HB

848

LETTER OF INTENT
HB 848

Dear Mr. Speaker:

Your Judiciary Committee has under consideration HB 848, "An Act reenacting the law relating to the marital deduction in testamentary transfers; and providing for an effective date."

At the present time there is a potential gap between the Federal Economic Recovery Act of 1981 and the Alaska Statutes. Specifically, Section 403(a) of the Economic Recovery Act allows for an unlimited marital deduction for estate tax purposes. However, AS 13.11.277 provides that wills which refer to the federal marital deduction are construed to mean the maximum deduction allowed by federal law.

Section 403 (e)(3) of the Economic Recovery Act of 1981 provides that the new unlimited marital deduction does not apply to wills executed before September 12, 1981, unless the State enacts a statute referring to the new unlimited marital deduction allowable under Section 403(a) of the Act. This bill will enact such a statute as required by section 403(e)(3)(D) of the Economic Recovery Act of 1981.

Legislative Counsel and the Attorney General's office agree that the enactment of HB 848 will remedy any gap between Federal and State Statutes.

Sincerely,

Ramona Barnes, Chairperson
House Judiciary Committee

# STATE OF ALASKA

**DEPARTMENT OF LAW**

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March 15, 1982

The Honorable Joseph L. Hayes
Speaker
House of Representatives
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

RE: HB 848, Estate Tax Marital Deductions

Dear Speaker Hayes:

Mr. Levi of your staff has asked this office to review the February 1, 1982 memorandum to you on this subject by legislative counsel Thomas Sofo. We have also reviewed HB 848, which you introduced in response to that memorandum.

As we have discussed with Mr. Levi by telephone several times, we agree generally with the conclusions drawn by Mr. Sofo. We agree that, to be conservative and to ensure that Alaskans can rely on the new "unlimited marital deduction" from estate taxes, AS 13.11.277 should be amended as § 403(e)(3)(D) of the Economic Recovery Act of 1981 apparently requires. We also agree that the only way to be sure that such an amendment is not necessary is to obtain a ruling from the Internal Revenue Service. It is very unlikely that such a ruling could be obtained in time to enact a bill this session if that were made clearly necessary by the ruling.

The approach chosen by the drafter of HB 848 appears to satisfy the language of § 403(e)(3)(D), even though it does not refer specifically to the amendments made by the 1981 Act. Regardless of whether the [illegible] could be [illegible] a letter of intent which clearly states that it is intended to satisfy § 403(e)(3)(D).

Please let me know if I can provide further assistance on this matter.

Sincerely,

WILSON L. CONDON
ATTORNEY GENERAL

By: Peter B. Froehlich
Peter B. Froehlich
Assistant Attorney General

PBF/ph

82-0210

# STATE OF ALASKA
# THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
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## LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM February 1, 1982

SUBJECT: Marital deduction under Economic Recovery Act of 1981 (Work Order No. 12-2240)

TO: Representative Joe L. Hayes
Attn: Seven Levi

FROM: Thomas A. Sofo
Legislative Counsel

You have asked whether the State of Alaska needs to enact a statute construing the existing formula clause under the Economic Recovery Act of 1981 as applying to the unlimited marital deduction rule even though the will is executed prior to September 12, 1981. The short answer to your question appears to be no. However, in order to understand the basis for that answer and the possible need for a different type of amendment, it will be necessary to briefly summarize the applicable law.

The term "marital deduction" refers to the deduction allowed under the federal gift and estate tax laws for transfers of property between spouses. As it applies to testamentary transfers, the federal law used to allow a minimum marital deduction of $250,000 or 50 percent of the deceased spouse's adjusted gross estate whichever was greater See, Internal Revenue Code, Sec. 2056 (26 U.S.C.A. 2056). This means that at least $250,00 would escape estate taxation if bequeathed to your spouse. Since the amount allowed for this deduction was forseen as changing with time (and in fact has changed), it became an accepted practice to merely refer to the [illegible] The [illegible] mechanism was to insure that the [illegible] minimum protection from [illegible] spouse.

The Alaska law regarding the interpretation of such a clause in a will is contained in AS 13.11.277 (copy attached). AS 13.11.277 states:

> MARITAL DEDUCTION. A provision or reference in any testamentary gift relating to the marital deduction provided for in the federal Internal Revenue Code and regulations under it is construed to contemplate the maximum marital deduction allowable under the Internal Revenue Code and regulations on the date of the death of the decedent making the gift.

Under Alaska law, reference in a will to the marital deduction allowed under the Internal Revenue Code refers to the amount allowed at the time of the testator's death, even though the will is of course, often prepared months or years in advance of that time.

The Economic Recovery Tax Act of 1981 (P.L. 93-34) had the broad goal of reducing taxes and one of the means used was to eliminate the payment of gift and estate taxes on transfers between spouses. In other words, the act provides for an unlimited marital deduction. See Sec. 403, Economic Recovery Tax Act of 1981, (26 U.S.C.A. 2056) [copy attached]. As a general proposition the act applies to the estates of decedents who die after December 31, 1981. There is however, a special provision which more narrowly addresses the marital deduction in a case such as the one raised by this request. The act provides that the unlimited marital deduction does not apply if (a) the will was executed before September 12, 1981; (b) the will has a formula referring to the maximum marital deduction allowed under the Internal Revenue Code; (c) the will was not amended after September 12, 1981 to specifically refer to an unlimited marital deduction; and (d) the state does not enact a statute which construes the formula contained in the will as referring to the unlimited marital deduction, i.e., the new law.

More straightforwardly, the general statement in a will that a transfer to a surviving spouse be equal to the maximum marital deduction allowed under the IRC, does not qualify the transfer for the unlimited marital deduction allowed by the [illegible] executed before September 12, 1981 unless (1) the will is amended after that date to specifically refer to the unlimited marital deduction; or (2) the state enacts a statute which construes that general statement as referring to the unlimited marital deduction. Thus in the absence of an

amendment to a pre-September 12, 1981 will, there seems to be a requirement for the state to enact legislation. The caveat to this conclusion is that AS 13.11.277 (supra) already provides that the general statement, or formula, as it is often called, will be taken to refer to the maximum deduction allowed under the IRC on the date of death. The interesting question is whether the federal statute requires yet another amendment to our state law in order to specifically refer to the unlimited marital deduction now available. The general rule, even in the absence of AS 13.11.277, is that the time of death is the relevant point for determining the nature of the marital deduction. Jackson v. U.S., 376 U.S. 503, 11 L.Ed.2d 871 (1964). Nevertheless the relevant language in Sec. 403(e)(3)(D) of the Economic Recovery Act of 1981 (copy attached) states that the unlimited marital deduction does not apply to existing wills if "the State does not enact a statute" which refers to the "marital deduction allowable by Federal law as amended by subsection (a)" (emphasis added). The use of the word "enact" seems to indicate a requirement for legislation since it does not refer to whether the state "has" an existing statute which is construed as accomplishing this. The conservative conclusion seems to be that an amendment should be pursued since it is at least arguable that the federal statute contemplates such an amendment.

Our own AS 13.11.277 appears to have been a response to a very similar situation concerning an increased marital deduction provided by Sec. 2002 of the Tax Reform Act of 1976 (P.L. 94-455, 90 Stat. 1856) [copy attached]. Whether the 1978 enactment of AS 13.11.277 in response to amendments made in the 1976 Tax Reform Act has continuing vitality is difficult to say with certainty. Technically speaking, the state has not enacted a statute construing the formula as referring to the marital deduction as amended by the Economic Recovery Act of 1981. On the other hand, the statute which was enacted in 1978 seems to have prospectively taken care of the need to constantly reenact or revise the formula after that. Since it is difficult to [illegible] clear on its face, my conclusion would be that an amendment to the Alaska Statutes is unnecessary.

Since it is the interpretation given AS 13.11.277 by the IRS which is of primary significance, it would be useful to get an informal opinion from that agency concerning the question you have raised. I would be happy to discuss this matter further at your convenience.

TAS:ljb