Taxation: Widow's Allowance and the Internal Revenue Code

Dale D. Miller

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COMMENTS
WIDOW’S ALLOWANCES AND THE INTERNAL REVENUE CODE

THE WIDOW’S SUPPORT ALLOWANCE

Every state has passed some type of legislation designed to protect the surviving family from hardship during the period of administration of the husband’s estate. Most state legislation authorizing widow’s allowances provides for either a fixed sum to be paid to the widow on her husband’s death or for a reasonable sum fixed by the probate court after considering the circumstances of the decedent’s estate and the family’s standard of living. To obtain the allowance it is important that proper application be made to the probate court pursuant to the legislative provisions of each state.

The object and purpose of a widow’s support allowance is to substitute the estate of the husband for the deceased husband during the progress of settlement of the estate. It is intended to provide for at least the daily necessities of the surviving family during the period of re-adjustment following the death of the breadwinner. The allowance to meet the needs of the family is preferred to most other claims and is granted even if the estate of the deceased husband is insolvent. In the case of a solvent estate the amount of the allowance is usually a sum that would maintain the family in approximately the same degree of comfort maintained by the husband prior to his death. The Wisconsin probate courts will also consider the size of the estate, other resources available and such other factors as they consider relevant.

Once the amount of a widow’s allowance is determined, the court must decide whether the allowance is to be charged against the gross estate as an expense of administration, or considered as an advance of the widow’s share of the estate? An Ohio case held a widow’s allowance chargeable against the gross estate. The court said the widow’s allowance is a debt and a preferred claim against the deceased husband’s estate, and therefore deductible before the respective shares of the estate are determined. In Wisconsin, in the Estate of Seliger, the court held the amount of a widow’s allowance deductible in arriving at the net estate to be distributed, but a provision in the will compelled the court

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1 77 HARV. L. REV. 533 (1964).
2 KAN. GEN. STAT. ANN. § 59-403 (1949).
3 WIS. STAT. § 861.31 (1969).
4 Estate of Sullivan, 200 Wis. 590, 229 N.W. 65 (1930).
5 31 AM. JUR. Executors and Administrators § 324.
6 Estate of Mayer, 29 WIs. 2d 497, 139 N.W.2d 111 (1965).
7 WIS. STAT. § 861.31 (1969).
8 129 Ohio 418, 195 N.E. 845 (1935).
9 Ibid.
10 27 WIs. 2d 323, 332, 134 N.W.2d 447, 452 (1965).
to include the amount of the allowance in the widow's one-third be-
quest. But for the expressed intent of the testator the allowance would
have been charged against the gross estate.12

The Seliger case illustrates the state of the law in Wisconsin prior to
the effective date of section 861.31 of the Wisconsin Probate Code.13
Under section 861.31, the probate court may direct that an allowance for
support "be charged as an advance or otherwise."14 What the legisla-
ture means by the term "advance" will be discussed below. What the
legislature intended by the term "otherwise" is less than clear. If by
the words "or otherwise" the legislature intended to allow the probate
courts to charge an allowance against the gross estate, it would have
been helpful if such an intent had been expressed. The failure of the
legislature to expressly define "or otherwise" leads to the conclusion
that, in addition to charging the allowance as an advance or against the
gross estate, a much broader range of possibilities exist. Future develop-
ments in this area may be interesting.

Charging the "spouse allowance"15 as an advance against the share
the surviving spouse receives was not authorized in the old Wisconsin
Probate Code. In 1969 the Wisconsin legislature passed the current
Probate Code and authorized such charge on the premise that charging
the allowance as an advance would prevent an unfair distribution in
substantial estates.16 For example, if the allowance was a large amount
per month and the estate remained open for a number of years the
distributive shares of legatees other than the surviving spouse could be
substantially reduced under prior Wisconsin laws which provided for
deducting the amount of the allowance in arriving at the net estate to be
distributed.17 By charging the allowance as an advance against the share
to which the spouse is entitled, the probate court, to some extent at
least, can protect the shares of other distributees from being reduced
unfairly.

Some additional questions that arise under section 861.31(4) of the
Wisconsin Statutes concern the discretionary power of the court to

11 In the Seliger case, the testator caused the allowance to operate as an advance
because of the following provision in his will:

3(b) In computing this one third devise (to my wife) my executor
shall take into account and deduct from this devise the clear market
value at my death, of any property, either real or personal, passing to
my wife Ruth Seliger, by right of joint tenancy, survivorship, operation
of law or any other manner other than by the terms of this will.

The majority held the $3,750 widow's allowance received by the widow was
property received "other than by the terms of the will" and therefore in-
cluded in the computation of the one third share received by the widow.

15 Wis. Stat. § 861.31 (1969) extends to the widower as well as the widow the
right to receive an allowance for support, hence "spouse allowance."
16 Official Comment, Wis. Laws 1969, Ch. 339.
17 Estate of Seliger, 27 Wis. 2d 323, 332, 134 N.W.2d 447, 452 (1965).
WIDOW'S ALLOWANCE

charge a support allowance as an “advance or otherwise” when the testator designates in his will the manner in which the allowance is to be charged. Is the intent of the testator as expressed in his will controlling? If a will contains a clause directing that the allowance be charged as an advance, is the court precluded from directing otherwise? And if a will contains a clause directing that the allowance not be charged as an advance, is the court precluded from directing the allowance be charged as an advance?

In the Seliger case discussed above, a provision in the will compelled the court to compute the $3,750 widow's allowance as part of her one-third bequest. The clause read as follows:

3(b) In computing this one-third devise (to my wife), my Executors shall take into account and deduct from this devise the clear market value at my death, of any property, either real or personal, passing to my wife, Ruth Seliger, by right of joint tenancy, survivorship, operation of law or any other manner other than by the terms of this will.18

Here, the court followed the expressed intent of the testator in determining the manner in which the widow's allowance was charged. Even though the allowance was deductible in arriving at the net estate to be distributed, the court deducted from the wife's share the amount of the widow's allowance which passed to the wife other than by the terms of the will.

Under the new Probate Code, section 861.31(4) empowers the court to charge the allowance as an advance or otherwise. This grant of power seems to provide the court with discretion even where the testator expresses his wishes in the will. The subsection states that “the court may direct that the allowance be charged . . . , either as an advance or otherwise.” The use of the term “may” in this subsection implies a broad grant of power to the court whenever an unfair distribution appears to be the likely result of the widow's allowance. However, the court should carefully consider any expression of intent by the testator to determine whether charging an allowance other than as an advance would result in an unfair distribution to his widow.

Ultimately, whether the allowance is charged as an advance or otherwise is important in determining whether the amount of the allowance qualifies for purposes of obtaining the maximum marital deduction. Clearly, if the allowance is charged as an advance against property passing to the surviving spouse which otherwise qualifies for the marital deduction, then the allowance paid qualifies for the marital deduction, but only because the property from which the allowance was paid qualified for the marital deduction. If the allowance is not charged as an advance against property which already qualifies, but is paid to the

18 Ibid.
widow in addition to her share in the estate of the deceased spouse, then
does the allowance qualify as marital deduction property in cases where
qualifying the allowance is important in obtaining the maximum marital
deduction of one-half the adjusted gross estate?

WIDOW'S SUPPORT ALLOWANCE AND THE MARITAL DEDUCTION

The general goal of the marital deduction authorized by section 2056
of the Internal Revenue Code of 1954 was to achieve uniformity of
federal estate tax impact between those states with community property
laws and those without them. Married couples in community property
states were required to report only one-half of the community property
in the estate of the first marital partner to die. In an effort to counteract
the estate tax benefit received by married couples in community
property states, Congress authorized the "marital deduction" which
permits a deduction of property interests passing from the decedent to
his surviving spouse. Up to 50 percent of the adjusted gross estate of
the spouse first to die may be removed from taxation by use of the
marital deduction. But Congress intended that those assets which were
removed from taxation would be exposed to estate tax upon the death
of the surviving spouse. Consequently, the method chosen by Congress
to achieve a degree of uniformity was hedged by the limitations and
qualifications of section 2056(b) of the Code.

Section 2056(b) of the Code represents the codification of the "ter-
minal interest" rule. The rule has in effect three requirements to
invoke its operation. First, there must be an interest in property, such as
a life estate, which will terminate or fail upon the lapse of time or some
other event. Secondly, an interest in property must pass from the dece-
dent to a person other than the surviving spouse. Finally, by reason of
its passing the other person or his heirs or assigns must possess or enjoy
any part of the property after the termination or the failure of the
spouse's interest. Broadly, the terminable interest rule excepts from
the marital deduction any asset of the estate transferred to the spouse
which may by any event ultimately pass from the decedent to any other
person for less than full consideration in money or money's worth.
Therefore, unless the interest in question meets all three of the above
conditions, it is not disqualified for deduction by reason of the termin-
able interest rule.

(E.D. La. 1967).
21 Ibid.
22 In Re Reilly's Estate, 239 F.2d 799 (3rd Cir. 1957).
Since the repeal of section 812(b)(5) of the Internal Revenue Code of 1939,\textsuperscript{26} qualifying the widow's allowance as part of the marital deduction property has been attempted by estate planners in order to minimize the estate tax liability of the marital partner first to die. Especially important in determining whether a widow's allowance qualifies for the marital deduction are the particular state legislative provisions which provide for the allowance. Cases hold that the nature and character of a widow's allowance for the purpose of determining whether the widow has a terminable interest in the property transferred, must be determined in accordance with local law.\textsuperscript{27}

In the case of \textit{Jackson v. United States}\textsuperscript{28} the question of whether a widow's allowance granted under California law is a terminable or nonterminable interest was decided by the Supreme Court of the United States. The issue was whether the interest in property passing to the widow as a widow's allowance would "terminate or fail upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur."\textsuperscript{29} The state court of California allowed the widow the sum of $3,000 per month from the corpus of the estate for her support pursuant to the Probate Code of California.\textsuperscript{30} A total of $72,000 was paid to the widow as a support allowance. On the federal estate tax return filed on behalf of the estate, the full $72,000 was claimed as a marital deduction. The deduction was disallowed and the Supreme Court of the United States affirmed the disallowance with the following statement:

... In that state (California) the right to a widow's allowance is not a vested right and nothing accrues before the order granting it. The right to an allowance is lost when the one for whom it is asked has lost the status upon which the right depends. If a widow dies or remarries prior to securing an order for a widow's allowance, the right does not survive such death or remarriage. The amount of the widow's allowance which has accrued and is unpaid at the death of the widow is payable to her estate but the right to future payments abates upon her death. The remarriage of a widow subsequent to an order for an allowance likewise abates her right to future payments.\textsuperscript{31}

\textsuperscript{26}Section 812(b)(5) allowed, as an expense of administration, an estate tax deduction for amounts "reasonably required and actually expended for support during the settlement of the estate of those dependent upon the decedent." The Revenue Act of 1950 repealed section 812(b)(5); Congress found that the section resulted in discrimination in favor of states having liberal family allowances and also tended to delay the settlement of estates. See 26 U.S.C. § 812(b)(5) (1946 ed.); S. Rep. No. 2375, 81st Cong., 2d Sess., p. 57.

\textsuperscript{27}Jackson v. U.S., 376 U.S. 503 (1964); Darby v. Wiseman, 323 F.2d 792 (10th Cir. 1963).

\textsuperscript{28}376 U.S. 503 (1964).

\textsuperscript{29}Id. at 506.


The Supreme Court concluded that the widow did not have an indefeasible interest in property at the moment of her husband's death since either her death or remarriage would defeat it. If the order for support allowance had been entered on the day of her husband's death, her death or remarriage at any time thereafter would terminate that portion of the interest allocable to the remainder of the two-year period during which the estate was open. Therefore, as of the date of the husband's death the allowance was subject to "failure or termination upon the occurrence of an event or contingency."32

In effect, the Supreme Court in Jackson upheld a prior Revenue Ruling33 which stated that an interest in an estate which passes to a surviving spouse in accordance with state law in the form of an allowance for support during the period of settlement of the deceased spouse's estate must constitute a vested right of property such as will survive, in the event of her death, as of any moment or time following the decedent's death, in order to qualify as part of the marital deduction.

Prior to the Jackson decision, some courts had concluded that the nature of the interest in a support allowance should be judged as of the date the state court ordered the award to the widow.34 Under this conclusion, the support allowance was deemed to vest unconditionally after receipt and unless consumed or given away during the life of the widow, the entire amount would be taxed to the widow's estate. Hence, amounts actually received by the widow qualified for the marital deduction. But in Jackson where the award was made to the widow 14 months after the decedent's death, payable at a rate of $3,000 a month beginning on the date of the decedent's death, the court held that the accrued payments, as well as the future payments, failed to qualify for the marital deduction, since at the moment of the decedent's death, under California law, either the widow's death or remarriage would defeat it.35 The court stated that the date of the decedent's death is the correct point of time for deciding the nature of the surviving spouse's interest in the support allowance.36 It was pointed out by the court that there is no provision in the Internal Revenue Code for deducting all terminable interests which become nonterminable at a later date and therefore taxable in the estate of the surviving spouse if not consumed or transferred. The determinative factor, the court said, "is not taxability to the surviving spouse but terminability as defined in the Code."37 The court refused to accept the argument in Jackson that

32 Id. at 507.
34 U.S. v. First National Bank Trust Co. of Augusta, 297 F.2d 312 (5th Cir. 1961); Estate of Gale, 35 T.C. 215 (1960); Estate of Rudnick, 36 T.C. 1021 (1961).
36 Id. at 508, 509.
37 Id. at 510.
the "terminable interest rule" should not apply where it is clear the
entire widow's allowance received will be taxed to the widow, unless
consumed or given away during her life.\textsuperscript{38} The reasoning of the court
appears to be based on the Senate Committee's admonition that termin-
ability of an interest for purposes of a marital deduction be viewed at
the death of the decedent.\textsuperscript{39}

A 1964 district court case, \textit{Estate of Weiner},\textsuperscript{40} decided whether a
widow's allowance granted under section 313.15 of the Wisconsin
Statutes is a terminable interest in property for estate tax purposes.
Until April 1, 1971, the applicable portion of the Wisconsin Statutes
read as follows:

(2) Allowance to family. The widow and minor children, or
either, constituting the family of the deceased testator or intesta-
tate, shall have such reasonable allowance out of the personal
estate or the real estate, or both, of the deceased as the county
court shall judge necessary for their maintenance until an award
shall be made or refused \ldots, or their shares assigned to them.\textsuperscript{41}

The court held that under Wisconsin law a widow was entitled to an
allowance only if she had need for it. Because her need would terminate
in the event of her death or remarriage, a widow's allowance in Wiscon-
sin is a terminable interest and does not qualify for the marital deduc-
tion.\textsuperscript{42}

Under the provisions of the current Probate Code, the applicable
portion of section 861.31 reads as follows:

861.31 Allowance to Family During Administration. (1) The
court may, without notice or in such notice as the court directs,
order payment by the personal representative or special admin-
istrator of an allowance as it determines necessary or appropriate
for the support of the surviving spouse and any minor children
during the administration of the estate.\textsuperscript{43}

This section is substantially the same as section 313.15(2).\textsuperscript{44} The allow-
ance is granted if the court determines it is necessary and appropriate

\textsuperscript{38} In Georgia, prior to the Supreme Court's decision in \textit{Jackson}, sums set aside
for a widow's one-year support by the probate court upon application of a
decedent's widow were held to qualify for the marital deduction, because the
sums were indefeasibly vested when the award became final. \textit{Will of Setze}, 297
F.2d 312 (5th cir. 1961); \textit{Estate of Landers, Sr.}, 38 TC 828 (1962). After
\textit{Jackson} the widow's right to an allowance was held terminable on the date of


\textsuperscript{40} 235 F. Supp. 919 (E.D. Wis. 1964); \textit{see also Estate of Busby}, 240 F. Supp.
(E.D. Wis. 1965).

\textsuperscript{41} \textit{Wis. Stat.} § 313.15(2) (1967).


\textsuperscript{43} \textit{Wis. Stat.} § 861.31(1) (1969).

\textsuperscript{44} The new section does, however, extend to the widower as well as the widow
the right to obtain an allowance. The section expressly recognizes that
separate allowances for the spouse and for the minor children may be appro-
priate in some cases. Subsection (3) limits the initial order for the allow-
ance to one year but permits extensions; the court also retains the power to
modify the allowance at any time.
for the support of the surviving spouse. The 1969 revision did not alter the fact that a spouse will receive an allowance only if need is shown. Consequently, the holding in the Weiner case was not affected by the revision of the Code. The spouse’s interest in the allowance remains defeasible in the event of death or remarriage of the surviving spouse, because the need would terminate upon the occurrence of either event.

The right to the allowance in Wisconsin continues as one that would terminate or fail “on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur.” If Wisconsin had granted the spouse an indefeasibly vested right to the allowance for a certain period regardless of need exercisable after remarriage or by a legal representative in the event of death, then the amount of the allowance for that period would qualify as marital deduction property.

The Wisconsin legislature did provide, however, that the allowance may be charged as an advance or otherwise. For marital deduction purposes the effect of charging an allowance as an advance on property that otherwise qualifies for the marital deduction is to qualify the amount of the allowance as marital deduction property. This result is really unimportant because the amount of the allowance that is charged as an advance does nothing to increase the marital deduction if the property charged qualified in the first instance. If the property charged with the allowance did not qualify initially, then the amount of the allowance does not qualify for the marital deduction for the same reason that prevented the property charged from qualifying.

The problem of qualifying the widow’s allowance as part of the marital deduction should never arise where sufficient nonterminable property passing to the spouse is available to obtain the maximum marital deduction. The problem usually arises in cases where property passing from the decedent to the surviving spouse is less than one half of the adjusted gross estate of the decedent. In such cases, qualifying the widow’s allowance as nonterminable property increases the marital deduction. But as we have seen, qualifying the widow’s allowance may not be possible.

One way to qualify at least part of an allowance in states where the allowance terminates upon death or remarriage is illustrated by

46 Under Illinois law, an award to a surviving spouse does not terminate upon his or her death or remarriage. The interest is vested and qualifies for the marital deduction. Will of Molner v. U.S., 175 F. Supp. 271 (N.D. Ill. 1959).
Estate of Cunha. A total of $10,500 was paid to the surviving widow as a family allowance. The executors claimed a deduction of the full $10,500 as a marital deduction. Forty percent of the amount deducted was allowed because the widow or her estate would receive that percentage of the allowance in any event as beneficiary under the husband's will of forty percent of the residue of his estate.

In the Cunha case, although the widows right to the allowance was held to terminate upon her death or remarriage, forty percent of the allowance qualified. The forty percent qualified because the residual property qualified. If the allowance had not been paid, the residue of the estate would have been greater by $10,500; forty percent of that amount would have gone to the widow. In no event would the forty percent have passed from the decedent to a person other than the surviving spouse and no other person or heirs or assigns could ever possess or enjoy any part of the forty percent unless the surviving spouse so directed. Hence, the spouse had an indefeasibly vested interest in forty percent of the allowance.

The Cunha case is distinguishable from the Jackson case and the Weiner case. Neither Jackson nor Weiner considered the second and third requirements which are necessary to invoke the terminable interest rule. The fact that an interest in property, such as a widow's allowance, will terminate or fail upon the lapse of time or some other event should be irrelevant if property charged with the widow's allowance passes from the decedent to no person other than the surviving spouse. In such cases the widow has an indefeasibly vested interested in the property she receives as an allowance, provided that upon her death or remarriage at any time after the death of the husband the property charged—usually residuary—passes directly to the wife or her estate. Actually, what occurred in the Cunha case is analogous to that which occurs when a court directs that an allowance be charged as an advance of property that otherwise qualifies for the marital deduction. In neither case, however, will the widow's allowance actually increase the size of the marital deduction. It is merely an advance on property passing to the surviving spouse which had qualified at the moment of the other spouse's demise.

INCOME TAX TREATMENT OF WIDOW'S ALLOWANCE

Deduction from the Estate's Income

In 1969 the Tax Court of the United States handed down the decision in the Estate of L. R. McCoy. The issue was whether a widow's allowance paid out of the principal of the estate pursuant to a probate decree was deductible under section 661(a) of the Internal

49 50 TC 562 (1969).
Revenue Code of 1954, in computing the taxable income of the estate. Upon application, the probate court ordered that there be set apart out of the personal estate of the deceased and assigned to the widow the sum of $1,000 each month from and after the decedent’s death for maintenance of the widow during the settlement of the estate.

During the taxable period May 9, 1963 to December 31, 1963, the estate paid the widow $7,000 at the rate of $1,000 per month. During the taxable year 1964 the widow received $12,000 from the same source and in the same manner. During 1963 and 1964 the estate made no other distributions to the widow. The widow’s allowances of $7,000 and $12,000 were made out of and charged to the principal of the estate. The widow, as executor, filed a fiduciary income tax return for the estate for the year 1964 and deducted the respective amounts of the widow’s allowance on each return. The Tax Court held that the payments made to the widow whether out of income or corpus were deductible by the estate under section 661(a)(2).

The widow argued that the widow’s allowances were a proper deduction from the estate’s income since they clearly qualify as “any other amounts properly paid ... or required to be distributed” under section 661(a) and that the amounts distributed did not exceed the “distributable net income.” The Commissioner took issue with this argument and referred to Treasury Regulation, section 1.661(a)-2(e), which specifically provides that a widow’s allowance is deductible under this section only where it is payable out of and chargeable to the income of the estate.

The widow thereupon attacked the validity of this regulation. She argued that the regulation necessitates tracing of distributions to their source (income or principal), contrary to the Congressional intent of subchapter J of the Internal Revenue Code of 1954.

The Tax Court replied:

The facts here clearly fall within regulation 1.661(a)-2(e), and petitioner’s only possible chance to win is an affrontal assault on the regulations. Accordingly, petitioner’s argument is that the regulation is not consonant with the purpose of sections 661

50 Id. at 566.
51 Id. at 565.
52 Treas. Reg. § 1.661(a)-2 (1968). Deduction for Distributions to Beneficiaries. (e) the terms “income required to be distributed currently” and “any other amounts properly paid or credited or required to be distributed” do not include amounts required to be paid by a decedent’s estate pursuant to a court order or decree as an allowance or award under local law for support of the decedent’s widow or other dependent for a limited period during the administration of the estate, except to the extent such amounts are payable out of and chargeable to income under the order or decree or local law. The term “any other amounts properly paid or credited or required to be distributed” does not include the value of any interest in real estate owned by a decedent, title to which under local law passes directly from the decedent to his heirs or devisees.
WIDOW'S ALLOWANCE

through 663 and the plain wording of section 661(a)(2) and is invalid. We agree with the petitioner.

We think the regulation is inconsistent with the plain wording of section 661(a). Under the provisions of that section the estate may deduct "the sum of—(1) any amount of income . . . required to be distributed currently . . . and (2) any other amounts properly paid or required to be distributed."53

The Commissioner's position was that a widow's allowance is deductible by the estate under section 661(a) only if it is "payable out of and chargeable to income."54 The Tax Court found no warrant for such restriction either in the statutory language or legislative history. The Tax Court cited Treasury Regulation, Section 1.661(a)-2(c) which provides as follows:

The term "any other amounts properly paid or credited or required to be distributed" includes all amounts properly paid, credited or required to be distributed by an estate or trust during the taxable year other than income required to be distributed currently. Thus, the term includes the payment of an annuity to the extent it is not paid out of income for the taxable year, and a distribution of property in kind . . . . Where the income of an estate or a trust may be accumulated or distributed in the discretion of the fiduciary, or where the fiduciary has a power to distribute corpus to a beneficiary, any such discretionary distributions would qualify under section 661(a)(2). The term also includes an amount applied or distributed for the support of a dependent of a grantor or of a trustee or co-trustee under the circumstances described in section 677(a) or section 678(c) out of corpus or out of other than income for the taxable year. [Emphasis supplied by court.]

A case in the U.S. District Court for Central California is in accord with the McCoy case. Cumings Exrs. v. U.S.,55 held that a family allowance paid under court order to the husband of the decedent was a proper deduction from the estate's distributable net income available for distribution to a beneficiary under section 661 of the Internal Revenue Code. The total amount deducted did not exceed the estate's distributable net income for the year. Therefore, the estate was improperly assessed with additional taxes for the period ending October 31, 1960. The distributable net income of the estate of the decedent for the taxable year was $18,308.05. Thus the sum of $10,200 paid to the husband as a family allowance was a proper deduction from the estate's distributable net income.56

54 Id. at 566.
56 Id. at 1323.
Widow's Allowance Taxable Income to the Widow

In Estate of L. R. McCoy, the widow claimed that her allowance was not taxable income to her as income under section 662 because she did not take the payments as a "beneficiary", and section 662 applies only to payments received by a "beneficiary." The McCoy case did not decide whether a widow's allowance is taxable to a widow. However, the court cited United States v. James, where the Ninth Circuit held a widow taxable on her allowance where it was payable from the income of the estate.

With respect to whether or not a widow's allowance is taxable to the widow where it is payable from the income of the estate, there are two questions that must be answered: Did Congress attempt to tax the widow under the circumstances? If so, was what she received income under the Constitution? Section 61 of the Internal Revenue Code of 1954 defines gross income as "all income from whatever source derived, including (but not limited to) the following items: Sub-section (15) income from an interest in an estate or trust". Congress has specifically expressed in sub-section (15) an intent to tax the estate's income. The question is, has it expressed an intent to tax it to the widow rather than the estate, when a part of the estate's income was, by order of the court, transferred to her?

Congress has expressly enacted that "gross income does not include the value of property acquired by gift, bequest, devise, or inheritance". But section 102 does not exclude from "gross income" (1) the income from such property or, (2) where the gift, bequest, devise, or inheritance is of income from property, the amount of such income.

Section 102(6) further provides: "Where, under the terms of the gift, bequest, devise, or inheritance, the payment ... thereof is to be made, at intervals, then, to the extent that it is paid ... out of income from property, it shall be treated for purposes of paragraph (2) as a gift, bequest, devise, or inheritance of income from property."

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57 Supra at note 53.
58 As authority for the proposition that the widow does not take the widow's allowance as a beneficiary of the estate, see Buck v. McLaughlin, 48 F.2d 135 (9th Cir. 1931); Estate of Charles H. Franklin, 43 B.T.A. 612 (1944); Estate of Proctor G. Rensenhouse, 27 TC 107 (1956); Katherine Titus MacMurray, 16 TC 616 (1951).
59 333 F.2d 748 (9th Cir. 1964).
61 Int. Rev. Code of 1954, § 102(b) (1) (2).
62 The pertinent provisions of Subchapter J, Part I, of the Internal Revenue Code which deal with "estates, Trusts and Beneficiaries," are: Section 643(c) "For purposes of this part, the term 'beneficiary' includes heir, legatee, devisee."; Section 661(a) "Deduction.—In any taxable year there shall be allowed as a deduction in computing the taxable income of an estate ..." (1) any amount of income ... required to be distributed currently (including any amount required to be distributed which may be paid out of income or corpus to the extent such amount is paid out of income from such taxable year); and (2) any other amounts properly paid or credited or declared to be distributed for...
In United States v. James, the taxpayer’s contention was that Internal Revenue Code sections 643(c), 771(a), and 662(a) and (b) did not purport to tax, in the hands of the widow, that part of her allowance which was paid to her by court order out of the income of the estate. The widow urged that Treasury Regulation section 1.661(a)-2, to the extent that it may purport to tax the widow for income received from the estate, was invalid. The taxpayer contended that the widow was not “a beneficiary” within the meaning of either the statute or the regulations, noting that the statute merely says that the term “includes heir, legatee, devisee,” and that the widow was none of these. The court reasoned against these contentions, however, first, because there is the all-inclusive effect of section 61 as indicated by the U.S. Supreme Court in Commissioner v. Glenshaw Glass Company, where it was held that by the enactment of the predecessor of section 61, Congress intended “to exert in this field the full measure of its taxing power.” Thus when a person receives what would ordinarily be considered income, he is subject to tax unless Congress has said that he is not. Second, the Court reasoned that the widow’s position is much closer to that of a “beneficiary” of the estate than to that of a creditor. She gets the allowance only by reason of her husband’s death; she is entitled to it because of such taxable year; but such deduction shall not exceed the distributable net income of the estate or trust.”; I.R.C. § 662(a) “Inclusion—Subject to subsection (b), there shall be included in the gross income of the beneficiary to whom an amount specified in § 661(a) is paid ... (by an estate ... described in § 661), the sum of the following amounts: “(1) amounts required to be distributed currently.—... the amount of income for the taxable year required to be distributed currently ...” This “includes any amount required to be paid out of income or corpus to the extent that such amount is paid out of income for such taxable year.”; I.R.C. § 662(b) “Character of amounts.—The amount determined under subsection (a) shall have the same character in the hands of the beneficiary as in the hands of the estate ...”

The Treasury Regulations (1954 Code) contain the following applicable provisions: 23 C.F.R., § 1.102-1 “(D) Effect of sub-chapter J. Any amount required to be included in the gross income of the beneficiary under sections ... 662 ... shall be treated for the purposes of this section as a gift, bequest, devise or inheritance of income from property ...” 23 C.F.R. § 1.661(A)-2 provides: “(E) The terms ‘income required to be distributed currently’ and ‘any other amounts properly paid or credited or required to be distributed’ do not include amounts required to be paid by a decedent’s estate pursuant to a court order or decree as an allowance or award under local law for the support of the decedent’s widow or other dependent for a limited period during the administration of the estate, except to the extent such amounts are payable out of and chargeable to income under the order or decree or local law ...” Regulation § 1.661(a)-2(e) has been discussed above in Estate of L. R. McCoy, 50 T.C. 562 (1969). The case held § 1.661(a)-2(e) invalid to the extent that amounts payable as an allowance to the widow must be payable out of and chargeable to income only. The amount payable may be paid out of and chargeable to income or corpus of the estate as long as the estate has distributable net income equal to or greater than the court ordered allowance. The McCoy decision did not discuss whether the allowance is taxable to the recipient. Therefore, the change does not affect the question of whether or not the recipient of the allowance should be required to include the amounts received as gross income on her individual income tax return.

63 333 F.2d 748 (9th Cir. 1964).
64 348 U.S. 426 (1955).
of her status as widow, and she receives it from his estate. Third, there is the fact that section 102 does not expressly exclude from "gross income" the value of property acquired by the widow as a family allowance.\textsuperscript{65}

Taxing the allowance to the widow fits the general scheme of the Code, because the Code contemplates taxation of the estate's income to it, when retained by it and to a "beneficiary" when distributed to the "beneficiary," such payment being then deductible by the estate. One of the basic precepts of income tax law is that the income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.\textsuperscript{66} Generally, under an order of the Probate Court the widow is free to spend the money paid under the agreement as she sees fit. This is analogous to periodic payments of alimony received by the wife for the support and maintenance of herself and of minor children of the husband without specific designation of the portion for the support of the children. In such case the whole of such amounts is includable in the income of the wife because she has the power to dispose of the income as she so determines and "the power to dispose of income is the equivalent of ownership of it."\textsuperscript{67} The \textit{Commission v. Lester}\textsuperscript{68} case which included the entire payment of alimony in the wife's gross income where no amount was specified for the support of the children comports with the underlying philosophy of the code. The code must be given as great an internal symmetry and consistency as its words permit.

In \textit{Buck v. McLaughlin},\textsuperscript{69} the court held that money paid by an estate to a widow as her family allowance was not taxable to her as income. No differentiation was made between principal and income as to the source of the allowance. No other Court of Appeals has passed upon the question, nor has the Supreme Court. The decision was based upon alternative grounds. The first was that the widow's right to a family allowance under California law being statutory, and the allowance being payable out of income or corpus regardless of any other right she may have in the estate, it was analogous to alimony, which had then been held not to be taxable income by the Supreme Court under \textit{Gould v. Gould}.\textsuperscript{70} The second was that under the definition of "income" adopted by the Supreme Court in \textit{Eisner v. Macomber},\textsuperscript{71} the family allowance was not income within that term as used in the Sixteenth Amendment.

\textsuperscript{65} \textit{Id.} at 750.
\textsuperscript{69} 48 F.2d 135 (9th Cir. 1931).
\textsuperscript{70} 245 U.S. 151 (1917).
\textsuperscript{71} 252 U.S. 189 (1920).
The Sixteenth Amendment uses but does not purport to define the term “income” nor do the early income tax statutes attempt a comprehensive definition of the term. The *Eisner* definition is:

Income may be defined as the gain derived from capital, labor or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets...

At the time the *Buck* case was decided, the *Eisner* definition still had been thought to state good law. It had been frequently cited with approval by the Supreme Court in the decade following its formulation, though an analysis of results reached in the later cases might have suggested that it was most often honored in the breach. A few months after *Buck* the Supreme Court hinted broadly that the definition had outlived its usefulness. The case was *United States v. Kirby Lumber Company.* The question was whether a corporation which issued its own bonds at par, then repurchased at less than par on the open market, received income on the amount of the difference in price. *Eisner v. Macomber* was not cited. In holding the gain to be taxable income Mr. Justice Holmes for a unanimous court said:

> We see nothing to be gained by discussion of judicial definitions. The defendant in error has realized within the year an accession to income, if we take words in their plain popular meaning, as they should be taken here.

The *Eisner* definition of income was expressly distinguished and limited for the first time in *Helvering v. Bruun.* The taxpayer had leased certain property for a term of 99 years. The lease provided that the lessee should make certain improvements, which would revert to the lessor on termination of the lease. The lessee tore down an old building and built a new one. He then defaulted on the lease, and the property reverted to the taxpayer. The government sought to tax as income the net increase in fair market value of the new building over the old one. The taxpayer argued that since the building had value only as “bricks, iron and mortar,” severed from the land, it was merely an increase in the capital, and not income. Mr. Justice Roberts noted that the taxpayer relied upon certain expressions found in the decisions of this court dealing with the taxability of stock dividends. Mr. Justice Roberts distinguished them:

> These expressions, however, were used to clarify the distinction between an ordinary dividend and a stock dividend. They were meant to show that in the case of a stock dividend, the stockholder’s interest in the corporate assets after receipt of the dividend was the same as, and inseverable from that which he owned...

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72 Id. at 207.
73 284 U.S. 1 (1931).
74 Id. at 3.
75 309 U.S. 461 (1940).
before the dividend was declared. We think they are not controlling here.76

The Eisner definition was finally laid to rest in Commissioner v. Glenshaw Glass Company,77 which concerned the taxability as income of money recovered as punitive damages in legal actions. Appellees characterized the recovery of these funds as a "windfall." They argued that the income provisions of the Revenue Code could not be read so broadly as to include these sums in income because Eisner v. Macomber had defined income as the product of capital or labor and these were neither. Chief Justice Warren brushed the argument aside:

The Court was there endeavoring to determine whether the distribution of a corporate stock dividend constituted a realized gain to the shareholder or changed only the form not the essence of his capital investment. ... It was held that the taxpayer had received nothing out of the company's assets for his separate use and benefit. ... The distribution, therefore, was held not a taxable event. In that context—distinguishing gain from capital—the definition served a useful purpose. But it was not meant to provide a touchstone to all future gross income questions. ... Here we have instances of undeniable accessions to wealth clearly realized, and over which the taxpayers have complete dominion. ... 78

Under present day statutes many courts have determined that alimony is taxable to the recipient wife and that Gould v. Gould79 was merely declarative of the law under older statutes and did not have a constitutional basis. The analogy that was drawn in the Buck case between alimony and family allowance is still a useful one. Today section 61(8) expressly places a tax on alimony payments to the wife. Furthermore, Congress has the power to require that tax on income shall fall on the ultimate recipient rather than the one who earned it.80 Therefore, a widow's allowance ordered by a court to be paid to the widow out of the income of an estate is taxable to the widow who is the recipient of the allowance. However, if the estate paid the allowance out of principal, then it appears that the amount paid could constitute a bequest to the widow and would not be taxable to the widow, provided the estate paid taxes on all the income received by the estate and no deduction from the income of the estate was taken because of the distribution of a widow's allowance.

Under United States v. James,81 if the estate claims a deduction from income, then the widow's allowance will be taxed in the hands of

76 Id. at 468.
77 348 U.S. 426 (1955).
78 Id. at 430.
79 245 U.S. 151 (1917).
80 Fairbanks v. Commissioner, 191 F.2d 680 (9th Cir. 1951).
81 333 F.2d 748 (9th Cir. 1964).
the widow. And in view of the McCoy case, which allows a deduction from the taxable income of the estate whether the allowance is paid out of income or principal, a widow is likely to be taxed on her allowance, if it is paid out of principal in cases where the estate claims the allowance as a deduction from the estate's income. But this may give one managing an estate an opportunity to have certain income of the estate taxed at the lower of the two rates. In large estates where a widow has very little income, a tax savings could result by having the estate claim the deduction regardless of whether the payments were made from the income or principal of the estate. In cases where the income of the widow is high, a tax savings could result if the allowance were paid out of principal only, and not deducted from the income of the estate. In such case, the allowance may not be taxed to the widow, and the income of the estate which could have been used to pay the allowance will be taxed at the rate level that applies to the estate, instead of at the rate level applied to the income of the widow which is assumed to be higher.

These considerations could be useful in Wisconsin, because the new Probate Code (effective April 1, 1971) provides that 'the court may direct that the allowance be charged against income or principal,...' In theory at least, if the allowance is charged against the principal of the estate the widow receives a bequest from the estate which is not included in gross income under section 102 of the Code. However, if the estate claims the allowance as a deduction from its income even though the allowance was charged against principal the Internal Revenue Service will probably argue that the allowance was ultimately paid out of the income of the estate and therefore taxable to the recipient as a bequest of income. On the other hand, if the estate computes its taxable income without claiming the allowance as a deduction from the estate's income, then the allowance should not be taxable to the recipient because all the income earned by the estate is subject to taxation and no amount deducted from the estate's income would escape taxation. A word of caution however, since the theory discussed has not been specifically litigated we must await future developments before drawing a conclusion that the Internal Revenue Service will accept it.

DALE D. MILLER

82 50 TC 562 (1969).