Washington Law Review

Volume 37 | Number 3

9-1-1962

Federal Estate and State Inheritance Tax Aspects of the Family Allowance, the Homestead, and the in Lieu of Homestead Awards

Donna Berg

COMMENT

FEDERAL ESTATE AND STATE INHERITANCE TAX ASPECTS OF THE FAMILY ALLOWANCE, THE HOMESTEAD, AND THE IN LIEU OF HOMESTEAD AWARDS

Petitions for setting aside the homestead or for an award in lieu of homestead are relatively common, and the family allowance is often requested. The availability of family support payments[1] as deductions from the decedent's estate for federal estate and state inheritance tax purposes will be considered in this Comment. Their deductibility vel non for Washington State Inheritance Tax purposes is reasonably clear. For Federal Estate Tax purposes, it appears that the homestead or in lieu of homestead award does qualify, but that the family allowance does not qualify, for the marital deduction.

WASHINGTON STATUTORY PROVISIONS FOR SUPPORT

Under Washington statutes the surviving spouse (widow *or* widower) may petition to set aside the homestead or for an award in lieu of homestead.[2] In either case the value of the property awarded cannot exceed $6,000.00.[3] These awards will normally consist of the home and furniture.[4] The surviving spouse has an absolute statutory right to one of these alternative awards on a showing of the statutory conditions, the existence of which are determinable as a matter of law.[5] When awarded, the property vests in the spouse absolutely and is no longer subject to administration.[6]

The spouse may also petition the court for a further allowance in the form of cash for maintenance of the family during administration of the estate.[7] Unlike the award of homestead or the award in lieu of homestead, granting the family allowance is discretionary with the

[1] RCW 11.52.
[2] RCW 11.52.010-.020.
[3] *Ibid.*
[4] *In re* Jones' Estate, 11 Wn.2d 254, 118 P.2d 951 (1941).
[5] *In re* Cooper's Estate, 32 Wn.2d 444, 202 P.2d 439 (1949); *In re* Wind's Estate, 32 Wn.2d 64, 200 P.2d 748 (1948); *In re* Small's Estate, 27 Wn.2d 677, 179 P.2d 505 (1947); *In re* Poli's Estate, 27 Wn.2d 670, 179 P.2d 704 (1947); *In re* Welch's Estate, 200 Wash. 686, 94 P.2d 758 (1939); *In re* Andrews' Estate, 123 Wash. 546, 212 Pac. 1073 (1923).
[6] *Ibid.*; RCW 11.52.010-.020.
[7] RCW 11.52.040.

probate court,[8] and the allowance is subject to court modification as the needs of the family change.[9]

STATE INHERITANCE TAX ASPECTS OF FAMILY SUPPORT PAYMENTS

Washington inheritance tax statutes permit the estate to deduct up to $1,000.00 for court-ordered family allowance payments.[10] The deduction was allowed in *In re Ferrel's Estate,*[11] even though a non-intervention will made no provision for an allowance and the executor paid it from estate assets without court order but later obtained court approval.

In the *Ferrel* case the court appears to have assumed that the full $1,000.00 deduction was available to the estate without regard to whether the family allowance was a community or separate obligation and without regard to whether, if community, it exceeded $2,000.00 so as to make the decedent's share of the liability $1,000.00. The court made no mention of the issue. The briefs submitted in the case show that the total estate was community property and that the surviving spouses received an allowance "in excess" of $1,000.00.[12] How much in excess was not stated. It seems arguable that the full $1,000.00 deduction is available so long as $1,000.00 is paid, even if the estate consists solely of community property. Clearly the full $1,000.00 deduction is available, no matter to whom paid or from what property paid, provided the allowance is at least $2,000.00.

No state inheritance tax deduction is allowed the decedent's estate for the transfer of the homestead or payment of the award in lieu of homestead.[13] After outlining the property subject to the state inheri-

[8] *In re* Wind's Estate, 32 Wn.2d 64, 200 P.2d 748 (1948).

[9] *In re* Armstrong's Estate, 33 Wn.2d 118, 204 P.2d 500 (1949); *In re* Hilleware's Estate, 159 Wash. 580, 294 Pac. 230 (1930).

[10] RCW 83.04.010.

[11] 112 Wash. 231, 192 Pac. 10 (1920).

[12] Brief for Appellant, pp. 4-6, *In re* Ferrel's Estate, 112 Wash. 231, 192 Pac. 10 (1920).

[13] RCW 83.08.020 appears to give preferential treatment to recipients of family support payments. Ordinarily all Class A beneficiaries benefit from the total exemptions given their class by RCW 83.08.020, because RCW 83.08.060 provides that the taxes imposed and the exemption with respect to each class of beneficiaries shall be apportioned between the beneficiaries in such class in proportion to the amount receivable by such beneficiary. However, RCW 83.08.020, after providing that the exemptions shall be allowed to the class as a whole and not to the persons therein, states: "which exemptions shall include all allowances in lieu of homestead and all family allowances in excess of one thousand dollars." Since the exemptions "include" the award in lieu of homestead and the excess family allowance, this provision clearly does not grant an added exemption to the class. Rather, it suggests that although the total exemption and the total tax will be prorated among those in the class, the excess family allowance and the award in lieu of homestead will not be treated as received by those who did receive

tance tax, RCW 83.04.010 provides that the property "shall, for the use of the state, be subject to a tax . . . measured by the full value of the entire property after deduction of the amounts allowable under RCW 83.04.013." The deductions allowable under RCW 83.04.013 are:

> all debts owing by the decedent at the time of his death, the local and state taxes due from the estate prior to his death, and a reasonable sum for funeral expenses, monument or crypt, court costs, including cost of appraisement made for the purpose of assessing the inheritance tax, the fees of executors, administrators or trustees, reasonable attorney's fees, *and family allowance not to exceed one thousand dollars, and no other sum* . . . . (Emphasis added.)

Federal Estate Tax Aspects Of Family Support Payments

Provisions for family support upon the death of one spouse vary from state to state. Some of the cases subsequently cited involve lump sum payments while others involve monthly payments or setting aside property once claimed as exempt. Some deal with "an allowance for support" and others with "setting aside exempt property." The tests of deductibility appear to be the same for both and the cases do not appear to turn on the label attached to the award. Consequently the award in lieu of homestead may be treated either as a setting aside of exempt property or as a family allowance. It has some of the characteristics of each. Basic to all of the cited cases is a payment of some sort to the surviving spouse from the estate of the decedent spouse under a statutory provision.

When the marital deduction section was originally enacted, the treatment of statutory support payments as a marital deduction was not contemplated[14] because at that time they were specifically deductible from the decendent's gross estate under 812(b)(5) of the *Int. Rev. Code of 1939*. Section 812(b)(5) was subsequently repealed, however, because it discriminated in favor of estates located in jurisdictions with liberal support allowances.[15] The Senate Report which accompanied the repeal stated that thereafter such expenditures would be allowable as marital deductions, subject to the terminable interest

---

it for purposes of computing their share of the tax. For example, inheritance tax will be levied on the homestead awarded to the disinherited wife, but other beneficiaries will pay the tax. Since the surviving spouse is the only one who can receive the award in lieu of homestead and is one of those primarily benefited by the family allowance, the effect of this statutory provision appears to be of special advantage to her.

[14] Estate of Cunha v. Comm'r, 279 F.2d 292 (9th Cir. 1960).

[15] *Ibid.*

limitations.[16] The Congress appears to have felt it unfair to allow unlimited deductions for support provisions—thus inviting states to enact extravagant support provisions—but that an allowance paid to the surviving spouse is an interest in property passing from the decedent's estate and should be deductible, subject to the same limitations as other interests so passing.

This view has been adopted in Revenue Rulings 83[17] and 55-419,[18] and in subsequent cases, although it has been questioned whether statutory allowances are interests which pass from the decedent's estate.[19] The case law indicates that the Washington family allowance is a terminable interest and does not qualify for the marital deduction. However, the homestead and in lieu of homestead awards appear not to be terminable interests and to qualify for the marital deduction.[20]

The current Estate Tax Regulations, 20.2056(b)-1(b), state: "A

[16] *Ibid.*

[17] 1953-1 CUM. BULL. 395.

[18] 1955-1 CUM. BULL. 458.

[19] Estate of Rensenhouse, 27 T.C. 107 was remanded in 252 F.2d 566 (6th Cir. 1958) because the Tax Court had concluded that the widow's allowance was not an interest "in property passing from decedent." The Commissioner later conceded that such allowances were interests in property passing from the decedent in Molner v. United States, 175 F. Supp. 271 (N.D. Ill. 1959), and Estate of Gale, 35 T.C. 215 (1960). See also Treas. Reg. § 20.2056(e)-2(a); 5 MERTENS, FEDERAL GIFT & ESTATE TAXATION 83 Supp. 1961).

[20] Six conditions must be met for a marital deduction: (1) A decedent dying after December 31, 1947 (when § 2056 became effective); (2) A citizen or resident of the United States at the time of death; (3) Marriage and survival by a spouse; (4) An interest in property which passed from decedent to the surviving spouse; (5) Which was included in decedent's gross estate; and (6) Which is not a terminable, non-deductible interest. LOWNDENS & KRAMER, FEDERAL ESTATE & GIFT TAXES 379 (1956). The homestead or in lieu of homestead award and the family allowance clearly come in whole or in part from the estate of the decedent spouse. Treas. Reg. § 20.2033-1(b) states: "Property subject to homestead or other exemptions under local law is included in the gross estate." Property or money from which the in lieu of homestead and the family allowance is taken is included in the gross estate pursuant to § 2033: "The value of the gross estate shall include the value of all property... to the extent of the interest therein of the decedent at the time of his death."

Since family support payments can qualify as deductions only by qualifying for the marital deduction under § 2056 of the INT. REV. CODE of 1954, their utility in community property states is subject to the following limitations: it will have no utility where the estate is all community or where the marital deduction has been used up by the transfer of other property; and the deduction is limited to one-half where the award is made from community property.

The value of the interest in property passing to the surviving spouse from the decedent's estate qualifies for the marital deduction unless: (1) the interest is terminable, and (2) on termination of the interest someone else may enjoy any part of the property by reason of an interest which he has received from decedent for less than full consideration in money's worth. (INT. REV. CODE of 1954, § 2056(b)). Most litigation concerning family support payments centers on whether the interest received by the surviving spouse is terminable. Where the surviving spouse is also residuary taker by will or intestacy, an award of family support payments will qualify for the marital deduction even if the spouse's right to payments thereunder will terminate on some contingency, because on termination of the interest, she will continue to enjoy the property. Though the allowance is a "terminable" interest in the estate assets, it is not a "terminable, non-deductible" interest. (Rev. Rul. 56-26, 1956-1 CUM. BULL. 447).

'terminable interest' in property is an interest which will terminate or fail on the lapse of time or on the occurrence or the failure to occur of some contingency." Conceivably, a surviving spouse's interest in property received from the decedent's estate could be tested for terminability as of three different points in time: (1) The time of the decedent's death; (2) the time that the allowance is awarded; or (3) the time that the actual payments are made pursuant to the award. The propriety of testing for terminability as of these various points in time will be discussed in light of the existing Revenue Rulings and case law.

Revenue Ruling 83 and subsequent cases have clearly indicated that the time at which the payments are actually made is not the proper time to consider whether the spouse has a terminable interest in the estate assets. If it were, any payments actually made to the surviving spouse would qualify, even though the right to future payments under the award would terminate upon death or remarriage. Revenue Ruling 83 states:

> In many States local courts have held that such allowances, or any rights thereto, terminate *ipso facto* upon remarriage and that death also terminates any rights to subsequent allowances. Under such circumstances, the interests passing to the surviving spouses of decedents in the forms of allowances made for their support, pursuant to local law, amount to no more than annuities payable out of the assets of the estates during the periods of settlement or until prior death or remarriage of the surviving spouses and, as such, constitute terminable interests. . . .[21]

In 1959 the Federal District Court in Nebraska, in *Quivley v. United States*,[22] held that the proper time as of which to view the terminable nature of the interest in property passing to the spouse was the time at which sums were actually paid to the widow pursuant to the award. Under Nebraska law, the allowance of $2,000.00 per month for 12 months which had been granted the widow would terminate if she died during the period of administration. On appeal, the Court of Appeals for the Eighth Circuit reversed the district court, and found that the interest granted to the widow was terminable because the right to further payments under the award would terminate if she died or remarried.[23] Thus it seems that the nature of the interest passing to the surviving spouse should be determined either as of the time of

[21] 1953-1 CUM. BULL. 395.
[22] 176 F. Supp. 433 (D. Neb. 1959).
[23] United States v. Quivey, 292 F.2d 252 (8th Cir. 1961).

decedent's death or as of the time that the allowance is awarded to the surviving spouse.

In *Quivley* the court of appeal stated that the situation is to be viewed as of the time of decedent's death.[24] It cited earlier cases in which the statement was first made, apparently approving their results. However, all cases in which this statement has been made have in fact held[25] or cited with approval the holding[26] that the allowance is not a terminable interest and qualifies for the marital deduction in situations where the surviving spouse had a vested statutory right to the allowance and has in fact exercised the right and obtained the award. One case[27] has held that the allowance qualified where the probate court had discretion to grant or deny the allowance but in fact had granted it, while in another,[28] qualification was denied on these facts. Those cases which have held that the family allowance passing pursuant to a vested statutory right (not discretionary with the probate court) is not a terminable interest and qualifies for the marital deduction, have done so on the theory that although the surviving spouse must petition the court to enforce the vested right to the allowance, the mere requirement that one resort to the law to enforce a vested right is not such a contingency as was contemplated to make the interest terminable.[29]

It seems that although the situation is purportedly viewed as of the decedent's death in these cases, they may be rationalized more accurately as a view of the situation as of the time when the award of the allowance is made. The interest in the estate assets in the form of the allowance is confused with the statutory right to claim the allowance. The "interest in property" which passes to the surviving spouse within the meaning of the marital deduction provision is not the statutory right to claim the allowance, but the allowance itself, once granted.[30] If the situation is truly to be viewed as of the decedent's death, the surviving spouse could never have an interest in the estate assets, in the form of an allowance for support, which would qualify for the marital deduction. At the time of death the survivor cannot possibly

[24] *Id.* at 255.
[25] Reynolds' Estate v. United States, 189 F. Supp. 548 (E.D. Mich. 1960); Molner v. United States, 175 F. Supp. 271 (N.D. Ill. 1959); Estate of Rensenhouse, 31 T.C. 818 (1959).
[26] Estate of Cunha v. Comm'r, 279 F.2d 292 (9th Cir. 1960); United States Nat'l Bank v. United States, 188 F. Supp. 332 (D. Ore. 1960).
[27] Estate of Gale, 35 T.C. 215 (1960).
[28] United States Nat'l Bank v. United States, 188 F. Supp. 332 (D. Ore. 1960).
[29] Cases cited note 25 *supra*.
[30] Estate of Cunha v. Comm'r, 279 F.2d 292 (9th Cir. 1960).

have an interest in the estate assets. Even where the spouse has a vested statutory right to claim the allowance, which right the probate court cannot deny, a petition must be made before a property right in the estate assets can exist. All that exists at decedent's death is a statutory right to claim the award. This is not an interest in "property" passing from the decedent.[31] To allow a sum to qualify for the marital deduction solely because at the moment of death the spouse had a vested statutory right to claim the award would be inappropriate. The award for which a deduction was allowed might never be claimed. The courts have not been faced with this difficulty because in all cases the allowance has been awarded by the time litigation arises.

Since at the time of decedent's death a spouse will never have an interest in the estate in the form of an allowance, and since it would be inappropriate to allow a sum to qualify for the marital deduction simply because it might be claimed, Revenue Ruling 83 must have been written on the assumption that an allowance had been granted to the surviving spouse; then directed its test to whether once awarded, the right to payments under the award was indefeasibly vested and could be enforced by the recipient, even in the event of remarriage, or by his estate in the event of his death. This would indicate that in the contemplation of Revenue Ruling 83, the appropriate time for determining whether the spouse has an interest in the estate assets which qualifies for the marital deduction is the time at which the award is actually made. At this time, it would not matter whether the statutory right to claim the award was vested or subject to the discretion of the probate court. The determinative factor would be whether, once the award was granted, the right to all payments thereunder was indefeasibly vested in the surviving spouse. Revenue Ruling 83 states:

> [I]t is held that the interest *in an estate* which passes to a surviving spouse *pursuant to State law* in the form of an allowance for support during the period of settlement of the deceased spouse's estate must constitute a *vested right* of property *such as will,* in the event of her death as of any moment or time following the decedent's death, survive as an asset of her estate, in order to qualify under section 812(e)(1)(A) [now section 2056(a)] of the Internal Revenue Code for the estate tax marital deduction. (Emphasis added.)

The ruling does not provide that the situation must be viewed as of time of decedent's death. It provides that to qualify, the allowance must be one that will survive as an asset of the surviving spouse's

[31] *Ibid.*

estate in the event of her death at any time after the decedent's death. It does not provide that as of his death such allowance must have been awarded. The "interest in the estate" passes in the form of an allowance "pursuant to State law." The right under state law is not itself the "interest which passes." Hence it is immaterial whether the right under state law will "terminate or fail on the lapse of time or on the occurence or the failure to occur of some contingency." Certainly if a spouse in Washington does not petition for an award in lieu of homestead it will be lost.[32] After six years the statutory right will lapse. However, it is not an interest in the property of the decedent's estate which lapses. The survivor simply receives no interest in the decedent's estate. The failure to distinguish between the statutory right to obtain the allowance and the right to payments pursuant to an award of the allowance has led to much confusion.

In *King v. Wiseman*[33], the court interpreted the Ruling to require that the statutory right to claim the allowance be vested. It went to great lengths to point out that even though the Oklahoma statute under which the support allowance was granted read, "may in its discretion make such reasonable allowance,"[34] it held that the $1,250.00 per month allowance which had been granted to the spouse, pending settlement of the estate, was not a terminable interest and hence qualified for the marital deduction. The court concluded: "[U]nder the Oklahoma Statutes the allowance given to a widow *when approved and authorized by the Probate Court* vests in the widow an absolute indefeasible right to said allowance and . . . it should all be included in the marital deduction." (Emphasis added.)[35]

Estate of Nelson v. Comm'r[36] quite reasonably held that homestead property awarded the widow did not qualify for the marital deduction where, under Florida law, her interest in the property, even after the homestead was awarded to her, would terminate upon her death, and the property would pass to her children without inclusion in her gross estate.

In *Estate of Rensenhouse*,[37] the argument was made that a court-ordered $10,000.00 lump sum allowance, paid to the widow for support pursuant to Michigan law, was a terminable interest because a petition of the widow was a prerequisite to granting the allowance. This

[32] Francon v. Cox, 38 Wn.2d 530, 231 P.2d 265 (1951); RCW 11.52.010.
[33] 147 F. Supp. 156 (W.D. Okla. 1956).
[34] *Id.* at 157.
[35] *Id.* at 156.
[36] 232 F.2d 720 (5th Cir. 1956).
[37] 31 T.C. 818 (1959).

appears to be the earliest decision in which the statement that the situation must be viewed as of the time of the decedent's death was made. The court seems to have confused the nature of the statutory right with the interest in estate assets passing pursuant to the award. It reached what seems to be the correct result, however, in concluding that the necessity of a petition to enforce the statutory right did not preclude its being vested:

> As of decedent's death his widow was entitled to a widow's allowance for 1 year and her right to this allowance was not lost by reason of her subsequent death or remarriage. . . . Of course the widow (or her representative) had to ask for the enforcement of this right or interest by petition to the appropriate Probate Court, and the Probate Court by its order would render the right enforcible. However, we are unable to agree with respondent that the necessity of invoking the proper legal procedures for the enforcement of a right is a contingency to the existence of the right (*i.e.*, a "failure of an event or contingency to occur" upon which the "interest passing to the surviving spouse will . . . fail") within the meaning of the statute.[38]

The court reasoned that invoking proper legal proceedings is required with regard to most widows' allowances and if this were a relevant factor it would almost universally deny the marital deduction for support allowances. It said that this was not considered a relevant factor in Revenue Ruling 83 and that it did not believe that Congress had intended it to be of legal significance. In this the court was probably correct. If it had recognized that the interest in estate assets passing to the spouse is the allowance once awarded, not the statutory right to claim the allowance, and that the Commissioner must have intended to view the situation as of the time that the allowance is awarded, it would not have stated that the time for viewing the situation is the time of decedent's death, and a good deal of current confusion would have been obviated.

Molner v. United States[39] followed *Rensenhouse* in holding that although the right to the allowance might be subject to some court action, it is a "vested right." Citing *Rensenhouse* with approval, it upheld, as not terminable and thus qualifying for the marital deduction, a $25,000 award to be paid in installments for the widow's support. The Commissioner argued that the interest was terminable because under a 1907 Illinois act, the probate court was given power, upon a petition being made, to increase or diminish the award originally granted by

[38] *Id.* at 821.
[39] 175 F. Supp. 271 (N.D. Ill. 1959).

the appraisers. The court said that the probate court had always had inherent power to review the award and send it back to the appraisers. The fact that the award was allowed by appraisers, subject to review by the court, instead of being allowed by the court in the first instance upon filing of a petition, as in Michigan, was considered "a mere difference in the legal procedure"[40] and not a relevant fact in considering whether the interest is terminable.

In cases in which state law provides that the probate court cannot refuse to grant the allowance on petition for it, what appears to be the correct result is reached by following the apparently fallacious *Rensenhouse* reasoning. Where, however, the statutory provision permits the probate court to exercise its discretion in granting the allowance, incorrect results appear to occur. In *United States Nat'l Bank v. United States*,[41] the Oregon Federal District Court denied that a $12,000.00 lump sum allowance for support, which had in fact been paid to the widow, qualified for the marital deduction. The court held that only a terminable interest passed to the surviving spouse because under Oregon law the receipt and size of the allowance was contingent on many factors—the widow's circumstances, her health, necessary expenditures for her support, income derived from her own property, her other income, and the total amount of estate assets—all considered by the probate court in the exercise of its discretion in granting or refusing the allowance.

The court recognized that at the time of decedent's death the surviving spouse had no interest in the estate assets themselves but rather only a statutory privilege, exercisable at her whim, to claim the allowance. The Court of Appeals for the Ninth Circuit, in *Estate of Cunha v. Comm'r*,[42] had recently stated (in dicta so far as the terminable nature of the interest was concerned) that the situation is to be viewed as of the time of decedent's death. The Oregon Federal District Court felt bound to conclude that the spouse's interest in the estate assets, not having existed at the moment of decedent's death, did not qualify for the marital deduction. Thus a rule originating in confusion, not even applied literally in the case which first announced it,[43] and long stated without recognition of what its literal application would mean, was here applied to disqualify an allowance which, within the strict meaning of Revenue Ruling 83, would seem to qualify for the

[40] *Id.* at 281.
[41] 188 F. Supp. 332 (D. Ore. 1960).
[42] 279 F.2d 292 (9th Cir. 1960): see also Parker v. United States, CCH Tax Ct. Mem. ¶ 12062 (1962).
[43] Estate of Rensenhouse, 31 T.C. 818 (1959).

marital deduction. Even then no end was put to the confusion, for the court cited with apparent approval the *King, Rensenhouse,* and *Molner* cases. It attempted to distinguish them:

> It would appear that the state law in each of the states in which those cases arose held that the widow's support statute created a vested interest which she would receive in any event. In other words, the property right was created in the assets of the estate and the courts of those states had so held.[44]

Yet these cases do not appear to hold that the state law itself gave the interest in the *estate assets. Rensenhouse* and *Molner* specifically discussed the fact that the surviving spouse had to petition the court in order to enforce the right and obtain the assets of the estate, while *King* assumed this fact. Certainly the statutory rights in those cases were vested, while in Oregon granting the allowance was within the discretion of the probate court. But this seems to be an irrelevant distinction if terminability is determined as of the time that the award is made by the probate court.

It is unpredictable whether the Court of Appeals for the Ninth Circuit will clarify the terminable interest rules. It took the first step in *Estate of Cunha v. Comm'r* by recognizing that the property interest involved is not the statutory right to claim the allowance, but the interest in estate assets themselves. The executor had admitted that the spouse's interest was terminable because all right to future payments, even after the award was made, would terminate upon her death or remarriage. He argued that it was not a *non-deductible,* terminable interest, because the "property" in which the widow had an interest was her statutory "right" to claim the allowance, and since this "right" disappeared at the same time her interest terminated, no one else could enjoy the "property." The court held that "property" within the meaning of the marital deduction provisions meant the assets of the decedent's estate. Since the widow's interest in the assets of the estate by way of the allowance would terminate upon her later death or remarriage, it was a non-deductible, terminable interest, and did not qualify for the marital deduction.[45]

In looking to the meaning of the word "property," the court viewed the situation as of the time of decedent's death and found that the widow then had only a right to apply for an allowance. Further, the amount of the allowance was in the discretion of the probate court.

[44] 188 F. Supp. 332, 338 (D. Ore. 1960).
[45] See note 20 *supra.*

Yet, all of this was to determine whether the admittedly terminable interest was also a non-deductible, terminable interest.[46] In the early pages of the opinion[47] the court said that the interest was terminable simply because the right to the allowance terminated upon the widow's death or remarriage. As far as the issue of terminability goes, the statement that the situation should be viewed as of the date of decedent's death is dictum. More significantly, the court apparently approved the results of the *King, Rensenhouse* and *Molner* cases:

> [T]he Commissioner conceded that a widow's allowance was an interest in property which passed to the widow within the meaning of the marital deduction provision and would qualify for the deduction if the right to an allowance under applicable state law was vested in a manner such that the widow or her estate would receive payments in any event. . . . Deductions of widow's allowances have been upheld where under state law the widow's interest was so vested. See *Estate of Procter D. Rensenhouse,... King v. Wiseman,... Molner v. United States*.... But that is not the instant case. It is admitted here that a widow's right to an allowance in California terminates upon her death or remarriage.[48]

It is possible that although the court recognized that as of decedent's death the widow had no "property" but only a right to apply for the allowance, it might still have found that she had an interest which was not a non-deductible, terminable interest, which qualified for the marital deduction if, under California law, her right to payments would not have terminated on her later death or remarriage. If so, it would imply that the appropriate time for determining terminability is the time when the allowance is awarded by the probate court.

Estate of Gale[49] seemed to adopt this reasoning in allowing a marital deduction for a lump sum award to a widower paid pursuant to Maine statutes. The statutes were similar to the Washington in lieu of homestead statute in that the statutory right was subject to two conditions (there, solvency of the wife's estate and availability of only her personal property for the award). However, unlike the in lieu of homestead statute, and like the family allowance statutes in Washington and Oregon, the amount of the award was subject to the discretion of the probate court. Instead of saying that the widower's interest in property was subject to "many factors" as did the federal district court in the *United States Nat'l Bank* case, the court said that the state court

[46] 279 F.2d 292, 297 (9th Cir. 1960).
[47] *Id.* at 295.
[48] *Ibid.*
[49] 35 T.C. 215 (1960).

had considered the various criteria, rendered its decision, and since the single payment allowance when awarded was not recoverable in case of the widower's later death or remarriage, it was vested absolutely and qualified for the marital deduction.

In *First Nat'l Bank and Trust Co. v. United States,*[50] the widow received $59,604.29 in bonds for her support under a Georgia statute which provided that her right to claim the award would terminate if she died or remarried before filing application for support, but once awarded, fee simple interest vested in her, which could not be divested in any event. The court held that this was in the nature of a statute of limitations and merely an adjective provision having no substantive effect on her interest in the property passing to her after timely award. The court said that in all the reported cases (citing those discussed herein), there had been at least an implied acknowledgement that the widow's allowance did not become an interest in property until such time as the court order determined the amount thereof and directed its payment or delivery. Under these circumstances the terminable interest rule should be applied to events that might occur after the order was entered: "[W]e must examine the widow's interest at the time that interest arose to determine whether it is terminable, *and that is at the time the probate court entered its order granting the allowance.*"[51]

The final development in this area is the 1961 case of *United States v. Quivey,*[52] decided by the Court of Appeals for the Eighth Circuit, in which the district court's determination that the time for testing the terminability of the interest was when the actual payments were made pursuant to the award, was reversed. Again the rule is stated that the situation must be viewed as of the time of decedent's death. Yet, again in apparent approval, not only *King, Rensenhouse, Molner* and *Cunha,* but also *Estate of Gale* and *First Nat'l Bank and Trust* are cited. The court, citing the above cases, said that all of the reported cases in which the question was considered, recognized "that only where a state statute does not leave a widow's allowance *thus* subject to termination, can the interest in the decedent's estate which it represents qualify as a marital deduction under section 2056."[53] (Emphasis added.) In this case the widow's right to monthly payments after the award was made would terminate if she died or remarried.

[50] 191 F. Supp. 446 (S.D. Ga. 1960).
[51] *Id.* at 448.
[52] 292 F.2d 252 (8th Cir. 1961).
[53] *Id.* at 255.

CONCLUSION

There are three possible conclusions to which the Court of Appeals for the Ninth Circuit might come concerning the Washington family support provisions: (1) The court might follow the theory of *Rensenhouse* and others that qualification for the marital deduction depends upon whether the statutory right to claim the award is vested. In this event the homestead or in lieu of homestead awards would qualify for the marital deduction but the family allowance would not. Statutes[54] and cases[55] unequivocally indicate that the right to the former is a vested right, such that on meeting the statutory requirements (determinable as a matter of law), the right to the homestead or in lieu of homestead award cannot be denied by the probate court. Equally clearly, granting the family allowance is within the discretion of the probate court,[56] and under the reasoning of *United States Nat'l Bank v. United States* (decided by an Oregon Federal District Court) would not qualify for the marital deduction. (2) The court has recognized that the interest in property which is determinative is not the statutory right to claim the award but the interest in estate assets acquired pursuant to the award.[57] It might look no further and simply apply the apparently fallacious rule that the situation is to be viewed as of the moment of decedent's death. In this event it would hold that since at the moment of death, neither the homestead or in lieu of homestead award, nor the family allowance, *as interests in estate assets,* have vested in the surviving spouse, neither qualifies for the marital deduction. This would make Revenue Rulings 83 and 55-419[58] nullities for all practical purposes. It appears an unlikely result, however, in view of the fact that the *King, Rensenhouse* and *Molner* cases were cited with apparent approval in *Estate of Cunha v. Comm'r.* (3) The court might recognize that since the interest in property, correctly viewed, is the interest in the estate assets, no award obtainable only by petition can possibly qualify for the marital deduction if the situation is viewed as of the time of decedent's death. In this event it seems that the court would hold that the critical moment at which to view terminability of the interest in the estate assets is when the award is granted. Again, the homestead or the in lieu of homestead award would qualify for the marital deduction but the family allowance

[54] RCW 11.52.010-.020.
[55] See note 5 *supra.*
[56] See note 8 *supra.*
[57] Estate of Cunha v. Comm'r, 279 F.2d 292 (9th Cir. 1960).
[58] 1955-1 CUM. BULL. 458.

would not. The award of the homestead or the in lieu of homestead property vests an indefeasible property interest, not terminable on any future event.[59] Payments under the family allowance, however, remain subject to modification by the probate court as the needs of the family change.[60] This seems to be a contingency which would make the interest terminable.[61]

DONNA BERG

[59] See notes 5 and 6 *supra*.
[60] See note 9 *supra*.
[61] But see dictum in Reynolds' Estate v. United States, 189 F. Supp. 548, 551 (E.D. Mich. 1960): "However, the only contingencies specifically mentioned in Rev. Rul. 83, 1953-1 CUM. BULL. 395, are the remarriage or death of the widow."