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Visualizing Tax Results

Alfred S. Pellard

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The drafting of a will involves the determination of future events. It involves not the answer to any specific question, but rather the building up of a document which trespasses upon numerous questions. The customary and common approach to the problem is an attempt to carry out the testator’s intentions. Too often the result of this approach is that important tax savings which might have been effected are overlooked. A restatement of some of the important tax savings which are available under various circumstances should help to consolidate such problems into a definite tax approach. Theories alone are often overlooked unless a specific problem is pointed out. As an aid, and in order to better visualize the theories, clauses illustrating the principles involved have been added to this article.

Life Estate

A large estate is quickly depleted by the estate tax toll exacted as the property passes over life’s bridges from one generation to the other. There are means of fording some streams without payment of the toll. One of the standard devices is the use of the life estate, with remainder over to another. This method can be seriously considered in those cases where the testator’s primary beneficiaries have ample resources and there is little likelihood that they will be in need of the corpus of the estate. Thus, if the income from all or a part of the property will satisfy the beneficiaries’ needs the property can be safely tied up in a trust.

The tax-saving feature of a trust is grounded in the fact that a life estate, created by one other than the life tenant, is not includible in the gross estate of the life tenant at the time of his death.\(^1\) By way of example, if a testator bequeaths property to his son and subsequently the son dies, leaving the property to the testator’s grandson, the property received by the grandson has been diminished by two successive estate taxes;\(^2\) the first in the testator’s estate and the second in the estate of his son. On the other hand, by creating a trust with income to his son for life and remainder to his grandson, the testator will succeed in passing his property through two generations with the imposition of but one estate tax, that on the testator’s

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\(^{1}\) Frew v. Bowers, 12 F.2d 625 (2d Cir. 1926).

\(^{2}\) If the son dies within five years from the date of his father’s death a deduction for previously taxed property can be had under Int. Rev. Code § 812(c). This deduction is not allowable if the property was received from a prior decedent who died after Dec. 31, 1947, and was at the time of such death the decedent’s spouse.
estate. No estate tax will become payable on the son’s death, as his interest in the property will have terminated with his death. The grandchild would then get his vested remainder, created by the testator, free of further tax.

The following form illustrates the use of a life estate with remainder over to others:

**FORM**

**Life Estate**

All the rest, residue and remainder of my property, real, personal or mixed, of which I may die seized or possessed, or to which I may in any way be entitled at the time of my death or to which my estate may hereafter become entitled, I give, devise and bequeath to my trustees, hereinafter named, in trust, to invest and reinvest the same and to collect and receive the issues, profits and income thereof, and, after deducting all proper and necessary charges or expenses arising in connection therewith, to pay the net income thereof, to my son, every year in as nearly quarter-annual installments as said trustees may determine for and during his natural life, and upon his decease to pay over the principal of said trust fund, together with all interest and income earned and accrued and unpaid to my son’s issue, *per stirpes*.

**Contingent Remainder**

Should the testator desire to give his son the income of a trust fund until he reaches thirty years of age at which time he is to obtain the principal, the use of the contingent remainder should not be overlooked. A contingent interest in another’s estate, terminated by the death of the owner of such contingent interest is not includible in the gross estate of the owner of such interest. Thus, if the testator bequeaths property in trust until his son attains the age of thirty years at which time he receives the principal of the trust and the son dies before he reaches the age of thirty years, the corpus of the trust would be includible in the son’s gross estate. However, if the testator also provides that in the event that his son dies before he reaches the age of thirty years the corpus of the trust shall go to his daughter, then, if the son does die before thirty years of age, the daughter will inherit the property from the testator and there will be no additional estate tax upon the death of the son. This example is but one of the many ways in which the use of the contingent remainder may be effectively used to avoid multiple estate taxes.

It might be noted in this connection that the construction of wills and the question of whether a remainder interest is vested or contingent involves property rights, as to which the local law of the state is determinative. The decisions of a state court settling property rights must be given

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3. Comm’r v. Rosser, 64 F.2d 631 (3d Cir. 1933).
However, in order to be given such effect the decision must be rendered in a proceeding presenting a real controversy and one which settles issues regularly presented. It must not be in any sense a consent decree which is "collusive in the sense that all parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional tax."  

The following form illustrates the use of a contingent remainder:

FORM

CONTINGENT REMAINDER

I give, devise and bequeath to my trustees, hereinafter named, the sum of $............... in trust, to invest and reinvest the same and to collect and receive the issues, profits and income thereof and after deducting all proper and necessary charges and expenses arising in connection therewith, to pay the net income thereof to my son, ....................., every year in as nearly quarter-annual installments as said trustees may determine until my said son shall attain the age of thirty years; and if he shall attain the age of thirty years, then upon his attaining the said age of thirty years, to pay over to my said son the principal of said trust fund, together with all undistributed income, provided however, should my son die prior to attaining the said age of thirty years, then and in that event, I direct that upon his death the principal of this trust fund shall be paid over to my daughter, .........................

POWER OF APPOINTMENT

The use of the estate tax-saving features of the life estate or contingent remainder may appeal to a testator, but, and there is perhaps always a "but," the inflexible provisions of such arrangements may not be to his liking. He may have more confidence in the ability and integrity of his primary beneficiaries to carry out his wishes than he has in the possibility that his will would properly reflect his intentions under varied future economic changes. He may also have doubts as to whether some of his ultimate beneficiaries will continue to merit his consideration, judged of course by his own concepts of what they should be to merit such consideration. The use of a "tax-free" power may be the answer to such a testator.

Initially, it should be pointed out that the term "powers of appointment" includes all powers which are in substance and effect powers of appointment regardless of the nomenclature used in creating the power and local property law connotations. Except for the two situations hereinafter mentioned, the possession by a donee of a power of appointment at his death will cause the value of the corpus of the property which is subject to such power of appointment to be included in the gross estate of

6. Leslie H. Green, 7 T.C. 263 (1946); Mary Clare Milner, 6 T.C. 874 (1946).
the donee at the time of his death. Thus, if the testator makes a bequest of his property in trust, to pay the income to A for life the corpus to go to such person as A shall direct in his last will, then upon A's death, the value of such trust property will be includible in A's gross estate regardless of whether or not A exercised the power.\(^7\)

Granting to a life beneficiary the right to appropriate principal ordinarily is equivalent to a power of appointment. For example, if a testator bequeaths property in trust for the life of his son, with a power in the son to appropriate or consume the principal of the trust, and upon the death of the son the remainder of the principal to go to A, the son has a power of appointment and the corpus of the trust subject to the son's power will upon his death be includible in his gross estate.\(^8\) This result follows, regardless of whether or not the son appropriated or consumed any part of the principal during his life. The principal of this trust will be depleted by a double estate tax before A, the remainderman, will receive the principal.

There are two types of powers, the exercise of which by a donee during his life or the possession of which at the time of his death will not cause the corpus of the trust to be includible in the donee's gross estate at the time of his death. Apparently to make sure that these exempt powers are not enlarged by judicial construction, the Code declares that all powers of appointment are "taxable." Then, in defining "power of appointment" the Code states that it means "any power to appoint exercisable by the decedent either alone or in conjunction with any person, except . . . ." and the two exceptions mentioned are then classified as powers to appoint. Thus, granting to a beneficiary a power to appoint the corpus of the trust which comes within either of the two exceptions will prevent the assessment of a second estate tax on the corpus of the trust at the time of the death of the donee of the power. The exceptions are:

**Exception 1**
If the power to appoint is not exercisable to any extent for the benefit of the deceased, his estate, his creditors, or the creditors of his estate and if it is exercisable in favor of only one or more other persons or objects in the following classes:

- (a) Spouse of the donee of the power,
- (b) Spouse of the donor of the power,
- (c) Descendants of the donee of the power or his spouse,
- (d) Descendants (other than donee of the power) of the donor of the power or his spouse,
- (e) Spouses of descendants mentioned in (c) or (d),
- (f) Certain religious, charitable, etc., organizations.

**Exception 2**
If the power to appoint is not exercisable to any extent for the benefit of the deceased, his estate, his creditors or the creditors of

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7. INT. REV. CODE § 811 (f)(1).
his estate and if it is exercisable in favor of only one or more other persons or objects within a restricted class if the deceased did not receive any beneficial interest, vested or contingent, in the property from the creator of the power or thereafter acquire any such interest.

A power to appoint within a restricted class under Exception 2 applies to a power possessed by a disinterested trustee or one occupying a similar status to appoint within a relatively small class. For example, a power to appoint to a class composed of A's children would be a power to appoint within a restricted class, but a power to appoint to anyone except A and his family would not be a power confined to a restricted class. A power to appoint is not confined to a restricted class merely because it is not exercisable in favor of the deceased, his estate, his creditors, or the creditors of his estate, or all of them.

If a testator bequeaths property in trust to pay the income thereof to his son A, for life and gives A the power to appoint the corpus of the trust to such of A's children or grandchildren as A may designate, then A has received a power to appoint which comes within Exception 1. Upon A's death, and regardless of whether or not A has exercised the power to appoint, the corpus of this trust will not be includible in A's estate. This example but points out the possibilities of drafting a power within the confines of the exceptions mentioned in the Code. In most cases the extra estate tax can be avoided by restricting the power and at the same time carrying out the testator's intent.

The following form illustrates the use of an "exempt" power to appoint. The use of this type of power will prevent the imposition of a second estate tax upon the death of the life tenant. The corpus of the trust will be includible only in the gross estate of the testator.

FORM

EXEMPT POWER TO APPOINT—RESTRICTED CLASS

I give, devise and bequeath to my trustees hereinafter named twenty-five (25%) percent of my residuary estate, to hold, invest and reinvest the same for the term of the natural life of my son, ________________, to collect the rents, dividends and income therefrom and, after all proper deductions, pay over the net income to my son, ________________, in equal quarter-annual installments. Upon the death of my said son, my trustees shall pay over the then corpus of this trust to such person or persons as my son, ________________, shall by his last will and testament direct but only pursuant to the following power; and I hereby give to my son, ________________, full power and authority so to dispose of the corpus of this trust but only to his descendants, in such shares and in such manner, as my son, ________________, shall by his last will and testament appoint, and in default of such appointment or insofar as he shall not effectually appoint all of such corpus, then such corpus, or the remainder thereof, shall be paid over by my trustees to such of my children
as shall survive me, and the issue me surviving of any of my said chil-
dren who may predecease me, per stirpes.

Marital Deduction

Congress has created a special prize in the way of estate tax savings for
the happily married couple. Though Congressional intent, as appears in
the Committee Reports, does not bear out the fact that such was the
purpose of the marital deduction, yet, the law has such effect. For, in
those cases where the closeness of family ties makes it immaterial whether
the spouse or children of the testator shall receive the property, special tax
savings are available.

The marital deduction, effective in the case of the estate of a citizen
or resident of the United States, dying after December 31, 1947, allows a
deduction up to fifty percent of the adjusted gross estate\(^9\) for the value
of any property which was includible in the decedent's gross estate and
which passes or has passed from the decedent to his surviving spouse. The
adjusted gross estate is the entire value of the gross estate less the follow-
ing deductions: funeral expenses, administration expenses, debts of de-
cedent, mortgages and liens, and net losses during administration.\(^10\) If a
testator bequeaths his entire estate outright to his wife, and the value of
the gross estate is $200,000, and the deductions $20,000, then the adjusted
gross estate would be $180,000, the marital deduction $90,000 and the net
estate $90,000 ($200,000 \(\text{-} 
[20,000 + 90,000])\). If the same estate were
left to a son, the marital deduction would not be allowable and the net
estate would be $180,000. The great savings in the federal estate tax at-
tributable to the marital deduction can be more clearly appreciated by
comparing the tax on a net estate of $90,000 with that on a net estate of
$180,000. The federal estate tax on an estate of $90,000 is $3,000, as com-
pared to a tax of $26,700 on a net estate of $180,000. The amount of the
marital deduction is further limited to the aggregate value of the "deduct-
ible interests" which passed from the decedent to his surviving spouse.
Accordingly, if in the above example the testator bequeathed to his wife
only $50,000, the marital deduction would be limited to $50,000 less the
amount of the estate taxes which would be chargeable to the widow on
such bequest.

If the estate includes community property, a special formula is used
for computing the "adjusted gross estate."\(^11\) In general it can be stated
that in such a case the value of the "adjusted gross estate" is determined by
subtracting from the value of the gross estate the value of the community
property included in the gross estate and only such proportionate amount
of the deductions as is attributable to the non-community property. The
effect of this, in a case in which all of the gross estate consisted of com-

\(^9\) Int. Rev. Code § 812(e) (1) (H).
\(^10\) Int. Rev. Code § 812(e) (2) (A).
\(^11\) Int. Rev. Code § 812(e) (2) (B); U.S. Treas. Reg. 105, § 81.47d(b) (1949).
community property would be that no marital deduction could be taken. Property in which the surviving spouse had merely an expectant interest\textsuperscript{12} is not for this purpose considered as community property.

The gross estate, for the purpose of computing the estate tax, usually includes property interests which pass by means other than the will, viz., life insurance, property held by the entirety, gifts made in contemplation of death, etc. As the marital deduction is allowable for property interests, includible in the gross estate, regardless of whether or not they pass by virtue of the will, it may become necessary in the drafting of a will to determine what property interests other than those covered by the will, will be includible in the decedent's gross estate; and for which of such other interests the marital deduction will be allowable. Life insurance, owned by most testators will, with a few exceptions, be includible in the decedent's gross estate. If the life insurance is payable outright to the spouse of the testator, the amount thereof will be allowable as a part of the marital deduction.

As previously stated, one of the limitations on the amount of the marital deduction is that it can include only the aggregate value of the "deductible interests" which passed from the decedent to his surviving spouse. Generally speaking, a nondeductible interest would be a life estate or other interest in property passing to the spouse which may terminate. The Code states that:

Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest . . .

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse . . .

If the interests in property which will pass to the spouse will include interests in property which may be classified as nondeductible interests, then, in order to estimate the amount of the marital deduction, the examples set forth in the Regulations\textsuperscript{13} should be consulted to determine if the value of such interests will be allowable in computing the marital deduction.

There are two types of interests which although they would appear from the above definition to be nondeductible, are nevertheless allowable

\textsuperscript{12} an expectant interest is defined to be one which at the time of the decedent's death would require the entire value of such property (and not merely one-half thereof) to be includible in decedent's gross estate.

\textsuperscript{13} U.S. Treas. Reg. 107, § 81.47b (1949).
pursuant to specific provision in the Code. They are: a trust with power of appointment in the surviving spouse, and life insurance or annuity payments with power of appointment in the surviving spouse. In order to qualify a trust with a power of appointment in the surviving spouse for the marital deduction, it must be drawn to meet the following five conditions:

1. The surviving spouse must be entitled for life to all the income from the corpus of the trust.
2. Such income must be payable annually or at more frequent intervals.
3. The surviving spouse must have the power, exercisable in favor of herself or her estate, to appoint the entire corpus free of the trust.
4. Such power in the surviving spouse must be exercisable by such spouse alone and (whether exercisable by will or during life) must be exercisable in all events.
5. The corpus of the trust must not be subject to a power in any other person to appoint any part thereof to any person other than the surviving spouse.

It can be noted at this point that in order to qualify a trust set up in a will for a marital deduction, the Code requires that the surviving spouse receive a "taxable" power of appointment. As a result, upon the subsequent death of the surviving spouse the value of the corpus of the trust subject to this power will be includible in the gross estate of the surviving spouse.

The problem confronting the draftsman of the will is whether to give the surviving spouse a "tax-free" power to appoint so that the value of the corpus of the trust will be includible in the testator's gross estate, but not in the estate of the surviving spouse; or to give the surviving spouse a "taxable" power of appointment so that a marital deduction for the value of the corpus of the trust will be available in the testator's gross estate, but will cause its inclusion in the gross estate of the surviving spouse. The answer, necessarily, depends upon the circumstances in each case. If the surviving spouse has considerable property it might be undesirable taxwise to have the testator's property taxed in the estate of the surviving spouse as the aggregate of taxes on both estates may be increased, and accordingly, a "tax-free" power to appoint, which will not cause the corpus of the trust to be includible in the surviving spouse's gross estate, may be desirable. On the other hand, if the surviving spouse has a relatively small amount of the property, or may consume a large portion during life, then a "taxable" power of appointment which will qualify the corpus of the trust for the marital deduction in the testator's gross estate may be more desirable. In some cases the answer may be to create two trusts, only one of which will qualify for the marital deduction.

Frequently the proceeds of a life insurance, endowment or annuity

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14. Int. Rev. Code § 812(e)(1) (F) and (G).
contract, are held by the insurance company pursuant to an election of
the testator, and periodic payments made to the surviving spouse. In order
that such proceeds of insurance may qualify for the marital deduction, the
terms of the contract with the insurance company must satisfy the follow-
ing five conditions.2

(1) The proceeds must be held by the insurer subject to an
agreement either to pay the proceeds in installments, or to pay
interest thereon, with all such amounts payable during the life of
the surviving spouse payable only to her.

(2) Such installments or interest must be payable annually, or
more frequently, commencing not later than 13 months after the
decedent's death.

(3) The surviving spouse must have the power, exercisable in
favor of herself or of her estate, to appoint all amounts so held by
the insurer.

(4) Such power in the surviving spouse must be exercisable by
such spouse alone and (whether exercisable by will or during life)
must be exercisable in all events.

(5) 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.

The essential problem confronted in the case of proceeds of insurance
payable in installments is quite similar to that in the case of trusts set up in
the testator's will. It also appears that the draftsman of a will must of
necessity consider the insurance problems. If the proceeds are held by
the company with directions to pay the surviving spouse installments during
life, and upon the death of the surviving spouse the balance of the install-
ments or the commuted value thereof are to be paid to another, then as
to such proceeds, the marital deduction will not be allowable, but the un-
paid balance will not be includible in the gross estate of the surviving spouse
upon his or her death. On the other hand, granting to the surviving spouse
the power to appoint the corpus of the proceeds, will qualify such proceeds
for the marital deduction in the testator's gross estate, but cause the unpaid
balance to be includible in the gross estate of the surviving spouse. Most
insurance companies have refused to insert a clause in their policies giving
the surviving spouse the right to appoint the corpus of the proceeds by will.
They will, however, consent to a clause giving the surviving spouse the
right to remove the contingent payees and to designate his or her estate
to receive such corpus in a single sum at his or her death. Such a clause
if acceptable to the testator, can be used to qualify such proceeds for the
marital deduction in the estate of the testator.

The following form provides for a trust with a general power of appoint-
ment. The value of the corpus of this trust will qualify for the marital
deduction in the testator's gross estate, but its value will be includible in
the wife's gross estate upon her subsequent death.

WILLS—VISUALIZING TAX RESULTS

FORM

TRUST WITH POWER OF APPOINTMENT

MARITAL DEDUCTION ALLOWABLE

I give, devise and bequeath to my trustees hereinafter named, twenty-five (25%) percent of my residuary estate, to hold, invest and reinvest the same for the term of the natural life of my wife, __________ , to collect the rents, dividends and income therefrom and, after all proper deductions, pay over the net income to my said wife, __________ , in equal quarter-annual installments. Upon the death of my said wife, my trustees shall pay over the then corpus of this trust, to such person or persons, including her estate, in such shares, and in such manner as my wife, __________ , may by her last will and testament appoint, and in default of such appointment or insofar as she shall not effectually appoint all of such corpus, then to such of my children, __________ , and __________ , as shall survive me, and the issue me surviving of any of my said children who may predecease me, per stirpes. I hereby give and grant to my wife, __________ , the power exercisable by her in her last will and testament, to appoint the corpus of this trust fund to such person or persons, including her estate, in such shares and in such manner as she may wish.

APPORTIONMENT OF TAXES

The drafting of wills involves an important tax question in which the Commissioner is not interested. The Commissioner’s prime concern is in determining the amount of the estate tax and securing its payment. The Commissioner takes up the question of the amount of the tax with the representatives of the estate. After the payment of the tax, the problem of its apportionment amongst the various beneficiaries must then be ironed out between the representatives of the estate and the various beneficiaries. Differences amongst the beneficiaries as to the respective amounts of the estate taxes for which they are liable are usually litigated in the local courts in an accounting proceeding involving the construction of the will. The clause providing for the payment of taxes is the one involved in such a proceeding. The large amount of cases which have arisen over the tax clause attests to the grief which has been caused by the careless drafting of such clauses.

It is apparent that it is not only important to estimate the amount of the estate, inheritance and succession taxes, but also to consider the question of which of the testator’s beneficiaries will bear the burden of the payment of such taxes. If the residuary beneficiaries are to bear the burden of such taxes, care should be exercised in determining the probable amount of such taxes and that the payment thereof will not result in the residuary legatees receiving a relatively smaller proportion of the estate than was intended by the testator.

The testator may by an appropriate provision in his will direct who shall pay these taxes. In the absence of any provision in the will, apportionment of taxes is governed by local law. Some states have enacted what
are commonly called apportionment statutes, and the validity of such statutes has been upheld. Pursuant to these statutes, unless the will otherwise provides, all estate, succession and inheritance taxes assessed with respect to any property included in the estate of the deceased are equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues.

The federal law provides for the apportionment of the federal estate tax in only two cases: (1) proceeds of insurance upon the life of decedent receivable by the beneficiary other than the executor and (2) the value of property included in the gross estate by reason of a power of appointment.

The federal law also permits a testator to direct which beneficiaries shall be chargeable with the payment of the federal estate tax.

The will should specifically provide which of the beneficiaries shall be chargeable with the payment of the taxes. For, not only may the applicable apportionment statutes be changed, but the testator may change his residence to another state which has a different or no apportionment statute.

If the will provides that the residuary estate shall bear the burden of all taxes imposed by reason of the property passing pursuant to the will, then the beneficiaries of property not passing under the will, but nevertheless includible in the decedent's gross estate (viz., life insurance, gifts made in contemplation of death, etc.) will not be covered by said provision, and may have to bear their pro-rata share of the taxes pursuant to applicable law.

The following two forms provide for the payment of all taxes with respect to any property includible in the decedent's gross estate for tax purposes. The first form provides for payment of such taxes by the residuary legatees and the second for apportionment amongst all beneficiaries:

FORMS

**Taxes Payable Out of Residuary Estate**

I direct that the amount of all estate, inheritance, succession, legacy and transfer taxes imposed by the laws of the United States or any state or country, upon or with respect to any property required to be included in my gross estate, under the provisions of any such law shall be paid out of or charged against my residuary estate by my executors, hereinafter named, as a part of the expenses of administering my estate.

**Taxes Apportioned Amongst All Beneficiaries**

I direct that the amount of all estate, inheritance, succession, legacy and transfer taxes imposed by the laws of the United States or any state or country, upon or with respect to any property required to be included in my gross estate under the provisions of any such law shall be equitably prorated among the persons interested in my

18. Int. Rev. Code § 826(c) and (d).
estate to whom such property was, is or may be transferred or to whom any benefit accrues. Such proration shall be made in the proportion that the value of the property, interest, or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate.

**Bequest Payable in Installments**

The testator may desire to bequeath to a beneficiary an annuity or a series of payments extending over a number of years. If this is done, income tax implications become involved. As the fastidious testator may also want to know what such income tax problems may be, it is well to consider the subject. The payments may be made from the income or the corpus of the estate or testamentary trust, or from both income and corpus. The question arises as to who shall bear the burden of the income tax. Gifts, bequests, devises and inheritances are not subject to income tax. However, if the payments are to be made at intervals and are paid out of income of the property they are taxable income to the recipient.19

If the will provides that the income is to be distributed to the beneficiaries, then such income is taxable to the beneficiaries.20 If the fiduciary has the discretion to either distribute the income or accumulate it, then if it is distributed it is taxable to the beneficiary, but if it is not distributed it is taxable to the estate or trust.21 If pursuant to the terms of the will the payments can be made out of the corpus, then to the extent that there is distributable income out of which such payments could be made, it is deemed to be made out of the distributable income and to said extent any payments made are taxable to the beneficiary.22

Ordinarily, payments to be made at intervals are taxable to the beneficiary. However, the rules offer some latitude in the drafting of such a provision. If the beneficiary of such payments may be in receipt of other substantial income, then it may be advisable to give the fiduciary the discretion to either distribute the income or accumulate it. Such a provision would in effect enable the fiduciary to determine whether the beneficiary on the one hand, or the estate or trust on the other hand, should bear the burden of the income tax.

The following form, giving the trustees the power to pay over or accumulate the net income, enables the trustees to determine the proportion of the net income which will be taxable to the trust and beneficiary, respectively:

**FORM**

**POWER TO PAY OR ACCUMULATE INCOME**

So long as my son, _______ ______, shall be under the age of

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21. Id. at § 162(c).
22. Id. at § 162(d)(1); U.S. Treas. Reg. 111, § 29.162-2.
twenty years, my trustees hereinafter named may in their discretion pay over to him such part or all of said net income as in the sole discretion of my trustees shall be deemed advisable for the education, support and maintenance of my said son. Any part of such net income not so distributed to my said son as aforesaid shall be accumulated and added at the end of each year to the principal of this trust fund.

Charity

The embittered testator who desires to disinherit most of the members of his family may present a special problem. It may well appear that the elimination of those who are to be disinherited leave few or no beneficiaries to whom he can make bequests. Such a testator will probably also have a grievance against the Treasury Department because it is that department which has forced him to pay income taxes during most of his life. By leaving his estate to charitable, religious or educational institutions, his problem may be solved, for the estate obtains a deduction equal to the amount bequeathed to such institutions.23 Thus, if all of his estate is so disposed of, there will be no federal estate tax and he can be assured that neither his family nor the Treasury Department will share in his property.