Michigan Law Review

Volume 63 | Issue 5

1965

Widows' Allowances and Marital Deductions-The Date-of-Death Rule

Michigan Law Review

NOTES

Widows' Allowances and Marital Deductions—The Date-of-Death Rule

In every state there are statutes that provide for widows' allowances in an attempt to assure adequate support for widows during the time it takes to settle their husbands' estates.[1] A common feature in most of these state support statutes is that the local probate judge is permitted to order an amount which the court finds to be reasonably necessary for the maintenance of the widow during the period of settlement to be set aside for her from the rest of the estate.[2] The maximum amount permitted, the method of payment, the duration of the allowance, the extent to which the probate court may later modify the award, and the factors to be considered in the initial determination of the award differ greatly from state to state.[3] In addition, only a few statutes and a limited number of cases have dealt with the question of when, if ever, the widow may be con-

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1. See ALA. CODE tit. 7, §§ 661-705 (1960); ALASKA STAT. §§ 13.30.120-.140 (1962); ARIZ. REV. STAT. ANN. §§ 14-513, -515 to -516 (1956); ARK. STAT. ANN. § 62-2501 (Supp. 1963); CAL. PROB. CODE §§ 680-82; COLO. REV. STAT. ANN. § 152-12-16 (1953); CONN. GEN. STAT. ANN. § 45-250 (Supp. 1964); DEL. CODE ANN. tit. 12, § 2307 (1953), as amended, DEL. CODE ANN. § 2307 (Supp. 1962); FLA. STAT. § 733.20(1)(d) (1964); GA. CODE ANN. § 113-1002 (Supp. 1963); HAWAII REV. LAWS § 317-21 (1955); IDAHO CODE ANN. §§ 15-501, -503 to -505 (1947); ILL. REV. STAT. ch. 3, §§ 178, 180-82 (1963); IND. ANN. STAT. §§ 6-402 to -403 (1953), as amended, IND. ANN. STAT. § 6-402 (Supp. 1964); IOWA CODE §§ 633.374-.375 (1963); KAN. GEN. STAT. ANN. § 59-403 (1949); KY. REV. STAT. § 391.030 (1962); LA. CIV. CODE ANN. arts. 2382, 3252 (West 1952); LA. CODE CIV. PROC. ANN. art. 3321 (1961); ME. REV. STAT. ANN. ch. 156, §§ 17, 19 (1954); MD. ANN. CODE art. 93, §§ 336-37 (1957); MASS. ANN. LAWS ch. 196, § 2 (1955); MICH. COMP. LAWS § 702.68 (Supp. 1956); MINN. STAT. ANN. § 525.15 (Supp. 1964); MISS. CODE ANN. §§ 561, 564 (1956); MO. ANN. STAT. § 474.260 (Supp. 1964); MO. ANN. STAT. § 474.300 (1956); MONT. REV. CODES ANN. §§ 91-2404 to -2405 (1964); NEB. REV. STAT. § 30-103 (1956); NEV. REV. STAT. §§ 146.010, 146.030-.040 (1963); N.H. REV. STAT. ANN. §§ 560:1-:2 (1955); N.J. STAT. ANN. §§ 3A:8-6 to -7 (1953); N.M. STAT. ANN. § 31-4-1 (1953); N.Y. SURR. CT. ACT § 200; N.C. GEN. STAT. §§ 30-15 to -31 (1950), as amended, N.C. GEN. STAT. §§ 30-15 to -30 (Supp. 1963); N.D. CENT. CODE § 30-16-10 (1960); OHIO REV. CODE ANN. §§ 2117.20-.22 (Page 1954); OKLA. STAT. tit. 58, §§ 311, 314 (1961); ORE. REV. STAT. §§ 116.010-.015 (1964); PA. STAT. ANN. tit. 20, §§ 320.211-.215 (1950), as amended, PA. STAT. ANN. tit. 20, § 320.211 (Supp. 1963); R.I. GEN. LAWS ANN. § 33-10-3 (Supp. 1964); S.C. CODE ANN. § 34-11 (1962); S.D. CODE §§ 35.1304, 35.1306 (Supp. 1960); TENN. CODE ANN. §§ 30-801 to -807 (1955), as amended, TENN. CODE ANN. §§ 30-804 to -807 (Supp. 1964); TEX. PROB. CODE ANN. §§ 286-87 (1956); UTAH CODE ANN. § 75-8-1 (1953); VT. STAT. ANN. tit. 14, § 404 (Supp. 1963); VA. CODE ANN. §§ 64-120 to -121 (1950), as amended, VA. CODE ANN. § 64-120 (Supp. 1964); WASH. REV. CODE § 11.52.040 (1956); W. VA. CODE ANN. § 4136 (1961); WIS. STAT. ANN. § 313.15(2) (1958); WYO. STAT. ANN. §§ 2-210 to -211 (1957).

2. See, *e.g.*, CAL. PROB. CODE §§ 680-82; MICH. COMP. LAWS § 702.68 (Supp. 1956); N.Y. SURR. CT. ACT § 200.

3. See statutes cited note 1 *supra*. Cases illustrating the factors considered by probate courts in determining the amount of an award are collected in Annot., 90 A.L.R.2d 687 (1963).

sidered as having a vested and indefeasible interest in the support allowance.[4]

The deductibility of these allowances as a marital deduction on the decedent's federal estate tax return has been the subject of much controversy in recent years. According to section 2056 of the Internal Revenue Code, the value of any interest in property which passes from the decedent to the surviving spouse may be deducted as a marital deduction from the gross estate.[5] However, deductibility is limited in two ways: Marital deductions may not exceed fifty per cent of the value of the decedent's adjusted gross estate,[6] and under the "terminable interest rule" deductions are not permitted for any interest passing to the surviving spouse which will fail or terminate upon the happening, or failure to happen, of any event or contingency.[7] Since 1950, the Commissioner of Internal Revenue

4. See, *e.g.*, ALA. CODE tit. 7, § 697 (1960); IOWA CODE § 633.374 (1963); MINN. STAT. ANN. § 525.15 (Supp. 1964); VA. CODE ANN. § 64-121 (Supp. 1964). See cases collected in 4 MERTENS, FEDERAL GIFT & ESTATE TAXATION § 29.27 (Supp. 1964); Annot., 144 A.L.R. 270 (1943).

In several states where the statute uses words like "shall be set aside" or "is entitled to" to describe the widow's interest, or where a statutory minimum is provided, the courts have held that the surviving spouse has a vested interest in an allowance at the date of decedent's death. See, *e.g.*, In the Matter of Estate of Dillman, 8 Ill. App. 2d 239, 131 N.E.2d 634 (1956) (court upheld probate court's grant of $1000, the statutory minimum, to the estate of a husband who had died only a few hours after his wife); *In re* Croke's Estate, 155 Ohio St. 434, 99 N.E.2d 843 (1951) (court held that widow's estate was entitled to a full year's allowance under Ohio statute, even though she had lived only three months after decedent's death. See Note, 29 CHI.-KENT L. REV. 270 (1951), which analyzes the possible interpretations of the Illinois statute. Although no court has expressly ruled on the nature of the allowance in Michigan in the situation where the widow died soon after the death of her husband, the court in Estate of Reynolds v. United States, 189 F. Supp. 548 (E.D. Mich. 1960), held that the widow has a vested right to an allowance for one year. This holding was criticized in Allan, *The Michigan Family Allowance—Some Pertinent Questions*, 2 MICHIGAN PROBATE GUIDE FOR THE GENERAL PRACTITIONER § 3.100 (1964).

5. INT. REV. CODE OF 1954, § 2056(a). See generally LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES §§ 17.1-.23 (2d ed. 1962); 2 BEVERIDGE, FEDERAL ESTATE TAXATION §§ 14.01-.10 (1956); Polasky, *Estate Tax Marital Deduction in Estate Planning*, Tax Counselor's Q., June 1959, p. 1.

6. INT. REV. CODE OF 1954, § 2056(c).

In community property states, generally the husband and wife each own one-half of the community property. At death, therefore, only that party's half interest is considered part of his estate. By allowing a deduction of up to fifty per cent of the adjusted gross estate for any interest passing to the surviving spouse and by restricting the use of this deduction in community property states, the marital deduction permits the taxpayer in a common-law state to reduce his taxable estate to the approximate level it would have been had he lived in a community property state. See INT. REV. CODE OF 1954, § 2056(c)(2)(B)-(C).

Varying views have been expressed on the feasibility and desirability of the intended equalization. See, *e.g.*, United States v. Stapf, 375 U.S. 118, 128 (1963); S. REP. No. 1013, 80th Cong., 2d Sess., pt. 1, at 28 (1948); H.R. REP. No. 1274, 80th Cong., 2d Sess. 75 (1948); Lowe, *Marital Deduction—Terminable Interests—Missouri Law*, 29 MO. L. REV. 13 (1964); Polasky, *supra* note 5, at 3.

7. INT. REV. CODE OF 1954, § 2056(b):

"(1) GENERAL RULE.—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an has regularly disallowed deductions for widows' allowances, claiming they are terminable interests. The courts, in reviewing the Commissioner's rulings, have consequently been faced with the problem of ascertaining the proper time at which the terminability of the widow's allowance should be measured. Conflicting solutions to this problem have produced the incongruous result of allowances being declared deductible in some cases but not in others, even when similar state statutes are involved.[8]

Three different approaches—time-of-payment, date-of-decree, and date-of-death—have been utilized by the courts to determine the time at which a widow's award must be vested and indefeasible in order to avoid the stricture of the terminable interest rule. The one used least by the courts, although it would almost always result in the deductibility of the allowance, is the time-of-payment approach.[9] Under this theory, examination of terminability does not occur until the widow actually receives each payment. Advocates of this approach argue that the interest cannot be categorized prior to the time of payment because no interest passes to the widow prior to that time.[10] This argument, however, is difficult to main-

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interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

"(A) 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

"(B) 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; and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B))—

"(C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust."

See generally 2 BEVERIDGE, *op. cit. supra* note 5, § 14.02; LOWNDES & KRAMER, *op. cit. supra* note 5, §§ 17.9-.23.

The essential purpose of the terminable interest rule is to assure that the value of the property interest which passes to the surviving spouse, for which a deduction is claimed, will be included in the estate of that survivor. See Proctor D. Rensenhouse, 31 T.C. 818, 828 (1959) (concurring, in part, and dissenting, in part, opinion); S. REP. No. 1013, *supra* note 6, at 28; Bush, *Widow's Exemption or Allowance and the Marital Deduction*, N.Y.U. 22D INST. ON FED. TAX. 1131, 1135 (1964); Luxemburger & Durrett, *How To Use Widows' Statutory Awards To Recover "Overlooked" Marital Deduction*, 20 J. TAXATION 34, 35-36 (1964).

8. *Compare* Estate of Cunha v. Commissioner, 279 F.2d 292 (9th Cir. 1960), *cert. denied*, 364 U.S. 942 (1961), *with* King v. Wiseman, 147 F. Supp. 156 (W.D. Okla. 1956). See also Proctor D. Rensenhouse, *supra* note 7, at 825-26.

9. Some lower federal courts have adopted this approach. See, *e.g.*, Shafer v. United States, 60-1 U.S. Tax Cas. ¶ 11949 (S.D. Iowa 1960), *rev'd per curiam*, 293 F.2d 629 (8th Cir. 1961); Quivey v. United States, 176 F. Supp. 433 (D. Neb. 1959), *rev'd*, 292 F.2d 252 (8th Cir. 1961). An examination at this time would always reveal the interest to be then nonterminable and vested unless it were subject to an unusual condition subsequent.

10. See, *e.g.*, Shafer v. United States, *supra* note 9; Quivey v. United States, *supra* note 9, at 439; Proctor D. Rensenhouse, 31 T.C. 818, 828 (1959) (concurring, in part, and dissenting, in part, opinion).

tain. It is more accurate to recognize that the widow receives her interest in an allowance from the statute at the time of her husband's death, or at least from the probate court when it determines the size of her allowance, rather than later when her interest is satisfied by actual payment.

A second approach, one which has attracted considerable judicial support, is to determine terminability. at the time of the probate court decree.[11] Use of the date-of-decree approach would allow deductions in those states where the support award is vested and indefeasible once ordered, even though it is contingent prior to the order. Unlike the date-of-death rule, this approach would permit deductions for allowances in states which make the widow's award contingent upon her filing an application for it, and in those states which terminate the widow's rights if she dies or remarries it would permit deductions for payments decreed retroactively for the widow's support between her husband's death and the allowance decree. However, as with the time-of-payment approach, characterization of the interest only at the date of the court order ignores the fact that the widow had an interest prior to the date of the decree and it merely applying to the court to have the amount of that interest ascertained. In addition, the date-of-decree approach is unfair in that the size of the deduction may be dependent upon when the widow elects to apply for the award.[12] For example, in a state in which the widow must survive in order to retain her interest, a widow who requires funds for sustenance and must apply for the award immediately after the decedent's death will not get a deduction. On the other hand, a widow who can afford to wait and apply later will be permitted to take a deduction for retroactive payments decreed for the period between her husband's death and the decree.

The third approach, which characterizes the interest as of the date of the decedent's death, was recently adopted by the United States Supreme Court in *Jackson v. United States*.[13] The *Jackson* case dealt with the deductibility of a widow's allowance awarded by a California probate court fourteen months after the death of petitioner's husband. Petitioner urged the Court to adopt the date-of-decree approach, which would have allowed a deduction for all

11. See, *e.g.*, United States v. First Nat'l Bank & Trust Co., 297 F.2d 312 (5th Cir. 1961); Molner v. United States, 175 F. Supp. 271 (N.D. Ill. 1959); Michael G. Rudnick, 36 T.C. 1021 (1961); Margaret R. Gale, 35 T.C. 215 (1960).

12. See Note, *Deductibility of the Widow's Allowance Under the Marital Deduction*, 36 N.Y.U.L. REV. 1188, 1198 (1961).

13. 376 U.S. 503 (1964). Mr. Justice Douglas dissented without opinion. The date of death approach was also used in Estate of Darby v. Wiseman, 323 F.2d 792 (10th Cir. 1963); United States v. Quivey, 292 F.2d 252 (8th Cir. 1961); Estate of Cunha v. Commissioner, 279 F.2d 292 (9th Cir. 1960), *cert. denied*, 364 U.S. 942 (1961); United States Nat'l Bank v. United States, 188 F. Supp. 332 (D. Ore. 1960).

payments decreed for the fourteen-month period between the husband's death and the decree. Insisting that the date-of-death approach should be adopted, the Government relied on California decisions holding that widows' allowances abate upon the death or remarriage of the widow[14] and argued that even though the widow in *Jackson* had survived unmarried to the date of the decree, as of the date of death there was a possibility of her death or remarriage. Since the widow's right to payments would have been defeated had this possibility occurred, the Government concluded that her interest was terminable.[15]

In support of its adoption of the date-of-death approach, the Court placed heavy emphasis on the Senate Committee report accompanying the Revenue Act of 1948, which expressly states that in determining whether an interest in property is terminable, the situation must be viewed as of the date of the decedent's death.[16] The Court also relied upon analogies to cases that have denied marital deductions for interests which were conditioned on the widow's surviving the date of settlement[17] and for interests which were limited in the case of her subsequent incapacity.[18] In addition, implicit in the Court's decision is the recognition that some interest in the widow's allowance passes to the widow at the time of her husband's death. Since the critical factor in applying the terminable interest rule is the possibility of failure of the interest rather than actual failure,[19] this interest should be classified when it passes and the date-of-death rule should be applied.

Under present law, the *Jackson* case was correctly decided. However, its adoption of the date-of-death approach will eliminate almost all deductions for widows' allowances.[20] In nearly every state these allowances, at the time of the husband's death, are subject to a number of contingencies, each of which may render the interest terminable. For example, a number of statutes provide for failure of the widow's interest upon her death or remarriage, and, in many states, the widow must specifically apply for the award and her failure to do so defeats it.[21] Only two states presently provide for

14. See, *e.g.*, Estate of Blair, 42 Cal. 2d 728, 269 P.2d 612 (1954); In the Matter of Estate of Hamilton, 66 Cal. 576, 6 Pac. 493 (1885).

15. Brief for Respondent, pp. 16-17, Jackson v. United States, 376 U.S. 503 (1964).

16. Jackson v. United States, 376 U.S. 503, 508 (1964); S. REP. No. 1013, 80th Cong., 2d Sess., pt. 2, at 10 (1948).

17. See, *e.g.*, Bookwalter v. Lamar, 323 F.2d 664 (8th Cir. 1963); United States v. Mappes, 318 F.2d 508 (10th Cir. 1963).

18. See, *e.g.*, Starrett v. Commissioner, 223 F.2d 163 (1st Cir. 1955).

19. See statute cited note 7 *supra*. See, *e.g.*, Estate of Darby v. Wiseman, 323 F.2d 792 (10th Cir. 1963); Kasper v. Kellar, 217 F.2d 744, 746 (8th Cir. 1954); 4 MERTENS, *op. cit. supra* note 4, § 29.23, at 517 (1959).

20. See William A. Landers, 38 T.C. 828, 836 (1962).

21. In United States Nat'l Bank v. United States, 188 F. Supp. 332, 337-38 (D. Ore. 1960), the court held that the requirement that the widow apply for the allowance

specific amounts to be set aside unconditionally at death for the support of the widow.[22] In several other states there are statutory provisions for review of the awards at a later time by the probate judge.[23] Under these provisions, it would appear that there is no certainty, as of the date of death, that any appreciable allowance will actually be paid even in those states where the statutes or cases indicate that there is a vested right in the widow at death.[24] Seemingly, this uncertainty would indicate terminability. Even in states where there is a statutory minimum award, the provision for review would seem to preclude a deduction of more than this minimum, if the situation is viewed at the date of death.[25] In most of the remaining states the probate judge has some discretion in determining amounts which are reasonably necessary for the maintenance of the surviving spouse. As of the date of death, therefore, the widow's exact interest is unknown and terminable.

In order to make widows' allowances deductible, state statutes could be amended so that the awards would vest absolutely on the date of death.[26] However, by so doing, many state legislatures would be destroying the flexibility which presently permits a probate court to mold its decree to meet the changing needs of the widow. Therefore, if deductibility is to be restored, the Internal Revenue Code rather than the state support statutes should be amended.

An examination of the history of the tax treatment of widows' allowances indicates a continuing congressional intent to permit

was one factor indicating terminability. However, such an argument was rejected by the court in Proctor D. Rensenhouse, 31 T.C. 818 (1959).

It has been contended that the date-of-death rule could eliminate deductions for other elective rights such as dower. See Bush, *supra* note 7, at 1146-47.

22. KAN. GEN. STAT. ANN. § 59-403 (1949); MD. ANN. CODE art. 93, §§ 336-37 (1957).

23. Some states allow either an increase or decrease in the award as the situation requires. See, *e.g.*, ILL. REV. STAT. ch. 3, § 180 (1963); OHIO REV. CODE ANN. § 2117.22 (Page 1954). Other states allow increases only. See, *e.g.*, ARIZ. REV. STAT. ANN. § 14-515 (1956); IOWA CODE § 633.375 (1963).

24. See note 4 *supra*. The court in *In re* Croke's Estate, 155 Ohio St. 434, 99 N.E.2d 843 (1951), although holding the widow's allowance to be vested at decedent's death, acknowledged that in a proper case the award could be decreased.

25. Statutes providing for minimum awards include ARK. STAT. ANN. § 62-2501 (Supp. 1963); GA. CODE ANN. § 113-1002 (Supp. 1963); ILL. REV. STAT. ch. 3, § 178 (1963).

In Molner v. United States, 175 F. Supp. 271 (N.D. Ill. 1959), the court ruled that the provision for review of the award did not affect the vested nature of a $25,000 allowance, although in Illinois the minimum award is $1000. However, the court's authority, Hodson v. Hodson, 277 Ill. 137, 115 N.E. 159 (1917), held only that the petition for reduction in that case was not filed within a reasonable time after the initial grant of the award. Thus, there is a possibility in Illinois that a large award may be decreased to the minimum upon timely application. This would seem to make the holding in *Molner* questionable.

26. The official comments accompanying IOWA CODE § 633.374 indicate that the insertion of the sentence "such allowance to the surviving spouse shall not abate upon . . . death or remarriage of such spouse" was made specifically to qualify the allowance for a marital deduction.

deductions for these awards. Section 812(b)(5) of the Internal Revenue Code of 1939 permitted widows' allowances to be deducted as an expense to the estate.[27] In 1948, while retaining section 812(b)(5), Congress added the marital deduction and terminable interest provision to the Code.[28] The Senate Report accompanying the Revenue Act of 1948 indicated that widows' allowances were not deductible under the marital deduction provision.[29] Since section 812(b)(5) was still in effect, it would appear that the Senate Report was aimed at preventing a double deduction. When section 812(b)(5) was repealed by the Revenue Act of 1950,[30] the congressional reports stated that widows' support allowances would henceforth be deductible under the recently enacted marital deduction section, subject to the "conditions and limitations" therein.[31] Subsequent attempts to provide more clearly for the deductibility of widows' allowances were defeated. In 1954, opponents of proposed changes persuaded their colleagues that these changes might have the undesirable effect of endangering rather than assuring the deductibility of the allowance.[32] Five years later another proposal was introduced, but after passage by the House it was never reported out of the Senate Committee on Finance.[33] The award of a widow's allowance is essentially beyond the control of the decedent. Because of this similarity to other estate expenses, Congress has consistently considered that some type of deduction should be allowed for estate assets expended in such a manner. However, since the decision in *Jackson*, it can no longer be said that widows' support allowances will be deductible without action on the part of Congress.

The proper guideline for a future amendment to the marital deduction section would appear to be that of the unsuccessful House bill of 1959.[34] Under its provisions any amounts paid to the

27. Int. Rev. Code of 1939, ch. 3, § 812(b)(5), 53 Stat. 123.

28. Int. Rev. Code of 1939, § 812(e) (3) (now INT. REV. CODE OF 1954, § 2056).

29. S. REP. No. 1013, 80th Cong., 2d Sess., pt. 2, at 3 (1948).

30. Revenue Act of 1950, ch. 994, § 502, 64 Stat. 962. The repeal was prompted by excessive deductions in states where liberal allowances were granted. See S. REP. No. 2375, 81st Cong., 2d Sess. 57-58 (1950).

31. See S. REP. No. 2375, 81st Cong., 2d Sess. 130 (1950); H.R. REP. No. 2319, 81st Cong., 2d Sess. 136 (1950).

Since the major cause for repeal of § 812 (b) (5) was the liberality of the allowances being granted, it would seem that coverage by the fifty per cent ceiling for marital deductions was the "condition and limitation" primarily intended.

32. See H.R. REP. No. 1337, 83d Cong., 2d Sess. 91-92, A319 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 125 (1954); H.R. REP. No. 2543, 83d Cong., 2d Sess. 75 (1954).

33. See H.R. 2573, 86th Cong., 1st Sess. (1959); H.R. REP. No. 818, 86th Cong., 1st Sess. 1-5 (1959). See note 34 *infra*.

34. H.R. 2573, 86th Cong., 1st Sess. (1959) (Proposed additions to this previously unsuccessful amendment proposal are included in brackets.):

Section 2056(b) of the Internal Revenue Code of 1954 (relating to limitation in the case of life estate or other terminable interest) is amended by adding at the end thereof the following new paragraph:

"(7) ALLOWANCE OR AWARD TO SURVIVING SPOUSE.—For purposes of this subsurviving spouse, or that spouse's estate, within fifteen months from the date of death would be exempt from the operation of the terminable interest rule. It would appear that this amendment could be strengthened by also exempting those awards which are indefeasibly vested in the widow within that time period. In this manner, those allowances which have been ordered and which are not subject to modification, but which have not been paid for some reason, will also be deductible.

Under an amendment of the type proposed, allowances would continue to be controlled by the fifty per cent limitation.[35] Thus, only amounts of awards which fill the gap between other qualified bequests to the widow and the fifty per cent ceiling would be deductible and the amount an estate could save in taxes through a generous court award would still be limited. In addition, a considerable degree of administrative convenience would be achieved by limiting the exempt awards to those paid or indefeasibly vested within fifteen months, the required date for filing the estate tax return.[36] With the fifteen-month limitation, a definite and readily ascertainable amount could be entered as a marital deduction for the widow's allowance, thus eliminating the necessity for amending the return. Since most awards are either paid or indefeasibly vested within fifteen months,[37] the time limit would not seriously curtail deductibility and would not unduly restrict the states' ability to retain flexible support statutes without denying a tax benefit to the estate. Furthermore, the proposal would, in some measure, equalize the deductibility of widows' allowances among the states

section, an allowance or award made after the decedent's death pursuant to local law for the support of the surviving spouse during the settlement of the decedent's estate, shall not be considered as an interest which will terminate or fail to the extent that the allowance or award is in fact paid to the surviving spouse, or to the estate of such spouse, [or to the extent to which a vested and indefeasible right to a specific amount has accrued to the surviving spouse,] within 15 months after the date of the decedent's death."

The underlying reasons for the proposed amendment are discussed in H.R. Rep. No. 818, 86th Cong., 1st Sess. 1-5 (1959).

A similar proposal made by the American Bar Association in 1959 inserted "reasonable" to modify "allowance or award," and it did not have any time limit. See American Bar Ass'n, Section of Taxation, Program and Committee Reports to be Presented at the Twentieth Annual Meeting 55-56, Aug. 1959. The use of reasonableness seems to conform to the unofficial criterion now being used by tax examiners in disallowing deductions. See Mahon, *The Widow's Allowance and the Federal Tax Laws*, 41 Taxes 692, 694-95 (1963). However, it would appear that the addition of a reasonableness requirement would create more problems than it would solve. Adequate protection against excessive awards is presently afforded by the fifty per cent limitation, and addition of the term reasonable would tend to encourage litigation in an attempt to determine its precise meaning.

For another proposed amendment, see H.R. 10591, 86th Cong., 2d Sess. § 60 (1960).

35. Int. Rev. Code of 1954, § 2056(c).

36. Int. Rev. Code of 1954, § 6075(a).

37. See H.R. Rep. No. 818, 86th Cong., 1st Sess. 2 (1959).

since exemption from the terminable interest rule would negate much of the impact of the diversities in the state laws on these deductions.

The *Jackson* decision should serve to alert Congress to the necessity for clarifying legislation in this area. Seemingly, an amendment of the type proposed would most effectively further the long-standing congressional policy of permitting deductions for widows' allowances, while permitting states to retain their present support standing congressional policy of permitting deductions for widows' needs of the surviving spouse.