WILLS AND ESTATE PLANNING

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I. Estate Tax

1. *Amending Act Compared with the Budget Resolutions*

On May 8th, 1969, royal assent was given to "An Act to amend the Income Tax Act and the Estate Tax Act."[1] This act wholly repealed and replaced the gift tax provisions of the Income Tax Act[2] and made important changes to the Estate Tax Act.[3] The act was generally in conformity with the budget resolutions presented by Mr. Benson on October 22, 1968.[4] However, in order to neutralize some of the very vocal criticism directed at these proposals, the government did make several modifications.[5] There were only two major changes. Firstly, the basic exemption level proposed had been 20,000 dollars but this was changed so that the complete exemption of estates of 50,000 dollars or less continues as it was prior to October 22, 1968. Under the budget resolution the basic exemption of 20,000 dollars was obtained by making the rate of tax on the first 20,000 dollars of the aggregate taxable value of the estate nil. When the government agreed to exempt all estates whose aggregate net value was 50,000 dollars, it seems rather anomalous that the nil rate on the first 20,000 dollars of the aggregate taxable value was retained. The nil rate was no longer necessary for its purpose and it would have been reasonable to replace it with a positive rate.

The second major change was that section 14A[6] was added to permit an executor to elect to pay the tax in up to six equal annual instalments commencing six months after the death with interest at a rate to be set by regulation. The minister has indicated that the rate would be set at approximately the prime rate for direct lending of the Central Mortgage and Housing Corporation.[7] This provision appears to have been included in

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[1] Can. Stat. 1968-69 c. 33.

[2] CAN. REV. STAT. c. 148 (1952).

[3] Can. Stat. 1958 c. 29.

[4] H.C., Ways and Means Budget Resolutions at 201-03 & 208-11 (1968).

[5] 5 H.C. DEB. 5178-82 (Feb. 5, 1969).

[6] Can. Stat. 1968-69 c. 33, § 8(1).

[7] 6 H.C. DEB. 5783 (Feb. 20, 1969). The new sections 10B and 10C of the Estate Tax Regulations, P.C. 1970-972, prescribe the rate of interest to be paid when an election is made to pay the tax by instalments. Where the election is made in the period between July 1, 1969 and June 30, 1970, the rate is eight and three-quarters per

the act to meet the exaggerated claims that the budget proposals would seal the doom of the family farm or family business. Previously, the option to pay the estate tax by instalment was not available to the executor but only to a successor to an income right or annuity, and then only to the extent that the successor did not receive a legacy payable out of property under the control of the executor.[8] The act continues to give the Minister of National Revenue discretion to postpone the payment of tax with interest not exceeding five per cent in cases in which the payment of tax cannot be paid on time "without undue hardship or excessive sacrifice. . . ."[9] Mr. Benson stated that in the last ten years, there have been only forty applications in which hardship was alleged and only twelve of these were granted postponement of tax with a rate of interest of five per cent being charged. The remaining twenty-eight were required to pay their tax immediately.[10] The inclusion of the right to opt to pay the tax in up to six equal annual instalments with interest at the market rate of interest is a great improvement over the former situation.

There were also several minor changes. In order to recognize that in cases in which death occurred shortly after October 22, 1968, the wills would be drawn in the light of the old rather than the new exemption structure, the estate was permitted to opt to use the old exemption total if this was more favourable than the new exemptions.[11] This option was made available only in cases in which the death occurred between October 22, 1968 and before August 1, 1969. This gave individuals six months from the time the bill was made public to change their wills in response to the amendments.

The budget resolution provided for a dependant child exemption because of infirmity of 10,000 dollars plus 1,000 dollars times the number of years remaining until the individual attains the age of seventy-one with a limit of 30,000 dollars. However, the 30,000 dollars limitation does not appear in the act, and thus the exemption for an infirm dependant child could amount to a maximum of 80,000 dollars.[12]

According to the budget resolution, the spousal exemption was to be available only in regard to property which passed absolutely and indefeasibly to the spouse. This aroused concern that the common disaster provision usually inserted in wills to avoid a double passing would cause the loss

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cent per annum and where an election is made in the period between July 1, 1970 and June 30, 1971, the rate is nine and one-half per cent per annum. For elections made in each subsequent annual period beginning July 1, 1971, the rate of interest is to be set at two per cent above the average yield on all Government of Canada bonds maturing in one to ten years during the six month period preceding the last Wednesday before March 31 of that year, rounded to the nearest one-quarter of one per cent.

[8] Estate Tax Act, Can. Stat. 1958 c. 29, § 7(1)(*a*). Section 7(1)(*b*) also provided for the deferment of tax on interests in expectancy.

[9] *Id.* § 16.

[10] 6 H.C. DEB. 5784 (Feb. 20 1969).

[11] Can. Stat. 1968-69 c. 33, § 13(2).

[12] *Id.* § 3(1)(*c*), *amending* Can. Stat. 1958 c. 29, § 7(1)(*c*)(ii).

of the spousal exemption in that the property only vests indefeasibly if the spouse survives for the requisite period. To remedy this, the act states that the exemption is available if the property vests indefeasibly in the spouse "within six months after the death of the deceased or such longer period as may be reasonable in the circumstances. . . ."[13] Thus the usual common disaster clause will not result in a loss of the spousal exemption. It appears that the inclusion of the phrase "or such longer period as may be reasonable in the circumstances" has been included to encompass property which may vest in the spouse by virtue of an order made in response to an application under dependants' relief legislation or as a result of a contest as to the validity of a will or a particular disposition in a will. The definition of "successor" has been extended in order to include a person who benefits from an application under dependants' relief legislation.[14] W. I. Linton states that "[i]n cases of dependants' relief applications or contested wills, the reasonable period will generally be until the court proceedings are concluded, provided they are pursued with reasonable despatch."[15]

The budget proposals provided for a gift tax exemption of 2,000 dollars to be deducted from gifts made to each individual in a year. There was, however, to be no exemption if the gift was made through a trust. This has been amended so that if the gift is to a trust, the gift will qualify for the exemption provided that there is only one beneficiary under the trust who is alive at the date of the gift and who will acquire a vested indefeasible interest before attaining an age not exceeding forty years.[16] This change was made primarily in order to deal with the problem of gifts to minor children.

2. *Important Changes and their Impact on the Drafting of Wills*

Having mentioned the minor changes which have been made between the budget resolutions and the amending act, consideration will now be given to the basic and significant reform which has taken place. There are four major changes in the gift and estate tax. Firstly, property passing absolutely and indefeasibly to a spouse is exempt from gift and estate tax. Secondly, gifts made after October 22, 1968, in excess of the new gift tax exemptions are taxed on the basis of the cumulative total of gifts according to a new rate schedule ranging from twelve up to seventy-five per cent. Thirdly, the gift and estate taxes have been integrated so that all amounts given away during a person's lifetime after October 22, 1968 in excess of the annual gift tax exemptions, plus gift tax paid, together with property which passes on his death, will be cumulated at his death and tax levied

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[13] *Id.* § 3(1)(*a*), *amending* Can. Stat. 1958 c. 29, § 7(1)(*a*).

[14] *Id.* § 12(4)(*r*), *amending* Can. Stat. 1958 c. 29, § 58(1)(*r*).

[15] Linton, *The 1968-69 Gift and Estate Tax Amendments*, CAN. TAX FOUNDATION 12 (1969).

[16] Can. Stat. 1968-69 c. 33, § 1, *amending* The Income Act, CAN. REV. STAT. c. 148, § 112(3) (1952).

according to the estate tax rate structure which ranges between fifteen and fifty per cent with any gift tax paid being treated as a prepayment of estate tax. Fourthly, the personal exemptions of the Estate Tax Act now depend on the fact that the spouse and children receive benefits whereas previously the personal exemptions were available merely because a spouse or children survived the testator.

It is important to consider the impact which the changes will have on the drafting of wills and the planning of estates.[17] The significance of the will in tax planning has been greatly enhanced by the amendments. Prior to October 22, 1968, the estate tax saving which could be obtained through a will was not great. There was the charitable deduction and more importantly, it was possible for a person who had property destined ultimately for his children, to utilize a testamentary trust to avoid estate tax on the wife's death. For example, a husband might leave all his property to a trustee to hold on trust to pay the income to the wife for life with remainder to the children. Such a testamentary trust did not save any estate tax on the death of the husband but it did mean that, on the death of the wife, no additional tax was levied in regard to the trust assets because the trust for the children vested in interest on the husband's death. When the wife died the trust for the children which was already vested in interest merely vested in possession. This event, until recent amendments, has consistently been regarded in Canada as not attracting tax. A will could not, therefore, save any estate tax on the death of a testator except for the exemption of legacies to charitable organizations, although it could save estate tax by avoiding a second passing on the death of the life tenant in regard to the assets contained in the testamentary trust.

A will now can save estate tax on the testator's own death. The major way is through bequests to the spouse. An outright bequest or devise to a spouse is exempt provided that the property vests indefeasibly within six months after the death of the deceased or such longer period as may be reasonable in the circumstances. If this exemption is to be obtained, clauses in wills containing a condition subsequent against remarriage of the spouse will have to be deleted. However, the provision for cessation or reduction on remarriage of pensions and death benefits from a fund or plan which becomes payable to the surviving spouse are specifically relieved from the requirement that the property vests indefeasibly.[18] The property left outright to a spouse will be exempt from estate tax, but, to the extent that such property or an equivalent amount of wealth remains in the estate of the surviving spouse, tax will be attracted on the death of the surviving spouse. The advantage of tax postponement will have to be carefully weighed against the advantage of splitting an estate which arises from the progressive nature

[17] The article by Dart, *Estate Planning under the New Legislation*, 17 CAN. TAX J. 258 (1969) is an excellent examination of the implications of new legislation on estate plans and wills.

[18] Can. Stat. 1968-69 c. 33, § 3(3), *amending* Can. Stat. 1958 c. 29, § 7(1)(*a*).

of the estate tax and from the advantage of utilizing the children's exemption on each spouse's death.

In addition to the exemption for property left outright to a spouse, there is an exemption for property which has been settled by the deceased, whether during his lifetime or by will for the benefit of the surviving spouse. To qualify for this exemption the following three condittions must be satisfied.[19] Firstly, the interest of the spouse in the trust must vest absolutely and indefeasibly within six months after the death of the deceased or such longer period as may be reasonable in the circumstances. Secondly, after the death of the deceased and before the death of the surviving spouse, the surviving spouse must be entitled to all the income of the settlement or to ascertained periodic payments, or limited to ascertained maximum amounts payable out of the income at intervals not greater than one year and, if the income is exhausted by such payments, out of the income and capital. Thirdly, following the death of the deceased and before the death of the surviving spouse, only the spouse may receive any of the capital of the settlement or the use of the capital or any income to which the spouse is entitled or the use of such income.

If a spouse is entitled to the full income of a trust, the amount that is exempt on the death of the first spouse is the value of the trust property.[20] If the spouse is entitled to a specified amount, it is the lesser of the value of the trust property or an amount equal to twenty-five times the amount payable to the spouse in a twelve-month period.[21] There is thus a full exemption if the trust is a full income trust for the spouse, and if it is a fixed income trust, there is a full exemption provided the spouse receives annual income equal to at least four per cent of the value of the trust property at the time of the spouse's death.

On the death of the surviving spouse who was a beneficiary under a trust which qualified for an exemption, the trust property is deemed to pass.[22] It must be emphasized that this is a major departure from the traditional Canadian approach. It is, however, necessary in order that the spousal exemption might be made available to trust property. If it is a full income trust, the trust property deemed to pass is valued as at the date of the death of the surviving spouse. If it is a fixed income trust, the trust property deemed to pass is valued at the lesser of its value at the date of the surviving spouse's death or at an amount equal to twenty-five times the annual income which the spouse received. It appears very anomalous that through the use of a fixed income trust, the value of the trust property can be frozen

[19] *Id.* § 3(1), *amending* Can. Stat. 1958 c. 29, § 7(1)(*b*).
[20] *Id.*
[21] *Id.* § 2(2), *amending* Can. Stat. 1958 c. 29, § 3(1)(*b*). The new section 10A of the Estate Tax Regulations, P.C. 1970-972, stipulates that in valuing the payments referred to in § 3(1)(*b*) and § 7(1)(*b*)(i)(B) the amount payable in a twelve month period shall be multiplied by twenty-five.
[22] Can. Stat. 1968-69 c. 33, § 2(2), *amending* Can. Stat. 1958 c. 29, § 3(1)(*a*).

at its value at the time of the donor spouse's death. Therefore, it would appear that if the trust is to contain assets which are likely to appreciate over time and if the wife has a substantial life expectancy, it is advisable from an estate tax viewpoint to provide that she is to receive a fixed periodic payment equivalent to an annual amount of four per cent of the trust property at the testator's death.

It is rather surprising that the act and the regulations should have been arranged such that a testator will have a tax incentive not to provide a full life interest in a trust but to limit the wife to a fixed annual amount. This effect is aggravated by the choice of such an unrealistic multiplier as twenty-five. When government bonds yield about eight per cent, a reasonable multiplier would appear to be twelve and one-half. If twelve and one-half were the multiplier, a testamentary trust would only be completely exempt provided the wife received a fixed annual income equal to eight per cent of the value of the trust assets at the testator's death. With a multiplier of twenty-five, complete exemption is achieved if the wife receives a fixed annual income equal to a mere four per cent of the value of the trust assets at the testator's death. [23]

The most common form of estate planning found in a will under the prior legislation was to provide a life estate to the wife with remainder to the children. This was to avoid a second passing on the death of the widow. If the will gave a power of encroachment to the wife, it was necessary that the power was not exercisable in her sole discretion, for if it was, or, if she had a general power of appointment, she would be regarded as competent to dispose of the property. [24] There would then be a deemed passing of the trust property on her death. Now there will be no tax reason to limit the wife's power of encroachment in cases in which the whole trust is exempt as property passing to the spouse. In the case of a fixed income trust where the income given to the wife is less than four per cent of the value of the trust property, it might be advisable to limit the wife's power of encroachment to the value of the exemption in order to avoid paying tax on the death of the husband with regard to property which the wife may expend. Within this limit, however, there is no tax reason to fetter her discretion in regard to the power of encroachment. There is also no tax reason for not giving the wife a general power of appointment over the trust property which qualifies for the spousal exemption.

Wills which provide for life estates to the surviving spouse will have to be carefully reconsidered in order to take advantage of tax postponement. Tax postponement will be lost if the trust provides for a power of encroach-

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[23] The legislation and the regulations in relation to trusts are going to prove to be an interesting tool for estate planners. The fixed income trust is certainly going to be used to freeze the value of trust property in cases in which the trust property is likely to appreciate during the life of the surviving spouse.

[24] Can. Stat. 1958 c. 29, §§ 3(1)(*a*), 3(2)(*a*), 58(1)(*i*).

ment in favour of the children.[25] Such powers exercisable in favour of children will have to be eliminated in order to obtain tax postponement. However, such powers may be purposely used in order to achieve estate splitting. A wife might be given half of the property outright or a full life estate in half of the husband's property with unlimited power of encroachment to the wife but no encroachment for the children. She might be given a full life estate in the trust consisting of the remaining half of the husband's estate with power of encroachment for the children. The power of encroachment for the children would make the remaining half of the husband's estate taxable on his death. In regard to the half that is taxable on the husband's death, it will be important to avoid having the property pass again on the death of the widow. Therefore, if the widow has power to encroach on the taxed half, it must not be exercisable by her in her sole discretion and she must not have a general power of appointment. Such cases as the *Bathgate Estate*,[26] *Maine Estate*[27] and *McGregor Estate*[28] will continue to be of significance in this situation. They will not be of any importance where a trust is exempt as property passing to the spouse in that the trust property will be taxable in any event. These cases will continue to be important where a life estate is given to children with the remainder to the grandchildren. A testator will wish to assure that there is not a second passing on the death of the surviving child.

In addition to the exemption for property passing to a spouse, there are maximum deductions for outright bequests to the children of the deceased which depend on the age, health and income of the children. These exemptions, like the exemption for the spouse, are entirely different from the former exemptions, which were available merely because minor or dependant children survived the testator. The new exemptions are available only if property passes to the children and are equal to the lesser of the property passing to the children and the maximum exemption. The maximum basic exemption for a child is 10,000 dollars[29] and, if the child is not infirm and has attained the age of twenty-five before the death of the parent, this is the only exemption. There is an additional exemption of 1,000 dollars for each full year that the child is under the age of twenty-six.[30] This special age exemption is reduced by the amount by which the average income of the child in the preceding three years exceeds 5,000 dollars.[31] The maximum child exemption will be 35,000 dollars. A child who has not yet reached his

[25] Can. Stat. 1968-69 c. 33, § 3(1)(*b*)(ii), *amending* Can. Stat. c. 29, § 7(1)(*b*)(ii).

[26] Montreal Trust Co. v. Minister of National Revenue, [1956] Sup. Ct. 702, 10 D. Tax Cas. 1088.

[27] Minister of National Revenue v. Canada Trust Co., [1964] Can. Exch. 949, 18 D. Tax Cas. 5128.

[28] McGregor Estate v. Minister of National Revenue, 17 D. Tax Cas. 630, 32 Tax App. Bd. Cas. 381 (1963).

[29] Can. Stat. 1968-69 c. 33, § 3(1)(*c*), *amending* Can. Stat. c. 29, § 7(1)(*c*).

[30] *Id.*

[31] *Id.*

first birthday will have the 10,000 dollars basic exemption plus an additional exemption of 25,000 dollars. There is also a special exemption for infirm dependant children of 1,000 dollars for each full year that the child is under the age of seventy-one.[32] The maximum exemption for an infirm dependant child is 80,000 dollars. A child who is infirm and who has not reached his first birthday will have the 10,000 dollars basic exemption plus an additional exemption of 70,000 dollars. These maximum exemptions are all conditional upon property of equal or greater value vesting in the child within six months after the death of the deceased. However, this exemption will not be lost if the property may be divested solely in the event of the child failing to reach a specified age, provided that the age specified is not more than forty years.

The maximum children's exemptions can be obtained at the death of both the father and the mother provided that each spouse has a sufficient estate to dispose of in favour of the children. Presumably, an exception to this proposition is the exemption for the dependant infirm child. If a father bequeathed sufficient property to an infirm child, the child would no longer be dependant on the mother at her death. A dependant child is not defined in the Estate Tax Act but it would appear that departmental practice will be to use the definition of dependant which is relevant for the Income Tax Act[33] and thus a child with income in excess of 950 dollars may not qualify.[34]

There is a further exemption which is not explicitly labelled as such. It arises out of the rate structure which provides that the tax on the first 20,000 dollars of the aggregate taxable value of an estate is nil.[35] If a man died, survived by a wife and four children who are able-bodied and have all attained the age of twenty-five years, 60,000 dollars could be bequeathed to the children tax free, the four maximum basic children's exemptions of 10,000 dollars each, plus 20,000 dollars on which the tax rate is nil. If the residue of the estate were left to the wife, no estate tax would be payable on his death. The amendments to the Estate Tax Act have resulted in a very great departure from a pure estate tax, that is, a tax levied on the estate which is solely determined by the amount of property passing on the death of the deceased. The previous legislation departed from a pure estate tax in that a charitable deduction was permitted and extra deductions were permitted if the deceased was survived by persons dependant upon him. However, under the previous legislation, except for the charitable deduction, the same amount of tax would be levied whether a man died intestate or whether he died with the most sophisticated will, in that the extra de-

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[32] *Id.*

[33] Linton, *The 1968-69 Gift and Estate Tax Amendments*, CAN. TAX FOUNDATION 13 (1969).

[34] Income Tax Regulations, P.C. 1957-718, § 2(1), *amending* P.C. 1954-1917, § 1000(1).

[35] Can. Stat. 1968-69 c. 33, § 4, *amending* Can. Stat. 1958 c. 29, § 8(3).

pendant deductions were available to the estate even if the dependant failed to receive any benefit. The new legislation impinges in a much more direct way on the making of a will.

If the net estate is less than 50,000 dollars under both the prior and new legislation, no tax is levied. Thus for small estates, the tax will not have any impact. The new legislation will encourage persons who have large estates to take advantage of the children's exemptions. Such persons, however, would probably be inclined to leave substantial bequests to their children even without the new legislation. Having more than sufficient assets to provide for their widow, they would probably leave substantial property to their children in order to avoid property passing again on the widow's death. With large estates, there is no conflict between maximizing the exemptions and leaving the assets in a most appropriate way from the point of view of fulfilling family obligations. In the case of medium-sized estates, there may be a real conflict between the full utilization of the children's exemptions and the allocation of sufficient assets to the widow so that she is provided for in an adequate manner.

A man with an estate of 100,000 dollars who has a wife and five adult children will probably not feel that he should make maximum use of the children's exemptions in that insufficient assets will go to his wife. He may feel that all his property should be available to his wife. He might leave 80,000 dollars outright to his wife and 20,000 dollars in trust to pay all the income to the wife but with a power of encroachment for the wife and the children vested in an independant person with the remainder to the children. The trust of 20,000 dollars would not be exempt as property passing to the wife in that there is a power of encroachment which may be exercised in favour of the children as well as the wife. However, as the rate of tax of the first 20,000 dollars of aggregate taxable value is nil, no tax is payable In addition, the trust property will not be property passing on the death of the widow provided that the power of encroachment is not exercisable in her sole discretion. In medium-sized estates in which it is thought not to be feasible to take advantage of the children's exemptions, advantage should at least be taken of the nil rate on the first 20,000 dollars of aggregate taxable value. However, persons with medium-sized estates in endeavouring to utilize the children's exemptions may be forced to allocate their assets as between their wife and their children in a less optimal way under the new legislation than under the prior legislation. The nil rate on the first 20,000 dollars of aggregate taxable value will encourage the inclusion of trust provisions in wills which, but for tax reasons, would simply provide that all property is to go to the spouse. There seems little reason for the Estate Tax Act to promote more complex wills in situations in which a simple will would be preferable.

Since in many cases, it will only be the wealthy who are able to take full advantage of the double children's exemption, once on the death of the father, and once on the death of the mother, the estate tax is slightly less progressive than the rate structure by itself would suggest. This would seem to indicate that it might be more equitable to double the basic exemption per child and to permit the estate of either parent to utilize it either in whole or in part, provided the total on both deaths did not exceed 20,000 dollars per child. This would also remove the temptation to testators having medium-sized estates to leave substantial legacies to children to the detriment of a widow since the exemption would not be lost as the widow would be able to utilize the increased basic children's exemption on her death.

3. *The Advantages of Estate Splitting as Compared with Tax Postponement*

The new legislation by permitting tax-free transfers between spouses facilitates estate splitting. A husband who owns all or most of the family assets will now be able to split his estate so that half will be taxable on his death and half will be taxable on his wife's death. The tax advantage of splitting an estate is derived from obtaining the benefit of the lower marginal rates of tax on two occasions. As the top marginal rate of tax of fifty per cent is imposed on estates in excess of 300,000 dollars, [36] the maximum estate tax saving of 60,800 dollars is realized when an estate of aggregate taxable value of 600,000 dollars is divided into two estates of 300,000 dollars. The estate tax on the passing of an estate of aggregate taxable value of 600,000 dollars is 239,200 dollars while the estate tax on two estates of 300,000 dollars is twice 89,200 dollars or 178,400 dollars. The tax saving is thus 60,800 dollars from splitting the estate.

In order to be assured of estate tax saving, the splitting of the estate should be achieved through a gift program between spouses. If the husband owns all the assets splitting may be arranged to occur on his death. However, this will only be effective provided the husband predeceases his wife. If the wife dies first and has no estate, no advantage will be taken on her death of the lower marginal rates on the first 300,000 dollars of an estate. To arrange an estate split to occur on the death of the spouse who owns most of the assets involves the risk that the other spouse will die first and no tax saving will be realized. An estate split brought about through gifting makes the estate tax saving more certain and, in those provinces which levy successsion duties, the inter vivos gift will also result in substantial savings in succession duties provided the gift was made more than five or three years before the donor's death.

The table indicates the tax saving available through the splitting of an estate on the death of the husband. The husband is assumed to own all the assets and the total value of his estate appears in column one. In order to distinguish between the tax saving from splitting an estate and the tax saving obtainable by fully utilizing the exemption for children, it is assumed that the couple is survived solely by a grandchild. In column two, the tax

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[36] *Id.*

which would be payable on the death of the wife is shown based on the assumption that the husband left a life estate to the wife with the remainder to the grandchild. It is also assumed that the value of the estate is the same at the wife's death as it was at the husband's death. Column three shows the tax which would be payable if half the husband's estate were taxed on his death and half were taxed on the death of the wife. The estate tax saving derived from splitting the estate is shown in column four.

It can be seen that there is some tax saving in splitting an estate in all cases in which the husband's assets exceed 50,000 dollars. The tax calculations in regard to estates of 60,000 dollars and 75,000 dollars may not be very realistic. The tax saving of 2,000 dollars and 4,500 dollars from splitting a 60,000 dollar and 75,000 dollar estate are based on the assumption that the widow will not encroach on capital but will live on the income and the value of the estate on her death will be the same as at the death of the husband. If she encroaches on capital and the estate is reduced from 60,000 dollars or 75,000 dollars down to 50,000 dollars, no tax would have been payable on either death if the estate had been left outright to the wife. Instead of a tax saving of 2,000 dollars and 4,500 dollars in splitting a 60,000 dollar and 75,000 dollar estate, 1,500 dollars and 2,625 dollars in taxes would be paid on the death of the husband which need not have been paid at all. If the estate is in the range of 50,000 dollars to 100,000 dollars and the widow encroaches on capital significantly, splitting on the husband's death may result in greater estate taxes being paid rather than in a tax saving.

It might be thought that it would not be feasible to split a 100,000 dollar estate in that the wife would require all the income for her maintenance. However, the splitting of an estate can be accomplished even though the widow receives all the income. Of the 100,000 dollar estate, she might be given 50,000 dollars outright or be made the beneficiary of a trust such that she alone is entitled to the income and she alone may benefit from an encroachment on capital. This part of the estate will be exempt from estate tax until her death. The husband's will might direct that the other 50,000 dollars be held on trust to pay the income to the wife with a discretionary power in an independent trustee to encroach on capital for the benefit of both the wife and the children with the remainder to the children. Even though there is no intention that there should be an encroachment on capital for the benefit of the children during the wife's life, the trust does not qualify for the spousal exemption and will be taxable on the death of the husband. There is thus no difficulty in arranging an estate split even in those cases in which all the income of the estate is required to support the wife.

As can be seen from the table, the maximum estate tax saving of 60,800 dollars is achieved when an estate of 600,000 dollars is split in half. If the husband's estate exceeds 600,000 dollars, it would be advisable for him not to split his estate into two equal parts. He should instead arrange

Table Illustrating The Advantage Of Estate Splitting
As Compared With Tax Postponement Through
Utilizing The Spousal Exemption

Total Estate (dollars)	Tax if entire estate taxed on wife's death (dollars)	Tax if one half of the estate is taxed on each spouse's death (dollars)	Tax Saving (dollars)	Tax on husband's death if one half of the estate is taxed on each spouse's death (dollars)	Number of years until the interest on the tax paid on the husband's death would accumulate at compound interest to the amount of the tax saving (years)			
				Interest	5%	6%	7%	8%
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
50,000	0	0	0	0	—	—	—	—
60,000	5,000*	3,000	2,000	1,500	18	15	13	12
75,000	9,750	5,250	4,500	2,625	21	18	15	13
100,000	15,600	9,600	6,000	4,800	17	14	12	11
200,000	46,700	31,200	15,500	15,600	15	12	11	10
300,000	89,200	59,400	29,800	29,700	15	12	11	10
400,000	139,200	93,400	45,800	46,700	15	12	10	9
500,000	189,000	133,400	55,800	66,700	13	11	9	8
600,000	239,200	178,400	60,800	89,200	11	9	8	7
750,000	314,200	253,400	60,800	126,700	9	7	6	6
1,000,000	439,200	378,400	60,800	189,200	6	5	5	4

*Note the notch provision, section 9(4), reduces the tax from 6,600 to 5,000 dollars and this causes the discontinuity in columns 6 to 9.

that 300,000 dollars is taxed on his own death and that the balance of the estate comes within the spousal exemption in order to take advantage of the tax postponement. In arranging any split, the growth assets should be included in the part which is taxed first in order to avoid paying tax on the appreciation which occurs during the life of the surviving spouse. Foreign assets should also be included in the part which is taxed on the first death to avoid the loss of the foreign tax credit. There is no provision for applying the foreign taxes paid on the death of the first spouse against the estate tax payable on that property at the death of the second spouse. Foreign taxes paid on the death of the first spouse can only be credited against the Canadian estate tax payable on the foreign assets at the first death. The foreign assets should therefore be made subject to estate tax on the death of the first spouse.

There is substantial tax saving involved in arranging that half of the estate is taxed on each spouse's death. This, however, involves an immediate estate tax liability on the death of the first spouse. In column five of the table, the tax liability on the death of the husband, who it is assumed is the first to die, is shown. If advantage had been taken of the spousal exemption, no tax need have been paid until the death of the wife. The estate would have been larger during the spouse's life and the income from the estate would have been larger. It is thus necessary to weigh the advantage of tax postponement by utilizing the spousal exemption against the tax saving resulting from estate splitting.

Columns six to nine of the table show the number of years which would have to elapse after the husband's death until the tax paid on half the estate at his death would, compounded at various rates of interest, equal the amount of the tax saving from splitting the estate. If, for instance, the husband had a 400,000 dollar estate, the tax saving by splitting the estate, so that half was taxable on his death and half on the wife's death, would be 45,800 dollars. This would involve an estate tax payment of 46,700 dollars on the death of the husband. As can be seen from column six, the interest on 46,700 dollars compounded at five per cent interest would in fifteen years accumulate to the amount of the tax saving of 45,800 dollars. Therefore, if the wife at the time of her husband's death has a life expectancy of more than fifteen years and if the rate of return on the estate assets, after deducting income tax which the wife would pay, is at least five per cent, tax postponement would be more advantageous than an estate split. By referring to column nine, it can be seen that, if the after tax rate of return to the wife is eight per cent, tax postponement is more advantageous than the tax saving of 45,800 dollars obtained from splitting the 400,000 dollar estate provided the wife has a life expectancy of more than nine years at the time of her husband's death.

The greater the life expectancy of a wife at the time of her husband's death and the greater the after tax rate of return which can be realized by the wife on the estate assets, the more significant is the advantage of tax postponement obtainable through the spousal exemption as compared with the tax saving obtainable through estate splitting. Estate splitting will probably not be an appropriate type of estate planning for young couples. Except for taking advantage of the exemption for children and the nil rate on the first 20,000 dollars of the aggregate taxable value, such persons should probably rely upon the tax postponement of the spousal exemption. For middle-age couples, estate splitting may not be the best course of action, particularly in cases in which the estate assets will yield a high rate of return. Also, if a wife is substantially younger than her husband, estate splitting may not be advantageous.

If the assets of the estate are likely to appreciate, this will be a factor which will militate in favour of an estate split. The table was based on the assumption that the assets would not appreciate. If the assets do appreciate, the table understates the advantage of an estate split in which the assets which are likely to appreciate are taxed on the death of the husband. It should also be recognized that if an estate split is part of an estate plan, the will of the husband should not contain a common disaster clause. This is an obvious proposition since the estate split would be frustrated by the clause if the wife did not live for thirty days or the requisite period following her husband's death. It is also apparent that the maximum relative advantage is obtainable from an estate split when the wife only survives her husband for a few days. The advantage of tax postponement in this case would be negligible.

It is thus apparent that the amendments have made estate tax planning far more complex than was formerly the case. The weighing of the advantage of tax postponement achieved by qualifying for the spousal exemption with the advantage of tax saving through estate splitting will test the mettle of the estate planner. It will be far more necessary to reconsider the terms of a will at regular intervals. As spouses grow older the advantage of tax postponement lessens while the tax saving from estate splitting remains the same and therefore becomes relatively more important.

4. *The Integration of Gift and Estate Taxes*

The integration of the gift and estate tax is a very significant change which will mean that many gift programs arranged in response to the former legislation will have to be drastically revised. Under the former legislation substantial tax savings could be obtained from a long-term gift program. The tax saving resulted from the gift tax being levied annually with no aggregation from year to year at a rate of from ten up to twenty-eight per cent [37] as compared with the estate tax rates of from ten up to fifty-four per cent. [38] The only minor amount of integration previously came from the provision which deemed gifts made within three years of death to be property passing

[37] Income Tax Act, CAN. REV. STAT. c. 148, § 113 (1952).
[38] Estate Tax Act, Can. Stat. 1958 c. 29, § 8.

on the death of the donor. However, there was some tax saving even in cases in which the donor died within three years. The value of the gift was added to the estate but not the gift tax paid; although, the gift tax paid was credited against the estate tax payable. There was thus a tax saving equal to the relevant estate tax rate multiplied by the amount of gift tax paid.

Under the new legislation, the rate of gift tax applicable to gifts made in a certain tax year is determined with reference to the aggregate amount of taxable gifts of that year together with the cumulative total of his taxable gifts made after October 22, 1968. [39] There is now a much greater progression in the rates—from twelve per cent up to seventy-five per cent in cases in which the cumulative gift sum exceeds 200,000 dollars. The top gift tax rate of seventy-five per cent is equivalent to an estate tax rate of 42.86 per cent. [40] The equivalent top gift tax rate is slightly below the top estate tax rate which is now fifty per cent. However, there is little tax saving in making taxable gifts, in that taxable gifts and the gift tax paid are included in determining the estate tax payable. In addition, since the gift tax is paid prior to the estate tax, the donor's income will be less, in that his property will be depleted by the payment of gift tax. A large gift program may still result in substantial tax saving if the gift consists of assets which are likely to appreciate rapidly in value. Provided the donor survives for three years after making the gift, only the value of the gift at the time it was given will enter into the estate tax calculation together with any gift tax paid. This is an example of the simplest mode of estate freezing.

Within the new gift tax exemptions, there is still scope for substantial tax saving. A person may make exempt gifts of up to 2,000 dollars to any number of individuals each year. [41] There is no gift tax on these gifts and provided the donor lives for three years the gifts will not enter the estate tax calculation since only the value of taxable gifts are cumulated. In addition, a person may give property to his spouse without limit. Also under this provision a father with five children could transfer to his sons a total of 20,000 dollars a year without attracting any gift tax. The father could give each of his five children 2,000 dollars each and give his wife a gift of at least 10,000 dollars and she could make a gift of 2,000 to each of the five children. There might be a problem in such a gift program in that the wife might be considered to be acting as agent for the husband. [42] The gift to the wife

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[39] Can. Stat. 1968-69 c. 33, § 1, *amending* The Income Tax Act, CAN. REV. STAT. c. 148, § 115 (1952).

[40] In order to illustrate this equivalence, it will be assumed that a man has an estate of 175,000 dollars. If he made a gift of 100,000 dollars and the gift tax rate were 75 per cent, he would pay 75,000 dollars in gift tax. If he died and the 175,000 dollar estate were taxed at 42.86 per cent, the estate would pay 75,000 dollars in estate tax. In each case the donee or beneficiary receives 100,000 dollars and the tax revenue of the government is 75,000 dollars.

[41] Can. Stat. 1968-69 c. 33, § 1, *enacting* The Income Tax Act, CAN. REV. STAT. c. 148, § 112(2) (1952).

[42] Mr. Benson has indicated that such a gift program will be valid provided that the gift to the wife is unconditional and she at her own discretion makes a gift to the

should perhaps be in an amount greater than the aggregate of her gifts to the children. If the wife has investment income of her own, another problem is that the wife's gift to the children might be considered to have come out of her own property with the result that the income from the funds given by the husband to his wife might be deemed to be the husband's income rather than that of the wife. Although property transfers between spouses are tax free, there has been no change in the Income Tax Act; therefore, income earned from property transferred to a spouse is deemed to be the donor's income as long as he remains married to the donee and a Canadian resident.[43] In arranging a gift program, attention should still be paid to the provision which deems income earned on property given to a person under the age of nineteen to be the income of the donor until the donee attains the age of nineteen.[44] The former once-in-a-lifetime exemption of 10,000 dollars for the gift of real estate to a child to be used in farming operations has been retained but the special exemption of 10,000 dollars for the gift of a residence to a spouse has been deleted in that it would no longer serve any purpose.[45] The special 10,000 dollar exemption cannot be claimed if it was previously claimed by either spouse. However, if a farm were owned by a husband and wife either jointly or in common, it would appear that a simultaneous gift to their child would be eligible for a 20,000 dollar exemption. But if title to the farm had been in the sole name of the husband and then it was transferred into joint tenancy in the name of the husband and wife and immediately gifted to their child, the 20,000 dollar exemption might be challenged on the basis that the wife was the agent of her husband.

Since taxable gifts are cumulative, with the result that the donor pays a higher rate of tax as his cumulative gift sum rises and, as the cumulative gift sum, together with gift tax paid, eventually enters into the calculation of the estate tax, it is not surprising that what constitutes a gift has been more particularly defined.[46] Firstly, property transferred pursuant to a marriage contract will be deemed to be a gift. If the transfer is to a spouse, it will be exempt but, if the transfer is to children of the marriage or others, the trans-

children. Mr. Benson stated:

> First, there is the provision of a $2,000 gift to anyone. Then, there is the unlimited provision of gifting to one's wife unconditionally, and she may gift to the same people or other people at her own discretion. Thus, one might achieve a position where a single child benefited to the extent of $4,000 from a husband and wife. It is quite possible, if a husband gave money to his wife and she decided to give $2,000 to her children at her own discretion, this would be quite a legitimate and tax free gift to the children. The husband of course could make similar gifts, so that one could conceive of a situation where over a period of 20 years it would be possible to give each of one's children providing the wife wanted to give to the children as well—an amount of $80,000 per child, which is quite a substantial amount.

6 H.C.DEB. 5776-77 (Feb. 20, 1969).

[43] CAN. REV. STAT. c. 148, § 21(1) (1952).

[44] *Id.* § 22(1).

[45] Can. Stat. 1968-69 c. 33, § 1.

[46] *Id.*

fer will be deemed to be a gift when the transfer is made and not when the contract is made. Secondly, if property is transferred to a person in consideration for an annuity, the transfer is deemed to be a gift unless the recipient is authorized to carry on the business of selling annuities. The value of the gift is the value of the property transferred minus the present value of the annual annuity payments which exceed five per cent of the value of the property transferred. Such a transaction results in property being deemed to pass for estate tax purposes, no matter when the transaction was entered into; thus, this provision accelerates the tax liability. Formerly, the liability would only arise on death. Thirdly, the exercise of a general power of appointment is deemed to be a gift made by the holder of the power of appointment. Fourthly, when an individual disposes of his right to reclaim any property, a gift is deemed to be made. Fifthly, if a corporation confers a benefit at the direction of an individual, the individual is treated as the donor if a transfer to the individual would have resulted in its inclusion in his income. Previously, personal corporations were liable for gift tax. The exempting of personal corporations probably indicates that the life expectancy of this breed of corporation is very limited. Sixthly, if an individual disposes of income or a beneficial interest in property which was orginally the subject matter of an exempt gift because the disposition was not to take place until the donor's death, he is deemed to make a gift at the time he disposes of his interest. Seventhly, if income or capital is paid out of a trust to someone other than the spouse and if the settlor of the trust was exempt from gift or estate tax because the trust was for the benefit of a spouse, such payment out is deemed to be a gift made by the spouse for whom the trust was created. Eighthly, a gift is deemed to be made when a debt becomes unenforceable if the parties were not dealing at arm's length.[47]

[47] It is surprising that when the definition of what constitutes a gift received elaboration that it was not specifically stated that the failure to charge interest is a gift if the parties are close relatives. The failure to charge interest confers a benefit equal to the interest the person would have had to pay if he had borrowed elsewhere. It seems only reasonable that this benefit should be subject to gift tax. The cases of Bartley v. Minister of National Revenue, 20 D. Tax Cas. 752 (Tax App. Bd. 1966) and Sewell v. Minister of National Revenue, 22 D. Tax Cas. 328 (Tax App. Bd. 1968) in which it was held that the failure to charge interest does not constitute a gift, do not present any persuasive arguments for exempting such benefits from a gift tax and should be statutorily overruled. Current departmental practice is that if a debt is payable on demand, the absence of a provision for interest does not give rise to a gift. However, if the debt is not wholly payable on demand, the obligation is to be valued by discounting its face value in accordance with ordinary commercial practice and the difference between its present value and its face value is considered to be a gift. This is an illogical distinction based purely on form. In both cases a benefit is being conferred in that use of money is being obtained without interest and in both cases gift tax should be levied.

The present illogical approach to the absence of a provision for interest gives an unwarranted preference to the wealthy person in that only he can take significant advantage of the loop-hole in the definition of a gift. It is only the wealthy person who can make a large demand loan at a zero rate of interest to his son and take back a demand note on which no interest is payable. This is inconsistent with the general approach that was adopted in the new gift tax provisions. Formerly, the larger your income, the larger was your gift tax exemption in that the gift tax exemption was 4,000

The integration of the gift and estate taxes so that the gift tax has effectively become a prepayment of the estate tax and the more comprehensive definition of what constitutes a gift, will both tend to increase the importance of estate freezing as a planning tool. Estate freezing is a technique whereby an individual arranges that any subsequent appreciation in the value of assets will accrue to those persons he wishes to benefit and that therefore property passing on his death will be limited to the present value of those assets. The most common mode of freezing the value of assets is for the owner to incorporate a company and in return for transferring his assets to the company, he takes back securities, notes, bonds or non-participating preference shares equal in value to the assets transferred. The company then sells its common shares to the persons to whom it is desired that the subsequent appreciation of property should accrue. If the person wishes to retain voting control over the assets transferred to the company, it is arranged that the non-participating preference shares taken back would be more numerous and have greater voting power than the common. The *Beament Estate* [48] and *Patterson Estate* [49] cases have laid to rest the ghost of the *Barber Estate* [50] case which had haunted estate planners with the spectre that through having control of a company a person was for that reason competent to dispose of the assets of the company with the result that the value of such assets was included in his estate. This frightening apparition has been exorcised.

A simpler form of estate freeze can be achieved through the granting of an option for nominal consideration to the children or others to whom the subsequent appreciation of the property is to accrue which permits them to purchase the property at the current market price. This technique was successfully used in *Re Odette.* [51] It is important that the option be for a fixed term and not specifically limited to being exercised on or after the death of the optionor. This technique can only be used if the optionor is indifferent as to whether he loses control of the property subject to the option. If there is an agreement that the option will not be exercised until after the death of the optionor, the difference between the value of the property and the option price is deemed to be property passing.

5. *The Impact on Provincial Succession Duties*

The federal statutory changes will have an impact on the provincial suc-

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dollars or one-half the difference between your taxable income of the preceding year and the tax paid. The new gift tax sections do not provide larger exemptions for persons with larger incomes. Everyone has the same gift tax exemption regardless of income or wealth. For this legislative policy to be really effective, it is necessary that the failure to charge interest to a close relative should constitute a gift for gift tax purposes.

[48] 24 D. Tax Cas. 6130 (Sup. Ct. 1970).

[49] 23 D. Tax Cas. 711 (Tax App. Bd. 1969).

[50] 20 D. Tax Cas. 315, 41 Tax App. Bd. Cas. 27 (1966).

[51] 51 D.L.R.2d 688 (Ont. 1965). This case involved § 1(*p*) (xiii) of the Succession Duty Act, ONT. REV. STAT. c. 386 (1960). However, it is probably equally applicable to the interpretation of § 3(1)(*i*) of the Estate Tax Act. See Bale, *Re Odette and Estate Tax Planning*, 14 CAN. TAX J. 87 (1966).

cession duties which are levied in British Columbia, Ontario and Quebec. The exemption from gift tax of transfers to a spouse will tend to reduce the tax yield from provincial succession duties. There will now be no tax deterrent to married persons splitting their estates. The amount of tax which is levied on two estates of equal size is considerably less than that levied on one estate of twice the size in that both estates will benefit from the lower tax rates at the bottom of the rate scale. To be effective in reducing succession duties, the gifting which brings about the estate split between spouses must occur more than three years in British Columbia [52] and five years in Ontario [53] and Quebec [54] prior to the death of the more wealthy spouse. Estate splitting, however, will not be achieved in British Columbia and Ontario through a husband placing property in his and his wife's name as joint tenants even if the husband dies first. In British Columbia [55] and Ontario, [56] the value of jointly held property is included in the estate of the deceased except to the extent that the survivor contributed to the acquisition of the property.

There is a risk involved in attempting to split estates between spouses to achieve succession duty savings. If the donor dies within three or five years of making the gift, the gifted property will be deemed to be an asset of the donor's estate and will be taxed. On the death of the donor's spouse, the gifted property will be subject to succession duty for a second time. As a result, higher provincial taxes will probably be levied than if the donor had retained the asset until his death and bequeathed the asset to his child.

It has been suggested that irrevocable inter vivos "criss-cross" trusts might succeed in reducing the provincial succession duties to zero. [57] If the husband placed all his property in trust, with a life estate to the wife and the remainder to the children, and if the wife placed all her property in another trust, with a life estate to the husband and the remainder to the children, there would be no succession duty levied on the death of either spouse. This is subject to the proviso that both the husband and the wife live for three or five years after establishing the trusts and retain no interest in the trust of which he or she is the settlor. Estate tax will be levied on the death of the life tenants of the two trusts and if the trust assets are situate in British Columbia, Ontario or Quebec, there would appear to be a provincial tax credit available to reduce the estate tax payable even though no provincial succession duties have been paid.

As a result of the potentially large saving in provincial succession duties which flows from the exemption from gift tax of gifts to spouses, there will be a strong impetus for change. There would appear to be at least four possibilities open to provinces who levy succession duties. First, the prov-

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[52] Succession Duty Act, B.C. REV. STAT. c. 372, § 2(2)(*c*) (1960).
[53] Succession Duty Act, ONT. REV. STAT. c. 386, § 5(1)(*g*) (1960).
[54] Succession Duty Act, QUE. REV. STAT. c. 70, § 22 (1964).
[55] Succession Duty Act, B.C. REV. STAT. c. 372, § 2(2)(*d*) (1960).
[56] Succession Duty Act, ONT. REV. STAT. c. 386, § 1(*p*)(i) (1960).
[57] Dart, *Estate Planning under the New Legislation*, 17 CAN. TAX J. 258, at 265 (1969).

inces might withdraw from this field of taxation and accept seventy-five per cent of the estate tax levied in the province by the federal government. The Treasurer of Ontario in his 1969 budget indicated that it was the government's intention to withdraw from the succession duty field.[58] On June 9, 1970 the Treasurer reiterated the government's intention to eliminate succession duty in Ontario.[59] Secondly, the provinces might amend their succession duties, so that on the death of a life tenant, the trust property is deemed to be property passing on the death of the life tenant. Thirdly, the provinces levying succession duties might impose a gift tax in order to protect their revenue from succession duties. The Smith Report on Taxation recommended that Ontario introduce a gift tax.[60] Fourthly, the provinces might request the federal government to amend the provincial tax credit by restricting it to cases in which provincial succession duty was actually paid. The increased estate tax liability would greatly reduce the incentive to avoid provincial succession duty through the establishing of inter vivos trusts in which the spouse receives the income for life. The potential revenue loss in succession duties will be a significant factor in promoting some change.

Another factor which will stimulate change is the elimination of the estate tax on property passing to a spouse. Pressure will undoubtedly be brought to bear on the provincial governments of British Columbia, Ontario and Quebec either to follow suit and remove succession duty in regard to inheritances received from a spouse or to increase the exemptions substantially.

There have been a number of recent changes in the succession duty legislation of the provinces. Some of these changes may in part be attributable to the amendment of the Estate Tax Act.

In British Columbia, a family home or an interest in it is now exempt from succession duty without any value limit with the proviso that it passes to a spouse or a close family member.[61] Previously the exemption was limited to 35,000 dollars and was only available to a spouse. In addition the total exemption for annuities provided other than by will has been increased from 2,400 dollars to 3,000 dollars per annum and the 1,200 dollars limit for each individual beneficiary has been eliminated. Also the charitable exemption has been limited to ten per cent and is available only if the funds are devoted exclusively to charitable activities in British Columbia.

In Ontario, the exemption for widows has been increased from 75,000 dollars to 125,000 dollars and in cases where duty is payable the corresponding credit has been raised to 11,500 from 4.743.75 dollars. Widowers are to receive the same exemption or credit if duty is payable.[62] Previously, the exemption or credit was only available to a widower if he were infirm and there was also a dependant child. Also the exemption granted to the spouse has been extended to a surviving common-law spouse. In addition a re-

[58] ONTARIO BUDGET 58-59 (1969).
[59] 96 ONT. LEG. DEB. 3812 (June 9, 1970).
[60] 3 REPORT OF THE ONTARIO COMMITTEE ON TAXATION 204-07 (1967).
[61] B.C. Stat. 1970 c. 45.
[62] Ont. Stat. 1970 c. 51, §§ 4, 5.

valuation of assets originally valued on the basis of present value tables will now be permitted if the event terminating the interest occurs within four years of the date of death. The provision is similar to section 15(*a*) of the Estate Tax Act. [63]

In Quebec, the exemption available in regard to transmissions to spouses and those in direct line has been increased from 20,000 dollars to 75,000 dollars. [64] Also exempt is the value of pension or retirement annuities payable to a spouse or a person in direct line to the extent that the contributions to the plan were deductible for income tax purposes. Provision has also been made for the payment of succession duty in four equal annual instalments in cases in which immovables and company shares amount to not less than two-thirds of the value of the estate.

6. *Estate Tax Havens*

The most drastic but most effective form of estate planning involves the giving up of one's Canadian domicile and the acquisition of a domicile in a jurisdiction, such as Bermuda or the Bahamas, which does not levy estate or succession taxes. Even if the person does not shift his assets from Canada, by becoming a foreign domiciliary, he limits his estate tax liability to fifteen per cent of the value of his Canadian property.[65] The very limited number of jurisdictions which do not levy estate or succession taxes and the difficulty involved in severing connections with one's native country and acquiring a new domicile has resulted in exceedingly few persons adopting such an extreme tax avoidance measure.

The new estate tax provisions will now make it feasible for more persons to avoid or reduce Canadian estate taxes through a change of domicile. It will now be possible for a husband to leave his entire estate on trust with a life estate to the wife and remainder to the children with the result that no estate tax is payable on his death. If the wife then acquired a domicile in a state of the United States or in almost any other jurisdiction, no foreign estate tax would be payable on her death because the mere cessation of a life estate is not generally regarded as a taxable event. The United Kingdom is an exception in that it does tax on the termination of a life estate and therefore the wife would not avoid estate tax by becoming domiciled there. However, foreign estate tax will be avoided if she became domiciled in most other jurisdictions. It is thus no longer necessary to acquire a domicile in such jurisdictions as Bermuda and the Bahamas. However, if the trust property is still located in Canada at the time of the wife's death, the Canadian estate tax liability will be fifteen per cent of the value of the trust property. If the trust property has been transferred from Canada, there will be no Canadian tax levied. The tax avoidance potential of this course of action may lead to an amendment.

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[63] Can. Stat. 1958 c. 29.
[64] Que. Stat. 1969 c. 31, §§ 1, 2.
[65] Estate Tax Act, Can. Stat. 1958 c. 29, § 36.

It is no longer necessary to look outside the country for estate tax havens. We now have partial estate tax havens within Canada. On April 1, 1967, Alberta became the first province to provide to eligible estates a rebate of the province's seventy-five per cent share of the estate tax.[66] In order to qualify for the rebate the deceased must have been domiciled in Alberta at the time of his death or must have been domiciled elsewhere in Canada and have resided in Alberta for at least 183 days in each of the three years preceding his death. The amount of the rebate is equal to seventy-five per cent of the estate tax payable in regard to property situated in Alberta and any property situated outside Canada that passes to an Alberta resident or domiciliary. Effective April 1, 1969, Saskatchewan passed legislation modelled on The Estate Tax Rebate Act of Alberta.[67] In Manitoba, Bill 88 also modelled after the Alberta Act was introduced in 1969, but an election intervened and it was not enacted. Since the new government is presumably in sympathy with one of the functions of an estate tax, that is to reduce the inequality of wealth distribution, it is reasonable to conclude that legislation providing for a rebate of estate taxes will not be passed in Manitoba under the present government. In 1970, Alberta[68] and Saskatchewan[69] passed reciprocal legislation which provides for rebates for domiciliaries of either province in respect to property situate in the other province.

It is too early to judge exactly what effect the establishment of partial estate tax havens in Alberta and Saskatchewan will have. These provinces now have a competitive advantage over other provinces in attracting wealthy persons to take up or retain residence in these provinces. The potency of this tax concession in influencing a person's decision about where he wishes to reside remains to be seen. The Alberta legislation has had one immediate impact. In the first three years after the act came into force, over two hundred companies established transfer offices in Alberta in order that the shares held by Alberta domiciliaries would have a situs in Alberta and thus qualify for the seventy-five per cent rebate.

II. LEGISLATION RELATING TO WILLS

1. *Alberta*

In Alberta, an amendment to The Family Relief Act,[70] extended the category of persons who qualify as dependants by including illegitimate children and increasing the qualifying age to twenty-one years from nineteen years for children.[71] The Wills Act, 1960,[72] has been amended by striking

[66] The Estate Tax Rebate Act, Alta. Stat. 1967 c. 18, § 4(1).
[67] The Estate Tax Rebate Act, Sask. Stat. 1969 c. 17.
[68] The Estate Tax Rebates Reciprocal Arrangements Act, Alta. Stat. 1970 c. 37.
[69] The Estate Tax Rebates Reciprocal Arrangements Act, Sask. Stat. 1970 c. 18.
[70] ALTA. REV. STAT. c. 109 (1955).
[71] Alta. Stat. 1969 c. 33.
[72] Alta. Stat. 1960 c. 118.

out the words, "in his name" in section 5(a) which now reads: "[a] will is not valid unless . . . (a) it is signed at the end or foot thereof by the testator or by some other person in his presence and by his direction." [73] This amendment was promoted by *Re Fiszhaut* [74] in which a will was signed at the direction of the testator but it was signed not in the name of the testator but in the signor's own name. The will was upheld but in response to this case, "in his name" has been deleted from the Uniform Wills Act to reaffirm clearly that there is no necessity to sign in the testator's name.[75] Alberta has now followed the lead of the Commissioners on the Uniformity of Legislation. The Wills Act, 1960, has been further amended to indicate that a power to sell real property includes the power to grant an option exercisable within one year.[76] In addition the Intestate Succession Act [77] has been amended to conform with the Uniform Intestate Succession Act [78] and now provides that "an illegitimate child shall be treated as if he were the legitimate child of this mother." [79] Formerly, sections 15 and 17 had dealt with specific instances in which inheritance by, from or through an illegitimate might occur. The defect of this approach was revealed in *Re Carlson.* [80] The Administration of Estates Act embodying many provisions which were formerly found in the probate rules was also enacted.[81]

2. *British Columbia*

In British Columbia, the age of majority has been lowered to nineteen years so that any person nineteen years of age or over can now make a valid will.[82] The Age of Majority Act also reduces five of the six permissible accumulation periods set out in the Accumulations Act [83] in that twenty-one will be read as nineteen and minority will not extend more than nineteen years from birth.[84]

3. *Newfoundland*

There was an amendment to The Wills Act [85] of Newfoundland. Sec-

[73] Alta. Stat. 1969 c. 116.

[74] 56 D.L.R.2d 381 (B.C. Sup. Ct. 1966).

[75] PROCEEDINGS OF THE FIFTIETH ANNUAL MEETING OF THE CONFERENCE OF COMM'RS ON UNIFORMITY OF LEGISLATION IN CANADA at 27, 96-97 (B.C. 1968). [Hereinafter cited as 50 PROCEEDINGS ON UNIFORM LEGISLATION IN CANADA].

[76] Alta. Stat. 1970 c. 114, § 29(*a*). The Devolution of Real Property Act was also amended by Alta. Stat. 1970 c. 31. I am indebted to W. F. Bowker, the Director of the Institute of Law Research and Reform for bringing the Alberta amendments to my attention.

[77] ALTA. REV. STAT. c. 161 (1955).

[78] PROCEEDINGS OF THE FIFTH ANNUAL MEETING OF THE CONFERENCE OF COMM'RS ON UNIFORMITY OF LEGISLATION IN CANADA (1925).

[79] Alta. Stat. 1970 c. 60, § 15.

[80] 11 D.L.R.2d 485 (Sask. 1957).

[81] Alta. Stat. 1969 c. 2.

[82] B.C. Stat. 1970 c. 2, § 2.

[83] B.C. Stat. 1967 c. 2, § 2.

[84] Scott-Harston, *Age of Majority Act*, 28 THE ADVOCATE 135 (1970).

[85] NFLD. REV. STAT. c. 155 (1952).

tion 18 of the Wills Act had provided against lapse if a child or other issue of the testator died before the testator and left issue surviving the testator. The amendment inserts section 18A [86] which prevents the lapse of a gift to a brother or sister of the testator who leaves a child or children who surive the testator. The gift which is prevented from lapsing by the section is to take effect as if it had been made directly to the child or to the children equally of the brother or sister who predeceases the testator.

4. *Ontario*

In Ontario, an amendment to the Surrogate Courts Act[87] requires registrars to prepare the necessary papers leading to the grant of letters probate, letters of administration or letters of guardianship where the estate does not exceed 1,000 dollars for a fee of two dollars. Formerly, this duty existed only if the estate was less than 400 dollars.

5. *Saskatchewan*

In Saskatchewan, an amendment was made to the provision of The Wills Act [88] which prevents a devise or bequest from lapsing which is made to a child, other issue or a brother or sister who predeceases the testator. [89] Formerly, it was necessary for that person to leave issue surviving the testator but it is now sufficient if a spouse or issue survives the testator. The other change is that the spouse is not entitled to receive a preferential share of 10,000 dollars when the property is divided as though the deceased survived the testator and died intestate. In addition the Coming of Age Act, 1970, reduces the age requirement for the making of a will to nineteen years. [90] It also provides that children of the deceased will only qualify as dependants under The Dependants' Relief Act up to age nineteen rather than twenty-one. [91]

6. *Yukon and Northwest Territories*

The Commissioners on Uniformity of Legislation in Canada adopted the Testamentary Additions to Trusts Act in 1968. [92] This act deals with the problem which may arise when a testator leaves property to a trustee to hold according to the terms of a trust which he or someone else has established. If this trust cannot be revoked or altered, there is no problem. If the trust is revocable or can be amended, a problem arises out of the doubtful application of the probate doctrine of incorporation by reference. From

[86] Nfld. Stat. 1969 No. 2.
[87] Ont. Stat. 1968-69 c. 124.
[88] SASK. REV. STAT. c. 127 (1965).
[89] Sask. Stat. 1969 c. 77.
[90] Sask. Stat. 1970 c. 8, § 12.
[91] *Id.* § 13.
[92] 50 PROCEEDINGS ON UNIFORM LEGISLATION IN CANADA at 30, 167-68.

this doctrine, courts have evolved the proposition that a testator cannot reserve to himself the power to dispose of property by an instrument not executed according to the formalities prescribed for a will. The bequest to the trustee of a revocable or amendable trust would contravene this proposition. The act provides that the bequest is not invalid because the trust is amendable or revocable or was amended after the execution of the will. These provisions have been enacted in the Yukon Territories [93] where one would have thought that the problem involved with "pour over" trusts was not pressing.

In the Northwest Territories, the Intestate Succession Ordinance has been amended to provide for a preferential share for the widow of 20,000 dollars. [94] Following the lead of Ontario and the Yukon, the Perpetuities Ordinance [95] has been enacted and is identical to The Perpetuities Act, 1966 of Ontario. [96]

III. Case Law Relating to Wills

1. *Taking Instructions and Drafting Wills*

Re Worrell [97] is an important case in that it sets out clearly a solicitor's duty in the drafting of a will. The deceased, who was eighty-two years old, had executed a will about eight months prior to his death. Probate of the will was granted in common form. Then, at the instance of a niece, the executor was ordered to bring in the will and to prove it in solemn form. The issue which was directed to be tried was as follows: "Dorothy Pickering affirms and National Trust Company Limited denies that the said George William Worrell lacked capacity to execute the Will dated February 12, 1967." [98] However, the issue appeared to be whether the document, purporting to be the will of Mr. Worrell, was his will. The will was prepared by a solicitor who took instructions from the nephew of the deceased. The nephew, his wife, daughter and grand-daughter were the major beneficiaries under the will. There was a letter of instruction signed by Mr. Worrell but the letter was also prepared by the nephew and the will did not fully conform to the letter. It was doubted that the difference was ever explained to Mr. Worrell. There was no evidence that the will was read to Mr. Worrell and very weak evidence indicating that he himself read the will. Judge Clare found that "the document propounded is not the will of the testator and that the deceased died intestate." [99] After criticizing the conduct of the solicitor who drew the will without ever speaking with the testator, he set out what he regarded to be the duty of a solicitor in drafting a will as follows: "I would

[93] Y.T. Ord. 1969 (2d Sess.) c. 3.
[94] N.W.T. Ord. 1968 (2d Sess.) c. 8.
[95] N.W.T. Ord. 1968 (2d Sess.) c. 15.
[96] Ont. Stat. 1966 c. 113.
[97] 8 D.L.R.3d 36 (Ont. Simcoe County Surr. Ct. 1969).
[98] *Id.* at 37.
[99] *Id.* at 41.

suggest that in this day of speedy methods of transportation there should be no occasion when a solicitor should prepare a will without receiving his instructions from the testator. It is certainly improper for a solicitor to draft a will without taking direct instructions from the testator and then not to attend personally when the will is executed." [100]

The judge then emphasized the necessity for a solicitor to determine the nature and extent of the testator's property in order to be able to advise the testator about estate tax and other matters. He also stated; "it should be clear that a solicitor taking instructions from a major beneficiary under a proposed will rather than from the testator, should be at once alerted and should, . . . satisfy himself thoroughly that the instrument expresses the real testamentary intentions of a capable testator, prior to its being executed *de facto* as a will at all." [101] The judge also emphasized the need to make full docket entries about all matters relating to the drawing of a will and quoted from the unreported case of *Re Dingwall* that "[i]t is the most elementary of teaching in regard to the drafting of wills that the draftsman should preserve his notes of the testator's intentions." [102]

2. *Revocation by a Subsequent Marriage*

On April 15, 1964, the testator, Thomas William Pluto, made a will leaving his house to his wife, Mary Beatrice Pluto and on April 16, 1964, the following day, he married Mary Beatrice. It would be difficult to find a case in which a stronger inference could be drawn that there had been an implicit declaration in the will that it was made in contemplation of marriage than when a man describes a woman in his will as his wife and the next day marries her. However, as the will did not contain an express declaration that it was made in contemplation of marriage, the judge in *Re Pluto* [103] held that the will was revoked. The judge quotes with approval that: "The purpose of the law as to revocation by marriage is to let in the claims of wives and children, and it is reasonable to suppose that their claims are properly protected and adjusted by the law as to intestacy." [104] There can be little doubt about the merit of letting in the claims of wives and children but is it reasonable to conclude that the claims of wives vis-à-vis children are properly adjusted by the rules of intestate succession?

Ontario and the Northwest Territories provide the largest preferential share where an intestate is survived by a spouse and a child or children. Yet would any husband feel that if his wife was to receive 20,000 dollars from his estate that his wife was then so well provided for that she should then receive only fifty cents or thirty-three and a third cents of every dollar by which his estate exceeded 20,000 dollars? Even Ontario's preferential share of

[100] *Id.* at 42-43.
[101] *Id.* at 43.
[102] *Id.* at 44.
[103] 6 D.L.R.3d 541 (B.C. Sup. Ct. 1969).
[104] *Id.* at 544. The quotation is from Burton v. McGregor, [1953] N.Z.L.R. 487, at 490 (Sup. Ct.).

20,000 dollars is woefully inadequate to properly provide for a spouse and the majority of provinces provide no preferential share at all if the intestate is survived by a child. There is little justification for the complacent claim that the rules of intestate succession will properly adjust the claims of widows as compared with children.[105] The problem is compounded by the fact that in only four provinces are the courts empowered to alter the intestate distribution if the widow does not receive a sufficient amount for her maintenance.[106] The intestate distribution may result in needless suffering because of a poor division of the estate among the members of a family in which relations are not harmonious. The estate of an intestate should be subject to the dependants' relief legislation in all provinces. *Re Pluto* also indicates that there is much merit in section 20(*b*) of the Ontario Wills Act[107] which gives the surviving spouse the option of electing to take under the will even though the will was made prior to the marriage. Revocation of a will by a subsequent marriage is intended to meet the interest of the spouse but, if the will is more advantageous to the spouse than an intestate share, the spouse should be able to opt in favour of the will even though it was executed prior to the marriage.

3. *Rule against Perpetuities*

In *Re Odelberg Estate,*[108] the testator provided: "All the rest of my property I give to the home for the aged of the Canada conference of the Lutheran Augustana Synod when such a home is built in Saskatchewan."[109] It was held that there was no general charitable intent and as the gift was contingent upon a future uncertain event, the gift violated the rule against perpetuities and thus failed. The case represents a straight forward application of the common law rule against perpetuities. It also represents another case in which a testator's intention has been frustrated. It provides a cogent basis for arguing that the old possibilities rule should be replaced by the "wait and see" rule as has been done in Ontario. If the Ontario statute had been applicable, the gift would have been presumptively valid. As there was no life or lives in being which were relevant for the vesting of the gift in this case, the perpetuity period would be twenty-one years. If a home for the aged was established within twenty-one years, the gift would be valid and, if it was not, the gift would fail.

4. *Interpretation*

There is always a plethora of cases dealing with the construction of

[105] The Family Law Project of the Ontario Law Reform Commission has recommended that the surviving spouse should take the whole of the estate but if this recommendation were not accepted then the commission recommends that the preferential share should be increased from 20,000 dollars to the amount of the succession duty exemption which was then 75,000 dollars and which is now 125,000 dollars. 3 FAMILY LAW PROJECT 563-64 (Ont. 1967).

[106] PROCEEDINGS ON UNIFORM LEGISLATION IN CANADA at 122-24.

[107] ONT. REV. STAT. c. 433 (1960).

[108] 72 W.W.R. (n.s.) 567 (Sask. Surr. Ct. 1970).

[109] *Id.* at 568.

wills. It is therefore difficult to select those cases which warrant some attention. *Re Herlicka*[110] deserves mention in that if testators could rise from the grave and haunt the judge who misconstrues their wills, Mr. Herlicka must wish to do so. In this case, the testator died leaving a lawful wife, Audrey, and two legitimate children and a common law wife, Phyllis, and three illegitimate children. The testator had separated from his lawful wife and for approximately the last ten years of his life, he had been living with Phyllis as husband and wife. In the first dispositive clause, the will refers to "my wife, Phyllis Herlicka" and, having explicitly identified the person, the will subsequently refers only to "my wife." From a reading of the will it appears clearly that it is his common law wife that he intended to benefit and that the children referred to in the will are the children of which he and his common law wife were the parents. However, the will was construed so that the common law wife took only the household goods given to her in the first dispositive clause. Except for this, the judge found that "the testator intended to benefit exclusively his lawful wife and his legitimate children."[111]

This conclusion was not reached primarily by a detailed analysis of the will of the testator and his circumstances at the time of making of the will but by a reliance upon late nineteenth century English decisions which have been followed in Ontario. *Hill v. Crook,*[112] which holds that the term children in a will prima facie means legitimate children, is referred to as the fountainhead of the modern jurisprudence on the subject. The case might be referred to more aptly as the zenith of Victorian hyprocrisy. This may not be entirely fair in that there is little wrong with starting with the presumption that children refers to legitimate children provided one is prepared to jettison the presumption if the wording of the will and the circumstances of the testator at the time he made the will indicate that this is not the case. However, it would probably be preferable to bring to the task of construing wills as few preconceived ideas as possible.

The strained interpretation placed upon the will in *Re Herlicka* undoubtedly defeated the intention of the testator but it did more than that. It probably caused needless suffering. If the will had been construed so that only the common law wife and illegitimate children took under the will, it would have been possible for the lawful wife and the legitimate children to apply for maintenance under the Dependants' Relief Act. If the estate were sufficiently large, both families might have received adequate provision from the estate. By construing the will as benefitting the lawful wife and the older children of that union, instead of the common law wife and the younger children by the common law wife, it became impossible to utilize the estate in a way which might have provided adequate maintenance for both families. In Ontario, a common law wife and illegitimate children are not within the category of persons who are eligible to apply under the Dependants' Relief

[110] 3 D.L.R.3d 700 (Ont. High Ct. 1969).
[111] *Id.* at 707.
[112] L.R. 6 H.L. 265 (1873).

Act. The act should be amended to include a common law wife and illegitimate children as dependants. The need for this amendment is increased by the persistence of the courts in rigidly applying outmoded presumptions in the construing of wills.

The presumption that a testator by using the words "wife" and "children" means lawful wife and legitimate children is based on the idea that it is in some way more equitable to give priority to these persons. At the time when *Hill v. Crook* was decided, the only way in which priority could be given to legitimate children and lawful wives was to construe the will so as to exclude illegitimate children and common law wives. With the passage of dependants' relief legislation, this is no longer the case. A sense of fairness no longer demands that wills be construed subject to the presumption in favour of lawful wife and legitimate children. The dependants' relief legislation will protect the interest of these persons. The words "wife" and "children," after the passage of such legislation, should be interpreted without reference to rigid presumptions.

IV. Conclusion

The amendments to the Estate Tax Act and the new gift tax provisions represent a very great inmprovement. There is now a unified transfer tax on the disposition of wealth which reduces the former broad avenue for estate tax avoidance through the making of substantial inter vivos gifts. The exemption of all property given to a spouse is a legitimate recognition that in general the accumulation of wealth is the result of their joint effort. It is also very reasonable that the rate schedule should have been adjusted upward with the result that, when property passes from one generation to the next, the estate tax payable has been substantially increased in order to compensate for the loss of revenue through permitting tax free transfers between spouses.

Transfer taxes continue to be subjected to critical comment.[113] The governments of Alberta and Saskatchewan have gone as far as they can go in freeing their residents from estate tax.[114] However, estate and gift taxes compare favourably with other forms of taxation. Professor Carl Shoup in writing about estate and gift taxes says: "Compared with most taxes, they have few effects on the allocation of resources and hence impose little excess burden. They tend less than other taxes to check entrepreneurial drive. They have little tendency to push investors either toward or away from risk taking. They are collected at times and under circumstances that are relatively convenient for the taxpayer and tax administrator."[115]

The estate tax does not raise a large amount of revenue. It is estimated

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[113] *E.g.*, J. SAVAGE & V. BULCKE, TRANSFER TAXES: THEIR EFFECT ON PRODUCTIVITY AND CONTROL OF OUR ECONOMY (1968).

[114] The Estate Tax Rebate Act, Alta. Stat. 1967 c. 18. *See also* the analogous Saskatchewan Act, Sask. Stat. 1969 c. 17.

[115] Shoup, *Federal Estate and Gift Taxes*, CAN. TAX FOUNDATION 104 (1960).

that in the fiscal year 1969-70, the estate tax revenue will be 110 million dollars which amounts to only .9 per cent of federal budgetary revenue.[116] In 1968-69, it is estimated that the provinces will raise 122 million in succession duty which amounts to 2.2 per cent of the provinces' total tax revenue.[117] Death taxation is a significant but marginal source of tax revenue. However, the role of gift and estate tax is not confined to simply raising tax revenue, it has a much more important social and political role. This role is to mitigate the inequality of wealth distribution in Canada. The Smith Report on Taxation states that "a democratic society such as ours, espousing political equality for all its citizens, cannot permit undue concentration of wealth in the hands of a few. Though differences in wealth will always be with us, extremes of affluence and poverty must be prevented in the interests of a stable society."[118]

There are no adequate statistics to indicate accurately the extent of the concentration of wealth in Canada. However, income tax and estate tax statistics give some indication of the great disparity in wealth distribution in Canada. In 1968, the latest year for which income tax statistics are available, only 57,411 persons earned more than 25,000 dollars out of a total of 8,495,184 persons who filed income tax returns. Approximately .7 per cent of all persons who filed an income tax return earned more than 25,000 dollars but this .7 per cent received thirty-seven per cent of the total dividend income declared by all persons filing a return or 241.7 million dollars out of a total of 653.3 million dollars.[119] In 1968, there were only 7,414 taxable estates,[120] estates in which the aggregate net value exceeded 50,000 dollars, and yet there were approximately 153,000 persons who died in Canada.[121] Thus only 4.85 per cent of the persons who died had taxable estates. Of the 7,414 who had taxable estates 102 or 1.4 per cent of those with taxable estates had estates in excess of one million dollars. The 102 estates or 1.4 per cent of the total number of taxable estates possessed total assets of 254 million dollars out of a total of 1,248 million dollars or 20.4 per cent of the total assets of all taxable estates. The 102 estates or 1.4 per cent of the total number of taxable estates also owned 135 million dollars in stocks and shares out of a total of 366.7 million dollars of stocks and shares held by all taxable estates or 36.8 per cent.

These statistics give some indication of the very great concentration of wealth in Canada. It is pertinent to inquire whether meaningful political equality can exist when economic inequalities are so blatant. Those who possess great wealth are almost certain to have an influence on government in relation to some issues which is far greater than that exerted by the average citizen. Government would probably be more responsive to the

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[116] THE NATIONAL FINANCES 52 (1969-70).
[117] PROVINCIAL FINANCES 24 (1969).
[118] 3 REPORT OF THE ONTARIO COMMITTEE ON TAXATION 132 (1967).
[119] TAXATION STATISTICS, Dept. of Nat'l Rev. 35 (1970).
[120] *Id.* at 176.
[121] 44 CAN. STATISTICAL REV. at 2 (No. 2 1969).

needs and aspirations of the majority if there were a decrease in the large aggregates of economic power that are concentrated in a few hands. Estate and gift taxation has an important role to perform in promoting a greater equality of wealth distribution in that this will probably give greater meaning and substance to democracy. The amendments to the Estate Tax Act and the new gift tax provisions will assist in this process. However, the estate tax rebate which the provinces of Alberta and Saskatchewan have provided for the benefit of the estates of their domiciliaries represents a retrograde step.

The new unified transfer tax on the disposition of wealth is not the ultimate solution. An answer to the problem presented by the avoidance of estate tax between generations through the use of trusts will eventually have to be found. A person can leave property to a trust with the income to be paid to his spouse for life, then to his children for their lives and then to his grandchildren alive at his death for their lives, and on the death of the surviving grandchild who was alive at his death, the corpus can be divided among the great grandchildren. In this example, no estate tax is levied on the trust property on the testator's death but it is levied on the death of his spouse. There is no estate tax levied on the trust property on the death of the testator's children or his grandchildren, because life estates merely terminate. The corpus of the trust is then divided among the great grandchildren and no estate tax will be payable on these assets until the death of the great grandchildren. In this example, the estate tax skipped two generations and yet the children and grandchildren benefitted from the trust property through the use of the income from it. There is no simple solution to this problem of generation estate tax skipping through trusts.[122] It is possible to levy estate tax on the cessation of a life estate as is done in the United Kingdom. However, this simply leads to the creation of discretionary trusts and no completely satisfactory solution has been evolved to deal with this type of trust.[123]

The amendments which have taken place will necessitate the redrafting of many wills to either take advantage of the tax postponement provided by the spousal exemption or to take advantage of estate tax saving through the splitting of an estate. Many wills will also have to be redrafted to take advantage of the new children's exemptions and the nil rate of tax on the first 20,000 dollars of the taxable value of an estate. Gift programs will have to be revised. Insurance which has been taken out to provide liquidity to pay estate taxes will have to be reconsidered. There will no longer be any estate tax advantage for a wife to own a policy of insurance on the life of her husband. It will now be more advantageous for children to own policies of insurance on the lives of their parents. The solicitor when he drafts a will is going to be called upon to exercise far more tax planning skill than was required under the former legislation.

[122] J. Smith, D. Fields and E. Mockler recommended that property be deemed to pass on the cessation of a life estate in STUDIES OF THE ROYAL COMM'N ON TAXATION at 10 (No. 11, 1964).

[123] G. JANTSCHER, TRUSTS AND ESTATE TAXATION 156-90 (1967).