1967


Douglas A. Kahn
University of Michigan Law School, dougkahn@umich.edu

Available at: https://repository.law.umich.edu/reviews/70

Follow this and additional works at: https://repository.law.umich.edu/reviews

Part of the Estates and Trusts Commons, and the Taxation-State and Local Commons

Recommended Citation

This Review is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Reviews by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
BOOK REVIEWS


Any evaluation of a book of this nature must be made in light of its purpose and its intended audience. The authors recognize that estate and tax planning is too broad a subject to be treated comprehensively in a single volume, and, consequently, they quite properly made no effort in that direction. Rather, their apparent purpose was to furnish the non-specialist with an annotated form book containing textual discussions of tax and estate planning problems, with particular emphasis on local Michigan law.

I. TEXTUAL MATERIAL

The value of the authors' textual material depends upon the use to which it is put. If a reader uses it only as a means of orienting himself so that he might better understand the purpose of the authors' forms, the text is a helpful aid. However, it is not likely to be helpful to a reader who is seeking instruction on specific problems that lurk in the estate and gift tax law. The difficulty with using the text for research or planning purposes is that it is written too concisely: in order to achieve brevity of presentation, the authors tend to state broad general principles rather than to provide an analysis of the problems involved or of the many exceptions to the general rules. There is a significant danger that the stating of a "black letter" principle, unadorned by a discussion of policy considerations or hypothetical illustrations, may convey to the reader an entirely different message from that which the authors intended. This danger is magnified where a substantive area is not fully treated at one place in the book, but rather is discussed partially in several different chapters. Since the cross-referencing and index do not always alert the reader to the fact that he should investigate further, there is a risk that he will discover only a fragment of a picture but believe it to be the entire work. For example, the book contains a six-page chapter on the federal estate tax, of which one brief paragraph is devoted to sections 2036 through 2038 of the Internal Revenue Code of 1954. As would be expected, that paragraph does not adequately explain those three sections, although they are probably the most difficult provisions to comprehend in the estate and gift tax field. Admittedly, additional discussion of those sections is set forth seven chapters later, at several widely separated places in the chapter on inter vivos trusts, and there are
pertinent references to them elsewhere in the book. Nonetheless, again the cross-references and index to the book do not readily "flag" these other areas, so that all or part of the additional discussion of those sections may well be overlooked by the reader. The textual material thus serves only to sketch the substantive law and to alert the practitioner to troublesome areas. Of course, reasonable men can differ as to the extent of textual discussion that is desirable for a book of this kind and the value of brevity ought not to be under-estimated. Nevertheless, even allowing for the very limited purpose of the text, portions of it are so brief as to raise the question whether they ought either to have been greatly expanded or omitted entirely.

An important justification for the textual material is the usefulness to the practitioner of having a concise correlation of local Michigan law with federal tax problems. One example of this approach is the authors' chapter on the federal estate and gift tax consequences attending the joint ownership of property. Since the federal gift tax consequences of creating or terminating joint ownership interests in property often turn on the rights of the joint owners under local law, the authors quite correctly discuss Michigan property law as well. However, several aspects of the Michigan property law of joint ownership that are highly significant in determining federal gift tax consequences are strangely omitted from the textual discussion. Before considering the Michigan law in question, it would be useful to review briefly the federal tax issues the resolutions of which are dependent upon Michigan law.

The authors note that the gift tax consequences of creating or terminating joint ownership of property may depend upon whether any co-owner, acting without the consent of the other co-owner(s), has the power to terminate the owners' survivorship rights. If not, the value of the property interest received by a co-owner either on creation or termination of the joint ownership is determined by an actuarial valuation of such co-owner's interest: that is, in valuing each owner's interest in the property, account must be taken of a co-owner's prospect of gaining the property interests of the other co-owners on their death and the said co-owner's risk of losing his property interest on his death, because of the provision for survivorship. If, on the other hand, a single co-owner, acting without the consent of the other owners, is able to terminate the survivorship

1. In the chapter on gifts and the gift tax there is a reference on the estate tax consequences of gifts to minors by a donor-custodian under a Uniform Gifts to Minors Act.

2. As used herein, the term "joint ownership" refers to a co-ownership of property where the interest of a co-owner passes upon his death to the surviving co-owner or co-owners by operation of law. The term does not, therefore, include tenancies in common where there are no rights of survivorship.
rights of the owners, no actuarial computation is required and the property value is allocated among the several co-owners according to their respective percentage interests therein.

The authors point out that a Michigan tenancy by the entirety cannot be severed by either party acting alone and that therefore actuarial computations may be required to determine the gift tax consequences where such tenancies are created or terminated. The authors do not however discuss the peculiar state of the law in Michigan concerning the power of one co-owner (other than a tenant by the entirety) of property, acting alone, to terminate the survivorship rights of the co-owners. Although generally a joint tenancy (in contrast to a tenancy by the entirety) may be terminated by any joint tenant irrespective of whether the other tenants consent, the Michigan Supreme Court has held that the survivorship rights of joint tenants cannot be terminated by any one joint tenant acting alone where the deed creating the joint ownership expressly provides for the right of survivorship or for an ultimate distribution to a survivor. Thus, provisions such as “joint tenants with right of survivorship, and not as tenants in common,”4 “joint tenants and not tenants in common, and to the survivor thereof,”5 “unto [A] and [B] or survivor,”6 or “to them and the survivor of them,”7 have been held to create rights of survivorship which cannot be terminated by one co-owner without the others’ consent. The rationale for so holding is that in such cases the co-owners actually have “joint life estates followed by a contingent remainder in fee to the survivor.” It would appear virtually certain that the federal estate and gift tax rules concerning joint tenancies apply to such so-called life estates with contingent remainders, since the federal laws are intended to operate on property which is co-owned by parties having rights of survivorship, regardless of the “tag” employed by local law in characterizing the parties’ interests. Stated differently, federal tax law depends upon the rights of parties under local state law but

3. The authors’ statement that Michigan spouses cannot hold personal property as tenants by the entirety presumably was written prior to the promulgation of the Michigan Supreme Court’s decision in DeYoung v. Mesler, 373 Mich. 499, 130 N.W.2d 38 (1964), which not only held that spouses could hold certain kinds of personal property by the entirety but actually made it difficult for spouses to avoid that form of ownership. The DeYoung case applied to property listed in Mich. Comp. Laws § 557.151 (1948), viz., bonds, certificates of stock mortgages, promissory notes, debentures, or other evidences of indebtedness payable to a husband and wife. For a pre-DeYoung discussion of whether Michigan spouses could hold personal property as tenants by the entirety, see Bienenfeld, Creditors v. Tenancies by the Entirety, 1 Wayne L. Rev. 105, 108-10 (1955).


the name given by the state to those rights is irrelevant. Consequently, where joint tenants hold Michigan property under a deed containing a provision for survivorship, it would appear that the value of each co-tenant's interest for gift tax purposes must be determined according to actuarial tables furnished by the Internal Revenue Service. The authors should have made some mention of this issue in their book, which, after all, is specifically aimed at Michigan practice.

Another interesting and related problem which the authors fail to discuss is the question of whether a husband is entitled to all of the income from property that he holds with his wife as tenants by the entirety or whether the income is to be divided between them. If the husband is entitled to all of the income, the valuation of the interests of the husband and wife for gift tax purposes must take into account this exceptional right of the husband and detriment of the wife. Section 8 of article XVI of the Michigan Constitution of 1908 (which is virtually identical to section 5 of article XVI of the Michigan Constitution of 1850) provides that:

The real and personal estate of every woman, acquired before marriage, and all property to which she may afterwards become entitled by gift, grant, inheritance or devise shall be and remain the estate and property of such woman, and shall not be liable for the debts, obligations or engagements of her husband, and may be devised or bequeathed by her as if she were unmarried.

Notwithstanding this constitutional provision and the provisions of the Married Women's Act, the Supreme Court of Michigan has uniformly held that a husband is entitled to all of the income from and the use of property held by him and his wife as tenants by the entirety. Although with one possible exception, all of the cases to date have dealt with a husband's right to the income from real property, the same rule presumably would apply to income from personalty held by the entirety under the rationale of DeYoung v. Mesler,

10. See Actuarial Values for Estate and Gift Tax (IRS Publication No. 11) ch. 6 & Table IX, reprinted in 1 CCH FED. ESTATE & GIFT TAX REP. ¶¶ 1209, 1209.35, 1209.85 (1966). For gift tax purposes, the actuarial value of the spouses’ property interests is irrelevant where the donated property is real estate and the amount of the gift is to be determined under INT. REV. CODE OF 1954, §§ 2515(a) or (b).
14. The possible exception is Dombrowski v. Gorecki, supra note 13, which involved, inter alia, the income from a grocery business conducted on realty held by the entirety.
15. 373 Mich. 499, 150 N.W.2d 58 (1964); see note 3 supra.
namely that a spouse's ownership of certain classes of personalty should not be treated any differently than their ownership of realty. Granting the husband such prerogatives over the income from personalty adds substantially to the significance of the rule since gifts of realty between spouses occur relatively infrequently due to the effect of section 2515 of the 1954 Internal Revenue Code.

The right of a husband to all of the income from property held by the entirety has significance for purposes of federal income as well as gift taxation. The income tax questions arise when the husband and wife file separate returns, since it is then necessary to determine whether all of the income should be taxed to the husband or divided between the spouses. In Commissioner v. Hart, the Sixth Circuit held that the income from Michigan property held by the entirety was to be taxed one-half to each spouse. The court's decision was grounded on its erroneous conclusion that, under Michigan law, the husband was not entitled to all of the income from the property, but rather that each spouse was entitled to one-half. The court stated that the Michigan Supreme Court decisions holding that the creditors of a husband could not garnish the income from property held by the entirety constituted a repudiation of the rule laid down in the earlier decision in Morrill v. Morrill that the husband had the right to all of the income. The court apparently overlooked the decision of the Michigan Supreme Court in Way v. Root, which, while holding that the income from property held by the entirety could not be reached by the husband's creditors, expressly noted that the husband was entitled to all of the income. Moreover, subsequent to Hart, the Michigan Supreme Court has adhered to its holding in Morrill. However, notwithstanding the patent error of the Hart decision, the weight of precedent is such that in subsequent tax cases, the holding of Hart became indisputable. Moreover, several attorneys who have been practicing in Michigan have indicated that the Internal Revenue Service has also accepted the Hart view and has applied the gift and income tax laws as if the income from Michigan property held by the entirety should be divided equally between the spouses.

Ironically, it is remotely possible that the Hart view has been correct since 1968. It has been suggested that the 1963 constitution of Michigan pre-empts the Morrill decision and gives a wife the right to one-half of the income from property held by the entirety. However, an examination of the 1965 constitution and the Official Record

16. 76 F.2d 804 (6th Cir. 1935).
of the Constitutional Convention gives little support to that view. Section 1 of article X of the 1963 constitution is very similar to the previously quoted section 8 of article XVI of the 1908 constitution, except for two sentences that were added in the 1963 provision. One, which is relevant to the issue at hand, reads: "The disabilities of coverture as to property are abolished." The impact (if any) of this constitutional provision on the husband's right to income depends upon whether his right is a product of the common-law view of marital unity, or whether it is merely an attribute of a tenancy by entirety, that is, when Michigan adopted the estate of a tenancy by the entirety, it adopted it with all of its common-law attributes, including the right of the husband to all of the income from the property. While the Morrill decision expressly left open that question, the Michigan Supreme Court apparently adopted the second rationale (that is, an attribute of the tenancy by entirety) in Way v. Root. Indeed, it is only if the husband's right is an attribute of the tenancy that it could have survived the 1850 constitutional provision and the adoption of the Married Women's Act. Consequently, it is doubtful that the denial of income to a wife constitutes a disability of coverture that was abolished by the 1963 constitution. Moreover, the Official Record of the Constitutional Convention strongly indicates that the delegates did not believe that the added sentence effected any change in existing law. However, the existing rule is an anachronism, and hopefully the legislature will specifically eliminate it.

II. Estate Planning Forms

The principal significance of the book under review lies in its forms rather than its textual material. The authors reproduce numerous tables, tax return forms, sample petitions, complaints, and other forms which are quite useful. They have provided a suggested form for obtaining information concerning a client's holdings and the size and nature of his probable estate, and another suggested

23. The delegates first struck the sentence, "The disabilities of coverture are abolished" from the proposed section of the constitution because they were uncertain of its meaning and fearful that it would change existing law. MICHIGAN CONSTITUTIONAL CONVENTION 1961-1962, OFFICIAL RECORD 3001-03. The sentence was revised to read in its present form (limited to property) and re-offered as an amendment and adopted. Id. at 3149-51. In support of that final amendment, one of the proponents for adopting the sentence, Mr. Everett, stated that the disabilities of coverture had been stuck down in modern times and that the proposed sentence enunciates as a principle that these common law disabilities may never again arise in the State of Michigan, and we are affording those who have some question about it the assurance that the legislature never can take this away. . . . [The legislature] would never have the nerve to take it away. But it doesn't change the fact that this is a historical declaration of women's freedoms. . . .

Id. at 3150.
form for illustrating the results of a hypothetical administration of the client's assets so that the problems under existing arrangements can be more easily located. These two forms are well-designed and should be of considerable assistance to the practitioner.

The heart of the book is the authors' forms for drafting wills and trusts. These forms are at least as good as those provided by the average form book. Of course, a draftsman should use form books to suggest points to be covered and language to be employed, but each draftsman must assume the responsibility for adapting that language to the peculiar needs of his client—a principle that is no less applicable to the authors' forms than to those of any other form book. Thus, if these forms are approached with the skepticism that is desirable in using all form books, they should be useful.

Several provisions in the authors' forms warrant discussion and should be examined with particular care. For example, the authors have provided a form24 for a funded revocable trust, the income from which is to be paid to the settlor during his life. However, the trust instrument does not make any provision for distributing corpus to the settlor should he have need thereof, although there is always the danger that a settlor could become incompetent and thereby lose his power to revoke the trust.25 In such event, the settlor's guardian would be powerless to revoke the trust and while a court could do so on petition,26 judicial revocation of an incompetent's revocable trust could be obtained only where it is shown that the trust funds are needed for the proper care and support of the settlor, and then only to the extent of that need.27 Consequently, unless the trustee is explicitly given discretion to distribute corpus to the settlor, the settlor's incompetency could make it difficult and expensive (or even impossible in some cases) to recapture the funds for the settlor's use. The significance of this defect in the authors' form is pointed up by the fact that a prime underlying purpose of a funded revocable trust (particularly where the settlor is elderly) is to provide for the continuous administration of the trust's assets and for the care of the settlor should he become incompetent, without undergoing the pain and publicity attending a suit to declare the settlor incompetent. This purpose might well be frustrated if the authors' form is employed.

At the settlor's death, the form in question (Form Section I) provides that the trust corpus of the revocable trust is to be divided

24. CHIRCO & WARD, MICHIGAN AND FEDERAL ESTATE AND TAX PLANNING FORMS Section I, at 177-88 (1965). Whenever a reference is made herein to a "Forms Section," it shall refer to the forms listed by that system in the book under review.
26. Ibid.
into two separate funds, each of which is in turn divided into two trusts. Looking at one of the two funds (the Beatrice I. Whitman Fund), one-half of it is to be placed in Trust A, and one-half in Trust B. Trust A grants the settlor’s daughter, Beatrice I. Whitman, a general power of appointment over the trust corpus, exercisable either during her life or by her will. There is no authorization for the trustee to distribute income or corpus to Beatrice unless and until she exercises her power. Also, no persons are named as alternative takers of the trust estate in the event that Beatrice fails to exercise her power. Should Beatrice become incompetent before all of the trust corpus has been withdrawn, there would be considerable difficulty in obtaining trust funds for her from Trust A, which funds may be needed where the assets of Trust B (which are available for her) have been exhausted. In addition, if Beatrice should die without exercising her power, it is unclear whether the trust corpus should be distributed as part of Beatrice’s estate or whether it should revert to the settlor’s estate.28 A reversion to the settlor’s estate would increase both probate and administrative expenses, which increase could easily be avoided by naming takers in default of the power.

A second form that warrants particular discussion is the authors’ method of distributing trust assets to the descendants of a testator (where the testator’s wife has predeceased him). In Form Section B, the authors provide that the trust estate shall be divided into equal shares: one for each living child of the testator and his wife, and one for the living issue per stirpes of any deceased child. Each share is to be distributed to the beneficiary thereof when he or she attains the age of twenty-one. The will further provides (Form Section B 3.4):

Should any child or issue die before becoming entitled to receive distribution of the entire trust set aside for him or her, such trust, or its undistributed remainder shall be held for and distributed to his or her then living issue, per stirpes, or should no such issue be then living, such trust shall go to augment equally the shares then held for the benefit of, and those previously distributed to, other children, excluding each child theretofore deceased leaving no issue living but including by right of representation the then living lawful issue of any deceased child.

This paragraph (or one substantially similar to it) appears in a number of the forms included in the book. While there is nothing technically wrong with this method of distribution if the testator wishes his property to be so divided, it is unlikely, as a practical matter, that many testators would desire this arrangement for the

disposition of the assets held on behalf of a surviving grandchild of the testator where the grandchild dies prior to his twenty-first birthday. By way of illustration, assume that John Testator died and was survived by his fifteen-year-old son, Paul, his twenty-five-year-old son, Frank, and by two grandchildren, Mary (age six) and Robert (age four), both of whom are children of the Testator's eldest son, Walter, who predeceased the Testator. Under the will, the trustee would distribute one-third of the trust estate to Frank, and would hold one-third in trust for Paul, one-sixth in trust for Mary, and one-sixth in trust for Robert. Assume further that Robert died two years after the Testator. In such a case, under the above-quoted provision, Robert's one-sixth share of the estate will be divided equally among Frank and the two trusts held for Mary and Paul respectively. It is likely that the testator would have preferred that on Robert's death, all of his one-sixth share be added to Mary's trust, but, under the quoted provision, her trust would receive only a one-eighteenth share. It could be contended that the paragraph as written should be construed so that, at Robert's death, his share is added to Mary's trust, but the language of the paragraph does not support that construction and it would require a liberal reading of the provision to achieve that result.

Finally, particular attention should be given to the authors' form for a marital deduction trust. One such form grants very broad administrative powers to the trustees and the existence of several of those powers could possibly disqualify the trust for the marital deduction allowance. For example, the trustees are authorized to retain in the trust non-income-producing property owned by the testator at his death; the trustees are given very broad powers of investment without restriction as to non-income-producing property; and the trustees are given very broad powers to determine which payments and receipts constitute income and which constitute principal and "their decision shall be conclusive and binding against all persons interested hereunder." Concededly, the granting of such powers may not disqualify the trust for the marital deduction, but the dollar value of the deduction is often

---

29. Forms Section D.
30. Forms Section G 1.1. The will containing the marital deduction trust adopts by reference the powers contained in Forms Sections G 1.1--10. See Forms Section D 10.1. This authority could run afoul of Treas. Reg. §§ 20.2056(b)-5(4) & (5) (1958).
31. Forms Section G 1.5. This authority also involves some danger of violating the requisites discussed in Treas. Reg. §§ 20.2056(b)-5(4) & (5) (1958), but the risk is less significant than that caused by the power given under Forms Section G 1.1.
32. Forms Section G 1.6. This provision may also violate Treas. Reg. § 20.2056(b)-5(4) (1958), unless local law will impose reasonable limitations on the trustees' exercise of this power; a recent Ohio case, Sherman v. Sherman, 5 Ohio St. 2d 27, 213 N.E.2d 360 (1966), illustrates the risk in relying on local law for that purpose. Cf. Treas. Reg. § 1.674(b)-1(b)(5)(i) (1956) for an indication of the risk in providing that a trustee's determination shall be conclusive.
of such magnitude that no risk, however small, should be deliber-
ately undertaken. The draftsman might consider restricting the
trustee powers for a marital trust more than those granted to other
trusts in the same will. In any event, it will often be desirable to
authorize the widow to compel the sale of any non-productive or
under-productive assets in the marital trust, so that the conditions
of Treasury Regulation sections 20.2056(b)-5(f)(4) and (5) (1958)
are satisfied in that regard. In order to forestall an attack against
the marital deduction trust because of the broad administrative
powers granted the trustees, the authors provided that the trustees
should have all the powers and discretions given under the will
"except those, the possession of which would deprive any estate of
said marital deduction under the tax laws, and the rulings and
regulations with respect thereto, in force at the time of the deter-
mination of said marital deduction."33 While there is no harm in
using that clause, it would appear that the Internal Revenue Service
regards such provisions as a nullity. In Revenue Ruling 65-144,4 the
Service ruled that a similar provision was ineffective for pur-
poses of determining whether powers otherwise granted to trustees
would disqualify gifts to the trust for the charitable deduction. That
does not mean that the suggested paragraph should not be used, for
it does provide additional support for qualification, and litigation
may someday prove the Service wrong.35 However, the paragraph
should be used (if at all) only as a backstop and every effort should
be made to avoid granting the trustees powers that might disqualify
the trust for the marital deduction.

In conclusion, the authors have provided a form book with an-
notations and textual discussion that should be of use to Michigan
practitioners. Omissions cannot be avoided in a book of this size
dealing with such a broad subject, and if each of one hundred at-
torneys were to decide what should be included and what omitted,
we undoubtedly would have one hundred different books. Conse-
quently, it is difficult to fault the authors for exercising their inde-
pendent judgments in that matter.

Douglas A. Kahn,
Assistant Professor of Law,
University of Michigan

33. Forms Section D 3.5. See also Forms Section H 2.6.
34. 1965-1 Con. Bull. 442.
35. Commissioner v. Procter, 142 F.2d 824 (4th Cir.), cert. denied, 323 U.S. 756 (1944),
which is cited in the abovementioned Ruling, is distinguishable, but does lend some
support to the Service's position.