PROBATE COURT: While proceeding under heirship determination statute, the probate court should invoke its jurisdiction to assess inheritance tax on its own motion.

INHERITANCE TAX:

May 25, 1961

Honorable Norman H. Anderson
Prosecuting Attorney
St. Louis County
Court House
Clayton, Missouri

Dear Mr. Anderson:

This is in response to your letter dated January 23, 1961, in which you request an official opinion from this office. Your letter is as follows:

> "The Hon. David R. Hensley, Probate Judge of St. Louis County, has requested that I obtain an opinion relative to the interpretation of Sections of Revised Statutes of Missouri, 473.663, 145.020, 145.150 and 145.310.
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> "It has been the practice in the Probate Court of St. Louis County, in determination of heirship proceedings, not to enter any order relative to appointing an appraiser for Missouri Inheritance Taxes, or making an order finding no tax due, or assessing Missouri Inheritance Tax. While there is no express authority in Chapter 145 or the Probate Code for the Probate Court to make any order relative to inheritance tax in a determination of heirship proceeding, it is stated in Chapter 145 that if tax is due, it constitutes a lien on the interest transferred, so that if the Probate Court has the power to assess tax, it would not appear to be barred by any statute of limitations.
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> "The question then is whether Chapter 145, and in particular Secs. 145.020 and 145.150,

> should be interpreted to authorize and direct the Probate Court to make orders relative to inheritance taxes in determination of heirship proceedings; and if so, whether the proper procedure is the one set out in Sec. 145.150, or the one set out in Sec. 145.310.
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> "I would request your office to render an opinion indicating whether or not the Probate Court should make orders relative to Missouri Inheritance Taxes in determination of heirship proceedings, and if so, which procedure should be followed."

You request the answer to two questions; (1) does the probate court have jurisdiction to determine the amount of inheritance tax owed and the persons liable therefor, when it makes an heirship determination, and (2) if this authority exists, should the probate court proceed according to Section 145.150 RSMo 1959, V.A.M.S. or 145.310, RSMo 1959, V.A.M.S.

An heirship determination is specifically provided for in Section 473.663, RSMo 1959, V.A.M.S. This section is as follows:

> "1. Whenever a person has died leaving property or any interest therein and no administration has been commenced on his estate in this state, nor has any will been offered for probate in this state, within five years after his death, any person claiming an interest in such property as heir or through an heir may file a petition in the court which would be of proper venue for the administration of such decedent's estate to determine the heirs of the decedent and their respective interests as heirs in the estate.
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> "2. The petition shall state:
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> (1) The name, age, domicile and date of death of decedent;
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> (2) The names, ages and residence addresses of the heirs, so far as known or can with reasonable diligence be ascertained;

(3) The names and residence addresses of the persons claiming any interest in the property through an heir, so far as known or can with reasonable diligence be ascertained;

(4) A particular description of the property with respect to which the determination is sought;

(5) The net value of the estate.

"3. Upon the filing of the petition, the court shall fix the time for the hearing thereof, notice of which shall be given to:

(1) All persons known or believed to claim any interest in the property as heir or through an heir of the decedent;

(2) All persons who may at the date of filing of the petition be shown by the records of conveyances of the county in which any real property described in such petition is located to claim any interest therein through the heirs of the decedent; and,

(3) Any unknown heirs of the decedent.

"4. The notice shall be given by publication by publishing the same once each week for four consecutive weeks, the last insertion of publication to be at least seven days before the hearing. In addition, notice under subdivision (1) of subsection 2 of section 472.100, RSMo.or notice by registered mail shall be given to every such person whose address is known to the petitioner. Upon satisfactory proofs the court shall make a decree determining the heirs of the decedent and their respective interests as heirs in the property.

"5. A certified copy of the decree shall be recorded at the expense of the petitioner in each county in which any real property described therein is situated, and is conclusive evidence of the facts determined therein as against all parties to the proceedings."

This statute applies to those estates which have not had an administration commenced nor a will offered for probate within five years after the death of the decedent. Since five years has expired since the death of the decedent, no administration can be granted nor may any will be admitted into probate, Section 473.070 RSMo 1959, V.A.M.S. If no administration has taken place during the five years then all claims against the estate, except claims of the United States and tax claims of the State of Missouri and subdivisions thereof, are barred, Section 473.360, RSMo 1959, V.A.M.S.

The procedure for heirship determination found in Section 473.663, supra, is an innovation to Missouri probate law. Its introduction came as part of the new Probate Code. It replaced the customary method of determining heirship by the use of affidavits or recitals in deeds executed by the heirs themselves or by anyone acquainted with the family history of the decedent. The procedure has many similarities to the method used in formal administrations and since there is no administration there is some comparison with the heirship determination available for small estates under Sections 473.090 thru 473.107, RSMo 1959, V.A.M.S.

It is assumed in this opinion that the probate court acts within its judicial capacity, and that it has jurisdiction to so act, when it makes an heirship determination under Section 473.663. Jurisdiction is vested in the probate court to exercise its administrative authority to determine the amount of inheritance tax due when the court proceeds in a formal administration or under those statutes applicable to small estates, by reason of Section 145.150 RSMo 1959, V.A.M.S. If no proceedings are pending in this state in which the amount of said tax may be fixed then the jurisdiction of the probate court is governed by Section 145.310 RSMo 1959, V.A.M.S. This Section reads as follows:

> "If any tax shall be due under the provisions of this chapter and no administration has been had in this state on the estate of decedent and no proceedings are pending in this state in which the amount of said tax may be fixed or the lien therefor enforced, any person interested in the property or estate may file an affidavit with the probate court of the county wherein the property or estate, or the greater part thereof, is situated, setting forth a description thereof and the clear market value thereof and the names of the persons, associations or corporations liable for the tax

> thereon, and an appraiser shall be appointed and the tax fixed by said court as herein provided. However, the probate court of any county in which administration on any such estate should be granted, may on its own motion, appoint such an appraiser."

For reasons of emphasis it should be stated that when the probate court proceeds according to Section 473.663, supra, there is no administration of the decedents' estate, nor may an administration be granted. However, from the information received when an heirship determination is commenced the probate judge should, by his own motion, invoke his jurisdiction to assess inheritance tax under Section 145.310. By an application of Section 145.310, supra, the assessment of inheritance tax liability is a separate and distinct proceeding from an heirship determination. The court may proceed to fix the tax liability upon an affidavit filed by an interested person or the court "in which administration on any estate should be granted" may on its own motion appoint an appraiser to determine the tax due. 4 Missouri Practice, Probate Law and Practice, Section 1292, p. 485. The court fixes the tax liability "as herein provided", or more clearly, as provided in the inheritance tax law; namely, section 145.150, supra. The court's authority to proceed on its own motion is derived from an interpretation of the last sentence of Section 145.310. The phrase "in which administration on any such estate should be granted" could be clarified by the substitution of the words "have been" to read "should have been granted." This past tense interpretation is preferred to a possible future tense interpretation of substituting the word "later" to read "should later be granted." If there is administration in the future then the probate court has authority to appoint an appraiser on its own motion, Section 145.150, and this special authorization would be superfluous. However, the future tense cannot apply to the situation that arises after five years from decedent's death since there can be no administration in any event.

An heirship determination under Section 473.663 may have the practical result of conferring marketable title upon the heirs of the decedent insofar as questions of administration are concerned. However, the respective interests of the heirs will be subject to possible inheritance taxes, Basze, Proof of Succession to Land Under the New Missouri Probate Code, 25 Kansas City Law Review 67, loc. cit 78. Whatever information a probate judge may acquire when proceeding in an heirship determination, he should use this to assess the tax due. If no tax is due then this also should be stated. The inheritance tax liability is assessed under section 145.310, which places this administrative jurisdiction to make such an assessment,

on the courts own motion, in the probate court. This section supplements 145.150. They are not unrelated. When proceeding under section 145.310 the court fixes the tax liability according to section 145.150.

In Missouri the inheritance tax law is a tax imposed upon the right to receive property under a will or by the intestate laws of Missouri, In re Rosings' Estate, 337 Mo. 544, 85 SW 2d 495. The interest of each heir, with respect to decedents property, is saddled with a lien to secure the payment of the taxes due, In re Costello's Estate, 338 Mo. 673, 92 SW 2d 723. Since the probate court has no property in its control when it proceeds under Section 473.663 it cannot order the tax to be collected as assessed under Section 145.310. However, Section 145.280 RSMo 1959, V.A.M.S., would apply to this situation. This statute says:

> "Whenever any tax shall be past due and delinquent under the provisions of this chapter, suit may be instituted in any court of competent jurisdiction by the prosecuting attorney of the county, or at the request of the director of revenue, by the attorney general, in the name of the state, to recover such tax and enforce the lien therefor and in any such suit all persons, associations or corporations interested in the estate from which such property is derived, including administrators, executors, guardians, curators, and trustees, may be made parties and service may be had on both residents and nonresidents in the same manner as provided by law in civil actions."

CONCLUSION

When the probate court makes an heirship determination under Section 473.663 RSMo 1959, V.A.M.S. it is exercising its judicial authority. If the court is to invoke its administrative jurisdiction to determine inheritance tax liability it may proceed by its own motion according to Section 145.310, RSMo 1959, V.A.M.S. The information gained while proceeding in an heirship determination should be used by the probate court to invoke its jurisdiction to assess inheritance taxes. The respective interests in decedent's property decreed in

the heirship determination will be subject to an inheritance tax lien if taxes are assessed by the probate court.

This opinion, which I hereby approve, was prepared by my Assistant, Eugene G. Bushmann.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

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