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Modern Coverture: Old Wine in Old Bottles

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as that is. Given that, it is essential that Congress also consider the effects that any marriage penalty relief proposal has on the choice of filing status, and thus, on the likelihood that joint and several liability will apply. Only by this consideration can Congress also avoid the unintended consequences of worsening some aspects of the tax law while attempting to improve others. Thank you.

PROF. BECK: Thank you very much Professor Christian. You picked a subject dear to my heart. I have always thought that both forms of spousal liability are a species of marriage penalty. The *Poe v. Seaborn*[35] liability which makes wives liable for half their husband's taxes when they file separately, and the joint and several liability on the joint return both apply only to married persons. They are in and of themselves both a form of marriage penalty. It is a different penalty than the rate penalty, but the liability rules are a penalty too which is something that I am sure that we will come back to later. Our next speaker is Bill LaPiana.

MODERN COVERTURE: OLD WINE IN OLD BOTTLES

William P. LaPiana

PROF. LaPIANA:[****] Good morning. Any discussion of men, women, marriage, family and taxation is bound to be contentious

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[35] 282 U.S. 101 (1930).

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since it concerns the relationships between men, women, sex, and money. In addition to these contentious issues, we have to realize that marriage is not for everyone. Some couples simply do not wish to marry, and some cannot because the two partners are of the same sex. These observations seem to be pretty obvious, and probably mean nothing to those who profess to base their efforts for tax reform in a fervent belief in the traditional family. Those who are unable or unwilling to marry, of course, are not faced with the possibility of an income tax marriage penalty or a marriage bonus or, indeed, need they be concerned with potential joint and several liability for each other's taxes. While I know of no reliable information, my guess is that there is a widely held belief that unmarried couples, whether gay, lesbian or straight, consist of two earners who are better off not married. That judgment, however, takes into account only the income tax. The transfer tax situation of the unmarried couple is disastrous.

The partners may be making taxable gifts to each other every day of their lives together, gifts which, over time, will completely erode their unified credits against the transfer tax and have the potential for completely deranging any estate tax planning in which they may have engaged.[36] For example, if the wealthier partner pays for vacations, he or she is making gifts to the poorer partner. The wealthier partner, or in New York, the more fortunate partner, is the tenant of record or the owner of the couple's residence. If he or she never collects rent from the other partner, the foregone rent may be a gift. In the course of a single calendar year these gifts may well exceed the annual present interest exclusion of $10,000. Husbands and wives, however, have no worries in this situation, because for transfer tax purposes, husband and wife are one. When partners are married inter-spousal transfers are completely free of tax.[37] This

[36] To the extent gifts exceed the present interest exclusion, *see* I.R.C. § 2503(b) (1999), or do not fall under another exclusion, *see* I.R.C. § 2503(b), (c), (e) (1999), a gift tax is due, although there will be no tax paid until the amount of tax levied on the cumulative total of lifetime gifts made by the taxpayer exceeds the amount of the unified credit against the transfer taxes, *see* I.R.C. § 2010 (1999). An increase in the credit is currently phasing in. In 2006 the credit will offset the taxes on $1,000,000 of transfers. Unplanned use of the credit during life will certainly upset any estate plan based on having the credit available at death.

[37] *See* I.R.C. §§ 2056(d)(2), 2523.

provision of both the estate and gift taxes (the unlimited marital deduction) is an important factor in formulating a solution to the problem posed by the income taxation of the married couple. Were the solution to the income tax problem a separate assessment system there would, one assumes, be an enormous incentive to transfer income producing capital to the poorer spouse so that its return would be taxed to him or her. Therefore, both sets of rate brackets would be used to maximum advantage, assuming, of course, we maintain a progressive system and ignore other solutions to the allocation of income problem. At first glance this might not be such a bad thing, especially in terms of social policy, if it encourages the true equal sharing of the couple's wealth; but will it?

First of all, it is possible to transfer the income of property to the poorer spouse without giving the spouse any control over the property. A properly structured qualified terminal interest property (QTIP) trust will pay and tax all income to the spouse/beneficiary, leave the spouse/beneficiary without any control over the trust principal, and on the spouse/beneficiary's death, pass the property to whomever the donor spouse has selected.[38] The price, of course, is taxation of the trust property in the spouse/beneficiary's estate, which may not be such a bad thing. Forcing taxation in the poorer spouse's estate may reduce the overall estate taxes for the marital unit by, in effect, transferring some of the wealthier spouse's estate tax liability to the poorer spouse.

The QTIP trust, of course, is a statutory device, the existence of which should make us question the relationship between the unlimited marital deduction and the idea that marriage is an equal economic partnership. It takes no great insight to note that the partnership theory is not without critics. From the progressive direction, a feminist critique tries to show that marriages are not marked by true partnership, but rather are governed by socially dictated roles of dominance and submission, which always leave women at a disadvantage, placing the burdens on them and giving relatively more control to men. Marjorie Kornhauser, for example, paints just this sort of picture of marriage and then outlines a tax

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[38] *See* I.R.C. § 2523(f). The corresponding estate tax provision is I.R.C. § 2056(b)(7).

regime in which women's fundamentally different role would be recognized.[39] From a traditional direction, we need only consider the recent statement by the Southern Baptist Convention that women are to be submissive to their husbands. What these two apparently disparate approaches have in common is a view of marriage as something other than a union of equals, something much more complex than a partnership of market actors. For better or for worse, marriage is at the center of a social organization marked by male leadership and law must either reinforce that organization or struggle against it. In either case, that sort of institution may not be one which same sex or non-traditional heterosexual couples want to embrace. In a sense, both of these views hearken back to the old common law doctrine of coverture in which the wife's legal personality was submerged into that of the husband. One view sees an economic version of coverture which the law must try to ameliorate, the other sees an emotional and spiritual coverture which, presumably, the law should reinforce.

If marriage really is a relationship in which one partner is always subordinate to the other, does it make sense to tax the married couple as other than a single entity? If the solution to the marriage were a separate assessment system how would "separateness" be determined? Would it be enough to simply make a "book entry," dividing in half the couple's income from whatever source? Or would the predicate for separate assessment be true separate ownership? What if the law required outright ownership of capital by a spouse before income from that capital is taxed to that spouse. What if income could be "split" only on the basis of a legally enforceable assignment — each spouse receiving a paycheck for one-half the wages of each earner? Such suggestions sound radical, and indeed they are. Their radical nature, in turn, exposes our limited notion of economic partnership. If many visions of marriage are indeed visions of subordination, the legal expression of economic partnership is equally limited. The QTIP trust, for example, requires that a donee "partner" receive only limited access to the economic value of the property "given" to him or her. Although matters may be a little

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[39] *See* Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413 (1996).