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TAX CONSIDERATIONS IN MAKING GIFTS TO SONS-IN-LAWS

I. THE STATUTORY FRAMEWORK

The Wisconsin Inheritance Tax Statutes tax at the most favorable rate of two per cent any transfer of property after death up to twenty-five thousand dollars.

... where the person or persons entitled to any beneficial interest in such property shall be the husband, wife, lineal issue, lineal ancestor, brother or sister, or descendant of brother or or sister of the decedent, a wife or widow of a son, or husband of a daughter of the decedent. ...¹

Later sections tax the property at six per cent if given to uncles and aunts and their descendants and at eight per cent where the gift is to a person more distantly related or to a stranger to the blood.² The progressive gradations in rates applicable to amounts over twenty-five thousand dollars are multiples of the primary rates referred to here.³ After the tax has been computed, it must be augmented by thirty per cent emergency tax.⁴

Exemptions are provided to the extent of fifteen thousand dollars to the widow, five thousand dollars to the husband of the decedent, five hundred dollars to a brother or sister or the descendant of a brother or sister of the decedent, and two thousand dollars to each of the other persons mentioned in the above quoted statute. Any other person receives a mere hundred dollar exemption.⁵

Included among the taxable death transfers are those made under a power of appointment, but excepted from the definition of "Power of appointment" is a power in which the class of possible appointees:

... excludes the donee of the power and is restricted to the husband, wife, lineal issue, the wife or widow of a son and the husband of a daughter of the creator of the power. ...⁶

The second lowest gift tax rate (four per cent) applies to gifts made to, among others, "the wife or widow of a son or the husband of a daughter" of the donor.⁷ These persons are nowhere mentioned in the lifetime exemptions⁸ or in the exclusion from the definition of a power of appointment in the gift tax statutes.⁹

¹ Wis. Stat. §72.02 (1) (1957) (Italics added). See also Neb. R. R. S. §77-2004, Mo. Rev. Stat. §573 (2). In Illinois (Smith-Hurd Stat. §375), New Jersey (Stat. §54:34-2) and New York, N.Y. Consol. Laws (§249-q) the language is substantially the same except "husband or widower of a daughter" is used. (Italics added).
² Wis. Stat. §72.02 (3) & (4) (1957).
³ Wis. Stat. §72.03 & 72.035 (1957).
⁴ Wis. Stat. §72.74 (1957).
⁵ Wis. Stat. §72.04 (1957).
⁶ Wis. Stat. §72.01 (5) (1957).
⁷ Wis. Stat. §72.77 (2) (1957).
⁸ Wis. Stat. §72.80 (1957).
⁹ Wis. Stat. §72.75 (3) (1957).
II. PROBLEMS POSED BY THE STATUTORY LANGUAGE

The questions most commonly raised by the language quoted above are:

1. Does a son-in-law remain the "husband of a daughter" after the daughter's death?

2. If he does, does he remain such (or does the daughter-in-law remain the "wife or widow of a son") after remarriage?

It appears that these questions have not been answered by the Wisconsin Supreme Court. They have, however, been given various and often conflicting answers by the courts of many states having similar tax statutes. The answer to the questions will have an effect on draftsmanship of wills and powers and on tax planning generally.

Suppose a direct gift in a will to a named person who is, at the time of the execution of the will, the son-in-law of the testator. If at the time of the testator's death the legatee's wife is deceased, will the gift be taxed at the primary rate of two per cent or at six per cent? Assuming the lower rate to be applicable, would the same be true if the legatee has remarried? If the transfer is taxed at the lower rate, presumably the two thousand dollar exemption is available; otherwise the exemption is limited to one hundred dollars.\(^10\)

Again suppose a Wisconsin testator wishes to draft a testamentary power of appointment, as broad as possible in its delineation of the class of possible appointees, and yet narrow enough to escape taxation to the appointee after the donee has exercised the power (or to the takers in default if the power has not been exercised). Will it be necessary for the testator to use the exact terms of the statute in describing the class? Assuming he has found it prudent to do so, will the donee be safe in appointing to the surviving spouse (remarried or not) of a deceased child of the testator or might it be argued that such exercise of the power exceeded its terms and is thus invalid? Assuming the exercise to be valid as a matter of property law, is the transfer nonetheless taxable to the appointee?\(^11\) Again assume the power has not been exercised; can the Department of Taxation successfully contend that the transfer is taxable to the taker in default on the grounds that the power might have been exercised in favor of a surviving spouse (remarried or not) and hence is not a tax-exempt power?

As will be seen, these questions have been raised in one form or other in all too many cases in various jurisdictions to be regarded as purely academic. They have a significant practical impact on many

\(^{10}\) Wis. Stat. §72.045 (3) (1957). It seems that in the case of an inter vivos gift, only the rate problem would be met.

\(^{11}\) In the gift tax, a power including a son-in-law would always be taxable, but the applicable rate would be at issue.
phases of draftsmanship and estate planning and cannot be safely ignored by the careful practitioner.

III. THE EFFECT OF THE DAUGHTER'S PRE-DECEASING THE TESTATOR OR DONEE OF A SPECIAL POWER

Although it appears that many of the older dictionaries defined husband as a man with a living wife, a surviving husband being more properly referred to as a "widower", the latter term seems to enjoy a marked unpopularity with the legislatures. While "widow" is commonly used, "husband" seems frequently to be the male counterpart when it is obvious from the context that surviving husband is meant.13

The tax statutes in question were in many respects taken from New York, and it is in that jurisdiction that the issue was first decided. In In re Woolsey's Estate (Matter of McGarvey)14 a legatee objected to the account filed by an executor. The executor, in paying a legacy to the widower of the testatrix daughter, had not paid any tax, presumably on the theory that the legatee was the "husband of a daughter." It appears that the proceeding was wholly ex parte: the executor did not contest, nor did the tax authorities appear. The Surrogate Court allowed the account, saying in a half-page opinion:

The legislature may have had in view more than the benefits accruing to the wife of the legatee by this exemption. The children of a deceased daughter may have been favored by the exemption, from this tax, of a legacy to their father.

Another New York Surrogate Court reached the same conclusion in In re Ray's Estate.15 There the legatee had, after his wife's death, lived with and cared for the testatrix mother-in-law until her death. The court observed that the laws of descent often use "husband" in the sense of "widower", and could see no reason why a widow and not a widower should be exempt.

This viewpoint is, of course, implicitly accepted by those authorities, hereinafter cited, which hold that remarriage does not destroy the exemptions provided for by the statute. However, cases dealing solely with the issue of survival by affinitive relatives are not numerous. Illinois16 has decided to follow New York and cited the further ground that the tax is a "special" tax and is to be construed against the state. The legislature of that state has since ratified the decision by amending the statute to read "husband or widower". A six to two decision

12 See, e.g., statements in In re Ray's Estate, infra.
13 See, e.g., Wis. Stat. §233.01 (1957). "The widow of every deceased person . . . shall be entitled to dower. . . ." and §233.23. "The husband of every wife dying . . . shall be entitled to courtesy. . . ."
15 35 N.Y.S. 481 (1895).
16 People v. Snyder, 353 Ill. 184, 187 N.E. 158, 88 A.L.R. 1012 (1933).
of the Supreme Court of Michigan is in accord, the court following New York and further observing that the words "husband, wife" are used just a few words earlier where the husband or wife of the decedent is meant, the legislature implicitly recognizing in the same statute that death of a spouse does not destroy the appropriateness of the designation. The dissenting judges favor a rule of strict construction of exemption statutes, citing as authority the earlier Michigan case of In re Gay's Estate, hereafter discussed. A Minnesota Attorney General's Opinion follows New York and "overwhelming authority" on the point. In Connecticut, where the language used is "wife of a son", it has been held that a widowed daughter-in-law will qualify. The court notes that the word "wife" is used earlier where the wife of the transferor is spoken of, and further reasons that ambiguities are to be resolved in favor of the taxpayer. That a widow is the "wife of a son," Texas seems to agree.

Many of the cases holding that remarriage disqualifies a legatee contain statements to the effect that the mere death of the spouse would produce the same result, but in these cases, this view may be regarded as dictum. The only case found holding that a surviving husband is not a "husband of a daughter" is Tax Commission of Ohio v. Hirsch. In that case the testator had left property in trust for his daughter for life, remainder to her husband if he survived her, otherwise remainder to their children. The court found the higher rate of tax to be applicable to the husband's contingent remainder, on the ground that he would not be the "husband of a daughter" when the interest vested. The court observed that in many Ohio statutes widows are favored over widowers and that wherever "husband" is used in the sense of widower, it is "husband-relict", or else it was clear from the context that surviving husband was meant. The court was not impressed by the New York authority, holding that this meant merely that the Ohio legislature was aware of the necessity of judicial construction.

IV. THE EFFECT OF REMARRIAGE

Two-thirds of the opinion in In re Ray's Estate was written before it was brought to the court's attention that the legatee had remarried. The court felt that dictionary definitions were irrelevant, the question being one of how terms are used in the particular statute. As the legis-

23 Supra, note 15.
lature had not explicitly made remarriage a bar, the court could not do so, and the exemption was allowed.

The rule of this case has enjoyed an authority quite unusual for a lower court decision. Eighteen years after the *Ray* decision, the New Jersey Court of Errors and Appeals felt compelled to follow it. The court dismissed the argument that the rule had not been passed on by a court of last resort in New York or elsewhere, taking notice that "the fact that surrogates deal largely and exclusively with matter relating to deceased persons qualifies them with expert knowledge of the subject." The court was further impressed by an argument from silence: the tax authorities had taken no appeal in the *Ray* case and the New York legislature, in passing a new tax law in 1909, had made no change in the language. It was held that "widow" (a female legatee being involved in the New Jersey case) was descriptive of the person, and not of the state or condition. The same rule has been applied in Michigan and in a probate court in Ohio.

Long before the *Ray* case, the Supreme Court of Pennsylvania had construed "wife or widow of a son" in a similar statute in that state and reached the opposite conclusion. The court said the defendant was not the "wife" of the son since the son was dead, and not the "widow" since that term is, in law and convention, exclusively descriptive of the unmarried condition of a woman who has once been married. The Supreme Judicial Court of Maine has since concluded that a remarried man is not the "husband or widower of a daughter." The court held that the condition, not the person, was described by the statute. The Attorney General of Texas has expressed the view that a remarried but subsequently divorced man is not a "husband of a daughter." Although the death of his wife does not affect the appropriateness of the description, remarriage does, and subsequent divorce will not restore the status. A recent case in that state has so held in the same situation.

In Nebraska, an Attorney General's Opinion had held that the New York opinion was controlling and that a remarried woman is the widow of a son. This opinion seems to have been overruled in that state by the recent case of *In re Thompson's Estate*. There the legatee son-in-law had remarried during the testatrix' lifetime, had paid the taxes at the highest rate, and sued the county for a refund. The Supreme Court

held for the county, relying strongly on the rule of strict construction of exemption statutes against the taxpayer. It felt that the Nebraska law was passed so soon after the 

Ray decision that it was not fair to charge the Nebraska legislature with knowledge of that lower court case. The court further doubted that a New York rule was highly authoritative on the point, since, in its opinion the New York draftsman had borrowed heavily from the earlier Pennsylvania Act construed in Commonwealth v. Powell.33

V. ANALOGIES FROM OTHER FIELDS OF LAW

When tax statutes have not been in question, the courts seem to have favored a broad interpretation of terms denoting relationship. Especially has this been true in the case of the word "widow." In Davis v. Neal34 the Arkansas court held that homestead statutes are to be liberally construed so that a remarried woman is a "widow" entitled to homestead, the term being mere descriptio personae. Oregon has held that remarriage and removal to the husband's home will not cut off the homestead right, the legislature not having explicitly indicated the contrary.35

Georgia Railroad & Banking Co. v. Garr36 is authority for the proposition that, even though the statute refers to "widow", a woman's remarriage will not cut off her right to sue her husband's employer for wrongful death, nor will it diminish damages.

New Jersey has held that, until the legislature amended the statute to provide otherwise, a widow's remarriage had no effect on her right to payments under the Workman's Compensation Law.37 Nor, accord-
dower.38 California, in construing "widow or widower" as used in her community property law, regarded the Ray case as in point, and held that remarriage had no effect on the ultimate devolution of the property.39

In the early Pennsylvania case Appeal of Kearns40 a widow's right to elect against the decedent's will was challenged on the ground of laches and remarriage. The court decided against the widow on the first ground, but stated that the second would also be a good point.

The Louisiana court in Franek v. Brewster41 denied a remarried widow the right to a payment from an estate where the statute pro-
vided for such payment to a "widow in necessitous circumstances." It is far from clear whether the decision went on the ground of non-

33 Supra, note 27.
34 100 Ark. 399, 140 S.W. 278 (1911).
35 In re Altz's Estate, 104 Ore. 59, 212 Pac. 409 (1921).
36 57 Ga. 277 (1876).
38 Matthews v. Marsden, 71 Mont. 502, 230 Pac. 775 (1924).
40 120 Pa. 523, 14 Atl. 435 (1888).
41 141 La. 1031, 76 So. 187 (1916).
widowhood or of non-necessitous circumstances; there are statements to indicate both.

The Michigan court, despite its liberal view of the tax statute in other cases,42 favored a strict interpretation of another phrase of the same statute in *In re Gay's Estate.*43 The statute provides for the same treatment as is accorded to the husbands and widows in our problem to anyone who: "... stood in the mutually acknowledged relation of parent... or to or for the use of a lineal descendant." The testatrix was not related to the legatees by either blood or marriage, but stood in the mutually acknowledged relation of grandparent. The court felt that this was not enough.

VI. CONCLUSIONS

It seems quite clear from all of the cases that the inheritance tax laws will not operate to defeat vested rights. Thus, once having properly received his legacy or gift, the son-in-law is in no danger of losing the gift or of having the tax reimposed after his wife's death, his divorce, or his remarriage.

Where, however, the son-in-law is a surviving spouse or a remarried spouse at the time the transfer takes effect, the problem is not so easily solved. It seems that the weight of authority favors the rule that a surviving spouse is a "husband" within the meaning of the statute. Not only do the majority of cases seem to support this view, but there is an argument from silence in that no legislature appears to have disapproved of its judiciary's reasoning by amending the statute to disqualify such a surviving spouse. The amendments in at least three states44 have, in fact, gone the other way, the statutes now reading "husband or widower."

Section 71.10(6)(b)(8) of the Wisconsin Income Tax Act, while perhaps not pertinent on the remarriage issue, may be of some value on the surviving spouse issue. That section, in defining dependents of the taxpayer, states that "The relationship of affinity, once existing, will not be terminated by divorce or death of a spouse." It may be that the court would not regard this section as being in pari materia with the Inheritance Tax Law. Assuming the two are in pari materia, two further problems are presented: first, the terminology of the Income Tax Act is "son-in-law, daughter-in-law", and second, it may be that the only spouse referred to is the spouse of the taxpayer (or in our case the testator or donor).

On the question of the effect of remarriage, the authorities are

42 *Supra*, notes 17 and 25.
43 *Supra*, note 18. See, however, CCH Inh. Tax Rep., §18,976 in which the Texas Attorney General (Opinion No. WW-629) held that adopted children of a decedent's sister are to be included among "lineal issue" of the sister.
much more evenly divided. The answer given in a particular jurisdiction often depends on the court's viewpoint on three problems:

1. Are the words descriptive of the person or are they descriptive of a state or condition?

2. Is the statute involved to be liberally construed in favor of the taxpayer or strictly against him?

3. Is the statute involved taken from New York legislation and, if so, did the local legislature impliedly adopt lower court New York decisional law?

In Wisconsin there seems to be no case construing "wife, widow, husband" as used in any statute, nor does there seem to be any close analogy on the *descriptio personae* problem. There is Wisconsin authority (in income tax cases) favoring strict construction of exemptions against the taxpayer, but it will be remembered that the terms involved are applicable to rates and to exclusions from taxable powers of appointment as well as to exemptions, and it is probable that the court would give a uniform construction to the words wherever appearing in the Inheritance Tax Act. Also, in a four to three decision involving the inheritance tax, the Wisconsin Supreme Court has declared a rule of strict construction against the state of all ambiguities involved in the act and has further stated that the act was taken from New York and the decisional law of that state will govern in Wisconsin. Only New York appellate cases were cited, however. It will be recalled that the *Woolsey* case was decided in 1887 and the *Ray* case not until 1895, whereas Wisconsin first adopted the language in question in an inheritance tax law in 1899. It might be argued that the legislature should not be charged with knowledge of these cases so soon after their publication. After the 1899 law was declared unconstitutional, however, the legislature has many times readopted the language in question. Thus it may not be entirely unfair to charge the legislature with knowledge of decisional law.

On policy grounds, it may be well argued that the legislative intent

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45 A different but somewhat related problem is discussed by Professor Page. When a gift is to the "wife" of a named person who is married at the time of the will, the term is *descriptio personae*, and the woman married to the named person at the time of the will takes the gift. If the person is unmarried at the time the will is made, the gift goes to the woman who is married to him at the testator's death. *Page, Wills, §§1007 & 1008* (1941).

46 *First Wisconsin Trust Co. v. Tax Commission*, 238 Wis. 199, 298 N.W. 595 (1941); *Bowman Dairy Co. v. Tax Commission*, 240 Wis. 1, 1 N.W. 2d 887 (1942); *Comet Co. v. Department of Taxation*, 243 Wis. 117, 9 N.W. 2d 616 (1943).

47 *Estate of Sweet*, 270 Wis. 256, 70 N.W. 2d 605 (1954).

48 *Supra*, note 14.

49 *Supra*, note 15.

50 *Laws 1899, ch. 355.*

51 *Black v. State*, 113 Wis. 205, 89 N.W. 522 (1902).

was to benefit the son-in-law despite the wife’s death and even his remarriage, since to do so would, in many cases, redound to the ultimate benefit of the donor’s grandchildren. It appears that immediate gifts to grandchildren are favored in the tax laws, and there would seem to be no reason that indirect benefits (although somewhat speculative) should be treated differently. In the case of minor grandchildren, a gift to the surviving parent would seem to be the normal way to avoid the expenses and complications of a trust or guardianship or power of appointment. On these grounds it is suggested that Wisconsin would be wise to follow the more liberal rule.

Until the issue is resolved in Wisconsin, problems may arise not only in the tax field but also under property law, unless the draftsman is careful to avoid certain pitfalls. Thus it would seem to be advisable in drafting a will to benefit a son-in-law regardless of changed circumstances for the instrument to refer to the beneficiary by name. The reason is that, if a gift to “my daughter’s husband” were to receive unfavorable tax treatment (where the beneficiary is a widower or remarried), the same rationale might invalidate the gift altogether. In drafting a power of appointment, however, a dilemma is presented. If the statutory language is used, any valid appointment made under the power should escape taxation, although the donee of the power may be restricted to a class narrower than he wishes, and perhaps narrower than the donor intended. If, on the other hand, persons within the statutory exemption at the time of the creation of the power are specifically named by the draftsman, any of such persons will validly take regardless of changed circumstances, and yet the transfer may be taxable even if exercised in favor of a presently qualified person or even if left unexercised. Moreover, the tax authorities could be successful (though it may be improbable) in a highly imaginative and speculative contention that, regardless of the existing circumstances at the time of the exercise or lapse of the power, the transfer is taxable since a named possible appointee could have survived his spouse and perhaps remarried. Until the court has given the final answer, it appears that the draftsman may have to take his chances, lean toward breadth of the class of possible appointees or toward a more restrictive class with certain tax-saving, whichever the testator may intend.

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