



THE ATTORNEY GENERAL
OF TEXAS

AUSTIN 11, TEXAS

WAGGONER GARR
ATTORNEY GENERAL

October 21, 1963

Honorable Robert S. Calvert
Comptroller of Public Accounts
Capitol Station
Austin, Texas

Opinion No. C-165

Re: Proper method of computing inheritance taxes where will devises property in fee simple to named beneficiary with remainder over in the event any of said property remains at death of beneficiary.

Dear Mr. Calvert:

You have requested the opinion of this office on the above captioned matter. Gus C. Klemstein died testate. His wife survived him. Attached to your letter of request is a copy of the decedent's last will and testament. The pertinent provisions thereof are the following paragraphs:

"It is our will and desire that the survivor of us, Gus C. Klemstein or wife, Mary Klemstein, as the case may be, shall have and hold in fee simple all of the Estate of every description, real, personal or mixed, and wheresoever situated, which either or both of us may own at the time of the death of the first of us to die, and with this in mind, I, Gus C. Klemstein do hereby give, devise and bequeath in fee simple, unto my beloved wife, Mary Klemstein, all of my property of every kind and character whether real, personal or mixed, and wheresoever situated; and I, Mary Klemstein, do hereby give, devise and bequeath in fee simple, unto my beloved husband, Gus C. Klemstein, all of my property of every kind and character whether real, personal or mixed, and wheresoever situated.

". . .

"In the event any of our Estate remains on hand at the time of the death

of the survivor of us, or when we are both deceased, then, in such event, the remainder of our Estate shall then vest in fee simple in our beloved niece, Lahree Munsch, and with this in mind, we hereby give, devise and bequeath in fee simple, unto our beloved niece, Lahree Munsch, all of our property of every kind and character, whether real, personal or mixed, and wheresoever situated, which we may own or have an interest in at the time of the death of the survivor of us or when we are both deceased."

You ask whether the rule laid down in Calvert v. Thompson, 339 S.W.2d 685 (Tex.Civ.App. 1960, error ref.) is applicable. In the Thompson case, the decedent's will contained the following provision:

"All of the rest and residue of my property, real, personal and mixed, I hereby give, devise and bequeath to my beloved wife, Cora Thompson, during her lifetime, with full power to sell or otherwise dispose of same, and at her death, to my children John W. Thompson and Ida May Thompson, share and share alike, in fee simple."

The tax was assessed against the interest of Cora Thompson, and its amount was determined on the basis of the value of the entire residuary estate. The court held that the fact that the life tenant was given the power of disposal did not change the estate into something other than an estate for life, citing, among other cases, Wier v. Smith, 62 Tex. 1 (1884); Edds v. Mitchell, 143 Tex. 307, 184 S.W.2d 823 (1945), and authorities cited therein. This, of course, had long been the established rule in the jurisprudence of this state.

At page 688, the court said:

"[2] The statute, Art. 7123,¹ supra,

¹ Article 7123, presently carried as Article 14.08, Ch. 14, Title 122A, 20A, Tax.-Gen., V.A.T.S., reads as follows:

"If the property passing as aforesaid shall

is plain in providing the method for determining the value of estates for life and remainders and any other method of determining such values would violate the statute. For this reason the most probable future disposition of the estate by the life tenant would not be a proper item to be considered in determining the amount of inheritance taxes due. . . ."

The taxpayer takes the position that the Thompson case dealt with a fact situation in which the will involved clearly created a life estate, and that, therefore, the instant case is distinguishable therefrom. We agree. We think that the nature of the estate received by the decedent's wife is governed by McMurray v. Stanley. The holding in the McMurray case has been ably summarized in the Edds case, supra, at page 826:

"In McMurray v. Stanley, 69 Tex. 227, 6 S.W. 412, 413, the testatrix, Mrs. Bagley, devised all of her property to her husband, N. G. Bagley, adding that he should have full power and control over the same to use and dispose of as he might desire, and in another clause she directed that if at his death he should have 'any of said property still remaining in his possession not disposed of or used by him' the same should be given to her nieces. The plaintiffs were the nieces referred to in the will and sought to recover from the executor, devisees and legatees of the husband, N. G. Bagley, certain property that belonged to the estate of Mrs. Bagley at the time of her death and was not disposed of by N. G. Bagley before his

¹ (Cont'd)

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."

death, and also the proceeds remaining in the hands of N. G. Bagley at his death of certain property of his wife's estate that he had sold. The trial court sustained demurrers to the plaintiff's petition, holding that Mrs. Bagley's will vested in her husband an absolute title in fee, and that it neither gave to the plaintiff's any right to any part of her estate nor affected it with a trust in their favor.

"The Supreme Court in its opinion recognized the rule announced by many decisions that when property is devised generally or indefinitely, with full power of disposition, the devise is construed to pass a fee, and an attempted limitation over is void. See Trustees Presbyterian Church v. Mize, 181 Ky. 567, 205 S.W. 674, 2 A.L.R. pp. 1237, 1240; 33 Am. Jur. pp. 492, 493, Sec. 29, pp. 498-500, Secs. 36, 37; 3 Page on Wills, pp. 385-388, Sec. 1123. The court, however, declined to apply that rule to Mrs. Bagley's will, believing that if it did, the testatrix' intention would be defeated, and held that while N. G. Bagley, the husband, took under Mrs. Bagley's will an estate in fee in the entire property, a trust would attach for the benefit of the nieces and that they were entitled to receive 'all such property as belonged to the estate of Mrs. Bagley at the time of her death as was not consumed in its use or disposed of by N. G. Bagley before his death.'"

Thus the McMurray case and the many cases that have followed it stand for the proposition that the conflict between the gift apparently absolute and the gift over of property not disposed of will not defeat the general intention as ascertained by reading the instrument as a whole. See 28 T.L.R. 125; 17 A.L.R.2d 76-78, "Anno: Absolute Grant - Purported Limitation."

We think the intention of the decedent in this case as manifested from all the provisions of his will necessitates the

same result as that reached in the McMurray case. Since the beneficiary received an estate in fee impressed with a trust, the provisions of Article 14.08 are clearly inapplicable; and the inheritance tax must be computed on the full value of the property received by the surviving wife. The nature of the estate created must be determined, of course, in each case by ascertaining the intent of the testator from the will as a whole.

S U M M A R Y

Where will creates an estate in fee in certain properties impressed with a trust in favor of a third party should any portion of the estate remain at the death of the first beneficiary, inheritance taxes should be computed on the full value of the property received by the first beneficiary rather than under the provisions of Article 14.08.

Yours very truly,

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APPROVED:

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