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THE MONTANA DEATH TAXES*

By Douglas Jerome Wold**

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A BRIEF OUTLINE OF THE MONTANA DEATH TAXES

A. Inheritance Tax

Montana enacted its first death tax in 1897, eight years after achieving statehood. It was an inheritance tax modeled after the New York law of 1885 and the California law of 1893.\(^1\) The 1897 law provided a familial exemption of $7,500; any excess was taxable at one percent. The tax on nonfamilial inheritances was five percent on amounts over $500. Future interests were valued immediately after death and were immediately taxable. Taxes were due at death with ten percent penalty if not paid within ten months; but a three percent discount was allowed if paid within six months of death.

No significant changes were made in the 1897 law until 1921,\(^3\) when a completely different structure was adopted, modeled after the then extant Wisconsin law. The 1921 act established progressive tax rates. Widows were given exemptions of $10,000; lineals were allowed only $2,000; transfers to charitable institutions were entirely exempt from tax. Absent a showing of adequate consideration, a transfer made within two years of death was presumed to have been made in contemplation of death and thus taxable. Holders of general powers of appointment were treated as absolute owners of all property subject to their power. The death of a joint tenant was deemed a taxable transfer of one-half of the property to the surviving tenant.

Due to a legislative oversight, the 1921 act failed to tax transfers to lineals in excess of $25,000. Consequently, in 1923 the entire 1921 act was repealed and a new act was passed superseding all inheritance tax laws previously enacted.\(^4\) Inter alia, the 1923 act increased the widow's exemption to $17,500; a husband's right to a $5,000 exemption was recognized; the exemption for lineals remained at $2,000. Transfers exceeding the exemptions and up to $25,000 were taxed at one percent. This was known as the primary rate. The primary rate for brothers and

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\(^1\) Laws of Montana, 1897, No. 128, p. 93.
\(^2\) In 1905 the act of 1897 was amended to authorize the county attorney to prosecute proceedings to collect unpaid taxes. Laws of 1905, Ch. 46, p. 94. In 1917, certain sections were amended which related to the payment of the tax to the County Treasurers. Laws of 1917, Ch. 46, p. 42.
\(^3\) Laws of Montana, 1921, Extra-ordinary Session, Ch. 14, p. 772.
\(^4\) Laws of Montana, 1923, Ch. 65, p. 140. While this act expressly repealed the 1921 inheritance tax law, it contained a savings clause as to the liability for taxes accrued under the old law and as to the right to collect and institute actions for such taxes.
sisters and their descendants was two percent up to $25,000, with a $500 exemption; transfers to uncles, aunts and first cousins were subject to a three percent primary rate; transfers to other collaterals or non-relatives were taxable at four percent. Regardless of class, transfers which exceeded $25,000 but were less than $50,000 were taxed at twice that classes’ primary rate; from $50,000 to $100,000 at three times the primary rate; transfers over $100,000 were taxed at four times the primary rate.

A resident’s tangible personalty located outside the state was not subject to tax, provided it was taxable by the state in which it was located. The time within which payment could be made at a discount was extended from six to eighteen months. Clear market value was set as the standard for valuation.

The 1923 act is the basis for the present law. Important amendments since that time include a doubling of all primary rates in 1933, an extension of the presumptive period to three years with regard to transfers in contemplation of death, an enactment of a provision permitting reciprocal taxation of intangible personalty of a non-resident decedent, and an increase of both the widow’s and husband’s exemption to $20,000.

In 1947, the inheritance tax laws were incorporated in the Revised Codes of Montana, 1947, as Chapter 44 of Title 91. Since that time, the basic tax scheme has remained substantially as originally enacted in 1923.

Subject to certain exceptions and qualifications, the tax is imposed when the recipient becomes beneficially entitled in possession or expectancy. It is imposed upon any transfer by succession or will, or by means of certain statutory substitutions for wills. The tax rate is applied against the clear market value of the transferred property as of the time of death after allowance for certain statutory deductions and exemptions. Liability for payment of the tax falls upon the beneficiary, but both the executor or administrator and the beneficiary are personally liable for payment. To insure payment, the property transferred is subject to a ten-year lien.

Neither the Montana Legislature nor the Montana Supreme Court has defined the term “clear market value.” Absent such definition, the term is probably synonymous with “fair market value” as utilized by the federal estate tax and which is defined as:

The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. Int. Rev. Regs., Section 20.2031-1(6)

Laws of Montana, 1933, Special Session, Ch. 48.
Laws of Montana, 1935, Ch. 47.
Laws of Montana, 1945, Ch. 3.
Laws of Montana, 1965, Ch. 244; Laws of Montana, 1969, Ch....
For a detailed discussion of post-1947 amendments, see 2 CCH, Inheritance, Estate and Gift Service (7th ed.), paras. 1034A-1044.
R.C.M.1947, sec. 91-4403.
R.C.M.1947, sec. 91-4401. The statute specifies five such substitutes. They are transfers in contemplation of death, transfers to take effect in possession or enjoyment at or after death, powers of appointment, joint tenancies, and insurance.
R.C.M.1947, secs. 91-4407, -4413, -4414.
R.C.M.1947, sec. 91-4415.
Ibid.
B. Estate Tax

Montana is one of thirty-seven states having both an estate and an inheritance tax. Montana's first estate tax was enacted in 1927 and was a progressive tax on estates having a net or clear market value in excess of $1,000,000. This act also provided for a credit against the estate tax equal to any amount of federal estate tax due.

The 1927 law was amended in 1933. No changes in the 1933 law have been made since its enactment and it is codified in the Revised Codes of Montana, 1947, as section 91-4411. The law applies only to resident decedent's estates which exceed $100,000, and is designed to absorb the eighty percent credit allowed the taxpayer by the 1926 United States Revenue Act for state taxes paid. The tax is due at the same time the federal estate tax is payable. A lien is imposed on the property subject to the tax, and it continues until the tax is paid.

TRANSFERS SUBJECT TO TAX

A. Generally

Transfers by will and by intestacy laws are apparently the oldest and most common categories of taxable transfers. Other types of transfers became more common only when it was found that the tax could be legitimately avoided by making transfers inter vivos rather than at death. Accordingly, in order to make the death tax function, legislatures found it necessary to levy taxes against those forms of inter vivos transfers which were being used to avoid the death taxes. Today, nearly every type of property devolution has been brought within the scope of death taxation.

The Montana death tax statutes reach six major categories of transfers:

1. Transfers by will or intestacy.
2. Transfers in contemplation of death.
3. Transfers to take effect in possession or enjoyment at or after death.
5. Joint interests.
6. Insurance.

Although each of these categories have distinct characteristics, there are some general rules applicable to all. For example, there can be no tax...
unless there has first been a "transfer." It must be remembered, however, that an inheritance tax is imposed upon the privilege of receiving property. Obviously, a beneficiary cannot receive something he already owns; likewise, a decedent cannot transfer something he does not own.

Section 91-4453, R.C.M. 1947, defines a "transfer" as:

... the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift or appointment.

Only transfers of beneficial interests are taxable; receipt of a mere legal title in trust is not a transfer subject to tax. When determining whether there has been a taxable transfer, the substance of the transaction should control.

B. Transfers by Will and Intestacy

The Montana inheritance tax statutes do not define what is meant by a "transfer by will or by intestate laws." Transfers made by codicil are taxable as being a transfer by will, since the law provides that the term "will" includes codicils. There is little difficulty in determining whether a transfer has been made when property passes either by will or by intestacy. Normally the will itself establishes the details of the transfer or the intestate laws will establish the manner and order of property devolution.

Frequently, a testator will direct his executor "to pay all my just debts and expenses." While this technically amounts to a bequest in favor of the testator’s creditors, such transfers are deductible and, consequently, are not subject to taxation. However, such transfers should not be confused with bequests made as consideration pursuant to a contract. For example, A might promise to leave his house to B if B will care for A during his waning years. There is neither Montana statutory authority nor case law directly on this point, but the weight of authority favors taxing such transfers and the Montana Supreme Court has recognized this fact in dicta.
A bequest to an executor or a trustee in lieu of his commission is taxable only to the extent it exceeds the amount of the commission as determined by law.\(^3\)\(^4\) However, if the transfer was to the executor to be distributed as part of the estate, or to the trustee to be held in trust for eventual distribution, neither transfer would be of a beneficial interest and, consequently, would not be subject to tax until received by the ultimate beneficiary.\(^3\)\(^5\)

There is no reported Montana case dealing with the taxability of renounced legacies. In this connection, section 91-4401 appears to tax only completed transfers. Other jurisdictions have held that no tax can be imposed on the legatee who renounces his inheritance since the tax is imposed only on those who actually receive property.\(^3\)\(^6\) However, a renunciation or disclaimer of an inheritance should not be confused with the release of an interest which has vested. For example, if a legatee should transfer his legacy to a specific person or category or persons, he should be deemed to have accepted the legacy and then to have disposed of it by gift. In this regard, distinction has been drawn between a disclaimer of a transfer by will and a disclaimer of an interest in an intestate estate. In *Hardenbergh v. Commissioner*\(^3\)\(^7\) a taxpayer disclaimed his intestate share and it was held that he had made a taxable transfer under the federal gift tax because under the local law an interest vested in him despite the disclaimer. It should be noted that that case turned on the local law's provision that intestate shares vested as a matter of law and could not be disclaimed. Montana has no such law. However, California provides that renunciations are to be disregarded, and the inheritance tax is to be computed as if the renunciation had not been made—section 13409 of its inheritance tax law.

**C. Transfers in Contemplation of Death**

An obvious way to avoid an inheritance tax would be to dispose of the property by gift just before death. To thwart this simple method of tax avoidence, the Montana Legislature has enacted section 91-4402, R.C.M. 1947, which expressly applies the inheritance tax to every transfer in contemplation of death. Section 91-4402 sets out a combination of elements which together raise a presumption that the transfer was made in contemplation of death. These elements are:

1. that there was a transfer,
2. that the transfer was made within three years of death,
3. that the property transferred was a "material part" of the decedent's estate,

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\(^3\)R.C.M.1947, Sec. 91-4420.

\(^4\)R.C.M.1947, Sec. 91-4403.


\(^6\)198 F.2d 63 (8th Cir., 1952), cert. den., 344 U.S. 836 (1952).
4. that the transfer was in the nature of a final distribution of the property, and
5. that the transfer was made for less than "fair consideration in money or money's worth."

However, the presumption is rebuttable and no transfer made more than three years before death will be subject to such presumption. Each of the foregoing elements warrants discussion.

(1) "Transfer" required.

If there has been no transfer, there cannot have been a transfer in contemplation of death. Section 91-4402, R.C.M. 1947, expressly recognizes certain types of transfers by deed, grant, bargain, sale or gift. A problem arises, however, as to whether other types of transactions qualify as transfers. For example, it has been held under statutes similar to section 91-4402 that a transfer of community property into a tenancy in common was not a transfer in contemplation of death; a disclaimer of a bequest under a will has been held not to be a transfer, even though it was obviously made in contemplation of death. In Montana, a wife's conveyance of legal title in real estate to her husband was held not to be a taxable transfer. The court found that the type of transfer contemplated by the statute was one of a beneficial, rather than a legal interest.

Transfers in contemplation of death frequently take the form of an inter vivos gift. To be regarded as a completed gift, the transaction must satisfy three requirements, i.e., delivery, accompanying intent, and acceptance by the donee. These three elements were found to be present in State Board of Equalization v. Cole. There, a widow's transfer of her funds from a single name account to a joint account amounted to a transfer subject to taxation.

In In re Brown's Estate, the Montana Supreme Court considered whether the transfer, which was made within the presumptive period, was an inter vivos transfer and, thus, free from any Montana tax, or whether it was a testamentary transfer and subject to the inheritance tax. In that case, a daughter had purchased certain bonds with the decedent's money which were payable either to the decedent or to the daughter. The bonds were placed in a safe deposit box to which both had access. It was held that there was no inter vivos transfer because there

[References]

[10] In re Mayer's Estate, 110 Mont. 66, 99 P.2d 209 (1940); Cf., In re Kohr's Estate, 122 Mont. 145, 199 P.2d 856 (1948) where it was held that the significant element in possession or enjoyment is the passing of economic benefits, rather than shifting of technical legal title.
[12] Id.
was no completed delivery to the daughter, not even a constructive delivery, inasmuch as the mother had not relinquished all control over the bonds.

2. Transfers made within three years of death.

In 1935, the Montana Legislature increased the presumptive period from two to three years. The purpose for articulating a time certain appears arbitrary, but is probably necessitated by the need to simplify administration of the tax. It should be noted that the presumptive period under federal estate tax is also three years.

It must be remembered that this element only provides the state with a rebuttable presumption. The 1926 federal estate tax created a conclusive presumption that transfers in excess of $5,000 made within two years of death were in contemplation of death. This conclusive presumption was held to be unconstitutional as a violation of the Fifth Amendment.


Section 91-4402, R.C.M. 1947, taxes only transfers of a "material part" of the decedent's estate. It does not define what is meant by the phrase "material part" nor has the phrase been interpreted by the Montana Supreme Court. However, the Court has found that gifts of $117,532 and $8,347 were made in contemplation of death and has, thus, impliedly decided that those gifts were a material part of the estate. Unfortunately, the size of the gross estate was not indicated in these opinions so a percentage figure cannot be computed.

The federal estate tax provision taxing transfers in contemplation of death does not require that the transferred property amount to a material part of the estate. Consequently, Montana practitioners can seek no guidance from interpretations of the federal law. The majority of those jurisdictions which have interpreted this phrase have utilized the theory that whether a gift amounts to a material part of an estate is a question of fact to be decided in regard to the facts of each case, and that even though the value of the property transferred may be small

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41 Laws of Montana, 1935, ch. 47.
43 U.S. Rev. Act of 1926, Sec. 302(e), 44 Stat. 70.
44 Heiner v. Donnan, 285 U.S. 312 (1932). It has been suggested, however, that the U.S. Supreme Court might now sustain a conclusive presumption that transfers within a prescribed period were in contemplation of death. See Lowndes, 'Current Constitutional Problems in Federal Taxation,' 4 Vand. L. Rev., 469, at 488-490 (1951).
45 In re Brown's Estate, 122 Mont. 451, 206 P.2d 816 (1949). The court here noted that a gift had been made of bonds having a maturity value of over $57,000. The decedent's gross estate was valued at over $555,000. The court noted that the estate had argued that the bonds were not a material part of the estate, but held that that question need not be decided since other reasons required a holding that the gift was not in contemplation of death.
46 In re Wadsworth's Estate, 92 Mont. 135, 11 P.2d 788 (1932).
compared to the total value of the estate, it may still be a material part by reason of its substantial value. For example, a Kentucky Court\textsuperscript{52} held that the term "material" was a relative one, meaning "of solid or weighty character," "substantial," "of consequence" or "important."\textsuperscript{53} In that case, the court held that a gift valued at $30,000 was a material part of a net estate amounting to over $600,000. Other courts have ruled that gifts were material which amounted to 10\% of the net estate,\textsuperscript{54} or which were $10,000 out of a net estate of $332,000.\textsuperscript{55} Gifts held immaterial include occasional gifts of $500 to $1,000 made by a donor possessing a net estate in excess of $300,000,\textsuperscript{56} and also a gift of one-sixth of a net estate.\textsuperscript{57}

Because Montana's inheritance tax laws have been adopted from the laws of Wisconsin, it is interesting to note that the courts of that state have said that while the size of the estate is a material factor in determining the materiality of the gift, the actual size of the gift in each instance is to a large extent controlling, and that a gift of great value is a material part of any estate, regardless of size, because it is a material matter or matter of substance.\textsuperscript{58}

(4) "...final disposition or distribution of the decedent's estate..."

This element requires an examination of the donor's motive or intent in making the transfer. The clearest example of a gift made in contemplation of death is a gift \textit{causa mortis}, i.e., a gift motivated by the donor's concern over his imminent death, but which is revocable if he survives. However, the United States Supreme Court, in \textit{United States v. Wells}\textsuperscript{59} held that for federal estate tax purposes, \textit{inter vivos} gifts may be made in contemplation of death, despite the fact that they may be fully executed, irrevocable, and indefeasible.\textsuperscript{60} The Montana Supreme Court has indicated its willingness to apply the rationale of \textit{United States v. Wells} in interpreting the contemplation of death provision of the Montana inheritance tax. In \textit{In re Wadsworth's Estate},\textsuperscript{61} the Court set out the controlling interpretation of the Montana statute, and cited extensively from \textit{Wells}, as follows:

The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. As the transfer may otherwise have all the indicia of a valid gift \textit{inter vivos}, the differentiating factor must be found in the transferor's motive. Death must be "contemplated," that is the motive which induces the

\textsuperscript{52}Chases' Executrix v. Commonwealth, 284 Ky. 471, 145 S.W.2d 58 (1940).
\textsuperscript{53}Ibid., 145 S.W.2d at 61.
\textsuperscript{54}Dupinac's Estate, 96 N.J.Eq. 284, 125 A.119 (1924).
\textsuperscript{55}In re Ebeling's Estate, 169 Wis. 432, 172 N.W. 734 (1919).
\textsuperscript{56}Id.
\textsuperscript{57}In re Gould's Estate, 8 N.J. Misc. 798, 151 A. 743 (1930), affm'd, 148 A. 731 (1930) and 154 A. 632 (1931).
\textsuperscript{58}In re Steven's Will, 177 Wis. 500, 188 N.W. 484 (1922); In re Stephenson's Est., 171 Wis. 452, 177 N.W. 579 (1920).
\textsuperscript{59}U.S. v. Wells, 283 U.S. 102 (1931).
\textsuperscript{60}The Montana Supreme Court has come to the same conclusion. See In re Wadsworth's Estate, 92 Mont. 135, 148, 11 P.2d 788 (1932).
\textsuperscript{61}92 Mont. 135, 11 P.2d 788 (1932).
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transfer must be of the sort which leads to testamentary disposition. 
... As the test, despite varying circumstances, is always to be found in motive, it cannot be said that the determinative motive is lacking merely because of the absence of a consciousness that death is imminent. It is contemplation of death, not necessarily contemplation of imminent death, to which the statute refers. It is conceivable that the idea of death may possess the mind so as to furnish a controlling motive for the disposition of property, although death is not thought to be close at hand. . . . The words in “contemplation of death” mean that the thought of death is the impelling cause of the transfer..."62

In the Wadsworth case, the decedent had transferred property in trust to his wife and children. He named himself as a trustee. At the time of the transfer, he was sixty years of age and had been a semi-invalid for several years. The disposition under the trust was substantially similar to that made under his will, except that under the trust he retained control of the trust property for life, as well as the income therefrom. The settlor died within two years of creating the trust. In finding that the gift was made in contemplation of death, the Court set forth its own version of the Wells criteria, i.e., that the possibility of death had subordinated the normal desire to retain ownership and control; the gift was not the result of “normal generosity,” but instead was “motivated by the same consideration which lead to testamentary dispositions, and is made as substitute for them.”63

The tests for whether a transfer has been made “in contemplation of death” are more easily articulated than applied. Their application requires a subjective determination of whether the transfer was prompted by a “life” or a “death” motive. Consider, for example, the man on his deathbed who makes lavish gifts to those about him in an attempt to induce them to make his final hours as pleasant as possible. Was the “impelling cause” for the gifts the thought of his death, or was it the “life motive” of insuring creature comforts while he could still enjoy them? Certainly these gifts are not the result of “normal generosity,” but on the other hand, they may not be motivated for the same reasons which lead to testamentary dispositions. This example illustrates that the ultimate test of the transfer is not its objective operation, but is the subjective state of mind of the transferror which must be tested by subjective standards.

Application of subjective standards necessarily requires an investigation into the history of the gift. As the court noted in In re Wadsworth’s Estate:

The best evidence of the decedent’s state of mind at the time and his reasons for making the transfers are the statements and expressions of the decedent himself, supported as such statements are by all the circumstances connected with the transfer as well as the transfers themselves."64

62 Mont. at 145, 146.
63 Mont. at 149.
64 Mont. at 148.
Thus, in *In re Warren’s Estate*, the court gave considerable weight to the recollections of the decedent’s accountant and lawyer who had supervised the transfer of property. Each recalled that the decedent had known that he was ill at the time of the transfer, but that their impressions of his dominant motive for making the transfer was to save income taxes and also to simplify his business operations. Accordingly, said the court, the evidence was ample to support the conclusion that the gifts were not made in contemplation of death, but instead were made for purposes associated with life.

In *State v. Rice*, a husband believed that he held certain property in joint tenancy with his wife, but discovered that it had been accidentally recorded in his name alone. He conveyed the property to himself and his wife as joint tenants and died within two years. The court held the transfer was not made in contemplation of death, but instead was motivated by a desire to arrange his affairs in accordance with his prior beliefs.

Cases from other jurisdictions have found transfers to have been prompted by life, rather than death motives. For example, transfers to provide immediate financial assistance to a transferee, or to set the donee up in business have been held to have been actuated by life motives. Gifts to promote family harmony have been held not to have been made in contemplation of death.

A transfer to avoid death taxes is obviously made in contemplation of death, but those made to avoid income, or property taxes have been held to have been prompted by life motives.

If a transfer is prompted by both life and death motives, the problem must be resolved by determining which was the dominant or impelling motive. The final decision may often result from pure speculation, for in many cases it is doubtful that there was a dominant motive. For this reason, there seems to be a good argument for the theory that the gift was made in contemplation of death if the death motive was “substantial”

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*128 Mont. 395, 275 P.2d 843 (1954).*
*134 Mont. 285, 329 P.2d 451 (1958).*
*Herbert G. Lowe, 38 B.T.A. 117 (1938); Commercial Nat’l Bank, 36 B.T.A. 239 (1937).*
*Terhune v. Welch, 39 F. Supp. 430 (D. Mass. 1941); Gillette v. Comm’r., 182 F.2d 1010 (9th Cir., 1950).*
*Anna B. Kneeland, 34 B.T.A. 816 (1936); but see, Rickenberg v. Comm’r., 177 F.2d 114 (9th Cir., 1949), cert. den., 338 U.S. 949 (1950).*
*Robert A. Taft, 33 B.T.A. 671 (1935), aff’m’d 92 F.2d 667 (6th Cir., 1937), aff’m’d 304 U.S. 351 (1938).*
rather than "dominant."\(^{75}\) However, most cases interpret \textit{United States v. Wells} as requiring that the death motive be the dominant one.\(^{76}\)

(5) "... fair consideration in money or money's worth..."

A transfer made for "fair consideration in money or money's worth" is not a transfer in contemplation of death. The theory for taxing a transfer in contemplation of death is to reach substitutes for testamentary dispositions and not to penalize sales and exchanges which do not deplete the transferor's estate.

Thus, in \textit{In re Sebree's Estate},\(^{77}\) the Montana Supreme Court held that the decedent's transfer of a hotel valued at $12,000 in exchange for a payment of $10,300 plus $150 per month for life was fair and valuable consideration.

Perhaps the most perplexing problem that may be anticipated under this section is the meaning of the phrase "in money or money's worth" as it applies to transfer incident to marriage. Reference to cases decided under the federal estate tax\(^{78}\) may provide a guideline for Montana practitioners. The leading case is \textit{Commissioner v. Weymss}\(^{79}\) where a widow's promise to marry the decedent in return for his paying her an amount equal to the value of an interest she would forfeit as a result of the marriage was held not to be consideration in money or money's worth. The court reasoned that the determinative factor was the consideration received by the donor, \textit{i.e.}, the decedent, which in this case was the widow's promise, and concluded that regardless of how valuable the promise was to the decedent, it was not reducible by him to a money value.

Other examples of considerations which might support a contract, but which are not considered as money or money's worth are promises to refrain from marrying until a certain age,\(^{80}\) agreeing not to contest the decedent's will,\(^{81}\) or dismissing a suit against the decedent's wife.\(^{82}\) Under the federal estate tax, a wife's release of dower is expressly said not to be adequate and full consideration in money or money's worth.\(^{83}\)

\(^{75}\)Such a theory was advanced by Judge Augustus Hand in \textit{Farmer's Loan and Trust Co. v. Bowers}, 98 F.2d 794 (2nd Cir., 1938), \textit{cert. den.}, 306 U.S. 648 (1939).

\(^{76}\)For example, the U.S. Supreme Court has elaborated on its decision in \textit{U.S. v. Wells}, \textit{supra}, note 59, by stating that not only must the motive be "dominant", it must be "controlling" or "impelling" as well. Allen \textit{v. Trust Co. of Georgia}, 326 U.S. 630 (1946). It does not appear that any of these adjectives are any more definitive than the other.

\(^{77}\)122 Mont. 509, 206 P.2d 553 (1949).

\(^{78}\)\textit{Int. Rev. Code, 1954, Sec. 2043}, provides that transfers which are "not a bona fide sale for an adequate and full consideration in money or money's worth... shall be included in the gross estate" to the extent of the excess of the value of the property transferred over the consideration received.

\(^{79}\)\textit{324 U.S. 303} (1945).

\(^{80}\)\textit{John Nichols, 40 B.T.A. 1040} (1939), affm'd 177 F.2d 972 (2d Cir. 1941), \textit{cert. den.}, 314 U.S. 631 (1941).

\(^{81}\)\textit{Latty v. Comm'r, 62 F.2d 952} (6th Cir., 1933).

\(^{82}\)\textit{Angus O. Swink, P-H para. 45, 169 affm'd 155 F.2d 723} (4th Cir., 1946).

\(^{83}\)\textit{Int. Rev. Code, 1954, Sec. 2043(b).}
However, a decedent is usually not penalized when he transfers property for less than its full value, provided that the sale or exchange was bona fide and made in good faith. This interpretation of the federal estate tax is probably applicable to the Montana inheritance tax, despite the fact that the former talks in terms of "adequate and full" consideration whereas the latter speaks in terms of "fair" consideration.

Overcoming the Presumption

The practitioner who supervises transfers of property will be well advised to keep notes of his impressions of the transferor's motives in making the transfer. It would be even better to collect and preserve any letters written by the testator in which he may have discussed his motives. To overcome the presumption that a transfer was made in contemplation of death, it is necessary to produce evidence to prove that the transfer was not prompted by a death motive. Montana courts will give serious consideration to such evidence, as was established in In re Warren's Estate where the Court's decision that the transfer was not in contemplation of death rested primarily on the recollections of the transferor's accountant and lawyer. However, it is clear that the ultimate question is one of fact, and simply because interested parties testify will not overcome the presumption as a matter of law. However, it has been said that the question is no longer one for the triers of fact "where the facts proved are overwhelmingly against the presumed facts and permit of but one rational and reasonable conclusion."

In a case where the transfer is made more than three years prior to death, the date of the transfer does not overcome the presumption as a matter of law; instead, the presumption never arises.

Advantages of making intentional transfers in contemplation of death

A discussion of the taxability of transfers in contemplation of death would not be complete without a mention of the possible advantages that may flow from making such a transfer intentionally. The advantage is not one resulting from the Montana inheritance tax, however, but results from the credit allowable under the federal estate tax for gift taxes paid.

Many persons of advanced age may hesitate to make gifts for fear of the transfer being taxed as a gift in contemplation of death. Ordinarily,
this is a mistake. If the donor does not die within the three year period, the contemplation of death provision will not apply and the transfer will be subjected only to the federal gift tax,89 the rates of which are lower than the estate tax. However, if he should die within the three year period, his estate is entitled to a double bonus, i.e., a credit under the Internal Revenue Code, 1954, section 2012, which is equal to the amount of federal gift tax paid, plus the amount of money used to pay the gift tax is not includible in his gross estate for federal estate tax purposes. Even if the gift tax has not been paid at the date of death, an amount equal to the amount of tax is deductible from the gross estate.90

D. Transfers to Take Effect at Death

Besides taxing transfers in contemplation of death, section 91-4402, R.C.M. 1947 also taxes transfers "intended to take effect in possession or enjoyment at or after . . . death." The statute does not define the quoted phrase, but the provision is meant to reach those transfers made by the transferor during his life where he retains a beneficial interest in the property so that the beneficiary must wait until the transferor's death in order to have possession or enjoyment. An example of this type of transfer is one in which property is conveyed in trust by the transferor for his children but he retains a life interest in the income. The children's enjoyment of the property is thus delayed until the transferor's death, and the entire transfer takes on the character of a testamentary disposition.

In In re Estate of Schuh,91 a mother transferred property to her children with the understanding that they would pay her an annuity during her life. The children put the property in trust and used the income therefrom to discharge the annuity. The Montana Court telescoped these two transactions into one and held the transfer taxable on the theory that the two transfers were actually designed to forestall the children's enjoyment of the property until the death of the mother.

In re Kohr's Estate92 followed the Schuh case, supra, in establishing the principle that under section 91-4402, the taxable event is the transfer of the beneficial rather than the legal title. There the decedent transferred property in trust to her issue, but retained a life estate. The court said that the vested character of the remainder was immaterial if the right to immediate possession and enjoyment was deferred until the grantor's death.

89Montana has no gift tax.
90For a detailed explanation of this advantage of intentionally making transfers in contemplation of death, see Lowides and Kramer, "Federal Estate and Gift Taxes," Sec. 513, pp. 75, 76.
9166 Mont. 50, 212 P. 516 (1923).
92128 Mont. 145, 189 P.2d 556 (1948).
In *State Board of Equalization v. Cole*, the decedent purchased U. S. Savings Bonds jointly in her name and the name of another, and placed the bonds in a safe deposit box to which both had access. The court found that there had been no gift because the delivery was not complete. Consequently, this was held to be a taxable transfer on the ground that the donee's unfettered right to enjoyment and possession had been postponed until the death of the donor.

Not all transfers which take effect at death are taxable. For example, in *In re Sebree's Estate*, the decedent entered into an escrow agreement for the sale of real estate. The grantee was given possession during the life of the grantor-decedent and was to pay her $175 each month for two years and $150 per month thereafter until the grantor's death, after which the grantee was to pay $4,000 to an heir of the grantor. The court found this transaction to be a bona fide sale and not taxable as a transfer to take effect at death.

In 1962, the Montana Supreme Court decided the case of *Estate of Maher* and may or may not have added to the development of section 91-4402. The opinion is unusually cryptic, describing the decedent's property only as a power to revoke a trust which she had created many years before her death. The court held that the "existence of this right of revocation, modification or change, constituted a reservation of an interest of property" which, when relinquished by her death, constituted a taxable transfer taking effect at death. It has been suggested that this holding was erroneous in the absence of an express Montana statutory provision similar to the federal estate tax provision transfers with reserved powers to alter, amend, or revoke. However, since the primary question in the Maher case dealt with the taxability of intangible property located outside the state, and not the application of section 91-4402, it may be best to consider the Court's reference to the taxability of reserved powers of revocation as dicta until such time as the court is squarely faced with the problem.

In the most recent of the reported Montana cases under this section, *Estate of Hess*, the Court was presented with the problem of whether there was a taxable transfer as a result of the death of one of two life tenants, when the second was still alive. The Court found that there was no transfer to the remaindermen since their possession remained in abeyance until the death of the second life tenant. However, the Court found, and apparently correctly so, that there was a taxable transfer of the deceased life tenant's interest to the surviving life tenant. The court...
noted that the remaindermen would not receive a taxable transfer until the death of the second life tenant.

E. Powers of Appointment

The Montana inheritance tax statute dealing with powers of appointment is section 91-4404 which provides in pertinent part:

Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property, . . . such appointment, when made, shall be deemed a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will, . . .

Continuing, the statute provides that the omission or failure to exercise such power shall likewise be a taxable event.

Section 91-4404 differs sharply from the federal estate tax law regarding powers of appointment. The federal law recognizes two classes of powers, i.e., general powers which are taxable, and special or non-general powers which are not taxable. The failure of Montana law to recognize this distinction subjects both kinds of powers to tax which probably accounts for the infrequent use of powers of appointment in Montana.

Nonetheless, there are many situations which may call for the use of a power of appointment despite the fact that it may be subject to the Montana inheritance tax. For example, the testator may wish to create a life estate for his wife, but allow her to appoint the remainder among their children according to their need at the time of his wife's death, which he presumed will post-date his own. The use of a special power of appointment may allow the wife's estate to avoid the federal estate tax on the remainder. Consequently, the Montana practitioner should not totally discard powers of appointment as useful estate planning tools. Many articles and treatises have been written which describe the topics of consequences of powers of appointment under the federal estate tax

Int. Rev. Code, 1954, Sec. 2041(b)(i).

A general power of appointment is defined as one exercisable "in favor of the decedent, his estate, his creditors or the creditors of his estate." Federal estate tax law recognizes exceptions to this definition which are generally called "non-general" or "special" powers of appointment: (1) Powers which enable the donee to appoint only to a limited class of persons, which excludes the donee, his estate, his creditors and the creditors of his estate; (2) A power to consume, invade or appropriate property for the benefit of the donee which is limited by an ascertainable standard relating to the health, education, support or maintenance of the donee; (3) Powers exercisable by the donee only in conjunction with (i) another person, (ii) or the creator of the power, (iii) or a person having an interest in the property which is adverse to the donee's interest, such as the remainderman. Lapses, as well as exercises of powers of appointment may likewise be taxable.

To date, there are no reported Montana cases which deal specifically with the taxation of powers of appointment.

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and which evaluate them as estate planning devices. Those topics are outside the scope of this article which is confined to an examination of the Montana statutes.

Section 91-4404 is not without its peculiarities and pitfalls. The act is workable in the classic situation, such as where A transfers property to B in trust, giving B a power to appoint the property by will to C. When B exercises the power, there is no doubt that he has made a testamentary transfer which is subject to the inheritance tax. But what if A gives B a general power of appointment which B, 20 years before his death, exercises in favor of C? B has made an inter vivos gift. Is this taxable under 91-4404? It would appear that it is, despite the fact that the theory of section 91-4404 is to tax substitutes for testamentary dispositions. It seems incongruous that an inter vivos transfer made 20 years before the transferor's death can be taxed as an inheritance. However, it should be noted that the Montana law provides no other means by which to tax inter vivos gifts, other than those made within three years of death which can be classed as gifts in contemplation of death. Because the beneficial interest vests immediately, the gift is not taxable under 91-4402 as a transfer intended to take effect at death. Since 91-4404 does not limit the taxable transfers to those made by will, it must be concluded that an inter vivos exercise of a power of appointment is taxable under this section. Thus, at least for sake of argument it appears that section 91-4404 is as much a gift tax as it is an inheritance tax.

However, there is no evidence that the Montana State Board of Equalization has ever attempted to apply section 91-4404 to inter vivos exercises of powers of appointment. Should that board ever exercise this prerogative, it appears that several problems will arise for Montana taxpayers. For example, there is a pragmatic problem of the collection of the tax. Section 91-4403, R.C.M. 1947 provides that the tax is imposed when the transferee becomes beneficially entitled; however, section 91-4415 does not require its payment until the date of death. What should be done with the tax money in the interim? Section 91-4415 also places a lien on the transferred property for ten years from the date of death. What if the transferred property had been perishable or had been wasted between

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103This statement is based on information obtained in an interview with the Director of the Inheritance Tax Department, Montana State Board of Equalization.
the time of the *inter vivos* transfer and the donee’s death when the lien attaches? It does not appear this possibility has been foreseen by the legislature.

As noted, the tax is imposed by 91-4403 at the time of the transfer. The state would probably accept payment of the tax at that time although it is not due until the date of the donee’s death under 91-4415. If such tax payment is made at the time of transfer, however, there is considerable doubt whether the donee is entitled to either an inheritance or gift tax credit on his federal estate tax return. This is because such credits are dependent upon the property being included in the donee’s estate at the time of death. If the donee exercises the power years before his death, the property could not be included in his gross estate for federal estate tax purposes and he would not be entitled to either credit.

There is also a question as to the intrinsic fairness of taxing certain types of transfers to the donee of the power of appointment. For example, a donee could be given a special power of appointment, *i.e.*, one exercisable only in favor of a certain class. Assuming this class is limited to the children of the donor, the donee, or his estate, is nonetheless personally liable for the tax. This does not seem fair, inasmuch as the donee was precluded from any enjoyment of the property.

Another unusual aspect of section 91-4404 is that it taxes the exercise of a power of appointment by a *corporate*-donee. Because the tax is due on the date of death of the donee, it is interesting to speculate whether the tax could ever be collected from a corporate-donee with a perpetual existence. Does this suggest a means of tax avoidance? Assume A formed a family corporation to which he transferred all of his assets in trust for his issue, giving the corporation a special power to appoint the corpus and income to his issue. Since the corporate-donee receives only mere legal title, that transfer is tax free, because under 91-4403 only the transfer of a beneficial rather than a legal interest is taxable. Then, if the corporate-donee exercises the power and vests the beneficial interest in the children, a tax would be imposed on the transfer under 91-4403, but would not be due until the death of the donee. Since the corporation has the possibility of perpetual existence, there is a possibility that the tax would never have to be paid. This scheme is certainly not recommended as being a fool-proof method by which to avoid the payment of death taxes in Montana, but it does pose an interesting problem. It is submitted that such a scheme would, of necessity, be challenged by the State Board of Equalization. The focal point of the Board’s attack would probably be that this was an obvious attempt to evade, rather than avoid taxation, and

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104 *Int. Rev. Regs.*, Sec. 20.2011-1(a) (State death tax credit), and Sec. 20.2012-1(a) (gift tax credit).

105 *R.C.M.*1947, Secs. 91-4404, 91-4415.

106 *R.C.M.*1947, Sec. 91-4403.
as being contrary to the policy of the law. In the absence of any court decision regarding powers of appointment in Montana, no reliable prediction can be made as to how the court might rule.

It must be concluded that section 91-4404 is not a well-written contribution to the Montana inheritance tax law. Its failure to recognize the exercise of special powers as a non-taxable event discourages the use of powers of appointment. Its taxation of *inter vivos* exercises of powers of appointment impinges on its integrity as an inheritance tax provision. The fact that the state board charged with its administration has never enforced this aspect of this provision speaks well of the statute’s clarity. The fact that it places tax liability on the donee of a special power who is precluded from possible enjoyment of the property casts doubt upon its fairness regarding burden distribution. For these reasons, it is hoped that a future legislature will give serious attention to the revision of this section.

**F. Joint Ownership**

Property passing to a surviving co-owner is subject to the Montana inheritance tax on the theory that the creation of the joint form of ownership is in effect a substitute for a testamentary disposition of all the property which cannot be shown to have ever been owned by the surviving co-owner. Section 91-4405,\(^1\) R.C.M. 1947 expressly applies the inheritance tax against jointly owned property to the extent of the decedent’s interest in the property at the date of death.

A working knowledge of section 91-4405 requires an understanding of that section’s interrelationship with other sections, especially section 91-4402 which taxes transfers in contemplation of death and transfers intended to take effect at death. For general analytical purposes, as a crude rule of thumb, the practitioner can generally assume that the decedent’s undivided interest which passes to the surviving joint tenant is the subject of the tax under 91-4405; whether the survivor’s undivided interest is also taxed as a result of the decedent’s death is determined under section 91-4402. That is, if the surviving co-tenant received his interest within three years of the decedent’s death, there is a presumption that the transfer is taxable as having been made in contemplation of

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\(^1\)Section 91-4405 provides: "Whenever any property, however acquired, real or personal, tangible or intangible, including government bonds of the United States, inscribed in co-ownership form, or held in joint tenancy by two or more persons, or as tenants by the entirety, or is deposited in any bank or other depository in the joint names of two or more persons and payable to the survivor or survivors of them upon the death of one of them, the right of the survivor or survivors to the immediate possession or ownership is a taxable transfer. The tax is upon the transfer or decedent’s interest, one-half or other proper fraction, as evidenced by the written instrument creating the same, as though the property to which the transfer relates belonged to the joint tenants, tenants by the entirety, joint depositors, holders in co-ownership form, or persons, as tenants in common, and had been for inheritance tax purposes, bequeathed or devised to the survivor or survivors by will, except such part thereof as may be shown to have originally belonged to the survivor and never to have belonged to the decedent. This section shall not be construed to repeal or modify the provisions of section 91-4402."
death. If, however, the transfer is made without the presumptive period, the surviving co-tenant’s interest may not be taxable, unless the transfer was one which was to take effect at death.

The application of section 91-4405 and its relationship to other sections of the Montana inheritance tax law can best be illustrated by example.

(1) At the time of his marriage to W, H transferred $10,000 from his private checking account to a joint savings account with right of survivorship, the account being in his name and that of W, his newly acquired wife. No withdrawals are made, and H dies the next year.

The entire $10,000 is subject to the inheritance tax. $5,000 of the joint account represents H’s proportionate but undivided share of the account. This share vests in W as a result of H’s death. It is taxable under 91-4405 as a transfer of the decedent’s share of jointly held property. The other $5,000, or W’s proportionate share, is also taxable, but the tax is imposed under section 91-4402 as a gift made in contemplation of death, unless of course, the presumption can be overcome. However, if H had died more than three years after creation of the joint account, W’s share would not be subject to the inheritance tax. Instead, it would be treated as a completed, and non-taxable inter vivos gift.

If W had predeceased H, there would be no tax, assuming that H could prove that the entire amount originally belonged to him alone, and never belonged to W.

(2) With his own funds, H purchases U. S. Savings Bonds, listing himself, jointly with W, his wife, as payees. He informs W of the purchase, and places the bonds in a safety deposit box to which each have independent access. H dies more than three years after the transaction.

Only one-half of the bond’s value at the time of H’s death are taxable. This one-half represents H’s share of the bond’s value. W’s share is not taxable as a gift in contemplation of death since it was made more than three years before H’s demise. Assuming a completed gift to W, her share is not taxable under 91-4402 as a transfer intended to take effect in possession or enjoyment at death.

109 In re Marsh’s Estate, 125 Mont. 239, 244, 234 P.2d 459, 462 (1951).
110 R.C.M.1947, Sec. 91-4405 provides that: “. . . such part thereof as may be shown to have originally belonged to the survivor and never to have belonged to the decedent” is excepted from the inheritance tax. Also see Estate of Parks, 145 Mont. 333, 401 P.2d 53 (1965); In re Powell’s Estate, 142 Mont. 174, 232 P.2d 342 (1951); In re Kuhr’s Estate, 123 Mont. 593, 270 P.2d 83 (1950).
(3) With his own funds, H purchases U. S. Savings Bonds, naming himself as payee, or in the alternative D, his daughter. He does not inform D of the purchase and places the bonds in a safety deposit box to which he alone has access.

The entire amount of the bonds is taxable under 91-4402 as a transfer intended to take effect at death. It is not taxable under 91-4405 as a joint interest because the bonds were not held in joint ownership. There was no completed gift because the element of delivery was lacking; accordingly, D's interest did not vest until H's death. Even if D had access to the safety deposit box, the gift would not be complete since the bonds were registered in alternative rather than joint names.

(4) Over the years, H deposited a total of $15,000 of his salary in a savings account held jointly with W, his wife. W never contributed any of her own money to this account. H and W used $10,000 of this money to purchase real estate, the title to which was taken in their names as joint tenants with right of survivorship. W predeceased H. At that time, $5,000 remained in the savings account.

Despite the fact that the real estate was purchased with money which had been earned only by H, W's proportionate share of the real estate is taxable under 91-4405. This is because there was a completed gift to W when the money was deposited in the joint savings account. Thus, her death precipitated a transfer of her proportionate share of the real estate back to H. However, none of the $5,000 remaining in the joint savings account is taxable as a result of W's death for the source of that fund is directly traceable back to H's earnings and it can be shown that none of it originally belonged to W. Consequently, the $5,000 falls within the exemption under section 91-4405.

(5) When he was married in 1960, H conveyed real estate which he owned to himself and W, his wife, as tenants in common. He recorded the transaction in 1965 and died that same year.

Had H recorded the conveyance immediately, only one-half of the property's value, i.e., H's proportionate share, would be subject to tax under 91-4405 as a transfer of jointly held property. However, section 91-4408, R.C.M. 1947 treats the recordation date as the date of transfer. Therefore, since the recordation date was within the exemption under section 91-4405.
three years of death, it is presumed that H made a gift of one-half of
the property to W in contemplation of death. Consequently, the
entire value of the property is subject to tax.

Section 91-4405 applies to all types of joint interests, viz., joint
tenancies, tenancies in common, and tenancies by the entirety. However,
it should be noted that an estate by the entirety is not a permissible
means of ownership of property in Montana.\textsuperscript{117} The Montana Supreme
Court has expressed the opinion that modern statutes have eliminated
the basis for the creation of such an estate and accordingly treat such
form of ownership as a joint tenancy.\textsuperscript{118}

G. Insurance

Section 91-4406 provides:

All insurance payable upon the death of any person over and above
fifty thousand dollars ($50,000), shall be deemed a part of the
property and estate passing to the person or persons entitled to
receive the same and if payable to more than one person the said
fifty thousand dollars ($50,000) exemption shall be prorated between
such persons in proportion to the amount of insurance payable to
each.

In \textit{State v. Cline},\textsuperscript{119} the estate included approximately $65,000 in insur-
ance proceeds which were to be paid both to the estate and named benefi-
ciaries. The Montana Supreme Court held that the $50,000 insurance
exemption was available without regard to the identity of the beneficiary.
Consequently, an insured could rely upon this opinion to name his estate
as sole beneficiary and thus inject up to $50,000 into his estate which
would be exempt from tax. However, the existence of a strong dissent
by two-fifths of the court’s membership\textsuperscript{120} may create grounds for pause
before relying on the \textit{Cline} decision. In that dissent, it was carefully
pointed out that the majority of cases draw a distinction for inheritance
tax purposes between proceeds payable to the estate and those payable to
named beneficiaries. Such cases usually hold the former to be subject
to death taxes.\textsuperscript{121} There appears to be merit in the dissenting opinion
inasmuch as the proceeds payable to the estate will pass as part of the
estate by will, or by intestate distribution, and thus would otherwise fall
within the general taxing power of section 91-4401.

In Montana, the proceeds and interest from a matured endowment
contract are not insurance and are fully taxable.\textsuperscript{122} On the other hand,
annuity proceeds are given the same status as insurance proceeds and are

\textsuperscript{117}Clark v. Clark, 143 Mont. 183, 387 P.2d 907 (1936); \textit{In re Marsh’s Estate}, 125
Mont. 239, 234 P.2d 459 (1951).

\textsuperscript{118}Clark v. Clark, \textit{supra}, note 117, 143 Mont. 192.

\textsuperscript{119}132 Mont. 328, 317 P.2d 874 (1957); \textit{also see} the companion case of \textit{State v. Midland

\textsuperscript{120}It should be noted that both dissenting justices have since retired while two of the
three justices constituting the majority have remained on the court.


\textsuperscript{122} \textit{Clark v. Clark}, \textit{supra}, note 117, 143 Mont. 192.
thus entitled to the $50,000 exemption. However, in the majority of states the holding is that annuities providing a death benefit are not insurance policies, and are not subject to insurance exemptions. The general reasoning is that in an annuity, the company’s obligation is not to indemnify on the happening of a contingent event causing loss. The company agrees to repay the amount paid by the annuitant. Such repayment is usually made in installments during the annuitant’s life and if, at his death, there is an unpaid balance, such balance is paid to a designated beneficiary. This is deemed to be a transfer of property intended to take effect at or after the death of the transferor and is thus taxable under almost all state inheritance tax statutes.

If an insurance policy is payable to a trust and the trust instrument alone provides for distribution of named beneficiaries, the $50,000 exemption is still available. However, the insurance exemption is allowed only once, i.e., it will not follow the proceeds through two estates. Thus, if the beneficiary dies before receiving the proceeds, the proceeds are fully taxable in his estate.

PROPERTY SUBJECT TO TAX

It is axiomatic that the state must have jurisdiction over the property transferred before it can impose a tax on the transfer. Whether the state has the requisite jurisdiction depends upon the interrelationship of three factors. The first is whether the decedent was a resident or nonresident at the time of his death. The second requires a determination of the type of property involved. The third factor is the situs, or location, of the property at the time of the transfer.

The distinction between residents and nonresidents is determined in terms of domicile rather than actual residence. The Montana Supreme Court has established the rule that the place of one’s residence is prima facie the place of his domicile, but that proof of domicile requires a showing not only that his residence was within the jurisdiction, but also that he had the intention of making that residence his home. This distinction is important inasmuch as the rules for taxation of the several classes of property differ somewhat in their application in taxing resident and nonresident property.
The nature of the property is determined by its property law characterization within one of the three commonly accepted classes, i.e., real property, tangible personal property, or intangible personal property. This characterization is necessary in order to establish the situs of the property, situs being a necessary prerequisite to the state's power to tax. Generally speaking, situs of real and tangible personal property is the place where the property is physically located, whereas the situs of intangible personal property may be divided so that more than one state may acquire jurisdiction to levy death taxes on the transfer.

RESIDENTS

Real Property

Real estate located within the state and belonging to a resident decedent is subject to the Montana inheritance tax. No state, including Montana, has ever attempted to tax the devolution of realty located outside its jurisdiction. Few problems are apt to arise when the resident decedent holds the real estate in fee. Thus, if a Montana resident owns Montana real estate at his death, it will be subject to the Montana inheritance tax. If he owns real estate outside Montana, under the general rule it will not be subject to the Montana inheritance tax, although the situs state may exercise its right to levy a nonresident death duty on the property.

However, serious problems can arise in the frequently encountered situation where a resident decedent had sold foreign realty and was holding an unsatisfied contract for deed at the time of his death. For example, a Montana resident may have sold California real estate by contract of deed prior to his death so that on his death he was actually holding only a bare legal title as trustee for the benefit of the buyer. As far as the decedent had been concerned, his real property interest had been equitably converted into personal property evidenced by the contract of sale.

In his will, the decedent may direct the disposition of his real property wheresoever located and thus effect what is called "equitable conversion" of his real property into personal property. Under such circumstances, it is clear that Montana cannot impose a tax on the

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130 R.C.M. 1947, Sec. 91-4401.
131 See Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385 (1903). It is of interest to note that in 1962, section 2031 of the Internal Revenue Code was amended to subject to the federal estate tax real property owned by United States citizens but which was located in a foreign country.
132 Equitable conversion is that constructive alteration in the nature or character of property whereby in equity real estate is for certain purposes considered as personality, or whereby personality for similar considerations, is regarded as real estate and in either instance it is deemed to be transmissible and descendible in its converted form. 27 Am. Jur. 2d, Equitable Conversion, Sec. 2, p. 483.
California property because it is outside its jurisdiction. But can it impose a tax on the unrealized proceeds from the contract of sale? On first impression, it would appear that because the contract actually represents the real property, it should not be taxed. This argument finds support if the property returns to the legal title holder if the buyer defaults. On the other hand, it may be argued that if the contract had been performed prior to the date of death, the decedent would have had cash at the time of his death, instead of real estate and the devolution of the cash would have been taxable.

The question turns on whether the jurisdiction applies the doctrine of equitable conversion in situations like those hypothecated above. New York and Illinois are among those which do not; Washington and North Dakota have accepted it. The Montana Supreme Court has never had the occasion to decide whether the doctrine should apply to proceeds from the sale of foreign property owned by a resident decedent, but in *In re Briebach's Estate* the court did apply the doctrine to preclude taxation of proceeds received by a nonresident from the sale of Montana real estate. Thus, if continuity can be presumed, it would seem that the Montana courts would apply the doctrine to tax the proceeds to be received by a resident decedent's estate from the sale of foreign realty. This analogy is supported by the fact that proceeds from mortgages are likewise subject to the Montana inheritance tax.

A problem may arise when the resident decedent's estate includes a partnership interest in foreign realty. For example, assume that a Montana resident decedent owned a partnership interest in Nevada realty. Since Nevada has no death tax, he will escape all death duties on this property unless his partnership interest works an equitable conversion to enable Montana to tax his intangible partnership interest. It would appear that under the current state of the Montana case law, no tax would be imposed on this interest. For example, in *In re Perry's Estate,* the Montana Supreme Court refused to apply the doctrine of equitable conversion to tax a nonresident decedent's partnership interest in Montana realty. Consequently, it would be a logical extension of the *Perry* case to say that the doctrine would likewise not apply to tax a resident decedent's partnership interest in foreign realty.

Regardless of how logical this may appear, however, the weight of American authority is to the contrary. Ordinarily partnership real

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134 *Mont. 437, 318 P.2d 223 (1957).*

135 *Atty. Gen. Op. 117 (Mont. 1909).*

136 *Mont. 281, 192 P.2d 532 (1948).*

137 *CCH, Inheritance, Estate and Gift Tax Reporter, para. 1065E (1968 ed.)*.
property is considered to be personalty as among the partners themselves. With the enactment of the Uniform Partnership Act, Montana has embraced the position that real property acquired in the partnership name belongs to the partnership, not the individual partners. Consequently, each partner owns only an undefined share of the partnership assets and his interest cannot be traceable to any specific asset. Accordingly, after the Uniform Partnership Act was enacted by several states, it was not surprising that courts of those jurisdictions held that partnership assets are considered intangible personal property. Such decisions have the same effect as the application of the doctrine of equitable conversion, *i.e.*, by treating the partnership interest as an intangible asset, it is possible to shift the situs of the interest away from the jurisdiction where the real property is located and tax it in the state of the decedent's residence.

Because the *Perry* case arose prior to Montana's enactment of the Uniform Partnership Act, it is unknown whether that case is still good law. It may not make much difference economically to the decedent whose partnership assets are located in any state other than Nevada, for if his interest is not taxable by Montana it will probably be taxable by the situs state.

**Tangible Personal Property**

Under section 91-4401, R.C.M. 1947, all tangible personal property owned by a Montana resident is subject to the Montana inheritance tax regardless of where it is found. However, section 91-4414 (4), R.C.M. 1947, exempts tangible personalty located outside the state provided it is outside of Montana for purposes other than deposit or safekeeping. Had the Legislature ended section 91-4414 (4) at that point, the statute would have been an expression of the majority rule in the United States which recognizes that tangible personalty is subject to death taxation.

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1\textsuperscript{97}R.C.M.1947, Sec. 63-101 et. seq.

1\textsuperscript{90}R.C.M.1947, Sec. 63-108.

1\textsuperscript{10}See e.g., Perkins v. Okla. Tax Comm'n, ..., Okla. ..., 428 P.2d 328 (1967); Est. of Havemeyer, 17 N.Y.2d 216, 217 N.E.2d 26 (1966); Est. of Gordon v. Dept. of Rev., Ky. Bd. of Tax Appeals, Nov. 9, 1965. However, in Wyoming it was held that an oil and gas leasehold in Wyoming which was owned by a partnership was not converted into personal property. Op. Atty. Gen., Feb. 3, 1965.

1\textsuperscript{13}R.C.M.1947, Sec. 191-4401 provides: 'A tax shall be and is hereby imposed upon any transfer of property, real personal or mixed ...' R.C.M.1947, Sec. 91-4453 defines 'property' as including 'all personal property within or without the state.'

1\textsuperscript{14}R.C.M.1947, Sec. 91-4414(4) provides: (4) Property without the state exempt, when. No tax shall be imposed upon any tangible personal property of a resident decedent when such property is located without this state, and when the transfer of such property is subject to an inheritance or transfer tax in the state where located and which tax has actually been paid, secured or guaranteed, provided such property is not without this state temporarily nor for the sole purpose of deposit or safekeeping; and provided the laws of the state where such property is located allow a like exemption in relation to such property left by a resident of that state and located in this state.
only by the state in which it is located. Instead, however, the Montana Legislature added a proviso to section 91-4414 (4) which purports to tax a resident’s personalty which is located outside Montana unless (1) the situs state imposes either "an inheritance or transfer tax . . . which tax has actually been paid, secured, or guaranteed," and (2) the situs state also allows "a like exemption in relation to such property of that state and located in this state (Montana)." This proviso thus permits Montana to impose a tax on a transfer of a resident decedent’s personalty located in Nevada simply because the personalty is not subject to any Nevada death tax.

It appears that this proviso is invalid. In 1925, two years after the enactment of section 91-4414, the United States Supreme Court flatly held in Frick v. Pennsylvania that the situs of tangible personalty for inheritance and estate tax purposes is the state where it is located rather than the domicile of the decedent owner. In Curry v. McCanless, that Court further held that tangible personal property is subject to estate and inheritance taxation only in the state where it is physically located. There, the Court said:

The power of government and its agencies to possess and to exclude others from possessing tangibles and thus, to exclude them from enjoying rights in tangibles located within its territory, affords adequate basis for an exclusive taxing jurisdiction . . . the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership and the power to reach effectively the interests protected for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as to set practical limits to taxation by others.

Thus, if Montana has been exacting death duties in reliance on the proviso of section 91-4414 (4), it has done so in contravention of established legal policy. The propriety of the proviso does not appear to have been judicially tested before the Montana Supreme Court.

The concept of situs of tangible personalty involves more than a determination of its actual physical location; some degree of permanency is required. As an example, it has been held that jewelry in the possession of a New York resident who died in France while on vacation, did not lose its New York situs and was thus subject to that state’s death tax. On the other hand, portraits loaned by a New York resident to a Pennsylvania museum were determined to have satisfied this requirement of permanency and thus lost their New York situs.

144 See cases annotated at 85 C.J.S., Taxation, Sec. 1139, note 61. Also see 4 CCH, Inheritance Estate and Gift Tax Reporter, paras. 1610-1610C.
145 Nevada has no death taxes.
146 268 U.S. 473 (1925).
148 Supra, note 146, 307 U.S. at 361.
150 City Bank Farmer’s Trust Co. v. Schnader, supra, note 147.
Problems may sometimes arise when distinguishing tangible and intangible personalty. For example, are accounts in banks which are located outside Montana, tangible personalty and thus subject to the Montana inheritance tax? No Montana case has addressed itself to this question, but cases from other jurisdictions may provide adequate guidelines. In Blodgett v. Silberman the United States Supreme Court held that a Connecticut resident's savings account in a New York bank was intangible personal property and hence taxable under the laws of Connecticut. Likewise, the Court held that United States Savings Bonds were also intangible, whereas bank notes and coins found in the decedent's New York safe deposit box were tangible personalty and thus subject to the New York tax. Colorado has similarly ruled that cash is tangible and taxable where situated. The Maryland Attorney General created an interesting dichotomy; he ruled that coins are tangible, but paper currency is intangible.

Intangible Personal Property

Intangible personal property owned by a Montana resident is subject to tax wherever it is located. This is in accord with the majority of jurisdictions which generally accept the rule that intangible property may have a tax situs in every jurisdiction which has dominion over the tangibles or persons whose relationships are the source of the intangible property or which has extended protection or other benefits to the intangible property.

In Montana, R.C.M. 1947, section 91-4453 defines intangible property as including "all monies, stocks, bonds, notes, securities and credits of all kinds, secured or unsecured." The Montana Attorney General has ruled that mortgage notes are intangibles for inheritance tax purposes. In Estate of Maher the Montana Supreme Court ruled that intangible personal property owned by a Montana decedent, including the assets of a revocable lifetime trust administered in Pennsylvania, is subject to the Montana inheritance taxes.

NONRESIDENTS

A nonresident's real and tangible personal property is generally held to be subject to the death taxes of the situs state. Montana follows this rule.

Whether a nonresident's intangible personal property is subject
to the Montana inheritance tax will depend on whether the property gained a "business situs" in Montana, which in turn depends on whether the nonresident's interests were at least partially protected by Montana law. For example, it was held in *State ex rel. Walker v. Jones* that promissory notes and mortgages on Montana land which were held by a nonresident decedent were dependent for their collection upon the Montana law. This protection provided sufficient basis upon which to apply the Montana inheritance tax. In *In re Perry's Estate* the court found that a nonresident's partnership interest in Montana mining property was subject to the Montana inheritance tax inasmuch as the property itself was protected by Montana law. In 1942, the State Board of Equalization issued a tax memorandum stating that all intangible personal property owned by nonresidents, and which was situated within Montana, was subject to the Montana inheritance tax. Such property, said the Board, includes stock of Montana corporations, bonds issued by debtors domiciled in Montana, money deposited with Montana banks, trust companies, or building and loan associations, as well as interests in businesses carried on in Montana.

However, no tax will be imposed if the decedent comes within the exemption provided by section 91-4413, R.C.M. 1947. That section exempts from taxation intangible personal property if the decedent was a resident of a state or territory which, at the time of transfer, did not tax intangibles of nonresidents of that jurisdiction or provided for the reciprocal exemption thereof. This section was applied in *In re Brieback's Estate* where the Montana Court found that although the vendor's interest in a contract of sale of Montana real estate was a taxable intangible, the property qualified for the exemption inasmuch as the decedent was a resident of California which had a reciprocal exemption statute.

**DEDUCTIONS**

A. Generally

Certain amounts of the decedent's gross estate are not subject to taxation, but are allowed as deductions. Deductions are not to be confused with exemptions. Deductions include such items as the decedent's unpaid debts, the expenses of his last illness, his funeral expenses and the costs of administering his estate. An exemption is usually an amount certain which is passed on to the heirs and is excluded from tax by virtue of the heir's relationship to the decedent. Deductible items are not included in the taxable estate on the theory that the property is passed to

159 Supra, note 129.
160 90 Mont. 574, 261 P. 356 (1927).
162 12 Mont. 280, 192 P.2d 533 (1948).
the recipient pursuant to his right, usually contractual, to receive the property. To tax such a transfer would violate the Constitutional provision prohibiting the impairment of the obligation of contracts. An exemption, on the other hand, is simply the legislature’s way of encouraging a testator to provide for his close relatives after his death.

Only certain items can qualify as deductions. Section 91-4407, R.C.M. 1947, permits the following deductions and no others:

[...]

debts of the decedent owing at the time of death, expenses of funeral and last illness, all Montana state, county, municipal and federal taxes, including all penalties and interest thereon, owing by decedent at the date of death, the ordinary expenses of administration, including the commissions and fees of executors and administrators and their attorneys actually allowed and paid, including attorney’s fees, filing fees, necessary expenses and closing costs incident to proceedings to terminate joint tenancies, termination of life estates and transfers in contemplation of death, and any and all other proceedings instituted for the determination of inheritance tax, and federal estate taxes due or paid.

In In re McAnelly’s Estate the Montana Supreme Court said that this statute “is clear and direct and declares that no deduction shall be allowed, excepting those specified therein.” Each type of deduction warrants individual comment.

B. Debts

All “debts of the decedent owing at the time of death” are deductible from his transferable estate. This phrase is not defined either by statute or Montana case law. Under the usual circumstances it needs no clarification. It is only logical that the decedent’s unsatisfied contractual obligations qualify as deductions. Further, it is obvious that only those contractual obligations “owing at the time of death” are deductible, for the decedent certainly cannot contract for debts after he has died. Consequently, it would appear that the phrase “at the time of death” is redundant.

Whether this is a harmless redundancy has yet to be judicially determined. The question may arise if a judgment is entered against a decedent after his death. It might be argued that the judgment represents a debt which did not arise until after death on the basis that a judgment is not enforceable until entered on the judgment roll. If the debt arose after death, it would not be deductible under section 91-4407, R.C.M. 1947 and it could then be argued that the payment of the judgment creditor would be taxable as if it were a legacy. There does not appear to be a logical reason to tax transfers to a post-death judgment creditor.

160 Mont. Const., Art. III, Sec. 11.
161 127 Mont. 158, 258 P.2d 741 (1953).
162 Id., 127 Mont. at 172.
163 R.C.M.1947, Sec. 91-4407.
164 R.C.M.1947, Sec. 93-5708.
while permitting a deduction for transfers to a pre-death contractual creditor. Therefore, it is submitted that a future legislature should obviate this inequitable distinction.

Other jurisdictions have encountered difficulties arising from the meaning of the term "debt." It has been held, for example, that a payment to settle or prevent a will contest is not a deductible debt although there is also authority to the contrary. The test for deductibility has been said to be whether the debt is valid in law and enforceable, not whether it has been proved or established or allowed by the court or even if it has been paid by the estate.

C. Funeral Expenses, Expenses of Last Illness

Absent statutory or case law clarification, it can generally be presumed that the amount deductible as a funeral expense or an expense of the final illness is limited to a reasonable expenditure. In many jurisdictions the reasonable cost of a monument and maintenance of the burial plot qualify as deductions, but a $20,000 monument expense has been disallowed as has the expense of a monument which exceeded 2% of the value of the net estate. New Jersey disallows deductions of funeral expenses and those of last illness if they have been prepaid by the decedent prior to his death. It is to be expected that such prepaid expenses are likewise not deductible in Montana inasmuch as their prepayment has already served to reduce the estate prior to death and their post-death allowance would result in a double deduction.

D. Taxes

Section 91-4407, R.C.M. 1947 permits a deduction of

\[ \ldots \text{All Montana state, county, municipal and federal taxes, including all penalties and interest thereon, owing by decedent at the date of death.} \ldots \]

Thus, if a decedent dies owing property, income or any other kind of tax to the state, county, or municipality, it is clear that his estate or beneficiaries are entitled to a deduction equal to the amount of the tax due.

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10Est. of J. Waldron, 84 Colo. 1, 267 P. 191 (1928); Est. of H. Graves, 242 Ill. 212, 89 N.E. 978 (1909); Est. of G. Wells, 142 Ia. 255, 120 N.W. 713 (1909); Indiana Dept. of St. Rev. v. Kitchin, 119 Ind. App. 422, 86 N.E. 2d 96 (1949). Such payment would not be a deductible expense of administration. People v. Upson, 338 Ill. 145, 170 N.E. 276 (1930).

11In re Hawley's Est. 214 Pa. 525, 63 A. 1021 (1906).

12In re McKittrick's Estate, 175 Misc. 767, 25 N.Y.S.2d 42 (1940); In re Lederer's Estate, 158 Misc. 796, 286 N.Y.S. 884 (1936).

13In re Westurn, 152 N.Y. 93, 46 N.E. 315 (1897); In re Lambrecht's Est., 112 Wash. 645, 192 P. 1018 (1920); Also see 61 C.J.S., Taxation, p. 1706, n. 28.

14In re Parrott's Est., 199 Cal. 107, 248 P. 248 (1926); People v. Tatge, 267 Ill. 634, 108 N.E. 748 (1915).

15In re McKittrick's Estate, supra, note 172.

16Est. of Volkering, 253 Wis. 186, 33 N.W.2d 263 (1948).


18Est. of Ingham, 128 N.J. Eq. 93, 16 A.2d 457 (1940).
Not so clear, however, is the deductibility of federal taxes. Section 91-4407 appears to allow federal taxes as a deduction but section 91-4421 expressly provides that "... no deduction shall be made for any federal estate, inheritance, succession or transfer taxes paid to the United States." This contradiction was resolved by the Montana Supreme Court in 1937 in *In re Clark's Estate*. The court noted that the phrase denying the deduction was enacted in 1927, whereas the section permitting the deduction was enacted in 1935. The court applied the rule of construction that when two statutes, enacted at different times, contradict each other, the one enacted on the later date must prevail. Because the statute permitting the deduction was the later one, the deduction was allowed.

More than two decades have passed since *In re Clark's Estate* was decided. Yet the law which was there held to be invalid still remains. This is simply one more example of the Montana Legislature's lamentable attitude of inattention in regard to the state's death tax laws.

The only taxes which qualify as deductions are those paid to the State of Montana, its political subdivisions or the federal government. Thus, death taxes paid to another state are not allowable as a deduction. However, in the case of a resident decedent, such taxes paid to another state may qualify as a credit against the Montana inheritance tax under section 91-4412, R.C.M. 1947. The amount of this credit is limited by the following proviso of section 91-4412:

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Provided, however, that the amount to be so credited shall in no event exceed that amount which the resident decedent was taxed on that property in Montana. (emphasis added)
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The effect of this proviso is to allow a credit only when the property is subject to tax both by Montana and another state, presumably the situs state. Because neither realty nor tangible personality located without Montana is subject to Montana tax, it appears that the credit will apply only in regard to taxes paid in respect to intangible property which has a situs in both states.

Penalties and interest paid on Montana and federal taxes are also allowable deductions. This allowance was enacted in 1957, probably as a result of a suggestion by the Montana Supreme Court in *In re McAnelly's Estate* where the court was forced to disallow interest paid on federal tax as a deduction. The *McAnelly* case was decided in 1953. The law was not amended until 1957. Why it took two Legislatures four years to make this simple amendment will probably never be known.
E. Ordinary Expenses of Administration

Perhaps the most problematical area in the field of deductions are those expenditures which are attempted to be qualified as "ordinary expenses of administration." The difficulty centers around the meaning of the word "ordinary." Frequently, expenses will be incurred which are necessary, although not ordinary in the sense that they are not incurred in the majority of cases. For example, in *In re Warren's Estate* an accountant was hired to evaluate the worth of the decedent's interest in a family corporation. The Montana Supreme Court found that such valuations are usually made by appraisers but allowed the accountant's fees as a deduction. The court reasoned that although such fees are not "ordinary" they were "necessary" to the administration of the estate. Most jurisdictions allow expenses of administration to be deducted provided they are "reasonable." If the Montana State Board of Equalization ever promulgates regulations in the inheritance tax field it is suggested that the word "ordinary" be defined as meaning both necessary and reasonable.

When section 91-4407 was enacted, the legislature evidently felt that certain types of expenses were ordinary for they expressly included certain expenses, e.g., fees or commissions paid to executors, administrators, and attorneys, costs of terminating joint estates, life estates, and transfers in contemplation of death as well as the costs of proceedings instituted for the determination of inheritance and federal estate taxes.

Fees or commissions paid to executors, administrators and their attorneys must have been both allowed and paid before they qualify as deductions. However, in *In re Warren's Estate* the court allowed the accountant's fees as a deduction despite the fact that they had neither been allowed nor paid. The court justified this exception on the ground that the requirement that the claim be allowed and paid referred only to "commissions and fees of executors and administrators and their attorneys" and "do not relate to the ordinary expenses of administration."

An executor's fee is expressly allowable as a deduction but a trustee's fee is not. However, both types of fees are excluded from

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182R.C.M.1947, Sec. 91-4407 permits as a deduction:
... the ordinary expenses of administration, including the commissions and fees of executors and administrators and their attorneys actually allowed and paid, including attorney's fees, filing fees, necessary expenses and closing costs incident to proceedings to terminate joint tenancies, termination of life estates and transfers in contemplation of death, and any and all other proceedings instituted for the determination of inheritance tax, and federal estate taxes due or paid.

1845 C.J.S., Taxation, section 1185 and cases cited therein.
185Supra, note 183.
186Supra, note 183, Mont. at 401, 402.
taxability if the testator bequeaths property to them in lieu of their commissions or allowances. The amount excluded, however, is limited to the amount prescribed by law as being the value of their services.

F. Apportionment of Deductions

Whenever a resident or a nonresident decedent leaves an estate consisting of property located within Montana and property located outside Montana, section 91-4421(3) may preclude the deduction of all but a portion of the total amount of deductions allowed by section 91-4407. Under such circumstances, the beneficiary or the estate may deduct only the same percentage of the deductions allowed under section 91-4407 as the value of property in Montana bears to the gross estate, or in other words and as an oversimplification, if only 10% of the gross estate is located in Montana, only 10% of the deductions permitted by Montana are allowable. The manner by which the apportionment is computed is best illustrated by examples.

1. At H's death he owned only two pieces of real estate; one was located in Montana and was valued at $60,000, the other was located in State X and was valued at $40,000. His allowable Montana deductions amounted to $1,000; no additional deductions were allowable by State X. H left all of his property to S, his son. S is entitled to a deduction on only $600, \((\frac{60,000}{100,000} \times 1,000 = 600)\). The net estate subject to the Montana inheritance tax would be $59,400 ($60,000 - $600).

2. Assume the same facts as in example 1 above except that State X permits a deduction of $500 for taxes paid to that state. The apportionment computations as they would appear on Montana's Inheritance Tax Form 3A, line 23 would be as follows:

"The decedent at time of death owned property located partly within and partly without the State of Montana:

\[\text{Line 23: } \frac{60,000}{100,000} \times 1,000 = 600\]

\[\text{Net estate subject to Montana inheritance tax: } 59,400\]
(a) The gross estate outside of Montana amounts to .......................................................... $ 40,000

(b) The gross estate in Montana amounts to ............ $ 60,000

(c) Total gross estate wherever situate (a + b) amounts to .................................................. $100,000

(d) Ratio between Mont. gross est. & total gross est. wherever situate is ................................. .6

(e) Total deduction allowed in Mont. (shown under 6, page 1) are ........................................ $ 1,000

(f) Total ded. allowed outside of Mont. are ............ $ 500

(g) Total ded. allowed for entire estate wherever situate are .................................................. $ 1,500

(h) Proportionate amt. of total ded. to be ded. from Mont. gross value is ................................. $ 900

(i) Mont. net est. sub. to tax amts. to ......................... $ 59,100

3. H, a nonresident of Montana, dies leaving a total estate of $150,000 which consists of:

Life insurance proceeds ............................................... $ 60,000
Tangible personalty located in State X .................. $ 50,000
Real estate located in State X ................................. $ 20,000
Real estate located in Montana ......................... $ 15,000
Stock in a Montana corporation ......................... $ 5,000

$150,000

H’s estate and beneficiaries are entitled to the following deductions in State X:

Death taxes owing State X at death ....................... $ 1,000
Income & property taxes owing State X at death .... $ 500
Debts owing at death ............................................... $ 500
Widow’s allowance .................................................. $ 5,000
Funeral expenses .................................................... $ 200
Costs of administration .......................................... $ 300

$ 7,500
H’s estate and beneficiaries are entitled to the following deductions in Montana:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taxes owing Montana at death</td>
<td>$300</td>
</tr>
<tr>
<td>Attorney fees</td>
<td>$200</td>
</tr>
</tbody>
</table>

$500

H leaves his estate equally to S, a Montana resident and D, a resident of State X. The form 3A computation for the apportionment of deductions would be as follows:

(a) The gross estate outside of Montana amounts to $70,000

(b) The gross estate in Montana amounts to $30,000

(c) Total gross estate wherever situate (a + b) amounts to $100,000

(d) Ratio between Mont. gross est. & total gross est. wherever situate is 0.3

(e) Total deduction allowed in Mont. (shown under 6, page 1) are $500

(f) Total ded. allowed outside of Mont. are $1,500

(g) Total ded. allowed for entire estate wherever situate are $2,000

(h) Proportionate amt. of total ded. to be ded. from Mont. gross value is $600

(i) Mont. net est. sub. to tax amts. to $29,400

Note that the computations are not affected either by the fact that the decedent was a nonresident nor by the fact that the beneficiaries are residents of different states.

**EXEMPTIONS**

The Montana inheritance tax permits two types of exemptions—charitable and personal.

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192Tangible personality ($50,000) plus State X real property ($20,000).
193Life insurance ($60,000 less $50,000 exemption) plus Montana real estate ($15,000), plus Montana securities ($5,000).
194Montana does not recognize the widow’s allowance, although other states do.
A. Charitable Exemptions

In 1923, the Montana legislature enacted a law providing that all transfers to certain institutions were totally exempt from tax. The list of institutions eligible for such tax-free bequests were limited to the state and its institutions, all municipal corporations within the state, and corporations or voluntary associations organized under Montana law which performed solely religious, charitable, educational or public purposes, provided that the property transferred was used by these organizations solely within the state of Montana.

In 1963, the law was amended, substantially conforming the definition of charitable organizations with the federal estate tax for charitable contribution deductions. The law is now codified as section 91-4414(1) of the Revised Codes of Montana, 1947. The 1963 amendment carried forward the 1923 provisions of allowing exemptions of the total amount transferred to the state, its institutions and municipal corporations; it also carried forward the 1953 provisions exempting transfers to crippled children's hospitals. However, it placed qualifying restrictions on transfers to other charitable institutions. Charitable institutions are now defined by the statute as

... any society, corporation, institution, or association foundation or trust, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes...

An organization is initially disqualified as a charitable organization if any part of its earnings inure to the benefits of any private shareholder or other individual, or if a substantial part of the organization's activities include the carrying on of propaganda or otherwise attempting to influence legislation. If the transferee organization does not have either of these disqualifying features, it qualifies as a donee to which tax-free testamentary donations can be made if it also meets any of the following conditions:

(1) It must be organized solely for religious, charitable, scientific, literary, or educational purposes. It will not be sufficient that the transferee's articles of incorporation or its by-laws state that it is organized solely for one or all of these purposes. The statute requires that the organization be both organized and operated as a charitable organization.

(2) If the property is transferred on the condition that it be used solely within Montana, the transfer will be totally exempt.
(3) If the transferee organization is organized under laws other than Montana's then a transfer to such organization will be exempt only if:

(a) The state under which laws the transferee was organized does not, as of the date of the decedent's death, tax similar transfers by its residents to a charitable institution organized under the laws of Montana;

(b) or, if such state provided for a reciprocal exemption for transfers to Montana organizations. 201

To date, there are no reported Montana cases dealing with charitable exemptions. This may indicate that the Montana law is clear and explicit. However, it is more likely that the lack of reported litigation reflects either: (1) astute estate planning by Montana practitioners, or (2) a lenient attitude on the part of district courts or the State Board of Equalization in allowing charitable exemptions to go unchallenged. This observation is not made lightly. Other states and the federal government have not experienced the same lack of litigation as has Montana regarding the subject of tax free bequests to charitable organizations.

One of the major areas of contention is as to what constitutes a charitable organization. The Montana statute does not furnish a definition other than to say that it is one organized for "religious, charitable, scientific, literary or educational purposes," but this is hardly sufficient. For example, does an association qualify as a religious organization if its primary purpose is to sell religious books to promote church attendance, 202 or if it operates timber mills and a hotel with which to train ministers? 203 Does an organization have a charitable purpose if it is organized to operate a public park only for white people. 204 Do private hospitals, 205 homes for the aged, 206 organizations which make distributions to needy persons, 207 blood banks, 208 or societies for the prevention of cruelty to animals 209 qualify as charitable organizations? Organizations which failed to qualify as scientific organizations under the federal income tax law include foundations to do research in the field of commercial oil extraction, but which made the results known to only a few

201 R.C.M. 1947, Sec. 91-4414 (1) (e) (ii).
203 The Golden Rule Church Association, 41 T.C. 719.
205 See Rev. Rul. 56-185, 1956-1 C.B. 202; Rev. Rul. 65-269, 1965-2 C.B. 159; Sonora Community Hospital, 40 T.C. 519; Davis Hospital, 5 T.C.M. 312 (1945).
subscribers, as well as organizations which were operated to carry on dog shows, despite the geneological information that was thereby accrued. Many cases and revenue rulings have discussed the meaning of the term educational organizations.

Section 91-4414(1) fails to provide an adequate definition of what is meant by charitable organization. Indeed, it would be a rare legislature that would undertake the task of enacting such guidelines into law. Normally these guidelines are found in regulations. Unfortunately, Montana has no inheritance tax regulations, but when and if any are adopted, it is hoped that they will define in some detail those types of organizations which qualify for tax free bequests. In the meantime, the cautious practitioner who is advising a client who is ready to give to an existing organization might resort to a directory maintained by the United States Treasury Department which lists those organizations which currently qualify as charitable organizations, contributions to which are deductible for federal tax purposes.

If the testator desires to create his own charitable organization after his death, and to fund it by leaving property to his executor or trustee to pay to the organization upon its creation, it appears that section 91-4414 would permit the exemption for such a transfer. A similar situation arose in New York; the exemption was contested but allowed in the same manner as though the organization had been in existence at the time of the testator’s death.

B. Personal Exemptions

The 1969 Montana Legislature created some important changes in the amounts permitted as personal exemptions. The exemption allowed to the husband of the decedent was raised from $10,000 to $20,000, equal to that allowed a widow, and the exemption allowed to the minor children...
of the decedent was raised from $2,000 to $5,000. The exemption that may be claimed by adult children and lineal ancestors remains unchanged from the $2,000 figure originally allowed by the 1923 legislature. Issue of the decedent, as used here, is defined by section 91-4414(2), R.C.M. 1947 as including besides lineal issue, adopted children and their issue as well as mutually acknowledged children and their issue. Mutually acknowledged children are defined as those to whom the decedent stood in the mutually acknowledged relation of parent for a period of at least ten continuous years prior to the transfer and which relationship began at or before the child's fifteenth birthday.

*In re Clark's Estate,* is the only reported Montana case dealing with the meaning of the term "adopted child." That case held that the adoption proceedings must actually have been completed before the child could be eligible for the exemption. The proceedings had not been completed as of the testator's death, and the exemption was denied, notwithstanding the fact that the decedent had expressed his desire to adopt the child and had been supporting and educating the child for a number of years prior to his death.

Most problems which arise under personal exemption statutes deal with whether a transferee can qualify within a favored class in order to avail himself of the exemption. These problems are usually simple to resolve by referring to the clear intent of the statute. However, sometimes a beneficiary who has been bequeathed two or more valuable pieces of property will attempt to claim a separate exemption for each. For example, he may be given one parcel of land which is taxable as a gift made in contemplation of death, and may also receive another parcel under the decedent's will. He will be allowed only one personal exemption regardless of the number of taxable bequests or gifts received. Also problematical are transfers to family corporations. Such transfers have been held not to qualify for personal exemptions, even though the only shareholders of the corporation were the widow and children, or the children alone.

C. Computations and Apportionment of Exemptions

Gifts which qualify as charitable exemptions are totally tax free regardless of the amount received by the organization. Thus, if a testator left one dollar or one million dollars to a charitable organization no tax would be imposed on the transfer.

The allowable personal exemptions are to be taken only from the first $25,000 received by the transferee. For example, a widow or a widower has a $20,000 personal exemption. Thus, if he or she received

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21c Laws of Mont., 1923, Ch. 65, sec. 4.
21d 165 Mont. 401, 74 P.2d 401 (1937).
21f Est. of Renwick, 126 N.J. Eq. 564, 10 A.2d 293 (1939).
a $25,000 legacy, only the last $5,000 would be subject to the tax. If the legacy amounted to $29,000 only $9,000 would be taxable; the first $5,000 of which would be subject to tax at the primary rate of 2%, whereas the last $4,000 would be taxable at twice the primary rate, or 4%. A brother or sister of a decedent is entitled to an exemption of only $500. Therefore, if a person received a $25,000 bequest from his brother, he would be taxed on $24,500 at the primary rate of 4%.

However, there are instances in which a beneficiary will not be entitled to claim his full exemption. Section 91-4421(3), R.C.M. 1947 provides that:

... As to his Montana exemption, each beneficiary shall be entitled to deduct only that portion represented by the ratio between his interest in the property in this state or within its jurisdiction, and his interest in the entire estate.

To illustrate, assume H leaves his minor child real estate valued at $4,000 located in State X, and also leaves him Montana real estate valued at $6,000. The minor child is entitled to a maximum personal exemption of $5,000. However, since the property received was neither "in this state or within its jurisdiction" the exemption must be apportioned. Here, only 3/5 of the property received by the minor child was located in Montana; therefore, he is entitled to claim only 3/5 of his maximum allowable exemption or $3,000 (3/5 X $5,000 = $3,000). This amount would be applied to reduce the amount of the Montana property subject to tax to $3,000 (Montana real estate valued at $6,000 less $3,000 allowable exemption).

VALUATION

No problem connected with the administration of inheritance taxes is more important than the problem of valuation. The amount of tax is dependent upon the value of the property transferred. Therefore, the tax cannot be accurately determined unless the value has first been properly ascertained.

The value of property is its clear market value. This principle, while easily stated, is often difficult in application. The process of valuation or of computing clear market value can be a complex process. The business of property valuation has become an occupation requiring no small amount of expertise. Professional appraisers can be found in almost every city. The list of books and chapters of treatises which have been written and are devoted solely to describing and explaining

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223 R.C.M. 1947, Sec. 91-4409 (1).
224 R.C.M. 1947, Sec. 91-4410 (1).
the principles of valuation is a long one. This chapter is neither designed
to parrot existing works nor to suggest innovations. Its purpose is to
outline the established Montana procedures for arriving at valuation and
to alert the practicing attorney to some of the more frequently encountered
pitfalls.

A. Procedures

One of the first things that an attorney who has been retained to
probate an estate must do is to see that the property owned by the de-
cedent is inventoried and valued. If he feels competent to do so, he may
value the property himself. However, in most cases it is better to have
the valuation made by a disinterested party who is neither the attorney
nor a beneficiary. Therefore, upon the application of the attorney or any
other interested party, the district court will appoint a special appraiser. The appraiser’s job is to value the decedent’s property at its clear market
value and report his findings to the court.

To assist the appraiser in performing his task, the Legislature has
granted him certain powers. After his appointment, he will notify by
mail all interested persons of the time and place when he will appraise
the property. He is empowered to issue subpoenas and compel the at-
tendance of witnesses who can furnish him information as to the property’s
worth. He may require that the witnesses testify under oath as to value.
In most cases, it will not be necessary for him to exercise these powers and
in many cases he will be able to value the property without the assistance
of witnesses. After he has secured sufficient information with which to
value the property he will return his findings to the court.

The court thereupon holds a hearing at which time it will examine
the appraiser’s report and hear any objections thereto. At this hearing,
the court will officially determine the value of the estate. The tax
is then computed on that value. As a matter of practice, the attorney
will normally have made all the computations for the convenience of the
court. If the appraiser’s report indicates the existence of a future
interest in the estate, the court can require its valuation by the Com-
missioner of Insurance. The State Board of Equalization is to be kept
informed of each stage in these proceedings and can intervene to assist
at any point.

As is apparent, the procedural aspects of valuation are relatively
logical and uncomplicated. Procedural problems, when they arise, are

See e.g., Bonbright, James C., Valuation of Property (2 vols. 1937); Paul, Randolph
E., Federal Estate and Gift Taxation, Ch. 18 (1941) and supplement (1946); Powell,
“Estate Tax Valuation” in The Estate Tax Handbook, 369 et. seq. (ed. by Lasser,
1951).
usually the result of a re-evaluation being made after the tax has been paid. The Montana inheritance tax law requires that the appraisal be made as soon after the date of death as is practicable. After the district court has determined the tax, the property is subject to reappraisal only within one year from the date of the court’s order. However, the federal government will frequently assign a different value to the property than was declared on the Montana return. If this is done more than one year after the district court has determined the tax, Montana is precluded from reappraising the property. Therefore, it is important that the original appraisal be an accurate one.

B. General Principles of Valuation

The degree of an appraisal’s accuracy will be partially dependent upon the type of property being appraised. The Montana statutes provide meager guidelines for the appraiser other than to say that he must value the property at its ‘'clear market value” or at its “fair market value.” Although there is probably no difference in the meaning of these two phrases, the statutes define neither one. The federal estate tax regulations define fair market value as:

... the price at which the property would change hands between a willing buyer and a willing seller; neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.

This classic definition is so vague and general as to be virtually meaningless in deciding specific valuations. Its use is somewhat suspect in light of the holding in State v. Hanson where the Montana Supreme Court held that “the consideration paid for property is not determinative of its value for inheritance tax purposes.” It is not clear from the decision whether the court meant to repudiate the federal definition of fair market value, but it seems unlikely that it did. There, the property had been purchased three years before death and there was an obvious disparity between the value at the date of purchase and the date of death. Consequently, it can probably be assumed that the language of the Hanson case can be qualified as meaning that the consideration paid for property is not determined by its value “when a substantial period of time has elapsed between the date of purchase and the date of death.”

It would be a rare situation where the decedent’s estate consisted of property which had not changed in value between the date of purchase and the date of death. Consequently, the appraiser will normally not rely on the purchase price as the sole indicia of value. He will instead
attempt to employ one or a combination of the three commonly recognized methods of valuation, i.e., the comparable sales method, the capitalization of earnings method, or the reproduction method.\footnote{Discussed in detail in Lowndes & Kramer, Estate and Gift Taxes, p. 445 (2d., ed. 1963).}

Comparable Sales Method: Some types of property can be valued by looking to the prices received from sales of identical or comparable property. Of course, no two pieces of property are truly identical. They may be comparable, but in making the comparison certain factors must be considered. Location, for example, may give one piece of real property more value than the piece adjacent to it. The date of sale of the property being compared may have affected the purchase price. The identity or relationship of the parties involved in the comparable sale may influence the price. All facts must be considered. Obviously, the greater the number of comparable sales, the more reliable the comparison.

Capitalization of Earnings Method: This method is an attempt to determine what an investor would pay for the property by capitalizing the earnings from it. It can be quite complex, but its underlying theory can be simply stated, i.e., property which can or does produce income is valued according to the amount of capital required to produce the same amount of income which is or can be produced by the property being valued. For example, if the estimated annual net income from a property is $40,000, and a fair rate of return from such property would be ten percent, the value of the property would be $400,000 ($40,000 divided by .10). This method has two defects which are immediately apparent: (1) the fair rate of return is based on an estimate, and (2) the future income from the property is not certain.

Reproduction Method: The third method is to determine the cost of reproducing the property at the time of valuation. Usually, this method is the least satisfactory of the three suggested. If the property is old, it may be impossible to determine the reproduction cost as of the more recent date of death; if it is so old as to be outmoded or discontinued, the cost of reproduction may give an obviously high and unreal value image. However, the method is useful if for no other reason than as a means with which to set a ceiling.

It is suggested that these three methods be used as a check upon each other. If the results obtained from their use are tempered by common sense, experience, expert judgment, and opinion, the ultimate figure arrived at will normally be acceptable. However, no general rule, formula, or method can be prescribed which would cover every type of property. Each kind of property has peculiar characteristics by which it can be valued. Some general observations can be made as to those classes.
C. Real Property

Realty, like all other types of property, must be valued at its clear market value as of the decedent’s death. Ordinarily, the best method of valuation is the comparable sales method. Of course, care should be exercised to insure that the comparable sale is truly comparable, i.e., that it involved property of like size and location, that the buildings located thereon, if any, were of similar style, age, condition, and used for similar purposes, and that the sale was made reasonably near the date of death as to decrease the possibility of a significant change of value in the interim.

It is preferable that real estate be valued by expert appraisers. The services of realtors, land agents, professional appraisers or engineers may be required to insure accuracy.

Special problems may arise with realty, such as how to value less than the whole interest. This may be required when the decedent had mortgaged his property or owned a leasehold. Under the federal estate tax, mortgaged property is included in the gross estate at its full value, but the mortgage is deducted as a claim against the estate. Under Montana law, because there is no express provision for making such a deduction, it appears that the appraiser would not err by simply listing the property at its full value less the value of the mortgage. It should make no difference in determining the property’s value, for the same value should result by both methods. There does not seem to be a prescribed rule for valuing a lessor’s leasehold interest. It appears to be a question of fact in each case. One rule frequently followed is to establish present value by the amount which the actual rental value exceeds the rent reserved in the lease. In the case of a mercantile building, the value of the leasehold is the present net worth of the estimated income to be received during the entire term of the lease, plus the income to be received during the renewal period, less the expenses of operation and management of the property. Depending on the term of the lease, the future value may have to be substantially discounted to arrive at an accurate present value.

In Montana it is not uncommon for a person to die seized of mineral, timber or oil rights. Expert appraisers are essential in the valuation of these types of interests. All of these interests have a common characteristic: their life is limited by eventual exhaustion and depletion. Usually the critical factor is the recoverable reserve which can seldom be accurately appraised by one who is not an expert in the field. This type of property is frequently valued with the aid of what is known as Hoskold’s formula.

D. Tangible Personal Property

There should be little difficulty in valuing tangible personality. Automobiles, jewelry, household goods, farm machinery, and other person.!
effects usually can be valued by use of the comparable sales or reproduction methods. As with all other property their value for inheritance tax purposes is their clear market value.

E. Listed and Active Securities

Besides real estate, most large estates consist of considerable possessions in the securities market. For valuation purposes, securities fall into two classes: those frequently traded in recognized markets and closely held securities. The value of public securities, or those which are traded in recognized markets can readily be ascertained by a reference to the trading prices on the day of death. However, this is not always as simple as it may seem. For example, is a large block of stock worth the same per share as a single share? This question has attracted considerable attention and no definite answer has yet been reached. Perhaps one of the best suggested solutions is to treat the question as a matter of evidence and not indulge in doctrinaire assumptions.

Counsel often finds that the stock owned by the decedent was traded within a given price range on the date of his death. For example, it may have sold as high as $100 per share and as low as $90 per share. Ordinarily, assuming that a proportionate amount of shares sold at both prices, the mean value, or $95 would be acceptable for tax purposes. If the decedent dies on a day when the stock did not trade, the mean value of the stock's highest and lowest prices on the nearest trade days before and after the date of death will be acceptable.

Unlisted securities can be more problematical than listed securities. The federal estate tax regulations provide that the actual ask and bid prices may be used for valuing these securities in the same manner as listed securities. However, care must be exercised to determine that sales of unlisted securities were not forced sales or due to some artificial trading influence which did not present a true picture of the stock's actual value.

F. Closely Held or Inactive Securities

Closely held securities pose the most difficult problems of valuation. They are seldom, if ever, traded and consequently have no established market. Any sales of closely held stock should be rigorously examined before attempting to use the comparable sales method of valuation. Such sales are usually accompanied by some intent to make a gift and are thus not true indicators of the stock's actual worth.

The United States Treasury has established some general guidelines with which to value closely held securities. Revenue ruling 59-60 lists the following considerations:

(a) The nature of the business and its history.

\[\text{\ttInt. Rev. Regs., Sec. 20.2031-2(b).}\]

\[\text{\tt1956-1 C.B. 237.}\]
(b) The economic outlook in general and the condition and outlook of the industry in particular.

c) The book value of the stock.

d) The company’s earning capacity.

e) The company’s dividend paying capacity.

f) Good will and other intangible values.

g) The relative size of the block of stock to be valued.

h) Sales of similar stocks.

It goes without saying that this list is not all-inclusive. The capitalization method of valuation is frequently employed in valuing these securities. Its use will of course be determined by the facts.

A more detailed discussion of the problems inherent in the valuation of closely held securities is beyond the scope of this article. The practitioner who is not experienced in this area and who does not consider himself an expert in the principles of valuation is well advised to seek assistance from professional appraisers.

G. Life Estates and Remainders

The Montana inheritance tax law provides that, if requested by the district judge, or the State Board of Equalization, the Montana Commissioner of Insurance will determine the value of life estates and remainders. His certificate is presumptive evidence that the method of computation adopted therein is correct.242 However, every practitioner should want to have at least an approximate idea of what this value will be before he files his petition for the determination of the inheritance tax with the district court.

Most states determine the value of life estates and remainders by use of mortality tables. Montana is no exception, and the American Experience Table With Interest at Five Percent243 is in use in this state.244

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242 R.C.M.1947, Sec. 91-4431.
243 AMERICAN EXPERIENCE TABLE WITH INTEREST AT 5 PERCENT WITH CRAIG’S EXTENSION BELOW AGE 10.

Annuity or Present Value of $1 Due at the End of Each Year During the Life of A Person of Specific Age

<table>
<thead>
<tr>
<th>AGE</th>
<th>Annuity or Present Value of $1 Due at the End of Each Year During the Life of A Person of Specific Age</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>12.818</td>
</tr>
<tr>
<td>1</td>
<td>14.922</td>
</tr>
<tr>
<td>2</td>
<td>15.781</td>
</tr>
<tr>
<td>3</td>
<td>16.125</td>
</tr>
<tr>
<td>4</td>
<td>16.346</td>
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<tr>
<td>5</td>
<td>16.472</td>
</tr>
<tr>
<td>6</td>
<td>16.535</td>
</tr>
<tr>
<td>7</td>
<td>16.561</td>
</tr>
<tr>
<td>8</td>
<td>16.560</td>
</tr>
<tr>
<td>9</td>
<td>16.540</td>
</tr>
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<td>10</td>
<td>16.50475</td>
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<tr>
<td>11</td>
<td>16.46076</td>
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<tr>
<td>12</td>
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<tr>
<td>13</td>
<td>16.36642</td>
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<tr>
<td>14</td>
<td>16.31551</td>
</tr>
<tr>
<td>15</td>
<td>16.26274</td>
</tr>
</tbody>
</table>

Annuity or Present Value of $1 Due at the End of Each Year During the Life of A Person of Specific Age

244 https://scholarship.law.umt.edu/mlr/vol31/iss2/1
It is relatively simple to use. For example, assume A, age 50, receives property with a present value of $10,000 for life, with remainder over to B. The value of A's life estate is $5,830.88; B's remainder is worth $4,169.12, computed as follows:

Annual income = $500 ($10,000 × 5%).

Value of A's life estate = $5,830.88 ($500 × factor of 11.66175 from table).

Value of B's remainder = $4,169.12 ($10,000 — $5,830.88, value of A's life estate).

Of course, few persons, including life tenants, die in accordance with mortality table calculations. If a life tenant should die substantially prior to the time predetermined by the table, his estate may be entitled to a refund for excess inheritance taxes paid. Of course, the early demise of a life tenant would increase the value of the remainder and the remainderman would then be expected to pay an additional tax commensurate with that being returned to the estate of the life tenant.

When successive life estates are involved, the computation becomes exceedingly complex. To insure accuracy, it is suggested that the practitioner co-ordinate his computations with the Inheritance Tax Division of the State Board of Equalization.

245R.C.M.1947, Sec. 91-4432.

246R.C.M.1947, Sec. 91-4433 provides, inter alia for the return of taxes paid when a life estate has been defeated or abridged.
THE MONTANA ESTATE TAX

A. Historical Basis

There are only two basic types of death taxes imposed in the United States. The most common form is the inheritance tax which is utilized in 37 states and the District of Columbia. In theory, the inheritance tax is levied on the respective shares each beneficiary receives from the estate. The second form of death taxation is the estate tax which is imposed by 8 states and the federal government. The estate tax is levied against the decedent’s estate before any distribution is made. Only one state, Rhode Island, imposes both an estate and an inheritance tax and only Nevada levies no death tax at all.

Most states which impose an inheritance tax also impose an additional “pick up” tax, which is labeled as an estate tax. Montana’s “estate” tax, section 91-4411, R.C.M. 1947, is a “pick up” tax. It is not a true estate tax, but is instead intended to take advantage of the maximum federal credit for death taxes paid to the state. This “pick up” or “estate” tax can only be understood in light of the history of the evolution of the federal estate death tax credit.

The federal estate tax was originally enacted in 1916. This tax was particularly disturbing to many states which clamored for the federal government to withdraw from the field of death taxation. Consequently, the United States Revenue Act of 1924 made provision for a credit of up to 25 percent of the federal tax for death taxes paid to the states. Unsatisfied, the states persisted in their demands for total federal withdrawal. To appease these demands, the United States Revenue Act of 1926 increased the state death tax credit to 80 percent of the federal tax. Under the 1926 act, the taxpayers who had a $1,000 federal estate tax liability could deduct 80 percent of the tax, i.e., $800, and pay that amount to the state, provided that the state imposed a death tax under which it could accept such payment. To take advantage of this provision, most states, including Montana, enacted “pick up” taxes which simply imposed a tax equal to the difference between the amount due under the state’s inheritance tax and the amount representing 80 percent of the federal estate tax. Thus, if a decedent’s gross federal estate tax was $1,000

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346 States imposing an estate tax are Arizona, Mississippi, New York, North Dakota, Oklahoma, Rhode Island, South Carolina and Utah. Legislative research commissions in Kentucky and Indiana have recommended adoption of an estate tax to replace the inheritance tax presently in use in those states. These recommendations were made in 1961 and 1966 respectively.

347 Article 10, sec. I of the Nevada Constitution prohibits the Nevada legislature from imposing any estate or inheritance tax.
and Montana's inheritance tax was only $650, the additional estate tax picked up the additional $150. The computation was as follows:

<table>
<thead>
<tr>
<th>Gross federal estate tax</th>
<th>$1,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>80% credit</td>
<td>$800</td>
</tr>
<tr>
<td>Montana inheritance tax</td>
<td>650</td>
</tr>
<tr>
<td>Montana &quot;estate&quot; tax</td>
<td>$150</td>
</tr>
</tbody>
</table>

Total tax paid to Montana $800
Total tax paid to United States $200

This system worked well, especially for the states. The states found it especially easy to administer. However, in 1932 the federal government found it necessary to augment the country's revenues and it was decided to raise a substantial amount of these revenues by means of the estate tax. The state tax credit presented a considerable problem, however, for if the rates were simply increased, most of the revenues would pass to the states. Consequently, the federal tax structure was revised so that the state tax credit was computed on the basis of the taxable estate rather than as a percentage of the gross estate tax. The result of this revision was that the relative positions of the states and the federal government almost reversed themselves. Today the states now collect about 20 percent of the total death taxes, whereas, the federal government collects 80 percent.

B. Validity of Section 91-4411

Unfortunately, the Montana "pick up" or "estate" tax failed to keep pace with the evolution of the federal estate tax. Until 1969 the Montana estate tax remained in its original form. Originally enacted in 1933, section 91-4411 was the typical state "pick up" tax, providing that:

In addition to the taxes hereinabove imposed (by the inheritance tax) an estate tax is hereby imposed upon the transfer of all estates which are subject to an estate tax under the provisions of the United States Revenue Act of 1926, and amendments thereto. . . . The amount of said estate tax shall be equal to the extent, if any, of the excess of the credit not exceeding eighty percent (80%) allowable under said United States Revenue Act, over the aggregate amount of all estates, inheritances, transfer, legacy and succession taxes paid to any state or territory or the District of Columbia. . . .

Thus, between 1933 and 1969, Montana has imposed an estate tax under this section. Evidently, it was never realized that the 1926 Revenue Act was repealed in 1939.248 This is significant since by the wording of section 91-4411, only those estates which are subject to the 1926 act or amendments thereto, are subject to the tax imposed by section 91-4411. Since no estates have been subject to the 1926 act since its repeal in 1939, it could be concluded that any taxes levied since 1939 under section 91-4411 were improperly collected.

In 1945, in *Edenborn v. Flornoy*, the Louisiana "pick up" tax was unsuccessfully attacked on this basis. In pertinent part, the Louisiana statute was identical to section 91-4411, i.e., the tax was imposed upon "all estates which are subject to taxation under the Federal Revenue Act of 1926." The Louisiana Supreme Court held that the statute should be construed liberally to obtain its purpose and found that substantially the same language of the 1926 Statute was carried over in the 1939 Internal Revenue Code. Thus, despite the fact that the 1926 Act had been repealed, the estate was subject to the tax.

*Edenborn v. Flornoy* was decided in 1945. In 1954 a new Internal Revenue Code was enacted which repealed the 1939 Internal Revenue Code relied upon in that case. The 1954 Code resulted in major changes designed to simplify terminology and modes of computation. Consequently, it is unknown whether the rationale of the *Edenborn* case would be applicable today.

The anachronistic reference by section 91-4411 to the 1926 Act was brought to the attention of the 1969 Montana Legislature which, by unanimous consent of both houses, deleted all reference to that act substituting therefore the words "Internal Revenue Code of 1954." The amendment was effective upon its approval by the Governor on March 14, 1969.

It is submitted that the amendment is probably a satisfactory stop-gap measure which will preclude a successful future attack on the tax. Yet to be resolved is whether section 91-4411 was invalid during the 30 years between the repeal of the 1926 Act in 1939 and the 1969 amendment of section 91-4411. Certainly the taxpayer has nothing to gain by challenging the act and suing for a refund of the tax paid to the state. He pays the same amount of gross tax regardless of the act's validity. If he was successful, the amount recovered from the state would simply be disallowed as a federal tax credit and would have to be paid over to the federal government. There is no question of double taxation. If any amount of state loyalty can be attributed to a taxpayer, he probably would rather have his tax payments received by the state government which is closer to home than the federal government.

The federal government is the only party which has any incentive for attacking the validity of section 91-4411 in its pre-1969 form. The taxes paid to Montana under that section could be disallowed as a state
tax credit. However, there are several reasons why the federal government would not be anxious to contest the act's validity. First, the federal government's claim would have to be against the taxpayer, since there is no "privity" as such between the federal and state governments in regard to the amount of tax owed by the taxpayer. The taxpayer in turn would have to recover from the state. This seems to be a lot of trouble for the federal government to go to in order to recover a relatively small amount. Second, it would require a disproportionate amount of research on the part of the federal government to ferret out those few Montana estates which paid any tax under section 91-4411. Third, empirically, the federal government has adopted a relatively lax approach in regard to the validity of state taxes. There is something inherently unfair about the big guy offering the little guy a piece of candy and then taking it back just because the little guy could not unwrap it.

C. Other Problems with the Montana "Estate" Tax

Aside from the question of the validity of section 91-4411, other substantial problems exist in the application of that section. As discussed above, the tax is not a true estate tax, but instead is a "pick up" tax. A major problem arises, however, in determining the amount to be "picked up." This computation was simple to determine while the 1926 Act was viable. It was simply the difference between 80 percent of the total federal estate tax and the amount levied by the Montana inheritance tax. However, the language directing the determination of the amount of the tax was not changed either when the 1926 Act was repealed nor when section 91-4411 was amended in 1969. As a result, the present section is pieced together with parts that do not interrelate. After the 1969 amendment the language of section 91-4411 makes it appear that the Montana estate tax is equal to 80 percent of the tax imposed by the federal government less the amount of the Montana inheritance tax due. If so, the Montana estate tax has lost its character as a "pick up" tax. This is because the federal estate tax credit is no longer computed as it was in 1926, i.e., by simply allowing a credit equal to 80 percent of the gross federal estate tax. Instead, it is computed by applying predetermined rates against the taxable estate, which rate varies according to the size of the taxable estate. To illustrate, if a Montana resident bequeathed a taxable estate of $5,000,000 to his wife, the state tax credit allowable on his federal estate tax return would be $398,320; his Montana inheritance tax would be $396,100; the difference would be $2,200. Is this the amount of the Montana "estate" tax? The amended statute provides that the amount of tax is equal to "the excess of the credit of not exceeding eighty percent (80%) allowable under the Internal Revenue Code of 1954 over the aggregate amount (of the Montana inheritance tax)" (emphasis added). It is submitted that the language of the statute as it currently exists is unintelligible, unless the italicized words are deleted. If this is done, it becomes readily apparent that the "estate" tax is a "pick up" tax equal to the difference between the federal estate tax credit and the Montana

inheritance tax.
It is submitted that the next session of the Montana Legislature should strike the words "of not exceeding eighty percent (80%)" from section 91-4411. This phrase was viable when that section was based on the 1926 Revenue Act, but it is only a confusing bit of verbiage today.

Besides the problem of ascertaining the amount of tax imposed by section 91-4411, other problems exist with that section. For example, there is a conflict between subsection (d) of section 91-4411 and section 91-4415. The former states that the estate tax "shall be, and remain a lien on the property subject to the tax until the same are paid" (emphasis added) whereas section 91-4415 provides that the lien shall exist "for a period of ten years" (emphasis in original statute) unless sooner paid.

Another problem which may be overlooked by the practitioner is the date that the estate tax is due. Section 91-4411(b) provides that the tax is due at the same time the federal estate tax is due. Section 6075(a) of the Internal Revenue Code of 1954 provides that the federal estate tax is due 15 months from the date of death. Most practitioners are no doubt aware of and try to take advantage of the provisions of section 91-4416 which permit a 5 percent discount on the inheritance tax if such tax is paid within 18 months of death. However, the practitioner who conscientiously insures that the inheritance tax is paid on the 18th month may be surprised to find that he is three months late in paying the Montana estate tax, and that the estate is subject to an interest penalty rather than a discount.

D. Conclusion

The Montana "estate" tax is not an estate tax at all, but is in reality a "pick up" tax which is designed to capture the maximum amount allowed by the federal government as a state death tax credit. In theory, the idea is fine. In practice, the tax is probably seldom applied. The smallest estates to which it can possibly apply are those whose taxable estate, i.e., after deductions, are approximately five million dollars, and only then if the entire amount was left to beneficiaries in the most preferred tax bracket such as the wife or children. Consequently, it is doubtful that the tax is being applied in very many Montana estates. Unfortunately, no statistics have been compiled with which to determine the frequency of its application.

CONCLUSION

Throughout this paper various conclusions and recommendations have been made. It appeared to be more logical to draw those conclusions and make those recommendations at the time the facts supporting them were under discussion rather than to reserve them for the final chapter. Accordingly and because of the length of this paper, no conclusions as to specific sections of the existing death taxes will be made here.

Instead, however, some general ruminations and evaluations appear to be in order. It appears that the Montana death tax structure, like
most tax structures, is like an old house which through the years has been partially torn down, partly rebuilt, and patched on not infrequent occasions. Some rooms of the house are modern, but the decor of many others is in sad need of remodeling. The time is fast approaching when the Montana Legislature, like the owner of the old house, must decide whether to raze the structure and build anew, or continue to suffer its antiquity.

Fortunately, for the owner of the house, he has certain tangible guidelines upon which to base his decision. Unfortunately, for the Montana Legislature, no such obvious guidelines exist for no study has ever been made of this tax structure. Perhaps the major point of this paper has been to point out the need for such a study.

When and if this study is made, serious consideration should be given to determining whether Montana should abolish its inheritance tax and enact a pure estate tax. It has proven impossible to devote a separate chapter to this possibility simply because of the lack of information with which to adequately evaluate the existing death tax. However, an estate tax has sufficient enticing features that it warrants some comment at this point. The primary advantage of an estate tax is its simplicity of administration in comparison to the inheritance tax. Under an estate tax, once the net taxable estate has been determined, it is only necessary to apply the successive rates to that figure in order to determine the tax due. In most cases, this relieves the administrators, executors, attorneys, courts, and the State Board of Equalization from construing wills and determining the rights of individual beneficiaries in order to determine the tax. It would no longer be necessary to labor over computation of contingent interests. Sizeable estates frequently involve at least one and possibly multiple life estates and remainders. Montana, like most states, requires that each such interest be valued and this seldom results in accurate appraisals. As noted earlier, if a life estate is cut short the life tenant or his estate has the right to claim a refund. Thus, just because an estate has been closed does not necessarily mean that problems will not arise again. Further, collection of the inheritance tax may be delayed for long periods of time while the estate is being valued or if the valuation is contested. These types of problems are not apt to arise as frequently, if at all, with an estate tax.

South Carolina adopted an estate tax in 1961. Prior to that time it was estimated that in about 45% of the estates administered in that state a will was probated and about 60% of those wills provided for a future interest. After the adoption of an estate tax and a $60,000 exemption, the Director of the South Carolina Estate Tax Division reported that:

The administrative cost, due to the tremendous decrease in returns of a nonrevenue producing nature that were formerly processed, has been minimized to a point of insignificance. Through an effective selective audit program with the federal government by
means of interchange of audit reports, deficiency collections have
more than doubled with no increase in our present audit staff. . . .
The estate tax is an administrator's tax in every respect.253

Montana evidently experiences much the same problems as did South
Carolina in having to process a large number of nonproductive returns.
As seen earlier, approximately one-half of all inheritance tax returns filed
in Montana do not produce a cent of revenue.254 Further, it appears
that about two-thirds of the estates taxed are valued at less than $60,000.255
Because of the lack of information on this point, these figures of necessity
have been derived in a round-about manner. However, in the absence
of countervailing indications it must be concluded that most of Mon-
tana's death taxes are paid by only about one-third of the estates taxed,
or about one-fifth of the total estates processed. If so, too much time is
wasted in processing nonproductive estates. The system which requires
this waste is defective and in need either of overhaul or replacement.

The adoption of an estate tax with a definition of gross estate and
an exemption equal to that of the federal estate tax would have other
significant advantages. For example, there should be an important decrease
in enforcement costs and at the same time enforcement efficiency should
be increased. This should result, at least in part, from the state's being
able to take advantage of the comprehensive federal tax audit system.
Further, the state could rely, at least in part, on the federal estate tax
regulations as a means of interpreting the state tax laws. Also, the
extensive body of case law dealing with the federal estate tax would be
applicable.

Adoption of an estate tax would also benefit the taxpayers. Once
the federal return is completed the information can simply be transferred
to a similar state tax form as is done with Montana's income tax. The
more closely the state tax corresponds to the federal base the greater
becomes this advantage. Further, the practitioner would no doubt like
to have some reference work upon which to rely when planning estates.
Montana presently has no death tax regulations, nor does it promulgate
the administrative decisions of the State Board of Equalization. If an
estate tax was adopted, it would be much simpler to adopt such regulations
and interpretative guides than if they had to be written from scratch as
would be the case if the inheritance tax is continued.

It is beyond the scope of this paper to propose in detail the specific
provisions of an estate tax that might be best for this state. Indeed,
until it is determined whether the inheritance tax has outlived its
function such proposals would be premature. Suffice it to say that
if the decision is ever made to institute an estate tax in this state,

253Letter from Lovick N. Hornsby, Director, Estate Tax Division, South Carolina Tax
Commission, to the Indiana Commission on State Tax and Financing Policy, July 6,
1966, as cited in 'Death Taxation,' Indiana Commission on State Tax and Financing
254See Table 7, Appendix.
255See Table 8, Appendix.
reference should be made to the statutes being postulated or promulgated by the increasing number of states which are contemplating or adopting this form of death taxation.

APPENDIX

STATISTICAL ANALYSIS OF THE MONTANA DEATH TAXES

It appears that this is the first attempt to analyze the Montana death taxes from a statistical point of view. From time to time, the Montana Legislative Council causes studies to be made of various Montana tax structures but so far the Montana death taxes have escaped scrutiny. This is not surprising in light of the paucity of available statistics with which to conduct such a study. The statistics utilized in this analysis, except where otherwise indicated, were gleaned from the records of the inheritance tax division of the Montana Board of Equalization. They were obtained without the aid of electronic data processing equipment since such equipment has not yet been made available to that department.

It is unfortunate that modern means of data compilation are not available with which to gather information about the Montana death taxes. Death taxes have consistently been a steady and important source of the state's total tax revenue. As indicated by Table 1, the inheritance and estate taxes have accounted for 5.2 percent of the state's total tax receipts over a 13-year period.

For a 10-year period following 1959, the Montana death tax collections experienced a growth rate roughly equivalent to the increase in gross tax receipts, as evidenced by Chart 1.

TABLE 1
MONTANA DEATH TAX COLLECTIONS AS PERCENT OF TOTAL STATE TAX REVENUE, 1956-1968

<table>
<thead>
<tr>
<th>YEAR</th>
<th>TOTAL GENERAL FUND REVENUE (Thousands)</th>
<th>TOTAL DEATH TAX COLLECTIONS (Thousands)</th>
<th>PERCENTAGE OF TOTAL REVENUE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1956</td>
<td>25,223</td>
<td>1,471</td>
<td>5.8%</td>
</tr>
<tr>
<td>1957</td>
<td>28,875</td>
<td>1,341</td>
<td>4.6%</td>
</tr>
<tr>
<td>1958</td>
<td>31,382</td>
<td>1,692</td>
<td>5.3%</td>
</tr>
<tr>
<td>1959</td>
<td>34,761</td>
<td>2,098</td>
<td>6.0%</td>
</tr>
<tr>
<td>1960</td>
<td>38,089</td>
<td>1,878</td>
<td>4.9%</td>
</tr>
<tr>
<td>1961</td>
<td>39,358</td>
<td>1,992</td>
<td>5.0%</td>
</tr>
<tr>
<td>1962</td>
<td>42,102</td>
<td>2,186</td>
<td>5.1%</td>
</tr>
<tr>
<td>1963</td>
<td>42,162</td>
<td>2,094</td>
<td>4.9%</td>
</tr>
<tr>
<td>1964</td>
<td>45,468</td>
<td>2,404</td>
<td>5.2%</td>
</tr>
<tr>
<td>1965</td>
<td>48,701</td>
<td>2,600</td>
<td>5.3%</td>
</tr>
<tr>
<td>1966</td>
<td>51,548</td>
<td>2,833</td>
<td>5.4%</td>
</tr>
<tr>
<td>1967</td>
<td>57,829</td>
<td>2,865</td>
<td>4.9%</td>
</tr>
<tr>
<td>1968</td>
<td>62,444</td>
<td>3,078</td>
<td>4.9%</td>
</tr>
<tr>
<td>Thirteen years</td>
<td>548,132</td>
<td>28,529</td>
<td>5.2%</td>
</tr>
</tbody>
</table>


2 The most recent published study is the "Montana Taxation Task Force Papers" (1966).
CHART 1

COMPARISON OF GROSS TAX RECEIPTS AND MONTANA INHERITANCE TAX RECEIPTS 1959-1968

Gross Tax Receipts (millions) vs. Inheritance Tax Receipts (millions)


3.0 2.5 2.0 1.5

60 50 40 30

https://scholarship.law.umt.edu/mlr/vol31/iss2/1
The relative importance of death taxes as a source of Montana revenue is further evidenced by Table 2 which compares 1968 death tax collections with the actual expenditures of selected vital governmental agencies during the same year.

**TABLE 2**

**COMPARISON OF 1968 MONTANA DEATH TAX COLLECTIONS WITH ACTUAL EXPENDITURES OF SELECTED STATE AGENCIES 1968**

<table>
<thead>
<tr>
<th>Death tax collections, 1968</th>
<th>$3,078,477</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expenditures, Selected agencies, 1968:</td>
<td></td>
</tr>
<tr>
<td><strong>Elected Officials</strong></td>
<td>$1,139,100</td>
</tr>
<tr>
<td>Includes: Attorney General, Auditor, Governor, Railroad Commissioners, Secretary of State, Supreme Court, Treasurer.</td>
<td></td>
</tr>
<tr>
<td><strong>General Government</strong></td>
<td>$3,082,894</td>
</tr>
<tr>
<td>Includes: Department of Administration, County Attorneys, Office of Economic Opportunity, Board of Equalization, Board of Examiners, Historical Society, Coordinator of Indian Affairs, District Judges, Department of Labor and Industry, Lands and Investments, Law Library, Library Commission, Board of Pardons, Department of Planning and Economic Development.</td>
<td></td>
</tr>
<tr>
<td><strong>Agriculture and Natural Resources</strong></td>
<td>$3,040,070</td>
</tr>
<tr>
<td><strong>Public Safety</strong></td>
<td>$2,810,000</td>
</tr>
<tr>
<td>Includes: Adjutant General, Civil Defense, Highway Patrol.</td>
<td></td>
</tr>
</tbody>
</table>

Thus, it may be concluded that while the Montana death taxes are not a major source of revenue in the sense that they do not contribute a large percentage of the gross receipts, they are an important source for two reasons. First, the amount collected is significant. Second, it is a stable source with a growth rate comparable to that of the gross tax receipts.

When compared with all other states, death taxes play a more important role in Montana's economy than in all but two other states. Table 3 shows that Montana is surpassed only by Connecticut and New Jersey in the ratio of death taxes to all other forms of state revenue.

**TABLE 3**

**ALL STATE COMPARISON OF DEATH TAX AS SOURCE OF TOTAL STATE TAX REVENUES, 1968**

<table>
<thead>
<tr>
<th>STATE</th>
<th>TOTAL TAX REVENUE, 1968 (Thousands)</th>
<th>DEATH AND GIFT TAX COLLECTIONS, 1968 (Thousands)</th>
<th>PERCENTAGE OF TOTAL REVENUE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>531,662</td>
<td>1,368</td>
<td>.2%</td>
</tr>
<tr>
<td>Alaska</td>
<td>60,402</td>
<td>170</td>
<td>.2%</td>
</tr>
<tr>
<td>Arizona</td>
<td>315,916</td>
<td>2,323</td>
<td>.7%</td>
</tr>
<tr>
<td>Arkansas</td>
<td>289,644</td>
<td>701</td>
<td>.2%</td>
</tr>
<tr>
<td>California</td>
<td>4,663,369</td>
<td>142,651</td>
<td>3.0%</td>
</tr>
<tr>
<td>Colorado</td>
<td>361,251</td>
<td>10,586</td>
<td>2.9%</td>
</tr>
<tr>
<td>Connecticut</td>
<td>499,826</td>
<td>38,347</td>
<td>7.6%</td>
</tr>
<tr>
<td>Delaware</td>
<td>144,789</td>
<td>6,013</td>
<td>4.1%</td>
</tr>
<tr>
<td>Florida</td>
<td>373,130</td>
<td>13,360</td>
<td>3.5%</td>
</tr>
<tr>
<td>Georgia</td>
<td>737,181</td>
<td>5,701</td>
<td>1.7%</td>
</tr>
<tr>
<td>Hawaii</td>
<td>242,655</td>
<td>1,606</td>
<td>.6%</td>
</tr>
<tr>
<td>Idaho</td>
<td>136,788</td>
<td>1,283</td>
<td>.9%</td>
</tr>
<tr>
<td>Illinois</td>
<td>1,730,634</td>
<td>44,583</td>
<td>2.5%</td>
</tr>
<tr>
<td>Indiana</td>
<td>819,152</td>
<td>21,205</td>
<td>2.5%</td>
</tr>
<tr>
<td>Iowa</td>
<td>502,453</td>
<td>15,102</td>
<td>3.0%</td>
</tr>
<tr>
<td>Kansas</td>
<td>357,045</td>
<td>7,501</td>
<td>2.1%</td>
</tr>
<tr>
<td>Kentucky</td>
<td>509,316</td>
<td>9,507</td>
<td>1.8%</td>
</tr>
<tr>
<td>Louisiana</td>
<td>740,436</td>
<td>6,160</td>
<td>.8%</td>
</tr>
<tr>
<td>Maine</td>
<td>146,145</td>
<td>4,667</td>
<td>3.1%</td>
</tr>
<tr>
<td>Maryland</td>
<td>711,368</td>
<td>7,455</td>
<td>.9%</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>1,033,369</td>
<td>38,301</td>
<td>3.7%</td>
</tr>
<tr>
<td>Michigan</td>
<td>1,886,629</td>
<td>25,032</td>
<td>1.3%</td>
</tr>
<tr>
<td>Minnesota</td>
<td>815,122</td>
<td>18,392</td>
<td>2.2%</td>
</tr>
<tr>
<td>Mississippi</td>
<td>322,520</td>
<td>1,459</td>
<td>.4%</td>
</tr>
<tr>
<td>Missouri</td>
<td>656,967</td>
<td>11,650</td>
<td>1.7%</td>
</tr>
<tr>
<td>Montana</td>
<td>102,394</td>
<td>3,078</td>
<td>4.9%</td>
</tr>
</tbody>
</table>
In 1968, death taxes represented 4.9 percent of Montana’s total tax receipts while the average for all states during that same period was only 2.4 percent. A geographical breakdown shows that Montana relies more heavily on its death taxes as a source of revenue than do its neighboring states.

TABLE 4
DEATH AND GIFT TAXES AS A PERCENT OF GROSS TAX RECEIPTS, SELECTED STATES, 1968

<table>
<thead>
<tr>
<th>STATE</th>
<th>PERCENTAGE OF GROSS TAX RECEIPTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Montana</td>
<td>4.9%</td>
</tr>
<tr>
<td>Oregon</td>
<td>3.1%</td>
</tr>
<tr>
<td>Colorado</td>
<td>2.9%</td>
</tr>
<tr>
<td>Washington</td>
<td>2.5%</td>
</tr>
<tr>
<td>South Dakota</td>
<td>1.7%</td>
</tr>
<tr>
<td>Wyoming</td>
<td>.9%</td>
</tr>
<tr>
<td>Idaho</td>
<td>.9%</td>
</tr>
<tr>
<td>North Dakota</td>
<td>.6%</td>
</tr>
</tbody>
</table>

One reason that death taxes play a larger role in Montana’s economy than in most other states is because Montana has a small population with relatively little industry. Consequently, there is not as much concentration of capital and there are also fewer opportunities to levy taxes. Thus, it is possible that Montana’s death tax structure, if imposed in another state, would produce proportionately less income in a more populous and more heavily industrialized state.

However, one reason that the amount of income generated by Montana’s death taxes is proportionately greater than that generated by states with similar population density is that Montana’s death tax rates are simply higher. In fact, Montana’s death taxes are among the highest in the Nation, as is evidenced by the high percentage of death and gift taxes as a percent of gross tax receipts.
### TABLE 5

**STATE DEATH TAXES ON SELECTED SIZE ESTATES, LEFT ONE-HALF TO THE WIFE AND ONE-FOURTH TO EACH OF TWO ADULT CHILDREN**

<table>
<thead>
<tr>
<th>Rank</th>
<th>(Net Estate After Deductions but Before Specific Exemptions)</th>
<th>$25,000</th>
<th>$50,000</th>
<th>$100,000</th>
<th>$400,000</th>
<th>$1,000,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Penn.</td>
<td>$480</td>
<td>Penn.</td>
<td>$980</td>
<td>$3,750</td>
<td>$33,250</td>
</tr>
<tr>
<td>2.</td>
<td>Md.</td>
<td>250</td>
<td>Wisc.</td>
<td>806</td>
<td>2,756</td>
<td>24,590</td>
</tr>
<tr>
<td>3.</td>
<td>Wisc.</td>
<td>221</td>
<td>R. I.</td>
<td>800</td>
<td>2,560</td>
<td>24,520</td>
</tr>
<tr>
<td>4.</td>
<td>La.</td>
<td>200</td>
<td>La.</td>
<td>750</td>
<td>2,529</td>
<td>18,525</td>
</tr>
<tr>
<td>5.</td>
<td>R. I.</td>
<td>200</td>
<td>W. Va.</td>
<td>750</td>
<td>2,260</td>
<td>18,725</td>
</tr>
<tr>
<td>6.</td>
<td>Mont.</td>
<td>170</td>
<td>Mass.</td>
<td>700</td>
<td>2,100</td>
<td>10,050</td>
</tr>
<tr>
<td>7.</td>
<td>Tenn.</td>
<td>150</td>
<td>Ky.</td>
<td>600</td>
<td>2,025</td>
<td>7,050</td>
</tr>
<tr>
<td>8.</td>
<td>Mass.</td>
<td>150</td>
<td>Tenn.</td>
<td>525</td>
<td>1,980</td>
<td>5,540</td>
</tr>
<tr>
<td>9.</td>
<td>N. Mex.</td>
<td>150</td>
<td>Mont.</td>
<td>520</td>
<td>1,950</td>
<td>5,025</td>
</tr>
<tr>
<td>10.</td>
<td>N. Car.</td>
<td>110</td>
<td>Utah</td>
<td>500</td>
<td>1,900</td>
<td>5,190</td>
</tr>
</tbody>
</table>

It is apparent from Table 6 that the total tax collected, the total number of estates paying tax, and the average tax paid per estate taxed have all enjoyed a steady rate of growth. The 1968 figures are well in excess of the ten-year averages.

**TABLE 6**

**AVERAGE MONTANA INHERITANCE TAXES PAID, 1959-1968**

<table>
<thead>
<tr>
<th>YEAR</th>
<th>TOTAL MONTANA INHERITANCE TAX PAID (Thousands)</th>
<th>NUMBER OF ESTATES IN WHICH TAX PAID</th>
<th>AVERAGE TAX PAID PER TAXED ESTATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1959</td>
<td>$2,089</td>
<td>1755</td>
<td>$1,190</td>
</tr>
<tr>
<td>1960</td>
<td>$1,878</td>
<td>1767</td>
<td>$1,062</td>
</tr>
<tr>
<td>1961</td>
<td>$1,992</td>
<td>1829</td>
<td>$1,089</td>
</tr>
<tr>
<td>1962</td>
<td>$2,186</td>
<td>1805</td>
<td>$1,211</td>
</tr>
<tr>
<td>1963</td>
<td>$2,094</td>
<td>1923</td>
<td>$1,089</td>
</tr>
<tr>
<td>1964</td>
<td>$2,404</td>
<td>2154</td>
<td>$1,116</td>
</tr>
<tr>
<td>1965</td>
<td>$2,600</td>
<td>2078</td>
<td>$1,251</td>
</tr>
<tr>
<td>1966</td>
<td>$2,833</td>
<td>2150</td>
<td>$1,317</td>
</tr>
<tr>
<td>1967</td>
<td>$2,865</td>
<td>2031</td>
<td>$1,410</td>
</tr>
<tr>
<td>1968</td>
<td>$3,978</td>
<td>1988</td>
<td>$1,548</td>
</tr>
<tr>
<td></td>
<td><strong>Ten-Year Averages</strong></td>
<td>1948</td>
<td><strong>$1,233</strong></td>
</tr>
</tbody>
</table>

In Montana, the State Board of Equalization must certify the amount of tax due in each estate administered or probated. In many cases, no tax will be due but a certificate must nonetheless be issued to that effect. Table 7 shows that over a ten-year period, only about one-half of the estates requiring certification were taxable estates.

**TABLE 7**

**NUMBER OF ESTATES IN WHICH NO DEATH TAXES WERE PAID, 1959-1968**

<table>
<thead>
<tr>
<th>YEAR</th>
<th>TOTAL CERTIFICATES ISSUED</th>
<th>NUMBER OF ESTATES IN WHICH NO TAX DUE</th>
<th>PERCENTAGE OF ESTATE IN WHICH NO TAX DUE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1959</td>
<td>3416</td>
<td>1661</td>
<td>48.6%</td>
</tr>
<tr>
<td>1960</td>
<td>3414</td>
<td>1647</td>
<td>48.2%</td>
</tr>
<tr>
<td>1961</td>
<td>3460</td>
<td>1631</td>
<td>47.1%</td>
</tr>
<tr>
<td>1962</td>
<td>3494</td>
<td>1689</td>
<td>48.3%</td>
</tr>
<tr>
<td>1963</td>
<td>3590</td>
<td>1667</td>
<td>46.4%</td>
</tr>
<tr>
<td>1964</td>
<td>3604</td>
<td>1450</td>
<td>40.2%</td>
</tr>
<tr>
<td>1965</td>
<td>3880</td>
<td>1802</td>
<td>46.4%</td>
</tr>
<tr>
<td>1966</td>
<td>3608</td>
<td>1658</td>
<td>43.5%</td>
</tr>
<tr>
<td>1967</td>
<td>4027</td>
<td>1996</td>
<td>49.5%</td>
</tr>
<tr>
<td>1968</td>
<td>3986</td>
<td>1998</td>
<td>50.1%</td>
</tr>
<tr>
<td></td>
<td><strong>Ten-Year Totals</strong></td>
<td>36679</td>
<td>46.8%</td>
</tr>
<tr>
<td></td>
<td><strong>Ten-Year Averages</strong></td>
<td>3667</td>
<td>46.8%</td>
</tr>
</tbody>
</table>

Further analysis of the information contained in Tables 6 and 7 reveals that while Montana's population increased only 3.7% between 1960 and 1968 inclusive, the total amount of tax collected has increased 38.9%. This is accounted for by an 11.1% increase in the number of estates paying tax and a 30.2% increase in the amount of tax paid per estate. If any valid conclusions can be drawn from these figures, it is that the size of the estates subject to the Montana death taxes has increased considerably more than the population increase and that while there is a slight increase in the number of taxable estates, the tax paid per estate has increased at a faster rate. If these conclusions are valid, it must be further concluded that the persons dying today are wealthier than those who died ten years ago. This may not be surprising in light of the fact that Montana has been a state for only about one generation. Many of the persons dying today and in the past ten years are those who acquired vast land holdings in the early years of statehood and whose holdings have substantially appreciated. It is unfortunate that statistics have not been compiled which would show the size of the estates which have been probated. If such information was available, a far more conclusive analysis could be made. Serious thought should be given...
to the acquisition of such data, for it is only by making such a study that the propriety of the burden distribution can be determined. For example, it would be helpful to know the ratio of large estates to small estates. Perhaps small estates are contributing far more than their fair share to the total collections. Of course, what is a fair share is a subject of legislative determination with sociological overtones, but it is submitted that the problem cannot be adequately dealt with without more information.

The only information discovered which casts light on the size of the estates being taxed in Montana is information culled from the files of the federal internal revenue office, which has supplied the number of federal estate tax returns filed in Montana for a 10 year period beginning in 1959. Those figures are compared with the number of estates filed in Montana in Table 8.

<table>
<thead>
<tr>
<th>YEAR</th>
<th>NUMBER OF CERTIFICATES ISSUED</th>
<th>NUMBER OF ESTATES IN WHICH TAX OWED</th>
<th>NUMBER OF FEDERAL ESTATE TAX RETURNS FILED</th>
</tr>
</thead>
<tbody>
<tr>
<td>1959</td>
<td>3416</td>
<td>1755</td>
<td>323</td>
</tr>
<tr>
<td>1960</td>
<td>3414</td>
<td>1767</td>
<td>334</td>
</tr>
<tr>
<td>1961</td>
<td>3460</td>
<td>1829</td>
<td>402</td>
</tr>
<tr>
<td>1962</td>
<td>3494</td>
<td>1805</td>
<td>340</td>
</tr>
<tr>
<td>1963</td>
<td>3590</td>
<td>1923</td>
<td>474</td>
</tr>
<tr>
<td>1964</td>
<td>3604</td>
<td>2154</td>
<td>474</td>
</tr>
<tr>
<td>1965</td>
<td>3880</td>
<td>2078</td>
<td>551</td>
</tr>
<tr>
<td>1966</td>
<td>3808</td>
<td>2150</td>
<td>518</td>
</tr>
<tr>
<td>1967</td>
<td>4027</td>
<td>2031</td>
<td>581</td>
</tr>
<tr>
<td>1968</td>
<td>3986</td>
<td>1988</td>
<td>700</td>
</tr>
</tbody>
</table>

1 Source: Compiled from records of Internal Revenue Service, Helena, Montana Office.
2 Estimated.

From Table 8 it is seen that about five times as many estates paid the state death tax as filed federal estate tax returns in 1959, whereas that ratio steadily decreased over a 10 year period to the point where in 1968 it is estimated that more than one-third of the estates which paid the Montana death taxes also filed a federal estate tax return. Since no federal estate tax return is necessary unless the estate exceeds $60,000, these figures provide the basis for at least some tentative conclusions. First, the raw number of Montana estates valued in excess of $60,000 has steadily increased approximately 53% over a 10 year period. Second, if it can be assumed that the same estates filed both federal and state tax returns in the same year, then in 1959 only 18.4% of those filing Montana returns had an estate valued in excess of $60,000, and that this figure has steadily increased to 24.6% in 1963 and approximately 35.2% in 1968. Consequently, it would follow that the decedents whose estates were filed in 1968 were considerably wealthier than those whose estates were filed in 1959. In short it appears that more large estates are being probated today than 10 years ago.

Analysis by County

A statistical analysis by county of the death taxes paid supports the conclusion drawn earlier that the increase in death tax collections could be attributed, at least in part, to the death of large land holders. For example, Table 9 shows that the largest average taxes paid per estate are those probated in the least populous counties.
<table>
<thead>
<tr>
<th>COUNTY</th>
<th>DEATH TAXES PAID (Thousands)</th>
<th>RANK</th>
<th>NUMBER OF TAXABLE ESTATES</th>
<th>RANK</th>
<th>AVERAGE TAX PAID PER ESTATE</th>
<th>RANK</th>
<th>POPULATION, 1968 (Thousands)</th>
<th>RANK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Meagher</td>
<td>205.4</td>
<td>40</td>
<td>81</td>
<td>52</td>
<td>2,535</td>
<td>1</td>
<td>2.6</td>
<td>49</td>
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<tr>
<td>Liberty</td>
<td>302.1</td>
<td>25</td>
<td>122</td>
<td>46</td>
<td>2,476</td>
<td>2</td>
<td>2.6</td>
<td>48</td>
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<tr>
<td>Prairie</td>
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<td>111</td>
<td>48</td>
<td>2,032</td>
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<td>2.3</td>
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<td>28</td>
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<td>41</td>
<td>1,956</td>
<td>4</td>
<td>3.0</td>
<td>44</td>
</tr>
<tr>
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<td>13</td>
<td>234</td>
<td>30</td>
<td>1,910</td>
<td>5</td>
<td>7.6</td>
<td>23</td>
</tr>
<tr>
<td>Broadwater</td>
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<td>46</td>
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<td>49</td>
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<td>7</td>
<td>3.2</td>
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</tr>
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<td>23</td>
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<td>10.6</td>
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<td>11</td>
<td>1,538</td>
<td>9</td>
<td>7.1</td>
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<td>155</td>
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<td>9</td>
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<tr>
<td>COUNTY</td>
<td>DEATH TAXES PAID (Thousands)</td>
<td>RANK</td>
<td>NUMBER OF TAXABLE ESTATES</td>
<td>RANK</td>
<td>AVERAGE TAX PAID PER ESTATE</td>
<td>RANK</td>
<td>POPULATION, 1968 (Thousands)</td>
<td>RANK</td>
</tr>
<tr>
<td>----------------</td>
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<td>750</td>
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<td>746</td>
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<td>690</td>
<td>50</td>
<td>13.1</td>
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<td>1.7</td>
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<td>612</td>
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</table>
Table 9 shows that the largest average tax paid per estate is in Meagher county which ranks 49th out of 56 counties in population. The most populous county, Yellowstone, ranks 18th in average tax paid per estate. However, it cannot be safely concluded that the per capita wealth of the populace of Meagher county is greater than the per capita wealth of Yellowstone county, simply because it is not safe to assume that the largest estates pay the most taxes. It is possible, however unlikely, that Petroleum county is the wealthiest per capita, even though it ranks 56th in average tax paid and 56th in population. Perhaps the decedents in Petroleum county have received better estate planning advice than those dying in Meagher county.

Consequently, Table 9 reflects interesting data, but it is hardly enough with which to draw any meaningful conclusions. To accurately appraise the size of estates administered or probated in each county would require information as to the value of the gross estate, the deductions allowed, and the exemptions permitted. Such information is necessary in order to appraise the burden distribution by county.

Conclusions

From the foregoing tables and chart, the following conclusions can be drawn:

1. The Montana death taxes play a small but important role as a revenue producer, consistently accounting for about 5% of the state's gross tax receipts (Table 1).

2. For the 10 years following 1959, the Montana death taxes have maintained a growth rate roughly equal to that of the gross tax receipts (Chart 1). This indicates that the tax is a stable revenue producer and that the amount of future collections may be accurately forecast. It is not safe, however, to make long-range forecasts until a more detailed study is made to determine whether the proceeds of the large estates now being probated are remaining subject to the Montana tax structure. For example, if relatively few decedents have devised a large portion of Montana lands to nontaxable foundations, this land will henceforth be exempt from taxation. This is a real possibility and should be investigated.

3. Although only about three million dollars is generated annually by the Montana death taxes, this is an important sum in light of the fact that it is sufficient to completely cover the expenditures of many vital governmental agencies (Table 2).

4. Death taxes play a larger role in Montana's economy than in all but two other states (Table 3). Since most other states are more populous and have a heavier concentration of capital, it is not recommended that the role of Montana's death taxes be de-emphasized solely for the reason of aligning them more squarely with the role played by such taxes in most other states. However, the fact that Montana's death taxes are among the highest in the Nation (Table 5) may give some legislators cause to re-examine them. Some legislators may not be too concerned about the fact that Montana ranks fourth nationally in amount of tax levied against a typical estate in excess of one million dollars. There probably have not been very many estates of that size probated in Montana. But the same legislator may pause to wonder whether the tax burden is evenly distributed when he learns that Montana ranks 6th among all states in taxing small estates of $25,000.

5. The average tax paid per estate taxed in Montana has grown at a faster rate than the number of estates taxed (Table 6). This might indicate that the average estate has gotten larger, a possibility supported by the fact that the number of federal tax returns has steadily increased over a ten-year period. However, this may not be the case. Perhaps, the average deductions have gotten smaller as a percent of the gross estate, or fewer exemptions are being claimed. A study should be made to determine the cause of the increased tax paid per estate.

6. The number of estates processed in which no tax is paid has steadily increased (Table 7). Consequently, it can be assumed that there has been either (1) a corresponding increase in the time and number of personnel required to process such estates, or (2) that less attention is being given to the processing of taxable estates. Either alternative is undesirable. A study should be made to determine whether it is possible to either reduce or eliminate the processing of small estates which produce no revenue for the state.
7. Generally speaking, the largest tax paid per estate is paid in the counties with the smallest population (Table 9). This may or may not indicate that decedents in those counties are wealthier than decedents of more populous counties. As would be expected, more death tax returns are filed in the most densely populated counties.

It is unfortunate that no other conclusions can be drawn at this time. A few other states, including California, Kentucky, Ohio, and Indiana have made detailed studies of their death tax structure. Using these studies as a guideline, those states have been able to meet what are probably the two primary objectives of a state death tax: (1) from the taxpayer's viewpoint, to insure that the tax is fair, i.e., that estates of differing sizes bear their fair share of the tax burden; (2) from the state's viewpoint, to insure that the tax operates effectively as a revenue producer. To date, Montana is unable to say with certainty that its death tax structure satisfies either of these objectives.

It is recommended that Montana undertake a study of its death tax akin to those made by other states. Such a study should attempt to answer the following questions, among others:

1. Number and value of taxable estates.
2. Number and percent of taxable estates by county and the size of the total estate.
3. Amount of deductions allowed, according to size of taxable estates.
4. Amount of exemptions allowed, according to size of taxable estates.
5. Amount of charitable contributions made, according to size of taxable estate.
6. Identity of beneficiaries by class.
7. Proportionate amount received by each class of beneficiaries.

With these figures as a starting point the Board of Equalization would be in a position to evaluate the operation of the tax and make appropriate recommendations for changes to the legislature.

The legislature should also be interested in insuring the efficient and effective administration of the tax. To this end, the following information should be gathered:

1. Time interval from death to certification of tax due.
2. Time required to process nontaxable estates.
3. Cost of processing estates, resident and nonresident.

These lists are not intended to be all inclusive. Those charged with the administration of the tax could no doubt increase it manyfold. The point, however, is that there is a need for further study of this small but important tax structure. The key to the study can be summed up in a word—funds. Without an appropriation from the Legislature, the study can never be made. Without the study, the tax will continue to be administered without a true awareness of what is being accomplished. No one will ever be certain until such a study is made whether the tax is as fair or as efficient as it could and should be.