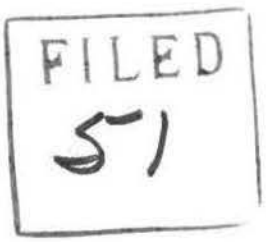
TAXATION (INHERITANCE): In the situation where a life estate is given to A with a vested remainder in B if B survives A but if not a contingent remainder in C, and if the tax rate is the same for B and C, then inheritance tax under Chapter 145, RSMo, should be taxed as a life estate against A and the remainder against B.

August 18, 1970

OPINION NO. 51



Honorable James E. Schaffner
Director of Revenue
Department of Revenue
Jefferson Building
Jefferson City, Missouri 65101

Dear Mr. Schaffner:

This is in reply to your request for an official opinion from this office concerning the inheritance tax that should be collected in the following situation:

> "The decedent died on the 18th day of March, 1969. In her will she left her house, which is valued at $7,500.00, in the following manner:
>
> (a) A life estate to her sister, Frieda, who was born January 10, 1898.
>
> (b) Then to John, the decedent's nephew, who was born November 22, 1921, if he survives Frieda.
>
> (c) To Gerry, daughter of the decedent's nephew, who was born April 1, 1952, if John fails to survive Frieda."

There is no question that there is an inheritance tax due. See Section 145.020, RSMo 1969. The question is the proper computation in this situation.

Section 145.200, RSMo 1969, provides the formula to be used in the valuation of life estates and remainders, and reads in part as follows:

> "When any property, interest therein or income therefrom belonging to any estate in course of administration, shall pass or be limited for the life of another or for a term of years, or to terminate on expiration of a certain period, the value of property at the date of death so passing shall be determined by appraisal for the purpose of taxes under this chapter immediately after the death of the decedent and the value of said life estate, term of years or period of limitation, shall be valued according to mortality tables, using the interest rate or income rate of five per cent, and the value of the remainder in said property so limited shall be ascertained by deducting the value of the life estate, term of years, or period of limitation from the clear market value of the property so limited and the tax on the transfer of the separate estate or estates, remainder or remainders or interest shall be immediately due and payable, to the director of revenue together with interest thereon and said tax shall accrue as provided in section 145.110 and remain a lien upon the entire property until paid; * * * "

See also Section 145.220, RSMo 1969, which provides for mortality tables to be determined by the Superintendent of Insurance.

It is clear that Frieda takes a life estate under the will. The computation turns on what interest, if any, John and Gerry take.

Section 474.480, RSMo 1969, provides:

> "In all devises of lands or other estate in this state, in which the words 'heirs and assigns', or 'heirs and assigns forever', are omitted, and no expressions are contained in the will whereby it appears that the devise was intended to convey an estate for life only, and no further devise is made of the devised premises, to take effect after the death of the devisee to whom the same is given, it shall be understood to be the intention of the testator thereby to devise an absolute estate in the same, and the devise conveys an estate in fee simple to the devisee, for all of the devised premises."

The language of the instant devise has omitted the any words of limitation referred to in the above section. Therefore, John and Gerry take, if at all, a fee simple.

It is clear that Gerry takes a contingent remainder under the will since her interest will become possessory only on the happening of a condition precedent; i.e., John's failure to survive Frieda.

To determine John's interest we must look to certain rules of construction set out by the Missouri courts governing the determination of the testator's intention. The primary rule is that the law favors the vesting of testamentary gifts or legacies at the earliest possible date, unless a contrary intention is manifested clearly. While there is doubt as to the nature of the legacy or interest, it will be construed as vested rather than contingent. St. Louis Union Trust Co. v. Herf, 361 Mo. 548, 235 S.W.2d 241. It is further stated in Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 S.W.261, l.c. 265, " . . . wherever it is possible, an instrument will be so construed as not creating an estate subject to a condition, particularly a condition precedent. . . . "

In Uphaus v. Uphaus, 315 S.W. 2d 801, (Mo.1958) l.c. 803, the court held that, after devising a life estate to testator's son, the words, " . . . at the death of my said son . . . there shall be paid to his wife, . . . if she shall survive him, the sum of three thousand dollars ($3000.00) out of said real estate . . . and the remainder . . . shall go to and descend equally to the rest of my children . . . ," created a vested remainder in the other children.

In Henderson v. Calhoun, 183 S. W. 584 (Mo.1916), the court held that a bequest to three brothers and sisters with the words, "' . . . and if any of them die without issue their portion to revert to their brothers and sisters . . . '", l.c. 584, created a vested remainder in each of the brothers and sisters subject to divestment if they "die without issue."

The words in the instant will are not such as to clearly manifest an intention to create a contingent remainder and, further, it is possible to construe the words as creating a vested remainder subject to divestment. Therefore, John takes a vested remainder in fee, subject to divestment, and Gerry takes a contingent remainder.

Subsection 2 of Section 145.240, RSMo 1969, provides for the computation of tax in the case of contingent expectancies, and reads as follows:

> "2. When the property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are wholly dependable upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed

> upon said transfer at the lowest rate which, on the happening of any of said contingencies or conditions transferring property to a natural person, would be possible under the provisions of this chapter, and such tax so imposed shall be due and payable forthwith by the executor, administrator, or trustee out of the property transferred; . . . "

Clearly both the vested remainder subject to divestment and the contingent remainder fall within the above section. Thus the tax is assessed at the lowest possible rate which is the same for both John and Gerry (three per cent) according to subdivision 2 of subsection 1 of Section 145.060, RSMo 1969.

Therefore, since John's interest is vested, and since the tax rate is the same for both John and Gerry, the entire remainder interest should be taxed against John.

CONCLUSION

It is the opinion of this office that in the situation where a life estate is given to A with a vested remainder in B if B survives A but if not a contingent remainder in C, and if the tax rate is the same for B and C, then inheritance tax under Chapter 145, RSMo, should be taxed as a life estate against A and the remainder against B.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,

JOHN C. DANFORTH
Attorney General