Taxations: Marital Deduction For Life Estates

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jeopardy; that in attempting to protect a client's interests by recording a notice of pendency, the attorney runs the risk of personal liability in an action for slander of title.

There seems to be no controlling authority in New York. A notice of pendency may be filed where the action affects the title to, or the possession, use or enjoyment of, real property. N. Y. CIV. PRAC. ACT §§ 120-125. In Smith v. Smith, 26 Hun. 573 (1880), an action on the case for abuse of the civil process by defendant's filing a notice of pendency, there is a dictum that such a filing is privileged; but in Schierloh v. Kelly, 253 App. Div. 373, 2 N. Y. S. 2d 188 (2d Dep't, 1938), the court refused to dismiss a complaint where the basis of the action was the malicious filing of lis pendens, although the question of privilege was not considered. The absolute privilege was granted to the printer of a defamatory list of questions which counsel prepared for trial, Youmans v. Smith, supra, while the court refused to extend such a privilege to the writer of a complaint to the District Attorney, Pecue v. West, 233 N. Y. 316, 135 N. E. 515 (1922). The Law Revision Commission has recently recommended that the legislature require parties filing a lis pendens to post a bond. N. Y. LAW REV. COMM. 203-226 (1951). It is uncertain, then, whether the filing of lis pendens in New York would be in the course of a judicial proceeding and therefore absolutely privileged.

The absolute privilege is granted to insure the utmost freedom of expression during litigation, and to afford access to the courts without fear of personal liability in a defamation suit. RESTATEMENT, TORTS § 587, comment a (1938). The court's supervisory and contempt powers are felt to be an adequate check to potential abuses. Maginn v. Schmick, 127 Mo. App. 411, 105 S. W. 666 (1907). In view of this purpose, the decision in the instant case appears to be sound. The recorder of lis pendens is able to publish the object of his action in a place of public access, while the courts have little, if any, control over such publication. The parties recording such a notice are protected if this act is in good faith and without malice, and any risk of personal liability is outweighed by the necessity of preserving the enjoyment of property interests in the face of malicious claims.

Richard F. Griffin

Taxations: Marital Deduction for Life Estates

Under the terms of her husband's will, the surviving spouse was given a life estate with uncontrolled discretion to use, enjoy, sell or dispose of the income and principal but with no power over the disposition of any part remaining at her
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death. An absolute devise over to remaindermen was made of the portion, if any, remaining at the termination of the life estate. Held: The marital deduction should be disallowed since the wife's estate was terminable and therefore did not qualify under section 812(e) of the 1939 Code (now INT. REV. CODE OF 1954, §2056); Estate of Edward F. Pipe v. Commissioner, 23 T. C. No. 14 (Oct. 22, 1954).

The marital deduction excludes bequests to the surviving spouse from the gross estate of decedent in an amount not in excess of 50 per cent of the gross estate in order to reconcile basic differences which exist between common law and community property states. This new concept, and particularly the terminable interest rules, did not receive the weighty consideration given to income-splitting provisions in the Internal Revenue Act of 1948 and have created a persisting area of confusion.

Within the past two years the Tax Court has considered the interpretation of these provisions several times, the principal case having the greatest breadth. Where decedent left his residuary estate to his surviving spouse for life, remainders over to his children, the Tax Court held the interest was terminable and no marital deduction would be allowed, despite the wife's power to invade and deplete corpus to maintain her standard of living. Estate of Michael Melamid v. Commissioner, 22 T. C. No. 116 (July 23, 1954). Two months later the Court held that no part of a transfer in trust qualified for a marital deduction when decedent's surviving spouse was entitled to life income from the corpus with a general power to appoint two-thirds of the corpus by will. The Court would accept no less than the power to appoint the entire corpus, free of the trust. Estate of Louis B. Hoffenberg v. Commissioner, 22 T. C. No. 146 (Sept. 17, 1954). A similar conclusion was reached the next month on the grounds that the section as written required complete power to appoint, although the widow had already appointed one-half of the corpus. Estate of Harrison P. Shedd v. Commissioner, 23 T. C. No. 8.

In the instant case, the petitioner contended in the alternative, first, that the estate taken by the wife, was, in reality, a fee; second, that the will created an implied trust of which the wife was trustee and life beneficiary, with remainders over but with an unqualified power over the corpus for enjoyment and consumption as well as for disposition.

The Court disposed of the first contention, saying that New York had modified the Rule in Shelley's Case so that an absolute power of disposition, not accompanied by a trust, given for life, creates a fee absolute as to creditors, purchasers and incumbrancers, but limited by future estates. Terry v. Wiggins, 47 N. Y. 512 (1872).
With respect to the implied trust argument, the Court said first, that no such trust existed, despite loose references in some New York cases to "trustees"; second, that even if such a trust existed, the corpus therefor would not only be less than the total share left to the widow, but also would be so indefinite as to render impossible of identification at the decedent's death what property was subject to the trust and therefore intended to be covered by the section.

Under the 1954 Code, section 2056 (b) (5), the problem in the principal case is covered explicitly and the marital deduction is allowed when the surviving spouse is given an uncontrolled power of invasion of corpus, exercisable either by will or during life. This is true of a life estate, as well as of a formal trust. No provision was added to make section 2056 retroactive, however, and the Courts therefore have given it a prospective effect only, applying the 1954 Code, section 812(e) to all decedents dying prior to December 17, 1954, the effective date of the 1954 Code provision. The possibility that section 2056 might be viewed as a clarification, rather than a modification of existent law, and therefore that its rationale would be applied retroactively was denied unequivocally by the Tax Court in Estate of Harrison P. Shedd v. Commissioner, supra.

In the absence of positive Congressional action to remedy this situation, it is highly dubious that the trend of decisions, illustrated by the principal case and the cases preceding, will change. The possibility of receiving the marital deduction for estates of this character is slight unless the estate can be placed exactly within the narrow precise terms of the 1939 Code.

Richard G. Birmingham

Workmen's Compensation: Bar to an Action in Deceit

Employee, injured in the scope of his employment, failed to report his injury to the Industrial Commission, relying on his employer's promise to do so. Employer failed to make the report but paid weekly compensation to employee for two years. When employer then stopped payments, the Industrial Commission refused employee's subsequent application for workmen's compensation on the grounds that the application was barred by the two year statute of limitations, during which time either an application or notice of injury must be filed under Ohio law, employee brought an action in deceit against his employer. Held: Employer's compliance with the Workmen's Compensation law bars any other action for damages for injuries arising in the scope of employment. Greenwalt v. Goodyear Tire & Rubber Co., ——O. S. ——, 128 N. E. 2d 116 (1955).

In general, the Workmen's Compensation statute excludes all other remedies