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THE WIDOW'S ELECTION IN CALIFORNIA: IS SHE A PURCHASER OR A BENEFICIARY?

The doctrine of "election" originated in equity and is applied whenever a person must make a choice between inconsistent rights.¹ As applied to wills, the doctrine generally comes into play when a husband has made a specific bequest to his widow, but has expressly provided in his will that the widow must relinquish any other claims in his estate—dower, for example, or statutory "forced share" in lieu of dower—in order to take the bequest under the will.² The widow is thus put to her election: she must either take the bequest under the will or claim her statutory share of her husband's estate.³

The application of the equitable doctrine of election in community property states has been termed an "anomaly in the law of community property."⁴ Nevertheless, it was applied quite early by the California courts⁵ and continues to be an important factor in estate planning.⁶

In Gist v. United States,⁷ a recent income tax case arising in California, the will of the deceased husband provided that the entire community property (including the widow's share) was to be transferred to a trust. The income from the trust was to be paid to the widow for life, thereafter to the testator's children from a previous marriage for

1. 5 PAGE ON THE LAW OF WILLS § 47.1 at 594 (Bowe-Parker ed. 1962); ATKINSON ON WILLS § 138, at 767 (2d ed. 1953); G. THOMPSON, THE LAW OF WILLS § 471, at 685 (3d ed. 1947).
2. 5 PAGE, supra note 1, § 47.7, at 610.
3. Id. § 47.11, at 616; G. THOMPSON, supra note 1, § 475 at 691; Brown & Brown, The Widow's Election, 43 CAL. ST. B.J. 343 (1968): "The typical case, however is that of a couple whose assets are entirely community property, both halves of which the husband by his will purports to transfer to a trust, from which the income is to be paid to the widow for life and the principal distributed on her death to the children. The widow is thus put to an election, either to take a life estate in the entire community property or to retain her full ownership of one half, in which event her husband's half will pass outright to the children. . . ." Id.
4. 1 W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 217, at 616 (1943) [hereinafter cited as DE FUNIAK].
their respective lives, and the corpus thereafter distributed equally to their issue.

The will contained certain other provisions for the widow. Insofar as the community property was concerned, however, the will provided that the widow would have to elect whether to take the life income from the entire property under the terms of the trust established in the will, or to retain her separate community interest. In the event the widow elected to retain her share of the community property, the decedent's share of the community property was to go to the trust under the terms of the will as though the widow had predeceased her husband.

The widow filed her election to take under the will. The will was admitted to probate and approved in 1961.

The widow subsequently brought an action in the federal district court for refund of federal income taxes paid for the taxable years 1962, 1963 and 1964. Her election to take under her husband's will, the plaintiff argued, constituted a purchase of a life estate; she therefore claimed an income tax deduction for the amortization of the cost basis of this life estate. The basic issue in the case was summarized by the court as follows:

The Commissioner took the position that Mrs. Gist had acquired her interest by bequest from her husband's testamentary disposition of his property. Mrs. Gist contended that she had purchased her interest by giving up fully vested rights in her half of the community property. Therefore, she had not acquired her interest by "gift, bequest, or inheritance" and was not within the coverage of [section 273 of the Internal Revenue Code of 1954].

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8. The trust corpus consisted of assets totalling $575,357; the widow's property of $343,083; and the husband's property of $232,274. The "present value" of the trust income which would be received by the widow during her life was computed to be $144,179 through the use of actuarial tables. The widow had originally contended that the "cost" of the life estate was the total of what she would receive from the trust, i.e., $144,179. The court, however, held that she would be allowed to amortize only that portion of the income attributable to her husband's share of the property in the trust, and this was computed to be $58,205 utilizing actuarial tables set forth in Treas. Reg. § 1.72-9 (1957). 296 F. Supp. at 528-29.

9. 423 F.2d at 1120. INT. REV. CODE OF 1954, § 273 provides: "Amounts paid under the laws of a State, a Territory, the District of Columbia, a possession of the United States, or a foreign country as income to the holder of a life or terminable interest acquired by gift, bequest, or inheritance shall not be reduced or diminished by any deduction for shrinkage (by whatever name called) in the value of such interest due to the lapse of time." This section has remained virtually unchanged since it was originally incorporated into the Revenue Bill of 1921; the following reasons were given for its passage: "Under existing laws persons receiving by gift, bequest, devise, or inheritance a life or other terminable interest in property, frequently capitalize the expected future income, set up the value of this expectation as corpus or principal, and thereafter claim a deduction for exhaustion of this so-called principal on the ground that with the passage of time the 'principal' or corpus is gradually shrinking or wasting. This section
The district court held the election constituted a "purchase," and accordingly allowed an amortization deduction for the "cost basis" of the life estate in the husband's share of the community property. On appeal by the Commissioner to the Court of Appeals for the Ninth Circuit, the court noted that "the precise question is one of first impression," but affirmed the judgment.

Unless the widow is recognized as a "purchaser" of the life interest she received under the terms of the will, amortization would not be allowed under the income tax laws. In the Gist case the court discussed the effect of the widow's election for purposes of the federal estate and gift taxes, and apparently arrived at conclusions of taxability under income tax law on the basis of prior decisions involving estate and gift taxes. This Note will discuss: (1) the California law relating to the effect of the widow's election on community property; (2) the applicability of the gift tax cases to the income tax considerations in the Gist case; and (3) income tax cases involving the widow's election. The discussion will indicate that the court in the Gist case erred in concluding that the widow was a "purchaser" of the bequest she received under the terms of her husband's will.

Community Property Law in California
And the Widow's Election

Prior to 1927, the wife's rights in community property in California were held to be a "mere expectancy," similar in some respects to dower. But since 1927, a husband and wife are deemed to have "present, existing, and equal" interests in community property during

explicitly provides that no such deduction shall be recognized." H.R. Rep. No. 350, 67th Cong., 1st Sess. 12 (1921).

10. Gist v. United States, 296 F. Supp. 526 (N.D. Cal. 1969). Amortization is an annual deduction permitted by law to enable taxpayers to recover the cost of an income producing intangible asset over its useful life. The Commissioner has allowed an amortization deduction to the remainderman of a trust who purchases the interest of a life beneficiary of the trust, the corpus of which consists of corporate stock; the cost is recovered by ratable annual deductions over the period of beneficiary's life expectancy in accordance with Treas. Reg. § 1.167(g)-1 (1-64). Commissioner v. Fry, 283 F.2d 869 (6th Cir. 1960); Bell v. Harrison, 212 F.2d 253 (7th Cir. 1954). The Commissioner had previously contended that the purchased life interest became merged with the remainder interest, and that the cost of the purchased life interest should be added to the "cost basis" of the remainder interest and recouped at the time of sale or other disposition of the stock. The Commissioner has now acquiesced with the view that the purchase cost may be amortized over the remaining life of the beneficiary. Rev. Rul. 132, 1962-2 Cum. Bull. 73. Application of this Revenue Ruling to the circumstances in the Gist case is highly questionable. See text accompanying note 76 infra.

11. 432 F.2d at 1120.

12. 1 DE FUNIAK, supra note 4, § 217 at 619.

13. CAL. CIV. CODE § 5105.
the continuance of the marriage relation, with the management and control thereof, with few exceptions, in the husband. Upon the death of either spouse, one-half of the community property is subject to the testamentary disposition of the decedent and in the absence of such disposition, the decedent's interest goes to the surviving spouse. An unauthorized gift of community property by the husband may be set aside in its entirety by the wife during his lifetime, but upon his death she can only recover her half share of the property.

The application of the equitable doctrine of the widow's election to community property interests disposed of by a deceased husband's will has been criticized on the basis that since the widow's share of the community property is already owned outright by her and cannot be affected by the husband's will, the widow is not faced with an election by virtue of an attempted testamentary disposition of her property by the decedent. This criticism is apparently based on the premise that the doctrine of election can only be applied when the decedent husband owns all the marital property and that the only purpose of a widow's election is to determine which portion of the husband's estate she will take—the bequest under his will or her statutory share of his estate. This is not always true, however, since any attempted testamentary disposition of property belonging to another gives rise to an election when it is conditioned upon a specific bequest to such person of the testator's own property. As to circumstances requiring an election, the California Supreme Court has stated:

If the testator purported to dispose of both his and his spouse's share of the community property, and it appears that the intent of the testator will be thwarted by giving literal effect to the will while recognizing the community property rights of the surviving spouse, an election should be required.

15. CAL. PROB. CODE §§ 201-03.
17. 1 DE FUNIAK, supra note 4, § 217, at 616-18: "The doctrine of election by the wife which has developed in some of the community property states ... is an anomaly in the law of community property. ... [I]t was borrowed from the common law as it relates to widow's dower rights and engrafted onto the community property system. ... [In California] the frequent misinterpretation of the principles of community property and the frequent attempt to explain them by the use of common law concepts led to numerous decisions which declared that 'community property' was actually owned by the husband and that the wife had merely an expectant interest in half of that property which vested in her at the husband's death." Id. at 616-19.
18. See id.
The California court has historically viewed the election as an "all or nothing" technique; a widow having the right of election may either take under the will or may retain her community interest in the property, but she cannot do both. This view is based on the theory that her election to take under the will constitutes a waiver of her community interest.

In an early case, the California court likened the effect of the widow's election to "a contract or an estoppel" and stated:

The will and the waiver must be considered together, and we think they are contractual in their nature. While the instrument attached to this will was a waiver, it was also both a consent and agreement.

The court concluded that the wife would be "estopped" from denying the validity of the agreement since she had made her election to take under her husband's will.

There is general agreement that under California law the only purpose of a widow's election is to adjust the distribution of the property under the will to conform to the testator's express or implied intention.

What then was the intention of the husband in the Gist case? The terms of the will provided as follows:

It is my intention to dispose of my entire separate estate, if any, and the entire community property including my wife's share thereof [the entire community property to go to a trust for the benefit of the wife and children].

Even though the decedent's will provided for transfer of the entire community property to a trust, the California court has held that such unauthorized transfer of the wife's separate and distinct interest in the


23. In re Wyss' Estate, 112 Cal. App. 487, 297 P. 100 (1931); accord, DE FUNIAK, supra note 4, at 618; 20 CALIF. L. REV. 217 (1932). But see In re Estate of Whitney, 171 Cal. 750, 754, 154 P. 855, 857 (1916). Professor Corbin has stated: "It is universally held that acceptance of the conditional devise or bequest creates an enforceable right in the third party to the payment specified by the testator. The acceptance of the devise or bequest has the effect of a binding promise, although it is hardly a promise to the third party and is certainly not a promise to the testator. The third party need know nothing about it and no communication to him is requisite. It may perhaps be regarded as a promise to the executor for the benefit of the third party." 4 A. CORBIN CONTRACTS § 784, at 90-91 (1951).


25. See authorities cited note 22 supra.

26. 296 F. Supp. at 527 (emphasis added).
community property is revoked and rendered inoperative as a devise or bequest by the husband.\textsuperscript{27} The widow's share of the community property does not become a part of the husband's taxable estate by virtue of her election to take under the will.\textsuperscript{28} The transfer of her share of the community property to a trust set up by the decedent's will is considered made by the widow herself, and not by the decedent or his estate.\textsuperscript{29}

The California court has held\textsuperscript{30} that the widow's election to take under her husband's will does not entitle her to any preference over the other legatees in the will.\textsuperscript{31} This would indicate that under California law the widow is not deemed to have "purchased" any interest in the decedent's estate by virtue of her election to take under his will. If the widow were deemed a purchaser of such interest, she would be entitled to a preference as a creditor of the husband's estate.

For purposes of federal taxation, it has been held that the status of property to be taxed is to be determined by reference to state law as construed by the state courts.\textsuperscript{32} In the Gist\textsuperscript{33} case, the district court relied on the contractual interpretation of the widow's election to support its holding that the widow had purchased the bequest under her husband's will in a "bargained-for sale or exchange made for consideration."\textsuperscript{34} The court's reasoning appears to have proceeded along the following lines:

1. If the widow's election is contractual in nature, there must have been consideration to uphold the contract.

\textsuperscript{27} Estate of Wolfe, 48 Cal. 2d 570, 311 P.2d 476 (1957); Estate of King, 19 Cal. 2d 354, 121 P.2d 716 (1942); In re Carson's Estate, 234 Cal. App. 2d 516, 44 Cal. Rptr. 360 (1965).

\textsuperscript{28} Commissioner v. Seigel, 250 F.2d 339 (9th Cir. 1957); Coffman-Dobson Bank & Trust Co., 20 B.T.A. 890 (1930), acquiesced in X-1 CUM. BULL. 13 (1931); In re Estate of Carson, 234 Cal. App. 2d 516, 44 Cal. Rptr. 360 (1965).


\textsuperscript{30} In re Estate of Chapin, 47 Cal. App. 2d 605, 118 P.2d 499 (1941).

\textsuperscript{31} "Contemporaneously with the execution of the will [the wife] executed an instrument, annexed to the will, consenting to all the terms of the will and waiving community property rights to make it effective. Contrary to her contention on this appeal, her cooperation with her husband in that regard does not warrant any preference beyond that provided in the will itself; for although it was an advantage to the testator to have her waiver, it is apparent that she has already benefited by the trust and will benefit still further, and she is bound by the terms of the will to which she expressly consented." Id. at 610, 118 P.2d at 502.


\textsuperscript{34} 296 F. Supp. at 528.
2. The widow relinquished the remainder interest in her share of the community property in order to obtain the bequest under her husband's will; therefore this remainder interest in her share may be regarded as the consideration given by the widow under the contract.

3. The widow's transfer of the remainder interest in her property to the trust is taxed as a gift, but only to the extent that it exceeds the value of the bequest which she received from her husband.

4. Therefore, to the extent that the widow's transfer was not a gift, it must have been a bargained-for sale or exchange made for consideration, that is, a purchase.

The court's reliance on cases involving the effect of the widow's election for purposes of federal estate and gift taxes\(^{35}\) to sustain its holding that the widow was a *purchaser* of the bequest she received under her husband's will and was thus entitled to amortize the "cost" of the bequest is questionable. The wisdom of such reliance is discussed in subsequent paragraphs.\(^{36}\)

Assuming for the sake of argument the validity of the conclusion of the *Gist* court that the widow "purchased" a life interest in the decedent's share of the community property by virtue of her election to take under his will, the unanswered questions remain: what were the terms of the transaction and from whom was the "purchase" made?

If the "purchase" were made from the husband's estate, the widow's share of the community property should have been included in the decedent's taxable estate. However, as previously noted,\(^{37}\) the widow's share of the community property does not become part of the husband's gross estate because of her election, and the transfer of the widow's share of the community property to the trust is considered made by the widow herself and not by the husband or his estate.

If the widow "purchased" her life interest in the husband's property from the trust established in the husband's will, then such transaction could have been completed independently of the husband's will insofar as the widow was concerned. This would not, however, appear to conform to the underlying premise of the widow's election—that the life interest in the husband's share of the community property is received by the widow under the terms of the will.

More importantly, if the widow were a "bona fide purchaser" of the life estate in her husband's property, and relinquished her share of the community property as the *consideration* for such purchase, as was held by the *Gist* court, the widow should not have been required to

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35. *E.g.*, Commissioner v. Seigel, 250 F.2d 339 (9th Cir. 1957).
36. See text following note 44 *infra*.
37. See cases cited note 28, *supra*.
pay a gift tax on the transaction, and her share of the community property should not be included in her gross estate at her death.\textsuperscript{38} The federal estate and gift tax provisions provide that "bona fide, arms length" transactions are exempt from the gift tax and are not includible in the transferor's gross estate at death.\textsuperscript{39} Since the widow in the \textit{Gist} case was required to pay a gift tax on the transfer of her share of the community property to the trust, and since it is well settled that her share of the community property will be included in her gross estate at her death, there would appear to be a basic inconsistency in the holding of the \textit{Gist} court that there was a "bona fide purchase" by the widow.

The husband's will expressly provided that the widow would have to relinquish her \textit{entire} community property interest in order to take the bequest of the life interest offered her in the will. The court, however, held that only a portion of her share of the property was used to "purchase" the life interest in her husband's share of the community property. The rest of the widow's property was deemed a gift in trust to her husband's children. In other words, the court allocated a portion of the widow's community property to the "purchase" of the life interest in the husband's community property, allowing amortization as to this portion, and held that the rest of the widow's property transferred to the trust was a gift.

It appears a forced interpretation of the terms of the husband's will to contend that there was intended a "bargained-for" sale of the life interest in the husband's share of the community property for only a portion of the widow's share of the community property. There is little doubt that the widow, by virtue of her election to take under the will, was required to relinquish her \textit{entire} interest in the community property. The only issue was whether the widow's obligation to relinquish her share of the community property changed the character of the bequest to that of a "purchase" for purposes of amortization under the income tax laws.

If the bequest were "purchased," no portion of the transfer should have been considered a gift. Conversely, if the transfer were a gift by the widow, then there would not be a "bona fide" commercial transaction for purposes of allowing amortization under the income tax laws. The court appears to have misconstrued the terms "consideration in money or money's worth" which are found only in the estate and gift tax provisions, and to have applied them to an income tax case.

For purposes of computing the gift tax liability of the widow on the transfer of her community property to the trust, the amount of the gift

\textsuperscript{38} \textsc{Int. Rev. Code of 1954}, \\textsection \textsection 2043(a) (estate tax), 2512(b) (gift tax); Treas. Reg. \\textsection \textsection 20.2043-1 (1958) (estate tax), 25.2512-8 (1958) (gift tax).

\textsuperscript{39} See sources cited note 38 \textit{supra}. 
is reduced by whatever consideration she receives in exchange for making the gift. In other words, only the net value relinquished is taxed as a gift. The court has apparently interpreted this reduction in the value of the gift as a “purchase” for purposes of allowing an amortization deduction under the income tax laws. There appears to be no sound basis for this application of the terms “consideration in money or money’s worth” to an income tax case.

The substance of the transaction was a gift by the widow of the remainder interest in her community property and a bequest to the widow under the terms of the husband’s will. The fact that the gift tax is imposed on only the net value relinquished by the widow would not seem sufficient to change the bequest into a “purchase” for purposes of allowing an amortization deduction under the income tax laws.

The Widow’s Election and Federal Estate and Gift Taxes

In the Gist case, the widow transferred her share of the community property valued at $343,083 to the trust, and she received a life interest in the income from the entire community property (both her share and her husband’s share) in the trust. The computed value of the life income interest in the trust was $144,179 and the widow paid a gift tax on the difference of $198,904. The widow had originally contended that she should be allowed to amortize $144,179 since this was the total amount exempted from gift tax liability for the gift of her share of the community property. The court, however, allowed the widow to amortize only the amount of the life estate attributable to her husband’s share of the community property in the trust, which was computed to be worth $58,205, and stated:

To argue that plaintiff sold her half of the community and used the funds to purchase [the entire income from the trust] places form over substance. The trust is composed of community property, therefore, plaintiff already owned one half of the assets prior to its creation. Plaintiff gave up a remainder in her half and received a life estate in her husband’s half. The amortization deduction should be computed with reference to the value of the husband’s assets which went into the trust.

There is no reason to import another legal fiction into the federal tax laws. The objective facts here support defendant’s contention that plaintiff purchased a life estate in the husband’s property while retaining a life estate in her own.

41. 296 F. Supp. at 528.
42. See note 8 supra.
43. 296 F. Supp. at 529.
To support its holding that the widow had purchased a life estate in the husband's property, the Gist court cited cases dealing with the effect of the widow's election for purposes of the federal estate and gift taxes and stated:

For purposes of the federal estate and gift tax, the exercise of a widow's election where the estate consists entirely of community property is considered a bargained-for sale or exchange made for consideration, i.e., a purchase.

While no income tax case dealing with a widow's election holds that the widow can amortize the cost of her life estate . . . it would be illogical to conclude that she cannot.

The federal estate and gift tax provisions make a distinction between transfers which are bona fide, arm's length, non-taxable transactions and transfers made for inadequate consideration which are taxable, but for which the amount of the gift to be taxed is reduced to the extent of any consideration received. The estate and gift tax regulations provide that transfers which are bona fide, arm's length transactions are deemed to be for full and adequate consideration and are thus non-taxable transfers. In other words, it is only when the transfer lacks a bona fide, arm's length, commercial character that the transaction comes within the estate and gift tax provisions. For example, the gift tax regulations provide:

Transfers reached by the gift tax are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration to the extent that the value of the property transferred by the donor exceeds the value in money or money's worth of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth.

44. Id. at 528-29.
45. INT. REV. CODE OF 1954, §§ 2043(a) (estate tax), 2512 (gift tax). For example, section 2043(a) provides: "If any one of the transfers, trusts, interests, rights or powers enumerated and described in sections 2035 to 2048, inclusive, and section 2041 is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefore by the decedent." (emphasis added). It would thus appear that if the transfer is a bona fide sale, as that term is customarily used in the ordinary course of business, the property would not be included in the transferor's estate. It is only transfers that lack the "arm's length" nature of business transactions which would fall within the section.
47. Id. § 25.2512-8 (emphasis added).
It is now settled that the transfer of the widow's share of the community property to a trust established by her husband's will, under an election situation involving California community property, is taxable as a gift.\(^4\) However, the gift is taxable only to the extent that the value of the widow's community interest exceeds the present value of the right to income from the entire community property in the trust; that is, only the net amount relinquished by the widow is taxable as a gift.\(^4\) The terms "consideration in money or money's worth" are found only in the federal estate and gift tax provisions and have been explained by Professor Lowndes as follows:

Consideration has a dual role under the estate and gift taxes. It serves to prevent a double estate tax upon property transferred by a decedent during his life and the consideration received in return for the transfer. At the same time, by injecting the requirement of economic equivalence into the common-law concept of consideration, Congress has attempted to prevent taxpayers from depleting their taxable estates by transfers for nominal consideration.\(^5\)

In *Commissioner of Internal Revenue. v. Siegel*,\(^5\) a case decided by the Ninth Circuit in 1957, the Commissioner had contended that the widow's transfer to a trust under an election situation was an independent gift and was thus fully taxable to her without allowance for the value of the income she received from the entire community property in the trust under the terms of her husband's will. The court held, however, that the bequest to the widow and the transfer of her share of the community property to the trust were in support of one another and stated:

[T]he surrender by the taxpayer of her community property rights was a gift to the estate to the extent that the value of the interest thus surrendered exceeded the value of the interest she acquired under the terms of the will . . . . What the taxpayer surrendered was the consideration for what she received.\(^5\)

The Tax Court came to the same conclusion in another case,\(^5\) and the Commissioner has now acquiesced in these decisions.\(^5\)

The *Gist* court concluded that for purposes of the federal gift and estate taxes the transfer of the widow's share of the community property

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to the trust constituted a "purchase" to the extent of the life interests she
 received, and a gift of the difference between the value of the entire
 property transferred and of the life interest received. This interpreta-
 tion would not be inconsistent with the purpose of the federal gift
 tax which is to impose an excise tax on transfers of wealth made dur-
 ing the life of the donor, which might otherwise escape the estate tax
 imposed upon transfers at death. The right to receive the life in-
 come from the entire community property has a determinable value in
 the hands of the widow, and to the extent of such "retained" value
 her estate has not been diminished and thus is not taxed as part of the
 gift. In other words, such a divisible transaction (part purchase, part
 gift) might be an appropriate interpretation for purposes of the federal
 estate and gift taxes, since only the net amount of the gift is taxable in
 any event.

 However, to conclude that the "part purchase, part gift" interpretation
 would be equally applicable for purposes of the federal income
tax, as was done by the court in the Gist case in allowing the widow
to amortize the "cost" of the life interest in the husband's share of the
community property, is not justified. Apparently disregarded by the
Gist court was the important distinction between a "bona fide, arm's
length" transaction which, of course, would not be subject to the gift
tax at all, and a "transfer for inadequate consideration" which is tax-
able as a gift, but only to the extent of the value relinquished by the
donor.

 The terms "consideration in money or money's worth" in the es-
tate and gift tax provisions are utilized only to determine the amount
of liability resulting from the transfer after it has been categorized as a
gift. Unless the transaction is categorized as a gift, the terms "consid-
eration in money or money's worth" are not applicable in any way. The
same transaction cannot be both a gift and a "bona fide, arm's length"
transaction since the latter is specifically excluded from the estate and
gift tax provisions. Amortization is an allowable deduction only in a
commercial setting and is not allowable for a gift transaction. A short
example might further clarify this point.

 Suppose A owns property with a fair market value of $1000 and

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55. For an excellent historical discussion of the federal gift tax, see Estate of San-
ford v. Commissioner, 308 U.S. 39, 42-44 (1939). The gift tax provisions and the
estate tax provisions are to be read in pari materia. Harris v. Commissioner, 340 U.S.
106 (1950).
57. The "present values" of the life income and of the remainder interest are com-
puted by reference to actuarial tables as set forth in Treas. Reg. §§ 20.2031-7 (1958),
58. See text following note 54 supra.
59. See note 45 supra.
in a bona fide, arm's length, commercial transaction he trades his property for B's property which has a fair market value of only $600. Would A be liable for the gift tax on the $400 he failed to receive as the result of the poor business bargain entered into with B? No! It is only when the entire transaction lacks the bona fide, arm's length character of a commercial transaction that the gift tax would be imposed on the $400 in the example above. Conversely, if the transaction is subject to the gift tax because it is not a bona fide, arm's length transaction (and the Gist court, by imposing the gift tax, has apparently concluded that the widow's election constituted such a transaction), it is difficult to perceive the justification for determining that there has been a bona fide transaction for purposes of allowing an amortization deduction.

Another troublesome aspect of the court's application of the "part purchase, part gift" rationale of the gift tax cases to the Gist case, is that the widow was not allowed to amortize the entire amount exempted from the gift tax—$144,179—as had been originally requested by the widow. Instead, the court utilized a hybrid approach and allowed the widow to amortize only the "cost" of acquiring the life income from the husband's portion of the community property in the trust—$58,205. Therefore, the court apparently did not completely follow the rationale of the gift tax cases and did not explain this apparent inconsistency other than to say that to allow the widow to amortize the entire $144,179 would be to import "another legal fiction into the federal tax laws." It appears that the "fictitious" characterization is equally applicable to the court's decision allowing amortization of the $58,205. It is extremely unfortunate that the court did not clearly explain the basis for its conclusion.

Under the estate tax provisions, property transferred to a trust in which the transferor retains a life interest is included in the gross estate of the transferor at his death. However, such transfers are not includible in the decedent's estate if there has been a bona fide sale for an adequate and full consideration.

Since the widow in the Gist case retained the life interest in her community property when it was transferred to the trust, her community property would be included in her estate at her death. However, only the excess of the fair market value of the property at the date of her death over the value of the entire life income (including the life income from the husband's share of the community property) when the

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trust was first established would be included in her gross estate. The same tax result is achieved whether the widow is deemed a "purchaser" of one-half of the life income, or whether she is deemed not to have transferred a portion of her community property to the trust equivalent to the value of the total life income she received for her life.

Thus, the term "consideration in money or money's worth" is applicable only insofar as the transaction is subject to the estate and gift taxes. Consequently, the Gist court erred in its reliance on the estate and gift tax cases to uphold its decision that the widow was a "purchaser" for income tax purposes.

The Widows's Election and the Federal Income Tax

The concept that a widow, by electing to transfer her share of community property to a trust named in the husband's will in order to take her bequest under the will, might be considered a "purchaser" of the interest she received had been considered by legal writers for a number of years prior to the Gist decision. However, the decision of the Supreme Court in a 1933 case, Helvering v. Butterworth, was generally

63. Treas. Reg. § 20.2043-1 (1958) (estate tax) provides: "[Transfers are not included in the gross estate of decedent if there was] a bona fide sale for an adequate and full consideration in money or money's worth. To constitute a bona fide sale for an adequate and full consideration in money or money's worth, the transfer must have been made in good faith, and the price must have been an adequate and full equivalent reducible to a money value. If the price was less than such a consideration only the excess of the fair market value of the property . . . over the price received by the decedent is included in ascertaining the value of the gross estate."

64. See text following note 54 supra.

65. Professor Lowndes contends that transplantation of the contractual concept of consideration into the area of federal estate and gift taxation does not promote satisfactory solutions to estate and gift tax problems. Lowndes, Consideration and the Federal Estate and Gift Taxes, 35 GEO. WASH. L. REV. 50 (1967). Consequently, it would seem that an extension of the conceptual confusion from the federal estate and gift tax area to the federal income tax area—the Gist situation—not only inherits the difficulties of applying the concept of consideration to the estate and gift tax area, but also dangerously increases the burden to be borne by such a conceptually unsound foundation.

66. See articles cited note 6 supra. In many of the articles discussing the income tax effects of the widow's election, the authors begin with the premise that the widow should be or could be considered a "purchaser" for income tax purposes, and then discuss the availability of an amortization deduction for the "cost" of the life estate acquired by the widow by virtue of her election to take under her husband's will. However, there is generally no case citation or other authority cited to substantiate the validity of the premise. For the scenario to the Gist case, for example, see The Measured Voluntary Survivors Election: A Planning Technique for Both Separate Property and Community Property Estates, 19 U. SO. CAL. TAX INST. 549, 578 (1967).

67. 290 U.S. 365 (1933), aff'd 63 F.2d 944 (3d Cir. 1933), rev'd 23 B.T.A. 838 (1931).
considered to have foreclosed the matter. 68

In *Butterworth*, a widow had elected to take the income from a trust established under her husband's will and had surrendered the rights in her husband's estate granted her under Pennsylvania law. The widow contended that by relinquishing her statutory rights in her husband's estate, she had purchased an annuity and payments to her from the trust were not subject to taxation until she recovered the value of the statutory share she relinquished. Prior cases had allowed a widow under similar circumstances to exclude trust distributions from her gross income until such time as her "capital" investment had been recovered. 69 Relying on these decisions, the Commissioner refused to allow the trust to deduct payments of trust income to the widow in computing the taxable income of the trust. 70 In the *Butterworth* case the Supreme Court was asked to decide whether the widow was to be treated as a beneficiary or as a purchaser insofar as the distributions of trust income were concerned. If the widow were a beneficiary, she would be required to include the trust income distributed to her in her gross income and the trust would be allowed a deduction for such distribution in computing its taxable income. If, on the other hand, the widow were found to be a "bona fide purchaser" of an interest in the trust, the distribution of trust income to the widow would not be deductible by the trust. The Court stated as follows:

Is a widow who accepts the provisions of her husband's will and receives part or all of the income from an established trust in lieu of her statutory rights a beneficiary within the ambit of the statute? We think she is. It is unnecessary to discuss her rights or position under other circumstances. We are dealing with a tax statute and seeking to determine the will of Congress.

When she makes her election the widow decides to accept the benefits of the will with the accompanying rights and liabilities. In no proper sense does she purchase an annuity. For reasons satis-


69. United States v. Bolster, 26 F.2d 760 (1st Cir. 1928); accord, Allen v. Brandeis, 29 F.2d 363 (8th Cir. 1928); Warner v. Walsh, 15 F.2d 367 (2d Cir. 1926). In Bolster, the court stated: "By the General Laws of Massachusetts (Chapter 191, § 15), as well as under the earlier statutes, a surviving husband or wife may refuse to accept the provisions of a will and take his or her statutory share in the corpus of the estate as if the deceased had died intestate. When the surviving husband or wife accepts the provisions of the will, whether or not such provisions are expressly declared to be 'in lieu of such statutory rights,' the survivor is in the position of one who sells property to the estate, and acquires the legal status of 'a purchaser for a valuable consideration.'" 26 F.2d at 761.

70. Int. Rev. Code of 1954, §§ 651-52 provide that a trust which distributes only current income is allowed a deduction in computing its taxable income for distributions of such income to beneficiaries; the beneficiaries are required to include the distributions in their gross income.
factory to herself, she expresses a desire to occupy the position of a beneficiary and we think she should be so treated.  

In Gist, the district court distinguished Butterworth on the basis that it did not deal with the issue of amortization and did not involve a widow's rights in community property. While it is true that there are important differences in the rights of a widow in community property as compared to a widow's statutory dower interest, it is also true that the widow in Butterworth relinquished valuable vested rights when she elected to take under her husband's will in lieu of her statutory interest in her husband's estate. The analogy between Butterworth and Gist should therefore be clear. The Butterworth decision does not suggest that the quantity or quality of the consideration relinquished by the widow was the determining factor in the decision. Rather, the issue was whether the widow's election to take under the will made her a "purchaser" under the income tax laws relative to trust income, and the Court held that she was a beneficiary. The amortization deduction in the Gist case, and the "return of capital" theory in the Butterworth case would appear to have a similar bearing on the taxability of the trust income to the widow: Whether the income was taxable to her would in both cases depend primarily on whether she was deemed a "purchaser" of her interest or had received her right to income under the trust as a beneficiary. Under these circumstances, the holding in Butterworth would appear to be fully applicable to the facts in the Gist case.

It should be pointed out that if the widow in the Gist case is deemed to be a "purchaser" of the right to the income from the trust, then the trust will not be entitled to a deduction for the distributions of income to the widow in computing its taxable income. Thus, the entire trust income will be subject to the income tax.

In discussing the amortization deduction to be allowed the widow in the Gist case, the district court stated:

It is now clear that a taxpayer who purchases a life estate may amortize his cost over the period of the beneficiary's life expectancy by ratable annual deductions. . . . (Bell v. Harrison, 212 F.2d 253 (7th Cir. 1954); Commissioner of Internal Revenue v. Fry,

71. 290 U.S. 365, at 369-70.
73. 296 F. Supp. at 529.
74. "Under the statutes of Pennsylvania a surviving spouse may elect to take either under or against the will. Election to take under the will bars the right of the survivor to dower or any statutory interest in the estate of the decedent. Sec. 8335 et. seq., Penna. Stat. 1920); Purdon's Penna. Stat. Title 20, § 261." 23 B.T.A. 838, 839-40 (1931), rev'd on other grounds, 63 F.2d 944 (3d Cir. 1933), aff'd, 290 U.S. 365 (1933).
75. Text accompanying note 9 supra.
76. INT. REV. CODE OF 1954, §§ 651-52.
The fact that the life estate here was created upon the exercise of the widow's election does not alter the fact that plaintiff may be a purchaser for value as would be one to whom she sold her life estate for cash.\textsuperscript{77}

Why the court deemed the Bell and Fry cases\textsuperscript{78} significant under the circumstances in the Gist case is not entirely clear, since the primary issue in these two cases was not whether the taxpayer was a purchaser, but whether a remainderman who purchases the intervening life interests will be allowed to recover his cost by ratable annual amortization deductions or will only be allowed to adjust the basis of the property received so as to recoup his cost at the time of sale or other disposition of the property. The Commissioner has now agreed to allow the remainderman under these circumstances to recover his cost by amortization.\textsuperscript{79}

The contrast between the facts in the Bell and Fry cases\textsuperscript{80} and in the Gist case is so striking that it can fairly be said the court was attempting to fit square pegs into round holes. In the Bell\textsuperscript{81} case, for example, the court noted that the remainderman had paid for the "full and fair value" of the life estates, measured by the life expectancies of the respective sellers, and stated:

In other words, if these life interests had been purchased by a third party, there would be no question but that such party would be entitled to amortization.\textsuperscript{82}

There would also be no question that a third party paying the "full and fair value" of the life estate of the widow in the Gist case would be entitled to recover such cost over the remaining life of the widow, and this would be true even though the widow had acquired her life estate by inheritance, bequest, or devise. However, the issue in the Gist case was not whether a purchased life estate can be amortized; it was whether the widow can be termed a purchaser by virtue of her election to be a beneficiary under her husband's will. Unless the widow is deemed to be a purchaser the issue of amortization is never reached. The court's reliance on the cases involving the effect of the widow's election for federal estate and gift tax purposes in concluding that the widow was a purchaser has been previously discussed\textsuperscript{83} and will not be repeated here. However, it should be pointed out that the gift and es-

\textsuperscript{77} 296 F. Supp. 526, 528 (S.D. Cal. 1969) (emphasis added).
\textsuperscript{78} See note 10 supra.
\textsuperscript{80} See note 10 supra.
\textsuperscript{81} Bell v. Harrison, 212 F.2d 253 (7th Cir. 1954).
\textsuperscript{82} Id. at 254.
\textsuperscript{83} See text following note 44 supra.
tate tax statutes have been held not to be controlling for income tax purposes. 84

As a sidelight, it may be pointed out that if the widow is treated as a purchaser under the circumstances in the *Gist* case, she may be subject to a taxable capital gain on the exchange to the extent that the value of the life estate received exceeds the value of the remainder interest "sold." 85 Similarly, to the extent that her share of the community property exceeds the value of the life interest she receives in her husband's share, his estate would realize taxable gain. Since the widow receives a "stepped up" basis for her share of the community property upon the death of her husband, 86 the possibility is remote that the value of the life estate in the husband's share of the community property will ever exceed the value of the widow's share of the community property transferred to the trust so as to give rise to taxable gain on the exchange.

**Conclusion**

The Ninth Circuit's decision in *Gist v. United States* 87 that the widow's election constituted a "purchase" of the life estate in her husband's share of the community property, and that her cost could thus be amortized over her expected life, appears unsound under both California law and federal income tax law. The decision incorporates another legal fiction into the already burdened federal tax laws, and though the tax reduction motives may be laudable, it would not appear to be in the public interest to allow California widows an unequal tax benefit on the basis of a contrived distinction in the California community property laws. Under the *Gist* holding, the widow's election in California results in a "purchase," the cost of which can be amortized by ratable deductions against the trust income received. The widow's election in a non-community property jurisdiction would not appear to provide a similar benefit because of the *Butterworth* decision.

Therefore, even though the substance of the transaction is the same in both instances—a relinquishment of concededly valuable rights in property in order to receive a bequest under the decedent husband's will—the California widow is allowed an income tax advantage not available to the other widow. The *Gist* decision was apparently based on an incorrect analogy to the gift tax cases, and careful reconsidera-

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84. See, e.g., Farid-Es-Sultaneh v. Commissioner, 160 F.2d 812, 814 (2d Cir. 1947); Gump v. Commissioner, 124 F.2d 540, 544 (9th Cir. 1941).
85. INT. REV. CODE OF 1954, §§ 1014(a), 1014(b)(g), 1201(b).
86. Id. § 1014(b)(g).
tion of the problem would appear to be in order when future cases (which are now sure to arise) come before the court.

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