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A Summary for the General Practitioner of the New Estate Planning Considerations Contained in the 1976 Tax Reform Act and the Tax Revenue Act of 1978

Bruce N. Willoughby

University of Wyoming
College of Law
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As the author of this article points out, every general practitioner of the law must have at least a rudimentary knowledge of current gift and estate tax law in order to be able to competently advise his clients in a variety of circumstances. During his recent tour with the Governor's Probate Statute Study Committee, the author was made aware of a need for a summary of new tax law for Wyoming attorneys. The purpose of this article is to familiarize attorneys engaged in general practice with the most recent developments in the gift and estate tax field, and to suggest how new tax laws may be utilized advantageously.

A SUMMARY FOR THE GENERAL PRACTITIONER OF THE NEW ESTATE PLANNING CONSIDERATIONS CONTAINED IN THE 1976 TAX REFORM ACT AND THE TAX REVENUE ACT OF 1978

*Bruce N. Willoughby**

Having performed various legal tasks for his client through a successful business career, the lawyer is under a duty to his client to continue giving appropriate advice for the protection of the family of the client. Accordingly, the lawyer has the responsibility to maintain a reasonable understanding of the principle elements of estate planning, either by himself or by associating himself

*Partner, Wass, Willoughby, Zwickl & Chapman, Casper, Wyoming; B.B.A. Gonzaga University, 1965; M.B.A., University of Washington, 1966; J.D., Gonzaga University, 1972; member, Governor's Probate Statute Study Committee; admitted to U.S. Tax Court, U.S. Court of Claims, Federal District Court, U.S. Court of Appeals, U.S. Supreme Court, Washington, and Wyoming State Bars.

> with another lawyer who is competent in the estate planning field.[1]

Good estate planning involves the transfer of property in a legally acceptable manner with the minimum amount of taxes reducing the estate, all within the ultimate goals of the person whose estate is planned. The task of minimizing taxes is accomplished within the framework of the Internal Revenue Code (IRC) and the cases, rulings and regulations interpreting the Code.

The Tax Reform Act of 1976, which will be referred to as TRA 1976 and The Revenue Act of 1978, which will be referred to as the 1978 Act, have altered some of the considerations for the attorney involved in estate planning.[2] (All section references will be to the Internal Revenue Code unless otherwise indicated.)

UNIFIED TAX RATES

One of the major revisions of the IRC made by TRA 1976 was the unified rate for both estate and gift taxes. The unified rate eliminates much of the incentive to make large gifts during a person's lifetime because the tax paid on gifts or by a person's estate will be essentially the same. The utility of making lifetime gifts is now measured by the amount of appreciation of the gifted property that will be kept out of the person's estate at death rather than the difference between gift and estate tax rates.

"The $3,000 annual exclusion was retained. Elimination of the $30,000 lifetime gift tax exemption makes the $3,000 annual exclusion strategically more important."[3]

The practitioner must now advise his client on the many possible estate planning methods utilizing the $3,000 annual exclusion for the client's maximum tax benefit. Gifts of partnership interests in a family partnership, gifts of

1. *Report of the Committee on the Role and Function of the Estate Lawyer*, 12 REAL PROPERTY PROBATE AND TRUST JOURNAL, 226 (1977).
2. I.R.C. § 2001(c).
3. Darling, *Pre Death Transfers; Pros and Cons of Gifts, Use of Charitable Remainder Trusts, Educational Trusts, etc., Pros and Cons of Private Annuities*, 37TH NEW YORK INSTITUTE ON FEDERAL TAXATION, 37-4 (1979).

stock in a family corporation and use of the Uniform Gifts to Minors Act statute are some estate planning methods which can be utilized.

Another method is the concept of the split gift.[4] The donor-spouse can make a gift of separate property applying his or her annual exclusion to the gift and the nondonor-spouse can join in the gift by applying his or her annual exclusion to the gift for a total gift of $6,000. A gift tax return is required to utilize a split gift.

The 1978 Act clarified the estate tax effect of a split gift in the nondonor-spouse's estate when the donor-spouse dies within three years of the gift. In such a situation, the entire gift will be included in the donor-spouse's estate. The gift will not be included in the non-donor spouse's estate for computing the estate tax. Caution should be used when advising elderly or seriously ill clients on split gifts.

This favorable estate tax effect makes it more attractive for spouses to make split gifts and will allow the donor-spouse to reduce his or her estate at a much more rapid level.

> However, the 1976 Act has had the effect of drawing attention to the advantages of $3,000 exclusion. For example, a person who can anticipate that his estate will be eventually taxed at the fifty percent marginal rate who fails to take advantage of the $3,000 annual exclusion and who eventually dies twenty years later, costs the ultimate beneficiary over $5,800. If the donor had been married and had failed to take advantage of the spouse's exclusion, the ultimate cost to the beneficiary would be over $11,600.[5]

Since the unified rate is a progressive rate and is based on cumulative transfers made during a person's life and at death, there is a two step formula required by the TRA 1976 to determine the tax rate to be paid.

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4. I.R.C. § 2513.
5. Jones, *Estate and Gift Tax Unification: The Concepts and Selected Giving Problems*, 36TH NEW YORK INSTITUTE ON FEDERAL TAXATION, 297 (1978)

1. Computing the Gift Tax

First, a tentative tax is calculated by applying the unified rate to the total of all lifetime transfers. Then, the amount of the unified rate calculated on prior lifetime transfers is subtracted from the tentative tax. The resulting amount is the gift tax for the current gifts made.[6]

2. Computing the Estate Tax

First, a tentative tax is computed by applying the unified rate to the total of the taxable estate and the adjusted taxable lifetime transfers. Then the gift taxes due or paid on the lifetime transfers made after 1976 and computed under the unified rate are subtracted from the tentative tax.[7] The remaining amount is the estate tax due.

The TRA 1976 removed any doubt about transfers made within three years of death and it is now a conclusive presumption that any transfer made within three years of death is a transfer in contemplation of death.[8]

The 1978 Act clarified the exemption of transfers to which the $3,000 annual exclusion was applied in contemplation of death situations. The transferred amount will not be included in a descendant's estate if no gift tax return was required to be filed. Therefore, the transfer to any one donee would have to be $3,000 or less in a calendar year.[9] The above exemption does not apply to life insurance policies whether or not a gift tax return was required to be filed. Each new premium payment on a term insurance policy could constitute a new transfer.[10]

The 1978 Act requires caution in making transfers where it appears the donor will die within the three year period. Only one transfer should be made to each donee for each calendar year if the $3,000 exemption is to be utilized.

6. I.R.C. § 2502(A).
7. I.R.C. § 2001(b).
8. I.R.C. § 2035(a).
9. I.R.C. § 2035(b)(2).
10. I.R.C. § 2035(b).

Unfortunately, the 1978 Act's changes mean that transfers split between husband and wife to take advantage of two $3,000 annual exclusions will be included fully in the estate of the decedent spouse because a gift tax return is required for split gifts.

After the tax on the estate or the gift has been computed using the unified tax rates, the use of the new unified credit must be carefully considered.

UNIFIED CREDIT

The TRA 1976 repealed the $30,000 lifetime gift tax exemption and the $60,000 specific estate tax exemption and substituted the new concept of the unified credit.[11]

> Because the progressive rates structures of the estate and gift taxes make an exemption or deduction relatively more valuable to wealthy individuals, Congress reasoned that the replacement of the old exemptions by a tax credit would benefit all taxpayers more equitably.[12]

The phase-in time of the unified credit is five years beginning in 1977 under the following schedule:[13]

Year of Gift or Death	Unified Credit	Value of Exempted Property
1977	$30,000	$120,669
1978	34,000	134,000
1979	38,000	147,333
1980	42,500	161,563
1981	47,000	175,625

The unified credit may be applied toward gift taxes on lifetime gifts or toward estate taxes at death. The use of the unified credit toward current gifts correspondingly reduces the unified credit available at death.[14] "For every dollar of gift tax credit utilized, the donor's ultimate estate

11. I.R.C. § 2010.
12. Jones, *supra* note 5, at 281.
13. I.R.C. § 2010.
14. I.R.C. § 2505(a)(2) and 2001.

tax is increased one dollar. Thus the use of the gift tax credit does not really avoid any tax but merely serves to postpone the payment of it."[15]

Under the prior law, the $30,000 gift tax exemption was used whenever the donor desired to use it. He or she had the choice to use the exemption or pay the gift tax. The TRA 1976 makes the use of the unified credit mandatory toward any gifts made during a person's lifetime. There is no longer any choice to either use the unified credit or pay the gift tax. The General Explanation of TRA 1976 insists that, unlike the old $30,000 specific exemption, the use of the credit is not optional.[16]

The use of the unified credit in estate planning requires a balancing of the ultimate effects of using the credit during a person's lifetime to postpone the payment of tax or saving the credit for use at a person's death to effectively reduce the estate tax drain on the estate assets. Other factors, such as the effect of the gifts on the donor and donee, and the income tax implications should be considered.

> Perhaps the most important consequence of the 1976 Act is that by the reduction though not elimination of the transfer tax advantages of lifetime gifts, donors will now give the income tax and the nontax aspects of lifetime gifts more consideration in their estate planning.[17]

MARITAL DEDUCTION

1. *Estate Tax Marital Deduction.*

For estates valued under $500,000 the TRA 1976 increased the marital deduction allowed in calculating the taxable estate to $250,000.[18] This change in the law requires a close examination of the estate tax consequences in both spouses' estates before a marital deduction formula is chosen.

15. Jones, *supra* note 5, at 282-283.
16. *Id.* at 283.
17. *Id.* at 300.
18. I.R.C. § 2056(c)(1)(A)(i).

The first consideration is property which will pass to the spouse outside of the will, such as joint tenancy property and life insurance policies, which could be in excess of property passing under the will. "Under these circumstances, the joint ownership will supersede the will provision causing loss of some potential estate tax savings."[19]

An unusual situation is created by TRA 1976 for estates of $250,000 to $500,000. The use of the maximum marital deduction may increase the total estate taxes because any marital bequest amount in excess of that needed to reduce the estate tax to zero will increase the amount taxable in the surviving spouse's estate.

In these estates, a "minimum marital deduction" clause can be used which provides for the marital deduction to be adjusted downward to an amount which produces no tax in the estate of the deceased spouse. This amount, after consideration of other property passing to the surviving spouse, may be much less than the maximum marital deduction allowed.

> Disregarding all other credits and deductions except the marital deduction, assume the husband dies with an adjusted gross estate of $200,000 and is survived by a wife who owns negligible property of her own. If an amount equal to the maximum marital deduction ($200,000) is bequeathed to the wife, there will be no tax in the husband's estate. But assuming the wife dies with a $200,000 taxable estate, her estate tax will be $7,800 ($54,800 less the credit of $47,000.) Had the husband made a marital bequest of $175,000 leaving $25,000 in a non-marital deduction bequest, the tax in both estates would be zero.[20]

With coordination of the unified credit, minimum marital deduction necessary to reduce the husband's estate tax to zero, and non-marital bequests, tax savings can be achieved in larger estates, as the following examples illustrate:

19. Lerner, *Spouse to Spouse — The Gift and Estate Tax Marital Deduction*, 36TH NEW YORK INSTITUTE ON FEDERAL TAXATION, 167 (1978).
20. Robinson, ESTATE PLANNING UNDER TAX REFORM, 317 (1977).

A. Using the Maximum Marital Deduction and Non-Marital Bequests

	Husband's Estate	Wife's Estate
Gross Estate	$350,000	$250,000
Less Maximum Marital Deduction	250,000	-0-
Taxable Estate	100,000	250,000
Tentative Tax	23,800	70,800
Unified Credit	(47,000)	(47,000)
Estate Tax Due	-0-	23,800

B. Using the Minimum Marital Deduction and Non-Marital Bequests

	Husband's Estate	Wife's Estate
Gross Estate	$350,000	$174,375
Less Minimum Marital Deduction	174,375	-0-
Taxable Estate	175,625	174,375
Tentative Tax	47,000	46,800
Unified Credit	(47,000)	(47,000)
Estate Tax Due	-0-	-0-

Because of the effect of inflation on the value of both real and personal property, it becomes essential for the practitioner to consider the most efficient use of the marital deduction in all his clients' estates. In many estates the marital deduction combined with a residuary trust for the benefit of the surviving spouse will produce maximum estate tax savings. The surviving spouse can be given the same economic security he or she would have had if he or she had received the entire estate outright and still achieve estate tax savings.

The 1976 Act has made it more complex than ever to take maximum advantage of the marital deduction provisions. However, use of the marital deduction is still the best method in the Internal Revenue Code of arranging for the postponement of the payment of estate taxes.[21]

21. Lerner, *supra* note 19, at 177.

2. Gift Tax Marital Deduction

The TRA 1976 provided for an unlimited $100,000 gift tax marital deduction. The next $100,000 of transfers have no marital deduction and those transfers in excess of $200,000 have a marital deduction of one-half the amounts transferred.[22] As part of the estate plan, one spouse can transfer to his or her spouse, $100,000 without paying gift tax and without using any part of his or her unified credit.

In the TRA 1976, the gift tax marital deduction and the estate tax marital deduction are interrelated. The allowable estate tax marital deduction is reduced by the amount of gift tax marital deduction claimed in excess of fifty percent of the gift.[23] A gift of $100,000 between spouses with the use of the full gift tax marital deduction of $100,000 would reduce the estate tax marital deduction by $50,000.

If one spouse utilized the $100,000 gift tax marital deduction and then died within three years of the gift, under TRA 1976, the amount of the gift was included in the deceased spouse's estate and the loss of part of the estate marital deduction was not restored to his estate. This inequity is eliminated by the provisions of the 1978 Act, which eliminates the estate tax marital deduction reduction if the transfers are included in the deceased spouse's estate under the "transfers in contemplation of death rule" of Section 2035 of the IRC.[24] The 1978 Act also provides that a lifetime gift from one spouse to the other for which no gift tax return was required to be filed will not reduce the estate tax marital deduction.[25]

The most efficient use of the $100,000 gift tax marital deduction is in situations where one spouse's estate exceeds $600,000 and the other spouse has no estate. If the spouse receiving the $100,000 gift predeceases the donor-spouse and leaves the $100,000 gift directly to children or other

22. I.R.C. § 2523(a)(2)(A) and (a)(2)(B)(i) and (ii).
23. I.R.C. § 2056(c)(i)(B).
24. I.R.C. § 2056(c)(l)(B).
25. I.R.C. § 2056(c)(l)(B)(ii).

beneficiaries, the gift will be exempt from estate tax by the use of the unified credit.

> However, with the greatly increased exemption equivalent it is now very important to build the poorer spouse's estate to the exemption equivalent (plus estimated debts and expenses) by gift through use of the new $100,000 marital deduction gift and annual exclusion gifts. Try to get each spouse's estate to the exemption equivalent.[26]

The use of the $100,000 gift tax marital deduction can be effectively combined with the new joint tenancy rules of TRA 1976.

JOINT TENANCY

TRA 1976 provides for a new type of joint tenancy interest for estate tax purposes, defined as a "qualified joint tenancy interest."[27] A qualified joint interest is defined under the Internal Revenue Code as follows:

1. The joint interests must have been created by the decedent, the decedent's spouse or both of them.[28]

2. In the case of personal property, the creation of the joint interest constituted a gift for purposes of the Internal Revenue Code.[29]

3. In the case of real property, an election under Section 2515(C) of the IRC must be made with respect to the creation of the joint interest.[30]

4. Only the decedent and the decedent's spouse are joint tenants.[31]

If the above requirements are met then, notwithstanding the ordinary estate tax treatment of joint tenancy interests, the amount to be included in the gross estate of the

26. Lentz, *Lifetime Gifts After 1976* 12 REAL PROPERTY PROBATE AND TRUST JOURNAL No. 3 at 345 (1977).
27. I.R.C. § 2040(b)(1).
28. I.R.C. § 2040(b)(2)(A).
29. I.R.C. § 2040(b)(2)(B)(i).
30. I.R.C. § 2040(b)(2)(B)(ii).
31. I.R.C. § 2040(b)(2)(C).

first spouse to die is one-half of the value of the qualified joint interest.[32] This is an exception to the general rule that taxation of a joint tenancy interest follows contribution of the consideration for the interest.[33] The exception applies to joint tenancies created after 1977 which make the election to be qualified joint interests and to joint tenancies created before 1977 for which a gift tax return is filed for any calendar quarter in the calendar years 1977, 1978, and 1979.[34]

The estate planner should exercise caution in making the election for joint tenancies created before 1977. If, when the election is made, the statute of limitations has run on the time when the joint tenancy was actually created, the gift tax value of the property at the time of the creation of the joint tenancy is zero and the spouse making the present election will have made a gift of one-half of the present value of the property for computation of the gift tax.

If the donee spouse were to die first, fifty percent of the joint tenancy property would then be included in his or her estate. If the election were not made, none of the value of the joint tenancy property would be included in the non-contributing spouse's estate.[35] However, if the donor spouse is the first to die, the appreciation on donee spouse's part of the joint tenancy property is removed from the donor spouse's estate with the consequential lessening of estate taxes on the first death.

A more significant type of joint tenancy interest was created by the 1978 Act.[36] To be eligible under Section 2040 of the IRC, the joint interest must be between spouses and must consist of a joint interest in real or tangible personal property used for a farm or farming purposes or in a trade or business.[37] If the property qualifies, and if it is owned in joint tenancy between spouses, and the spouse materially participates in the operation of the farm, trade or business,

32. I.R.C. § 2040(b)(1).
33. I.R.C. § 2040(a).
34. I.R.C. § 2040(d)(1) and (2).
35. I.R.C. § 2040(a).
36. I.R.C. § 2040(c).
37. I.R.C. § 2040(c)(4).

he or she will be deemed to have contributed two percent of the excess of the date of death value over the original consideration of the property for each year of material participation, to a maximum of fifty percent. This is in addition to any consideration actually furnished.[38] The material participation that must be shown by the surviving spouse is determined by the test used in paragraph (1) of Section 1402 (a) of the IRC.[39]

The computation of the amount to be included in a deceased spouse's estate if the Section 2040 election is made is shown by the following example: If the property at the deceased spouse's death is worth $100,000 and the deceased spouse contributed $20,000 and the surviving spouse $10,000 to the original purchase price, and the joint tenancy had been in existence for ten years, $73,600 would be included in the deceased spouse's estate.

The $10,000 original contribution plus interest at six percent for ten years ($6,000) would be deducted from the current value. In addition, the original contribution of the deceased spouse of $20,000 plus interest at six percent for the ten years ($12,000) would be deducted from the current value. Next is deducted the two percent a year for ten years, times the property's value in excess of the original contribution plus interest. This figure is $10,400.

The $100,000 current value is reduced by the $10,000 original contribution, $6,000 of interest on the original contribution and the $10,400 which is consideration by the spouse because of the two percent per year rule of Section 2040.

This election is available for estates of decedents dying after December 31, 1978.[40] In addition, this election, if applicable, can be an effective estate planning tool, since the decision to use the election does not have to be made until the due date of the estate tax return.[41]

38. I.R.C. § 2040(c)(5)(A) and (B).
39. I.R.C. § 2040(c)(7).
40. P.L. 95-600 § 511, 92 Stat. 2881-2882 (1978).
41. 49 C.P.A. JOURNAL 81 (April, 1979).

The creation of such a new category of joint tenancy property follows several recent decisions where a working spouse's (in all cases, the wife's) efforts were recognized as contributions for purposes of Section 2040 and is consistent with the general theory of community property that both spouses contribute to a marriage, and the earnings of each spouse should belong one-half to each spouse.[42]

ORPHANS DEDUCTION

The TRA 1976 provides for a deduction from estate taxes for the value of property passing to a minor orphaned child of the decedent.[43] The deceased parent cannot have a surviving spouse and the minor child can have no known living parent. The orphans deduction is computed by multiplying the number of years the orphan is below the age of 21 times $5,000.[44]

The 1978 Act further defined the orphans deduction into a viable consideration for will drafting and estate planning. A single trust can now be utilized for all of the minor children of a deceased parent and can be continued until the youngest child reaches the age of 23.[45] If one child should die before the youngest child reaches age 23, his or her share of the trust can pass to the other children or any other person.[46] The trustee can be given the discretion to accumulate income[47] or to make distributions for the health, education, support, and maintenance of the children.[48] Upon termination of the trust, there must be a pro rata distribution of corpus and accumulative income among all the remaining children.[49]

The 1978 Act liberalizes the requirements for qualification of a minor's trust for the orphans deduction. The practitioner should consider inclusion of a qualified minor's

42. Moore, *Estate Planning Implications of the 1978 Revenue Act*, PROPERTY AND PROBATE, AMERICAN BAR ASSOCIATION SECTION OF REAL PROPERTY PROBATE AND TRUST LAW 24 (Winter, 1979).
43. I.R.C. § 2057(a).
44. I.R.C. § 2057(b).
45. I.R.C. § 2057(d)(6).
46. I.R.C. § 2057(d)(2)(D).
47. I.R.C. § 2057(d)(4).
48. I.R.C. § 2057(d)(3).
49. I.R.C. § 2057(d)(2)(E).

trust in the wills he or she drafts for their married clients with minor children. The possibility of a common disaster resulting in the death of both parents is always present. The wills of widows and widowers with minor children should normally be drafted to include a qualifying minor's trust.

> The orphans deduction is a new estate planning concept that should be considered in estate planning and will drafting even when the other spouse is alive at the time the will is drawn. The estate planner cannot guarantee which spouse will be first to die or that the spouses will not die in a common disaster.[50]

DISCLAIMERS

The 1976 TRA added the concept of "qualified disclaimers" to the methods of estate planning.[51] To be a qualified disclaimer, the disclaimer has to be irrevocable and unqualified and meet other requirements.[52] The disclaimer must be in writing,[53] and the writing must be received by the person making the transfer or his legal representative or the holder of legal title not later than nine months after the day the transfer is made, or the day on which the person to whom the transfer is made attains age 21.[54] The person making the disclaimer cannot accept either the transferred property or any of its benefits.[55] The transferred property must pass without the direction of the person who is disclaiming the property to either the spouse of the decedent or to a person other than the one making the disclaimer.[56]

The 1978 Act permits a surviving spouse to make a qualified disclaimer of all or part of a marital deduction or specific bequest even if this bequest will pass into a trust of which the surviving spouse is a beneficiary and which

50. 48 C.P.A. JOURNAL 70 (May, 1978).
51. I.R.C. § 2518(a).
52. I.R.C. § 2518(b).
53. I.R.C. § 2518(b)(1).
54. I.R.C. § 2518(b)(2).
55. I.R.C. § 2518(b)(3).
56. I.R.C. § 2518(b)(4).

will not be included in the surviving spouse's estate at his or her death.[57] "The transfer may specify in the instrument for the disposition of disclaimed property, even including the directive that that disclaimed property pass into a trust for the benefit of the disclaimant, so long as the disclaimant is a spouse."[58]

The practitioner should consider drafting a disclaimer provision into the wills of clients with larger estates or where there is a possibility one or both spouses will inherit large amounts of property. This will allow the surviving spouse and the personal representative of the deceased spouse's estate to make decisions which could result in substantial estate tax savings on the surviving spouse's death.

Wyoming presently has a disclaimer statute which contains all the elements necessary for a qualified disclaimer under Section 2518 of the IRC.[59] The practitioner should review the provisions of this statute and follow them in drafting a disclaimer clause in the wills of clients.

GENERATION SKIPPING TRANSFERS

"The generation-skipping tax is abstract and intricate. It is likely to be understood by only a minute fraction of affected taxpayers. It is questionable whether any significant portion of the legal or accounting professions will master it."[60]

The main problem in generation-skipping transfers is to understand when one has been made. The taxable transfer takes place, according to the IRC, when there is any taxable distribution from or taxable termination of a generation skipping trust or its equivalent.[61] To have a generation skipping trust, there must be beneficiaries two generations lower than the grantor of the trust. The transfer may be to the grandchildren of the grantor after a life estate in someone in a younger generation than the grantor.

57. I.R.C. § 2518(b)(4)(A).
58. Moore, *supra* note 42, at 25.
59. WYO. STAT. § 2-4-112 (Supp. 1979).
60. Shaw, *The Generation Gap,* 36TH NEW YORK INSTITUTE ON FEDERAL TAXATION 182 (1978).

The exclusion of $250,000 per child of the grantor for generation-skipping transfers to grandchildren should eliminate all but the largest estates from the tax effects of the IRC Section.[62] "The grandchild exclusion will, in theory, shield moderately large fortunes from any Chapter 13 tax."[63]

If an estate planner is faced with a generation-skipping transfer problem, it is recommended that he or she read R. Stephens and D. Calfee, *Skip to M'Loo*, 32 TAX LAW REVIEW 443 (1977), which treats the subject in great detail.

CONCLUSION

Both the Tax Reform Act of 1976 and the Revenue Act of 1978 provide opportunities for the general practitioner to utilize estate planning ideas which can help his clients with medium estates escape taxation altogether and reduce the estate tax burden on larger estates.

This article is intended only as a summary of the different estate planning considerations a general practitioner should be aware of in drafting wills for clients or advising clients on making gifts or determining the correct ownership of property. There are many professional publications and texts available for the practitioner with specific and detailed analysis of estate planning methods and will-drafting ideas.

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61. I.R.C. § 2611(a).
62. I.R.C. § 2613(b)(6).
63. Shaw, *supra* note 60 at 209.