INHERITANCE TAX: A contingent remainder is taxable although the original trust was created prior to the passage of the Mo. inheritance tax law.

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Mississippi Valley Trust Company,
St. Louis, Missouri.

Gentlemen:

This department is in receipt of your request for an opinion as to the following state of facts:

> "'The Mississippi Valley Trust Company is successor trustee under the will of William L. Ewing, deceased. Mr. Ewing died on October 22, 1873. The original trustees were his wife and his two sons. The trust is for the life of his daughter, Clara Louisa Ewing, and the will provides:
>
> > 'and it is my will that at the death of my said daughter CLARA LOUISA leaving children surviving, said principal shall be paid and conveyed to said children share and share alike discharged of this trust, and if said CLARA LOUISA shall die leaving no children surviving then the principal fund shall vest in my right heirs.'
>
> The daugher Clara Louisa Wilson died this year and the property passes to her following five children: Louise W. Schwarz, Victor Wilson, William Sydney Wilson, George K. Wilson and Alfred C. Wilson. The total value of all the property constituting the trust fund is $59,000.00.
>
> It is our opinion that this trust fund is not subject to inheritance tax and we ask that you issue an unconditional waiver to transfer the assets of this trust to the five children of Mrs. Wilson.
>
> For your information we are enclosing herewith a photostatic copy of the will. We refer you to Item 7, which covers the trust in question. '"

I.

A contingent remainder is taxable although the original trust was created prior to the passage of the Missouri Inheritance Tax Law.

It is well recognized that remainders that vested prior to the statute providing for an inheritance tax are not taxable at the death of the life tenant, and any such statute declaring them taxable is unconstitutional. Matter of Pell, 171 N.Y. 48; 63 N.E. 789.

However, a different rule prevails where the remainder is contingent. Section 597 R.S. Mo. 1929 provides in part as follows:

> "****Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estate for purposes of taxation, upon which said estates in expectancy may have been limited. ****"
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> "A contingent remainder is where the estate in remainder is limited either to a dubious and uncertain person, or upon the happening of a dubious and uncertain event."
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> 21 Corpus Juris, 981.

Item 7 of the will of William L. Ewing, deceased, provides for certain payments to the daughter, Clara Louisa, during her natural life, free from all control or interference of her husband should she thereafter marry. At the time the will was executed the daughter of William L. Ewing was evidently unmarried and there were therefore no children in existence to whom the will could have been held applicable. At testator's death there was no assurance that there would be any children surviving the daughter of William L. Ewing capable of taking the property at the death of said daughter. In other words, there was a contingency upon which the passing of the remainder interest was based.

In the case of In Re Hoedley, 101 Federal 233, the Court said:

"'****Besides the above considerations, the cases quoted by the referee, confirmed also by the still later cases of In Re Brown, 154 N.Y. 313, 48 N.E. 537, Paget v. Melcher, 156 N.Y. 399, 51 N.E. 24, and Clark v. Cammann, 160 N.Y. 315, 54 N.E. 709, show that where, as under these wills, the testator directs a division of the estate into shares upon the termination of the life tenancy, and a gift to his children then living, or in the case of the death of either then to the lawful issue of any deceased child, the intent of the testator if nothing else indicates the contrary, will be construed to be to convey to the future beneficiaries no estate or interest of any kind until the termination of the life estate; or as stated by Earl, J., in Delafield v. Shipman, 103 N.Y. 463, 9 N.E. 184:

> 'He, (the testator) vested the whole estate in the trustee during the life of his widow, and during that time evidently intended that it should remain there, and not be subject to the disposal of his children, or to be seized by their creditors; and after the death of his widow he gave it not to the children living at his death, but to the children and descendants of children deceased, living at her death.' Page 468, 103 N.Y., and page 185, 9 N.E.

And again in Campbell v. Stokes, 142 N.Y. 23, 36 N.E. 811, Andrews, C.J., explaining the case of Townshend v. Frommer, 125 N.Y. 446, 26 N.E. 805, observes:

> 'That case arose under a trust deed whereby the grantor retained the beneficial use of the property for life, and which contained directions for the disposition of the fee after her death, to persons who were not ascertainable until the happening of that event. The intention of the grantor, deduced by the court from the transaction, was to postpone the accruing of any future interests until that event happened.'

In such cases, therefore, it is held that there is no alienable or descendible interest while the precedent life estate is outstanding. ****"

Page on "Wills ", Section 1119, defines "contingent remainder" as follows:

> "'A future interest is contingent if the person to take is not in existence, as where the gift is to children, heirs of the body, and the like of one who, at that time, has no living descendants.
>
> It is also contingent where, by the terms of the gift, the beneficiaries can not be ascertained until the happening of some future event. Where a devise is made to a class in such terms that the class can not be ascertained at the death of the testator, but must be ascertained at some future time, the interest of the members of such class corresponding to such description is a mere contingency until such class is definitely ascertained. A gift to the 'heirs' of a certain person, to be ascertained at some time in the future, 'heirs' being used in its primary meaning, and not as equivalent to children; or a gift to the members of a class, such as children, who may be living at some future period of time, is contingent. A gift to A for life and at his death to his children and the heirs of such as might be deceased, or to the survivors of a class, as to A's children or the survivors of them, or to A and his children if he has any living, is a contingent remainder.'"

In the case of Dickerson v. Dickerson, 211 Mo. 483, the testator by will gave to his wife the use and income of his dwelling house and the 200 acres of land in controversy "to have and to hold the same for her during the term she may remain my widow. If she marries or ceases to be my widow, the farm then reverts to my children to be equally divided between them and at her death, the said farm to be divided between my surviving children and grandchildren if any whose parents are dead". Judge Woodson, after an exhaustive opinion, held that the will created a contingent remainder in the children which vested in the children alive at the wife's death and the child who died before she did leaving no children of his own took no interest in the estate. Judge Woodson said:

> "'And if those words referred to the death of the testator, why did he provide in the will that upon the death or marriage of his widow, the farm should then go to his children, and further provide in the same clause of the will that the land should at that same time be equally divided between his 'surviving children, and grandchildren if any whose parents are dead?' If it was the intention of

the testator to give the farm to such of his children as were living at the time of his death, then we are unable to see what he meant by the use of the words 'and at her death said farm to be equally divided between my surviving children and grandchildren, if any whose parents are dead.' Conceding the testator, at the time of his death, knew which of his children were then living, yet neither he, because of his death, nor any other person could tell which of his children would be dead and leave living children at the time of the death or marriage of the testator's widow. And yet, by the express terms of the will the estate was not to terminate until the happening of one of those events, and at the same time the remainder was to pass to and be divided equally between his children and grandchildren then living. There was not only an uncertainty as to which of his children would be alive at the time of the termination of the particular estate; but there was also a further contingency which could not be forseen, and that was which, if any, of his children would be dead, leaving surviving children at the marriage or death of the widow. If, upon the other hand, those words refer to the death or marriage, they become of much significance by making definite and certain the persons who are to take the remainder after the termination of the particular estate.'"

CONCLUSION

In view of the foregoing, it is the opinion of this department that the property passing to the children of Clara Louisa Wilson by reason of the will of William L. Ewing is subject to the inheritance tax laws of the State of Missouri. The remainder interests of the children were contingent until the death of Clara Louisa Wilson this year, and by Sec. 579 R.S. Mo. 1929, supra, are especially made subject to the inheritance tax of the State of Missouri.

Respectfully submitted,

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APPROVED:

ROY McKITTRICK,
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JWH:AH