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How a state marital deduction savings clause 'saved the day'

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Many attendees at the Heckerling Institute on Estate Planning are leaders in their state bars and wield influence over state estate planning and probate laws. This column will hopefully illustrate the value of well-considered state laws in protecting the marital deduction - even in cases of poor drafting.

We all know some people will draft their own estate plans. We also know some attorneys will draft estate plans without adequate knowledge of the federal tax laws. We even know that competent attorneys sometimes make mistakes with the intricacies of drafting to qualify for the estate tax marital and charitable deductions. The results can be calamitous for innocent surviving spouses and/or charities, if, for example, a plan fails to properly qualify for the marital or charitable deduction and instead creates a substantial tax.

It is precisely this type of fact pattern which recently came before the 9th Circuit. But the court affirmed a U.S. District Court and allowed the estate's claim for a marital deduction for a gift to a surviving spouse which at first blush would not have qualified under Sect. 2056(b) of the Internal Revenue Code. (*Sowder v. U.S., 100 AFTR 2d 2007-6379.)*

Washington case

The decedent in the case, Tony Sowder, prepared his own Last Will and Testament. He died 12 years later, survived by his wife and three adult children. In his will, Sowder bequeathed $200,000 to each of his three children, and left the remainder of his estate as follows: "All the rest, residue and remainder of my estate, both real and personal, of every nature and wherever situated, of which I may die seized or possessed, I give, devise and bequeath unto my wife, Marie L. Sowder, if she survives me, and if she does not survive me, *or dies before my estate is distributed to her*, to my issue me surviving in equal shares per stirpes." (Emphasis added)

The problem with this provision is the requirement of survivorship until the assets are distributed. Section 2056 (a) of the Code permits a marital deduction for bequests to a surviving spouse in an unlimited amount. However, Sect. 2056(b) provides that a bequest to a spouse conditioned upon survival of that spouse for a period of time or the occurrence of an event more than six months after the first spouse's death will not qualify for the deduction.

Because here the bequest required Mrs. Sowder to survive distribution from the estate, which might (and in fact apparently did) take longer than six months, the bequest, if not saved by state law, did not qualify for the marital deduction.

But fortunately for Mrs. Sowder, the Revised Code of Washington has a series of marital deduction savings clauses. (RCW 11.108 et seq)

One provision in the Washington Code defines the term "marital deduction gift" as a gift "intended to qualify for the marital deduction as indicated by a preponderance of the evidence including the governing instrument and extrinsic evidence whether or not the governing instrument is found to be ambiguous."

This broad definition allowed the trial court (as affirmed by the 9th Circuit) to look to extrinsic evidence when considering if the gift should qualify for the marital deduction. The court took notice, for example, of the following facts: Sowder was a "tax-wise businessman and individual;" the 1981 change to an unlimited marital deduction was well-publicized and Sowder was aware of it, as evidenced by a copy of a *U.S. News & World Report* article he saved addressing the changes to the estate tax laws; he understood the benefits of tax deferral; and his subsequent purchase of second-to-die life insurance in an irrevocable life insurance trust showed he expected no estate tax would be due on his death.

Another provision in Washington's Code states that if a court determines that the testator intended a bequest to qualify for the federal estate tax marital deduction, then the "governing instrument shall be construed to comply with the marital deduction provisions of the IRC in every respect." This supported the court's conclusion that since Sowder's intent to create a marital deduction gift was manifest; the bequest under the will had to be read to qualify for the federal estate tax marital deduction.

Should other states follow suit?

The result in the *Sowder* case suggests that Washington has adopted several tax savings clauses which might be worthy of emulation. There can be no doubt that these statutes really "saved the day" for at least one surviving spouse. How many more innocent spouses and charities (if savings clauses for charitable gifts are considered) could benefit from similar statutes? That question is worthy of further consideration.

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