

TRUSTS:
TAXATION:
INHERITANCE TAX:

Bequests to person for purpose of caring for
testator's cat held taxable under Missouri
Inheritance Tax Law.

October 18, 1961



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

Dear Mr. Anderson:

We are in receipt of your request for an official opinion
of this office which reads as follows:

"A question has arisen which, although on its
face may not seem to be of dire importance,
has caused some problems and will cause
problems in the future unless answers are
forthcoming.

"An appraisal has been made for Missouri
inheritance tax purposes of an estate of
a person who died testate, one of the
provisions in the will being that if the
decedent's cat was alive at the time of
the decedent's death, a certain fund was
to be placed in trust with the income and
any principal necessary to be used for the
care and maintenance of said cat. At the
cat's death, said fund, both principal and
interest, was to go to Harvard University.
The questions in the above matter are as
follows:

"1. Is a cat a 'person, institution, associa-
tion, or corporation' within the meaning of
Section 145.020, Missouri Revised Statutes 1959?

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"2. If the cat is a 'person' under the above section, how is the life expectancy of said cat determined so as to determine the value for inheritance tax purposes of said cat's interest?

"3. If the cat is a 'person' under the meaning of Section 145.020, Missouri Revised Statutes, is the transfer one for 'charitable' purposes within the meaning of Section 145.090, Missouri Revised Statutes, or would the property be for a 'benevolent and charitable purpose' within the meaning of Section 145.100, subparagraph 1, Missouri Revised Statutes?

"As there is an estate pending at the present time, which estate is ready to be closed, we would appreciate answers to the above questions as rapidly as possible."

Article V of the will involved provides as follows:

"ARTICLE V. If my cat called 'Kitty' shall be living at the date of my death, I give and bequeath unto GEORGE S. HECKER, presently residing in St. Louis County, Missouri, the sum of Ten Thousand Dollars (\$10,000.00), to have and to hold the same in trust as Trustee for the uses and purposes and with the powers and duties as follows:

Section 1. The Trustee shall invest the funds of such trust estate in bonds issued by the United States of America, or deposit such funds in a Federal Savings and Loan Association, or both, in such proportions as he may deem advisable and shall use and apply so much of the net income therefrom and of the principal thereof as he shall in his absolute discretion deem necessary and proper for the care and maintenance of said cat during the remainder of her natural life.

Section 2. Upon the death of said cat, my Trustee shall pay over and deliver the then remaining principal and accumulated income, if any, of such trust estate unto the Trustees of Harvard University, the principal and income therefrom to be applied, at the absolute discretion of the Trustees of Harvard University, for scholarships to worthy and needy students of the Medical School of Harvard University in memory of Frederick Warren Hecker, son of Eugene A. Hecker, of the

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Class of 1905, Harvard College, and Eugenie L. Hecker, of the Class of 1905, Wellesley College.

Section 3. Upon the death, inability or refusal to act or further act of George S. Hecker as Trustee hereunder, I hereby appoint my brother-in-law, John D. Lodwick, his successor Trustee; such successor Trustee shall have all of the powers, rights, obligations, duties, privileges and immunities herein granted to the original Trustee herein named. I direct that my Trustee hereunder shall serve without bond and without compensation."

In order to determine the taxability of this transfer, we must analyze it to see what type of transfer it is.

It cannot be a private trust. A private trust must have a beneficiary capable of possessing rights in the res of the trust, and capable of enforcing those rights against the trustee. Vol 1A Bogert, Trusts and Trustees, Section 161, page 84; Restatement, Trusts, 2nd, Section 112 (1959). The only possible beneficiary in this situation is the cat. An animal cannot possess rights in property. Gray, Nature and Sources of the Law (1921) Chapter 1, page 20, Chapter 2, page 43. Therefore, there is no beneficiary here who is capable of possessing and enforcing rights in the res, and there is no private trust.

The transfer does not establish a charitable trust. In order to have a charitable trust, a settlor must provide for an indefinite number of beneficiaries. Russell vs. Allen, (Mo. 1883) 107 U.S. 163, 27 L. Ed. 397, 2 Sup. Ct. 327. Here there is no such indefinite class nor undetermined number. The purported beneficiary is a single cat.

Transfers of this type have been called "honorary trusts". Restatement, Trusts, 2nd, Section 124; comment "C" (1959); In re Searight's Estate (1950), 87 Ohio Appeals 417, 95 N.E. 2d 779.

The Searight case involved a consideration of the taxability of these transfers. In it a testator had devised his dog to a legatee with instructions that the executor of his will deposit \$1,000.00 in a bank which was to be paid to the legatee periodically for him to use in the care of the dog.

The Ohio inheritance tax statutes, Section 5332 (1) of the General Code, similar in language to Section 145.020 RSMo 1959 read as follows:

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"A tax is hereby levied upon the succession to any property passing, in trust or otherwise to or for the use of a person, institution or corporation, in the following cases:

'1. When the succession is by will or by the intestate laws of this state from a person who was a resident of this state at the time of his death.'

Section 5332 (4) of the General Code reads:

"4. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property heretofore or hereafter made, such appointment when made shall be deemed a succession taxable under the provisions of this subdivision of this chapter in the same manner as if the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by said donee by will * * *"

After considering the transfer in the light of the statutes the Ohio Court held that no inheritance tax could be levied and stated, at 87 Ohio Appeals 426, 95 N. E. 2d 784:

"This statute determines that a tax shall be levied upon succession to all property passing to a person, institution or corporation. Certainly, a dog is neither an institution nor a corporation. Can it be successfully contended that a dog is a person? A 'person' is defined as '3. A human being.' Webster's New International Dictionary, Second Edition.

"[5] We have hereinabove indicated that the bequest for the dog, Trixie, comes within the designation of an 'honorary trust,' and, as such, is proper in the instant case. A tax based on the amount expended for the care of the dog cannot lawfully be levied against the monies so expended, since it is not property passing for the use of a 'person, institution or corporation.'

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"The executor herein had a power granted to him to use the funds for the support of the dog, which he proceeded to fulfill. Is it possible that such a power could be considered as a power of appointment within the terms of subsection 4 of Section 5332, General Code, and, hence, subject to taxation thereunder?

"[6] On this point, we need look for no other authority than that contained in 3 Restatement of the Law of Property (Future Interests), Section 318(2), which states the rule as follows:

'(2) The term power of appointment does not include a power of sale, a power of attorney, a power of revocation, a power to cause a gift of income to be augmented out of principal, a power to designate charities, a charitable trust, a discretionary trust, or an honorary trust.'

This opinion overlooks one basic issue. The transfer, although called an "honorary trust" is not an actual trust, either private or charitable. The trustee cannot be compelled to carry out the desires of the settlor; but has the power to carry out these desires if he so wishes. If he does not carry out the desires he holds as the trustee of a resulting trust for the settlor's estate. 2 Scott, Trusts, Sec. 124 (1956).

Since this is the case, the transfer here is neither a trust in the actual sense, nor an outright bequest to the so-called "trustee" as was held in *In re Renner's Estate* (1948) 358 Pa. 409, 57 A. 2d 836. It is a bequest to the "trustee" on the condition that he apply the income therefrom and the principal to the maintenance of the settlor's cat. The transfer is, therefore, one to a person within the provisions of Section 145.020 RSMo 1959.

The fact that the "trustee" does not come into a personal enjoyment of the property is of no effect. The "trustee" is lawfully entitled to possession of the amount devised, and he exercises control over it. Under such circumstances, he has possession and enjoyment of the bequest under the provisions of the last mentioned section. In *Re Costello's Estate* (1936) 338 Mo. 673, 92 S.W. 2d 723. The transfer is, therefore, subject to the Missouri Inheritance Tax.

Having decided this, we are met with another problem. What is the value of the bequest to the "trustee"? To answer this question we must look to the wording of the will itself. The determinative factor in this regard is that the will (Section 1, Article V) provides that the net income and the principal may be

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used in the discretion of the "trustee" for the care of the cat. The trustee has an unlimited power of encroachment for the purpose of caring for and maintaining the cat. The transfer should therefore be taxed for Missouri Inheritance Tax purposes as a bequest to the trustee at the full value of the principal involved, Ten Thousand Dollars (\$10,000.00).

If, as seems likely, the cat should die before the entire amount is used, the provisions of Section 145.230 RSMo 1959 may be invoked to provide a refund of the excess tax. This section provides that in the event of the abridgement, defeat or diminution of an estate, a return of the inheritance tax paid is to be made proportionate to the reduction in value of the estate actually received.

CONCLUSION

It is the opinion of this office that the transfer stated in your opinion request is taxable under the Missouri Inheritance Tax Law as a transfer to a person within the provisions of Section 145.020, RSMo 1959. It is further the opinion of this office that the tax should be assessed on the entire amount of the bequest.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Ben Ely, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

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