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The Montana Inheritance Tax*

James A. Poore, Jr.**

INTRODUCTION

The Montana inheritance tax, as presently interpreted by case law, can be understood only after a general examination of the relevant statutory provisions.¹

Subject to certain exceptions and qualifications, the tax, which is imposed when the recipient becomes beneficially entitled in possession or expectancy,² is upon any transfer by succession or will,³ or by means of certain statutory substitutes for wills. Five such substitutes are specified: (1) transfer in contemplation of death,⁴ (2) transfers to take effect in possession or enjoyment at or after death,⁵ (3) powers of appointment,⁶ (4) joint tenancies, including co-ownership of government bonds,⁷ and (5) insurance.⁸

The rate of the tax depends upon the relationship of the recipient to the decedent⁹ and upon the value of the taxable estate.¹⁰ The primary rate on the first $25,000 less specific exemptions,¹¹ varies from 2 percent to 8 percent, depending upon the relationship. The maximum rate, when the benefit exceeds $100,000 ranges from 8 percent for close relatives to 32 percent for nonrelatives.¹² The applicable rate is applied to the clear market value of the transferred property¹³ as of the time of death¹⁴ after allowance for specific deductions¹⁵ and exemptions,¹⁶ to determine the actual dollar amount of the tax.

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¹The Montana inheritance tax law is not contained in the taxation statutes in Title 84, REVISED CODES OF MONTANA, 1947, but is in Chapter 44 of Title 91 covering Wills, Succession, Probate and Guardianship. See §§ 91-4401 to -4467. Hereinafter REVISED CODES OF MONTANA will be cited as R.C.M.
²R.C.M. 1947, § 91-4403.
³R.C.M. 1947, § 91-4401.
⁴R.C.M. 1947, § 91-4402.
⁵R.C.M. 1947, § 91-4402.
⁶R.C.M. 1947, § 91-4404.
⁷R.C.M. 1947, § 91-4405.
⁸R.C.M. 1947, § 91-4406.
¹⁰R.C.M. 1947, §§ 91-4409, -4410.
¹¹R.C.M. 1947, § 91-4414. These exemptions are: $17,500 widow; $5,000 husband; $2,000 lineal issue, lineal ancestor or adopted child; $300.00 brother, sister or descendant. Certain charitable bequests are wholly exempt from the operation of this section.
¹²R.C.M. 1947, §§ 91-4409, -4410.
¹³R.C.M. 1947, § 91-4407.
¹⁴R.C.M. 1947, §§ 91-4415, -4432.
¹⁵R.C.M. 1947, § 91-4407.
¹⁶R.C.M. 1947, §§ 91-4413, -4414.
The beneficiary is primarily liable for the payment of the tax, but both the executor or administrator and the beneficiary are personally liable for its payment. Additionally, to insure payment of the tax the property involved is subjected to a ten year tax lien.\(^\text{17}\)

Credit against the amount of the tax is allowed for taxes paid on the same property in other states.\(^\text{18}\) Children of a decedent mother are also entitled to a credit for taxes paid by the mother upon transfers to her from her husband's estate if she dies within ten years of her husband and transfers the same property to the children.\(^\text{19}\)

Finally, there is a section imposing a Montana estate tax. In essence, this section places a tax on the estates of resident decedents to the extent of any excess credit allowed by the federal estate tax for state death taxes over the total death taxes levied by the states.\(^\text{20}\)

Montana has had some sort of an inheritance tax act since 1897,\(^\text{21}\) and forty-nine decisions by the Montana Supreme Court have directly interpreted the inheritance tax law.\(^\text{22}\) This litigation has, for the most part, dealt with the above mentioned substitutes for wills. The balance of this paper will deal primarily with a consideration of the more important decisions giving interpretation to the inheritance tax law of Montana.

**TRANSFERS IN CONTEMPLATION OF DEATH**\(^\text{23}\)

When the motive for an inter vivos transfer is similar to that which would cause the decedent to make a will, this statutory device treats the property as if passing by will. The first case on this subject, *In re Wadworth's Estate*,\(^\text{24}\) laid down the controlling interpretation of this section:

> The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent evasion of the tax. As the transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's mo-

\(^{17}\)R.C.M. 1947, § 91-4415.

\(^{18}\)R.C.M. 1947, § 91-4412.

\(^{19}\)R.C.M. 1947, § 91-4414(2).

\(^{20}\)R.C.M. 1947, § 91-4411. The code contains numerous other provisions covering miscellaneous items such as a discount for prompt payment, prepayment of estimated tax to avoid penalties and interest; bond to reduce interest on deferred payment to six per cent and provisions with respect to mechanics such as notices, appraisals, hearings, and enforcement provisions, which have in most instances not resulted in litigation and need not be listed in detail to obtain an understanding of the theory of the tax. See, R.C.M. 1947, §§ 91-4416, -4418, -4419.

\(^{21}\)Laws of Montana 1897, at 83-92.

\(^{22}\)A few of those cases no longer have any foreseeable value as they are concerned with provisions no longer in the law and not helpful to the construction of the present law. See, Hinds v. Willcox, 22 Mont. 4, 55 Pac. 355 (1898); *In re Tuohy's Estate*, 35 Mont. 431, 90 Pac. 170 (1907); State *ex rel.* Floyd v. District Court, 41 Mont. 357, 109 Pac. 438 (1910).

\(^{23}\)R.C.M. 1947, § 91-4402.

\(^{24}\)92 Mont. 135, 11 P.2d 788 (1932).
tive. It is contemplation of death, not necessarily contemplation of imminent death, to which the statute refers.\textsuperscript{25}

Since the motive of the transferor is the "differentiating factor" in many instances, what is or is not a transfer in contemplation of death will depend upon the facts of the individual case. The following factual situations are illustrative of dominant motives other than contemplation of death:

1. A husband purchased real estate solely in the name of his wife with the explicit understanding that she was to convey it to him upon request. The court held that such an conveyance, within two years of the wife's death, was not in contemplation of death but was motivated by her trust obligation. The wife never had any beneficial interest in the property.\textsuperscript{26}

2. A decedent grantor, in exchange for stipulated monthly payments for her lifetime, agreed to transfer immediate possession of a hotel. This transaction was held not to be a transfer in contemplation of death, but rather a sale for valuable consideration.\textsuperscript{27}

3. A rancher transferred his ranch to a corporation. He gave stock to his wife and other relatives who had performed services at the ranch with the understanding that they would receive an interest in the property. However, he transferred no stock to a son who had not wished to work on the ranch. The court held contemplation of death was not the dominant motive for the transfers. Rather, they were rewards for services rendered.\textsuperscript{28}

4. A husband believed that he held certain property in joint tenancy with his wife, but discovered that it stood in his name alone. Subsequently, within two years of his death, he caused it to be conveyed to himself and his wife as joint tenants. The transfer was held to be motivated by a desire to arrange his affairs in accordance with his prior beliefs, not in contemplation of death.\textsuperscript{29}

Rather than contemplation of death, motives behind other transfers have been identified as: a desire to relieve the donor of responsibilities and permit him to travel,\textsuperscript{30} evidencing a joint venture,\textsuperscript{31} and a desire to aid the donor's children financially during the donor's lifetime.\textsuperscript{32}

If nothing else, the case of \textit{State v. Ludington}\textsuperscript{33} indicates that judges on occasion have soft hearts.\textsuperscript{34} In that case the decedent, more than three

\textsuperscript{25}Id. at 145, 11 P.2d at 791.
\textsuperscript{26}In re Mayer's Estate, 110 Mont. 66, 99 P.2d 209 (1940).
\textsuperscript{27}In re Seebree's Estate, 122 Mont. 509, 206 P.2d 553 (1949).
\textsuperscript{28}In re Warren's Estate, 128 Mont. 395, 275 P.2d 843 (1954).
\textsuperscript{31}In re McAnelly's Estate, 127 Mont. 158, 258 P.2d 741 (1953).
\textsuperscript{33}Ibid.
\textsuperscript{34}In re McAnelly's Estate, supra note 31, supports this proposition.
years before death, gave his daughter $10,000 and recorded a satisfaction of a mortgage securing a debt due from his son for more than $6,800. His will provided that the gift to the daughter had been in full settlement of her rights in the estate, and that the son should take nothing from the estate other than cancellation of the son's debts. The court held that certain testimony, which was not quoted in the opinion, showed the testator's motives in making the gifts to be other than in contemplation of death. The language of the will was merely to explain why the decedent left nothing to his children. 35

TRANSFERS TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AT OR AFTER DEATH 36

Most of the Montana cases under this section pose relatively few problems since the possession or enjoyment was clearly postponed until after the death of the transferor. In State Board of Equalization v. Cole, 37 United States bonds, registered in the names of co-owners, were not delivered by the purchaser-donor to the other co-owner during the lifetime of the purchaser. Although the other co-owner did have access to the joint bank box in which the bonds were stored, the court found this right of access had been exercised only as agent of the purchaser. Thus, delivery was held insufficient and possession and enjoyment were considered as postponed until after the purchaser-donor's death.

In another case a mother made an outright transfer of property to her children with the understanding that they would pay her an annuity during her lifetime. The children then transferred the property to a trust to pay the annuity during the mother's lifetime and return the property to them after her death. The court considered this as a single transaction and taxed the transfer as one to take effect in possession or enjoyment at or after death. 38

In In re Estate of Oppenheimer 39 a woman agreed in an ante-nuptial settlement to give up her dower interest and the right to any inheritance from her husband's estate in consideration for $150,000 to be paid to her in installments after his death. The $150,000 was held taxable as a trans-

35Subsequent to the death of the testator, but prior to the final determination of the case, the legislature added to the section covering gifts in contemplation of death (R.C.M. 1947, § 91-4402) the words: "but no such transfer...made before such three-year period shall be treated as having been made in contemplation of death..." Although the court in the Ludington case did not mention this amendment, it may have influenced the opinion.

36R.C.M. 1947, § 91-4402.

7122 Mont. 9, 195 P.2d 989 (1948).

37In re Estate of Schuh, 66 Mont. 50, 58-61, 212 Pac. 516 (1923) (1930), and 37U.S. 238 (1930), and ending with Commissioner v. Church, 335 U.S. 632 (1949). The Schuh case, supra, was followed by In re Kohr's Estate, 122 Mont. 145 (1948), which also reserved a life estate in the grantor.

75Mont. 186, 243 Pac. 589 (1926).
fer to take effect in possession and enjoyment at or after death. In reaching this conclusion the court stated: "Clearly, a gift or transfer for a valuable consideration must be in praesenti in order to escape the tax." The result of this case may be correct, but the reasoning appears to be unsound. R.C.M. 1947, section 91-4402, provides, in effect, that transfers of property made within three years of death are presumed to be made in contemplation of death unless made for "fair consideration in money or money's worth." The court in Oppenheimer apparently ruled that the matter of consideration applies only to transfers in contemplation of death and not to transfers to take effect in possession or enjoyment at or after death.

If all the facts were known, the recent case of Estate of Maher might add nothing new to Montana law. However, the opinion stated only that the decedent died a resident of Montana, owning no property other than a right of revocation of a trust which she had created in Pennsylvania many years before her death. The court did not indicate whether the decedent was also a beneficiary of the trust. If she in fact had reserved a right to income from it during her life, the trust would be taxable under the Schuh and Kohr cases. But the court mentioned no such retained economic benefit; it said only that the "existence of this right of revocation, modification or change, constituted a reservation of an interest in the property" which was taxable. Under what provision of the Montana inheritance tax law is it taxable? Montana has no code section such as that in the federal estate tax, which specifically covers transfers reserving the power to alter, amend or revoke. Such a retained right is not made a substitute for a will by any specific provision of the Montana code. The beneficiaries did not receive their interest by will or succession, but rather by the terms of a trust instrument executed long before the death of the decedent. The only benefit accruing to the beneficiaries at the settlor's death was the termination of the possibility of revocation. However, termination of that power is not specifically made a taxable occasion by statute.

The reasoning of the court in Maher is similar to that in the United States Supreme Court of Reinecke v. Northern Trust Co. That case involved a transfer in trust with a power of revocation reserved, which was not made in contemplation of death. On the theory that the gift was not complete until termination of the power of revocation by the transferor's death, the Supreme Court held that it was subject to the federal estate tax as a transfer to take effect in possession or enjoyment at or after death. Thus, the Maher case may be considered as holding that the

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40Id. at 200, 243 Pac. at 592.
42In re Estate of Schuh, supra note 38.
43In re Kohr's Estate, supra note 38.
44"Estate of Maher, supra note 41, at 479, 373 P.2d at 521 (1962).
45INT. REV. CODE OF 1954, § 2038.
termination of such a reserved power is a taxable transaction in Montana. However, the decision might be better explained in a manner not mentioned in the opinion. Since the power to amend would include the power to appoint other beneficiaries, a reserved power to alter, amend or revoke might be regarded as a power of appointment. If so, the tax would be specifically authorized under the section of the code making a power of appointment, whether exercised or not, a substitute for a will.47

JOINT TENANCIES, INCLUDING CO-OWNERSHIP
OF GOVERNMENT BONDS48

How will a client affect the potential inheritance tax on all his property by placing it in the joint names of himself and his wife? Assume that the client has bought and paid for everything himself. He has a home, some stocks, and a bank account, all in joint tenancy with right of survivorship, and he has government bonds payable to himself or his wife. The bonds and stocks are in a bank box to which both have a right of access, but she in fact has not entered the box or handled the stocks or bonds. Everything was placed in co-ownership form within the last year. If the client should die tomorrow, probably all of this property would be taxable to his estate. This is because the section concerning jointly owned property49 can not be read alone. The statutes dealing with transfer in contemplation of death or to take effect at or after death50 and making the date of recording presumptively the date of the transaction51 must also be kept in mind. Half of each item would be taxable under the joint tenancy section.52 If the estate should be unable to prove a contrary motive, the three year presumption would make the other half taxable as a gift in contemplation of death.53

If the client lived beyond the three year presumptive period only the house and bank account would be taxable, as to the half theoretically in the name of the decedent, under the joint tenancy section.54 The other half, theoretically in the name of the survivor, would not be taxable as a transfer in contemplation of death,55 unless it involved an instrument delivered but not recorded prior to the three year period.56 Nor would it be taxable as taking effect in possession or enjoyment at or after death, since the wife had the right to the immediate use and possession of the bank account and home during the decedent’s life. However, under the

47R.C.M. 1947, § 91-4404.
48R.C.M. 1947, § 91-4405.
49R.C.M. 1947, § 91-4405.
50R.C.M. 1947, § 91-4402.
51R.C.M. 1947, § 91-4408.
52R.C.M. 1947, § 91-4405.
53R.C.M. 1947, § 91-4405.
55R.C.M. 1947, § 91-4405.
56R.C.M. 1947, § 91-4402.
Cole case if the wife’s signature was not on the signature card, the bank account would probably be taxable as a gift to take effect in possession or enjoyment at or after death. The stocks and bonds would be taxable in full. Since they were not in fact delivered to the wife, the half theoretically in her name would be taxable as intended to take effect in possession or enjoyment at or after death, and the half theoretically in the name of the husband would be taxable under the joint tenancy section.

If the bank account had been a savings account and the husband had not delivered the passbook to his wife, and if the deed to the house had not been recorded until after the husband’s death, the property might be taxable in full to the husband’s estate. The account would be taxable under the theory of possession and enjoyment at or after death, and the house under the statutory language that “all such transfers, if recorded after the death of the person or persons making such transfer, whatever form of such transfer, shall be deemed, for the purposes of taxation under the provisions of this act, to have been made by will.”

If the wife rather than the husband died first it is questionable whether any of the joint tenancy property would be taxable to her estate. R. C. M. 1947, section 91-4405 excepts from the tax that part of the decedent’s interest in joint tenancy property “as may be shown to have originally belonged to the survivor and never to have belonged to the decedent,” and at one time the Montana law was clear that the joint tenancy assets would not be taxed if the joint tenant who created the joint tenancy survived the donee joint tenant. Montana law is now settled that the bank account and the stocks would not be taxable, but some question may still exist on the taxability of the real property.

The question of taxability of the real property was created by the curious interpretation given to R. C. M. 1947, section 91-4405 in State v. Hanson. The survivor in that case had provided the consideration for the purchase of real property and promissory notes and had supplied the money which created three joint bank accounts. The court, citing In re Mayer’s Estate, held the source of the consideration for the purchase of the property was immaterial. The opinion stated that to come within the exception the property itself, deemed to be bequeathed or devised, must be shown to have originally belonged to the survivor and to have never belonged to the decedent prior to the creation of the joint tenancy. Since the land and the notes were purchased with the funds of the survivor, but

Supra note 53.
R.C.M. 1947, § 91-4402.
R.C.M. 1947, § 91-4408.
In re Kuhr’s Estate, 123 Mont. 593, 220 P.2d 83 (1950).
State v. Hanson, 125 Mont. 174, 232 P.2d 343 (1951); In re Estate of Parks, 22 State Rep. 442 (April 15, 1965). See also In re Powell’s Estate, 142 Mont. 133, 381 P.2d 957 (1963).
Ibid.
Supra note 26.
were not land or notes owned by the survivor prior to the creation of the joint tenancy, the court held them to be subject to the tax. However, the bank account was not taxed even though it represented only a chose in action or credit with the bank. The court treated it as money, on the theory that the joint tenancy section differentiates in some way between bank accounts and other property. The case appears to be unsound in theory and not supported by any distinction in the statute between bank accounts and other property, or by the holding in *In re Mayer's Estate).*

Although *State v. Hanson* has not been expressly overruled, two subsequent cases, *In re Powell’s Estate* and *In re Estate of Parks*, appear to leave little vitality in the *Hanson* interpretation of R. C. M. 1947, section 91-4405. *In re Powell’s Estate* held that United States bonds purchased by the husband and a son of the decedent, and issued in the names of the decedent and her husband, and the decedent and her son, came within the exception in R. C. M. 1947, section 91-4405 as having originally belonged to the survivors. The court quoted from the *Hanson* case and applied the bank account theory of *Hanson* to bonds without expressly overruling any part of the decision. Also, *Powell’s Estate*, by implication, seems to overrule *Hanson* with respect to promissory notes.

In the recent case of *In re Estate of Parks* the distinctions drawn in *Hanson* were even further undermined and may have been totally eliminated. There the court upheld the lower court’s finding that no inheritance tax was due on shares of stock registered in joint tenancy which had been purchased by the surviving spouse with her own separate funds and held by her in exclusive possession. The Montana Supreme Court relied upon the holding in *In re Powell’s Estate*, pointing out that the only difference in the situation before the court and the *Powell* case was the nature of the property, shares of corporate stock in *Parks Estate* and government bonds in *Powell*.

The real significance of the *Parks Estate* decision may lie in the language utilized by the court in discussing the state’s argument that *State v. Hanson* should control the question of taxation of the corporate shares. It pointed out that the *Hanson* case could not be deemed to control since R. C. M. 1947, section 91-4405 had been amended since that case was decided. In describing the effect of the amendment the court stated:

It [R. C. M. 1947, section 91-4405] was amended by adding a clause to the property description, “however acquired” and also the descriptive terms “tangible or intangible.” Thus, after amendment, the entire section, including the exception clause
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applies whether the property is tangible or intangible and no matter whether the purchase price or the actual property is the subject of the joint tenancy.\(^{72}\)

This language seems to leave little force remaining in the *Hanson* decision. However, *Hanson* was not overruled and may still be applicable to real estate purchased by the survivor where title is taken in the names of the survivor and the decedent as joint tenants. Until such time as the court explicitly overrules *Hanson*, a donor wishing to avoid the possible remaining effect of the case may wish to purchase real property in his own name first and then create a joint tenancy under R. C. M. 1947, section 67-1602(1).

INSURANCE

Under present law, $50,000 of life insurance is exempt from tax whether payable to the executor or directly to the ultimate beneficiaries.\(^{73}\) Proceeds of annuity contracts and unmatured endowment contracts are treated as insurance.\(^{74}\)

However, the proceeds of a matured endowment contract, left under a supplementary contract with the insurance company at interest, are not insurance and are fully taxable.\(^{75}\) A transfer of insurance policies in trust less than three years before the death of the transferor, which requires the trustees to collect the proceeds of the policy at the death of the transferor and pay them to beneficiaries named in the trust instrument, is not taxable as a gift in contemplation of death. The special insurance exemption controls the general provision as to gifts in contemplation of death, whether the beneficiaries are named in the insurance policy or in a trust agreement.\(^{76}\)

The insurance exemption will not allow insurance proceeds to be followed through two estates. If the beneficiary dies the day after the insured dies, the tax exemption does not apply to the money received by the heirs or legatees of the beneficiary from the insurance company.\(^{77}\)

The Montana Supreme Court has treated an annuity as insurance in three cases.\(^{78}\) In the last two cases this decision was reached on the sole basis of stare decisis.\(^{79}\) The court in the first case reasoned that since

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\(^{72}\) In re *Estate of Parks*, supra note 62, at 444.


\(^{75}\) In re *Harper’s Estate*, 124 Mont. 52, 218 P.2d 927 (1950).

\(^{76}\) *State v. Midland National Bank*, supra note 74.


\(^{78}\) In re *Fligman’s Estate*, supra note 74; *State v. Midland National Bank*, supra note 74; *State v. Hammerstrom*, supra note 74.

\(^{79}\) *State v. Midland National Bank* and *State v. Hammerstrom*, supra note 74. In the *Midland National Bank* case, supra note 74, at 345, 317 P.2d at 883, which was quoted in the *Hammerstrom* case, the court said:

However, appellant would have this court reverse its holding in In re *Fligman’s Estate*, 113 Mont. 505, 129 P.2d 627, wherein it was held
the license fee paid by insurance companies is based upon premiums for annuities as well as life insurance, annuities and life insurance may be equated. This is much like saying that because the income tax on a grocery business is calculated upon receipts from potatoes and eggs, potatoes and eggs are the same. None of the cases have attempted to determine whether the legislative reason for the insurance exemption applies to annuities. Future cases may hold that it does not.

Application of the $50,000 exemption to insurance made payable to an executor or administrator also faces the possibility of further attack. A strong dissent in the case of State v. Cline pointed out that such insurance passes to the beneficiaries by will or by the laws of intestacy rather than by the terms of the insurance contract. According to statute only insurance proceeds passing to the beneficiary directly by the terms of an insurance contract must necessarily be "deemed" to pass by will. The statute directs that the exemption shall be prorated between the beneficiaries in proportion to the amount of insurance payable to each. Where the insurance is paid to the executor or administrator and becomes a part of the general assets of the estate usable for payment of debts, taxes, etc., there is no assurance that any specific amount of insurance is payable to a specific beneficiary. Because of the apparent instability of this phase of the law, it would seem inadvisable to make insurance payable to the executor or administrator if there is any other way to provide liquid assets for an estate.

NON-RESIDENT DECEDEENTS

R. C. M. 1947, section 91-4401(2) taxes transfers of property of non-resident decedents when the property is "within the state or within its jurisdiction." The meaning of "within its jurisdiction" is clarified by the cases of State ex rel. Banker's Trust v. Walker and State ex rel. Walker v. Jones. Because the Montana Power Company had property in Montana, the state in the Banker's Trust case attempted to tax shares of company stock physically located in New York and belonging to a non-resident decedent. The court held that the state had no jurisdiction over the stock, since the ownership of the corporate stock gave no ownership of the actual property in Montana. In the Jones case, a New York decedent had

\[\text{that annuity proceeds were exempt under R.C.M. 1947, section 91-4406. That case was decided in 1942. Eight legislative sessions have been held since the decision, and the legislature has not seen fit to amend the statute. Estates and property have been planned and settled on the basis of the decision in the Fligman case, and if necessary to this decision, this court would treat that opinion as stare decisis.}\]

\[\supra\] note 74.

\[\text{See, State ex rel. James v. Aronson, 132 Mont. 120, 314 P.2d 849 (1957) and In re Murphy's Estate, 99 Mont. 114, 43 P.2d 233 (1935) with regard to stare decisis.}\]

\[\supra\] note 73, at 330, 317 P.2d at 875 (Bottomly J., dissenting).

\[\text{R.C.M. 1947, § 91-4406.}\]

\[\text{R.C.M. 1947, §§ 91-4401, -4413.}\]

\[\text{70 Mont. 484, 226 Pac. 894 (1924).}\]

\[\text{In re Fligman's Estate, supra note 74.}\]

\[\text{Murphy's Estate, supra note 73.}\]
notes and mortgages physically located in New York, but the mortgages were upon real property in Montana. The court said that since the power of the courts of the state would be needed to enforce the debts, the debts were property within the jurisdiction of Montana under the inheritance tax law.

In 1945 the present R.C.M. 1947, section 91-4413 was passed. It exempts intangible personal property of non-resident decedents if the decedent's state of residence has a reciprocal law exempting Montana resident's intangible property located in that state; or if the decedent's state does not impose a transfer or death tax on intangible personalty of Montana decedents. Since every state except Nevada, which has no inheritance tax, has a reciprocal law, intangible personal property of a non-resident simply is not taxed.

Intangible personal property is defined by statute as "moneys, stocks, bonds, notes, securities and credits of all kinds, secured or unsecured." Three Montana cases, all involving real property in Montana, have arisen on the theory that the non-resident decedent had only an intangible personal property interest which was not taxable. In re Hunter's Estate, involved a partnership in land and cattle and also a contract to purchase land in the name of the decedent. Since the properties were purchased with community property funds from California, the widow of the deceased partner claimed that the decedent held half in constructive trust for her and that only one-half should be taxable. The court held her California community property right to be so subject to limitations and restrictions that no constructive trust could be impressed on the Montana property; nor could the presumption that the title was in accordance with the record be overcome.

In State v. Kistner the court was concerned with real property in Montana subject to a contract of sale with deed in escrow. It was held that the interest of the decedent vendor was intangible personal property not subject to the tax, since his right to the land was only as security for the debt.

In In re Perry's Estate, mining claims, a dredge, machinery, bank accounts, accounts receivable, United States bonds and prepaid insurance were owned by a partnership of which the non-resident decedent was a member. The representative of the estate contended that the decedent's share went to the surviving partners to settle the affairs of the partnership and that the estate had a right to share in any remainder after the satisfaction of liabilities. Thus, the estate claimed only a chose in action, an intangible personal property right. The court held the property to be taxable.

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"Laws of Montana 1945, ch. 3, § 1, at 5.
R.C.M. 1947, § 91-4453.
125 Mont. 315, 236 P.2d 94 (1951).
132 Mont. 437, 318 P.2d 223 (1957).
12 Mont. 920, 19 P.2d 652 (1940).
in Montana, saying in effect that after the partnership affairs are settled
the real estate of the partnership is held by the owners as tenants in
common, and the remainder of the property is tangible personality.

The principles of Perry's Estate may be subject to future attack. Since
the case arose, the Uniform Partnership Act has been adopted in Mont-
tana. It provides that "a partner's interest in a partnership is his share
of the profits and surplus, and the same is personal property." The
Perry case did not involve a situation in which the realty must be sold to
pay debts leaving only personalty, nor did it discuss the status of ac-
counts receivable, bonds, or prepaid insurance, all of which are clearly
intangible personal property that might be treated separately.

TAXES ON LIFE ESTATES AND REMAINDERS

When each beneficiary receives some asset at the time of distribution,
it is easy to determine who pays the tax and how it is payable. But what
happens if the will leaves a life estate with contingent remainders? The
eyearly case of In re Fratt's Estate dealt with a life estate to a niece with
the remainder to her children, if any, and if she were to die without issue,
then to children of the testator's brother. The court held that the niece
could not be taxed on the value of the remainder. Since the remainder-
men could not be determined until the happening of the contingency, the
tax could not be calculated. After this case the legislature enacted a new
inheritance tax law which included provisions comparable to R. C. M.
1947, sections 91-4432 to 91-4436. R. C. M. 1947, section 91-4435 provides
that when estates are created dependent upon contingencies, "a tax shall
be imposed upon such transfer at the lowest rate which, on the happening
of any of said contingencies or conditions, would be possible under the
provisions of this act, and such tax so imposed shall be due and payable
forthwith out of the property transferred." The section also provides for
a payment of an additional amount in case a higher rate should be appli-
cable after the contingency has occurred.

However, the rule of Fratt's Estate, that one beneficiary can not be
forced to pay the tax of another, may still be valid. R. C. M. 1947, section
91-4419 provides for a bond allowing the tax payment to be postponed,
subject to six per cent interest, until the persons beneficially interested
"shall come into actual possession or enjoyment." Thus, a life tenant
might force the administrator to postpone payment of all but the tax on
the life estate until the termination of that estate, since any tax paid on

*60 Mont. 526, 199 Pac. 711 (1921).
*Laws of Montana 1923, ch. 65, at 140. See particularly § 15 at 155.
*See also In re Powell's Estate, 110 Mont. 213, 101 P.2d 54 (1940), which held that
an administrator was not liable for a tax with respect to property passing directly
to the beneficiaries by contract, when the administrator had held no property of
any kind going to those beneficiaries, and that he could not withhold the tax
applicable to that property from assets going to other beneficiaries.
the remainder before that time would be payable out of property of the
life tenant. The law is not clear on this matter.

If the life tenant has the power to dispose of the corpus for her sup-
port and maintenance, is it a fee or a life estate? If she dies within six
months of the testator's death when she should have had a life expectancy
of about six years, how is the life estate valued? State v. Robb97 held that,
notwithstanding a power in the life tenant to invade the principle for
the limited purposes of support and maintenance, it was still a life estate.
The value of the life estate was to be based on the standard of mortality
and value given in R. C. M. 1947, section 91-4432, regardless of how long
the tenant actually lived.

RETROACTIVE EFFECT

The validity of various retroactive applications of the Montana in-
heritance tax law has been tested in a number of cases. All cases dealing
with the retroactive application of a law tending to increase the tax on
an estate have held the application valid but one case held the retro-
active application of a law decreasing the tax to be unconstitutional.

Since the 1897 act, there has been some provision which would make
the act effective as to any estate not yet distributed or on which an in-
heritance tax had not been paid at the effective date of the act.98 In Gel-
sthorpe v. Furnell,99 the decedent died before the passage of the act, but his
estate was in process of probate at the date of enactment. It was con-
tended that it would be unconstitutional to apply the act to the estate as
it would be an interference with a vested right and an impairment of a
contractual obligation under Article I, section 10 of the Constitution of
the United States100 and would also be a violation of the equal protection
 provision of the fourteenth amendment.101 The court said that the tax was
imposed upon the right to receive property, not upon the property itself;
that although the rights of the beneficiaries were vested, they were vested
subject to the process of administration, of which payment of any taxes
was an incident, and that the imposition of the tax was not unconstitu-
tional.

The case of State ex rel. Murray v. Walker,102 decided that the 1921
inheritance tax act taxed the widow only on the first $25,000, subject to a
$10,000 exemption. Before the Murray estate was distributed the legisla-
ture changed the law, providing a different exemption for a widow and
fixing a rate applicable to amounts receivable by a widow over $25,000.

98R.C.M. 1947, § 91-4457.
9920 Mont. 299, 51 Pac. 267 (1897).
100''No state shall . . . pass any . . . law impairing the obligation of contracts.''
U.S. Const. art. 1, § 10.
101''No state shall . . . deny to any person within its jurisdiction the equal protection
of the laws.''' U.S. Const. amend. XIV.
**State ex rel. Rankin v. District Court** determined that it was not unconstitutional to apply the new rates and exemptions to the Murray estate. The decision did not distinguish between the establishment of a new rate applicable above $25,000, which would increase the tax, and the increase in the exemption for a widow, which in some cases would undoubtedly reduce the tax. Both changes in the law were applied retroactively.

The next case raising the question of retroactivity, **In re Clark's Estate**, held that it was unconstitutional to apply a deduction which had been created by the legislature after the death of the decedent. The opinion held the retroactive application of the deduction to be unconstitutional on two grounds. First, the court rejected an argument based on the Rankin and Gelsthorpe cases, that if the state could impose or increase a tax after death, it could also diminish a tax at any time before distribution, and stated that the right of the state to a tax and the right of the beneficiaries to receive the property both vested at the moment of death of the decedent. Primarily on the authority of the United States Supreme Court case of **Cooledge v. Long**, the court held that interference with such a vested right would be unconstitutional under the contract and due process clauses and explicitly stated that the Gelsthorpe and Rankin cases could not now be followed as authority for the proposition that the legislature may retroactively tax estates. Secondly, the court held that to retroactively apply a deduction which did not exist at the decedent's death would violate section 39 of Article V of the Montana Constitution, which prohibits the legislature from diminishing any obligation owed to the state.

**State ex rel. Blankenbaker v. District Court** held that the statutory extension of the presumption of contemplation of death, from two to three years before death, did not apply to transfers made prior to the amendment. No constitutional question was raised, and the Cooledge and Clark cases were not discussed. The case simply said that statutes should not be construed as retroactive unless this was expressly required or clearly and necessarily implied. The court did not consider the next section of the same act which made the act applicable to estates of all decedents dying since 1921 and whose estates were undistributed at the effective date of the act. The case apparently follows the theory of

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103 Mont. 322, 225 Pac. 804 (1924).
104 Mont. 401, 74 P.2d 401 (1937).
106 282 U.S. 582 (1931).
107 The court noted that at the time of the Gelsthorpe decision the tax was not imposed at death, but rather after appraisal, and that the Rankin case did not discuss the difference in the time of imposition of the tax.
108 Except as hereinafter provided, no obligation or liability of any person, association or corporation, held or owned by the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, or postponed, or in any way diminished by the legislative assembly; nor shall such liability or obligation be extinguished, except by the payment thereof into the proper treasury.
109 Mont. 331, 96 P.2d 936 (1939).
Cooledge v. Long that the taxable event is the vesting in title at the time the gift was made.

The Cooledge case, upon which In re Clark's Estate relied and which expresses the same rationale as found in the Blankenbaker case, involved an inter vivos transfer in trust. It contained a strong dissent by Mr. Justice Roberts, concurred in by Justices Holmes, Brandeis and Stone, which expressed the view that the rights of the ultimate beneficiaries were not vested, except in a technical legal sense, until they were entitled to enter into possession and enjoyment at the testator's death. As the tax was on the right to receive the property, the right was not fully vested before the testator's death and it was not unconstitutional to change the law between the date of creation of the trust and the final vesting in possession and enjoyment. The theory of vesting expressed by the dissent in the Cooledge case has been applied by later decisions of the Supreme Court of the United States to cases involving other substitutes for wills.

The Montana court may also be shifting toward the theory that the taxable event is the transfer of possession to the beneficiaries. In re Kohr's Estate involved a nonrevocable transfer in trust, reserving a life estate in the donor. The court held that the rate to be applied in taxing the transfer as a gift to take effect at or after death was the rate contained in the 1935 statute, which was in effect at the date of death of the transferor, and not the rate in effect in 1915 when the trust was created. The majority opinion distinguished between "vesting in interest" and "vesting in possession" and determined that the shifting of economic benefits at the time of vesting in possession at the termination of the life estate was the taxable event to which the rate applied. A logical application of the theory enunciated in the Cooledge case would have required a different result.

Thus, under present Montana law the tax on a transfer by substitute for will may be altered at any time before the beneficiary obtains a right to possession. In the case of a transfer in trust with a life estate reserved in the transferor, any changes in the tax law prior to the death of the life tenant will clearly affect the transfer. However, the Montana Code does provide that all taxes imposed by the act shall be due at the death of the decedent, "except as hereinabove provided"; and further that the act shall apply "to the estate of any decedent on which the inheritance tax has not been determined by the court and paid prior to the date when this act takes effect, to the same extent, and in the same manner, as though this act had been in full force and effect at the date of death of such decedent." A question remains as to whether, under these

\[\text{supra note 106, at 606 (Roberts J. dissenting).}
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\[\text{Fernandez v. Wiener, 326 U.S. 340 (1945).}
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\[\text{R.C.M. 1947, § 91-4415.}
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\[\text{R.C.M. 1947, § 91-4457.}
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\[\text{112 R.C.M. 1947, § 91-4415.}
\]
\[\text{113 Poore: The Montana Inheritance Tax, Published by The Scholarly Forum @ Montana Law, 1964}
\]
\[\text{15}
\]
statutes, the theory that vesting in possession is the taxable event would
require a change in the rule of the Clark case. A future case may permit
the retroactive application of a change in the law after the decedent's
death and prior to actual payment of the tax in an estate where the vesting
in possession is delayed until the court's decree of distribution.

MONTANA ESTATE TAX

A survey of the Montana inheritance tax law would not be complete
without some consideration being given to R. C. M. 1947, section 91-4411
which provides for a Montana estate tax. This section, which purports to
impose as an estate tax an amount equal to the excess, if any, of the
maximum credit for state death taxes provided in the federal estate tax,
over the total amount of death taxes levied by any state with respect
to the property of a decedent, is of questionable validity. This estate tax
section was passed in 1933 and refers to the United States Revenue Act
of 1926 and amendments thereto. It also refers to the 80 percent credit
for state death taxes allowable under the United States Revenue Act.
But, the present federal estate tax law is not an amendment to the 1926
law. In 1939 Congress enacted an entirely new revenue act and repealed
all of the 1926 law. Moreover, the 1954 Code was again a completely
new act repealing the 1939 law.

Even if the Montana estate tax were to be held invalid, the amount
of tax paid by a given estate would still be the same. The federal credit
is only a maximum credit, and is allowable only to the extent paid to a
state. However, the validity of the act does concern the state of Mon-
tana. If the act is valid, the tax, to the extent of the maximum federal
credit goes to the state. If the act should be held invalid, the money
would go to the federal government. The legislature would do well to
amend this section by eliminating the references to the 1926 law and the
80 percent credit, and by referring only to the maximum credit allow-
able under the Internal Revenue Code.

Supra note 104.
109 There are certain other incidental matters that the attorney handling estates and
inheritance tax problems should keep in mind:
1. R.C.M. 1947, § 91-4438, which allows for an application for rehearing within
sixty days of an inheritance tax determination, may be a pitfall. If the motion for
rehearing is either denied, or granted and the original order affirmed on rehearing,
the right of an appeal from the order determining the tax may be affected. An order
determining inheritance tax is appealable within sixty days of entry. The motion
for rehearing does not extend the time to file an appeal. In re Blankenbaker's
Estate, 108 Mont. 383, 91 P.2d 401 (1939). Nor can the correctness of an order
determining inheritance tax be reviewed on an appeal from a decree confirming a
2. The inheritance tax is based upon the appraised clear market value of the
property, not upon the sale price from an estate. In re Walker’s Estate, 111 Mont.
66, 106 P.2d 341 (1940).
3. Although a widow’s allowance was once deducted from the taxable estate, In re
Blackburn’s Estate, 51 Mont. 284, 152 Pac. 31 (1915), this deduction is no longer