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Future Interests: Construction of Heirs; When Determined

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It is arguable as to whether imposition of a tax on the transfer of these incidents of ownership violates the U. S. Constitution, Fourteenth Amendment "due process" clause. However, from 1942 to 1948, the federal estate tax was levied on the whole community property when the husband died.³⁶ This, in effect, was a tax on the relinquishment of powers of control by the husband and was held constitutional;³⁷ but was highly criticized,³⁸ and the law was amended in 1948³⁹ and is now levied on and measured by the vested estate of the deceased.⁴⁰

It is submitted that the Montana court erred in calling a California wife's interest in community property a mere successive interest, but it is clear that all community property located in Montana, but owned by California residents will, as the law now stands, be subjected to an inheritance tax when the husband dies. Therefore, since California spouses may hold property as joint tenants or tenants in common,⁴¹ it is advisable that their Montana property be so held. In order to effectuate this, care must be taken to overcome the presumption imposed by California Civil Code 164 that property obtained with community funds is community property. Another factor which warrants consideration is the federal estate tax. This tax is imposed upon the whole estate when a joint tenant dies;⁴² therefore, for purposes of the federal tax and Montana tax, it is best to hold Montana property as tenants in common.

R. Bohna.

FUTURE INTERESTS: CONSTRUCTION OF "HEIRS"; WHEN DETERMINED.—In a recent case¹ in the Supreme Court of Mississippi a testator's will² provided that: "I give, grant and convey to my said wife and daughter, as joint tenants, with the right of survivorship, to take effect at my death and not sooner, the following described land. . . . But if both of said Grantees shall die *without heirs, descendants of mine*, living at the death of the last of said Grantees, then the remainder of said estate after such death of the survivor of said grantee, shall go to my lawful heirs in fee simple." The testator died in 1899, having been predeceased by his wife, his daughter took possession of the land and remained so possessed until her death without children in 1948, at which time she attempted to devise it to a third person, no relation to the grantor. Besides his daughter, Inez, the testator left surviving him five other children, all of whom died many years before his daughter, Inez, almost all of them leaving issue. These issue, grand and great grandchildren of the testator, now sue for the estate, along with the sole devisee of Inez Inman, the daughter. Three possible interpretations were offered to the court:

1. That the instrument created a life estate in Inez, and at her death the land

³⁶Note 28 *supra*.

³⁷*Fernandez v. Wiener*, 326 U.S. 340 (1945).

³⁸In *re Monaghan's Estate*, 65 Ariz. 9, 173 P.2d 107 (1946); see *1 DE FUNIAK, supra*, 1948 Supp., § 255.

³⁹Note 28 *supra*.

⁴⁰For details for computing the tax see P-H 1951 FED. TAX SERV., ¶ 23, 744, 24, 230-D.

⁴¹Calif. Civ. Code, § 161.

⁴²*United States v. Jacobs, and Dimock v. Corwin* (companion cases), 306 U.S. 363 (1938); 26 U.S.C.A. § 811(e) (1). For details see P-H 1951 FED. TAX SERV., ¶ 23, 730.

¹*White v. Inman*, 54 So. 375 (Miss., 1951).

²There was some contention that the instrument was a deed, not a will; but the court found it to be a will.

- descended to the lawful heirs of B. R. Inman determined at the time of her death.³
2. That the lawful heirs of B. R. Inman must be determined at the date of his death, but that Inez did not take under the limitation to his heirs,⁴ and
 3. That Inez fulfilled the condition of the instrument by leaving heirs, who were descendants of the testator at her death, and therefore the executory limitation to his heirs did not take effect.

The lower court accepted the first of these contentions and therefore ruled Inez out of the gift of the remainder over to "heirs." The Supreme Court, in reversing this stand, ruled that the interests created were a fee simple to Inez as survivor of the joint tenants subject to an executory devise over in favor of heirs of the testator determined at the time of his, not her death, and that she was also included in the gift over. At first glance this may seem in full accord with the majority rule that, unless a contrary intention appears within the document itself, the ordinary natural meaning will be given to the word "heirs" appearing in a devise.⁵ It is also in accord with the general rule that merely because the preceding taker is one of the heirs, the instrument does not show a sufficient contrary intent to give the word other than its primary meaning.⁶

However, a more serious question arises when we ask if the actual condition of divestment ever occurred. The court construes the phrase "shall die without heirs, descendants of mine," to mean "without living children of her (Inez's) own." It cites *Corpus Juris Secundum*⁷ to prove "descendants" is often used to mean the issue of a living person and a Massachusetts case⁸ to show it has been held to be sometimes synonymous with the word "children." Doubtless the court could have cited endless authority for such an interpretation (they did cite several of their own cases⁹), but it is difficult to see how the court arrived at the final conclusion that the "Testator did not intend to use the words 'heirs, descendants of mine' in a technical sense, but in the popular sense of children. Inez died without children." And therefore the condition was fulfilled.

Granting that the testator may have meant children instead of descendants in the technical sense, it seems inadequate to explain "descendants of mine" as meaning "children of hers." A more easily understood intention would have been to create a fee simple in the survivor of the first takers subject to divestment only if she died without leaving any children or grandchildren of his (the testator's) living at her death, whether they be direct lineal descendants or mere collateral heirs of such first taker.¹⁰ Thus it was Mr. Inman's opinion that the survivor would undoubtedly die intestate or carry out his wishes in her own will, and that the property would naturally descend by its regular course to her children, if any, if not, to her brothers and sisters

³*Bird v. Wood*, 2 Sim. & Stu. 400, 57 Eng.Rep. 399, 40 L.J.Ch. 86, 25 Rev.Prop. 228 (1825); *Nicoll v. Irby*, 83 Conn. 530, 77 A. 957 (1910).

⁴*In re Tatham's Estate*, 250 Pa. 269, 95 A. 520 (1915); *Walker v. Dunshee*, 38 Pa. 430 (1861).

⁵*In re Newman's Estate*, 68 Cal.App. 581, 229 Pac. 898 (1924); *Whall v. Converse*, 146 Mass. 345, 15 N.E. 660 (1888); cases cited in note 33 L.R.A. (N.S.) 2; and the RESTATEMENT OF PROPERTY, § 308 (1940).

⁶*Matter of Bump*, 234 N.Y. 60, 136 N.E. 295 (1922); cases cited in note 33 L.R.A. (N.S.) 2; and the RESTATEMENT OF PROPERTY, § 308 (1940).

⁷26 C.J.S., *Descendant*, p. 984.

⁸*Schmaunz v. Goss*, 132 Mass. 141 (1882).

⁹*Thompson v. Green*, 145 Miss. 365, 110 So. 788 (1927); *Boxley v. Jackson*, 191 Miss. 134, 2 So.2d 160 (1941); *Middlesex Banking Co. v. Field*, 84 Miss. 646, 37 So. 139 (1904); *Dunlap v. Fant*, 74 Miss. 197, 20 So. 874 (1896).

¹⁰*Boston Safe Deposit & Trust Co. v. Blanchard*, 196 Mass. 35, 81 N.E. 654 (1907).