

January 1943

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Recommended Citation

Joe McElwain, *The Application of the Law of Wills and of Gifts to War Bonds*, 4 Mont. L. Rev. (1943).
Available at: <https://scholarship.law.umt.edu/mlr/vol4/iss1/12>

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THE APPLICATION OF THE LAW OF WILLS AND OF GIFTS TO WAR BONDS

The United States is at war. It is attempting to furnish "flit" to every crack on earth in order to exterminate a common and deadly insect which is threatening our very existence. Such an extermination will take a lot of "flit." Estimates range as high as \$331,600,000,000.¹ Governments have essentially two ways of obtaining such revenue, (1) by taxation and (2) by borrowing. It is obvious that both means must be used to raise a sum anywhere near the above figure.

Borrowing is usually considered easier than taxation because the individual feels that he is getting value received for his contribution, and consequently is more willing to part with his money. Towards this end, the Treasury Department has issued what it terms the "series E" savings bonds for individual purchases up to \$5,000 annually. The purchaser of such bonds has an alternative of three forms; (1) the bond issued to the individual alone, (2) the bond issued to A or B, and (3) the bond issued to A payable on death to B. The apparent intent of the latter two forms is to establish coownership in the bond between the two named parties or to invest one with the right of survivorship upon the death of the owner and thus circumvent the necessity of probate proceedings in the transfer of the bonds.

It is the purpose of this comment and the comment of Mr. Milne² to inquire into the validity of these types of bonds and to analyze them in the light of existing state law and decisions. Mr. Milne approaches the problem on the theory that the bonds constitute either a contract or a trust. This comment will consider the applicability of theories of gift, of will, or of joint ownership in the bond.

According to Section 22 of the Second Liberty Bond Act,³ the Secretary of the Treasury is authorized to issue United States savings bonds which shall be subject to restrictions on their transfer as he may from time to time prescribe. Under this authority the Treasury Department has issued a circular⁴ in which it enumerates the forms which are used in the present issue. The Treasury Department has labeled one type of

¹United States News, January 22, 1943, p. 45.

²Milne, *The Applicability of Contract and Trust Theories to War Bonds*, 4 MONT. L. REV. (1943) P. 70.

³48 STAT. 344 (1935), 31 U. S. C. A. §757 (c).

⁴U. S. TREASURY DEPT. CIRCULAR No. 530 (1935). A revision of this circular has recently been made containing substantially the same material under different section numbering.

bond the "coownership form," which states that during the lives of both coowners the bond will be paid to either upon his separate request without requiring the signature of the other coowner; and upon payment to either coowner the other person shall cease to have any interest in the bond.⁵ It also provides that upon the death of one coowner, the surviving coowner will be recognized as sole and absolute owner of the bond, and payment will be made only to him.⁶

The second type of bond issued under this authority is called the "beneficiary form." This bond must be registered in the name of one person payable on his death to another named person. If the owner dies without receiving payment, the beneficiary will be recognized as the sole and absolute owner of the bond, which in such case will be paid only to him.⁷

⁵U. S. TREASURY DEPT. CIRCULAR No. 530 §315.32:

"(a) During the lives of both coowners.—During the lives of both coowners the bond will be paid to either coowner upon his separate request without requiring the signature of the other coowner; and upon payment to either coowner the other person shall cease to have any interest in the bond. The bond will also be paid to both coowners upon their joint request, in which case payment will be made by check drawn to the order of both coowners in the form, for example, "A and B" and the check must be endorsed by both payees. The bond will not be reissued in any form during the lives of both coowners except as specifically provided in these regulations."

⁶U. S. TREASURY DEPT. CIRCULAR No. 530, §315.32:

"(b) After the death of one coowner.—If either coowner dies without having presented and surrendered the bond for payment to a Federal Reserve Bank or the Treasury Department, the surviving coowner will be recognized by the Treasury Department as the sole and absolute owner of the bond, and payment will be made only to him: *Provided, however*, that if a coowner dies after he has properly executed the request for payment and after the bond has actually been received by a Federal Reserve Bank or the Treasury Department, payment of the bond, or check if one has been issued, will be made to his estate (see Subpart P hereof). Upon proof of the death of one coowner and appropriate request by the surviving coowner the bond will be reissued in the name of such survivor alone, or in his name with another individual as coowner, or in his name payable on death to a designated beneficiary."

⁷U. S. TREASURY DEPT. CIRCULAR No. 530, §315.36:

"Payment or reissue to beneficiary.—If the registered owner dies without having presented and surrendered the bond for payment or authorized reissue to a Federal Reserve Bank of the Treasury Department, and is survived by the beneficiary, upon proof of such death and survivorship, the beneficiary will be recognized by the Treasury Department as the sole and absolute owner of the bond, and it will be paid only to him, or may be reissued in his name alone, or otherwise reissued in accordance with Subpart J as though it were registered in his name alone: *Provided, however*, That if the bond with a properly executed request by the registered owner for payment or authorized reissue has actually been received by a Federal Reserve Bank or the Treasury Department, payment of the

In *Decker v. Fowler*⁸ decided in Washington in 1939, an action was brought by Mrs. Decker, the beneficiary named in a United States savings bond, to have the same stricken from the inventory of the estate of the deceased. The bonds were very similar to the present issue in that they were not transferable and no substitution could be made for the person named therein as beneficiary; moreover, the owner of the bond could have cashed the bonds during his life and thus have cut off the beneficiary. The court held that Mrs. Decker could not claim such bonds as a gift, notwithstanding her right to remain as beneficiary until the bonds had been paid, since in view of the right of the deceased to accept payment during his lifetime, the proceeds of the bond did not pass beyond his control during his life. This case would seem to indicate that as to the "beneficiary type" bond, a valid transfer had not been effected and the claims of the estate were superior to those of the beneficiary concerning the ownership of such bonds. The case was decided on the gift theory, and while the contract theory was suggested in a dissenting opinion, the gift theory seemed to be much better supported by authority.⁹

It is a well established principle of the law of personal property that in order to constitute a valid "gift inter vivos" of personal property, there must be a delivery, either actual or symbolical. This delivery must divest the donor of present control and dominion over the property absolutely and irrevocably, conferring such dominion and control either upon the donee or some named third person.¹⁰

A similarity has been suggested between the problem here-in involved with that involved in joint bank depositors' accounts. In *Bradford v. Eastman*¹¹ the owner of a bank deposit was about to go on a visit. She caused her deposit to be put in the names of herself and her niece, and gave possession of the deposit book to the niece on the latter's promise to return it. It was held

bond, or check, if one has been issued, will be made to the estate of the deceased owner in accordance with Sec. 315.49."

U. S. TREASURY DEPT. CIRCULAR No. 530, §315.35:

"A bond registered in the name of one person payable on death to another may not be reissued during the latter's lifetime to eliminate his name but may be reissued on request of the registered owner to name beneficiary as coowner."

⁸*Decker v. Fowler* (1939) 199 Wash. 549, 92 P.(2d) 254.

⁹*In re Slocum's Estate* (1915) 83 Wash. 158, 145 P. 204;

In re McCoy's Estate (1937) 189 Wash. 103, 63 P. (2d) 522;

Shaw v. Camp (1896) 160 Ill. 425, 43 N. E. 608;

Hicks v. Meadows (1915) 193 Ala. 246, 69 So. 432.

¹⁰*First National Bank v. Rutherford Trust Co.* (1931) 109 N. J. Eq. 265, 157 A. 142; *O'Brien v. O'Brien* (1925) 112 Ohio St. 202, 147 N. E. 4.

¹¹*Bradford v. Eastman* (1918) 229 Mass. 499, 118 N. E. 379.

that, the owner's only intention being that the niece should make her remittances as needed while away, and there being no intention to make a gift, as between the owner and her niece the money belonged always and wholly to the former.

In *Wolfe v. Hoefke*¹² a niece came from Germany on money advanced by her uncle, living at his home without charge. The uncle deposited a sum with a bank to their joint account. He made other deposits, stating his intention that the money should *in time* belong to his niece. The Washington Court held that owing to his retention of partial control over the account there was no gift. The fact of deposit by the uncle under circumstances allowing the niece to withdraw the money did not imply that the money belong to her or that she had joint ownership in it.

A strong minority of courts hold that there is no valid gift created when one sets up an account in which either he or the donee may draw and appropriate the money without accounting therefor to the other. These courts reason that while the donee has authority to withdraw all the funds, a like power also remains in the donor. And, therefore, the donor retains power and dominion over the intended gift."

Applying the reasoning of these cases to the "beneficiary type" bond, such a transfer would appear to be ineffective to vest title in the beneficiary at death for three reasons: (1) There does not appear to be an intent upon the part of the owner of the bond to make a present gift since he maintains the sole right to receive payment of the bond; only upon his death does anything accrue to the beneficiary. (2) There is no delivery of the bond either actual or symbolical to the beneficiary as donee. (3) Even though there be the necessary intent and delivery, there is not a valid gift because the donor retains complete and singular control over the chose in action as long as he lives, with no present interest whatsoever vested in the beneficiary.

The "coownership type" bond is more difficult to reconcile with the gift theory because it is the apparent intent of the government to attempt to vest some type of dual ownership in the bond. This approach will be considered in detail later. To assume an attempted gift, however, it would appear that this type would likewise fail because of the lack of intent and the fact that the donor, while vesting some control in the

¹²*Wolfe v. Hoefke* (1923) 124 Wash. 495, 214 P. 1047.

¹³*Carr v. Carr* (1911) 15 Cal. App. 480, 115 P. 261; *Pearre v. Grossnickle* (1921) 139 Me. 274, 115 A. 49.

donee (coowner), still keeps such dominion as would negative any present gift according to the decision in *Wolfe v. Hoefke*.

It is quite clear that these bonds do not conform to the requisites of a "testamentary disposition" as set out by the Montana Code¹⁴ for the following reasons: (1) The bond is not subscribed to by the testator or by some person in his presence and by his direction. (2) There are no attesting witnesses who acknowledge the bond to be the testator's last will and testament. (3) There are no signatures by the two attesting witnesses at the end of the will. If such instruments are intended as wills, it is paramount that they follow the requirements set up by the state statutes for disposing of such property before such dispositions are considered valid transfers.

Application for the bond is made on a standard printed form signed by the applicant designating the type and amount desired in the bond.¹⁵ Montana recognizes a holographic will as a valid testamentary disposition.¹⁶ Requirements for such a will, however, are that it be entirely written, dated, and signed

¹⁴R. C. M. 1935, §6980:

"Every will, other than a nuncupative will, must be in writing; and every will, other than a holographic will, and a nuncupative will, must be executed and attested as follows:

1. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto;

2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority;

3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument in his will; and,

4. There must be two attesting witnesses, each of whom must sign his name as a witness, at the end of the will, at the testator's request, and in his presence.

¹⁵Application for the bond is made on Treasury Department Form PDE 1686 which states in printed form: "The undersigned hereby applies for United States Defense Savings Bonds of Series E (issued pursuant to Treasury Department Circular No. 653, dated April 15, 1941) as follows:" (Here the applicant inserts the number of bonds desired and the amount of each bond.) "Bonds to be inscribed as follows:" (The choice of the three allowed forms is inserted here.) The applicant then signs and dates the application and a receipt is given him by the institution selling the bond. The bond is then issued in the desired form with the name or names of the owners typed into a space allowed for the same in the bond. No signature of the owners appear on the bond in any form; of course, the signature of the Secretary of the Treasury appears thereon.

¹⁶R. C. M. 1935, §6981:

"A holographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed."

by the hand of the testator himself. It is subject to no other form. The Montana Court has been very strict in interpreting this statute, holding that even the printed designation of the year in a writing on a letterhead of the decedent rendered such writing invalid as a holographic will even though all the other requirements were fulfilled." The printed form of the application for a bond would therefore seem to preclude the application of such a theory in sustaining the transfer.

"The beneficiary type" bond appears to be an attempted testamentary disposition. It recites that the bond belongs to A, who during his lifetime has the sole right to any payments and is collectible by B only upon A's death. Although B has the right according to the regulations to remain as beneficiary as long as the bond is outstanding, the fact that A may at any time turn the bond in for payment and thus cut off the beneficiary renders B's right as beneficiary of no value or meaning. A need only turn in the bond for payment and have a new bond issued, naming another beneficiary to cut off B.

A "vested interest" is one in which there is a present fixed right either of present enjoyment or of future enjoyment.¹⁴ It is not the uncertainty of enjoyment in the future, but the uncertainty of the right of enjoyment, which makes the difference between a "vested" and a "contingent" interest.¹⁵ A's right to collect on the bonds during his life affects the "right of enjoyment" of B and therefore renders the beneficiary's interest a contingent interest—contingent upon A's death without having received payment. There being no present right of the beneficiary in the bond, the clause "payable on death" would appear to be a testamentary disposition which is invalid because it does not conform to the state requirements for such dispositions.

In *Deyo v. Adams*,¹⁶ which has been decided by the Supreme Court of New York for Kings County and is at the present time up on appeal, action was brought by the executrix of the estate of the owner of United States bonds against the beneficiary named in the bond to recover said bonds as part of the deceased's estate. The bonds were of the "payable on death" type. The argument of the beneficiary was that the Treasury Department's regulations were controlling in the matter of the transfer. The

¹⁴In re Noyes' Estate (1909) 40 Mont. 190, 105 P. 1017.

¹⁵Nelson v. Nelson (1904) 36 Ind. App. 331, 72 N. E. 482.

¹⁶Mahoney v. Mahoney (1923) 98 Conn. 525, 120 A. 342.

¹⁷Deyo v. Adams (1942) 36 N. Y. S. (2d) 734, 178 Misc. 859. The United States attempted to intervene in the Kings County Court, but their petition was denied.

court held that the regulations of the United States government concerning the manner of issue and payment of the bonds did not preclude the application of the laws of the state of New York determining the validity of the devolution of property. These regulations fix and determine exactly to whom the government may make payment of the bonds, thereby relieving the government of suits and claims or controversies. The rights of all persons in relation to the bonds are governed by the same rules of law as apply to bonds issued by a private corporation. Aside from the directions and provisions as to manner and form of payment, the federal laws create no distinction between the bonds in question and other bonds. The court quoted Judge Beals in the *Decker* case, "It seems to me clear that neither Federal statutes nor the rules and regulations promulgated by the Federal Department can render inoperative state laws governing the administration of the estate of a deceased citizen of that state and the distribution of his property to the persons entitled, under state laws, to receive the same, or the application of state laws providing for the payment of the debts of a decedent out of his property."

In *Rice v. Bennington County Savings Bank*,²¹ in which the ownership of a joint bank account was in dispute, the court held that an order executed by the owner of a bank deposit, "Pay to the order of A or B, or either, or the survivor of either of them" did not create a joint tenancy or joint interest; moreover that the provisions of a statute²² relating to the payment of joint deposits, are for the protection of the bank paying money to persons named in deposits made in the manner specified in the statute, and do not change or affect the title to such deposit as between the two parties. Such statutes are not controlling upon the relative rights of the parties but are merely for the protection of the bank in making payment to either of them.

These two cases seem to indicate that the regulations set forth by the Treasury Department are merely for the protection of the United States in making payment to either of the parties named in the bond, and do not set forth the right of ownership of the parties as between themselves which is determined by

²¹*Rice v. Bennington County Savings Bank* (1920) 93 Vt. 493, 108 A. 708.

²²Montana has a similar statute, R. C. M. 1935, §6014.53:

"When a deposit has been made, or shall hereafter be made, in any bank, in the name of two (2) persons, payable to either or payable to either or the survivor, such deposit, or any part thereof, or any interest or dividend thereon, may be paid to either of said persons, whether the other be living or not; and the receipt or acquittance of the person so paid shall be a valid and sufficient release or discharge to the bank for any payment so made."

state law. The judgment in the *Decker* case was given in this light. It directed the plaintiff (who was the beneficiary named in the bond) to collect the money or the bonds from the Federal Government and turn the same over to the administrator as part of the assets of the estate.

The decision of the Court of Claims in *Warren v. United States*²³ might easily be interpreted under this view and when so interpreted is not contra to either the *Decker* or the *Adams* case. The court merely held that the executrix of the owner's estate was not entitled to payment of the bond from the United States because payment to the beneficiary was in conformity to the provisions of the contract entered into with the owner. The court did not attempt to adjudicate the ownership of the money derived from the bond. It merely decided to whom it was proper to direct payment under the contract. It was then within the province of a state court to decide such ownership as between the beneficiary and the executrix of the estate.

In *Sinift v. Sinift*²⁴ in which the ownership of some United States bonds was also in question, the court held that the Federal Liberty Loan Act providing that bonds authorized thereby shall be in such forms and denominations and subject to such terms and conditions of issue, conversion, and redemption as the Secretary of Treasury may prescribe, did not authorize such officer to fix title to or ownership of the bonds or of the money owing thereon. No power was given by the Treasury regulations to provide for joint ownership with the right of survivorship in bonds issued to two persons or to one person and his named survivor. In determining the rights of the testator's collateral heirs to bank deposits and bonds listed in a will and executor's inventory, the court held that the controlling factor was the testator's intent, as established by the entire record considering his life and conduct in general.²⁵

The Treasury Department by its regulations seems to acknowledge that it does not attempt to define the respective

²³*Warren v. United States* (1929) 68 Ct. of Claims 634. This case involved a controversy between the beneficiary named in the bond and the executrix of the deceased owner's estate. The court held that the refusal by the Secretary of the Treasury to make payment to the executrix was in conformity with the provisions of the contract entered into with the owner of the bond.

²⁴*Sinift v. Sinift* (1940) 229 Iowa 56, 293 N. W. 841.

²⁵This case seems to be contrary to Montana law laid down in *In re Sullivan's Estate* (1941) 112 Mont. 519, 118 P. (2d) 383, in which the court held that a testatrix who had made a joint deposit with her daughter could not later dispose of the account in her will, because she had already put it out of her power so to do. Judge Angstman in a strong dissenting opinion suggested the intent of the party as the better approach.

rights of the parties. The circular²⁶ states that conflicting claims as to ownership of or interest in a savings bond, as between the registered owner and the coowner or the registered owner and the designated beneficiary may be determined by valid judicial proceedings. In such a case the bond may be reissued in the names of the respective coowners or the owner and the beneficiary to the extent of their respective interests as determined by such proceedings.

The "coownership type" of bond appears to be an attempt to create a joint tenancy with the right of survivorship in the surviving coowner. The Montana Code defines a joint interest as one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy²⁷ and declares that all other interests are interests in common.²⁸ Under Montana law, therefore, it might well be contended that in these bonds an "interest in common" is created because the bonds fail expressly to declare the interest to be joint, also that because a joint interest has not been created, the right of survivorship is lost and the bond must go through probate proceedings.

As before stated it is the intent of this comment to determine whether the present bond issue can be supported as a gift, a will, or in joint ownership. Whether the issue may be upheld on a contract or a trust theory is not considered herein. It is the purpose of Mr. Milne in his comment to investigate the subject under these theories. Tremendous amounts are involved. Much litigation has already ensued. With 48 probate jurisdictions in our federal union, there is opportunity for more. It is the opinion of this writer that a better analysis of the problem

²⁶U. S. TREASURY DEPT. CIRCULAR No. 530, §315.52:

"Determination of interest as between owner and coowner or beneficiary.—Conflicting claims as to ownership of or interest in a savings bond, as between the registered owner and the coowner, or the registered owner and a designated beneficiary may be determined by valid judicial proceedings, in which case the bond may be reissued in the names of the respective coowners or the owner and the beneficiary to the extent of their respective interests as determined by such proceedings, but only in authorized denominations."

²⁷R. C. M. 1935, §6680:

"A joint interest is one owned by several persons in equal shares by a title created by a single will or transfer, when *expressly declared* in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants."

²⁸R. C. M. 1935, §6683:

"Every interest created in favor of several persons in their own right, including husband and wife is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless *declared in its creation* to be a joint interest as provided in §6680."

and a more thorough research into applicable state law might have suggested to government attorneys the desirability of issue of the bonds under conditions less litigious. "To A and B, not as tenants in common, but as joint tenants with the right of survivorship" is fairly well recognized as creating an interest in the survivor free from the necessity of probate. The present issues are yet to be tested. One does not like to buy into a law suit, either for himself or for his successor in interest. With all of their attractiveness in the present emergency, the bonds might, under more conventional terms of issue, have been made even more attractive to the buying public. And the social interest in saving the time of our already overburdened courts is a matter not to be lightly considered.

—Joe McElwain.

THE APPLICABILITY OF CONTRACT AND TRUST THEORIES TO WAR BONDS

In its financing of the present war, the United States Government is currently issuing two types of bonds which are calculated to prove litigious. In the first, when A invests, the bond provides that for a stated consideration, and at ten years from date, the government will pay a certain sum to "A or B." In the second, it will pay "to A, payable on his death to B." The Government regulations make provision only for these two types of "coownership" bonds. Controversy arises, when upon A's death, A's estate seeks to prevail over B, on the theory that such a disposition is testamentary. According to state laws on devolution of property, the estate prevails if the disposition is considered to be a gift.¹ It has been argued that contract theories apply and that federal regulations should prevail over state laws as regards devolution of property.² This comment will attempt to consider the applicability of trust and contract theories to the situation. Another comment in this issue treats the problem in so far as it involves applicability of the law of wills and of gifts.³

First, as to the contention that a trust is created, it is apparent that no express trust is found in the words used, since the requisite manifestation of an intention is lacking. An express trust can be created only upon an outward expression of

¹*Deyo v. Adams* (1942) 36 N. Y. S. 734; *Decker v. Fowler* (1939) 199 Wash. 549, 92 P (2d) 254.

²*Warren v. United States* (1929) 68 Ct. Claims 634.

³McElwain, *The Application of the Law of Wills and of Gifts to War Bonds*, 4 MONT. L. REV. 61 (1943).