INHERITANCE TAX: Taxation of remainder interest should be at the highest possible rate.

2-20

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Mr. Harry Sloan, Appraiser,
Post Office Building,
Clayton, Missouri.

In the Matter of the Appraisal of the Estate of Edwin T. Nugent, deceased.

Dear Sir:

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

> "****For your information, the widow is 57 years old, the married daughter is 30 and the single daughter 21 years of age.
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> Under the terms of the Will, it is provided that the widow receives 5/7 of the income of the trust estate for life, each daughter 1/7 for life, upon the death of the mother, 1/2 of the said 5/7 shall go to each daughter for life, with remainder to their children, and if no children, then to the surviving daughter for life. It provides that the life estates of the daughters shall pass under this will, unless the daughters provide differently by their wills.
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> The married daughter has two children, the contention of the executor is that for the purposes of inheritance tax it should be assumed that the daughter, now single, will have one child to inherit and that neither of the daughters will make a will diverting the remainder.
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> The language of Section 597 R.S. 1929 reading in part as follows, provides: 'A tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of

this article.'

The executor and appraiser differ on the law and I therefore ask instructions from your department."

Olga M. Nugent Conroy, daughter of the deceased, has three children. Edwine C. Nugent, the other daughter of the deceased, is 21 years old, unmarried, and has no children. The precise question involved is as to the taxation of the remainder interest of the trust in which Edwine C. Nugent has or will have a life interest. The paragraph of the will in question provides as follows:

"My daughters shall each have the right to provide by will for the distribution upon their respective deaths of one-half of the trust estate, provided they leave children surviving them, such wills to take effect after the death of my wife. In the absence of a will and in the event of a daughter dying leaving children surviving her, one-half of the trust estate shall go to such children to be held in trust under the terms and conditions hereinafter provided. In the absence of such children surviving a daughter, upon the death of one daughter the other shall receive the entire income during her life, and upon the death of the surviving daughter the children of such surviving daughter shall receive the trust estate IN TRUST under the terms and conditions hereinafter provided, unless such surviving daughter shall leave a will otherwise providing, in which event the trust estate shall go as provided by such will."

Section 597, R.S. Mo. 1929 provides in part as follows:

"****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 highest rate, which,

> on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executor, administrator, or trustee out of the property transferred: Provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article. Such return of overpayment shall be made in the manner provided by section 584 of this article, upon the order of the court having jurisdiction. ***"
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> (Emphasis ours)

It is entirely possible that Edwine C. Nugent may predecease Olga M. Nugent Conroy, in which event the remainder interest of the trust in which Edwine C. Nugent has a life interest would pass to Mrs. Conroy. Mrs. Conroy, having three children, could then, under the terms of the will, dispose of this remainder interest, together with the remainder interest of the trust in which she (Mrs. Conroy) has a life interest, to a stranger in blood or to a body politic, association, institution or corporation. These remainder interests, under Section 572, R.S. Mo. 1929, would then be taxable at 5% on the first $20,000 and 10% on the next $20,000. On the other hand, if it were to be assumed that Edwine C. Nugent would marry and have children, the result would be the same, for both daughters could then by will dispose of the remainder interest to a stranger in blood or to a body politic, association, institution or corporation.

The precise statute involved here has been before the Supreme Court of Missouri in the case of State Treasurer v. Trust Company, 293 Mo. 545. The facts in that case are not dissimilar to those involved in the case here under discussion. In that case the testator, by his will, created a trust estate for the benefit of his daughter for life and provided that if his daughter should predecease his wife, the property was to go to his wife absolutely; however, if his wife should predecease his daughter, the trust fund was to go (1) to the daughter's children or their descendants, if any such there were; (2) if no children or their descendants, then the daughter, by will duly executed, could

name the person or persons to take; and (3) if the daughter had no children or their descendants and failed by will to nominate or appoint a person or persons to whom the estate should go, then, and in that event the trust should go to such persons as would be entitled to receive the same from her under the laws of descent and distribution then in effect in this state. Judge Graves, in holding that the inheritance tax payable upon the transfer of the remainder of the trust estate, after the daughter's life estate, was the highest rate fixed by Sub-division 5 of Section 3 of said Act (now Sub-division 5, Section 572, R.S. Mo. 1929) said:

> "This was on the theory that under her power of appointment by the will, the daughter might and probably would name and appoint either a stranger to the blood or some 'body politic, association, institution or corporation'. The value of the remainder was found to be $24,365. Of this sum $20,000 was fixed at 5% and $4,365 (after deduction $100 exemption) was taxed at 10%, making the total tax of $1,426.50 complained of in this appeal.
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> I do not understand that it is urged that the value of the remainder was not properly and rightfully determined nor that the rates fixed are not the proper ones under the statute. ****
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> From it all it appears that (to say the least) the Probate Court followed the statute in fixing the rate and in fixing the time of payment. Appellant's second contention must be ruled against then."

A leading case from New York on this subject is the case of Matter of Zborowski, 213 N.Y. 109, wherein the court said:

> "The different statutes hereinbefore referred to contain evidence of a constant effort of the Legislature to enlarge the class of transfers immediately taxable upon the death of the transferror. The question of the Legislature's power in that regard was set at rest by the decision of this court in Matter of Vanderbilt (supra). In one aspect it may be unjust to the life tenant to tax at once the transfer, both of the life estate and

> of the remainder though contingent, and it may seem unwise for the State to collect taxes which it may have to refund with interest, but those considerations are solely for the Legislature, who are to judge whether they are more than offset by the greater certainty which the State thus has of receiving the tax ultimately its due under the statute. However unwise or unjust it may seem in a particular case like this for the State to collect the tax at the highest rate when in all probability the remainder will vest in a class taxable at the lowest rate, it is the duty of this court to give effect to the statute as it is written."

In the case of State Treasurer v. Trust Company, supra, Judge Graves cited the Zborowski case and said:

> "****And it will be noticed that the decision was made after the State of New York had amended its law so as to read practically as our Section 25 of the Act of 1917 reads."

In the case of The People v. Starring, 274 Illinois 289, the testatrix left her estate in trust for a period of twenty years with directions to pay the income to her brother and her sisters for that period with provisions that if all shall die before the termination of the trust period, then all the income should be paid to a certain nephew of the testatrix. The Court said:

> "The county court did not err in imposing the tax at the highest rate which, on the happening of the contingencies provided for by the will, would be possible under the provisions of the Inheritance Tax Act. A nephew is entitled to less exemptions and is taxed at a higher rate than a brother or sister. Under the provisions of this will the brother and sisters of the testatrix did not receive an amount equal to their exemptions and therefore their estates were liable to no tax. To impose the highest rate possible it was necessary to assume that the contingencies mentioned, namely, the deaths of the brother and sisters of the testatrix, would

> happen, and that Edwin Newlander, a nephew, would receive seven-ninths of the income from the trust for the remainder of the twenty years."

In consideration of this problem it must be remembered that the Legislature of the State of Missouri, in enacting Section 597, supra, used the word "possible". Thus it is that the tax must be assessed at the highest possible rate and not the highest probable rate. This distinction is clearly brought out in a recent case by the Supreme Court of Washington in the case of In Re Eaton's Estate: (170 Wash. l.c. 283, 284, 285)

> "We refrain from discussing the authorities cited, as no other state has a statute like ours. The statutes of New York and three other states provide for taxation of the trust estate at the highest rate possible.
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> * * *
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> Twelve years later, our legislature amended the 1917 act. The present (1929) statute requires the payment of the tax, immediately upon the transfer of the property, at the highest rate probable; that is, the word 'possible' was changed to 'probable' and the court was vested with the power to adjust the tax if same 'appear to be excessive'.
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> * * *
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> 'Possible' is defined as 'capable of being done'. 49 C.J. 1118. The definition of the word 'probable' in Gallamore v. Olympia, supra, appears at page 419 of vol. 50 C.J., and in distinguishing the word 'possible' the author says:
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> > 'Things or results which are only possible cannot be spoken of as either "probable" or "natural" for the latter are those things or events which are likely to happen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference.'
> > 50 C.J. 420.

> The word 'probable' implies a far different meaning than the word 'possible'. Had our legislature intended to follow the New York law, it would have used the word 'possible'"

CONCLUSION

In view of the foregoing, it is the opinion of this department that the remainder interests of the trusts in which Olga M. Nugent Conroy and Edwine C. Nugent have or will have life interests should be taxed under sub-section 5 of Section 572, R.S. Mo. 1929 so that said remainder interests will be taxed at 5% on the first $20,000 and 10% on the next $20,000.

Our conclusion is based upon Sec. 597, R.S. Mo. 1929 and we do not consider the purpose of this statute obscure, which is to put at once into the Treasury of the State the largest sum which in any contingency the remaindermen may have to pay. The remaindermen do not suffer, for when the estate takes effect in possession there will be a refund of any excess.

If preferred, the persons, institutions, associations or corporations beneficially interested in the property chargeable with this tax may elect not to pay the same until they shall come into actual possession or enjoyment of such property, and may give bond payable to the State of Missouri in a penal sum of three times the sum or amount of taxes due, as provided in Section 577, R.S. Mo. 1929.

If the conclusion we have reached in this matter appear to be unjust, we can but refer to the case of Matter of Parker, 226 N.Y. 260, decided by Judge Cardozo, now Associate Justice of the Supreme Court of the United States, when he was a member of the Court of Appeals of New York. Judge Cardozo, in passing upon a question similar to that here under discussion, said:

> "This construction of the statute maintains the consistency of the law and its singleness of purpose. The State has secured itself against all contingencies, remote as well as probable. That is the dominant scheme which it is our duty to preserve. In the case before us the contingency is in all likelihood remote, and so the mind rebels a little against the tying up of money. But in other cases it may be less remote, and the need of protection greater. Whether in improbable contingencies the risk justifies the burden, it is not for us to say.

That is a question for the Legislature. Our duty is done when we enforce the law as it is written."

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

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