



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 52 | Number 1

Article 15

11-1-1973

Estate Tax -- Administrative Expense Deductions -- A Reaffirmation of the Section 2053(a) Standard

Robert DeWitt Dearborn

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Robert D. Dearborn, *Estate Tax -- Administrative Expense Deductions -- A Reaffirmation of the Section 2053(a) Standard*, 52 N.C. L. REV. 190 (1973).

Available at: <http://scholarship.law.unc.edu/nclr/vol52/iss1/15>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

better qualified simply because of minority origins."⁶⁷

The *Spurlock* decision qualifies as an important precedent for a sympathetic lower court response to the Burger Court's cautious approach toward enforcement of the constitutional rights of minorities.⁶⁸ Had the court seen fit to apply either a "business necessity" approach or the standards provided by the EEOC Guidelines, United's task would have been measurably greater. If the goals of Title VII are not to be abandoned, the courts must carefully consider the availability of alternatives and the specific problems they themselves present, and weigh these against the inequity of current hiring practices. If less discriminatory alternatives are feasible the courts should be extremely reluctant to condone existing discriminatory impacts. The "headwinds" against minorities have not yet dissipated; the advanced technology and elevated production standards of modern corporations should not blind the courts to the portentous consequences of permitting employers to reject qualified minority applicants merely because their white applicants are "better" qualified.

SAXBY M. CHAPLIN

Estate Tax—Administrative Expense Deductions— A Reaffirmation of the Section 2053(a) Standard

The transfer of property at death results in the levy of federal estate taxes upon the taxable estate, that is, the gross estate less allowable deductions and exemptions.¹ One of the allowable deductions from the gross estate is that of administration expenses provided for in section 2053(a) of the Internal Revenue Code of 1954.² Treasury Regulations

⁶⁷401 U.S. at 436.

⁶⁸See, e.g., *Palmer v. Thompson*, 403 U.S. 217 (1971).

¹INT. REV. CODE OF 1954, § 2051.

²INT. REV. CODE OF 1954, § 2053(a) provides:

General Rule.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts—

- (1) for funeral expenses,
- (2) for administration expenses,
- (3) for claims against the estate, and
- (4) for unpaid mortgages on, or any indebtedness

sections 20.2053-3(a)³ and 20.2053-3(d)(2)⁴ limit the deduction for expenses associated with the sale of property to situations where the sale was *necessary* to preserve the estate, pay debts of the estate, or to effect distribution. However, in *Estate of Park v. Commissioner*,⁵ the Court of Appeals for the Sixth Circuit rejected the necessity requirement imposed by these regulations to the extent that they apply to the sale of probate property and held that the exclusive criterion for deductibility under section 2053(a)⁶ should be the determination provided for in the statute itself—the allowability under the laws of the jurisdiction in which the estate is being administered.⁷

Mabel F. Colton Park's will was admitted to probate on March 8, 1968. Her probate estate⁸ included a residence and a cottage that were to pass to her four sons under the residuary clause of the will, a situation which the Tax Court conceded might prove administratively inconven-

in respect of, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate . . . as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

³Treas. Reg. § 20.2053-3(a) (1958) provides:

In general. The amounts deductible from a decedent's gross estate as "administration expenses" of the first category (see paragraphs (a) and (c) of § 20.2053-1) are limited to such expenses as are actually and necessarily incurred in the administration of the decedent's estate; that is, in the collection of assets, payment of debts, and distribution of property to the persons entitled to it. The expenses contemplated in the law are such only as attend the settlement of an estate and the transfer of the property of the estate to individual beneficiaries or to a trustee, whether the trustee is the executor or some other person. Expenditures not essential to the proper settlement of the estate, but incurred for the individual benefit of the heirs, legatees, or devisees, may not be taken as deductions. Administration expenses include (1) executor's commissions; (2) attorney's fees; and (3) miscellaneous expenses. Each of these classes is considered separately in paragraphs (b) through (d) of this section.

⁴Treas. Reg. § 20.2053-3(d)(2) (1958) provides in part:

Expenses for selling property of the estate are deductible if the sale is necessary in order to pay the decedent's debts, expenses of administration, or taxes, to preserve the estate, or to effect distribution. The phrase "expenses for selling property" includes brokerage fees and other expenses attending the sale, such as the fees of an auctioneer if it is reasonably necessary to employ one.

⁵475 F.2d 673 (6th Cir. 1973).

⁶INT. REV. CODE OF 1954, § 2053(a), *quoted in note 2 supra*.

⁷475 F.2d at 676.

⁸The probate estate consisted of the following:

ient.⁹ The sons decided that they would prefer the readily divisible cash proceeds from a sale of the real estate and therefore requested the administrator to sell the properties under the power given him in the will. Brokerage fees and other expenses incurred in selling the property were included in the administrative expenses listed in the annual probate accountings and were approved for deduction from the principal of the estate by the Michigan probate court. However, the Commissioner subsequently disallowed the estate tax deduction for these expenses.

The Tax Court affirmed the Commissioner's decision on the basis of the requirement of the regulations that the sale and related expenses be *necessarily* incurred in administration of the decedent's estate rather than for the individual benefit of the devisees.¹⁰ The court concluded that the sale of the property was not essential for the proper settlement of the estate, and therefore no deduction for the selling expenses should be allowed.¹¹

The Sixth Circuit reversed. The court first examined an earlier Tax Court decision, *Estate of David Smith*.¹² The issue in *Smith* was the deductibility of expenses incurred when the decedent's sculptures were sold in order to fund certain trusts established for his daughters. The majority of the Tax Court held that the fact that expenses had been allowed by the probate court was not sufficient for federal estate tax

Residence	\$ 52,000.00
Cottage	24,750.00
U.S. Savings Bonds, Series E	24,069.62
350 Shares Continental Associates, Inc. common stock	350.00
Cash in bank account	1,807.45
Social Security benefit	97.90
Income on hand and accrued due deceased's estate from Trust Accounts	6,625.55
Household furniture at 253 Lewiston Road	5,841.25
Household furniture and personal effects at 2315 Lake Shore Road	250.00
Jewelry	2,090.75
Refund of overpayment of 1967 Federal income tax	347.61
Proceeds from Connecticut General annuity policy	5,004.38
	\$123,234.51

⁹Estate of Mabel F. Colton Park, 57 T.C. 705, 710 (1972).

¹⁰Treas. Reg. §§ 20.2053-3(a), 20.2053-3(d)(2) (1958), *quoted in notes 3-4 supra*.

¹¹57 T.C. at 709.

¹²57 T.C. 650 (1972).

deductibility without also meeting the criteria set forth in Regulation section 20.2053-3(d)(2).¹³ The court felt that the standard contained in the statute was only a threshold requirement with the ultimate test being satisfaction of the regulations' necessity requirement.¹⁴

Estate of Park found the reasoning in *Smith* unpersuasive.¹⁵ The court reasoned that if the fiduciary, on the basis of his sound judgment, as approved by the probate court, feels that the estate would benefit by the sale of the real estate, a section 2053(a) deduction should not be denied because the Commissioner does not think the sale was necessary.¹⁶ Instead the *Park* court advocated a strict application of section 2053(a) of the Code,¹⁷ which requires only that the deduction be allowable under state law.¹⁸

It has long been established that deductions from federal tax liability are questions of federal law, and are allowed only when clearly provided in the appropriate statute.¹⁹ *Estate of Park* does not dispute this, for it is precisely the standard for deductibility contained in section 2053(a) that the court feels called upon to defend. What the Sixth Circuit has rejected is the Treasury's interpretation of the statute which relegates the statutory standard of deductibility to a role preliminary to the Treasury's own necessity standard.

Regulations sections 20.2053-3(a) and 20.2053-3(d)(2) have been in effect in substantially identical language since 1919.²⁰ Treasury regulations and interpretations long continued without substantial change are usually deemed to have received congressional approval, and hence have the effect of being law.²¹ However, the rejection of these regulations by the Sixth Circuit does not seem offensive to the deference usually given

¹³*Id.* at 661.

¹⁴*Id.*

¹⁵475 F.2d at 676.

¹⁶*Id.*

¹⁷While the literal wording of § 2053(a) refers to deductions "allowable" in the various jurisdictions, the holding of *Estate of Park* limits deductibility to situations where the deduction actually has been allowed by a state probate court. 475 F.2d at 676. The restriction represents the proper application of § 2053(a). The propriety of a deduction depends upon the circumstances of the administration of the particular estate. Accordingly, it would be unreasonable in applying § 2053(a) to a specific estate to speak of the allowability of a deduction without reference to whether the deduction had been allowed or would likely be allowed if reviewed by the probate court.

¹⁸475 F.2d at 676.

¹⁹*Deputy v. Dupont*, 308 U.S. 488 (1940); *New Colonial Ice Co. v. Helvering*, 292 U.S. 435 (1934).

²⁰*Estate of David Smith*, 57 T.C. 650, 664 (1972).

²¹*United States v. Correll*, 389 U.S. 299, 305-06 (1967); *Taft v. Commissioner*, 304 U.S. 351, 357 (1938).

long-standing regulations. The Supreme Court has previously questioned the significance of reenactment without expressed approval of the prior interpretations.²² Furthermore, the disputed regulations were not mentioned in the pertinent section of the House Report on the adoption of section 2053.²³ The only discussion in the report was of the state law standard of deductibility.²⁴ Therefore, it is a plausible argument that Congress has considered and approved only that standard.

Estate of Park's defense of the state determination of deductibility draws support from a number of judicial opinions outside the Sixth Circuit which have questioned the propriety of the standard of the regulations.²⁵ In *Estate of Louis Sternberger*²⁶ an executor was instructed

²²Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).

²³H.R. REP. NO. 1337, 83rd Cong., 2d Sess. 91 (1954) provides:

G. Expenses, indebtedness, and taxes (sec. 2053)

Funeral expenses, administration expenses, claims against the estate and unpaid mortgages are deductible in computing the taxable estate under present law. However, *this deduction is limited to those expenses allowable by the laws of the jurisdiction under which the estate is being administered* and cannot exceed the value of the property included in the gross estate subject to claims, that is, the probate estate. Thus, if the decedent has placed most of his assets in a trust (not includible in his probate estate) funeral and other expenses actually paid . . . out of the trust assets are not allowed as a deduction to the extent they exceed the value of the property in the probate estate.

These arbitrary distinctions have been removed under your committee's bill. Expenses incurred in connection with property subjected to the estate tax, although not in the probate estate, are to be allowed as deductions if the expenses are of the type which would be allowed as deductions if the property were in the probate estate and they are actually paid within 1 year of the decedent's death.

In addition, expenses in connection with property subject to claims are to be allowed without regard to the total value of the probate estate if they are paid within the period provided for the assessment of the estate tax.

(emphasis added.)

²⁴*Id.*

²⁵With the exception of *Smith*, prior determinations *within* the Sixth Circuit failed to establish a clear preference for either the necessity requirement of the regulations, or the exclusive state determination of deductibility. In *Estate of Goodwin v. Commissioner*, 201 F.2d 576 (6th Cir. 1953), a probate court in Ohio had determined that the daughters' claim against the estate qualified for a § 2053(a) deduction. Despite the Commissioner's accusation that such was for the individual benefit of the daughters rather than the estate as a whole, the Sixth Circuit allowed the deduction. The allowance was reconciled with the regulations by reliance upon Treas. Reg. 105, § 81.30, 7 Fed. Reg. 1449 (1942), the predecessor of Treas. Reg. § 20.2053-1(b)(2), *see* note 41 *infra*.

In *Union Commerce Bank v. Commissioner*, 339 F.2d 163 (6th Cir. 1964), a deduction for interest on overdue debts not provided for in Treas. Reg. § 20.2053-3(a) was remanded for further examination. However, there had not been a determination as to its deductibility by a probate court.

The court in *Central Trust Co. v. Welch*, 304 F.2d 163 (6th Cir. 1962) allowed deduction of attorney fees incurred in defending an estate. Reliance on the deference given probate court determinations under Treas. Reg. § 20.2053-1(b)(2), *see* note 41 *infra*, excused the court from

under the decedent's will that he might sell the decedent's residence if the surviving wife and daughter decided not to live there. The executor subsequently sold the property and claimed a section 2053(a) administrative expense deduction for the related brokerage fee and legal expenses. The court rejected the government's argument that the expense was one of the trust created by the decedent rather than of his estate. Although the New York Surrogate's Court found that the proceeds from the sale were not needed to pay any debt of the estate,²⁷ the court allowed the deduction since the selling expenses were administration expenses allowed by the laws of New York.²⁸

In *Ballance v. United States*,²⁹ the Commissioner had rejected a deduction under the predecessor of section 2053(a) allowable under Illinois law for interest that accrued to debts of the estate when the fiduciary delayed payment of the debts to avoid selling assets at a loss. The Seventh Circuit refused to grant the regulations superiority to the standard contained in the statute and allowed the deduction.³⁰

The Court of Appeals for the Fourth Circuit, in *Commercial National Bank v. United States*,³¹ considered the deductibility of attorneys' fees included in the settlement of an heir's challenge to the decedent's will. Since the assignment of costs was not petitioned for in the probate court, it had not been declared as an administration expense under North Carolina law and the deduction was not allowed.³² However, the court theorized that if that assignment of costs to the estate had taken place according to the appropriate provision in the North

deciding the validity of § 20.2053-3(d)(2).

The Tax Court in *Estate of Swayne*, 43 T.C. 190 (1964), considered the deductibility under § 2053(a) of the selling expenses incurred when the decedent's son as executor sold the decedent's residence. The sale had been authorized by the probate court but the deduction was denied for failure to establish the necessity of the sale in accordance with § 20.2053-3(a). However, the taxpayer had not challenged the validity of the regulation itself; he had relied solely on an assertion that such sale was necessary.

²⁷18 T.C. 836 (1952), *aff'd*, 207 F.2d 600 (2d Cir. 1953), *rev'd on other grounds*, 348 U.S. 187 (1955). The issue of deductibility was not raised on appeal.

²⁸*Id.* at 842.

²⁹*Id.*

³⁰347 F.2d 419 (7th Cir. 1965).

³¹"[T]he definition of 'administration expenses' in the treasury regulation as . . . 'necessarily' incurred in the administration of the estate cannot serve to override the statutory provision . . . authorizing the deduction of '[s]uch amounts . . . for administration expenses . . . as are allowed by the laws of the jurisdiction . . . under which the estate is being administered.'" *Id.* at 423.

³²196 F.2d 182 (4th Cir. 1952).

³³*Id.* at 184.

Carolina General Statutes,³³ the determination of the probate court might have been controlling for the question of federal estate tax deductibility.³⁴

Estate of Park does not seem to be a radical departure from precedent. Rather, it makes explicit the dissatisfaction with the regulations that was suggested in these earlier cases. Section 20.2053-3(a) pits the interests of the estate as a whole against the interest of the individual beneficiaries: "The expenses contemplated in law are such only as attend the settlement of an estate. . . . Expenditures not essential to the proper settlement of the estate, but incurred for the individual benefit of the heirs . . . may not be taken as deductions."³⁵ The statement is internally inconsistent, for what benefits the estate as a whole also benefits the heirs of that estate.³⁶ Where there is only one beneficiary, by necessity, there must be a one to one correlation between the benefit enjoyed by the estate and that enjoyed by the individual beneficiary.

Of greater importance to the court in *Estate of Park*, however, were the pragmatic considerations for the estate administrator. The Sixth Circuit has realized that a fiduciary functions as the agent of the beneficiaries as well as of the decedent.³⁷ The fiduciary has a duty to protect the assets of the estate.³⁸ This duty may require the selling of some unproductive assets in order that the income producing assets will not have to be sacrificed to meet the financial obligations of the estate. Similarly, if the executor sees an opportunity to sell an asset at a substantial gain over its present value, or if he foresees a devaluation of the

³³N.C. GEN. STAT. § 6-21 (1969), which is similar in pertinent part to the statute before the court, provides that "Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court: . . . (2) Caveats to wills . . ." The statute further provides that "[T]he word 'costs' as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow"

³⁴Notwithstanding this established state law, the United States contends that the attorneys' fees were not administrative expenses within the terms of the federal statute . . . and that therefore even if they had been assessed as costs of the proceeding by the judgment of the state court, they were not deductible for the purposes of the estate tax. This position is doubtful since it would seem to have been the purpose of Congress to follow the state law in the allowance for administrative expenses, but we do not find it necessary to decide that question in this case.

196 F.2d at 185.

³⁵Treas. Reg. § 20.2053-3(a) (1958), quoted in note 3 *supra*.

³⁶*Sussman v. United States*, 236 F. Supp. 507, 509 (E.D.N.Y. 1962); see *Estate of Harry C. Porter*, 49 T.C. 207 (1967).

³⁷475 F.2d at 676.

³⁸*First Nat'l Bank v. United States*, 233 F. Supp. 19, 29 (D. Kan. 1964).

asset during the period of probate, he would be preserving the aggregate asset value of the estate if he sells now, even though the sale was not "necessarily" incurred in the sense that it was not needed to provide funds to pay liens upon the estate. The sale of non-income producing residential property will "preserve" the aggregate assets of the estate in two ways. First, liquid assets which are not used in satisfaction of the liens of the estate are able to be invested in income producing ventures. Secondly, the maintenance cost of the residential property would continue to be a drain on the assets of the estate as long as the property is held.

Aside from the purely economic considerations which render the regulations' standard overly restrictive, there is a basic convenience consideration. In *Estate of Park* there were two properties and four sons. It is usually inconvenient for the administrator to make such a division.³⁹ Such practical considerations are not recognized in the necessity requirement of the regulations. The decision in *Estate of Park* returns the standard to one more in harmony with the realities of the daily administration of estates.

If *Estate of Park* represents the proper standard for section 2053(a) deductions, the prudent fiduciary would be wise to consider what varying fact situations might fit under its fiscal umbrella as administrative expenses. Three areas, expenses incurred in will contests, appraisal costs, and probate of an intestate's estate, should exemplify the considerations and questions that would arise with any attempt to extend the *Estate of Park* rationale to different fact situations.

In the past, the question of the deductibility of expenses incurred in a will contest has defied any definitive determination. Some courts have relied heavily on the probate court's determination⁴⁰ and the deference given this determination by the Treasury Regulation section 20.2053-1(b)(2).⁴¹ Others have required the will contest to meet the necessity requirement of Regulation section 20.2053-3(a).⁴² Under *Estate*

³⁹See *Estate of Mabel F. Colton Park*, 57 T.C. 705, 710 (1972).

⁴⁰*E.g.*, *Sussman v. United States*, 236 F. Supp. 507 (E.D.N.Y. 1962).

⁴¹*E.g.*, *Estate of Goodwin v. Commissioner*, 201 F.2d 576 (6th Cir. 1953); *Treas. Reg. § 20.2053-1(b)(2)* (1958) provides in part: "*Effect of court decree.* The decision of a local court as to the amount and allowability under local law of a claim or administration expense will ordinarily be accepted if the court passes upon the facts upon which deductibility depends." (emphasis added.)

⁴²In *Estate of Louvine M. Baldwin*, 59 T.C. 654 (1973), the court denied a § 2053(a) deduction for the legal expenses of the sole surviving heir's attempt to enter caveats to the will of her mother. The court conceded that state law controlled as to what was a proper administrative expense, but followed the regulations in holding that the expenses incurred in reaching a settlement were for

of *Park*, the only question as to deductibility of such expense would be its status under Michigan law.⁴³ The applicable statute provides that the court may charge reasonable expenses incurred by the fiduciary in *defense* of the will.⁴⁴ Since such expense would be readily admitted as necessary in the administration of the estate, *Estate of Park* would provide no additional area of deductibility for will contests in Michigan.

North Carolina, in contrast, is a jurisdiction where the *Estate of Park* decision could provide a significant additional estate tax deduction for will contest costs. The North Carolina statute provides that costs, including reasonable attorneys' fees, may be taxed against *either* party or apportioned among the parties in the discretion of the court.⁴⁵ By taxing the contestant's costs to the estate as an administrative expense, a friendly probate court could minimize the potential loss of both the contesting beneficiary and the net estate. In *Commercial Bank*, the Fourth Circuit dealt with this situation in dicta. The court found the government's contention that the costs of the will contest would not be deductible even if they had been assessed against the estate as costs of the proceeding to be "doubtful."⁴⁶ If *Estate of Park* controlled in North Carolina, the government position would be less than doubtful; it would be futile.⁴⁷

the individual benefit of the heir rather than the estate as a whole, and therefore not deductible as a necessary administrative expense.

Similarly, a § 2053(a) deduction was not available in *Jacobs v. United States*, 248 F. Supp. 695 (E.D. Tex. 1965), for attorney's fees incurred by the claimant trying to get the whole estate for himself. Again, failure to meet the necessity requirement of Regulation § 20.2053-3, in that the expense was for the individual benefit of the claimant rather than the estate, precluded a § 2053(a) deduction.

However, there had not been a state court determination of deductibility in either of these cases. In *Baldwin*, the question of the deductibility of attorney fees for the daughter was not raised in the probate proceeding, and in *Jacobs*, the will had not been submitted to probate. If *Estate of Park* is limited to the situation where there actually has been a determination of deductibility by the probate court, the IRS would not have to adjust its approach to cases which fit the procedural context of *Baldwin* and *Jacobs*.

⁴³See note 2 *supra*.

⁴⁴MICH. STAT. ANN. § 27.3178(94) (1962).

⁴⁵N.C. GEN. STAT. § 6-21 (1969), *quoted in* note 33 *supra*.

⁴⁶*Commercial Nat'l Bank v. United States*, 196 F.2d 182 (4th Cir. 1952).

⁴⁷The Commissioner could argue along the lines of *Commissioner v. Bosch*, 387 U.S. 456 (1967), that a determination of a state tribunal is not binding on a federal court, unless it is a determination of the highest court of that state. However, the language of *Bosch* distinguishes that case from a § 2053(a) situation:

Next, it must be remembered that it was a federal taxing statute that Congress enacted and upon which we are here passing. Therefore, in construing it, we must look to the legislative history surrounding it. We find the report of the Senate Finance Committee

Estate of Park may pose a problem in those instances where an expense must be incurred *for tax purposes* which is unnecessary for settlement of the estate under local probate procedures. A common expense of this type is appraisal costs. Typically, state law requires a valuation for estate inventory purposes which is obtained quickly and often perfunctorily by a court appointed appraiser. The appointed appraiser often has no expertise in valuing the property and is awarded a relatively low fee by the court. If commercial real estate, closely held securities, antiques, works of art or other similar items are involved, the executor may require the services of several qualified appraisers to obtain valuations for federal estate tax purposes. The fees of the appraisers may be many times the amount allowable under state law for court appointed appraisers. If *Estate of Park* means to limit the deduction to that allowable (and allowed) by the local court, the result will be that significant and required costs of settling an estate may not be deductible.

Had Mabel Colton Park died intestate, the applicable Michigan statute would allow a section 2053(a) deduction.⁴⁸ The sale of intestate

recommending enactment of the marital deduction used very guarded language in referring to the very question involved here. It said that "proper regard" not finality, should be given to "interpretations of the will" by state courts and then "only when entered by a court in a bona fide adversary proceeding *If Congress had intended state trial determination to have that effect on the federal actions, it certainly would have said so*

Id. at 463-64 (emphasis added.) The relevant part of the House Report on the reenactment of § 2053, *see* note 23 *supra*, contained no such restrictive language. Instead it mentioned only the state court's determination as the basis for deductibility.

⁴⁸MICH. STAT. ANN. § 27.3178(462) (1962) provides:

Sale of real estate of decedent; when may be authorized . . . duty of fiduciary. SEC. 2. *Real estate of a deceased person, or any interest therein, may be sold upon petition of the executor or administrator under license of the probate court in the following cases.*

1. When it shall appear to the court that the personal estate of a deceased person in the hands of his executor or administrator is insufficient to pay the debts of the deceased and the charges of administering his estate, or whenever it shall appear to the court that it is for the best interest of all persons interested in the estate that his real estate or some part thereof be sold for such purpose in lieu of disposing of the personal estate;

2. When it shall appear to the court that sale of such real estate is necessary to preserve the estate or to prevent a sacrifice thereof, or to carry out the provision of a will;

3. When a testator shall have given any legacy by will that is effectual to pass or charge real estate, and his personal property is insufficient to pay such legacy, together with his debts and charges of administration;

4. When a testator shall have given real estate to two [2] or more persons, or *when a person shall have died intestate, and it shall appear to the court that it is necessary or will be for the best interests of the persons interested in said real estate as such*

property, necessarily approved by the probate judge,⁴⁹ would receive the *Estate of Park* endorsement as fiduciary discretion exercised with approval of the probate court. This gives a tax advantage to the heirs if the land is sold for their benefit while still under the fiduciary's administration.

In contrast, the administrator of an intestate's estate in North Carolina does not have the discretionary power to sell real estate.⁵⁰ Real estate may be sold only when the outstanding debts of the decedent's estate require such a sale.⁵¹ Thus it appears that *Estate of Park* would have no significant impact upon the asset management considerations of an administrator of an intestate's estate in North Carolina.

CONCLUSION

In proclaiming the standard for a section 2053(a) administration expense deduction to be the good conscience of "the fiduciary on the basis of his sound judgment, as approved by the probate court. . . ."⁵² *Estate of Park* could cause the federal government to lose considerable revenue under the decisions of state tribunals that do not have the Treasury's concern for tax revenues at heart. However, the size of the federal government's coffers should have no bearing on the validity of section 20.2053-3(d)(2). In its zeal to protect the general policy that

heirs to sell the same for purpose of distribution: Provided, That [sic] application under this subdivision shall be approved in writing by the persons owning a majority interest of the real estate proposed to be sold

(emphasis added.)

⁴⁹MICH. STAT. ANN. § 27.3178(475) (1962) provides:

Order for sale, conveyance or lease; when judge to make. SEC. 15. If the judge of probate shall be satisfied, after a full hearing upon the petition, and an examination of the proofs and allegations of the parties interested, that a sale, transfer, conveyance or lease . . . be assented to by all persons interested, he shall thereupon make an order of sale, authorizing the fiduciary to sell, transfer, convey, or lease the whole, or so much and such part of the real estate, interest therein, or easement, described in the petition as he shall judge necessary or beneficial.

⁵⁰N.C. GEN. STAT. § 28-81 (1966).

⁵¹*Id.*; *But see* N.C. GEN. STAT. § 28-96 (1966) which provides that in a testate situation, an executor may be provided with a discretionary power of sale. If *Estate of Park* controlled in North Carolina, a significant anomaly would result. Not only could discretionary sale for the benefit of the beneficiaries not allowable in the intestate situation be made under a power given the executor in the will, but also the related expenses could potentially qualify for a § 2053(a) deduction. This variance is conducive to a friendly executor and friendly probate court allowing the beneficiaries to realize a tax break on the sale of unwanted property while it is still in probate.

⁵²475 F.2d at 676.

wealth should not be transferred at death tax free,⁵³ the Treasury's necessity requirement goes beyond any standard suggested by Congress. The rejection of the validity of the regulations by *Estate of Park* issues a challenge to the Congress aptly stated by Judge Goffe in his dissenting opinion in *Estate of Smith*:

If additional safeguards are needed they should come from the Congress, not from the Secretary or his delegate in the form of unauthorized regulations. . . . [T]he estate tax must be safeguarded from unauthorized and unwarranted limitations imposed by regulations as well as abuses which may occur elsewhere.⁵⁴

ROBERT DEWITT DEARBORN

Income Tax — Triumph of Form Over Substance—Private Income Averaging

Taxpayers have long attempted to avoid the payment of federal income taxes by transferring their future income to other persons and having the transferees pay the taxes on the income at a lesser rate. The Internal Revenue Service and the majority of the cases that have considered these schemes have disallowed such anticipatory assignments of income and have assessed taxes against the original recipient of the income, the assignor, in the years in which the income is received by the assignee. In the recent case of *Estate of Stranahan v. Commissioner*,¹ however, the Court of Appeals for the Sixth Circuit allowed a taxpayer-assignor to avoid paying taxes on the income in the later years; the assignee paid the taxes instead. This avoidance was accomplished by the taxpayer "selling" his rights to the future income and paying taxes on the "sale price" in the year of transfer, a maneuver which resulted in a substantial tax saving for the assignor.²

This decision is a poor one for two reasons. Specifically, the money received by the taxpayer from his assignee had more of the characteristics of a loan than payment for the purchase of an asset. If the transfer of the 122,820 dollars were a loan, there would have been no tax consequences at the time of the assignment of the income, and the income

⁵³United States v. Stapf, 375 U.S. 118, 131 (1963).

⁵⁴57 T.C. at 665.

¹472 F.2d 867 (6th Cir. 1973).

²*Id.* at 869-70.