



OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Thomas Co.
affirmed by
R-1704

Honorable George H. Sheppard
Comptroller of Public Accounts
Austin, Texas

Dear Sir:

Opinion No. 0-2819

Re: Application of the Texas
Inheritance Tax law when
property passes to a
devisee under a joint
and mutual will executed
by a husband and wife.

We are in receipt of your letter of October 11, 1940, in which you request the opinion of this department as to the application of the Texas Inheritance Tax law to the following situation:

"J. W. Thomas and wife, Mrs. Annie E. Thomas, of Bastrop County, in the year of 1929 executed a joint and mutual will which devised to the survivor all of the community property for the benefit of the survivor during life with the power to 'buy, sell, convey, exchange, handle and manage the same in anyway and manner they may see fit during the lifetime of such Survivor.'

"At the death of the survivor the property was bequeathed to the surviving heirs of Mr. and Mrs. Thomas, one-half to descend to her heirs and the other half to pass to his heirs. The question now arises in the closing of this estate for inheritance tax purposes, as to whether or not the property of Mr. Thomas, who died first, passed to his heirs at that time or whether or not all of the estate passed at the death of the survivor, one-half to the heirs of Mr. Thomas and the

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other half to the heirs of Mrs. Thomas."

Article 7117, Vernon's Annotated Civil Statutes, reads as follows:

"All property within the jurisdiction of this State, real or personal, corporate or incorporate, and any interest therein, including property passing under a general power of appointment exercised by the decedent by will, including the proceeds of life insurance to the extent of the amount receivable by the executor or administrator as insurance under policies taken out by the decedent upon his own life, and to the extent of the excess over Forty Thousand Dollars (\$40,000) of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life, whether belonging to inhabitants of this State or to persons who are not inhabitants, regardless of whether such property is located within or without this State, which shall pass absolutely or in trust by will or by the laws of descent or distribution of this or any other State, or by deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor or donor, shall, upon passing to or for the use of any person, corporation, or association, be subject to a tax for the benefit of the State's General Revenue Fund, in accordance with the following classification. Any transfer made by a grantor, vendor, or donor, whether by deed, grant, sale, or gift, shall, unless shown to the contrary, be deemed to have been made in contemplation of death and subject to the same tax as herein provided, if such transfer is made within two (2) years prior to the death of the grantor, vendor, or donor, of a material part of his estate, or if the transfer made within such period is in the nature of a final distribution of property and without adequate valuable consideration. Acts 1923, 2nd C.S., p. 63; Acts 1929, 41st

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Leg., 1st C.S., p. 109, ch. 50, § 1; Acts 1939, 46th Leg., H. B. # 990, § 1."

Article 7123, Vernon's Annotated Civil Statutes, reads as follows:

"If the property passing as aforesaid shall be divided into two or more estates, as an estate for years or for life and a remainder, the tax shall be levied on each estate or interest separately, according to the value of the same at the death of the decedent. The value of estates for years, estates for life, remainders and annuities, shall be determined by the 'Actuaries Combined Experience Tables,' at four per cent compound interest."

Under the above quoted articles unquestionably the inheritance tax is due on the husband's share of the community estate which he leaves at his death and is payable by his heirs on their respective interests or estates in such decedent's property. The tax is due at such time and is to be paid by the various estates or interests in proportion to the value of each interest in the property. There is no provision for the postponement of the payment of the tax until the property is actually received by the remaindermen. The Austin Court of Civil Appeals, in the case of *Bethea v. Sheppard*, (as yet unreported), stated as follows:

"Manifestly the statutes do not authorize the postponement of the tax to await such contingency or conditions subsequent, and these conclusions answer all alternative contentions of appellant that only portions of the value of the corpus or principal were taxable. Our above conclusions also deny the contention of appellant that the tax should be postponed to determine what eventually might happen during the eight year period after the death of grantor or settlor. Nothing in the statute authorizes such postponement of the tax; but to the contrary it shows that the Legislature intended that the tax become due and

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payable immediately after the death of grantor, * * *."

The question in the specific case which you present is whether or not the property belonging to the one half community interest of J. W. Thomas which has now passed to his remaindermen or heirs passed under the terms of his will at the time of his death at which time it was taxable or did it pass upon the death of his wife, the survivor. It is our opinion that the former is the correct analysis of the situation. Under the will Mr. Thomas left his share of the community estate to his wife for her life with the power to dispose of the same but provided that if any of the same was left at the death of his wife that it should go to his heirs. It is our opinion that when heirs so take the remaining property at the death of Mr. Thomas' surviving wife they are taking the same under the will of Mr. Thomas and whatever interest or estate they had in the property was taxable at the time of Mr. Thomas' death and would not be taxable at the time of the death of the surviving wife.

In Opinion No. O-2351 this department construed a will in which a husband left his property to his wife for life with power to dispose of same but provided that if any of it was left at the time of her death the remainder should go to his daughter. We ruled in said opinion that upon the husband's death both the wife and the daughter had an interest or estate in the property which interest or estate should be taxed and valued in accordance with the value of the same at the time of the husband's death. This same rule of law was announced by the Supreme Court of Wisconsin in the case of State v. Merrill, 248 N. W. 909. The court states as follows:

"The statutory provisions above stated disclose a complete scheme for the valuing of interests in estates given by will and for the imposing of the tax upon such interests transferred as of the date of the death of the testator, and for the payment of the tax upon its imposition, whether the actual enjoyment of the interest transferred be present or future. The tax is imposed upon the right to receive and is fixed by the value of that right. State ex rel. Kempsmith v. Widule, 161 Wis. 389, 154 N. W. 695. The state is entitled to an inheritance tax measured by the market value of the interest transferred and the value for taxing

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purposes cannot be reduced by dividing it into term estates and remainders. Estate of Stephenson, 171 Wis. 452, 458, 459, 177 N. W. 579. Thus the several interests transferred by the will in suit were subject to valuation at the time of the testator's death. * * *."

The United States Board of Tax Appeals passed on a question very similar to the one you present in the case of Carrie L. Jones v. Commissioner, decided May 29, 1940. In that case a testator bequeathed his property to his wife for life with remainder to their daughter. By the terms of the will the widow was given the power to dispose of the property including the right to devise, mortgage or sell the same. During her lifetime the widow made a transfer in trust of said securities received under the will of her husband directing that she should receive the income therefrom for life and that upon her death the entire trust estate should be paid to her daughter. The widow died. The daughter wrote the trustee that she elected to take the securities under the will of her father. The court held that the daughter did take the securities under the will of her father and that their value at the time of the widow's death is not included in her gross estate. We believe that the United States Board of Tax Appeals has laid down the correct rule to be applied in such a case.

You are therefore advised that the husband's half of the community property which now passes to his heirs upon the death of his surviving wife was taxable in accordance with its value at the time of the husband's death and is not taxable under the Texas Inheritance Tax laws at the time of the death of the surviving wife as part of her estate.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Billy Goldberg*
Billy Goldberg
Assistant

BG:RS

APPROVED OCT 30, 1940

Gravel Mann
ATTORNEY GENERAL OF TEXAS

