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Effect of Renunciation of Tax Liability of Heir or Devisee

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incident thereto. The question of navigability is most important. If the lake is navigable according to the federal definition, the bed passed to the state upon its admission to the Union. Under the trust doctrine adopted by the Florida Supreme Court the state can grant the bed to private owners if, and only if, the grant is so limited as not to interfere with public welfare, the normal overriding control of the state, or any applicable authority of Congress.

If the lake is nonnavigable the bed can freely pass to private owners according to the calls of the deed. When property abutting on a nonnavigable lake has been conveyed by the state or by the United States and no intention is ascertainable from the terms of the deed, state law will determine whether the grant carries title out to the center of the lake. Florida will probably follow the majority of states and permit private acquisition of such title.

Whether the bed owner will be confined to the waters overlying his fee is a question that may arise any day, although as yet it has not reached our Supreme Court. It is submitted that, when the question does arise, adoption of the civil law view will best serve the interests of Florida, with its great inland lake area and its emphasis on sports and recreation, not only for Floridians but also on a broad commercial basis for tourists.

JAMES W. CULLIS

EFFECT OF RENUNCIATION ON TAX LIABILITY OF HEIR OR DEVISEE

The right of a devisee or legatee under a will to renounce or disclaim a devise or legacy during the course of administration is recognized by most courts and text writers.[1] A devisee-debtor may even defeat his creditors by renouncing the devise, since the renunciation relates back, as a matter of law, to the death of the decedent and therefore is not considered a fraudulent conveyance for the purpose of defeating creditors.[2] The right of an heir to renounce his intes-

[1]*E.g.*, Brown v. Routzahn, 63 F.2d 914 (6th Cir. 1933); Schoonover v. Osborne, 193 Iowa 474, 187 N.W. 20 (1922); Sanders v. Jones, 347 Mo. 255, 147 S.W.2d 424 (1940); ATKINSON, WILLS 726 (1937).

[2]Kearley v. Crawford, 112 Fla. 43, 151 So. 293 (1933); Lehr v. Switzer, 213 Iowa

tate share of realty stands upon different ground, however, and was denied at common law.[3]

TAX COURT VIEW OF GIFT TAX LIABILITY

Prior to 1943 American discussions of the right of an heir to renounce were admittedly dicta,[4] but two recent Tax Court decisions have expressly denied the heir such right.[5] The rationale offered by way of distinguishing an heir and a devisee begins with the proposition that the property of an intestate passes and title thereto is cast upon the heir by operation of law, his assent being unnecessary,[6] while a devise, being the voluntary act of the testator alone, should not be forced upon an individual without his consent.[7]

These principles have recently been illustrated in *Ianthe B. Hardenbergh*,[8] which involved liability of the heirs of a Minnesota intestate to federal gift tax. The decedent died in 1944, survived by his widow, a daughter, and one son by a former marriage. During the course of administration the mother and daughter expressly renounced their interests, and the son subsequently received the entire estate,

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658, 239 N.W. 564 (1931); Schoonover v. Osborne, 193 Iowa 474, 187 N.W. 20 (1922). *Contra: In re* Kalt's Estate, 16 Cal.2d 807, 108 P.2d 401 (1940).

[3]See 4 PAGE, WILLS §1401 (3d ed. 1941). On the other hand, the civil law has always given the heir the right to renounce, inasmuch as acceptance of his intestate share made him liable for the debts of the intestate, *ibid.* By adoption of the civil law as well as by statute Louisiana permits the heir to renounce his intestate share, LA. CIV. CODE §946 (1932); see 3 WASHBURN, REAL PROPERTY §1829 (6th ed. 1902).

[4]*E.g.,* 4 PAGE, WILLS §1401. *See* Payton v. Monroe, 110 Ga. 262, 34 S.E. 305 (1899); Coomes v. Finegan, 233 Iowa 448, 450, 7 N.W.2d 729, 731 (1943).

[5]William L. Maxwell, P-H 1952 TC REP. DEC. ¶17.196 (1952); Ianthe B. Hardenbergh, 17 T.C. 167, P-H 1951 TC REP. DEC. ¶17.20 (1951), aff'd, 4 P-H 1952 FED. TAX SERV. ¶72,515 (8th Cir. 1952). See also Coomes v. Finegan, 233 Iowa 448, 7 N.W.2d 729 (1943); Bostian v. Milens, 193 S.W.2d 797 (Mo. 1946).

[6]*In re* Wolfe's Estate, 89 App. Div. 349, 85 N.Y. Supp. 949 (2d Dep't 1903); see 4 PAGE, WILLS §1401. In the one instance in which the legal heir and the intestate expressly agree that he is not to take by intestacy he can avoid the succession, McDowell v. McDowell, 141 Iowa 286, 119 N.W. 702 (1909); Brands v. DeWitt, 44 N.J. Eq. 545, 10 Atl. 181 (Ch. 1887). The theory is that he disposes of his interest before the intestate dies and thereby eliminates any question of renunciation.

[7]See ATKINSON, WILLS 725 (1937); 4 PAGE, WILLS §1402.

[8]17 T.C. 167, P-H 1951 TC REP. DEC. ¶17.20 (1951), aff'd, 4 P-H 1952 FED. TAX SERV. ¶72,515 (8th Cir. 1952).

consisting of realty and personalty. Later the collector asserted a deficiency in the gift tax returns of the mother and daughter for the calendar year 1944, claiming that they had made no return to cover the transaction in question. In the ensuing contest over the determination of deficiency the court held that the petitioners had no power to prevent passage of title to the property, and that the execution of the renouncing instrument effected a transfer from the mother and daughter to the son within the meaning of the Federal Gift Tax Statute.[9]

The foregoing discussion of the distinction between the vesting of title to property descending under intestacy and property descending under a will is subject to a further qualification. At common law the realty of an intestate vested in the heirs upon his death,[10] but his personalty descended to his personal representative.[11] Modern statutes in some states have changed this succession by providing that title to personalty vests in the intestate successors immediately upon the death of the intestate.[12] If, under local law, an intestate successor can prevent title to personalty from ever vesting in him, there is no valid reason at law for imposing upon him the onus of the federal gift tax. Recognizing this principle, the court found in the *Hardenbergh* case that under Minnesota law personal property descends to the intestate successor, subject only to the administrator's right of possession for purposes of administration. Hence the petitioners' interest in the estate vested in them upon the death of the intestate.

The *William L. Maxwell* decision[13] is at first glance in conflict with the general principle of the *Hardenbergh* case. The testator left certain property in California to his wife, and her attempted renunciation of all interest in the estate was held a transfer and taxable as such. Close scrutiny, however, indicates that the court acknowledged her right to renounce her portion under the will. The renunciation prevented title to the devised land from vesting in her as devisee, since the renunciation related back to the death of the decedent; but her attempt to disclaim her intestate share, which interest

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[9]INT. REV. CODE §1000.

[10]*E.g.*, Brewster v. Gage, 280 U.S. 327 (1930); Taylor v. Crook, 136 Ala. 354, 34 So. 905 (1901); Simmons v. Spratt, 26 Fla. 449, 8 So. 123 (1890).

[11]*E.g.*, Moore v. Brandenburg, 248 Ill. 232, 93 N.E. 733 (1910); Richardson v. Cole, 160 Mo. 372, 61 S.W. 182 (1901).

[12]*E.g.*, CAL. CIV. CODE §1384 (1949); TEX. REV. STAT. art. 2570 (1925).

[13]P-H 1952 TC REP. DEC. ¶17.196 (1952).

necessarily resulted upon her renunciation of her share under the will, effected a transfer of this intestate share for tax purposes.

FLORIDA LAW

Only three Florida cases have dealt with this general problem, and in none was the precise question of renunciation by an heir before the Court. *Kearley v. Crawford*[14] allowed a devisee under a will to renounce despite protestations of his creditor. Two subsequent cases appear to recognize a right in an heir at law to renounce,[15] but they should not be taken as conclusive authority for any such general proposition. Florida has apparently settled upon the doctrine that title to personalty passing by intestacy vests in the personal representative of the decedent;[16] and, although specific adjudication is lacking, one can probably assume in a strong common law jurisdiction that title to realty vests in the heirs immediately upon the death of the intestate.[17] Renunciation of personalty, in any event, or of realty by a devisee, is accordingly effective as such in Florida, but an attempt by an heir to renounce succession to realty is in all probability a transfer within the purview of the Federal Gift Tax Statute.

FEDERAL ESTATE TAX

The applicability of the federal estate tax[18] to the *Hardenbergh* situation should logically be determined by the principles governing gift tax liability. An attempt by an heir to renounce his intestate share within such time prior to his own death and under such circumstances as to render a transfer one in contemplation of death[19] would be governed by the state law fixing the time of vesting of title to real and personal property.[20] Any distinction between application of the

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[14]112 Fla. 43, 151 So. 293 (1933).

[15]Adams v. Saunders, 139 Fla. 730, 191 So. 312 (1939) *passim; In re* Slawson's Estate, 41 So.2d 324 (Fla. 1949) *passim.*

[16]Mills v. Hamilton, 121 Fla. 435, 163 So. 857 (1935); see REDFEARN, WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA §332 (1946).

[17]FLA. STAT. §733.01 (1951); Williams v. Williams, 149 Fla. 454, 6 So.2d 275 (1942); Johnson v. McKinnon, 45 Fla. 388, 34 So. 272 (1903); REDFEARN, *op. cit. supra* note 16, §332.

[18]INT. REV. CODE §§800-951.

[19]INT. REV. CODE §§811 (c), 811 (l).

[20]See notes 10-17 *supra; see* Brown v. Routzahn, 63 F.2d 914, 916 (6th Cir. 1933).

gift and estate taxes has no basis in logic; each is concerned with a transfer of an interest in property from one person to another. If, on the other hand, only testate property is involved, a renunciation by a devisee or legatee prior to his own death is not a transfer at all and hence is not a transfer in contemplation of death.[21]

A parallel problem arises when the heir or devisee dies before distribution without renouncing. Intestate succession to realty precludes renunciation, since in most states title vests immediately upon death of the intestate;[22] accordingly the value of the property can properly be included in the heir's estate.[23] If a devisee under a will fails to exercise his right to renounce, a somewhat different legal problem is posed, but the property will probably be included anyway because the devise is presumed accepted if beneficial.[24]

Power of Appointment

The recently enacted amendment to Sections 811 (f) and 1000 (c) of the Internal Revenue Code, commonly referred to as the 1951 Powers of Appointment Act, may perhaps have placed a cloud of confusion over the tax aspects of renunciation. Under the estate tax provisions the exercise or release of a general power of appointment created after October 21, 1942, constitutes a transfer of property.[25] A general power is defined as one exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate.[26] A legatee or devisee under a will or a distributee entitled to personal property by intestate succession[27] might be regarded as the possessor of a power

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[21]Brown v. Routzahn, 63 F.2d 914 (6th Cir. 1933).

[22]See note 10 *supra.*

[23]The hardship involved in inclusion of this property is, to a certain extent, alleviated by §812 (c), which provides for a deduction for property previously taxed. The deduction is not allowed, however, for the benefit of the estate of a surviving spouse, *ibid.*

[24]Miller v. Herzfeld, 4 F.2d 355 (3d Cir. 1925); Helmer v. Helmer, 159 Ga. 376, 125 S.E. 849 (1924); Devol v. Dye, 123 Ind. 321, 24 N.E. 246 (1890); Gottstein v. Hedges, 210 Iowa 272, 228 N.W. 93 (1929); Holmes v. McDonald, 119 Mich. 563, 78 N.W. 647 (1899); Bacon v. Barber, 110 Vt. 280, 6 A.2d 9 (1939).

[25]Int. Rev. Code §811 (f) (2).

[26]Int. Rev. Code §811 (f) (3).

[27]A distributee cannot be classed with a devisee or legatee except in those jurisdictions that by law place the title to personalty in the personal representative during administration.

of appointment, inasmuch as he can in a sense appoint the property to himself. If the right to renounce or accept the devise is deemed a power of appointment, then it might seem that a renunciation is a taxable release of this power if executed within such time prior to the death of its possessor and under circumstances as to render a transfer one in contemplation of death. The act specifically provides, however, that a disclaimer or renunciation of a power shall not be deemed a release.[28] The probable result is that the property subject to the devisee's acceptance or renunciation is not within his gross estate for federal estate tax purposes.

The new gift tax provisions, which are similar to those relating to the estate tax, govern the taxability of any general power created after October 21, 1942. Either the exercise since that time of such a power or its release since May 31, 1951, is taxable as a transfer of property.[29] A general power is defined as a power exercisable in favor of the individual possessing the power, his estate, his creditors, or the creditors of his estate.[30] The exception of disclaimer or renunciation for estate tax purposes, however, is made applicable for gift tax purposes also;[31] and probably no gift tax will be imposed upon a devisee or legatee if he renounces his testate share within a reasonable time after the death of the decedent.[32]

WILLIAM J. HORNER, JR.

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[28]INT. REV. CODE §811 (f) (2).

[29]INT. REV. CODE §1000 (c) (2).

[30]INT. REV. CODE §1000 (c) (3).

[31]INT. REV. CODE §1000 (c) (2). The same result follows upon renunciation of an intestate share of personal property in a jurisdiction in which title to personalty passes to the personal representative; see notes 10-17 *supra.*

[32]*Compare* Bacon v. Barber, 110 Vt. 280, 6 A.2d 9 (1939) (devisee not allowed to renounce after passage of sixteen years from death of testator), and Strom v. Wood, 100 Kan. 556, 164 Pac. 1100 (1917) (five years held unreasonable time) *with* Buckner's Adm'r v. Martin, 158 Ky. 522, 165 S.W. 665 (1914) (five years held reasonable time).