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The Estate Tax Marital Deduction-Revenue Procedure 64-19

THE ESTATE TAX MARITAL DEDUCTION—REVENUE PROCEDURE 64-19

I. BACKGROUND

The federal estate tax marital deduction[1] was embodied in the Revenue Act of 1948, and was intended by Congress to equate common law states with community property states for federal estate tax purposes.[2] In community property states, the surviving spouse is the absolute owner of fifty per cent of her spouse's estate, subject only to payment of community debts and expenses. Section 2056(a) generally allows the estate tax marital deduction for the value of any interest which passes to or has passed to the decedent's surviving spouse, but only to the extent that such interest is included in the decedent's gross estate.

Other subsections of section 2056 limit and modify the deduction allowed by subsection (a). Section 2056(c) generally imposes a limitation of fifty per cent of the value of the adjusted gross estate on the maximum marital deduction allowable. This equates, at least mathematically, common law and community property states. To insure this equation, Congress developed the concept of a nondeductible terminable interest.[3] A terminable interest is an interest which will terminate or fail on a lapse of time or on the occurrence or the failure to occur of some contingency.[4] A terminable interest is nondeductible if another interest in the same property passes for less than an adequate and full consideration in money or money's worth from the decedent to some person other than the surviving spouse and by reason of such passing such other person may possess or enjoy the property after termination of the surviving spouse's interest.[5] The reason for this rule is to insure that the value of the property which was deductible would be included in the surviving spouse's gross estate, unless consumed or transferred, just as in community property states.

To escape the disallowance of a terminable interest, many marital bequests are aimed at the section 2056(b)(5) exception to the terminable

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† This essay was written by Charles A. Cohen, Symposium Editor of the Indiana Law Journal, and placed second in National competition in the Estate Planning Competition Essay Contest sponsored by the First National Bank of Chicago.

1. NOW INT. REV. CODE OF 1954, § 2056.
2. Pedrick, *The Revenue Act of 1948—Income, Estate and Gift Taxes—Divided They Fall*, 43 ILL. L. REV. 277 (1948).
3. INT. REV. CODE OF 1954, § 2056(b).
4. Treas. Reg. § 20.2056(b)-1(b) (1958).
5. INT. REV. CODE OF 1954, § 2056(b)(1).

interest rule. This subsection allows escape from the terminable interest rule where the surviving spouse is given a life income interest with a general power of appointment over the entire interest. However, the language which brought forth Revenue Procedure 64-19[6] is that which expressly prohibits a "power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse. . . ."[7]

Section 2056(e), in defining what shall be considered an interest in property passing from the decedent, lists seven specific examples and then provides:

> Except as provided in paragraph (5) or (6) of subsection (b), where at the time of the decedent's death it is not possible to ascertain the particular person or persons to whom an interest in property may pass from the decedent, such interest shall, for purposes of subparagraphs (A) and (B) of subsection (b)(1), be considered as passing from the decedent to *a person other than the surviving spouse.*[8] (Emphasis added.)

The principle stated here was recently affirmed by the Supreme Court in *Jackson v. United States*[9] where the Court stated that "Qualification for the marital deduction must be determined as of the time of death,"[10] so that the nature of the interest passing to the surviving spouse must be determined as of the date of the decedent's death. This principle, along with the language of section 2056(b)(5), brings us to the problems which led to the issuance of Revenue Procedure 64-19.

To be assured of the full marital deduction, a testator could leave all of his property outright to his surviving spouse. However, this could have adverse estate tax consequences for, although only half of the testator's property would be taxed at this time, all the transferred property remaining in the surviving spouse's estate upon her death would again be taxed, subject to the tax on prior transfers credit if the spouse died within ten years of the death of the testator.[11] To take full advantage of any available marital deduction and, at the same time, pass to the surviving spouse only the minimum amount of property necessary to obtain the deduction which would be included in her gross estate, "formula clauses" were devised.

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6. Rev. Proc. 64-19, 1964-1 CUM. BULL. 682 (hereinafter cited as Rev. Proc. 64-19).
7. INT. REV. CODE OF 1954, § 2056(b)(5).
8. INT. REV. CODE OF 1954, § 2056(e).
9. 376 U.S. 503 (1964).
10. *Id.* at 508.
11. INT. REV. CODE OF 1954, § 2013.

Formula clauses are of two basic types: the pecuniary bequest formula clause and the fractional share formula clause.[12] The pecuniary bequest clause provides for a dollar amount bequest which is carved out of the estate before disposition of the residue. Thus, since the dollar amount of the bequest to the surviving spouse is fixed, her proportion of the total assets of the estate would vary with the fluctuation in value of the estate assets during the administration of the estate. The fractional share bequest, on the other hand, measures the amount of the property transferred to the surviving spouse in terms of a fractional share of the estate. This bequest is generally expressed as "that fractional share of my residuary estate which, together with all other property qualifying for the federal estate tax marital deduction, is equal to one-half of my adjusted gross estate as determined for purposes of the federal estate tax. . . ."[13] Since the fraction remains constant as applied to the value of the residuary estate, the property transferred to the surviving spouse shares ratably in any fluctuations of the estate assets during the period of administration.

Regardless of the method of bequest chosen, if the will directed the executor to convert the assets to cash before payment to the surviving spouse or transfer to a trustee, this conversion would result in recognition of gains or losses by the estate for income tax purposes. Such gain or loss is measured by the difference between the fair market value of the property at the date of the decedent's death[14] and the amount realized.[15] For this reason and other reasons dictating against conversion of the assets, e.g., the assets are essential to the operation of a going business, pecuniary formulas allowed the executor to satisfy the bequest in kind as well as in cash. However, distribution in kind could still result in the estate recognizing gain or loss where the estate assets had fluctuated in value between the valuation date for federal estate tax purposes and the date of distribution.[16]

Since the bequest to the widow under the pecuniary bequest method establishes a specific legacy due her from the estate,[17] satisfaction of this debt by the estate distributing assets in kind with a basis to the estate lower than present fair market value will result in a taxable gain to the

12. CCH FED. EST. & GIFT TAX REP. ¶ 7179.

13. Polasky, *Marital Deduction Formula Clauses in Estate Planning-Estate and Income Tax Considerations,* 63 MICH. L. REV. 809, 814 (1965).

14. INT. REV. CODE OF 1954, § 1014(a).

15. INT. REV. CODE OF 1954, § 1001(b).

16. Rev. Rul. 56-270, 1956-1 CUM. BULL. 325.

17. Use of the fractional share method avoids this problem since an obligation of a specific dollar amount is not involved. Rev. Rul. 55-117, 1955-1 CUM. BULL. 233; Treas. Reg. § 1.1014-4(a)(3) (1957).

estate.[18] This could result in a deductible loss if the fair market value at the date of distribution is less than the basis of the assets to the estate.[19] The surviving spouse would then be deemed to take the property by purchase rather than by inheritance and her basis for the assets would be her cost, the fair market value of the property at the time of distribution.[20] To avoid imposition of this tax when the pecuniary bequest method is used, the will could provide that the assets distributed were to be valued at the values determined for federal estate tax purposes. Since the basis of the assets transferred would be equal to the bequest, the state would recognize neither gain nor loss.

It was to meet these problems whereby post-mortem estate planning, clearly inconsistent with the provisions of the marital deduction, could be engaged in by the executor through use of his discretionary powers,[21] that Revenue Procedure 64-19 was promulgated. Such a procedure was especially needed where the assets chosen to satisfy the bequest had depreciated in value since valuation for estate tax purposes, yet their basis was still equal to the amount of the bequest. It was in these instances that the interest of the surviving spouse in a common law state would not be preserved to the extent preserved in a community property state and the congressional ideal envisioned in section 2056 would not be met. Furthermore, assuming that the depreciated property is not consumed or transferred nor does it subsequently increase in value, the full fair market value of the property which escaped inclusion in the decedent's gross estate through the marital deduction will also escape inclusion in the surviving spouse's estate for that part of the depreciation (plus any further depreciation) which occurred during the administration of the decedent's estate. Thus the executor would, in substance, have a power of appointment over the marital bequest which would have the effect of making the value of the property disposed of by the bequest unascertainable in amount with a concomitant inability to determine to whom the property passed from the decedent. The result would be that the bequest would be disqualified for the marital deduction under section 2056(e).[22]

II. Scope of Revenue Procedure 64-19

Revenue Procedure 64-19 deals with a fairly narrow area within the marital deduction. It is applicable where the dispositive instrument

18. Rev. Rul. 56-270, 1956-1 Cum. Bull. 325; Rev. Rul. 60-87, 1960-1 Cum. Bull. 286.
19. Brinckerhoff v. Commissioner, 168 F.2d 436 (2d Cir. 1948).
20. Treas. Reg. § 1.1014-4(a)(3) (1957).
21. Cohen, *Treasury Views on Current Questions,* 104 Trusts & Estates 9 (1965).
22. Covey, *The Marital Deduction: Revenue Procedure 64-19 and Formula Provisions,* 36 N.Y.S.B.J. 317 (1964).

makes a pecuniary bequest which the executor or trustee is permitted or required to satisfy by a distribution in kind of assets which can be selected in his discretion and where, in determining the amount to be transferred, the assets distributed are to be valued at the value determined for federal estate tax purposes.[23] It makes no difference as to application of Revenue Procedure 64-19 whether the amount of the bequest or transfer is determined by a formula fixing the bequest by reference to the adjusted gross estate of the decedent as finally determind for federal estate tax purposes or in some other manner by which a fixed dollar amount distributable to the surviving spouse can be computed.[24] It should be noted that nonformula pecuniary bequests are covered by the Procedure as well as the formula pecuniary bequests, but the latter are more commonly found.[25]

If, in spite of the language of the pecuniary bequest clause, the fiduciary, in order to implement such bequest or transfer, is required by applicable state law or by the express or implied provisions of the dispositive instrument to distribute to the surviving spouse either—

> (1) assets, including cash, which have an aggregate fair market value at the date, or dates, of distribution amounting to no less than the amount of the pecuniary bequest or transfer as finally determined for federal estate tax purposes, or
> (2) assets, including cash, which are fairly representative of appreciation or depreciation in the value of all property available for distribution in satisfaction of the pecuniary bequest or transfer,

the marital deduction is determinable and may be allowed in the full amount of the pecuniary bequest or transfer passing to the surviving spouse.[26] If there is no state law or provision in the dispositive instrument which causes the fiduciary to satisfy the pecuniary bequest or transfer so as to meet the conditions of either (1) or (2), the interest in property passing from the decedent to his surviving spouse would not be ascertainable as of the date of death[27] if the property available for distribution included assets which might fluctuate in value.[28] Thus the marital deduction would be totally disallowed for this property.

Revenue Procedure 64-19 applies only to a pecuniary bequest to a

23. Rev. Proc. 64-19, §§ 1, 2.01.
24. Rev. Proc. 64-19, § 2.01.
25. Comment, 9 ST. LOUIS U.L.J. 517 (1965).
26. Rev. Proc. 64-19, § 2.02.
27. As required by Jackson v. United States, 373 U.S. 503, 508 (1964).
28. Rev. Proc. 64-19, § 2.03.

surviving spouse by will or by transfer in trust which may be satisfied by someone other than the surviving spouse selecting assets in kind at estate tax values. If the surviving spouse was given an amount equal to one-half of the adjusted gross estate and, whether or not she was the executrix under the will, she was given the right to select the assets to satisfy the bequest, the Procedure would be inapplicable for the surviving spouse has the absolute right to take the maximum one-half interest.[29] However, if she was a coexecutor, the bequest would not fall within section 2056(b)(5) since she could not exercise the power alone and in all events.[30] If she takes less than the one-half interest to which she is entitled, there is a gift from her to the other beneficiaries under the dispositive instrument.[31]

There are certain other instances in which the Procedure, by its own terms, is inapplicable:[32]

> (1) where the bequest or transfer in trust is of a fractional share of the estate and each beneficiary is to share proportionately in the appreciation or depreciation in value of the assets up to the date of distribution;
> (2) where the bequest or transfer is of specific assets;
> (3) where the bequest or transfer, whether in a stated amount or an amount computed by a formula,
> (a) must be satisfied by the fiduciary solely in cash, or
> (b) must be satisfied by the distribution of assets in kind and the fiduciary has no discretion in selecting the assets, or
> (c) must be satisfied by assets selected by the fiduciary to be distributed in kind but which must be valued at their respective values on the date of distribution.

However, escape under the above provisions of the Procedure is not without its difficulties. Method (1) above, calling for a fractional share bequest with proportionate sharing in appreciation or depreciation of estate assets, may often be difficult to administer and sometimes may call for complicated computations to be made at the time or times of distribution. Method (2), the bequest of specific assets, may be difficult to draft as it often is impossible to designate specific assets at the time of execution; also, this method may result in utilizing less than the full marital deduction or transfer of an amount greatly exceeding the allowable

29. Speech by Mitchell Rogovin, Chief Counsel, Internal Revenue Service, to Illinois Bar Association, April 23, 1965, in CCH FED. EST. & GIFT TAX REP. ¶ 8163.
30. *Ibid.*
31. *Ibid.;* Treas. Reg. § 25.2511-1(c) (1958).
32. Rev. Proc. 64-19, § 4.01.

deduction. Method (3)(a), satisfaction of the bequest solely in cash, may require the fiduciary to dispose of assets which could advantageously be retained. This could also result in the recognition of capital gain or require the forced sale of assets at a great sacrifice in value. Method (3)(b), where the fiduciary has no discretion in selecting assets to be distributed in kind, limits the fiduciary in carrying out the testator's intent and is difficult to administer due to a required matching of asset values to bequests. Method (3)(c), whereby the fiduciary can exercise discretion in selecting the assets for distribution though the values must be distribution date values, prevents the surviving spouse from sharing in the appreciation or depreciation of the assets subsequent to the testator's death. These are factors which should be taken into consideration when choosing a form of bequest or transfer which will escape application of the Procedure.

In situations where it is not clear under the dispositive instrument or state law that the exercise of discretion by the fiduciary would be limited so as to render the Procedure inapplicable,[33] the Procedure provides transitional protective measures for instruments executed before October 1, 1964. Of course, if the testator has not died, existing instruments could be changed by codicil or amendment to the instrument to conform to the requirements of the Procedure. The Internal Revenue Service will regard such powers as relating to the time the original instrument was executed as long as the bequest is not mentioned in or in any way affected by the codicil or amendment.[34] Drafters of instruments executed subsequent to the above date should be aware of the requirements of the Procedure and make provision to avoid its application. But in cases where the instrument was executed prior to this date and the testator has died, the Procedure permits the fiduciary and the surviving spouse to save a marital deduction otherwise lost by filing agreements with the Service. These agreements must provide that the estate assets available for distribution will be distributed so that the property the surviving spouse receives will be fairly representative of the net appreciation or depreciation in the value of the available property on the date of distribution.[35] The execution and performance of an agreement will not constitute a gift.[36] The Procedure presupposes that state law permits the fiduciary to enter into such a post-death agreement. The Procedure sets forth forms of agreement which will satisfy its provisions.[37] The fiduciary's agreement pro-

33. Rogovin, *supra* note 29.
34. *Ibid.*
35. Rev. Proc. 64-19, § 3.01.
36. *Ibid.*
37. Rev. Proc. 64-19, § 5.

vides, in substance, that he will make the distribution so that the marital deduction bequest or transfer will share ratably in the appreciation or depreciation of the estate assets to the date of distribution.[38] The surviving spouse, on the other hand, must only agree that if the "property accepted in full satisfaction of this bequest or transfer in trust is not fairly representative of my proportionate share of any net appreciation in the value . . . the difference in value will be treated as a transfer . . . by gift . . . and a Federal gift tax return . . . will be filed if required under the gift tax provisions of the Internal Revenue Code."[39] This latter agreement is consistent with other provisions of the Procedure whereby if the fiduciary violates the agreement and distributes assets to the surviving spouse of lesser value than the amount required, the surviving spouse is considered to have made a gift to the other beneficiaries in whose favor the violation occurs unless the surviving spouse objects when apprised of the situation and takes appropriate steps under state law to rectify it.[40]

Revenue Procedure 64-19 states that it does not relate to any federal income tax issues,[41] and the Service is not considering any modification or addition to the Procedure at this time to cover income tax consequences.[42] For example, by signing the agreements discussed above, the marital deduction clause of the dispositive instrument is treated as if it were a fractional share bequest and in such a bequest, unlike in a bequest of a specific amount, there is no debt in a specific amount owing from the estate to the beneficiary so there would be no gain or loss recognized by the estate in the distribution of assets which have fluctuated in value prior to distribution.[43] However, if the bequest is of a specific amount or of specific assets, the estate would recognize gain or loss on the distribution of assets where their value had fluctuated between the date of decedent's death and the date of distribution.[44]

III. Proposed Solutions to the Problems Raised by Revenue Procedure 64-19

As a starting point in proposing a solution to the problem raised by Revenue Procedure 64-19, it is necessary to capsulize the tax objectives of the testator. First, the testator desires to insure the maximum marital deduction for his own estate, so that he must devise an amount of property equivalent to one-half of his adjusted gross estate for federal estate

38. Rev. Proc. 64-19, § 5.02.
39. Rev. Proc. 64-19, § 5.01.
40. Rev. Proc. 64-19, § 3.02.
41. Rev. Proc. 64-19, § 4.02.
42. Rogovin, *supra* note 29.
43. *Ibid.*
44. Treas. Reg. § 1.1014-4(a)(3) (1957).

tax purposes to his surviving spouse. Secondly, where the surviving spouse is well-provided for either through her own property or via the marital bequest, the testator wants to avoid bequeathing her property valued in excess of an amount necessary to obtain the full marital deduction, i.e., overfunding her estate. Finally, the testator wants to avoid incurring any recognizable gain, even long-term capital gain, by his estate on the distribution of assets in satisfaction of the marital bequest.[45]

A question may be raised whether the fiduciary's duty of impartiality in his dealing with beneficiaries serves as a general protection to the surviving spouse in the allocation of appreciated and depreciated assets so as to cause conformity with Revenue Procedure 64-19. The relationship between an executor and the legatees, like that between a trustee and the beneficiaries of the trust, is a fiduciary relationship.[46] Where there is more than a single beneficiary or legatee, it is the duty of the fiduciary to deal impartially among the several beneficiaries.[47] It would appear that this duty would insure the surviving spouse of sharing in the appreciation or depreciation of the estate assets, but, in practice and usually in complying with the testator's intentions, the surviving spouse does not share proportionately in the situations encompassed by Revenue Procedure 64-19. The mere issuance of the Procedure implies that the Service feels that this duty is not being performed so as to prevent the evils at which the Procedure is aimed.

State law may have developed through case law so as to place duties on the fiduciary which would cause conformance with Revenue Procedure 64-19. New York, for instance, has definitive action by a state court,[48] a special ruling of the Service,[49] and state personal property law[50] on which to rely to avoid disallowance of the marital deduction under Revenue Procedure 64-19. In *Matter of Bush*,[51] one paragraph of decedent's will devised specific real estate to her executor-husband and a separate paragraph gave him an additional pecuniary amount which, in total, provided a maximum marital deduction. It was also provided for certain securities to be distributed to her surviving spouse in kind. The court held that the executor-husband in distributing stock to himself and to the trustee of a trust for decedent's son could not make selections favorable to himself and deliver to the trustee for decedent's son securities which had not increased in value in the same proportion as those received

45. Comment, 9 ST. LOUIS U.L.J. 517, 527 (1965).
46. 1 SCOTT, TRUSTS § 6 (2d ed. 1956).
47. *Id.* at § 183.
48. Matter of Bush, 2 A.D.2d 526, 156 N.Y.S.2d 897 (1956).
49. CCH FED. EST. & GIFT TAX REP. ¶ 8151.
50. N.Y. PERSONAL PROPERTY LAW § 17-f.
51. 2 A.D.2d 526, 156 N.Y.S.2d 897 (1956).

by the surviving spouse. The court held that the two distributees were to share proportionately in the appreciation and depreciation in the securities, if any. The special ruling mentioned above confirmed this case as causing conformity with Revenue Procedure 64-19, and this result was further reinforced by the personal property law mentioned which was effective July 2, 1965. At present, New York is the only state whose judicial law meets the requirements of the Procedure, at least as respects the ratable sharing in appreciation and depreciation of estate assets sanctioned by the Procedure.[52]

Another possible solution to preventing total disallowance of the marital deduction in these instances is the passage of conforming statutory law by the state legislature. At the onset it should be stated that a state legislature should be wary in enacting state statutes which prescribe rules of fiduciary administration solely to comply with federal tax procedures as expressed in administrative publications. Mississippi enacted a statute to comply with Revenue Procedure 64-19[53] which gave the fiduciary the option of satisfying the bequest by distributing assets having an aggregate fair market value on the dates of distribution not less than the amount of the pecuniary bequest or transfer in trust as determined for federal estate tax purposes, *or* assets fairly representative of appreciation or depreciation in the value of all property available for distribution. It should be noted that this statute is nearly an exact repetition of the qualifying language of the Procedure, except in one respect. The fiduciary is not limited to one of the two alternatives provided, but rather has the discretion to use either. Thus it would be impossible to determine, as of the date of decedent's death, that one alternative rather than the other is applicable,[54] and the Commissioner has stated that whenever a Mississippi fiduciary has to refer to state law to define the extent of his powers, the pecuniary bequest does not qualify for the marital deduction.[55] If the Mississippi statute was found to cause conformance to the requirements of the Procedure, the fiduciary would have substantially the same opportunity for post-mortem estate planning as in those situations at which the Procedure is aimed. If the estate assets increased in value, the fiduciary could elect to satisfy the bequest with assets with a distribution value no less than the amount of the bequest as determined for estate tax purposes; if the estate assets decreased in value, the fidu-

52. Covey, *The Marital Deduction: Revenue Procedure 64-19 and Formula Provisions,* 36 N.Y.S.B.J. 317, 322 (1964).

53. Covey, *Statutory Panacea for 64-19,* 104 TRUSTS & ESTATES 69 (1965), as reported therein.

54. Rev. Proc. 64-19, § 2.03.

55. Cohen, *Treasury Views on Current Questions,* 104 TRUSTS & ESTATES 9, 10 (1965).

ciary could elect the alternative whereby the marital bequest shared ratably in appreciation or depreciation since the date of death.

If the state legislature chooses to meet the problems of Revenue Procedure 64-19 by statute, it could avoid the difficulty encountered by Mississippi by enacting the first alternative provided in the Procedure. A statute whereby the fiduciary was required to distribute assets having a distribution date value no less than the amount of the marital bequest as determined for estate purposes[56] (hereinafter referred to as alternative 1) would establish a "floor" for the legacy, but no "ceiling." Such a statute would insure that the assets received by the surviving spouse would be at least equal to the dollar amount of the marital deduction. However, since there is no "ceiling" on the amount distributed to the surviving spouse under this alternative, appreciation of all or a large portion of the assets could result in overfunding her estate. This could violate the testator's secondary objective, dependent on the exercise of the fiduciary's discretion in favor of the surviving spouse subject only to the "floor" limitation. Such overfunding could be avoided by converting a portion of the estate assets to cash in order that only the minimal amount necessary to satisfy the bequest, i.e., the "floor," would be distributed, but this would result in the estate recognizing gain on the conversion, a violation of the testator's third objective. If, on the other hand, all or a large portion of the estate assets had depreciated in value, the surviving spouse would receive the minimum amount, i.e., the "floor," but the residuary legatees would receive an amount considerably less than they had anticipated based on estate tax values. If the testator had intended to provide adequately for his surviving spouse through the marital bequest, the fact that the residuary legatees bear the total risk of depreciation in the value of estate assets is of no concern. However, where the surviving spouse has sufficient property of her own or the marital bequest is so substantial that depreciation in asset values will not prevent her being adequately provided for, the testator's intention to favor the residuary legatees is thwarted. In relation to the total assets available for distribution, the surviving spouse's estate has been, in effect, overfunded since she receives a greater proportion of the estate assets than was intended by the testator.

A state legislature could also meet the requirements of Revenue Procedure 64-19 by enacting the second alternative provided by the Procedure. This would require the fiduciary to apportion appreciation and depreciation in the value of estate assets ratably in satisfying the marital

56. Rev. Proc. 64-19, § 2.02.

bequest[57] (hereinafter referred to as alternative 2). Adoption of this alternative would prevent recognition of gain or loss on distribution since there is no fixed dollar amount established which is being satisfied by the distribution of appreciated or depreciated assets.[58] The effect of this alternative is to convert the legacy into a fractional share bequest, except this alternative makes no requirement that the marital share receive a ratable portion of the appreciation or depreciation of *each asset,* as may be the case under a straight fractional share formula clause.[59] This alternative would serve to defeat the testator's purposes in providing the pecuniary bequest for the marital bequest would share in appreciation and depreciation of estate assets with possible overfunding of the surviving spouse's estate if the assets appreciate in value or underfunding if they depreciate. Presumably, if the testator had intended such a result, he would have employed a fractional share formula clause in the dispositive instrument.

Aside from state law, it is always possible for the draftsman to draft the dispositive instrument in such a way that the fiduciary is required to act in conformance with the alternatives provided by the Procedure. Thus either alternative 1 or alternative 2 could be required by the "express or implied provisions of the instrument,"[60] to the exclusion of the alternative not provided for, but the election of either by the fiduciary should not be provided or the consequences will be the same as those under the ill-fated Mississippi statute.[61] Another escape from the rigors of the Procedure is accorded by drafting the marital bequest in terms outside the scope of the Procedure,[62] but this would not have accomplished the desired leverage even before issuance of the Procedure.

IV. Conclusion

The legitimacy of Revenue Procedure 64-19, as to its statutory basis, has not been subjected to serious attack. The Commissioner, in commenting on the situations within the coverage of the Procedure and the statutory basis for issuance of the Procedure, stated:[63]

> This type of post-mortem planning is clearly inconsistent with the provisions of the marital deduction, which prohibit the ex-

57. *Ibid.*
58. *But see* Brinckerhoff v. Commissioner, 168 F.2d 436 (2d Cir. 1948); Polasky, *Marital Deduction Formula Clauses in Estate Planning—Estate and Income Tax Considerations,* 63 Mich. L. Rev. 809, 869-70 (1965).
59. Covey, *Statutory Panacea for 64-19,* 104 Trusts & Estates 69 (1965).
60. Rev. Proc. 64-19, § 2.02.
61. See text accompanying notes 53-55 *supra.*
62. Rev. Proc. 64-19, § 4.01.
63. Cohen, *Treasury Views on Current Questions,* 104 Trusts & Estates 9 (1965).

ecutor from having the power to appoint any part of the marital deduction bequest to any person other than the surviving spouse,[64] and which further prohibit the marital deduction to a decedent's estate if it is not possible to ascertain the particular person to whom an interest in property may pass from the decedent on the date of his death.[65]

It appears that the uproar among practitioners upon issuance of the Procedure is not precipitated by its lack of statutory basis, though statutory amendment may be in order to clarify the situation, but rather by its removal of the opportunity to subvert the basic principle underlying the marital deduction—the theoretical equation of surviving spouses in common law states to those in community property states. In addition, the Procedure has drastic consequences for nonconformance, the total disallowance of the marital deduction for property affected by the discretionary powers. This is just another of the multitude of those situations where if the statute had been clear originally and compliance had been strictly enforced, there would have been no need for such a Procedure representing what appears to be a radical departure from prior administrative procedure.

There is little doubt that the future will present many instances of statutory law, judicial law, and draftsmanship which will attempt to circumvent the Procedure and accomplish some form of post-mortem estate planning. However, if the Service, in administering the Procedure, is able to focus clearly on the evils which it was intended to prevent and ferret out situations in which the evils are present, there appears to be little chance that the opportunities formerly available will continue to be available.

Because of the uncertainties attendant to the enactment of conforming state law, it is suggested that the draftsman incorporate express provisions in the dispositive instrument to meet alternative 1 of the Procedure, with one exception. The instrument should require that the property distributed have a fair market value "equal to" the amount of the marital bequest, rather than "amounting to no less than" the amount of the marital bequest.[66] Since the surviving spouse would be assured of an amount at least equal to the amount of the marital deduction allowed for federal estate tax purposes, the Government would be placated as the theoretical purposes of the marital deduction would be met and the property would be taxed in the surviving spouse's estate, assuming it was not

64. INT. REV. CODE OF 1954, § 2056(b)(5); Treas. Reg. § 20.2056(b)-5(j) (1958).
65. INT. REV. CODE OF 1954, § 2056(e).
66. Covey, *Statutory Panacea for 64-19,* 104 TRUSTS & ESTATES 69, 70 (1965).

consumed or depreciated. Since the Government is satisfied, the testator's primary objective, obtaining the maximum marital deduction for his own estate, is effectuated as the amount allowed as a deduction for estate tax purposes and the value of the property distributed are equal. Even in the face of appreciation of all of the estate assets, this requirement would prevent overfunding of the surviving spouse's estate, the testator's secondary objective, since there is no way the fiduciary could exercise his discretion to distribute more to the surviving spouse than the amount taken as a marital deduction. This is the reason that alternative 2 is not favored since the ratable sharing of appreciation and depreciation could automatically result in overfunding the surviving spouse's estate, especially in the light of the present trend of appreciation in asset values. There is one substantial drawback to this proposed solution. Since requiring distribution of an amount "equal to" the amount of the marital deduction establishes an obligation of a fixed amount to the surviving spouse, satisfaction of this obligation by the fiduciary with appreciated or depreciated assets will result in the recognition of gain or loss to the estate. This may distort the testator's intent to a degree, but it does not completely subvert his intent by converting the legacy into a fractional share bequest, the result of employing alternative 2.

It is important to recognize that whether conformance with the requirements dictated by Revenue Procedure 64-19 is accomplished through applicable state law, either judicial or statutory, or draftsmanship, the result is only that the marital deduction will not be totally disallowed for the portion of the marital bequest included within the fiduciary's discretionary powers. The leverage obtained through post-mortem estate planning formerly allowed is no longer available or at least cannot be accomplished through the same means formerly utilized. It is essential that this be realized by practitioners in the interest of uniform administration of the revenue laws and service to clients.