the marital trust will qualify for the marital deduction in the maximum amount possible, and consequently will not be subject to federal estate tax in the decedent's estate.

The provisions of the non-marital trust should be drafted so that substantial rights and benefits are given the surviving spouse, but, at the same time, a general power of appointment for estate tax purposes must be avoided.[48] Within this context the spouse may receive all of the net income from the trust, and also certain special or limited powers of appointment which will not cause inclusion in the spouse's estate.

Avoiding a General Power of Appointment

The intent is to provide one trust which will qualify for the marital deduction to the extent desired and within the maximum deduction allowable. Thus a general power of appointment is required. At the same time that portion of the estate which should not qualify for the marital deduction is placed in another trust and the power of appointment must be specified or limited. It is possible to provide the surviving spouse with substantial powers to enjoy maximum benefits of the non-marital trust and still avoid inclusion of the trust assets in her estate.

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[48]IRC Sec. 2041 (b) (1) defines a general power of appointment as a power which is exercised in favor of the decedent, his estate, his creditors or the creditors of his estate, except that a power to invade for the decedent's benefit under an ascertainable standard is not a general power.

For instance, not only can the surviving spouse receive all the net income, but also have the power to invade principal. As long as the power to invade principal is limited by an ascertainable standard relating to the support, maintenance, health or education of the surviving spouse, it will not constitute a general power of appointment.[49] In addition, the surviving spouse may be given the power to invade principal for any purpose limited to the extent of $5,000 or 5%, whichever is greater, of the principal per calendar year, on a noncumulative basis and still avoid having the power construed as a general power of appointment.[50] In this situation, there will be included in the surviving spouse's estate either $5,000 or 5% of the trust assets, whichever is greater, by virtue of the fact that the right would not have lapsed in the calendar year of the surviving spouse's death.

Another opportunity to give the surviving spouse the maximum rights over the entire estate and still avoid a general power of appointment, is to give a special power of appointment allowing the surviving spouse to dispose of the assets of the non-marital trust to third parties either during life or upon her death. The permissable donees may be limited, by the provisions of the trust, to a class such as the couple's

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[49]Regs. Sec. 20.2041.1 (c) (2) clarifies what is necessary in order for the standard to be considered an ascertainable standard relating to health, education, support or maintenance. For instance, "support in his accustomed manner of living" qualifies as an ascertainable standard, whereas a power to use property for the comfort, welfare or happiness of the holder of the power, does not. Since the regulations are precise about the language to be used in order to limit a power of appointment, it is suggested that it be followed closely to avoid inadvertently drafting a general power of appointment.

[50]IRC Sec. 2041 (b) (2).

children, or virtually unlimited with the sole exception that the surviving spouse may not be empowered to appoint herself, her creditors, her estate, or the creditors of her estate.[51] This provision can add flexibility to the estate plan. At the time the estate plan is created, the children may be very young and there is no way to predict their futures. The decision of how much, when, and in what manner amounts should be left to the children, upon death of the surviving spouse, can be left for a later day by giving the surviving spouse this special power of appointment.

The foregoing is a description of what may be called a maximum benefit by-pass trust. There is a second type of by-pass trust which may be referred to as a discretionary trust. In essence, a discretionary type non-marital trust gives the trustee the discretion to accumulate income and/or to distribute the income and principal to the wife and the children. Since this is contrary to our assumption that the testator's desire, in small estates valued at less than $120,000, is to leave the entire estate to the surviving spouse, the discretionary trust will not be discussed further.[52]

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[51] IRC Sec. 2041 (b) (1), so long as the surviving spouse may not appoint herself, her creditors, her estate, or creditors of her estate, the power is classified as a special power not a general power. Thus, the assets subject to the power will not be taxed in the surviving spouse's estate.

[52] Harold Weinstock, "The A-B-C's of Generation Skipping Trusts," Taxes, The Tax Magazine, 52(February, 1974), pp. 71-73 and Edward C. Halbach, Jr., "Discretionary Trusts," 1967 Institute on Estate Planning (Indianapolis, 1967), Ch. 67-3, pp. 1-15. This latter article was written prior to the enactment of the 1969 Tax Reform Bill and the provisions concerning accumulation trusts may restrict some of the benefits claimed therein.

Designation of Trustee for the Non-Marital Trust

There is much to be said for the use of a bank or professional trust company as trustee. As professionals, they generally achieve a good return and are financially accountable for their actions. No matter how honest or resourceful an individual may be, there is no assurance that he will not become mentally or physically ill or experience severe financial pressures that lead to a misapplication of trust assets. In addition, the professional trustee is an impartial party which avoids the potential family disharmony that could arise if a friend or relative serves as trustee.

In keeping with the assumption that the surviving spouse should receive or control the entire estate of the married couple, a natural desire is to appoint the surviving spouse as trustee. A major consideration, in this event, is whether or not the surviving spouse has or will have the ability or desire to manage the entire estate and its investments. Not only should the present abilities be considered, but also how these abilities may be affected by death, the so-called "widow's psychology."[53]

In addition to the foregoing considerations regarding the trustee, there is the possible tax effects that must be considered. The type of plan, previously described, involves a marital and a non-marital trust. For federal estate tax purposes, those assets placed in the marital trust could also be given outright to the surviving spouse

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[53]Martin L. Sturman, "The Importance of the Family Trust," The Practical Lawyer, 17 (January, 1971), pp. 75-76. He refers to the feelings of insecurity that prevails following the spouse's death. The psychology of a widow is not the same as that of the same woman prior to the death of her husband.

without any change in tax in either of the two estates. Therefore, whether or not the surviving spouse is appointed trustee must be determined for non-tax reasons, since the federal estate tax effect remains unchanged in either case. With regard to the non-marital trust, however, its purpose is to keep its assets from being included in the surviving spouse's estate. This is accomplished by avoiding a general power of appointment. Inadvertently granting a general power of appointment would nullify the estate tax advantages provided by the non-marital trust.

If the surviving spouse's power is limited by an ascertainable standard, then he may act as the sole trustee of the non-marital trust without having the power construed as a general one.[54] If the desire is to give someone the power to invade for a purpose which is not limited by such a standard, then an independent trustee should be appointed to exercise this power without the surviving spouse's participation.[55] Even though the surviving spouse's power is limited by an ascertainable standard there appears to be a problem if he's given the right to invade

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[54]Malcolm A. Moore, "The Tax Importance of Ascertainable Standards in Estate Planning," Trusts & Estates, 111 (1972), p. 946, exemplifies this as "a surviving wife serving as sole trustee of a trust under her husband's will, with power to invade principal for her support and maintenance, such a power would be a special power and not a general one, because the words 'support' and 'maintenance' are ascertainable, but if, in addition, she was able to invade for her happiness or pleasure, the power would be rendered a general one, and the assets subject to the power would be taxable in her estate."

[55]Ibid., p. 947, indicates the importance of the co-trustee exercising the unlimited power without the wife's participation. ".....with an independent trustee, (a bank, for example) she would still have a general power because only if the co-trustee is 'adverse' (such as a child who is a remainderman of the trust and whose interest would be adversely affected by distributions to the mother) will the vice be taken out of an otherwise general power."

principal in favor of those he's legally obligated to support.[56] One cannot afford to take lightly the drafting and planning problems that arise when the desire is to designate the life beneficiary as trustee of the tax-planned trust. There is the danger that powers held as trustee taken individually or in the aggregate, may constitute a general power of appointment for estate tax purposes.

Use of Inter Vivos Trusts

An inter vivos trust is a trust created and made effective while the trustor is still living. The trust is administered outside the jurisdiction of the probate court, thus probate fees on the trust assets will be avoided. Since the trust is not subject to probate, it need not be a part of probate records and thus a matter of public record. The extent of trust assets can be kept confidential and made available only to authorized persons.

There are tax considerations. If the trust is a testamentary one, the property placed into the trust will be includable in the trustor's estate. If the trust is an inter vivos one, the trust property can be kept out of the trustor's estate. To do so, however, the settlor must divest himself of all rights and interests to the trust property. For three years after divesting himself of those rights, his estate would be faced with the task of overcoming the presumption that the trust

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[56] Regs. Sec. 20.2041-1 (c) reads, "A power of appointment exercisable for the purpose of discharging a legal obligation of the decedent or for his pecuniary benefit is considered a power of appointment exercisable in favor of the decedent or his creditors." Malcolm A. Moore, p. 947, believes this is inconsistent with the ascertainable standard regulations. However, both he and Harold Weinstock, p. 70, advise, for safety sake, against giving the power to invade for one's dependents.

was created in contemplation of death. At the same time, the creation of the trust is construed as a gift subject to gift taxes.

A person unwilling to give up control of property can still get the benefits of a trust by using a revocable trust. Thus the trustor retains the power to revoke, amend or alter the trust at any time. Assets transferred to a revocable trust will still be includable in the trustor's estate. The effect of federal estate taxes will be the same as with a testamentary trust. However, the revocable trust takes the place of a will for trust property. The trust assets are not subject to probate costs nor the publicity of probate proceedings. As long as the trustor retains the power to revoke the trust, there is no gift. With a revocable trust, the trustor can watch it in operation, thus having an opportunity to change the instrument or clarify any provision that raises doubts.

The revocable inter vivos trust is a most useful and flexible lifetime planning device for the older client. All provisions that can be made in a will can be made in a revocable inter vivos trust. Some non-tax benefits provided are the protection of one's assets from the fast talking con artist when one is older and may be more vulnerable to such tactics, the avoidance of a conservatorship in the event one becomes mentally or physically incapacitated[57] and the relief from day

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[57]James M. Corcoran, Jr., "Planning for the Older Client," The Practical Lawyer, 15 (April, 1969), pp. 28-38. He indicates the most convincing argument against a conservatorship is its cost. A conservatorship is the circumstance where there is a court-appointed individual who acts in much the same capacity as a trustee. He determined annual costs of a conservatorship, excluding the first and last years which would be more costly, of $1,900 for assets totaling $90,000. This includes $600 for a surety bond, $50 court costs, $750 attorney fees, and $500 conservator's fee, if it is not waived. With a revocable inter vivos trust, these costs would be replaced by a trustee fee which averaged .5% of the trust assets, or $450 ($90,000 x .005) in this case.

to day responsibility, management, and investment of the trust assets.

As far as the small estate, which does not exceed $120,000, is concerned, the use of a testamentary trust will accomplish the elimination of federal estate taxes on both the husband's and wife's estates equally as well as the inter vivos trust can. However, the inter vivos trust provides the additional benefit of avoiding probate, with its attendant delays and expenses.[58] The purpose of estate planning should be the intelligent disposition of property in accordance with the testator's specific desires. Avoidance of probate should seldom, if ever, be the prime objective.

Certain advantages can be obtained through the selective use of the inter vivos trust for the conveying of certain forms of property to intended beneficiaries. However, use of the inter vivos trust merely to avoid probate of assets could be foolhardy. In order to create a trust which will pass property at death, there must be an intention to create a present trust giving a beneficiary certain rights in designated property prior to the death of the trustor.[59] It may be that the trust instrument preserves so many rights of ownership in the trustor, that the intent to create a trust is negated. The cost of establishing the

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[58]Norman F. Dacey, pp. 1-360, has as its central theme the use of inter vivos trusts as a means of transferring assets outside of probate, thus avoiding the costs in terms of both time and money.

[59]Merle H. Miller, "Pitfalls of Inter Vivos Trusts," 1967 Institute on Estate Planning (Indianapolis, 1967), para. 67.205-67.210 gives an example involving an inter vivos trust for purposes of transferring assets outside of probate. Paul B. Sargent, "Facts and Fallacies of Living Trusts," 1971 Institute on Estate Planning (Indianapolis, 1971), Ch. 71-2, pp. 2-6, provides an enumeration of bad characteristics of the living trust.

validity of an inter vivos trust, in this instance, could cost more in time and money than would be incurred in probate.

When establishing a trust, the trustor creates a separate legal entity. Even through rights of revocation are retained, the trustor must realize ownership of the property is not the same as when he owned it as an individual. If the property transferred to the trust does not really require administration, such as stock of a wholly owned corporation, an inter vivos trust can be very beneficial. If on the other hand, the property is such that the trustor will find it necessary to manage the investment of the property, such as real estate, he may find it quite frustrating when conducting a sale, purchase or incurring a mortgage on the property. Each event may require a copy of the trust instrument and evaluation regarding its validity which leads to additional time and expense. In addition, the separate legal entity will require separate accounting and filing of income tax returns. Whether or not income tax benefits can be achieved is another consideration, although not covered here because it is beyond the scope of this report.

There are situations where the inter vivos trust has important advantages which should be considered. However, it is not designed for mass transfer of all assets merely to avoid probate. Indiscriminate use of an inter vivos trust could be costly, if its validity is questioned.

Conclusion

This study was concerned with the estate valued at more than \$60,000 but less than \$120,000, of a man who has a wife and children. He wanted to give his wife the benefits of his entire estate and minimize the federal estate taxes and administration costs at his death and that of his wife's. Within this context, the use of testamentary trusts lent itself very well, without requiring a change in the form of investment management during the life of the testator. He could appoint his wife and/or a professional as trustee of the testamentary trusts formed at his death. He could further designate the beneficiaries of the trusts after his wife's death, although his wife had to have the power to change his designation in the marital trust. As long as the estate value did not exceed $120,000 and the husband predeceased his wife, there was no federal estate tax due and probate costs were assessed only once, in the initial estate.

In an effort to leave the circumstances unchanged during the testator's life, an inter vivos trust plan was not recommended initially. In the event the testator is retired and his estate consists of investments which require little administration, a revocable inter vivos trust may be the most advantageous plan to follow and, certainly, should be considered. Most importantly, an inter vivos trust would avoid the necessity of a conservatorship if the testator were to become incapacitated.

CHAPTER III

PLANNING FOR THE FEDERAL ESTATE TAX AND PROBATE COSTS - JOINT INTERESTS AND LIFE INSURANCE

Joint Interests

Types of Co-Ownership

The nucleus of estate planning is the property includable in an estate. Basic to this consideration is how property is owned. In the case of a husband and wife, joint ownership is a highly popular type of property ownership. There are three types of property co-ownership; tenancy-in-common, joint tenancy with rights of survivorship, and, tenancy by the entirety. Tenancy-in-common provides for two or more persons to be owners of a given piece of property in undivided interests. each tenant-in-common can sell or will his share. Joint tenancy is the type of ownership wherein every tenant has an interest in the whole, but not of any separate share. The interest of each joint tenant is subject to definite restrictions. A joint tenant cannot dispose of his interest by will. When he dies, his interest in the property is equally divided among the remaining joint tenants. Tenancy by the entirety is a type of joint tenancy between a husband and wife. Upon the death of one, the survivor acquires title to the property.

Popularity of Joint Tenancy and Counterpoints

To the layman, joint ownership with a right of survivorship, has appealing qualities, some real, while others are illusory. Meanwhile, the estate planner is aware of the numerous pitfalls in such joint tenancies and prefers to avoid them whenever possible. The qualities appearing to the layman is the relative ease of creating a joint tenancy, the avoidance of administering property in the probate court, thus reducing the basis for executor's commission and attorney's fee, and the opportunity to share property between a husband and wife, thus promoting domestic tranquility. Another motivating force for creating joint tenancies with rights of survivorship is that often it is a security requirement imposed by the lender of funds for acquisition of the property.[1] Unfortunately, the layman often has the mistaken belief that this type of ownership will avoid death taxes.[2]

Property held in joint tenancy is not subject to disposition by will and does, in fact, eliminate the probate or intestate administration of that property in the estate of the first decedent. In Oklahoma a simplified proceeding for judicial determination of death is required

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[1]Fredric H. Wright, "Estate Planning for Agricultural Interests," Oklahoma Law Review, 24 (February, 1972), p. 8.

[2]The difficulty of explaining the application of federal estate taxation of property owned in joint tenancy with rights of survivorship was often mentioned during conversations the author had with Tulsa, Oklahoma, practitioners. In addition, it was likewise mentioned in numerous articles; such as, Paul R. Dean, "Jointly-Owned Property", 1968 Institute on Estate Planning (Indianapolis, 1968), p. 68-1; James R. Queenan, Jr., "Division of Jointly Owned Property for Estate Planning Purposes," Massachusetts Law Quarterly, 56 (September, 1971), p. 289, and John E. Reicker, "Joint Tenancy: The Estate Lawyer's Continuing Burden," Michigan Law Review, 64(March, 1966), p. 801.

on all property held in joint tenancy. However, if all property is not held in joint tenancy, probate proceedings will be required for that part of the estate not held in joint tenancy ownership and much of the advantage of simplified legal proceedings is gone.

Placing property ownership in joint tenancy causes the owner to lose control over disposition of the property, because all co-owners must agree before title can be transferred, whereas a person can change his will any time. Thus flexibility in planning a person's estate is sacrificed.

Liquidity of the decedent's estate can be a problem if significant portions of the estate are subject to joint survivorships. Joint tenancies are not subject to probate and are beyond the reach of the executor, but they may add to the cash needs of the estate while subtracting from its resources.

As indicated in the following section, joint tenancies have led to considerable litigation, both in determining ownership and disposition of property and in contesting tax liability. This litigation adds to the costs and increases the time involved in closing the estate.

A fact that is seldom realized by the layman is that the creation of a joint tenancy, may effect a taxable gift and result in an unanticipated tax liability. In addition, the termination of a joint tenancy may likewise create a gift tax liability. Gift tax treatment of joint tenancies is covered in detail later.

Application of Federal Estate Tax

Traditional notions of property law apply for federal estate tax purposes when property is held as tenants-in-common. However, property in which a decedent, at the time of his death, held an interest either as a joint tenant or as a tenant by the entirety, with rights of survivorship, is subject to special treatment under the estate tax law. Ordinarily, under property law, each co-owner in a joint tenancy or tenancy by the entirety would be attributed an undivided equal share. The estate tax law, however, represents a departure from property law.

The basic rule is that property held in joint tenancy by the decedent and another at the date of death will be wholly includable in the decedent's gross estate unless it can be shown that the surviving joint tenant contributed to the purchase of the property. The surviving joint tenant has only two ways of avoiding complete and full inclusion of the property in the estate of the decedent. The survivor must either prove a proportionate contribution to the purchase of the property from his separate funds, or must prove a joint gift or gift or inheritance from a third person.[3] The test is not who owns the property,

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[3]IRC 1954, Sec. 2040 provides: "The value of the gross estate shall include the value of all property to the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, ..., except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth, ..., there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person, ..., where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants, ..., then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants."

but, rather, who paid for it.[4]

A most important fact to be noted is that the burden is on the decedent's estate and/or survivor to prove that any amount was contributed by the survivor for the purchase of the property. What kinds of facts are sufficient to prove that the surviving tenant originally owned all or part of the property under consideration is a question which may require litigation.[5] Obviously, the problem is one of tracing. One could be required to trace funds backward through time, through a series of purchases, sales, and numerous bank accounts. After a lapse of many years, it is practically impossible in most cases to prove the source of the funds which were used to purchase the property.

There is not only the problem of tracing the source of funds used in purchasing property, but also the problem of tracing income and realized appreciation in value of property. Where the source of the funds are traced to property that was given to the surviving joint tenant by the deceased joint tenant, the proportionate value of the joint property will be included in the deceased's adjusted gross estate; however, if the gift is income-producing property, and the donee uses the income to buy property in joint tenancy with the donor, that income

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[4]John E. Reicker, p. 804. The extent of determining who owned the funds used to acquire the property reverts to the very origin of separate funds. Reicker states: "..... a surviving wife cannot claim an exclusion from her husband's estate for any contribution she made to the joint tenancy if the contribution consisted of property he had previously given her - even if the previous gift had been reported and had resulted in the payment of a gift tax."

[5]See the following as a sample of some of the acceptable facts: Richardson v. Helvering, 35-2 USTC Para. 9,644; Fox v. Rothensies, 40-2 USTC Para. 9,688; Estate of N. Koussevitsky, 5 TC 650; Estate of J. H. Heidt, 48-2 USTC Para. 10,646; Singer v. Shaughnessy, 52-2 USTC Para. 10,863.

will constitute a proportionate contribution on behalf of the donee.[6] The question of whether realized appreciation upon sale of gift property, where the proceeds are used to form a joint tenancy with the original donor in some other property, constitutes a proportionate contribution on the part of the donee is still controversial.[7]

The severity of the burden to prove contributions by the surviving tenant as applied by the courts has varied from case to case. Clients must be aware of the existence of this burden of proof and warned that clear evidence of the relative contributions of the joint owners, as well as the dates of contribution, will be required.

Gift Tax Treatment of Joint Tenancies

Generally, the transfer of separate personal property to the transferor-owner and another as joint tenants results in a taxable gift, under federal gift tax law, to the other co-tenant equal to the

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[6] Regs. Sec. 20.2040-1 (c) (5) provides: "If the decedent, before the acquisition of the property by himself and the other joint tenant, transferred to the latter for less than an adequate and full consideration in money or money's worth other income-producing property, the income from which belonged to and became the other joint owner's entire contribution to the purchase price, then the value of the jointly held property less that portion attributable to the income which the other joint owner did furnish is included in the decedent's gross estate....."

[7] Regs. Sec. 20.2040-1 (c) (4) provides: "If the decedent, before the acquisition of the property by himself and other joint owner, gave the latter a sum of money or other property which thereafter became the other joint owner's entire contribution to the purchase price than the value of the entire property is so included, notwithstanding the fact that the other property may have appreciated in value due to market conditions between the time of the gift and the time of the acquisition of the jointly held property....." See, however, Harvey v. U. S., 50-2 USTC Para. 10,787; Swartz v. U. S., 60-1 USTC Para. 11,942; First National Bank of Kansas City, Executor of the Estate of Maxwell W. Cline, 64-1 USTC Para. 12,216.

value of a one-half undivided interest in the property.[8] The creation of a joint bank account and the acquisition of certain United States savings bonds are two specific exceptions to the general rule.[9]

The creation of joint tenancies in real estate is subject to the same rules applicable to personal property, except where the co-tenants are husband and wife. If a tenancy by the entirety or joint tenancy of a husband and wife is created in real estate after December 31, 1954, no taxable gift results unless an election is specifically made to have it taxed as a gift.[10] The election is made by filing a gift tax return and disclosing the gift on the return. It is especially noteworthy that the election to treat such a transaction as a gift does not preclude inclusion of the value of the real estate in the donor-spouse's gross estate because the interest of the donee-spouse has been acquired from the other for less than an adequate and full consideration in money or money's worth.[11] Ordinarily for federal estate and gift tax purposes

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[8]Regs. Sec. 25.2511-1 (h) (5).

[9]Regs. Sec. 25.2511-1 (h) (4) "The gift arises when the co-tenant who did not furnish the original funds, draws funds for his personal use without any obligation to account for a part of the proceeds to the other co-tenant, who furnished the funds originally. Similarly, when United States savings bonds are purchased by "A" and registered as payable to "A" or "B", a gift does not arise unless "B" cashes the bond without any obligation to account for a part of the proceeds to "A". See, also Rev. Rul. 68-269, 1968-1 C.B. 399, Situation 5. Rev. Rul. 69-148, 1969-1, C.B. 226, provides: "The creator and sole contributor of a joint brokerage account with securities registered in the name of a nominee of the firm has not made a gift to the other joint owner unless and until the joint owner draws on the account for his benefit."

[10]IRC 1954, Sec. 2515.

[11]See footnote 7.

it would not be advisable to treat the creation of a joint tenancy in real estate as a taxable gift.[12]

The value of the gift when a joint tenancy with rights of survivorship is created between a husband and his wife depends on whether or not either co-tenant can unilaterally defeat the right of survivorship under applicable local law. If either spouse, acting alone, may cause a severance of his interest in the property, then the value of the amount of the gift is the excess of one-half of the value of the property over the consideration furnished by the donee co-tenant. If neither, acting alone, can defeat the rights of survivorship in the property, then the gift is equal to the excess of the consideration furnished by the donor spouse over the actuarial value of his retained interest.[13]

As previously indicated, joint tenancies with rights of survivorship are easily created by the layman. Often he is unaware of the gift tax provisions, and, thus, unintentionally may become delinquent in a gift tax liability. Adding to the gift tax pitfalls in joint tenancies with rights of survivorship is that termination of a joint tenancy may likewise cause a gift tax liability.

Termination of a joint tenancy can result from a sale of property, an exchange when the property acquired is not held in an identical tenancy, a gift to a third party, and conversion into a tenancy in common

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[12]Byrle M. Abbin, "How to Break Joint Ownership of Real Estate Without Gift Tax," Estate Planning Selections from The Tax Advisor, ed. Byrle M. Abbin, et al. (New York, 1973), p. 5-5. Abbin proposes that the election may be advantageous where real estate owned in joint tenancy is reasonably expected to increase in value and then be sold thus transferring a portion of the appreciation in value to the donee-spouse free from gift tax upon termination of the tenancy.

[13]Regs. Sec. 25.2515-2 (b).

or a sole ownership. If creation of the joint tenancy effects a gift by the donor-tenant to the donee-tenant, termination of a joint tenancy will not result in a taxable gift as long as the proceeds from the termination are divided in accordance with the tenant's respective interest in the property. Consequently a termination of a joint tenancy may require an equal division of the property or sales proceeds or, when unilateral severance is not possible under applicable local law, a division based on actuarial factors. If care is not exercised, a gift may result upon termination of a joint tenancy. It is conceivable that a gift tax liability could arise upon creation of a joint tenancy, and again upon termination without any benefit to the donor/donee parties. For example: Husband (H) having provided the $100,000 purchase price creates a joint tenancy with his wife (W) in a painting. Under controlling state law, neither spouse acting along can cause a severance of his or her interest. H is 45 and W is 40. The value of the gift upon creation of the joint tenancy is based upon the actuarial value of H's retained interest.

Value of the property transferred	$100,000
Less $100,000 x .42911 (factor for value of donor's retained rights)	42,911
Value of gift from H to W	$ 57,089

Assume the painting is sold 15 years later for $200,000 and the proceeds divided equally between H & W. Then W will have made a gift to H determined as follows:

Proceeds received by H	$100,000
Actuarial value of H's interest at time of severance - $200,000 x .38485[14]	76,970
Value of gift from W to H	$ 23,030[15]

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[14]Table ET6 from IRS Publication 723A, Supplement 1 (4-71), "Actuarial Values II: Factors at 6 Percent Involving One or Two Lives," It is made pertinent by Reg. Sec. 25.2512-9 (e) and Sec. 25.2515-2 (c)

[15]Byrle M. Abbin, pp. 5-3 and 5-6.

It would not be unusual for a husband and wife to desire equal ownership in such personal property, proceeding with joint ownership and never realizing the tax consequences that are involved. Tax costs could be high with no benefits accruing to the property owners.[16]

Conclusions Regarding Joint Tenancies

Joint tenancies with survivorship rights are popular and easily formed. No problem is created when a husband and wife hold relatively small proportions of their property in both their names. In fact, a small savings account in both names would assure the wife of simple and fast access to funds immediately after her husband's death. In the event an estate can reasonably be expected to remain under $60,000, jointly-held property may very well accomplish the desires of the estate owner in a very efficient manner. Even though a judicial determination of death is required it does not delay distribution of the estate and the costs are less than probate proceedings.[17] Thus the

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[16] State gift taxes must not be overlooked. Fredric H. Wright, pp. 12-13, issues a warning that the Oklahoma Tax Commission follows a non-statutory position that the federal estate tax law is applicable in Oklahoma and no gift arises on the creation of joint tenancies in real estate between husband and wife unless the contributor elects to treat the transfer as a gift. Since this position does not conform to a literal interpretation of the law, Wright believes a mere change in policy by the Oklahoma Tax Commission could bring about drastic gift tax results. He states, "For example, if the federal law is followed and joint tenancy property reconveyed to the contributing spouse, there is no federal gift tax result either at the time of creation or termination of the tenancy. However, if the Oklahoma law is followed, in accordance with the statutory provision, there is a gift by the contributing spouse to the noncontributor at the time the joint tenancy is created and an additional gift by the noncontributing spouse to the contributor at the time the property is revested in the sole name of the contributor....."

[17] See Appendix B and minimum fee schedule for "Determination of Death of Joint Tenant or Life Tenant," on p. 187.

merits of joint ownership should not be overlooked entirely.

Even when an estate is valued at $120,000, jointly held property between a husband and wife will qualify for the marital deduction, thus a $60,000 marital deduction and the $60,000 exemption will operate so that no federal estate tax will be due on the estate of the donor-tenant if he is the first to die. However, there will be an over-qualification of the marital deduction, and, upon the death of the donee-tenant, all the remaining property will be included in the gross estate and a federal estate tax liability will result. As the estate value becomes larger, the pitfalls of joint interest with survivorship rights become more pronounced and alternative approaches to avoidance of federal estate tax and probate costs become more advantageous.

Life Insurance

Taxability of Life Insurance Proceeds

Neither prior law nor the 1954 Internal Revenue Code defines insurance. For estate tax purposes, proceeds of insurance on the life of a decedent include the common forms of insurance, group insurance, accident and flight insurance, War Risk and National Service Life Insurance, double indemnity clauses by reason of the accidental death of an insured, and death benefits paid by fraternal beneficial societies operating under the lodge system.[18] Such proceeds of insurance are included in the decedent's gross estate when they are payable to the estate representative,[19] or when they are payable to named beneficiaries

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[18]Regs. Sec. 20.2042-1 (a) (1)

[19]IRC 1954, Sec. 2042 (1)

and the decedent at his death possessed any of the incidents of ownership in the policies.[20]

Life insurance proceeds are an important source of liquid assets in most estates. In many instances, this liquidity can be enhanced if the insurance policies are planned so that the proceeds will not be included in the insured's gross estate. Thus, estate planning should consider having ownership of life insurance policies vested in a person other than the insured, in order to remove the insurance proceeds from the insured's gross estate for federal estate tax purposes.[21]

Administration Costs of Life Insurance Proceeds

The minimum fee for administering a decedent's estate is based upon the value of the gross estate. However, insurance proceeds payable to a named beneficiary other than the estate of the decedent is excluded in computing the fee. In the event services are involved in connection with the life insurance proceeds, then the beneficiary should be charged on an hourly rate, or by contract.[22] As long as the proceeds of life insurance are not payable to the estate representative, regardless of whether the insured was the owner or not, the transfer of the asset is

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[20] IRC 1954, Sec. 2042 (2)

[21] Earl M. Colson, "Life Insurance Owned by the Noninsured," *1973 Institute on Estate Planning* (Indianapolis, 1973), Ch. 73-3. There are nontax reasons for vesting ownership of a life insurance policy in a person other than the insured. One reason, given by Colson, is a means of providing the financial security that resides in the owner's power to control the cash value during the insured's lifetime and to control the devolution of the proceeds at the insured's death.

[22] Title 58, Oklahoma Statutes Annotated, Section 527.

outside of administrative proceedings and should not be included in determination of administration costs.

Incidents of Ownership

As indicated previously, life insurance proceeds are included in the decedent's gross estate even though payable to a named beneficiary as long as the decedent, at his death, possessed any of the incidents of ownership in the policies. The term "incidents of ownership" refers to the right of the insured or his estate to the economic benefits of the policy. It includes the right to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment, to pledge the policy for a loan, and to borrow the cash value from the insurer.[23] The 1954 code broadened the scope of the term to include a reversionary interest.[24] Inadvertent retention of any one of the rights defeats the attempt to keep the insurance proceeds on the decedent's life from being included in his estate. In determining whether a decedent possessed any incidents of ownership in a policy, or any part of a policy, the effect of state or other applicable law upon the terms of the insurance policy must be considered.

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[23] Regs. Sec. 20.2042-1(c)(2)

[24] Regs. Sec. 20.2042-1(c)(3) states "The term 'incidents of ownership' also includes a reversionary interest in the policy or its proceeds, whether arising by the express terms of the policy or other instrument or by operation of law, but only if the value of the reversionary interest immediately before the death of the decedent exceeded five percent of the value of the policy ....., the term 'reversionary interest' includes a possibility that the policy or its proceeds may return to the decedent or his estate and a possibility that the policy or its proceeds may become subject to a power of disposition by him."

Other Code Provisions

Even though the insured possesses no incidents of ownership in the policy nor a reversionary interest at the time of his death, all or a portion of the insurance proceeds may be includable in his estate pursuant to other code provisions. There are three situations that are especially noteworthy.

First, there is the situation where the insured transfers a policy to the ownership of another and the insured dies within three years after the transfer, the possibility is that all the proceeds will be included in the insured's estate on the grounds that the transfer was made in contemplation of death. The possibility of inclusion is stronger for the transfer of a life insurance policy than any other kind of property, because of the nature of life insurance itself and the fact that its greater value occurs after the death of the insured. The presumption that the transfer is made in contemplation of death is difficult to overcome.

The second situation is where the beneficiary of the proceeds has a binding legal obligation to use the proceeds to pay debts or taxes of the insured's estate.[25] Frequently, life insurance is acquired by the insured to provide funds for the payment of death taxes and

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[25]Regs. Sec. 20.2042-1 (b) refers to inclusion of insurance proceeds when they are receivable by or for the benefit of the estate. It states, "It makes no difference whether or not the estate is specifically named as the beneficiary under the terms of the policy. Thus, if under the terms of an insurance policy the proceeds are receivable by another beneficiary but are subject to an obligation, legally binding upon the other beneficiary, to pay taxes, debts, or other charges enforceable against the estate, then the amount of such proceeds required for the payment in full (to the extent of the beneficiary's obligation) of such taxes, debts, or other charges is includible in the gross estate."

administration expenses. In an effort to avoid inclusion of the insurance proceeds in his gross estate, he may transfer all incidents of ownership to someone else. However, the insured should realize that in so doing, he cannot bind the donee to use the proceeds to pay the death taxes and administration costs without sacrificing the estate tax advantage of excluding the proceeds from his gross estate, which was the original purpose for transferring ownership of the policy. This is not to say that the donee cannot use the insurance proceeds to buy assets from the estate or make loans to the estate, thus providing the liquidity needed by the estate to pay the taxes and administration costs and still avoid the inclusion of the proceeds in the insured's gross estate. Likewise, when ownership of the policy is vested in a trust, the trustee should be authorized, not directed, to make loans to, and purchase assets from, the insured's estate.

Third, there is the situation where an irrevocable transfer of an insurance policy is made, but the insured/donor continues to pay the premiums. Where the insured's death occurs more than three years after the transfer, thus distinguishing this situation from the first, we still have a contemplation of death question. Prior to 1971, the Internal Revenue Service's position was that a portion of the insurance proceeds of the policy was included in the insured's gross estate.[26] That portion is equal to the ratio that the amount of premiums paid within three years prior to the date of death bears to the total amount of premiums paid throughout the life of the policy. After the Internal

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[26]Rev. Rul. 67-643, 1967-2 CB 327.

Revenue Service lost several court cases on this issue,[27] a new ruling was issued.[28] The ruling states that no part of the proceeds of a whole life policy will be subject to tax where the owner lives for more than three years after the transfer. Only the actual amount of premiums paid by the former owner in contemplation of death within three years of his death is includible in his gross estate.[29]

Payment of premiums by the insured can raise questions in instances of newly-issued policies owned by the noninsured, term insurance, and flight insurance. In the situation where a policy is originally issued directly to the noninsured owner, but the insured pays the premiums and dies within three years of issuance, the Internal Revenue Service contends that the proceeds of the policy, and not merely the amount of premiums, are subject to the contemplation of death risk. The basis for this conclusion is that the insured indirectly transferred the policy within three years of death. There are court cases supporting this position and rejecting it.[30] The cases rejecting the

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[27]See Gorman v. U.S., 68-2 USTC Para. 12,553; First National Bank of Midland, Executor of the Estate of O. D. Mathers, 70-1 USTC Para. 12,666.

[28]Rev. Rul. 71-497, 1971-2 CB 329.

[29]William J. Casey, Estate Planning (New York, 1973) Para. 16403.5. It is suggested that it may be preferable for the insured to make a cash gift to the owner of the policy and let him pay the premium, thus the presumption that the gift was in contemplation of death may be easier to overcome.

[30]Cases upholding the IRS position include: Bel v. U.S., 72-1 USTC Para. 12,818; Detroit Bank & Trust Company, Executor of the Estate of Fred W. Ritter, 72-2 USTC Para. 12,883; First National Bank of Oregon, Executor of the Estate of Fred M. Slade, 74-1 USTC Para. 12,966. Cases rejecting the IRS position are: Gorman v. U. S., 68-2 USTC Para. 12,553; Mercantile Trust Company National Association, Executor of the Estate of Charles W. Ahner, 70-1 USTC Para. 12,678. It should be noted that the Rev. Rul. 71-497, 1971-2 CB 329, was issued after the cases rejecting IRS's position and prior to those cases supporting their position.

IRS position are based on the assertion that since the insured never owned the policy he could not have transferred it.

In addition, the IRS expressly takes the position that if an insured pays the premium and makes a gift of a one-year term policy, then dies within the year, the entire proceeds will be taxed.[31] Thus, the purchaser of a flight insurance policy cannot escape the estate tax even if he makes the beneficiary the owner before takeoff. At least two authorities express the concern that this theory of inclusion may be extended to an annual renewable term policy issued directly to the noninsured more than three years prior to the insured's death.[32] By virtue of the insured paying the premium, the contention could be that each annual renewal was a separate indirect transfer of the policy by the insured.

Noninsured Ownership Techniques

The noninsured owner may acquire the policy upon its original issuance or by transfer from the insured or other owner. A gift of a life insurance policy owned by the insured has advantages over other types of gift property. For instance, a gift of income-producing

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[31] Rev. Rul. 71-497, 1971-2 CB 329, presents Situation 2 where "nine months before he died by accidental means, the decedent purchased an accidental death insurance policy on his life for a one-year term, designating his children as owners and beneficiaries. He paid the full premium from his individual funds ..... Thus, in Situation 2, the economic benefit that the decedent did in substance transfer to his children by the purchase of the insurance policy was not the use of the cash amount of the premium payment but the right to the insurance coverage for the one-year period of the contract..... Accordingly, it is held that the value of the insurance in this situation is includible in his gross estate under Sec. 2035 of the Code."

[32] Earl M. Colson, Para. 73.308, p. 3-14, and William J. Casey, Para. 16,403.5, p. 16,418.

property results in the donor losing the income. In estates valued at less than $120,000 it is assumed such results are undesirable. However, an unmatured life insurance policy produces no income. Granted, the donor would lose the potential income that could be earned on the investment of any cash value, but this assumes he surrenders the policy for the cash value. A term insurance policy does not have any cash value, thus, its transfer does not result in any loss of income. Another aspect of a gift of a life insurance policy is an assured ultimate appreciation over current value. This occurs because the value of an unmatured policy for estate and gift tax purposes is the policy's interpolated terminal reserve value adjusted for any prepaid premiums and policy loans in effect at the time of the gift. The amount excluded from the gross estate, because of the transfer by gift, is the proceeds of the policy. Consequently, the gift tax is generally assessed on a substantially smaller amount than that excluded from the gross estate. If a policy has been in force for many years, the reserve value may be approaching the face amount. Naturally such a mature policy is less attractive as a gift than a newly issued policy.

Noninsured ownership of insurance can be outright or in trust. Outright ownership is simple and economical and, when a transfer by gift is involved, the gift qualifies for the $3,000 per donee annual exclusion as well as the gift tax marital deduction if the donee is the insured's spouse. Alternatively, transfer of the policy, as well as payment of future premiums to a trust, would be gifts of future interests not qualifying for the annual exclusion and marital deduction.[33]

Outright ownership may be accompanied by drawbacks in certain situations. For instance, if the owner survives the insured, the proceeds are paid to the owner and, if not dissipated, will be includible in the owner's gross estate. It may be that the estate tax saving in the insured's estate is more than offset by the additional tax cost in the owner's estate, depending upon the size of the owner's independent estate. If the situation is such that there is an additional tax cost, then the question to be considered is whether the deferment of the tax on the proceeds justifies this additional cost.

As previously indicated, the insured may intend for his life insurance to provide the funds with which the death taxes and other debts and expenses are to be paid. However, the insured has no assurance the outright owner will use the proceeds for these purposes. There is also the possibility that the owner may die before the insured and fail to make adequate provisions for continuing the premiums.

There are additional problems which must be considered with outright ownership of a policy by someone other than the insured. First, the owner should designate himself as the primary beneficiary, or a gift liability may arise. As an example, assume the wife owned a policy covering her husband and she designates their child as the primary beneficiary. Her husband dies before she does. Upon his

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[33]Earl M. Colson, Para. 73.303, p. 3-6 indicates qualification as a present interest is possible, but the purpose of transferring the policy in trust would be defeated. Likewise, qualification for the gift tax marital deduction is possible, but the proceeds would be subject to inclusion in the wife's gross estate for federal estate tax purposes, thus defeating a primary reason for trust ownership.

death, she is deemed to have made a gift to their child of the proceeds of the policy.[34] Second, care should be given to designating a secondary beneficiary to avoid any possibility of having the proceeds paid to the insured's estate. Failure to provide for a secondary beneficiary when the owner dies before the insured may result in the proceeds being paid to the insured's estate and, consequently, included in the insured's gross estate for estate tax purposes. Thus the primary reason for having a noninsured own the life insurance policy is inadvertently defeated. However, nontax considerations may indicate the return of the policy to the insured is preferable. If so, then steps should be followed to accomplish such. The important thing is not leaving the issue in a state of confusion, allowing chance to dictate the final disposition of substantial proceeds.

Other than outright, ownership can also be vested in a trust. Many of the disadvantages of outright ownership can be eliminated through trust ownership. First, if properly drafted, a trust can assure the availability of funds to meet the liquidity demands on the insured's estate and even those of his wife's estate. As previously stated, the trustee should be authorized, but not directed, to make loans to and purchase assets from the estate, thus providing funds to pay estate taxes and other costs. Second, the trust can be drafted so as to give the spouse a beneficial interest in the proceeds and, yet, avoid inclusion of the proceeds in the spouse's gross estate. Third, trust ownership could provide knowledgeable and prudent management of the

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[34]Adele F. Goodman v. Commissioner, 46-1 USTC Para. 10,275.

proceeds which may be woefully lacking in outright ownership. Fourth, trust ownership will prevent the spouse from having direct access to the cash value, which may be desirable in case of marital discord. Finally, if the proceeds are for the primary benefit of a minor child, trust ownership is a practical necessity.

Trust ownership naturally requires the services of an attorney to draft the instrument. A separate entity is developed, thus separate records and income tax forms are necessary. Consequently, a major drawback of trust ownership, as compared with outright ownership, is its complexity and additional cost in time and money to administer the trust.

Conclusions and Recommendations

Generally, insurance proceeds are includible in the insured's gross estate, because the insured retains the incidents of ownership in the policies. Thus a federal estate tax liability may arise. If the proceeds are payable to a named beneficiary, the proceeds should not be subject to administration costs, whereas, such costs will be incurred if the proceeds are paid to the insured's estate.

It is possible to vest ownership in an insurance policy in someone other than the insured thus avoiding federal estate tax on the proceeds in the insured's estate as well as administration costs. Care must be exercised to avoid the aforementioned pitfalls. In addition, the nontax consideration that the insured has no legal control over the policy must be fully understood.

The decision regarding policy ownership depends upon the value of the overall estate. If the net value of the insured's estate is less than $60,000 (the amount of the federal estate tax specific exemption) it is not particularly disadvantageous to have the insured own the insurance policies and provide for the proceeds to be paid to a beneficiary other than the insured's estate. In this study, the estates being analyzed have values of more than $60,000 but less than $120,000. Probably the most important consideration here is whether or not the payment of the proceeds to the surviving spouse of the insured will qualify for the marital deduction.[35] For example, assume insured has an estate consisting of $60,000 of life insurance with the spouse as named beneficiary and $60,000 of other assets. If the insured is survived by his spouse, the insurance proceeds will be paid to her and qualify for the marital deduction. Since the deceased owned the policy, the proceeds are includible in his gross estate. Thus, the deceased's total estate would be $120,000 less $60,000 which qualified for the marital deduction and $60,000 specific exemption, leaving no taxable estate for federal estate tax purposes. Since the surviving spouse was named beneficiary, administration costs would not apply to the insurance proceeds.

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[35]Regs. Sec. 20-2056 (b)-6 requires all five of the following conditions must be satisfied if insurance proceeds from a decedent to his surviving spouse shall qualify for the marital deduction: "(1) The proceeds, or a specific portion of the proceeds, must be held by the insurer subject to an agreement either to pay the entire proceeds or a specific portion thereof in installments, or to pay interest thereon, and all or a specific portion of the installments or interest payable during the life of the surviving spouse must be payable only to her. (2) The installments or interest payable to the surviving spouse must be payable annually, or more frequently, commencing not later than thirteen months after the decedent's death. (3) The surviving spouse must have the power to appoint all or a specific portion of the amounts so held by the insurer to either herself or her estate. (4) The power in the surviving spouse must be exercisable in all events. (5) The amounts or the specific portion of the amounts payable under such contract must not be subject to a power in any other person to appoint any part thereof to any person other than the surviving spouse."

If the spouse owned the insurance policy on the deceased's life the proceeds would be paid to her, would not be includible in the deceased's estate and would not qualify for the marital deduction. Thus the deceased's estate would be valued at $60,000 and the specific exemption of $60,000 would eliminate any federal estate tax. Likewise, the proceeds would not be subject to administrative costs. The net cost for federal estate taxes and administrative costs would be the same in either instance. Consequently, transferring ownership of life insurance policies, when the total estate value including the insurance proceeds is not likely to exceed $120,000, is not a prime consideration in the estate plan.

Ownership of life insurance should be considered carefully when the current estate of the testator is $120,000 and potential growth is anticipated. Transferring ownership of life insurance policies to the spouse is not necessarily a good practice.[36] The particular family circumstances including the overall family estate plan should be considered. It is conceivable that alternative methods are available which will achieve the estate owner's financial objectives without

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[36]Fredric H. Wright, "Life Insurance and Its Use in Estate Planning," Oklahoma Law Review, 23 (May, 1970), p. 168. "Absolute assignment of newly issued life insurance to the spouse of the insured is not an 'automatic' but should be effected only in those instances in which there is absolute assurance that the purposes for acquiring the insurance will be uninterrupted after the transfer."

having an adverse estate tax impact.[37] The most practical alternative generally involves a trust which adds to the complexity of the estate plan. The dilemma becomes one of accepting a more complex estate plan or higher federal estate taxes and administration costs.

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[37]Fredric H. Wright, pp. 168-169., exemplifies potential problems when the wife owns the life insurance policies on the life of her husband. First consideration must be given to the estate tax impact on both the husband and the wife's estates, the effect in the event of the wife's mental disability or the wife predeceasing the insured husband, and the need to provide for distribution of the insurance proceeds in the event of the premature death of both the husband and wife. Wright believes the most practical and beneficial answer to these problems is for the policy to be owned by and payable to a revocable trust created by the husband which becomes irrevocable on the husband's death and designed, by formula, to take full advantage of the federal estate tax marital deduction.

CHAPTER IV

CIRCUMSTANCES FOUND TO EXIST IN ESTATES

Introduction

Various facets of estate planning have had considerable coverage in professional journals as evidenced by the lengthy discussion in Chapters II and III. It appears there are opportunities to reduce federal estate taxes and administrative expenses, but these opportunities require careful planning and attention to detail. The objective of this study was two-fold. First, an effort was made to assemble pertinent data about probate proceedings and the condition of those estates from actual estate files. The information is presented in this chapter. Second, an analysis of the data was made to determine the amount of federal estate tax and administrative expenses that could have been saved through planning. This information is developed in Chapter V.

A restraint was placed upon the data in that the study was restricted to those estates which had a net value of at least \$60,000, but less than \$120,000. As previously indicated in Chapter II, a husband and wife, whose combined estate value is within this range, are likely to avoid federal estate tax on the estate of the first to die, but may incur federal estate tax unnecessarily on the estate of the survivor. It is well established that significant dollar savings can be enjoyed by estates exceeding a quarter of a million dollars and discussions with Tulsa, Oklahoma, accountants, who specialized in estate taxes and planning, revealed a hesitancy to get involved in estate planning when the estate value was less than a quarter of a million dollars. The purpose of this chapter was to explore the effect of this general attitude as well as the presentation of data regarding the administration proceedings and the configuration of the estates.

Source of Data

The population chosen for this study consisted of those estates filed for probate or judicial determination during 1972 in Tulsa County, Oklahoma. In 1972, there were 1,640 proceedings involving either estate administration or judicial determination of the death of a joint tenant. Of the proceedings filed, there were 80 cases which fell within the range of $60,000 to $120,000. There were seven cases which had to be excluded because the inventory of assets was incomplete. Thus 73 case files were used for this study. Almost ninety percent of the 1,640 cases reported assets less than $60,000.

Initially, all 1,640 files were examined in an effort to identify those cases which fell within the designated range. After the cases to be included in this study were identified, each file was thoroughly studied and data was extracted regarding the decedent's sex, date of death, marital status, date of last will, the date the will was admitted to probate, who the heirs at law were, who the devisees and legatees were, whether the executor served without bond, the date of final proceedings, and the expenses and estate taxes, both federal and state, paid by the estate. The compilation of these data and the discussion of the information follows.

Information Regarding Testacy

The first item of information under consideration was the number of decedents who died testate (had a will). In Table III shown on the following page, the existence of testacy is shown. Out of the 73 cases in the study, 61 of the decedents had a will. Of the twelve, who did not have a will, six held all their property in joint tenancy, thus no administration proceedings were instituted, although a judicial determination terminating tenancy was required. In Case No. 80-15, the decedent did have a will, however, all of the property was held in joint tenancy and only a judicial determination hearing was required. Thus, almost 84% of the decedents died testate indicating that at one time they gave some consideration to the affairs of their estate. It was apparent that at this time, at least, they were receptive to a discussion regarding estate planning.

Also shown in Table III is the date of the will or last codicil that was submitted for probate as well as the date of the decedent's death. The longest period between the two dates was reflected in Case No. 60-6. Here the date of the will was April 10, 1948, and the testator died on January 1, 1972, a period of more than twenty-three years. The shortest periods were reflected in Case Nos. 70-13 and 110-4. Both indicated a period of less than one month.

A tabulation of the periods between the two dates is shown in Table IV on Page 85. Only sixty cases were tabulated because the date of the will probated in Case No. 80-13 was not entered in the transcript of the proceedings admitting the will to probate. The distribution showed thirteen of sixty cases, or about 22%, had a will dated within one year of the testator's death and twelve of sixty, or 20%, of the

TABLE III

FREQUENCY OF TESTACY AND DATE OF WILL, WHEN APPLICABLE, AND DATE OF DEATH

Estate Number	Died Testate	Date of Will	Date of Death
60- 1	Yes	3-29-62	11-11-72
2	Yes	3-15-71	6-19-72
3	Yes	3- 6-64	8-17-72
4	Yes	8-11-61	12- 2-71
5	Yes	12-24-71	9-18-72
6	Yes	4-10-48	1- 1-72
7	Yes	11- 9-63	1-24-72
8	Yes	12- 8-71	4-18-72
9	Yes	6-18-67	2-17-72
10	Yes	3-24-72	5-17-72
11	Yes	12- 2-70	9-30-72
70- 1	Yes	9-10-71	1-31-72
2	No	N/A	2- 2-72
3	Yes	8-25-69	8-16-72
4	No	N/A	9- 2-72
5	Yes	6- 9-71	5-29-72
6	Yes	1-14-69	2-21-72
7	Yes	9- 4-68	8-29-72
8	Yes	8-29-52	10-28-72
9	No	N/A	5-19-72
10	No	N/A	8-12-72
11	Yes	10-19-56	3-22-72
12	Yes	1-11-72	7-29-72
13	Yes	4-19-72	5- 7-72
14	Yes	5-29-52	8-22-72
15	Yes	9-25-58	11-10-71
80- 1	Yes	10- 1-68	9-10-72
2	Yes	5-21-65	2- 3-72
3	Yes	1-17-69	12-10-72
4	Yes	2- 2-72	5- 8-72
5	Yes	1-31-69	10-28-72
6	No	N/A	3-30-72
7	Yes	2- 5-71	1-20-72
8	No	N/A	12-13-71
9	Yes	5-17-71	7-20-72
10	Yes	2-18-71	8-12-72
11	No	N/A	3-24-72
12	No	N/A	8- 2-72
13	Yes	Missing	1- 7-72
14	Yes	10-30-69	7-19-72
15	Yes	11- 8-63	4-28-72
16	Yes	1-14-72	3- 9-72
90- 1	No	N/A	1-10-72

TABLE III (Continued)

Estate Number	Died Testate	Date of Will	Date of Death
90- 2	Yes	8-21-63	10-19-72
3	Yes	2- 2-71	12-20-71
4	Yes	3-29-71	3-29-72
5	Yes	8- 7-52	7- 4-72
6	Yes	1- 8-65	1-31-72
7	Yes	5-25-69	8-27-72
8	Yes	9- 4-48	2-22-72
9	Yes	5-17-58	1-21-72
10	Yes	7- 8-69	9-30-72
100- 1	Yes	5-19-65	3- 3-72
2	Yes	12-28-67	5- 4-72
3	Yes	1-22-65	4- 9-72
4	Yes	12-23-65	5- 7-72
5	Yes	10-14-68	10-14-72
6	Yes	6-17-70	1-22-72
7	Yes	10-26-70	3-24-72
110- 1	Yes	2-12-71	5- 3-72
2	Yes	8-18-70	7-19-72
3	Yes	8-16-66	3-23-72
4	Yes	6-11-72	7- 6-72
5	Yes	1-17-69	6-18-72
6	No	N/A	12-31-71
7	Yes	10-16-61	4-30-72
8	Yes	7-30-65	5-31-72
9	No	N/A	10-26-72
10	No	N/A	12-10-72
11	Yes	9- 4-71	9- 5-72
12	Yes	3-20-57	2-16-72
13	Yes	4-30-65	9- 1-72
14	Yes	11-16-64	2-20-72

TABLE IV

LENGTH OF TIME BETWEEN LAST DATE
OF WILL AND DATE OF DEATH
BY SIZE OF ESTATE

Number	Size of Estate (000's omitted)						Cumulative
of Years	$60-70	$70-80	$80-90	$90-100	$100-110	$110-120	Total
0-1	3	4	3	2		1	13
1-2	2		2		2	3	22
2-3		1	1				24
3-4		2	3	2	1	1	33
4-7	1		1		3	2	40
7-10	2		1	2	1	2	48
Over 10	3	4	—	3	—	2	60
Totals	11	11	11	9	7	11	

cases had a will dated over ten years prior to the testator's death. Over half of the cases, thirty-three out of sixty, had wills or codicils dated within four years of death. Some of the wills with more recent dates may have been prepared because death seemed imminent, whereas others would have been prepared because of a real desire to arrange for the transfer of their property in the event of death.

Since six of the twelve decedents who died intestate, held all of their property in joint tenancy with their wives, all of their property was transferred to their wives and intestate distribution of their property did not apply. However, the remaining six cases reflected the following results: 1) Case No. 70-2 involved a woman whose husband and one sister survived her. Her estate was valued at $71,300, of which $10,800 was held in joint tenancy with her husband. The rest of her estate was distributed one-half to her husband and sister. A charge of $230 was paid by the estate for an administrator's bond. This item could have been avoided if the testator had designated an executor for her estate and stipulated that no bond should be required; 2) Case No. 80-6 referred to a woman whose husband had died in 1965. There existed a joint action will, which was dated May 16, 1952, wherein each left their entire estate to the other. Since he predeceased her, she died intestate. As a result the entire estate passed under the Oklahoma Statute of Succession and the heirs at law consisted of fifteen first cousins.[1] Her estate was valued at about $82,800. Amounts paid by the estate included $396 for the administrator's bond, and $2,750 for an administrator's fee. Quite often the administrator or executor

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[1]Title 84, Oklahoma Statutes 1961, Section 213.

was a devisee or legatee of the estate and waived his fee. However, in this case, the administrator of the estate appointed by the court was a friend of the deceased and did not waive his fee; 3) Case No. 80-8 involved a woman who died on December 13, 1971. Her estate included real estate valued at $75,000, which was held in joint tenancy with rights of survivorship with her son. The remainder of her estate consisted of cash and savings of $9,700, which also went to her son as her only heir at law. Then on December 25, 1971, twelve days after she died, her son and heir died. The two estates were administered simultaneously. There was a compromise and settlement between a niece and nephew of the son, who were the heirs at law, and a woman claiming to be the son's common law wife. The amount paid for the administrator's bond was $25. The total fee for the administrator and attorney was set at 10% of the total gross value reported in the federal estate tax return for the mother, which fee amounted to $8,470; 4) Case No. 80-12 referred to a man who died August 2, 1972, and his heirs at law were his mother and father. His estate consisted of an eighty acre farm valued at $75,000, some common stock valued at $1,000, and cash and savings of $9,200. This was one of the cases which was not closed as of the last day of the field study, thus further information was not available; 5) Case No. 110-9 involved a man who was survived by his wife and two daughters. Since he died intestate, Oklahoma laws of descent applied and his wife and two daughters thus received one-third each of the estate. However, of the total estate value, $121,600, the savings accounts were held in joint tenancy with the decedent's wife and consisted of $107,100. Thus, only the common stock valued at $14,500 was affected by the Oklahoma laws of descent. In this situation an administrator's bond of $85 was paid by the estate; 6) Case No. 110-10 referred to a man who was survived by his wife and three daughters from a prior marriage. According to the Oklahoma laws of descent, the widow and three daughters received one-fourth each of the probated estate. Included in the estate was common stock valued at $317,300, which was subject to claims of $282,900. Included in these claims was $58,400 which was ordered held in trust for payment to the decedent's ex-wife. The net value of the common stock was $34,400. The only other property subject to administration proceedings was an interest in a joint venture valued at $2,500, making the total value of the estate subject to the laws of descent, $36,900. The remaining assets in the estate were $10,200 in cash and real estate valued at $28,500. Both of these were held in joint tenancy with the decedent's wife. There was also $47,000 in life insurance paid to named beneficiaries. The data in the file did not reveal the amount paid for the administrator's bond, but it did indicate the attorney's fee paid was $11,930.

The basic choices an individual has regarding the disposition of his property at death are whether he makes a will or allows his property to be transferred according to the state laws of descent. Generally a will permits the testator the freedom to give his property to whomever he chooses and to use a variety of methods in doing so.

The cases for this study where wills did exist were reviewed to determine the differences between the testate distribution, and the distribution that would have been made according to the Oklahoma laws of descent. Table V, on the following three pages, provides the detail for each testate case, allowing a comparison between the heirs at law and the devisees and legatees under the will.

TABLE V

PATTERNS OF DISTRIBUTION CHOSEN BY TESTATORS VERSUS INTESTATE DISTRIBUTION

Estate Number	Heirs at Law	Testate Distribution
60- 1	Wife and five daughters	Wife
2	Wife, sisters, brothers, nieces and nephews	Wife
3	One niece and five nephews	Three nephews, equally
4	Wife and two children (from first marriage)	Wife
5	One son and one daughter	One-third each to son and daughter and one-twelfth each to four grandchildren
6	Two sisters	Two sisters equally
7	One daughter, one son, four grandchildren and one step-son	One-fourth each to daughter and son and one-half to step-son
8	Two daughters, two sons and three grandchildren by a deceased daughter	One-fifth to each daughter and son and one-fifteenth to each child of deceased daughter
9	Wife, two adult children and three minor children	$1,000 to each of adult children and residue to wife
10	One daughter and one son	Daughter, son and step-son equally
11	Eight nieces and nephews	One nephew
70- 1	One daughter and one son	Personal items to daughter, residue shared equally by the son and daughter
3	Mother and two sisters	Mother
5	One sister	One sister
6	Wife and one daughter	Wife
7	Wife and one daughter	Wife
8	Wife and one son	Wife
11	One daughter	One daughter
12	One sister	One sister
13	Cousins	Specific bequests to cousins, step-children and a friend
14	One sister, two brothers and two nieces by a deceased brother	Missing
15	Wife and one daughter	Wife
80- 1	One son	One son
2	Husband, three sons and one daughter	Husband
3	One daughter and two sisters	One daughter

TABLE V (Continued)

Estate Number	Heirs at Law	Testate Distribution
80- 4	Two nieces and two nephews	Specific bequests to the two nieces and two nephews and to nieces and nephews of deceased husband
5	Husband and one daughter	Husband and one daughter, equally
7	Wife and two sisters	Specific bequest to sister and sisters-in-law, residue to wife
9	One brother and one sister	Testamentary trust for use and benefit of brother, corpus going to sister upon brother's death
10	Wife and one son	Wife
13	Wife and three sons	$20,000 to one son, residue to wife
14	Wife, three brothers and five sisters	Wife
15	Wife and two sons	Wife
16	Husband and one daughter	Husband
90- 2	Wife and one daughter, a minor	Missing
3	Three sisters, seven nephews and three nieces	One sister
4	Husband and three children	Missing
5	Wife, one daughter and two sons	Missing
6	Husband and one son	Son as trustee for husband
7	Wife, three sons and one daughter	Wife
8	Wife and three children	Wife
9	Father, one brother, one sister and two nephews	One-fifth to each of five heirs at law
10	One daughter	One daughter
100- 1	Husband and mother	Husband
2	Husband and one son	Son as trustee for grandson, residue to husband
3	One sister and one brother	Specific bequests to sister, brother, nieces and nephews
4	Wife, four sisters, two sisters-in-law, six nephews and nieces	Specific bequest to one nephew, residue to wife
5	Two daughters	Two daughters equally
6	Two brothers	Two brothers equally
7	Wife, one daughter, two sons and mother	Missing

TABLE V (Continued)

Estate Number	Heirs at Law	Testate Distribution
110- 1	Wife, one sister, two nieces and one nephew	Wife
2	Two daughters, one grandson and one granddaughter	Specific bequest to one granddaughter, residue to two daughters equally
3	Wife and two sons	Two sons, equally
4	Wife, one daughter and two sons	Wife
5	One son	One son
7	Wife and two daughters	Wife
8	Three daughters and one son	One-fourth each to daughters and son
11	Wife and three sons	One-fourth each to wife and sons after survivorships
12	Wife, one daughter and one son	$250 each to son and daughter, $1,000 to grandson and residue to wife
13	Wife, one daughter and one son	Wife
14	Wife and three sons	Wife

There were 61 cases in which a will was admitted for probate and five of those did not reveal the testate distributions. In 27 of the cases, the decedent was survived by his wife and various other heirs at law. In seventeen of these, the surviving wife was the sole devisee and legatee. In five cases, there were some small bequests specified with the bulk of the estate going to the surviving wife. Information regarding the testate distribution in four cases was not available in the file because the estate was still open. The remaining case was No. 110-3, wherein the legatees under the will were the decedent's two sons, although his wife was living. Thus, the information here indicates that 22 out of 23 testators who were survived by wives and lineal descendants chose to bequeath substantially the whole estate to the spouse.

There were seven cases in which the husband was the surviving spouse. The heirs at law included children in six cases and a mother in one case. In three cases, the husband was designated as the sole heir. In Case No. 90-6, the will provided a trust for the benefit of the husband, with their son acting as trustee. In Case No. 100-2, the will provided that common stock valued at $32,800 should be placed in trust for a grandson with the son acting as trustee. The residue of the $101,300 estate was distributed to the surviving husband. Case No. 80-5 involved an estate valued at $82,600, of which $50,700 was held in joint tenancy with the surviving husband. The remainder, after expenses, was equally divided between the one daughter and the decedent's husband. This testate distribution is the same as that which would have occurred under the Oklahoma laws of descent. The remaining case had not been closed and the file did not include the information regarding the testate distribution. Even where the husband was the survivor, three cases out of six had the husband as the sole devisee and legatee. In the other three cases, the husband received benefits for well over fifty percent of the estate value. These results were in agreement with our premise that couples with estates valued in the range of $60,000 - $120,000 desire to provide for each other before distributing their wealth to lineal descendants.

Of the remaining 27 cases, where there was no surviving spouse, fourteen cases reflected testate distributions different than the Oklahoma laws of descent, whereas thirteen cases reflected testate distributions conforming to the Oklahoma laws of descent. Nine of the thirteen involved children of the deceased and no surviving spouse. Three involved sisters as the only heirs at law and one involved a mother. The testate distribution in Case No. 80-5, which was discussed in the previous paragraph also conformed to the Oklahoma laws of descent. Thus fourteen of fifty-six cases, where the testate distribution could be compared with the state laws of descent, or twenty-five percent of the time the testator's desires for distributing his estate were the same as that provided by the Oklahoma laws of descent. This provides a strong argument for considering, at least, the desirability of making a will. The fact that sixty-one of the seventy-three cases had wills indicates the public does consider a will to be a worthwhile undertaking.

It should be noted that in only three instances, a trust was included in the provisions of the will. One of these, Case No. 90-6, provided that the entire estate be placed in a trust for the benefit of the surviving husband with the son as trustee. The second instance is Case No. 100-2 where some common stocks, thirty-two percent of the total estate value, were placed in trust for the benefit of a grandson with the son serving as trustee. The third case, No. 80-9, provided for a testamentary trust for the use and benefit of a brother and upon his death, the corpus was to be distributed to a sister. Only the first case gave the appearance of planning for the minimization of estate taxes and administrative costs, the other two arose for reasons other than tax planning.

Time Involved in Estate Administration

There are several elements involved in estate administration. First, if there is a will, it must be found. Then a petition for probate of the will must be filed with the Probate Court. If, instead, the decedent dies intestate, a petition for letters of administration must be filed. The personal representative, either executor or administrator, has the responsibility to collect the assets of the estate, to pay the lawful claims against the estate and to distribute the balance to the heirs. One of the first steps is to determine what assets comprise the estate. An inventory of the assets must be taken and an appraisal of the assets made. During the administration period legal formalities must be observed.[2] For estates that are valued at $60,000 or more, federal estate tax regulations must be followed and a federal estate tax return filed within nine months of the date of death.[3] The estate assets are valued as of the date of death or six

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[2]See Appendix B for a list of the instruments that need to be filed during the administration of an estate in Oklahoma.

[3]1954 IRC Secs. 6018, 6075, 6151. For decedents dying on or after January 1, 1971, the federal estate tax return must be filed within nine months after date of death, unless extensions are granted. For decedents dying before January 1, 1971, the due date of the estate tax return was 15 months after the date of death.

months from date of death.[4] When a federal estate tax liability is involved, there are various estate and income tax aspects to be considered, if the most preferred tax position is to be attained. Thus, the circumstances surrounding estate administration are such that a certain amount of time will be involved.

An indication of the time involved to get a will admitted to probate and the date of the decree of final distribution is shown in Table VI on the following two pages. The time between death and the date the will was admitted to probate was analyzed according to size of estate in Table VIII, on page 99. In twenty-three or 37.7% of the cases, the will was admitted to probate within one month of death. An overwhelming 83.6% of the cases had the will admitted to probate within two months of death. Only five cases were over three months and the longest was seven months, seven days after the date of death.

Also shown is the date of the decree of final distribution of the estate. In Table IX, the number of estates for various sizes were compared with the time elapsed between the date of death and the date of decree for final distribution. It is shown that twelve cases, or 18% of the cases, were closed within eight months of the decedent's death. Also note that only one of these was in the smallest range whereas, three were in the largest range. Further, forty-four cases, or two-thirds of the total, were closed within fifteen months of the decedent's death. This compared favorably with the study of probate

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[4]1954 IRC Sec. 2032. This six-month period is applicable to estates of decedents dying after December 31, 1970. A one-year valuation period was used for estates of decedents until P.L. 91-614 was enacted reducing the time for filing the estate tax return and this alternate valuation date.

TABLE VI

DATE OF DEATH, DATE WILL ADMITTED TO PROBATE AND DATE OF DECREE OF FINAL DISTRIBUTION FOR EACH PROBATE CASE

Estate Number	Date of Death	Date Will Admitted to Probate	Date of Decree of Final Distribution
60- 1	11-11-72	12-18-72	Missing
2	6-19-72	9-25-72	7-18-73
3	8-17-72	9-14-72	7-25-73
4	12- 2-71	1-20-72	8- 9-72
5	9-18-72	10-16-72	9- 5-73
6	1- 1-72	8- 8-72	12-20-72
7	1-24-72	3- 6-72	Missing
8	4-18-72	5-22-72	7- 3-74
9	2-17-72	Missing	10-25-72
10	5-17-72	6-13-72	12-12-72
11	9-30-72	12- 6-72	Missing
70- 1	1-31-72	2-22-72	4-18-73
2	2- 2-72	N/A	3-28-73
3	8-16-72	9-12-72	10-31-73
5	5-29-72	6-19-72	11- 7-73
6	2-21-72	3-30-72	10-25-72
7	8-29-72	10-16-72	4- 3-74
8	10-28-72	12-19-72	8-22-73
11	3-22-72	5- 1-72	9-20-72
12	7-29-72	8-11-72	11-14-73
13	5- 7-72	5-22-72	3-28-73
14	8-22-72	9-28-72	Missing
15	11-10-71	4- 4-72	5-23-73
80- 1	9-10-72	12- 7-72	2-13-74
2	2- 3-72	3- 7-72	4- 4-73
3	12-10-72	1- 8-73	7-25-73
4	5- 8-72	5-23-72	4- 4-73
5	10-28-72	12-18-72	9-19-73
6	3-30-72	6-19-72	6-13-73
7	1-20-72	2-22-72	1-16-73
8	12-13-71	N/A	8- 9-72
9	7-20-72	7-21-72	5- 2-73
10	8-12-72	9-21-72	3-20-73
12	8- 2-72	N/A	Missing
13	1- 7-72	1-31-72	9- 5-73
14	7-19-72	8-21-72	10- 3-73
16	3- 9-72	5-18-72	12-13-72
90- 2	10-19-72	11-20-72	Missing
3	12-20-71	2-22-72	11- 1-72
4	3-29-72	5-18-72	Missing
5	7- 4-72	8-24-72	Missing
6	1-31-72	3-14-72	12-13-72

TABLE VI (Continued)

Estate Number	Date of Death	Date Will Admitted to Probate	Date of Decree of Final Distribution
90- 7	8-27-72	10- 5-72	4-25-73
8	2-22-72	3-20-72	7-13-73
9	1-21-72	2-15-72	9- 6-72
10	9-30-72	11- 9-72	5-30-73
100- 1	3- 3-72	3-30-72	12- 6-72
2	5- 4-72	5-30-72	1- 3-73
3	4- 9-72	5- 8-72	8-29-73
4	5- 7-72	6- 5-72	6- 6-73
5	10-14-72	11- 9-72	7-25-73
6	1-22-72	1-26-72	1-17-73
7	3-24-72	8- 1-72	Missing
110- 1	5- 3-72	6-26-72	7-18-73
2	7-19-72	8-28-72	2-28-73
3	3-23-72	5- 9-72	10- 3-73
4	7- 6-72	8-29-72	9-19-73
5	6-18-72	8-21-72	4-11-73
7	4-30-72	10-19-72	5- 9-73
8	5-31-72	8- 1-72	6-26-74
9	10-26-72	N/A	5-30-73
10	12-10-72	N/A	7-18-73
11	9- 5-72	9-28-72	6-13-73
12	2-16-72	3-16-72	11- 7-73
13	9- 1-72	9-25-72	9-19-73
14	2-20-72	3-27-72	7- 6-73

TABLE VII

DATE OF DEATH AND DATE OF DECREE TERMINATING TENANCY IN NON-PROBATE CASES

Estate Number	Date of Death	Date of Decree Terminating Tenancy
70- 4	9- 2-72	3- 6-73
9	5-19-72	11- 2-72
10	8-12-72	1-23-73
80-11	3-24-72	11- 6-72
15	4-28-72	12- 7-72
90- 1	1-10-72	2-20-73
110- 6	12-31-71	9- 7-72

TABLE VIII

TIME BETWEEN DEATH AND BEGINNING OF PROBATE PROCEEDINGS FOR TESTATE CASES BY SIZE OF ESTATE

	Size of Estate (000's omitted)							
Time	$60-70	$70-80	$80-90	$90-100	$100-110	$110-120	Total	Percent
1 Week or less			1		1		2	3.3
More than 1 wk. - 1 mo.	3	5	3	2	5	3	21	34.4
More than 1 mo. - 2 mos.	5	5	6	7		5	28	45.9
More than 2 mos. - 3 mos.			2			2	4	6.6
More than 3 mos. - 6 mos.	1	1			1	1	4	6.6
More than 6 mos. - 9 mos.	1						1	1.6
Unknown	1						1	1.6
Total	11	11	12	9	7	11	61	100.0

TABLE IX

LENGTH OF TIME BETWEEN DATE OF DECREE
OF FINAL DISTRIBUTION AND DATE OF
DEATH BY SIZE OF ESTATE

Number	Size of Estate (000's omitted)						Cumulative
of Months	$60-70	$70-80	$80-90	$90-100	$100-110	$110-120	Total
5-6		1					1
6-7	1						2
7-8			3	3	1	3	12
8-9	2	1				1	16
9-10		1	2		2	1	22
10-11		1	2	1			26
11-12	3		1	1	1		32
12-13	1				1	1	35
13-14		1				1	37
14-15		2	3			2	44
15-16		1					45
16-17				1	1	1	48
17-18		1	1				50
18-19		1	1			1	53
19-20		1					54
Over 20 mos.	4	1	1	3	1	2	66
Totals	11	12	14	9	7	13	

court cases closed in 1965 in Cuyahoga County, Ohio.[5] In that study the median time spent in probate court for the 48 estates over $60,000 was eighteen months to two years. The additional time for closing the estates in excess of $60,000 was attributed largely to the fact a federal estate tax return had to be filed. Ordinarily the personal representative for the estate will not distribute the assets of the estate until he receives an Estate Tax Closing Letter from the Internal Revenue Service, thus assuring him he is not personally liable for a mistake in the estate tax return. It should be noted that the estates in the Cuyahoga County study had the fifteen-month filing period for the estate tax return, whereas the estates in this study were subject to the reduced filing period of nine months. It appeared this was a factor in the shorter time period for probate proceedings.

Referring again to Table IX, of the twelve cases that were in probate court over twenty months, nine of those case files had no information regarding a petition being filed for a decree of final distribution. Three each were in the $60 - 70,000 range and $90 - 100,000 range and one each in the $70 - 80,000, $80 - 90,000 and $100 - 110,000 ranges.

Some of the reasons for the delay were identified as follows: (1) In Case No. 60-1, the executrix of the estate died after her appointment; (2) In Case No. 60-11, there were numerous heirs-at-law, none closer than nieces and nephews; (1) In Case No. 70-14, there was no surviving executor, thus a bank was appointed as administrator with will annexed. Prior to the appointment there was a contest filed regarding the

[5]Marvin B. Sussman, p. 239.

appointment of an administrator. In addition, there was also a petition for the sale of real estate; (4) In Case No. 90-2, it developed that a guardianship for a nine-year old daughter was required; (5) In Case No. 90-5 a major portion of the estate consisted of a one-fourth interest in a partnership; and (6) In Case No. 100-7, all of the property was held in joint tenancy with the surviving spouse except some common stock subject to a sell agreement. There was no apparent reason for the delay in probate proceedings for the remaining three open cases.

As previously indicated, most of the decedents died testate, however, five of the sixty-six probate cases were for decedents who had no will. These five were Case Nos. 70-2, 80-8, 80-12, 110-9, and 110-10. Interestingly enough, three of these took only eight months from date of death until the date of decree for final distribution. One took fourteen months and the other remained open, with no apparent reason for the delay. Thus, three out of five, or 60% of the intestate cases were completed within eight months, whereas twelve out of sixty-one, or 20% of the testate cases were completed within eight months. This result corresponds to that found in the Cuyahoga County study where 50% of the intestate cases were closed within nine months and only 24% of the testate cases were closed in the same period.[6] However, it was stated that the majority of the intestate cases were small estates of $2,000 or less, which is not the case in this study. Since the number of intestate cases was only five, the above results should be weighed carefully until additional information is forthcoming.

Of the seventy-three cases in this study, seven cases were not

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[6] Ibid., p. 238.

administered by the probate court because all of the decedent's property was held in joint tenancy with rights of survivorship. Thus the estates were not subject to probate, however, Oklahoma required a court proceedings determining the death of a joint tenant. Table VII, on page 98, provides the data needed to determine the length of time between the date of death of the decedent and the date of the decree terminating tenancy. All of the cases were closed within five to eight months of the decedent's death except Case No. 90-1, which spanned a period of thirteen months and ten days. There was no information in the file suggesting a reason for the delay.

When reviewing the files for the cases which remained open, the intent was to find some reason for the delay in closing the estate proceedings; however, that does not imply that similar circumstances or other reasons for delay did not exist in those estates which were closed in a relatively short time. For instance, Case No. 80-8, which is described on page 87, involved two estates as well as a compromise and settlement instrument. The two estates were probated simultaneously and the date of the decree of final distribution was dated August 9, 1972, less than eight months after the first death. Case No. 110-10, previously described on page 88, is another instance where a delay in probate proceedings might be expected. The decedent was a man whose heirs at law were a wife and three adult daughters from a previous marriage. There was no will and one of the many claims against the estate was filed by his former wife for alimony, under a divorce decree. A trust had to be formed and assets transferred to it to cover the projected alimony payments. Despite these circumstances the decree for final distribution was dated within eight months after death.

After reviewing the probate proceedings for the sixty-six cases in this study, it was apparent that a major factor in the length of time the probate proceedings took was the estate's personal representative and its attorney. Apparently much was accomplished, time-wise, through their combined skill and tenancity to stick to a job until a proper conclusion was reached. It appeared that when a sense of urgency was lacking, an estate would be allowed to wallow in probate much longer than necessary.

Estate Configuration

An integral part of estate planning is a classification of assets into broad categories. Such a classification provides an indication of the liquidity of the estate. For instance, cash, savings and insurance proceeds provide funds for cash requirements of the estate. Real estate, on the other hand, may require cash funds during the administration period rather than provide cash. Another planning benefit derived from the classification of assets is that some assets can be molded into an estate plan, whereas other assets may be the nucleus of the estate plan and that plan must be built around those assets. An illustration is the estate that consists largely of real estate and the testator desires to transfer part ownership of that land to his children in equal parts, but keep the real estate in one economic unit. Transferring part of the land would not accomplish his objective, however, transferring that land to a corporation and giving minority shares to the children may be a feasible alternative.

Since estate configuration is important, Table X on pages 106 through 108, is presented to show the percent of the total estate represented by each of nine categories. This table was prepared on the basis of the information available in the probate files and efforts were made to determine whether the assets reported in the file constituted all of the assets of the estate. As previously indicated insurance proceeds paid to a named beneficiary and property held in joint tenancy were not subject to probate proceedings. However, in the files, there was an estate tax closing letter from the Internal Revenue Service establishing the federal estate tax paid, if any, on the total assets of the estate. In thirty cases, federal estate taxes were paid and they were reconciled with the total assets reported in the file. Although not required, four cases which paid no federal estate tax filed an inventory which set out the value of the assets subject to probate and the value of the non-probate assets. In addition to the above, there were fifteen cases which included a copy of the Oklahoma estate tax form, which detailed real estate, stocks and bonds, personal property, life insurance, and transfers during lifetime and the amounts reported therein were reconciled to those reported in the general inventory for probate proceedings. Of the remaining twenty-four cases, thirteen identified jointly owned property in the general inventory and two included both insurance proceeds and jointly owned property. Nine case files had general inventories and supporting documents which did not elaborate on the estate assets, thus it was impossible to tell whether non-probate assets did or did not exist. Thus Table X was prepared as though the total estate value was identified and the percentage breakdown was computed accordingly.

Since the situs for the study was Tulsa County, Oklahoma, there was some concern that mineral interests may have an unusual effect.

TABLE X

PER CENT OF CATEGORICAL DISTRIBUTION
OF ESTATE VALUES

Estate Number	Homestead	Cash and Savings	Stocks and Bonds	Real Estate	Insurance	Business Interest	Other Personal	Mortgages Receivable	Undivided Mineral Interest
60- 1	16.7%	.8%	29.6%	52.9%	- %	- %	-	- %	- %
2	53.2	14.7	31.6	-	-	-	.5	-	-
3	-	35.7	-	-	-	-	-	64.3	-
4	26.3	1.2	67.4	-	-	-	5.1	-	-
5	-	15.8	82.6	-	-	-	1.6	-	-
6	-	25.2	57.8	-	13.7	-	3.3	-	-
7	47.1	52.7	-	-	-	-	.2	-	-
8	-	11.1	-	81.3	-	-	7.6	-	-
9	46.8	8.5	16.4	-	28.3	-	-	-	-
10	-	91.0	5.0	-	3.6	-	.4	-	-
11	7.2	-	-	80.0	-	-	.3	12.5	-
70- 1	-	37.7	32.5	23.1	-	-	6.8	-	-
2	12.6	53.5	12.5	19.6	-	-	1.8	-	-
3	-	18.5	33.2(a)	30.3	17.6	-	.4	-	-
4	36.4	13.4	-	-	50.2	-	-	-	-
5	-	54.3	7.7	8.2	12.1	17.7	-	-	-
6	-	27.8	23.4	20.1	24.4	-	4.3	-	-
7	44.5	1.9	2.0	-	50.9	-	.7	-	-
8	15.8	51.2	15.8	12.6	-	-	4.6	-	-
9	17.1	51.0	25.3	-	6.6	-	-	-	-
10	-	29.1	-	70.9	-	-	-	-	-
11	-	9.0	80.4	10.6	-	-	-	-	-
12	32.2	44.0	21.1	-	-	-	2.7	-	-
13	11.9	40.4	-	31.6	-	-	-	16.1	-
14	-	74.0	8.5	14.1	-	-	3.4	-	-

TABLE X (Continued)

Estate Number	Homestead	Cash and Savings	Stocks and Bonds	Real Estate	Insurance	Business Interest	Other Personal	Mortgages Receivable	Undivided Mineral Interest
70-15	18.8%	46.3%	- %	- %	- %	- %	1.8%	22.5%	10.6%
80- 1	-	21.8	57.7	-	-	-	-	20.4	.1
2	37.4	1.6	19.8	41.2	-	-	-	-	-
3	22.3	42.8	34.1	-	-	-	.8	-	-
4	44.8	24.8	26.7	-	-	-	3.7	-	-
5	30.3	28.3	37.9	3.5	-	-	-	-	-
6	-	73.3	26.3	-	-	-	.3	-	.1
7	17.5	63.9	-	-	-	-	6.3	-	12.3
8	-	11.5	-	88.5	-	-	-	-	-
9	21.8	11.3	61.4	-	1.4	-	4.1	-	-
10	23.5	31.8	-	11.8	-	27.0	5.9	-	-
11	22.9	7.5	10.4	-	59.2	-	-	-	-
12	-	10-8	1.2	88.0	-	-	-	-	-
13	19.2	80.8	-	-	-	-	-	-	-
14	-	78.4	12.6	9.0	-	-	-	-	-
15	-	29.9	-	70.1	-	-	-	-	-
16	36.2	7.7	-	-	-	-	-	56.1	-
90- 1	7.6	90.3	-	-	-	-	2.1	-	-
2	8.8	74.9	.6	-	-	-	6.6	9.1	-
3	-	44.4	39.0	13.1	-	-	3.5	-	-
4	-	50.8	-	-	-	-	4.3	44.6	.3
5	24.6	1.3	-	-	-	72.1	.5	1.5	-
6	10.1	53.2	36.7	-	-	-	-	-	-
7	25.8	4.2	2.1	14.4	51.6(b)	-	1.9	-	-
8	15.7	27.8	56.5	-	-	-	-	-	-
9	-	70.2	-	19.0	10.6	-	.2	-	-
10	-	12.3	54.9	-	-	-	2.5	30.3	-
100- 1	16.4	47.5	35.2	-	-	-	.9	-	-

TABLE X (Continued)

Estate Number	Homestead	Cash and Savings	Stocks and Bonds	Real Estate	Insurance	Business Interest	Other Personal	Mortgages Receivable	Undivided Mineral Interest
100- 2	3.0%	31.0%	65.1%	- %	- %	- %	.2%	- %	.7%
3	17.1	50.8	30.0	-	-	-	2.1	-	-
4	29.7	2.0	7.7	-	24.7	35.2	.7	-	-
5	13.6	49.6	36.3	-	-	-	.5	-	-
6	14.8	25.5	16.1	38.5	1.9	-	3.2	-	-
7	27.7	5.9	1.8	15.7	-	46.2	2.7	-	-
110- 1	19.4	16.8	59.4	-	-	-	4.0	-	.4
2	-	18.7	16.7	-	-	-	-	64.6	-
3	-	13.3	69.7	-	-	-	-	17.0	-
4	21.0	15.7	3.8	54.4	.8	-	4.3	-	-
5	-	13.3	71.8	-	-	-	.3	14.6	-
6	15.5	.8	-	-	83.7	-	-	-	-
7	26.0	4.9	68.5	-	-	-	.6	-	-
8	17.3	41.4	20.8	-	1.0	-	2.2	-	17.3
9	-	88.1	11.9	-	-	-	-	-	-
10	23.3	8.3	28.1	-	38.3	2.0	-	-	-
11	16.1	44.4	-	4.8	-	-	.4	34.3	-
12	-	100.0	-	-	-	-	-	-	-
13	-	88.7	9.6	-	-	-	1.7	-	-
14	33.1	10.6	36.4	.4	19.1	-	.4	-	-

(a) Includes an employee savings plan distribution of 31.1%
(b) Includes an employee benefits plan of 15.5%

However, as seen in Table X, the mineral interests were practically nonexistent. Only three cases show mineral interests in excess of 1% of the total estate value; however, the mineral interests in these three cases constituted 10.6%, 12.3%, and 17.3%, of the total value of the respective estates.

Insurance proceeds were revealed by twenty of the seventy-three estates. In fourteen cases, the percentage of the insurance proceeds constituted over 10% of the total estate valuation. In five cases it constituted over 50% of it, and the highest percentage is 83.7% in Case No. 110-6. It should be noted that the existence of the insurance coverage in these five cases, caused the estate value to exceed $60,000 and thus be subject to federal estate tax return filing requirements and possibly the federal estate tax.

Generally, the estates did have considerable liquidity. Cash and savings were significant and when combined with stocks and bonds they comprised 50% and more of the total estate value in over 60% of the estates, or forty-four cases. Only thirteen cases showed this combination as less than 20% of the total estate, and six of these have insurance proceeds providing liquidity equal to 24% and more of the total estate value.

One additional table was prepared, Table XI on the following page, indicating the percentage of the asset value of the estate which was property held in joint tenancy. Although, property held in joint tenancy was not subject to probate, a proceedings determining death and terminating the tenancy was required in Oklahoma and generally this was combined with the probate proceedings. As a result the value of property held in joint tenancy was often reported in the general

TABLE XI

PER CENT OF ESTATE VALUES HELD AS JOINT TENANTS
WITH RIGHTS OF SURVIVORSHIP

Estate Number	Per Cent Held In Joint Tenancy
60- 1	16.7%
2	64.9
9	51.6
70- 1	92.4
2	15.1
4	49.8
6	55.5
7	46.4
8	70.8
9	93.4
10	100.0
11	78.1
12	32.2
14	25.4
15	65.1
80- 1	38.8
5	61.4
7	81.4
8	88.5
11	40.8
14	99.0
15	100.0
90- 1	100.0
5	24.6
7	40.2
9	19.0
100- 2	19.1
3	18.6
4	37.7
6	38.5
7	52.4
110- 1	57.3
2	18.4
4	96.2
6	16.3
9	88.1
10	31.6
11	58.3
12	100.0
13	88.7
14	80.5

inventory and identified as jointly held property. That was the basis upon which this table was prepared.

In Chapter III, it is indicated that taking title to property in joint tenancy is rather common, especially between a husband and wife. In this study, a husband or wife survived the decedent in forty-four cases and in 31 of those cases there was property held in joint tenancy. In ten other cases, property was jointly held with someone other than a husband or wife.

The implication derived is that in about 71% of the cases property was held by a husband and wife jointly. Ordinarily it is desired by the testator that the home and some savings be held in joint tenancy, but when an estate reaches the level of $60,000 and above, the application of the federal estate tax to such property must be understood. It should be realized also, that joint tenancy property can cause some liquidity problems for the estate during probate.

Concluding Remarks

The information in this chapter reveals the usual policy of a decedent to have a will. However, the provisions of those wills showed almost a complete lack of using testamentary trusts. This was unexpected because the literature generally supported the use of trusts for estate planning purposes and the avoidance of additional probate. The indication was that people dying with estates in the $60,000 - 120,000 range, do see an attorney for purposes of making a will, but the result showed little or no evidence of estate planning procedures being practiced at this estate value level. This could very well be the result of a lack of time and interest on the part of those in a position to promote estate planning and a lack of an awareness of estate planning on the part of the testator.

On the average, the time spent in probate was quite reasonable and compared favorably with the administration time reported in the Cuyahoga County study. It appears that, since Congress has shortened the period during which the federal estate tax return should be filed, the period of probate for estates in the \$60,000 - \$120,000 range has likewise been shortened.

CHAPTER V

A DETERMINATION OF SAVINGS IN TAXES AND FEES WHEN TESTAMENTARY TRUSTS WERE USED

Introduction

The purpose of this chapter was to analyze the cases studied to determine whether federal estate taxes and attorney fees may have been paid unnecessarily. Since the estate range was restricted to a ceiling of $120,000 before the marital deduction and specific exemption, there was no federal estate tax on the first estate as long as the surviving spouse received property equal to fifty percent or more of the decedent's estate. The survivor, however, would not be entitled to the marital deduction, barring remarriage, thus his estate could incur a federal estate tax liability. The first $60,000 in an estate was exempt from federal estate tax. The next $5,000 was taxed at a rate of 3% which progressed to 25% on the portion of $10,000 which exceeded $110,000. The maximum tax on the above ceiling of $120,000 was $9,500.[1]

The attorney fees involved in probate proceedings were also a factor. Since attorney fees tend to be a function of the estate value of probate assets, as evidenced by the rate schedule on page 184 of Appendix B, costs do increase the more often an asset is subject to

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[1]Refer to Appendix A for the federal estate tax rate schedule.

probate. Note that the recommended minimum attorney fee for the probate of a will or administration of an estate was $450. For an estate valued at $120,000 and having no mortgage indebtedness, life insurance payable to a named beneficiary, or property held in joint tenancy, the attorney fee based upon the minimum fee schedule was $4,700. This recommended minimum fee was per estate; therefore an asset, owned by the husband who died and bequeathed that property to his wife, was included in the base for computing the attorney fee for probating each estate. Thus planned avoidance of probate proceedings was considered.

The basic premise involved was that the desire of the couple was to use their limited estate, which did not exceed $120,000, to provide for themselves, the survivor and, finally, to transfer as much as possible to their designated heirs. The result was an effort to minimize federal estate taxes and attorney probate fees. The overriding factor in estate planning is the testator's wishes. The estate plan should never force the testator into a distribution formula that minimizes taxes and costs, but is contrary to his wishes. However, a part of the planning process should be a comparison of the least amount of taxes and attorney fees possible and the taxes and attorney fees that would be paid based upon the testator's desired plan. Thus the question asked was: Can the testator's desires be met equally well, but with a reduction in taxes and attorney fees?

The foregoing question was considered first with regard to those estates in the study which did have a federal estate tax to pay. The existence of a federal estate tax meant, either there was no surviving spouse, or the estate did not qualify for the maximum marital deduction allowable. Next, was a determination of the potential federal estate tax liability and attorney fees that applied to those estates which initially had no federal estate tax to pay by virtue of the fact that the spouse survived the decedent. The results were tabulated indicating the savings in the federal estate taxes and attorney fees that estate planning could achieve.

Basic Estate Plan Proposed

The objective of the estate plan for estates falling within the range of $60,000 to $120,000 was to retain all benefits for the surviving spouse, but not control by the surviving spouse. Control for these purposes referred to a general power of appointment which would result in its value being included in the estate of the holder. Holding property in joint tenancy between the husband and his wife resulted in total ownership to the survivor. Consequently, the benefits from the property were transferred to the survivor, but so was the control. As a result, barring disposition of some kind, the value of the entire property would be includable in the estate of the survivor. So long as the total value of the estate property did not exceed $60,000, joint ownership did not present any problems from the federal estate tax viewpoint. For estates valued in excess of $60,000, joint ownership of property between spouses resulted in an overqualification for the marital deduction and probable federal estate tax when the surviving spouse died.

In Chapter III, there is a discussion about life insurance proceeds. Ownership by other than the insured was a means of keeping the insurance proceeds from being included in the insured decedent's estate. However, in this study the concern was with keeping the proceeds from being includable in the owner's and surviving spouse's estates. Ownership of the life insurance by the insured's surviving spouse would not only provide benefits for the survivor, but also the control. In fact, in the cases involved in this study, either situation, life insurance owned by the surviving spouse or owned by the deceased with the surviving spouse as named beneficiary, resulted in the surviving spouse receiving benefits and control without the proceeds being taxed in the deceased's estate. The question of life insurance ownership by the spouse of the insured would be relevant when planning an estate which is expected to grow in value beyond our $120,000 ceiling during the testator's remaining lifetime. Naturally this expectation would be based upon the testator's age, health and type of assets currently owned. Within the confines of this study, the value of the estate at death was $120,000 or less, thus life insurance ownership by the testator's spouse was not pertinent. In the test reported herein, the life insurance proceeds were paid to the estate and available for distribution to marital and nonmarital trusts. Subsequently, the situation was changed allowing the insurance proceeds to be paid to the surviving wife as named beneficiary.

There was a workable method that, in effect, transferred the entire estate to the surviving spouse and yet was sufficiently restrictive to avoid the general power of appointment. This involved the use of a trust commonly called a generation skipping trust or a bypass trust. As discussed in Chapter II, care should be exercised in drafting the trust instrument to achieve the desired results. Assuming proper construction, a couple could provide full benefits to the survivor and subsequently reduce death taxes and administration fees and maximize the amount remaining for the devisees and legatees.

In Chapter IV, we found that over eighty-four percent of the decedents did have wills, although these wills demonstrated very little estate planning. We assumed this implied an interest in preparing wills with no intention of changing their affairs while both the husband and wife were living. Thus, a testamentary trust, which did not become effective until the testator's death, was used. An inter vivos trust which became operative while the testator was still living, could have been used also. Since it was assumed the testator did not wish to relinquish control of his assets, a revocable inter vivos trust would be required and the federal estate tax effect would be the same as that for a testamentary trust. The assets in the inter vivos trust, however, would not be subject to probate. The testamentary trust provisions, on the other hand, would not require separate accounting during the testator's lifetime.

During probate proceedings, the testamentary trust or trusts as provided for in the will would be organized. The surviving spouse would have control over all the assets placed in the trust which qualified for the marital deduction. Control, in this instance, means receiving all the net income, having an unlimited right to withdraw principal at any time, and the right to appoint devisees and legatees to those trust assets. An alternative to this trust could be a direct transfer of those assets qualifying for the marital deduction to the surviving spouse. The federal estate tax would not be affected, but, again, those assets subject to direct transfer would be subject to probate upon the spouse's death whereas the trust would not.

The remaining assets in the estate would be placed in a separate trust which was carefully worded to qualify as a bypass trust. The effect was that the assets in the first trust were not taxed in the decedent's estate, but were included in the spouse's estate upon her death. The portion of the estate in the second trust was taxable in the decedent's estate, but these assets were not taxed again upon the spouse's death; they would pass free of federal estate taxes and probate costs to the children or other remainder beneficiaries.

For a couple whose combined estate was $120,000 or less, the trust arrangement would eliminate the federal estate tax on both estates when the owner of the major portion of the estate died first. This was possible because the will provisions resulted in an estate of $60,000 or less in each estate, through the proper utilization of the marital deduction, and the specific exemption of $60,000 for each estate resulted in no federal estate tax.

For the purpose of this study, the basic estate plan used was a will for the person owning the major portion of the couple's assets providing for two testamentary trusts as described in the foregoing literature. The spouse owning the smaller portion, if any, would have a will designating that all the assets be placed in a bypass trust, thus avoiding its inclusion in the spouse's estate later. In the case of an estate valued at no more than $120,000 and the one owning the larger portion of the estate died first, the taxable estate for either spouse would not exceed the $60,000 specific exemption. If the one owning the smaller portion of the estate died first, then the federal estate tax would be minimized. The amount of reduction in tax, however, would depend upon the ratio of the smaller portion to the larger portion. The closer to a ratio of one to one, the larger the reduction in tax.

Aside from the advantage of reducing federal estate taxes and probate costs, there were at least two other advantages in such a testamentary trust arrangement. First, during the testator's life there would be no change in the manner of conducting his business affairs as there could be with an inter vivos trust. Second, at the time of the testator's death, an inventory of assets would be taken and legalities taken into account. With the trust arrangement, competent financial help would be available to the surviving spouse. If the testator had any qualms about the survivor's ability to handle financial and/or business affairs, the trust arrangement could alleviate the problem.

Basic Plan Applied to Actual Estates of Widows

Since the objective was to minimize the federal estate taxes and attorney fees for administering the estates of a husband and wife, that group of estates which actually incurred a federal estate tax liability was analyzed. It was this group of estates that provided the most assurance that all assets of each estate were identified, because those amounts were reconciled with the actual federal estate tax paid. Table XII, on the following page, lists the thirty estates which did incur a federal estate tax liability. In this study, a federal estate tax liability occurred only when the maximum marital deduction was not allowed, either because there was no surviving spouse or the testate/intestate distributions to the surviving spouse did not equal the maximum marital deduction allowable.

Based upon our societal framework and the fact Oklahoma is not a community property state, the property which a husband and wife obtained was commonly attributed to the labors of the husband and included in his

TABLE XII

VALUE OF ESTATE AND TAXABLE ESTATE
AND FEDERAL ESTATE TAX PAID

Estate Number	Value of Estate	Value of Taxable Estate	Federal Estate Tax
60- 3	$ 63,800	$ 800	$ 25
5	67,100	1,400	43
8	68,300	2,400	72
10	68,700	1,500	44
11	69,500	4,000	119
70- 1	70,400	8,600	401
3	71,500	7,600	333
5	73,500	10,000	500
11	77,700	15,100	1,056
12	77,700	13,600	899
13	79,200	11,200	633
14	79,600	14,400	988
80- 1	80,100	17,500	1,327
3	81,500	14,200	959
4	81,500	6,300	242
6	82,800	15,600	1,121
7	84,000	12,900	814
8	84,700	20,300	1,646
9	84,900	15,700	1,124
90- 3	91,300	27,600	2,665
6	95,400	31,500	3,271
9	98,900	36,400	4,157
10	99,100	32,600	3,462
100- 3	102,000	31,900	3,334
5	106,400	39,700	4,741
6	107,800	39,300	4,676
110- 3	112,000	43,900	5,621
5	119,600	56,500	8,637
8	121,400	54,700	8,174
11	124,400	23,600	2,110

estate. The Internal Revenue Service presumed property held in joint tenancy was owned by the first joint tenant to die unless convincing evidence to the contrary was forthcoming. This evidence would be scrutinized closely when the survivor had not been involved in income producing activities, which traditionally had been the situation of the housewife. Thus it was assumed the husband was the property owner, as interpreted by the Internal Revenue Service, of the couple's estate. As a result, there was no federal estate tax on the husband's estate if he predeceased his wife and qualified for the maximum marital deduction. In addition, the wife had no estate unless she survived her husband and then acquired ownership to their property. Her estate then incurred a federal estate tax liability because the marital deduction was not allowable on her estate, since there was no surviving spouse. As indicated earlier in this chapter, the objective of estate planning in this situation was to retain the benefits of the entire estate for the surviving spouse but to avoid ownership of the property through the use of testamentary trusts.

With regard to the thirty estates listed in Table XII which did incur federal estate taxes, five of the decedents had never been married, five were widowers and twenty were widows. Thus twenty of the thirty cases were reviewed and tested to determine the effects of estate planning through the use of testamentary trusts. One of these involved a situation wherein the wife died only five months after her husband, thus full information was available regarding the couple's assets. This situation is discussed later. The results for the nineteen remaining cases are presented in Tables XIII through XVII on the following pages.

TABLE XIII

TOTAL FEDERAL ESTATE TAXES AND ATTORNEY FEES ON THE COMBINED ESTATES OF THOSE CASES WHERE THE WOMAN DIES HAVING BEEN PREDECEASED BY A HUSBAND. ASSUMPTION IS THAT HER ESTATE IS A DIRECT INHERITANCE OF SUBSTANTIALLY ALL OF HER HUSBAND'S ESTATE

Estate No.	Value of Husband's Estate	Expenses of Estate	Value of Wife's Estate	Property Held in Joint Tenancy between Wife and a Third Person	Wife's Estate Subject to Probate	Wife's Taxable Estate	Recommended Minimum Attorney Fees For Administering an Estate			Federal Estate Tax on Wife's Estate	Total
							Husband's Estate	Wife's Estate	Total for Both Estates		
60-5	$ 71,600	$ 4,500	$ 67,100	$	$ 67,100	$ 1,400	$ 3,000	$ 2,800	$ 5,800	$ *	$ 5,800
-11	74,100	4,600	69,500		69,500	4,000	3,100	2,900	6,000	100	6,100
70-1	75,000	4,600	70,400	64,000	6,400	8,600	3,100	1,000	4,100	400	4,500
-11	82,600	4,900	77,700	60,700	17,000	15,100	3,400	1,400	4,800	1,100	5,900
-12	82,600	4,900	77,700	25,000	52,700	13,600	3,400	2,500	5,900	900	6,800
-13	84,200	5,000	79,200		79,200	11,200	3,500	3,300	6,800	600	7,400
80-1	85,100	5,000	80,100	31,100	49,000	17,500	3,500	2,400	5,900	1,300	7,200
-3	86,600	5,100	81,500		81,500	14,200	3,600	3,400	7,000	1,000	8,000
-4	86,600	5,100	81,500		81,500	11,900	3,600	3,400	7,000	700	7,700
-6	87,900	5,100	82,800		82,800	15,600	3,600	3,400	7,000	1,100	8,100
-8	89,900	5,200	84,700	75,000	9,700	20,300	3,700	1,300	5,000	1,600	6,600
-9	90,100	5,200	84,900		84,900	15,700	3,700	3,500	7,200	1,100	8,300
90-6	101,000	5,600	95,400		95,400	31,500	4,100	3,900	8,000	3,300	11,300
-10	104,800	5,700	99,100		99,100	32,600	4,200	4,100	8,300	3,500	11,800
100-3	107,800	5,800	102,000	19,000	83,000	31,900	4,300	3,700	8,000	3,300	11,300
-5	112,400	6,000	106,400		106,400	39,700	4,500	4,300	8,800	4,700	13,500
-6	113,800	6,000	107,800	41,500	66,300	39,300	4,500	3,200	7,700	4,700	12,400
110-5	126,000	6,400	119,600		119,600	56,500	4,900	4,700	9,600	8,600	18,200
-8	127,800	6,400	121,400		121,400	54,700	4,900	4,700	9,600	8,200	17,800

*Actual tax paid was $43 but disappears when rounding to nearest $100.

TABLE XIV

TOTAL FEDERAL ESTATE TAXES AND ATTORNEY FEES ON THE COMBINED ESTATES OF THOSE CASES WHERE THE WOMAN DIES HAVING BEEN PREDECEASED BY A HUSBAND. ASSUMPTION IS THAT HER ESTATE IS A DIRECT INHERITANCE OF HER HUSBAND'S ESTATE AS A JOINT TENANT

Estate No.	Value of Husband's Estate	Expenses of Estate	Value of Wife's Estate	Property Held in Joint Tenancy Between Wife and a Third Person	Wife's Estate Subject to Probate	Wife's Taxable Estate	Recommended Minimum Attorney Fees For Administering an Estate: Husband's Estate **	Recommended Minimum Attorney Fees For Administering an Estate: Wife's Estate	Recommended Minimum Attorney Fees For Administering an Estate: Total for Both Estates	Federal Estate Tax on Wife's Estate	Total
60-5	$ 69,300	$ 2,200	$ 67,100	$	$ 67,100	$ 1,400	$ 700	$ 2,800	$ 3,500	$ *	$ 3,500
-11	71,800	2,300	69,500		69,500	4,000	800	2,900	3,700	100	3,800
70-1	72,700	2,300	70,400	64,000	6,400	8,600	800	1,000	1,800	400	2,200
-11	80,100	2,400	77,700	60,700	17,000	15,100	900	1,400	2,300	1,100	3,400
-12	80,100	2,400	77,700	25,000	52,700	13,600	900	2,500	3,400	900	4,300
-13	81,600	2,400	79,200		79,200	11,200	900	3,300	4,200	600	4,800
80-1	82,500	2,400	80,100	31,100	49,000	17,500	900	2,400	3,300	1,300	4,600
-3	83,900	2,400	81,500		81,500	14,200	900	3,400	4,300	1,000	5,300
-4	83,900	2,400	81,500		81,500	11,900	900	3,400	4,300	700	5,000
-6	85,200	2,400	82,800		82,800	15,500	900	3,400	4,300	1,100	5,400
-8	87,100	2,400	84,700	75,000	9,700	20,300	900	1,300	2,200	1,600	3,800
-9	87,300	2,400	84,900		84.900	15,700	900	3.500	4,400	1,100	5,500
90-6	97,900	2,500	95,400		95,400	31,500	1,000	3,900	4,900	3,300	8,200
-10	101,700	2,600	99,100		99,100	32,600	1,100	4,100	5,200	3,500	8,700
100-3	104,600	2,600	102,000	19,000	83,000	31,900	1,100	3,700	4,800	3,300	8,100
-5	109,000	2,600	106,400		106,400	39,700	1,100	4,300	5,400	4,700	10,100
-6	110,400	2,600	107,800	41,500	66,300	39,300	1,100	3,200	4,300	4,700	9,000
110-5	122,300	2,700	119,600		119,600	56,500	1,200	4,700	5,900	8,600	14,500
-8	124,100	2,700	121,400		121,400	54,700	1,200	4,700	5,900	8,200	14,100

*Actual tax paid was $43 which disappears when rounding to nearest $100.

**Attorney fees for the Determination of Death of a Joint Tenant.

TABLE XV

TOTAL FEDERAL ESTATE TAXES AND ATTORNEY FEES ON THE COMBINED ESTATES OF THOSE CASES WHERE THE WOMAN DIES, HAVING BEEN PREDECEASED BY A HUSBAND, WHOSE WILL MADE PROVISIONS FOR TESTAMENTARY TRUSTS

Estate No.	Value of Husband's Estate	Expenses of Estate	Value of Wife's Estate (Marital Trust Balance)	Wife's Estate Subject to Probate	Wife's Taxable Estate	Recommended Minimum Attorney Fees For Probating an Estate: Husband's Estate	Wife's Estate	Total for Both Estates	Federal Estate Tax	Total
60-5	$ 71,600	$ 4,500	$ 33,550	$ -0-	$ -0-	$ 3,000	$ -0-	$ 3,000	$ -0-	$ 3,000
-11	74,100	4,600	34,750	-0-	-0-	3,100	-0-	3,100	-0-	3,100
70-1	75,000	4,600	35,200	-0-	-0-	3,100	-0-	3,100	-0-	3,100
-11	82,600	4,900	38,850	-0-	-0-	3,400	-0-	3,400	-0-	3,400
-12	82,600	4,900	38,850	-0-	-0-	3,400	-0-	3,400	-0-	3,400
-13	84,200	5,000	39,600	-0-	-0-	3,500	-0-	3,500	-0-	3,500
80-1	85,100	5,000	40,050	-0-	-0-	3,500	-0-	3,500	-0-	3,500
-3	86,600	5,100	40,750	-0-	-0-	3,600	-0-	3,600	-0-	3,600
-4	86,600	5,100	40,750	-0-	-0-	3,600	-0-	3,600	-0-	3,600
-6	87,900	5,100	41,400	-0-	-0-	3,600	-0-	3,600	-0-	3,600
-8	89,900	5,200	42,350	-0-	-0-	3,700	-0-	3,700	-0-	3,700
-9	90,100	5,200	42,450	-0-	-0-	3,700	-0-	3,700	-0-	3,700
90-6	101,000	5,600	47,700	-0-	-0-	4,100	-0-	4,100	-0-	4,100
-10	104,800	5,700	49,550	-0-	-0-	4,200	-0-	4,200	-0-	4,200
100-3	107,800	5,800	51,000	-0-	-0-	4,300	-0-	4,300	-0-	4,300
-5	112,400	6,000	53,200	-0-	-0-	4,500	-0-	4,500	-0-	4,500
-6	113,800	6,000	53,900	-0-	-0-	4,500	-0-	4,500	-0-	4,500
110-5	126,000	6,400	59,800	-0-	-0-	4,900	-0-	4,900	-0-	4,900
-8	127,800	6,400	60,700	-0-	-0-	4,900	-0-	4,900	-0-	4,900

TABLE XVI

COMPARISON OF TOTAL FEDERAL ESTATE TAXES AND ATTORNEY FEES ON THE COMBINED ESTATES OF THOSE CASES WHERE THE WOMAN DIES HAVING BEEN PREDECEASED BY HER HUSBAND DIRECT TRANSFER VERSUS TESTAMENTARY TRUST PROVISIONS

Estate No.	Value of Wife's Estate	Attorney Fees: Direct Table XIII	Attorney Fees: Trust Table XV	Attorney Fees: Decrease	Federal Estate Tax: Direct Table XIII	Federal Estate Tax: Trust Table XV	Federal Estate Tax: Decrease	Total Tax and Attorney Fees: Direct Table XIII	Total Tax and Attorney Fees: Trust Table XV	Total Tax and Attorney Fees: Decrease Amount	Total Tax and Attorney Fees: Decrease %-Wife's Estate
60-5	$ 67,100	$ 5,800	$ 3,000	$ 2,800	$ -0-	$ -0-	$ -0-	$ 5,800	$ 3,000	$ 2,800	4.2 %
-11	69,500	6,000	3,100	2,900	100	-0-	100	6,100	3,100	3,000	4.3
70-1	70,400	4,100	3,100	1,000	400	-0-	400	4,500	3,100	1,400	2.0
-11	77,700	4,800	3,400	1,400	1,100	-0-	1,100	5,900	3,400	2,500	3.2
-12	77,700	5,900	3,400	2,500	900	-0-	900	6,800	3,400	3,400	4.4
-13	79,200	6,800	3,500	3,300	600	-0-	600	7,400	3,500	3,900	4.9
80-1	80,100	5,900	3,500	2,400	1,300	-0-	1,300	7,200	3,500	3,700	4.6
-3	81,500	7,000	3,600	3,400	1,000	-0-	1,000	8,000	3,600	4,400	5.4
-4	81,500	7,000	3,600	3,400	700	-0-	700	7,700	3,600	4,100	5.0
-6	82,800	7,000	3,600	3,400	1,100	-0-	1,100	8,100	3,600	4,500	5.4
-8	84,700	5,000	3,700	1,300	1,600	-0-	1,600	6,600	3,700	2,900	3.4
-9	84,900	7,200	3,700	3,500	1,100	-0-	1,100	8,300	3,700	4,600	5.4
90-6	95,400	8,000	4,100	3,900	3,300	-0-	3,300	11,300	4,100	7,200	7.5
-10	99,100	8,300	4,200	4,100	3,500	-0-	3,500	11,800	4,200	7,600	7.7
100-3	102,000	8,000	4,300	3,700	3,300	-0-	3,300	11,300	4,300	7,000	6.9
-5	106,400	8,800	4,500	4,300	4,700	-0-	4,700	13,500	4,500	9,000	8.5
-6	107,800	7,700	4,500	3,200	4,700	-0-	4,700	12,400	4,500	7,900	7.3
110-5	119,600	9,600	4,900	4,700	8,600	-0-	8,600	18,200	4,900	13,300	11.1
-8	121,400	9,600	4,900	4,700	8,200	-0-	8,200	17,800	4,900	12,900	10.6

TABLE XVII

COMPARISON OF TOTAL FEDERAL ESTATE TAXES AND ATTORNEY FEES ON THE COMBINED ESTATES
OF THOSE CASES WHERE THE WOMAN DIES HAVING BEEN PREDECEASED BY HER HUSBAND
JOINT TENANCY VERSUS TESTAMENTARY TRUST PROVISIONS

		Attorney Fees			Federal Estate Tax			Total Tax and Attorney Fees			
Estate No.	Value of Wife's Estate	Joint Tenant Table XIV	Trust Table XV	Decrease Increase*	Joint Tenant Table XIV	Trust Table XV	Decrease	Joint Tenant Table XIV	Trust Table XV	Decrease - Increase* Amount	Decrease - Increase* %-Wife's Estate
60-5	$ 67,100	$ 3,500	$ 3,000	$ 500	$ -0-	$ -0-	$ -0-	$ 3,500	$ 3,000	$ 500	.7 %
-11	69,500	3,700	3,100	600	100	-0-	100	3,800	3,100	700	1.0
70-1	70,400	1,800	3,100	1,300*	400	-0-	400	2,200	3,100	900*	1.3*
-11	77,700	2,300	3,400	1,100*	1,100	-0-	1,100	3,400	3,400	-0-	-0-
-12	77,700	3,400	3,400	-	900	-0-	900	4,300	3,400	900	1.2
-13	79,200	4,200	3,500	700	600	-0-	600	4,800	3,500	1,300	1.6
80-1	80,100	3,300	3,500	200*	1,300	-0-	1,300	4,600	3,500	1,100	1.4
-3	81,500	4,300	3,600	700	1,000	-0-	1,000	5,300	3,600	1,700	2.1
-4	81,500	4,300	3,600	700	700	-0-	700	5,000	3,600	1,400	1.7
-6	82,800	4,300	3,600	700	1,100	-0-	1,100	5,400	3,600	1,800	2.2
-8	84,700	2,200	3,700	1,500*	1,600	-0-	1,600	3,800	3,700	100	.1
-9	84,900	4,400	3,700	700	1,100	-0-	1,100	5,500	3,700	1,800	2.1
90-6	95,400	4,900	4,100	800	3,300	-0-	3,300	8,200	4,100	4,100	4.3
-10	99,100	5,200	4,200	1,000	3,500	-0-	3,500	8,700	4,200	4,500	4.5
100-3	102,000	4,800	4,300	500	3,300	-0-	3,300	8,100	4,300	3,800	3.7
-5	106,400	5,400	4,500	900	4,700	-0-	4,700	10,100	4,500	5,600	5.3
-6	107,800	4,300	4,500	200*	4,700	-0-	4,700	9,000	4,500	4,500	4.2
110-5	119,600	5,900	4,900	1,000	8,600	-0-	8,600	14,500	4,900	9,600	8.0
-8	121,400	5,900	4,900	1,000	8,200	-0-	8,200	14,100	4,900	9,200	7.6

For these tables, the case files provided the information for the "Value of Wife's Estate," "Property Held in Joint Tenancy Between Wife and a Third Person," "Wife's Estate Subject to Probate," "Wife's Taxable Estate," and the "Federal Estate Tax on Wife's Estate."[2] The attorney fees for administering an estate were computed using the rate schedules from Appendix B, which reflect the minimum fees recommended by the Oklahoma Bar Association. It was assumed the value of the wife's estate represented the couple's entire property remaining after paying the funeral and administration expenses for the husband. In addition, the wife did not deplete her estate prior to her death. Thus the husband's estate was derived as the value of the wife's estate plus the minimum attorney fee for administering the estate and an arbitrary $1,500 for funeral expenses. The value of the husband's estate was needed to determine the minimum attorney fee. For the estate range involved in this study, the fees increase by $30 or $40 on each $1,000 when probate proceedings were involved and only $7.50 or $10 on each $1,000 when proceedings involving the termination of a joint tenancy was involved. Thus the over or understatement of the funeral expenses and other paid expenses allowed as a deduction on the estate tax return would have to exceed $2,000 before an effect on the comparisons conducted herein would be noted.

Two comparisons were made of these nineteen cases. The information was obtained from the wife's estate. It should be noted that in seven

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[2]Case No. 80-4 included a bequest of $5,600 to a church which qualified as a deduction for federal estate tax purposes. Since our assumption was that the entire estate was transferred to family heirs, this charitable bequest was ignored and the tax computed on a taxable estate of $11,900 was $709.

cases the wife held property as joint tenant with another party, thus reducing the amount of her estate subject to probate, but not the amount subject to federal estate tax. The recommended minimum attorney fee for the wife's estate shown in Tables XIII and XIV was computed using the fee schedules for probating property and for terminating a joint tenancy from Appendix B. With regard to the husband's estate, which existed in some prior year, the fee of administering the estate would vary depending upon the amount of the property, if any, held in joint tenancy between the husband and wife. Thus Table XIII was prepared assuming all property was held in the name of the husband only. This represents the situation which would be the most costly in terms of an attorney fee for probating the estate. Conversely, Table XIV was prepared assuming all of the property was held in joint tenancy with the wife, thus representing the least costly in terms of an attorney fee for terminating the joint tenancy. In both instances the wife received control and ownership over the property when the husband died. As a widow, the wife received no marital deduction for federal estate tax purposes and incurred a federal estate tax liability ranging in actual amounts of $25 on a taxable estate of $800 to $8,637 on a taxable estate of $56,500, as shown in Table XII on page 120. On all subsequent tables in this chapter, amounts are rounded to the nearest hundred dollars.

Table XIII is a good illustration of attorney fees for probating estates being assessed twice on substantially the same property in what could be a short time span depending upon the dates of death of a husband and wife. A considerable improvement in this respect was achieved when probate was avoided by holding all property in joint tenancy with the spouse, as shown in Table XIV.

In Table XV, the effect on attorney fees and federal estate taxes is shown for the recommended estate plan providing for testamentary trusts for the benefit of the surviving wife. The federal estate tax was eliminated entirely and the trusts avoided probate when the wife died. This did, however, subject the entire husband's estate to probate. There would be no opportunity to hold property in joint tenancy and incur the lower fees for terminating the joint tenancy.

Table XVI is a comparison of the fees and taxes incurred for both estates combined when testamentary trusts were used versus a testamentary transfer of all the property to the surviving wife. The decrease in the attorney fee rose steadily as the value of the wife's estate rose, except for those cases where the wife held property as a joint tenant with a third person. The testamentary trust provisions precluded the ownership of property in joint tenancy. Thus in those cases where the wife's property was jointly held, the decrease in attorney fees was not as large as the cases of sole ownership by the wife. Despite the fact some cases avoided the higher probate fees through joint tenancy holdings, the decrease in attorney fees for administering the two estates was substantial when probate was avoided for the surviving spouse's estate with the trust instruments. One consideration that should not be overlooked, however, is the probable legal fees that will arise in connection with a trust. However, these fees are more apt to be based upon an hourly rate for time spent and the procedures are regulated by the trust instrument, not the probate court and its lengthy routines of publication and notification as enumerated in Appendix B.

The decrease in federal estate tax showed an inverse relationship with the value of the wife's estate although it was not continuous. It would be continuous if all deductions claimed by the estates were consistent. Table XIII shows the value of the wife's taxable estate for each case and the federal estate tax increases as the taxable estate values increase. The rate of increase is very rapid in the range of $60,000 to $120,000 estates. The tax moves from three cents on the first dollar to twenty-five cents on the last dollar.

Finally, Table XVI shows the decrease in the amount of the attorney fees and federal estate taxes combined when the testamentary trust provisions were applied. Also shown is the percentage decrease of the wife's estate value. These amounts and percentages range from $1,400 which was two percent of the $60,400 estate to $13,300 or 11.1% of the $119,600 estate. Attorney fees represented over half of the decrease for the cases valued up to $102,000. For those estates valued at $106,400 to $121,400, the decrease in federal estate tax contributed over half of the decrease. The taxable estate prior to the specific exemption of $60,000 was generally the amount available to the devisees and legatees before the estate taxes were paid. Case 80-6, reflected an amount of $75,600 which was reduced $1,100 for federal estate taxes paid. Case 80-8, paid $1,600 on an amount of $80,300. An amount of $91,500 incurred a tax of $3,300 in Case 90-6. A tax of $4,700 was incurred in Case 100-5 on an amount of $99,700 and Case 110-5 reflected a tax of $8,600 on an amount of $116,500. These were representative amounts that became estate liabilities when little or no consideration was given to the federal estate tax consequences.

Table XVII is a comparison similar to that in Table XVI except that the entire estate of the husband was assumed to be held in joint tenancy with his surviving spouse. Thus the husband's estate was not probated, instead the court action was merely that of terminating the joint tenancy. The most obvious effect was that it practically eliminated any advantage of the trust in decreasing the attorney fees for administering the two estates. In fact, in most of the cases where the surviving wife held property in joint tenancy with third persons, there was not a decrease in attorney fees through the use of trusts, but rather an increase.[3]

The joint tenancy provisions resulted in a federal estate tax liability being incurred on the wife's estate in the same manner and amount as the direct testamentary transfer of property to the wife. The total decrease in fees and taxes enjoyed by the estates with trust provisions were largely dependent upon the avoidance of the federal estate tax. Where an increase in attorney fees was noted, the decrease in federal estate tax was equal to or larger than that increase in all cases except Case No. 70-1. The elimination of tax was only $400 whereas the minimum attorney fees were increased by $1,300 with a resultant net increase of $900.

There appeared to be a definite change in the rate of increase in savings between Case No. 80-9 where the wife's taxable estate was $75,700 and Case No. 100-3 where it was $91,900. The decrease in fees

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[3] If this joint tenancy property in the wife's estate was devised by the deceased husband to his wife and the third person as joint tenants, it would not have qualified for the marital deduction in the husband's estate. Thus, there may have been a federal estate tax liability incurred on the husband's estate which was not included in these computations. See example 1 on page 42 of Chapter II.

and taxes of $1800 in Case No. 80-9 was only 2.1% of the value of the wife's estate which may not be significant enough to convince a testator of the benefits of estate planning for him. In addition, the joint tenancy route meant less attorney fees payable on the first estate, leaving a larger amount being transferred to the surviving spouse. Thus it was a matter of paying the expenses on the first estate with a savings to be realized, but not until the wife died versus a smaller fee on the husband's estate with federal estate taxes payable on the wife's estate. This comparison is made in Table XVIII, on the following page. This decrease in the amount of property transferred to the surviving wife when testamentary trusts were involved ranged from $2,300 to $3,700. Depending upon the time during which the wife survived the husband, this decrease in fees in the husband's estate may be more advantageous than the federal estate tax avoided in the wife's estate. Thus the advantages of the trust provisions over transfer of the entire estate via joint tenancy for estates valued below $80,000 to $90,000 were not clear cut, but began to appear in the $90,000 bracket and became more vivid in the $100,000 and $110,000 brackets. It should be noted that of the 73 cases involved in this study, only six cases involved estates which had all the property in joint tenancy ownership. There was some evidence that joint tenancy could be a viable estate planning technique, but, it, too, requires careful planning.

Basic Plan Applied to Actual Estates of Men Survived by Their Wives

An analysis was also made of those cases wherein the decedent was a male survived by his wife and substantially all of his estate was

TABLE XVIII

DECREASE IN HUSBAND'S ESTATE WHEN ALL PROPERTY IS SUBJECT TO PROBATE VERSUS ALL PROPERTY BEING HELD IN JOINT TENANCY

Estate Number	Value of Wife's Estate	Attorney Fees: Joint Tenancy Table XIV	Attorney Fees: Probate Table XV	Decrease in Estate: Amount	Decrease in Estate: % of Total Property
60- 5	$ 67,100	$ 700	$ 3,000	$ 2,300	3.4%
11	69,500	800	3,100	2,300	3.3
70- 1	70,400	800	3,100	2,300	3.3
11	77,700	900	3,400	2,500	3.2
12	77,700	900	3,400	2,500	3.2
13	79,200	900	3,500	2,600	3.3
80- 1	80,100	900	3,500	2,600	3.2
3	81,500	900	3,600	2,700	3.3
4	81,500	900	3,600	2,700	3.3
6	82,800	900	3,600	2,700	3.3
8	84,700	900	3,700	2,800	3.3
9	84,900	900	3,700	2,800	3.3
90- 6	95,400	1,000	4,100	3,100	3.2
10	99,100	1,100	4,200	3,100	3.1
100- 3	102,000	1,100	4,300	3,200	3.1
5	106,400	1,100	4,500	3,400	3.2
6	107,800	1,100	4,500	3,400	3.2
110- 5	119,600	1,200	4,900	3,700	3.1
8	121,400	1,200	4,900	3,700	3.0

transferred to his wife either through testamentary provisions or through joint tenancy ownership. The consequences in the wife's estate was projected and compared with the results had the testamentary trust provisions applied. This information is reflected in Tables XIX through XXII on the following pages.

The basis for this analysis was the substance and value of the husband's estate and the manner in which it was owned. In Table XIX the amount of the estate subject to probate was determined and the recommended minimum attorney fees for administering the estate was calculated. The expenses paid out of the estate other than the attorney fees were added to the calculated attorney fees and these expenses were subtracted from the value of the husband's estate to derive the value of the wife's estate. The assumption was that the widow did not invade the principal except to the extent of increases in the value of the property during her control of it. It was also assumed the entire value of the property received from the husband's estate was subsequently subject to probate upon her death. The recommended minimum attorney fee for the wife's estate was computed. The wife's taxable estate was derived by taking the wife's estate reduced by the calculated attorney fees, an arbitrary amount of $1500 for funeral expenses and the $60,000 specific exemption. The federal estate tax was computed using the tax rates in Appendix A. There was no federal estate tax on the husband's estate because the marital deduction allowed and the specific exemption exceed the value of the estate. The recommended minimum attorney fees, for both estates, and the federal estate taxes were combined. It should be noted that the bulk of these estates had property which was not subject to probate and yet only a third of them had no property subject to

TABLE XIX

TOTAL FEDERAL ESTATE TAXES AND ATTORNEY FEES ON THE COMBINED ESTATES OF THOSE CASES WHERE THE HUSBAND DIED AND HIS WIFE SURVIVES, DIRECTLY INHERITING SUBSTANTIALLY ALL OF THE ESTATE

Estate No.	Value of Husband's Estate	Property Held as Joint Tenant	Insurance Paid to Named Beneficiary	50% Mortgage Indebtedness	Amount of Estate Subject to Probate	Expenses of Estate	Value of Wife's Estate	Wife's Estate Subject to Probate	Wife's Taxable Estate	Recommended Minimum Attorney Fees for Administering an Estate: Husband's Estate	Wife's Estate	Total for Both Estates	Federal Estate Tax on Wife's Estate	Total
60-9	$ 68,400	$ 35,300	$ 19,400	$ -	$ 13,700	$ 6,800	$ 61,600	$ 61,600	$ -	$ 1,000	2,600	$ 3,600	$ -	$ 3,600
70-4	72,900	36,300	36,600	-	-	2,500	70,400	70,400	6,000	400	2,900	3,300	200	3,500
-6	74,700	41,500	18,200	-	15,000	3,700	71,000	71,000	6,600	1,200	2,900	4,100	300	4,400
-7	75,200	34,900	38,300	-	2,000	2,000	73,200	73,200	8,700	500	3,000	3,500	400	3,900
-8	75,800	53,700	-	-	22,100	4,500	71,300	71,300	6,700	1,500	3,000	4,500	300	4,800
-9	76,000	71,000	5,000	-	-	4,000	72,000	72,000	7,500	800	3,000	3,800	300	4,100
-10	77,600	77,600	-	-	-	4,000	73,600	73,600	9,000	800	3,100	3,900	400	4,300
-15	79,900	52,000	-	-	27,900	4,600	75,300	75,300	10,700	1,800	3,100	4,900	600	5,500
80-10	85,100	-	-	-	85,100	5,900	79,200	79,200	14,400	3,500	3,300	6,800	1,000	7,800
-11	85,200	34,800	50,400	-	-	3,200	82,000	82,000	17,100	400	3,400	3,800	1,300	5,100
-14	88,700	87,800	-	-	900	4,500	84,200	84,200	19,200	1,000	3,500	4,500	1,500	6,000
-15	89,100	89,100	-	-	-	4,600	84,500	84,500	19,500	900	3,500	4,400	1,600	6,000
90-1	90,100	90,100	-	-	-	4,700	85,400	85,400	20,400	1,000	3,500	4,500	1,600	6,100
-7	96,800	38,900	35,000	6,900	29,800	4,900	91,900	91,900	26,600	1,700	3,800	5,500	2,500	8,000
-8	97,200	-	-	-	97,200	7,700	89,500	89,500	24,300	4,000	3,700	7,700	2,200	9,900
100-4	104,300	39,300	25,800	-	39,200	6,200	98,100	98,100	32,600	2,100	4,000	6,100	3,500	9,600
110-1	111,000	63,600	-	-	47,400	5,300	105,700	105,700	40,000	2,700	4,200	6,900	4,800	11,700
-4	118,800	114,300	-	-	4,500	10,600	108,200	108,200	42,300	1,400	4,400	5,800	5,300	11,100
-6	119,900	19,500	100,400	-	-	4,600	115,300	115,300	49,300	300	4,500	4,800	6,800	11,600
-7	120,500	-	-	11,800	132,300	11,100	109,400	109,400	43,600	5,100	4,300	9,400	5,600	15,000
-12	125,400	125,400	-	-	-	5,300	120,100	120,100	53,900	1,200	4,700	5,900	8,000	13,900
-13	125,900	111,700	-	-	14,200	9,000	116,900	116,900	50,800	1,800	4,600	6,400	7,200	13,600
-14	128,300	103,300	24,500	-	500	11,000	117,300	117,300	51,200	1,100	4,600	5,700	7,300	13,000

TABLE XX

TOTAL FEDERAL ESTATE TAXES AND ATTORNEY FEES ON THE COMBINED ESTATES OF THOSE CASES WHERE THE HUSBAND DIED AND HIS WIFE SURVIVES, PROVISIONS HAVING BEEN MADE FOR TESTAMENTARY TRUSTS

Estate No.	Value of Husband's Estate*	50% Mortgage Indebtedness	Amount of Estate Subject to Probate	Expenses of Estate	Value of Wife's Estate (Marital Trust Balance)	Wife's Estate Subject to Probate	Wife's Taxable Estate	Recommended Minimum Attorney Fees for Probating an Estate: Husband's Estate	Wife's Estate	Total for Both Estates	Federal Estate Tax	Total
60-9	$ 68,400	-	$ 68,400	$ 8,600	$ 29,900	$ -	$ -	$ 2,800	$ -	$ 2,800	$ -	$ 2,800
70-4	72,900	-	72,900	5,100	33,900	-	-	3,000	-	3,000	-	3,000
-6	74,700	-	74,700	5,600	34,550	-	-	3,100	-	3,100	-	3,100
-7	75,200	-	75,200	4,600	35,300	-	-	3,100	-	3,100	-	3,100
-8	75,800	-	75,800	6,000	34,900	-	-	3,100	-	3,100	-	3,100
-9	76,000	-	76,000	6,300	34,850	-	-	3,100	-	3,100	-	3,100
-10	77,600	-	77,600	6,400	35,600	-	-	3,200	-	3,200	-	3,200
-15	79,900	-	79,900	6,100	36,900	-	-	3,300	-	3,300	-	3,300
80-10	85,100	-	85,100	5,900	39,600	-	-	3,500	-	3,500	-	3,500
-11	85,200	-	85,200	6,300	39,450	-	-	3,500	-	3,500	-	3,500
-14	88,700		88,700	7,100	40,800	-	-	3,600	-	3,600	-	3,600
-15	89,100	-	89,100	7,400	40,850	-	-	3,700	-	3,700	-	3,700
90-1	90,100	-	90,100	7,400	41,350	-	-	3,700	-	3,700	-	3,700
-7	96,800	6,900	103,700	7,400	44,700	-	-	4,200	-	4,200	-	4,200
-8	97,200	-	97,200	7.700	44,750	-	-	4,000	-	4,000	-	4,000
100-4	104,300	-	104,300	8,300	48,000	-	-	4,200	-	4,200	-	4,200
110-1	111,000	-	111,000	7,000	52,000	-	-	4,400	-	4,400	-	4,400
-4	118,800	-	118,800	13,900	52,450	-	-	4,700	-	4,700	-	4,700
-6	119,900		119,900	9,000	55,450	-	-	4,700	-	4,700	-	4,700
-7	120,500	11,800	132,300	11,100	54,700	-	-	5,100	-	5,100	-	5,100
-12	125,400	-	125,400	9,000	58,200	-	-	4,900	-	4,900	-	4,900
-13	125,900	-	125,900	12,100	56,900	-	-	4,900	-	4,900	-	4,900
-14	128,300		128,300	14,800	56,750	-	-	4,900	-	4,900	-	4,900

*After indebtedness

TABLE XXI

COMPARISON OF TOTAL FEDERAL ESTATE TAXES AND ATTORNEY FEES ON THE COMBINED ESTATES OF THOSE CASES WHERE THE HUSBAND DIED AND HIS WIFE SURVIVES ACTUAL TRANSFER VERSUS TESTAMENTARY TRUST PROVISIONS

Estate No.	Value of Property	Attorney Fees			Federal Estate Tax			Total Tax and Attorney Fees			
		Direct Table XIX	Trust Table XX	Decrease	Direct Table XIX	Trust Table XX	Decrease	Direct Table XIX	Trust Table XX	Decrease Amount	Decrease % of Total Property
60-9	$ 68,400	$ 3,600	$ 2,800	$ 800	-0-	$ -	$ -	$ 3,600	$ 2,800	$ 800	1.2%
70-4	72,900	3,300	3,000	300	200	-	200	3,500	3,000	500	.7
-6	74,700	4,100	3,100	1,000	300	-	300	4,400	3,100	1,300	1.7
-7	75,200	3,500	3,100	400	400	-	400	3,900	3,100	800	1.1
-8	75,800	4,500	3,100	1,400	300	-	300	4,800	3,100	1,700	2.2
-9	76,000	3,800	3,100	700	300	-	300	4,100	3,100	1,000	1.3
-10	77,600	3,900	3,200	700	400	-	400	4,300	3,200	1,100	1.4
-15	79,900	4,900	3,300	1,600	600	-	600	5,500	3,300	2,200	2.8
80-10	85,100	6,800	3,500	3,300	1,000	-	1,000	7,800	3,500	4,300	5.1
-11	85,200	3,800	3,500	300	1,300	-	1,300	5,100	3,500	1,600	1.9
-14	88,700	4,500	3,600	900	1,500	-	1,500	6,000	3,600	2,400	2.7
-15	89,100	4,400	3,700	700	1,600	-	1,600	6,000	3,700	2,300	2.6
90-1	90,100	4,500	3,700	800	1,600	-	1,600	6,100	3,700	2,400	2.7
-7	96,800	5,500	4,200	1,300	2,500	-	2,500	8,000	4,200	3,800	3.9
-8	97,200	7,700	4,000	3,700	2,200	-	2,200	9,900	4,000	5,900	6.1
100-4	104,300	6,100	4,200	1,900	3,500	-	3,500	9,600	4,200	5,400	5.2
110-1	111,000	6,900	4,400	2,500	4,800	-	4,800	11,700	4,400	7,300	6.6
-4	118,800	5,800	4,700	1,100	5,300	-	5,300	11,100	4,700	6,400	5.4
-6	119,900	4,800	4,700	100	6,800	-	6,800	11,600	4,700	6,900	5.8
-7	120,500	9,400	5,100	4,300	5,600	-	5,600	15,000	5,100	9,900	8.2
-12	125,400	5,900	4,900	1,000	8,000	-	8,000	13,900	4,900	9.000	7.2
-13	125,900	6,400	4,900	1,500	7,200	-	7,200	13,600	4,900	8,700	6.9
-14	128,300	5,700	4,900	800	7,300	-	7,300	13,000	4,900	8,100	6.3

TABLE XXII

DECREASE IN HUSBAND'S ESTATE DUE TO INCREASED ATTORNEY FEES FOR PROBATING THE HUSBAND'S ESTATE WHEN TESTAMENTARY TRUSTS ARE INVOLVED

		Attorney Fees		Decrease	
Estate Number	Value of Property	Actual Table XIX	Trust Table XX	Amount	% of Total Property
60- 9	$ 68,400	$ 1,000	$ 2,800	$ 1,800	2.6%
70- 4	72,900	400	3,000	2,600	3.6
6	74,700	1,200	3,100	1,900	2.5
7	75,200	500	3,100	2,600	3.5
8	75,800	1,500	3,100	1,600	2.0
9	76,000	800	3,100	2,300	3.0
10	77,600	800	3,200	2,400	3.1
15	79,900	1,800	3,300	1,500	1.9
80-10	85,100	3,500	3,500	-	-
11	85,200	400	3,500	3,100	3.6
14	88,700	1,000	3,600	2,600	2.9
15	89,100	900	3,700	2,800	3.1
90- 1	90,100	1,000	3,700	2,700	3.0
7	96,800	1,700	4,200	2,500	2.6
8	97,200	4,000	4,000	-	-
100- 4	104,300	2,100	4,200	2,100	2.0
110- 1	111,000	2,700	4,400	1,700	1.5
4	118,800	1,400	4,700	3,300	2.8
6	119,900	300	4,700	4,400	3.7
7	120,500	5,100	5,100	-	-
12	125,400	1,200	4,900	3,700	3.0
13	125,900	1,800	4,900	3,100	2.5
14	128,300	1,100	4,900	3,800	3.0

probate. Thus the routine and provisions governing probate had to be fulfilled even though the value of the property was relatively small.

Table XX illustrates the results that would be obtained if testamentary trusts were included in the provisions of the husband's will. In this case, the entire estate of the husband was subject to probate and the corresponding fees reduced the estate values transferred to the trusts. However, the property in the wife's estate was not subject to probate and did not incur a liability for federal estate tax, because the value did not exceed the $60,000 specific exemption. The total of the federal estate tax and the recommended minimum attorney fees for the combined estates was only the attorney fee computed for the husband's estate.

In Table XXI, the comparison between the fees and taxes to be incurred using testamentary trusts is shown. Also shown is the percentage the decrease was of the total value of the husband's estate. The decrease in attorney fees was greater than the decrease in federal estate tax through Case No. 80-10 which reflected a value of $85,100. After that the tax saving exceeded the saving in attorney fees except for Case No. 90-8. It should be noted that Case Nos. 80-10, 90-8 and 110-7 were the only estates wherein the entire estate of the husband was subject to probate and these show the largest savings in attorney fees, because the property was subject to the minimum attorney fee calculation twice. The amount of decrease in attorney fees was smallest in Case No. 110-6 because over ninety percent of the estate consisted of insurance proceeds payable to a named beneficiary, thus theoretically no attorney fees were due on the transfer. It can be seen, that the smaller the husband's probate estate, the smaller the savings in attorney fees on the two estates combined.

As indicated in the previous analysis, the federal estate tax liability generally rose as the estate value rose. However, the allowable deductions for estate tax purposes operate to decrease the taxable estate. The savings reached $1,000 when the taxable estate was near $15,000, or $75,000 before the $60,000 specific exemption. In the table, the tax savings reached $8,000, in Case No. 110-12, which referred to a taxable estate of $53,900 or $113,900 before the exemption. The savings enjoyed by the elimination of the federal estate tax liability became more pronounced as the estate values approached the $120,000 ceiling, because of the progressive rates which existed in the federal estate tax rate schedule.

In Table XXII a comparison was made of the attorney fees that were due on the husband's estate as it existed and those due if testamentary trust provisions had been in effect. Since all of the husband's estate would be subject to probate if testamentary trusts were used, the recommended minimum attorney fees were equal to or larger than those incurred under existing conditions. The result was a reduction in the amount of the estate transferred or available for the benefit of the wife. As explained in the previous analysis, this involved a payment now, with the savings deferred until the widow's death. Thus, the time value of money becomes a factor which depends upon interest earned and the length of time the widow survives her deceased husband. This increased cost on the first estate should be considered when the testator is involved in planning his estate.

Effect of Some Deviations

In ten of the 23 cases, the decedents were men with surviving spouses and insurance proceeds were paid to named beneficiaries. Since such proceeds were not subject to probate in the insured's estate, the testator may have chosen to leave the insurance payable to a named beneficiary other than his estate, thus the proceeds would not be available to the estate for transfer into the marital and/or non-marital trusts. Table XXIII, on the following page, shows the results of having the insurance payable to the wife with additional property, if any, transferred to a marital trust so that the maximum marital deduction allowable was preserved in the insured's estate.[4]

The "Value of Husband's Estate" shown in Table XXIII is the total value of the assets in the decedent's estate as taken from the probate file. This amount coincides with the amounts in the second column of Table XIX and Table XX, on pages 135 and 136 respectively. The life insurance proceeds in the respective cases have been maintained as they existed. In other words, the wife was retained as the named beneficiary rather than designating the decedent's estate as the primary beneficiary. Thus the proceeds were paid to the surviving spouse and were not subject to probate proceedings in the husband's estate. It was assumed the surviving spouse enjoyed complete control over the proceeds until her death. At that time, the proceeds were part of her estate subject to probate and federal estate tax, if the taxable estate exceeded the $60,000 specific exemption. In addition, the full marital deduction

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[4]See discussion regarding marital and non-marital trusts on pp. 43-55 of this study.

TABLE XXIII

TOTAL FEDERAL ESTATE TAXES AND ATTORNEY FEES ON THE COMBINED ESTATES OF THOSE CASES WHERE THE HUSBAND DIED AND HIS WIFE SURVIVES, PROVISIONS HAVING BEEN MADE FOR TESTAMENTARY TRUSTS EXCEPT WITH REGARD TO LIFE INSURANCE PROCEEDS

Estate Number	Value of Husband's Estate	Insurance Paid to Wife as Named Beneficiary	50% Mortgage Indebtedness	Amount of Estate Subject to Probate	Expenses of Estate	Value of Wife's Estate	Wife's Estate Subject to Probate	Wife's Taxable Estate	Recommended Minimum Attorney Fees for Probating an Estate: Husband's Estate	Wife's Estate	Total for Both Estates	Federal Estate Tax on Wife's Estate	Total on Combined Estates
60- 9	$ 68,400	$ 19,400	$ -	$ 49,000	$ 7,800	$ 30,300	$ 19,400	$ -	$2,100	$ 900	$3,000	$ -	$3,000
70- 4	72,900	36,600	-	36,300	3,600	36,600	36,600	-	1,600	1,600	3,200	-	3,200
- 6	74,700	18,200	-	56,500	4,900	34,900	18,200	-	2,400	800	3,200	-	3,200
- 7	75,200	38,300	-	36,900	3,100	38,300	38,300	-	1,600	1,600	3,200	-	3,200
- 9	76,000	5,000	-	71,000	6,100	34,950	5,000	-	2,900	500	3,400	-	3,400
80-11.	85,200	50,400	-	34,800	4,300	50,400	50,400	-	1,500	2,100	3,600	-	3,600
90- 7	96,800	35,000	6,900*	68,700	5,900	45,450	35,000	-	2,800	1,500	4,300	-	4,300
100- 4	104,300	25,800	-	78,500	7,300	48,500	25,800	-	3,200	1,100	4,300	-	4,300
110- 6	119,900	100,400	-	19,500	5,200	100,400	100,400	36,300	900	4,100	5,000	4,100	9,100
-14	128,300	24,500	-	103,800	14,000	57,150	24,500	-	4,200	1,100	5,300	-	5,300

*Since "Value of Husband's Estate" is after any mortgage indebtedness, 50% of that mortgage indebtedness is added to the probate assets to compute the recommended minimum attorney fee per the minimum fee schedule in Appendix B.

allowable is desired in the decedent's estate, therefore will provisions were made to transfer one-half of the total estate value, before the marital deduction and specific exemption, to the wife. A marital trust was used if the insurance proceeds did not equal or exceed the full marital deduction allowable for federal estate tax purposes. Case Nos. 70-4, 70-7, 80-11 and 110-6 illustrate the situation wherein the insurance proceeds exceeded the maximum marital deduction allowable. Thus the "Value of Wife's Estate" equaled the insurance proceeds and no marital trust was formed. In the remaining cases, additional property was transferred to a marital trust. For instance, Case No. 60-9 had a gross value of $68,400 and allowable expenses, for federal estate tax purposes, of $7,800. Included in the $7,800 was the recommended minimum attorney fee for administering the husband's probate estate valued at $49,000 ($68,400 less $19,400). Thus the net estate for the husband is $60,600 ($68,400 less $7,800) and one-half of it is the maximum marital deduction allowable for federal estate tax purposes. This amount, which is reflected as the "Value of Wife's Estate" in the table, less the insurance proceeds paid to the surviving spouse is transferred to a marital trust. In this case, $19,400 insurance proceeds is paid to the wife and $10,500 ($30,300 less $19,400) is transferred to a marital trust. Assuming the wife kept these principal amounts intact during her lifetime, her estate subject to federal estate taxes was $30,300 less allowable expenses. Since this did not exceed the $60,000 specific exemption, no federal estate tax liability was incurred. The insurance proceeds, as long as outright ownership of the ultimate investments was retained by the wife, were subject to probate, whereas the assets transferred to the marital trust would not be subject to probate.

Consequently a recommended minimum attorney fee for probating the wife's estate of $19,400 was $900 in Case No. 60-9. The attorney fees and federal estate tax incurred on both estates totaled $3,000.

A comparison of the total column in Table XXIII and the total column in Table XIX shows a decrease for the foregoing analysis over the actual as shown in Table XIX, in all ten cases. The range of the decrease is $300 to $7,700. The largest decreases were attributable to the elimination of federal estate taxes in the wife's estate. Case No. 110-6 consisted mostly of insurance, consequently a federal estate tax of $4,100 was incurred, although this was $2,700 ($6,800 less $4,100) less than the tax on the direct transfer of the entire estate.

A comparison between the foregoing procedure and that using only testamentary trusts, reflected in Table XXIII and Table XX respectively, shows lower totals in Table XX in every case. However, the difference is only $100 in five cases, $200 in two, $300 in one and $400 in another. Case No. 110-6 shows a difference of $4,400, of which $4,100 is the federal estate tax incurred in the wife's estate. By leaving the insurance payable to the wife as a named beneficiary, there was a reduction in the attorney fee for probating the husband's estate and this may be preferred by the testator even though it could result in a larger attorney fee for probating the wife's subsequent estate.

As previously mentioned, in four cases the insurance proceeds exceeded the maximum allowed under the marital deduction, thus a marital trust was not formed. This would avoid the additional trust entity and its separate accounting, which may be preferred by a testator. On the other hand, where the insurance proceeds did not equal the maximum marital deduction allowable, a marital trust was formed. The surviving spouse could make an inter vivos transfer of the insurance proceeds to that trust, without incurring a gift tax, and avoid probating the second estate. This action would eliminate the amounts computed for the attorney fee for probating the wife's estate, shown in the fourth column from the right in Table XXIII, and create additional savings that a testator may consider significant. Note, however, that this is a separate action to be taken by the surviving spouse.

The thrust of this study has been the avoidance of federal estate tax and duplicate attorney fees for probate on the combined property of a husband and wife, when the net value of that property did not exceed $120,000. The intent was to plan for both estates simultaneously. The marital/non-marital testamentary trust arrangement was used to eliminate the federal estate tax and avoid the attorney fees for probate on the second estate. The wife would have full control over the assets in the marital trust. She could even withdraw the principal and close the trust if she so chose. The income from the non-marital trust and even the principal would be available for her support, maintenance, health or education. The use of inter vivos trusts by the husband/testator would avoid the attorney fees for probate on both estates. If the husband chooses to transfer all his property to his wife via joint tenancy provisions, life insurance proceeds and/or will provisions, the surviving wife would need to undertake some estate planning procedures if the federal estate tax is to be eliminated and attorney probate fees reduced. In this event, some of her options are to spend the money, to make gifts or to form an inter vivos trust. To eliminate any federal estate tax, she would have to keep the value of her estate after allowable expenses at $60,000 or less. Note that the first $5,000 above $60,000 is taxed at only three cents on a dollar. The tax rate is not very high on the first two $5,000 brackets after the $60,000 specific exemption. The recommended minimum attorney fee for assets subject to probate is $500 on the first $10,000 of asset value and $400 on each subsequent $10,000 until $100,000 is reached. Thus on probate assets valued at $60,000 the recommended minimum attorney fee is $2,500.

If the surviving spouse did decide that lifetime gifts were a desirable method for transferring assets to the children in an effort to avoid probate fees and federal estate taxes, the surviving spouse could give $30,000 plus $3,000 each year to each donee without incurring any gift tax. For instance, in Case No. 110-6, the estate consisted of $100,400 life insurance proceeds and $19,500 as the value of the residence and checking account, both held in joint tenancy with rights of survivorship. The minimum attorney fee in the determination of the death of a joint tenant would be $300. The widow received $115,300 from her husband's estate and the estimated federal estate tax on an estate valued at that amount was $6,800. If she made nontaxable gifts to one or two children, the reduction in federal estate tax and attorney fee for probating her estate would be as shown in Table XXIV on the following page.

The gift program is continued in this table until the taxable estate before the specific exemption falls below $60,000, thus eliminating all federal estate taxes. If there were two children, her gross estate would be $61,300 after the four annual gifts, resulting in a minimum attorney fee of $2,600 and no federal estate tax. If there is only one child, it would require eight annual gifts to reduce her $115,300 estate to $61,300, without incurring any gift tax. Note, that

TABLE XXIV

REDUCTION IN ATTORNEY FEES AND FEDERAL ESTATE TAX
THROUGH A GIFT PROGRAM

Year Following Husband's Death	Amount of Gift	One Child: Reduction In Federal Estate Tax	One Child: Reduction In Attorney Fees	Two Children: Reduction In Federal Estate Tax	Two Children: Reduction In Attorney Fees
1st Year Gift	$33,000	$5,500	$1,100		
	36,000			$5,800	$1,200
2nd Year Gift	3,000	300	100		
	6,000			600	300
3rd Year Gift	3,000	300	100		
	6,000			300	200
4th Year Gift	3,000	300	200		
	6,000			100	200
5th Year Gift	3,000	200	100		
6th Year Gift	3,000	100	100		
7th Year Gift	3,000	100	100		
8th Year Gift	3,000	-0-	100		

the first year gift uses the entire $30,000 lifetime gift exemption plus the $3,000 per donee annual exclusion. Bear in mind that the donor must live more than three years from the date of the gift to avoid the possible inclusion of the gift in her estate as a gift "in contemplation of death."[5]

In Case No. 70-9, the gross value of the estate was $76,000, consisting of $71,000 of assets held in joint tenancy with the decedent's wife and a $5,000 life insurance policy. The recommended minimum attorney fee for determination of death of a joint tenant was $800. The expenses of the estate were $4,000, thus $72,000 in property was transferred to the surviving wife. Her estate valued at $72,000 would incur an estimated $300 for federal estate tax and $3,000 for an attorney fee to probate the estate. In order to eliminate the federal estate tax, she would have to relinquish control of the assets by making gifts and/or transferring the assets to an irrevocable inter vivos trust. In order to avoid probate, she would have to make lifetime gifts or transfer the assets to an inter vivos trust, either revocable or irrevocable. It appears these solutions are not as beneficial to her as the testamentary trusts in her husband's will. However, this is a choice to be made by the testator and his wife. This informed choice is the objective of estate planning.

A basic assumption in this study was that the testator's estate was retained by the surviving wife such that the income from the estate assets were sufficient to provide her with a comfortable living. Therefore her estate neither increased nor decreased during her remaining

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[5]See discussion on pp. 16-21 of this study.

lifetime. It could be that the surviving spouse is in a position to add to her estate. The question is whether it would be possible to increase the estate value and avoid additional federal estate taxes and probate fees.

The file for Case No. 90-7 included information indicating the surviving wife was 41 years old and there were four children ranging in ages from 10 to 17 years. The estate was valued at $96,800. Life insurance proceeds were $35,000, the home was valued at $25,000, other real estate was valued at $13,900 and cash and personal items accounted for the remaining $22,900. In Table XIX, one can see the recommended minimum attorney fee was $1,700 and total expenses were $4,900. The surviving wife received a net of $91,900. If the wife retains this amount in her estate, the recommended minimum attorney fee for probating her estate would be $3,800 and the federal estate tax would be $2,500.

Assume that she, at 41, is self sufficient and wishes to use the income from the assets from her husband's estate to build a larger estate for their four children. One approach that could be considered is to buy a permanent life insurance policy on her life. To avoid the inclusion of the proceeds in her estate, she could form an irrevocable trust to own the life insurance for the benefit of the four children. She must be sure to avoid all incidents of ownership.[6] Each year she could make a gift to the trust out of income received on certain existing assets to pay the premium on the life insurance policy. This gift would be one of a future interest, therefore it would not qualify for the $3,000 annual exclusion, but would be applied to the $30,000

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[6]See discussion on pp. 66-79 of this study.

lifetime exemption. A trust is recommended, because the children are minors, otherwise, adult children could buy the life insurance and the mother could make annual gifts to them to pay the insurance premiums. In this latter case, these gifts would qualify for the $3,000 annual exclusion. In the event of the mother's death, the insurance proceeds would not be includible in her estate for either federal estate tax purposes or probate.

If the surviving wife/mother wanted to avoid probate proceedings on a large portion of her existing estate, she could transfer her investments to an inter vivos trust that is revocable. If she wanted to reduce her taxable estate of $91,900 plus annual incomes, she could make annual gifts to her children - outright when they are adults or in trust while they are minors. She could make annual gifts of present interests equal to $3,000 to each of her four children without incurring a federal gift tax. Thus in one year she could reduce her estate by $12,000 without incurring a gift tax and without using any part of her $30,000 lifetime exemption. These procedures are mentioned merely as possible alternative plans. Whether they are practical must be determined in light of a testator's particular circumstances and desires.

Analysis of a Double Estate

Included in the 73 estate files which comprised the population of this study, was one instance where a husband and his wife died within four months of each other and both estates fell within the time period of the study. A discussion of this situation is given because information for both estates was available.

Case No. 80-7 involved a man who died January 20, 1972, at the age of 82 and his will was dated February 5, 1971. His will stipulated that his wife should serve as executrix. His estate was valued at $84,000 including real estate valued at $14,700 and cash of $53,700 held in joint tenancy with his wife. Under the provisions of the will, mineral interests valued at $150 and cash of $500 were transferred to two sisters and a sister-in-law and the remainder of the estate was transferred to his wife. His wife died May 20, 1972, before his estate could be closed. A sister of the wife was then appointed administratrix of the husband's estate, because she was named as executrix of the wife's estate. The two estates were simultaneously closed on January 16, 1973. There were no children, thus the devisees and legatees of the wife's estate were three sisters, a brother and a nephew.

The estates consisted of the following:

	H	W
Real Estate (held in joint tenancy w/ wife)	$14,700	$ --
Cash (held in joint tenancy w/ wife)	53,700	64,150
Mineral interests in Oklahoma	150	--
Mineral interests outside Oklahoma	10,150	10,150
Household goods and personal effects	1,000	1,000
Ring	--	500
Stamps, Coins & Jewelry	3,900	3,900
Car	400	--
Total -	$84,000	$79,700

The expenses paid by the estates were:

	H	W
Federal estate tax	$ --	$ 800
Oklahoma estate tax	1,500	150
Attorney fee - statutory sum	1,500	3,400
Attorney fee - extraordinary	500	--
Administratrix fee	200	1,900
Court Costs	200	200
Funeral expenses	1,500	1,500
Appraisers	100	--
Total -	$ 5,500	$ 7,950

The federal estate tax on the wife's estate was verified as follows:

Estate value	$79,700
Less deductions ($7,950 less estate taxes of $950)	7,000
Taxable estate before the specific exemption	72,700
Less specific exemption	60,000
Taxable estate	$12,700

Federal estate tax: (See Appendix A for rate schedule)

First $10,000		$500
Next 2,700 @ 11%		297
	Total -	$797
	Rounded to	$800

The attorney fee relating to the husband's estate consisted of $1,500 based upon the recommended minimum fee schedule in Appendix B, plus an extra amount of $500 which is likely due to the additional work involved in selling the real estate and car. The attorney fee of $3,400 paid by the wife's estate is based upon the rates in the fee schedule. Note, however, that it applied to essentially the same assets as those in the husband's estate.

As indicated in the previous analysis, there was no federal estate tax liability incurred on the husband's estate, but there was on the wife's estate because the marital deduction was not allowable. In this case the highest estate tax bracket was only 11% thus the total federal estate tax is $800.

These individuals apparently thought about the transfer of their property quite recently because both had wills dated February 5, 1971. If they had chosen to provide for testamentary trusts, they would have had to break the joint tenancy ownership of the cash holdings at least. The assumption in the previous analysis had been that all the property was individually owned and transferred to two testamentary trusts, how ever, if it is decided that the personal residence, a checking account and/or a savings account should be held in joint tenancy, then the testamentary trust provisions should stipulate that the marital trust should consist of one-half of the estate less the value of any property transferred to the spouse outright, which would cover the property held in joint tenancy. The testator must be aware, however, that the property transferred outright to the spouse will subsequently be subject to probate whereas the property transferred in trust will not. In an effort to keep this analysis consistent with the previous ones, it was assumed that the joint tenancies were broken and ownership placed in the husband's name. This should not raise any questions of gift tax since the entire value was included in the husband's estate implying he provided the assets to acquire the property originally.

The recommended minimum attorney fee for probating the husband's estate valued at $84,000 would be computed as follows:

First $10,000 at 5%	=	$$ 500.00
Next 74,000 at 4%	=	2,960.00
	Total	3,460.00
Rounded to the nearest $100		$3,500.00

Since the availability of the marital deduction was preserved, there was no federal tax liability incurred on the husband's estate. When the wife died four months later her estate for federal estate tax purposes consisted of those assets transferred to the marital trust which was half of the net assets from her deceased husband's estate. The amount was $39,850, (79,700 ÷ 2), well below the specific exemption of $60,000, therefore no federal estate tax was incurred on her estate either. Since all of the assets from the husband's estate were transferred to trusts there was no probate court proceedings necessary and, consequently, attorney fees for probating the estate were not incurred. A comparison of the total federal estate taxes and attorney fees for both estates reflected the following:

	Estates as Administered	Estates with Recommended Trusts
Recommended minimum attorney fees:		
For probating husband's estate	$1,500	$3,500
For probating wife's estate	3,400	-0-
Federal estate tax on wife's estate	800	
Totals -	$5,700	$3,500

Because these estates were closed simultaneously on January 16, 1973, the fees and taxes were paid roughly at the same time, thus the entire difference of $2,200 would be considered a savings if the trust provisions had applied. In other words, the time value of money was not a factor here, because the two died within four months of each other.

Concluding Remarks

It should be recognized that estate planning is a specialization and will involve some additional time over and above that taken to prepare a will. Thus estate planning does involve some additional cost and the testator will find that he must exert some effort and spend a certain amount of time in planning his estate. For the professional, who is familiar with estate taxes and planning, the time needed to present the costs for alternate estate plans in the range of $60,000 to $120,000 in value should not be very lengthy. For instance, the investigator in this study averaged approximately an hour for each case when deriving the comparative figures. Remember, the thrust of this study was whether the accountant should urge his clients who have estates valued at $60,000 to $120,000 to undertake estate planning. Thus the accountant is familiar with his client and his financial and tax affairs. Getting the information regarding the types of property owned, their approximate market values and the form of ownership should not be too time consuming given the cooperation of the client. For the initial estate planning session, the additional time involved, over the time spent on the regular work performed, should not exceed five hours and at $35 to $40 an hour, the additional cost could be $200. The attorney's fee for preparing the will should not differ greatly from that charged for the wills prepared without any estate planning. Since 66 out of the 73 cases in this study had wills, it appears most individuals do prepare wills and thus the cost of will preparation should not be considered an additional cost of estate planning. Thus we speak of an additional cost of $200 for estate planning. Subsequent review of the estate plan should be done annually when the income taxes are being computed. In most instances this time spent would be nominal unless a significant change in the assets occurred.

Another cost to be considered is the probable cost for legal consultation regarding the trusts and their termination when the surviving spouse dies. What this amount will be is beyond the scope of this study. However, it should be based upon an hourly rate for hours spent, not a percentage of the gross value of the assets. In addition, the procedures followed are not as lengthy as those required by the probate court, therefore, it is believed these legal costs would not be as large as the recommended minimum fees for probating an estate.

CHAPTER VI

IMPORTANT CONSIDERATIONS IN PLANNING A $60,000 TO $120,000 ESTATE

Basic Format for Estate Planning

Throughout this study there were concepts introduced which applied to estate planning in general. These concepts were analyzed for their particular applicability to the estate valued between $60,000 and $120,000. A basic format for developing an estate plan for the $60,000 to $120,000 estate has been derived. Initially this format provides for the minimization of federal estate taxes and attorney fees. No practical restrictions, such as legal complications involved in property management because of the proposed type of ownership, were considered. The reason was that the majority of cases in this study showed a high degree of liquidity and a concentration of investments that required little or no management. These types of investments were not subject to the practical restrictions mentioned above. The indications were that as a testator grows older, his preferences in investments tend toward those which work well in the basic format.

The format derived is presented in outline form as follows:

(A) Information to be assembled.

(1) Ages, health and professions of testator and spouse.

(2) Present inventory of existing property that would be included in the testator's estate and spouse's estate

under current estate tax provisions.

(3) Present forms of ownership of the property.

(4) Current fair market valuations for all property included in (2) above. (For purposes of this format, the combined estate valuation for the testator and spouse is not more than $120,000.)

(5) Testator's and his spouse's particular desires regarding the distribution of their assets.

(B) Items considered for purposes of the marital deduction.

(1) Based upon the value of the testator's estate and spouse's estate, determine the preferred value of property that should qualify for the marital deduction.

(2) Determine whether a formula bequest is appropriate when considered with amount derived in (1) above.

(3) Consider incorporating a "common disaster clause" in the will or trust instrument.

(a) Generally desirable when the testator's estate is over twice the size of the spouse's estate.

(4) Consider use of a "conditioned-on-survivorship" clause.

(a) Basically not advantageous when combined estates are $120,000 or less.

(5) Avoid the application of the "terminable interest rule" to the property intended to qualify for the marital deduction.

(C) Explore the use of trusts.

(1) Discuss carefully the use of testamentary trusts and inter vivos trusts.

(a) If testator is quite old and/or investments require little management, an inter vivos trust may be appropriate.

(b) If testator is rather young and/or active in managing his/her investments, then testamentary trusts should be recommended.

(2) Exercise care in avoiding a general power of appointment in the non-marital trust.

(3) Discuss powers and responsibilities of trustee.

(a) Help testator choose a trustee.

(D) Evaluate the effect of property held in joint tenancy.

(1) Discuss thoroughly the estate tax consequences.

(2) Establish who provided funds to acquire property held in joint tenancy.

(3) Consider gift tax consequences when established and broken.

(a) When testator is relatively young and the estate has growth potential, the elimination of joint tenancies should be completed as soon as possible.

(4) A household checking account, savings account and the personal residence are often jointly held and probably will be left in that form.

(E) Consider the relative importance of life insurance.

(1) Examine policies for ownership, primary and secondary beneficiaries.

(a) Consider having the estate designated as beneficiary to take full advantage of cross testamentary trust provisions or the trust if inter vivos trusts are used.

(2) Does the lack of liquidity in the estate suggest a need for additional life insurance coverage.

(a) If testator is relatively young and the estate has growth potential, consider the advisability of having the spouse or a trust own insurance on the life of the testator.

(3) If noninsured ownership is desired, be sure no "incidents of ownership" are retained by the insured.

(F) Discuss the current federal gift tax provisions regarding lifetime gifts and how they complement the estate tax provisions.

(1) For estates valued at less than $120,000, gifts may not be a consideration; however, if the testator is relatively young or the estate has growth potential, a gift program may be an effective means of reducing the testator's estate in the future.

(2) It may be that the testator and his/her spouse may want to begin a gift program between spouses in an effort to equalize their two estates and forego the marital deduction.

Alternatives to be Considered

As indicated throughout this study, the marital deduction was a most important consideration in estate planning. Care must be exercised so that the legal requirements are met; however, within those legal requirements, we must weave those conditions which coincide with the testator's desires and are most advantageous for his purposes. Based upon the value of the testator's estate and the value of the spouse's estate, a determination of a preferred marital deduction is made. The closer the two estates of the husband and wife are to being equal in value, the less desirable are testamentary transfers to each other to the full extent of the allowable marital deduction. The reason is that, with estates valued at $120,000 and less, the transfers may cause a potential federal estate tax liability in the survivor's estate without a reduction in the federal estate tax in the estate of the first spouse to die. It should be noted that if the preferred marital deduction does not equal the maximum marital deduction allowable, then the formula bequests, which provide flexibility in the will, are not appropriate. Thus it would be even more necessary to reanalyze the estate plan whenever a significant change in the two estates occurred.

The use of trusts in an estate plan for a couple's estate valued between $60,000 and $120,000 provides a means of eliminating the federal estate tax on both estates. Actually the use of inter vivos trusts will provide the added advantage of avoiding probate for the estate of the first to die as well as the estate of the survivor. The testamentary trust provision avoids probate only for the estate of the survivor. The problem with an inter vivos trust is that it is a separate entity for accounting and tax purposes and can cause delay in business transactions. Thus, when the estate consists of investments which involve considerable management, an inter vivos trust may not be appropriate, whereas testamentary trusts do not exist until the testator dies and avoids the foregoing complications for the testator. It appears the choice between using inter vivos trusts versus testamentary trusts depends on the age and health of the testator and types of assets owned. If the testator is relatively old and he is not active in business, an inter vivos trust arrangement should be considered, thus enjoying the added advantage of avoiding probate on those assets transferred to the inter vivos trust. If the testator is still young and active in business affairs, it appears better to provide for testamentary trusts in his will. The testator should understand, however, that he may want to consider an inter vivos trust in the future when, and if, his circumstances change.

As indicated in this study, some, and perhaps a large portion, of a couple's estate will be in joint ownership. If each spouse contributed funds to acquire the joint tenancy property initially, steps should be taken to document those contributions to establish what portion of the property should be attributed to each spouse. It is extremely important that the testator and spouse understand how jointly owned property is taxed for federal estate tax purposes. From a practical standpoint, joint ownership of a household checking account and a savings account which would provide some ready cash for the surviving spouse is a good policy. Also joint ownership of the personal residence is often preferred. In discussions with practicing accountants in Tulsa, Oklahoma, it was revealed that often the wife demonstrated strong interest in her home and joint ownership of it was very important to her. Thus it appears these three items will be allowed to remain in joint ownership. However, eliminating joint ownership of other investment property should be seriously considered. If the estate value is under $75,000, and growth seems a remote possibility, it may be that total joint ownership of property results in a larger reduction of attorney fees for administering the transfer of property than the potential federal estate tax on the surviving spouse's estate. In this case, care must be exercised to provide for joint ownership of all property. For instance, when the husband is the sole provider, such that most of the jointly-owned property is attributable to his estate, a provision could be inserted in his will stipulating that all household goods is his wife's property, having been given to her when acquired. Thus probating this property would not be required in the husband's estate if the wife survives him.

In the event the estate is valued over $75,000 and growth potential is evident, it appears the testator should be advised to eliminate joint tenancies and avoid joint ownership of property in the future. If the testator insists upon continuing joint ownership of property, then computations should be made to show him the cost, in terms of federal estate tax and attorney fees, of such action.

Life insurance is involved in estate planning as an indication of the amount of liquidity that can be expected in the estate. It must be understood that as long as the testator enjoys any "incidents of ownership," as defined by the Federal Estate Tax Code, the proceeds will be included in the testator's gross estate. In addition, insurance payable to a wife as a named beneficiary will not be subject to probate in the testator's estate; however, it will be includable in the surviving spouse's estate and subject to probate then. More flexibility in planning can be achieved when the insurance proceeds are payable to the estate, but then the proceeds will be includable in the gross estate for purposes of computing the attorney's fee for probating or administering the estate. Computations should be made to determine the costs involved for the two alternatives so that the better choice may be made by the testator.

Ownership of life insurance by a non-insured will keep the proceeds from being included in the insured's estate. As indicated in this study, such non-insured ownership is not pertinent to the estate valued between $60,000 and $120,000; however, it should be kept in mind when the testator is relatively young and potential for growth in the estate does exist.

It was determined that a couple with a combined estate valued between $60,000 and $120,000 can effectively eliminate any federal estate tax and reduce attorney fees for administering the estates through the use of trusts. Thus gifts to third persons merely to reduce the gross estate is not necessary. However, a pertinent question is: "At what point in life has the couple's estate reached the value of $120,000?" Again, if the testator is relatively young and the estate has growth potential then a gift program may become appropriate as the estate becomes more valuable. Gifts may also be recommended when the testator is unmarried and the marital deduction is not allowable. Then gifts may be an effective means of reducing that part of the estate which exceeds $60,000, the specific exemption. Note, in Appendix A, there are seven brackets of estate tax rates between the values of $60,000 and $120,000 and some gifts may be desirable in an effort to reduce the taxable estate and eliminate the higher tax brackets.

Another area that may be explored is gifts between the spouses. Estate planning procedures apply to the estate of the spouse who owns the larger portion of the combined estate. It is assumed that spouse with the larger portion of the combined estate will be the first to die. If, instead, that spouse is the survivor of the two, then estate planning under such circumstances should be redone, because much of the planned savings arose because of the availability of the marital deduction. Line 8 of Table I on page 30, shows that the 'best' marital deduction for a combined estate of $120,000 is zero when each spouse individually owns half of the estate. Thus, for a couple whose estates are nearly equal, the estate plan would not be dependent on an allowable marital deduction and the order of deaths not as important to the plan. Annual gifts from one spouse to the other could be used to achieve relative equality between the two estates.

Concluding Remarks

Estate planning is important for those couples with estates valued between $60,000 and $120,000. This study has shown that savings in federal estate tax and attorney fees were possible. Added to these savings, is the possibility of avoiding extraordinary attorney fees. Estate planning should provide the testator and spouse with an awareness of the procedures and the information required in administering an estate. The accountant should establish a file for the estate planning consultations which would be helpful when the estate is administered. All of this should provide for an orderly administration procedure and avoid costly surprises which lead to fees for extraordinary services. Remember, the attorney fees computed in this study were recommended minimum fees. In Appendix B on page 184, note the reference made to additional charges for extraordinary services.

In the investigator's opinion, estate planning consultations should include both the husband and the wife. Generally, the husband is the owner of the property and he is the one who meets with his accountant to discuss financial and tax matters. Too often, this continues when estate planning is discussed. Since the husband is the first to die in the majority of cases, it is the wife who is involved in the administration procedures of his estate and it is most important that she be aware of her rights and responsibilities before she is thrust into the situation during her bereavement. It is also important that she anticipate the cash requirements of administering the estate.

Another reason for involving both the husband and wife in the estate planning consultations, is because a trustee for the trusts must be chosen, if trust provisions are part of the estate plan. The surviving spouse can serve as trustee of both the marital and non-marital trusts. Before making this choice, however, a decision must be made whether the surviving spouse is capable and wants to serve as trustee. This should be a mutual choice of the couple.

CHAPTER VII

CONCLUSIONS

Effect of the Results of the Study

Estate planning has become a specialized segment in the broad area of tax services performed by the accountant. A prime objective of estate planning is the minimization of variable costs attributable to estates, namely estate taxes and attorney fees involved in the administration of an estate. Of the variable costs, the federal estate tax has the potential of depleting an estate by a relatively large percentage. For instance, a taxable estate before the $60,000 exemption which is valued at $5.5 million will have an effective federal estate tax rate of fifty percent, although the highest tax bracket for federal estate taxes on the $5.5 million estate is 67%. In contrast, the minimum attorney fee recommended by the Oklahoma Bar Association is $141,100 or 2.57% of the $5.5 million estate. Thus tax is the most obvious area where meaningful savings in variable estate costs can be achieved.

A public accountant is paid for services performed and justification for his fee is often presented as a reduction in other costs, thus an economic gain results. Using this criterion, the public accountant can easily justify a fair fee for his services as an estate planner for an estate valued at $5.5 million. Fact is, during discussions with accountants specializing in taxes and experienced in estate planning who had offices in Tulsa, Oklahoma, it became evident that they had little difficulty justifying a fair fee when the estate was valued as low as a quarter of a million dollars. A taxable estate of $250,000 (before the $60,000 exemption) would incur a federal estate tax of $47,700. The effective rate is 19% and the top estate tax bracket is 30%. The minimum attorney fee recommended for estates in Oklahoma would be at least $8,600 or 3.44% of the taxable estate value.

None of the public accountants interviewed indicated a desire to actively promote estate planning for an estate valued at less than $250,000. This is not to say they did not participate in estate planning for smaller estates, nor that the need for estate planning in the smaller estates did not exist. Instead we are saying the public accountant did not initiate estate planning conversations with his clients unless indications were that his client's estate would be valued at $250,000 and above. Such hesitation by the public accountant to urge estate planning for a client appeared to be due to a fear that a fair fee based on time spent may not be forthcoming. In fact, a few accountants indicated more difficulty encountered in planning an estate valued at $120,000 than one of $250,000, because, too often, there were not enough assets to do all the testator desired, thus choices between alternatives had to be made. As a result, additional time was consumed, which increased the fee. It could be argued, however, that these are the persons who stand to gain more with a reduction in variable estate costs, because the savings achieved would be needed for consumption, whereas the savings in a larger estate would not fulfill basic needs.

Ironically, we appear to be in a quandary wherein the public accountant skilled in estate planning is not informing those clients, who could benefit most, of the advantages of estate planning. What is worse, these clients are apt to be totally unaware of the extent of these variable costs their estates will bear. As a result, feelings of confusion and frustration are added in the period of bereavement. This leads to additional cost of administering the estate if extraordinary services are required before the estate can be closed.

The point is that the person who goes to a certified public accountant for tax assistance is expecting more than he thinks is offered by the various income tax services. Why shouldn't this something "more" be estate planning?

In Chapter IV, it was shown that, for the cases included in this study, an overwhelming percentage (84%) of the decedents died testate. This indicated a receptive attitude toward thoughts of the affairs of their estates. Unfortunately, none showed evidences of planning to reduce the variable costs of the estate. In Chapter V, it was demonstrated that an overwhelming majority of the cases showed a reduction in variable costs for the two estates of a husband and wife when cross-testamentary trusts were used and the property owner was the first to die. Naturally, these savings increased as the estate values reached higher federal estate tax brackets. At what point these savings become significant is a personal value judgment that can vary among testators. The point is that the information presented in Chapter V can help the testator arrive at this value judgment as it applies to himself in his particular circumstances.

As indicated earlier in this chapter, the professional accountant hesitates to urge estate planning upon a client whose estate would be valued at less than $250,000. The information assembled in Chapter V showed savings of over ten thousand dollars for estates valued between $110,000 and $120,000. Surely such amount would be considered significant by a client having an estate valued within that range and, certainly, such savings would justify a fair fee for estate planning. Even a savings of five thousand dollars, which is not uncommon with a $90,000 estate should meet that criterion.

This study of 1972 probate files in Tulsa County, Oklahoma, provided information about the savings in variable costs that would have been possible with the use of cross testamentary trusts for the estates of husbands and wives valued between $60,000 and $120,000. The effects of some deviations from trusts were also shown. The accountant can present this information to his client as a part of his tax services. Urging his client to consider the alternatives and consequences of estate planning should be in order. The decisions regarding the methods to be followed in disposing of an estate must be that of the testator, but the responsibility for the decisions being made are attributable, at least in part, to the testator's accountant. Hopefully the information presented in this study will help influence accountants to actively promote estate planning for more of their clients. After all, there is a larger number of clients who have assets valued at $90,000 than those with assets valued at a quarter of a million dollars.

One additional comment is that this study was concerned with an estate valued between $60,000 and $120,000 as of the date of death. Since savings are shown at this level, this also provides a good argument for estate planning to start at this level when the testator's assets have the potential for growth prior to his eventual death. The evolution from a relatively small estate to a larger one can be far more orderly if estate planning is begun at the "small" stage and progresses with the growth of the estate. Another significant aspect is that, in case of an untimely death, the variable costs would be minimized, to the extent desired by the testator, every step of the way.

Recommendations for Further Study

During the course of this study, it was noted that in many cases, the estate tax paid to the Oklahoma Tax Commission exceeded that paid for federal estate tax. In fact, this was the case in every situation except when the estate reached a value of $90,000 and the marital deduction for federal estate tax purposes was not allowable. During the course of this study, the provisions of the Oklahoma estate tax underwent two significant changes. One change applied to the various exemptions allowed, thus bringing the Oklahoma provisions more in line with the federal exemption of $60,000 and the other applied to transfers from the husband to his surviving spouse. A worthwhile study would be one of determining the savings, if any, that could be realized in the Oklahoma estate tax if cross-testamentary trusts were used.

As indicated previously, a majority of the decedents died testate and yet, their wills did not reflect evidence of estate planning procedures. It was assumed this indicated a lack of estate planning, but does it? Professional journals and services extol the advantages of estate planning and the use of cross testamentary trusts is in the forefront. Is the lack of use of cross testamentary trusts shown in this study an indication the testators were not advised of their advantages, or were the testators advised and then decided against them for personal reasons? A survey of the clients of professional accountants, to determine the extent of their knowledge about estate planning and their attitudes toward certain estate planning techniques, would provide some useful information to the estate planner.

This study is not definitive of the entire realm of estate planning for United States citizens with estates in the range of $60,000 to $120,000. It is, however, one important contribution, and now, more similar studies are needed to further substantiate or refute the findings in this endeavor.

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APPENDIX A

ESTATE AND GIFT TAX RATE TABLES

The following is taken from Treasury Regulations, Section 20.2001-1:

TABLE FOR COMPUTATION OF GROSS ESTATE TAX

(A) Taxable estate equal to or more than---	(B) Taxable estate less than---	(C) Tax on amount in column (A)	(D) Rate of tax on excess over amount in column (A)
			Percent
....	$ 5,000	....	3
$ 5,000	10,000	$ 150	7
10,000	20,000	500	11
20,000	30,000	1,600	14
30,000	40,000	3,000	18
40,000	50,000	4,800	22
50,000	60,000	7,000	25
60,000	100,000	9,500	28
100,000	250,000	20,700	30
250,000	500,000	65,700	32
500,000	750,000	145,700	35
750,000	1,000,000	233,200	37
1,000,000	1,250,000	325,700	39
1,250,000	1,500,000	423,200	42
1,500,000	2,000,000	528,200	45
2,000,000	2,500,000	753,200	49
2,500,000	3,000,000	998,200	53
3,000,000	3,500,000	1,263,200	56
3,500,000	4,000,000	1,543,200	59
4,000,000	5,000,000	1,838,200	63
5,000,000	6,000,000	2,468,200	67
6,000,000	7,000,000	3,138,200	70
7,000,000	8,000,000	3,838,200	73
8,000,000	10,000,000	4,568,200	76
10,000,000	....	6,088,200	77

The following is taken from Treasury Regulations, Section 20.2011.1:

TABLE FOR COMPUTATION OF MAXIMUM CREDIT
FOR STATE DEATH TAXES

(A) Taxable estate equal to or more than---	(B) Taxable estate less than---	(C) Credit on amount in column (A)	(D) Rates of credit on excess over amount in column (A)
			Percent
$ 40,000	$ 90,000	....	.8
90,000	140,000	$ 400	1.6
140,000	240,000	1,200	2.4
240,000	440,000	3,600	3.2
440,000	640,000	10,000	4.
640,000	840,000	18,000	4.8
840,000	1,040,000	27,600	5.6
1,040,000	1,540,000	38,800	6.4
1,540,000	2,040,000	70,800	7.2
2,040,000	2,540,000	106,800	8.
2,540,000	3,040,000	146,800	8.8
3,040,000	3,540,000	190,800	9.6
3,540,000	4,040,000	238,800	10.4
4,040,000	5,040,000	290,800	11.2
5,040,000	6,040,000	402,800	12.
6,040,000	7,040,000	522,800	12.8
7,040,000	8,040,000	650,800	13.6
8,040,000	9,040,000	786,800	14.4
9,040,000	10,040,000	930,800	15.2
10,040,000	....	1,082,800	16.

The following is taken from Treasury Regulations, Section 25.2502-1 (b):

GIFT TAX RATE TABLE

"Taxable gifts" in the table below are determined by deducting the $30,000 specific exemption (allowed only once, but cumulative until used up) and by deducting an annual exclusion of $3,000 per donee of gifts of present interests.

Taxable Gifts[1] From	Taxable Gifts[1] To	Tax = +	%	Of Excess Over
....	$ 5,000	$ 0	2-1/4%	....
$ 5,000	10,000	112.50	5-1/4	$ 5,000
10,000	20,000	375	8-1/4	10,000
20,000	30,000	1,200	10-1/2	20,000
30,000	40,000	2,250	13-1/2	30,000
40,000	50,000	3,600	16-1/2	40,000
50,000	60,000	5,250	18-3/4	50,000
60,000	100,000	7,125	21	60,000
100,000	250,000	15,525	22-1/2	100,000
250,000	500,000	49,275	24	250,000
500,000	750,000	109,275	26-1/4	500,000
750,000	1,000,000	174,900	27-3/4	750,000
1,000,000	1,250,000	244,275	29-1/4	1,000,000
1,250,000	1,500,000	317,400	31-1/2	1,250,000
1,500,000	2,000,000	396,150	33-3/4	1,500,000
2,000,000	2,500,000	564,900	36-3/4	2,000,000
2,500,000	3,000,000	748,650	39-3/4	2,500,000
3,000,000	3,500,000	947,400	42	3,000,000
3,500,000	4,000,000	1,157,400	44-1/4	3,500,000
4,000,000	5,000,000	1,378,650	47-1/4	4,000,000
5,000,000	6,000,000	1,851,150	50-1/4	5,000,000
6,000,000	7,000,000	2,353,650	52-1/2	6,000,000
7,000,000	8,000,000	2,878,650	54-3/4	7,000,000
8,000,000	10,000,000	3,426,150	57	8,000,000
10,000,000	....	4,566,150	57-3/4	10,000,000

[1] After deducting exemption of $30,000, and after taking annual exclusions for individual donees ($5,000 through 1938; $4,000 after 1938 and through 1942; and $3,000 after 1942). The annual exclusions do not apply to gifts of future interests. Neither do they apply to gifts in trust made after 1938 but before 1943.

APPENDIX B

MINIMUM FEE SCHEDULE

The following is taken from the Minimum Fee Schedule as published in The Journal, Handbook Issue, Part One, Vol. 44, No. 3, January 20, 1973 (Oklahoma Bar Association):

MINIMUM FEE SCHEDULE

PROBATE OF WILL WHERE VALUE OF ESTATE EXCEEDS $5,000.00

The probate of a Will, in simplest form, and in uncontested proceedings, necessitates the preparation and filing of the following instruments:

O.S.A.

1. Petition for Probate of Will with copy of Will attached......58-23
2. *Order for Hearing Petition for Probate of Will...............58-25
3. Notice of Hearing Petition for Probate of Will...............58-25
4. Publish Notice on One Thursday. Set hearing between 10 and 30 days from date Petition filed. Hearing must be at least 10 days after publication. Posting is unnecessary.
5. Court Clerk, Deputy, or the Attorney must mail a copy of Notice to each heir...58-24,34
6. Publish in newspaper one Thursday only......................58-25
7. Affidavit of Mailing signed by Court Clerk, Deputy, or Attorney...58-26,34
8. Affidavit of Publisher
9. Deposition of Subscribing Witnesses or one witness if no contest, (but deposition unnecessary if will is self-proved) 58-30,84,55
10. *Order Admitting Will to Probate (FILE ORIGINAL OF WILL)......58-42
11. Certificate of Probate of Will (if self-proved).............84-55
12. Bond of Executor (if not waived by Will)...................58-171
13. Letters Testamentary and Oath of Executor...................58-110
14. Obtain at least 1 certified copy of Letters Testamentary
15. Petition for Temporary Allowance...........................58-314
16. *Order for Temporary Allowance.............................58-314
17. Notice to Creditors to Present Claims......................58-331
18. Publish in newspaper 2 consecutive Thursdays................58-331
19. Affidavit of Publisher
20. *Order Appointing Appraisers................................58-282
21. Oath of Appraisers..58-283
22. General Inventory and Appraisement with Certificate of Appraisers attached (due 3 months from appointment)...........58-281
23. File within 60 days Form 704 with Internal Revenue if estate valued at over $60,000
24. Bill of Appraisers or waiver of fee........................58-282
25. Application for Attorney's Fee & Executor's Fee.............58-527
26. *Order Allowing Attorney's Fee & Executor's Fee.............58-527
27. File Estate Tax Returns
28. Receipt from Oklahoma Tax Commission or Order Exempting from Tax and closing letter from Federal
29. Election of Widow to take under Will........................84-44
30. Final Account...58-612

31. Petition for Determination of Heirs, for Final Settlement and Distribution..58-553
32. *Order Fixing Time for Hearing Final Account and Petition....58-553 For Determination of Heirs, for Distribution and Discharge set hearing over 20 days after filing final petition
33. Notice of Hearing Final Account and Petition for Determination of Heirs, for Distribution and Discharge...........58-553
34. Mail a copy of above notice to each heir at least 10 days before hearing..58-553
35. Publish a copy of Notice in newspaper on 2 consecutive Thursdays. Set hearing at least 10 days after first publication.58-553
36. Affidavit of Mailing Notices signed by Clerk, Deputy or Attorney..58-34
37. Affidavit of Publisher
38. *Order Allowing Final Account, Determining Heirs, and Final Decree of Distribution....................................58-631
39. File certified copy of above order with county clerk if real estate included. Certificate as to other counties..........58-711
40. Report of Executor under Decree of Distribution.............58-691
41. Final Discharge..58-691

Time expires on Notice to Creditors on____________________.

*APPEARANCE IN DISTRICT COURT

Estate Tax Returns: One-half of 1% of value of estate fixed for estate tax purposes, but not less than......................... $50.00

Like charges should be made for preparation of gift tax returns if this service is performed separately and not in connection with Probate of Will.

A. Attorney's fees for estate situated within State of Oklahoma, Attorney's fees shall be computed on the value of the gross estate, including both real and personal property, as finally determined for Oklahoma estate tax purposes.

B. Attorney's fees for estate situated in both the State of Oklahome and in one or more foreign states. The attorney may, at his option, compute his fee using one of the following methods:

(1) Compute his fee as in A above, in which case the estate shall pay the attorney's fee of local counsel in the foreign state.

(2) Compute his fee on the value of the gross estate in all states, including both real and personal property, as finally determined for federal estate tax purposes, in which case the attorney shall pay the attorney's fee of local counsel in the foreign state.

The attorney in either case shall be entitled to attorney's fees for extraordinary services performed by him in connection with the foreign probate.

In arriving at the value of the gross estate for either A or B there shall be included income to the estate during probate, proceeds from pension funds, and similar benefits. The value of the gross estate shall not be reduced by liens or other debts or claims against the estate; provided, however, that if the decedent had outstanding indebtedness secured by real estate mortgage then the value of the gross estate for computation of the attorney's fee shall be reduced by 50% of the mortgage indebtedness. If reduction is made because of a mortgage, the fee shall not be reduced to less than 50% of the minimum fee computed upon the value of gross estate without indebtedness.

The minimum fee computed upon the gross estate shall not be less than:

5% on the first $10,000
4% on the next $90,000
3% on the next $400,000
2½% on the balance

Insurance proceeds payable to a named beneficiary other than the estate of the decedent, an executor or administrator, shall be excluded in computing the fee unless services are involved in connection therewith, in which event the beneficiary shall be charged on an hourly rate, or by contract.

Additional charges shall be made for contests, and other matters constituting extraordinary services with the fees in this regard to be set either by agreement with the Executor or by the District Judge.

In addition to the above, there shall be included in computing the attorney's fee for sales proceedings, the following:

a. Oil and Gas Leases (advertisement in 1 County)..........$150.00
b. Oil and Gas Leases (advertisement in more than 1 County.$200.00
c. Interest in Real Estate (advertisement in 1 County).....$150.00
Plus 1% of Sale Price
d. Interest in Real Estate (advertisement in more than 1 County)...$200.00
Plus 1% of Sale Price
e. Personal Property......................................$ 50.00
Plus 1% of Sale Price

Real and/or personal property standing in the name of the decedent as a joint tenant or life tenant shall be subject to the following fees:

1-1/2% on the first $10,000
1% on the next $90,000
3/4% on the next $400,000
1/2% on the balance

In no event shall the attorney's fee for the Probate of a Will in an estate exceeding $5,000.00 in value be less than $450.00.

ADMINISTRATION OF ESTATE WHERE VALUE OF ESTATE EXCEEDS $5,000.00

The administration of an estate, in simplest form, and in uncontested proceedings, necessitates the preparation and filing of the following instruments:

O.S.A.

1. Petition for Letters of Administration......................58-127
2. *Order Fixing Time for Hearing Petition for Letters of Administration..58-128
3. Notice of Application for Appointment of Administrator or Waiver of Notice..58-128
4. Deliver copy of above notice to newspaper for publication on one Thursday

5. Court Clerk, Deputy, or Attorney shall mail copy of the above notice to each heir................................58-128,34
6. Affidavit of Mailing as to above notice signed by Court Clerk, Deputy, or Attorney...............................58-128,34
7. Affidavit of Publisher as to above notice
8. *Order Appointing Administrator...............................58-130
9. Bond of Administrator approved by Court......................58-171
10. Letters of Administration and Oath...........................58-161
11. Appointment of Agent for Non-residents.......................58-162
12. Petition for Temporary Allowance.............................58-314
13. *Order for Temporary Allowance...............................58-314
14. Notice to Creditors..58-331
15. Deliver copy of Notice to Creditors to newspaper for publication on 2 consecutive Thursdays
16. Affidavit of Publisher as to above Notice.
17. *Order Appointing Appraisers.................................58-282
18. Oath of Appraisers...58-283
19. General Inventory and Appraisement with Certificate of Appraisers attached (due 3 months from appointment)............58-281
    File within 60 days Form 704 with Internal Revenue if Estate valued at over $60,000
20. Bill of Appraisers or Waiver of Fee
21. Application for Attorney's Fee and Administrator's Fee
22. *Order Allowing Attorney's Fee and Administrator's Fee
23. Prepare and mail Estate Tax Returns
24. Final Account of Administrator and Petition for Determination of Heirs, for Final Settlement, Distribution and Discharge...58-553
25. *Order Fixing Time for Hearing Final Account and Petition for Determination of Heirs, for Distribution and Discharge.......58-553
26. Notice of Hearing Final Account and Petition for Determination of Heirs, for Distribution and Discharge....................58-553
27. Deliver copy of above notice to newspaper for publication 2 successive Thursdays.
28. Mail copy of above notice to each heir over 10 days before hearing.
29. Affidavit of Mailing as to above notice signed by Clerk, Deputy or Attorney..58-34
30. Affidavit of Publisher as to above notice
31. Receipt from Oklahoma Tax Commission or Order Exempting Estate from Tax and closing letter from Federal
32. *Order Allowing Final Account, Determining Heirs, and Final Decree of Distribution and Discharge
33. Mail certified copy of Final Decree to County Clerk if real estate included. Certificate as to other counties...........58-711
    Time expires on Notice to Creditors on______________________

*APPEARANCE IN DISTRICT COURT

Estate Tax Returns: One-half of 1% of value of estate fixed for estate tax purposes, but not less than.......................... $50.00

Like charges should be made for preparation of gift tax returns if this service is performed separately and not in connection with Administration of the Estate.

A. Attorney's fees for estate situated within State of Oklahoma. Attorney's fees shall be computed on the value of the gross estate, including both real and personal property, as finally determined for Oklahoma estate tax purposes.

B. Attorney's fees for estate situated in both the State of Oklahoma and in one or more foreign states. The attorney may, at his option, compute his fee using one of the following methods:

(1) Compute his fee as in A above, in which case the estate shall pay the attorney's fee of local counsel in the foreign state.

(2) Compute his fee on the value of the gross estate in all states, including both real and personal property, as finally determined for federal estate tax purposes, in which case the attorney shall pay the attorney's fee of local counsel in the foreign state.

The attorney in either case shall be entitled to attorney's fees for extraordinary services performed by him in connection with the foreign probate.

In arriving at the value of the gross estate for either A or B there shall be included income to the estate during probate, proceeds from pension funds, and similar benefits. The value of the gross estate shall not be reduced by liens or other debts or claims against the estate; provided, however, that if the decedent had outstanding indebtedness secured by real estate mortgage then the value of the gross estate for computation of the attorney's fee shall be reduced by 50% of the mortgage indebtedness. If reduction is made because of a mortgage, the fee shall not be reduced to less than 50 per cent of the minimum fee computed upon the value of the gross estate without indebtedness.

The minimum fee computed upon the gross estate shall not be less than:

5% on the first $10,000
4% on the next $90,000
3% on the next $400,000
2½% on the balance

Insurance proceeds payable to a named beneficiary other than the estate of the decedent, an executor or administrator, shall be excluded in computing the fee unless services are involved in connection therewith, in which event the beneficiary shall be charged on an hourly rate, or by contract.

Additional charges shall be made for contests and other matters constituting extraordinary services with the fees in this regard to be set either by agreement with the Administrator or by the District Judge.

In addition to the above, there shall be included in computing the attorney's fee for sales proceedings, the following:

a. Oil and Gas Leases (advertisement in 1 County).........$150.00
b. Oil and Gas Leases (advertisement in more than 1 County $200.00
c. Interest in Real Estate (advertisement in 1 County)....$150.00 Plus 1% of Sale Price

d. Interest in Real Estate (advertisement in more than 1 County)..$200.00
Plus 1% of Sale Price

e. Personal Property......................................$ 50.00
Plus 1% of Sale Price

Real and/or personal property standing in the name of the decedent as a joint tenant or life tenant shall be subject to the following fees:

1½% on the first $10,000
1% on the next $90,000
3/4% on the next $400,000
1/2% on the balance

In no event shall the attorney's fee for the administration of an estate exceeding $5,000.00 in value be less than $450.00.

DETERMINATION OF DEATH OF JOINT TENANT OR LIFE TENANT

The Judicial Determination of Death of a Joint or Life Tenant, in simplest form, and in uncontested proceedings, necessitates the preparation and filing of the following instruments:

1. Petition to Judicially Determine Death and To Terminate Tenancy of Deceased
2. Order for Hearing Petition to Determine Death and Terminate Tenancy
3. Notice of Hearing Petition to Determine Death and Terminate Tenancy
4. Affidavit of Mailing to Heirs
5. Affidavit of Publication
6. Preparation of Tax Return or Returns
7. Order of Oklahoma Tax Commission
8. Decree Determining Death and Terminating Tenancy or Tenancies
   A. Attorney's fees for estate situated within State of Oklahoma. Attorney's fees shall be computed on the value of the gross estate, including both real and personal property, as finally determined for Oklahoma estate tax purposes.
   B. Attorney's fees for estate situated in both the State of Oklahoma and in one or more foreign states. The attorney may, at his option, compute his fee using one of the following methods:
      (1) Compute his fee as in A above, in which case the survivor shall pay the attorney's fee of local counsel in the foreign state.
      (2) Compute his fee on the value of the gross estate in all states, including both real and personal property, as finally determined for federal estate tax purposes, in which case the attorney shall pay the attorney's fee of local counsel in the foreign state.

   The attorney in either case shall be entitled to attorney's fees for extraordinary services performed by him.

The minimum fee shall not be less than:

1-1/2% on the first $10,000	- 2 Percent
1% on the next $90,000	- 1-1/2 Percent
3/4% on the next $400,000	- 1 Percent
1/2% on the balance	- 3/4 Percent

Services rendered in connection with the tax return or returns shall be charged in addition to the above. In no event should attorney's fee for the Determination of Death of Joint Tenant or Life Tenant be less than $175.00, plus preparation of the tax returns.

VITA

JoAnn Sander DeVries

Candidate for the Degree of

Doctor of Philosophy

Thesis: AN ANALYSIS OF ESTATE ADMINISTRATION AND PLANNED REDUCTION IN FEDERAL ESTATE TAXES AND COSTS FOR ESTATES VALUED AT LESS THAN $120,000

Major Field: Business Administration

Biographical:

Personal Data: Born in Humphrey, Nebraska, December 30, 1935, the daughter of Mr. and Mrs. Ernst E. Sander. Married in June, 1958, to Richard N. DeVries, two children, Sandra, 14, and Richard, 9.

Education: Graduated from Creston High School, Creston, Nebraska, in May, 1952; received Bachelor of Science in Business Administration with high distinction from the University of Nebraska in 1958; received Master of Science in Accounting from Oklahoma State University in 1971; completed requirements for the Doctor of Philosophy at Oklahoma State University in July, 1975.

Professional Experience: Supervisor, Tax Department, Peat, Marwick, Mitchell & Co., Omaha, Nebraska, 1958-66; Lincoln, Nebraska, 1967-69; graduate assistant, Department of Accounting, Oklahoma State University, 1969-71; instructor, Department of Accounting, Oklahoma State University, 1971-74; associate professor, Department of Business, Langston University, 1974-Present. Certified Public Accountant, Nebraska, 1960; Oklahoma, 1971.

Memberships: Alpha Lambda Delta, freshman scholastic honorary; Beta Gamma Sigma, business scholastic honorary; Phi Kappa Phi, scholastic honorary; American Institute of Certified Public Accountants; American Accounting Association.