INHERITANCE TAXES:
ANNUITY PROCEEDS:
TAXABLE: WHEN:

When decedent paid annual fixed premium for life, under terms of annuity contract; was not to receive any return of premiums or income thereon during her life; had right to change beneficiaries but did not, and on her death premiums paid company or cash value, whichever was greater, to be paid named beneficiaries, and beneficiaries to come into possession and enjoyment of fund at or after decedent's death. Said transfer is taxable under provisions of par. 3, Sec. 145.020, RSMo Cum. Supp. 1957.

June 5, 1958

Honorable Forrest L. Hill
Assistant Supervisor
Inheritance Tax Unit
Department of Revenue
Jefferson City, Missouri

Dear Mr. Hill:

This department is in receipt of your request for our official opinion, reading as follows:

> **"Your opinion on the following is respectfully requested:**
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> **"The issue is whether or not proceeds of a certain annuity are subject to Inheritance Tax. The decedent paid an annual premium of a fixed amount until death; there were no changes under the original contract and no funds were payable to the decedent during her lifetime; the right to change the beneficiary was retained during the entire lifetime of the contract; the premiums were due and payable and the insured could not have obtained a refund of the premiums and the contract provided that upon her death the return of the premiums would be payable or the cash value, whichever was largest; the proceeds are now payable to the beneficiaries named by the decedent."**

Section 145.020, RSMo Cum. Supp. 1957, imposes inheritance taxes upon the transfer of any property, or any interest therein, in the cases mentioned in said section, which reads in part as follows:

> **"1. A tax is hereby imposed upon the transfer of any property, real, personal, or mixed, or any interest therein or income therefrom in trust or otherwise, to persons, institutions, associations or corpora-**

tions, not herein exempted, in the following cases:

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"(3) When the transfer is made by a resident or by a nonresident whose property is within this state or within its jurisdiction, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intending to take effect in possession or enjoyment at or after such death. Every such transfer made within two years prior to the death of the grantor, vendor or donor, of a material part of his estate or in the nature of a final disposition or distribution thereof without an adequate valuable consideration shall be considered to have been made in contemplation of death within the meaning of this section;

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"2. Such tax shall be imposed when any person, association, institution or corporation actually comes into the possession and enjoyment of the property, interest therein or income therefrom."

In this connection, we call attention to the case of Kansas City Life Insurance Co. v. Rainey, 353 Mo. 477, 182 SW(2d) 624, which we believe to be very much in point. From the facts of such case it appears Herbert F. Hall, aged 72, purchased an "Investment Policy" from the Kansas City Life Insurance Company for $50,000, with income payable to him, and at his death the principal payable to his wife. After the death of his wife in 1941, Hall named his secretary, Jessie A. Rainey, as the beneficiary in such policy. After the death of his wife, Hall also changed the beneficiary in a similar policy of $50,000 to Irving V. Sanford, one of his employees.

After the death of Hall, Miss Rainey and Sanford claimed the proceeds of the respective policies from the insurance company. The executor of Hall's estate also claimed the proceeds of both policies. The two suits were tried together in the lower court and when the court found for the beneficiary in each policy, the executor appealed. The two suits were consolidated in the Supreme Court for argument and decision. The policies were the same, and in discussing the issues, the appellate court referred only to the policy for Miss Rainey. It was argued by the executor that the policy was not one of insurance, since there was lacking the necessary element of risk and at Hall's death the insurance company was required to pay $50,000, and the policy was merely a certificate of deposit to take effect at Hall's death and was

testamentary in character. In discussing appellant's contention, and other issues involved in the case, the court said at l.c. 483:

> "The policy we are considering is a contract between Hall and the insurance company for the benefit of Miss Rainey. This is true regardless of the element of risk. It still would be a contract for the benefit of a third person if made with a bank, a corporation of any other sort, or an individual. In the policy Miss Rainey is a third-party donee-beneficiary. Restatement of Contracts, sec. 133. She is entitled to enforce the contract even though she is a stranger to both the contract and to the consideration. 12 Am. Jur. Contracts, sec. 277.
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> "The policy is not testamentary because it became effective before Hall's death. It was a contract made and in force during Hall's lifetime. Hence there would be no reason to surround it with formalities which safeguard a will. See Krell v. Codman (Mass.), 14 L.R.A. 860.
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> "The policy became effective upon its execution and the payment of the consideration of $50,000, all done during Hall's lifetime. The payment of the consideration was an immediate disposition of the $50,000. The money became the property of the insurance company. Upon Hall's death the money to be paid to the beneficiary constituted no part of the Hall's estate. So far as Miss Rainey is concerned, any disposition as to her was effected at the time she was designated as beneficiary. Her enjoyment of the fund was merely postponed until Hall's death, subject to the right of revocation retained by Hall.
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> "The mere fact a note, bond or other instrument for the payment of money is not payable until at or after death is not sufficient to make such an instrument testamentary in character and invalid for that reason. Green v. Whaley, 271 Mo. 636, 197 S.W. 355 (supra); 12 Am. Jur. Contracts, sec. 302; cases cited in Annotation 2 A.L.R. 1471. See Maze v. Baird, 89 Mo. App. 348; Robbins v. Robbins, 175 Mo. App. 609, 158 S.W. 400." (Underscoring ours.)

In this case it will be noted the court held that the annuity contract was one between Hall and the insurance company for the benefit of Miss Rainey, who was a third party donee-beneficiary, and

since it was not testamentary in character, there was no reason to surround it with the formalities safeguarding a will. The policy became effective upon its execution and payment of the premium, all done during Hall's lifetime, and the money paid for the premium became the property of the insurance company, but at Hall's death was to be paid to Miss Rainey and constituted no part of Hall's estate.

No question of liability or nonliability under the inheritance tax statutes of the gift to Miss Rainey was in issue. While the court found that the fund was no part of the estate, this is no authority for holding that transfers of property, no part of a decedent's estate, are not subject to the tax, as there are many taxable transfers under the statutes where the property was never a part of decedent's estate.

It is noted the court did find the enjoyment of the fund transferred to Miss Rainey was postponed until Hall's death, subject to his right of revocation (or change of beneficiary), which right was never exercised. In other words, the donee beneficiary of the proceeds of the annuity contract was to come into possession and enjoyment of her gift only when the death of Hall occurred.

Section 571, RSMo 1939, of the Inheritance Tax Laws, was in force at the time of Hall's death, and said section, with a few minor changes, has been incorporated in our present statutes. That part of Section 571, imposing a tax on transfers "* * * by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intending to take effect in possession or enjoyment at or after such death * * *" has been incorporated in par. 3, sec. 145.020, supra, without any change. Since the gift to Miss Rainey was intended by the donor to take effect in possession and enjoyment when said donor's death occurred, it is believed the transfer would have been a taxable one under provisions of Section 571, RSMo 1939.

In the instant case, we find the factual situation to be very similar to that in the Hall case. The insured paid a fixed annual premium for the annuity contract during her lifetime. She had the right to change beneficiaries but could not withdraw premiums paid or any increase on same. On her death the return of the premiums, or the cash surrender value, whichever was greater, were to be paid to named beneficiaries. Here, as in the Hall case, the beneficiaries were not to come into possession and enjoyment of the proceeds of the contract until the death of the insured occurred. Clearly, this is a taxable transfer within the meaning of par. 3, sec. 145.020, supra, imposing a tax on all transfers of property by deed, grant, bargain, sale or gift, which were intended by the grantor, vendor, or donor to

take effect in possession or enjoyment at or after such death. Therefore, our answer to your inquiry is in the affirmative.

CONCLUSION

Therefore, it is the opinion of this department that when, under the terms of an annuity contract, the decedent paid an annual premium of a fixed amount for life, and was not to receive any premiums paid or income thereon during her life, with the right to change beneficiaries, but failed to exercise such right, and on decedent's death premiums paid to the company, or the cash value of same, whichever was greater, were to be paid to beneficiaries named in the contract, and the beneficiaries were not to come into possession and enjoyment of the fund until at or after decedent's death; such transfer of the fund is a taxable one under provisions of par. 3, Section 145.020, RSMo Cum. Supp. 1957, of the Inheritance Tax Laws.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

John M. Dalton
Attorney General

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