Indiana Law Journal

Volume 35 | Issue 4 Article 8

Summer 1960

The "Transfer Intended" Clause in Indiana Inheritance Tax

access in the eminent domain sense, and in view of the Indiana court's apparent change of attitude towards the right of access as against the state, it would seem a justified prognostication that an abutting land owner who is placed in a cul de sac by the state suffers compensable damage.

THE "TRANSFER INTENDED" CLAUSE IN INDIANA INHERITANCE TAX

A prolific source of litigation is a clause found in the majority of inheritance tax statutes taxing transfers intended to take effect in possession and enjoyment at or after the death of the transferor.[1] This litigation of the scope of the "transfer intended" clause principally involves transfers by inter vivos trust, perhaps because of their flexibility.[2] The courts agree that a transfer wherein the transferor retains a beneficial interest in the transferred property is a "transfer intended." A beneficial interest in trust property has been held to consist of a life estate in the income,[3] a power of revocation, alteration, or amendment,[4] or a general power of appointment.[5] Many statutes today explicitly state that retention of these interests will cause taxation.[6]

Control, when it has been considered separately, has been held to constitute a beneficial interest only when it amounts to a lawful economic in-

1. Hereinafter referred to as "transfer intended."

2. *E.g.*, Settlor creates an inter vivos trust providing for the income to accumulate until his death, then to the beneficiary; or, settlor creates a trust with benefits to another for the settlor's life, remainder to a third person.

3. *In re* Hubbs, 41 Ariz. 466, 19 P.2d 672 (1933); Hackett v. Bankers Trust Co., 122 Conn. 107, 187 Atl. 653 (1936); Blodgett v. Guaranty Trust Co., 114 Conn. 207, 158 Atl. 245 (1932), *aff'd* 287 U.S. 509 (1933); People v. Forman, 322 Ill. 223, 153 N.E. 376 (1926); Crocker v. Shaw, 174 Mass. 266, 54 N.E. 549 (1899); *In re* Estate of Rising 186 Minn. 56, 242 N.W. 459 (1932); Chase v. Commissioner of Taxation, 226 Minn. 521, 33 N.W. 2d 706 (1948); *In re* Kohrs', 122 Mont. 145, 199 P.2d 856 (1948); Kimball v. Potter, 89 N.H. 234, 196 Atl. 272 (1938); *In re* Brockett's Estate, 111 N.J. Eq. 183, 162 Atl. 150 (Preg. Ct. 1932); *In re* Perry's Estate, 111 N.J. Eq. 176, 162 Atl. 146 (Preg. Ct. 1932); Matter of Keeney's Estate, 194 N. Y. 281, 87 N.E. 428 (1906), *aff'd* 222 U.S. 525, (1912); Matter of Garcia's Estate, 183 App. Div. 712, 170 N.Y. Supp. 980 (1918); *In re* Bass, 200 Okla. 14, 190 P.2d 800 (1947); *In re* Ellis, 169 Wash. 581, 14 P.2d 37 (1932).

4. Bryant v. Hackett, 118 Conn. 233, 171 Atl. 664 (1934); Topping v. McLaughlin, 125 Conn. 456, 6 A.2d 343 (1939); Cochran v. McLaughlin, 129 Conn. 176, 27 A.2d 120 (1942).

5. Hackett v. Eastwick's Estate, 118 Conn. 233, 171 Atl. 664 (1934); Hill v. Treasurer & Receiver Gen., 229 Mass. 474, 118 N.E. 891 (1918); *In re* Stewart,131 N.Y. 274, 30 N.E. 184 (1892); Saltonstall v. Saltonstall, 276 U.S. 260 (1928).

6. CAL. REV. & TAX CODE §§ 13641-13648; ILL. ANN. STAT. ch. 120, § 375 (Smith-Hurd 1954); WIS. STAT. ANN. § 72.01 (1957).

terest. That the control retained must be lawful was held by the Michigan Supreme Court in a case involving an inter vivos transfer by the decedent of interim certificates of stock to a holding corporation in which he was a minority stockholder.[7] The court held no inheritance tax was assessable since

> the control necessary to produce an inheritable interest must, of course, be a lawful power and by lawful right. The physical ability and opportunity to steal, misappropriate, or fraudulently convert the certificates and negotiate them would not be sufficient.
>
> . . . .
>
> It may be assumed that [the decedent] . . . expected to retain control of the affairs of [the holding company]. . . . But such expectation must have founded [*sic*] on personal influence and mutual confidence among the family, as he put legal control out of his hands by selling a majority of the stock to the other members.[8]

That the lawful interest retained must further be an economic one is set forth by a Pennsylvania court.[9] The court, in exempting from taxation an irrevocable trust of which the settlors were trustees, declared that the fact that the trustees have "the power to sell, mortgage or lease the assets, to reinvest the proceeds, and, in general, to manage and operate the trust properties, is immaterial so far as concerns the question of the taxability of the trust assets."[10] Although the trustees have an acknowledged legal interest in the trust, it is an interest that, as fiduciaries, must be exercised exclusively for the benefit of the trust beneficiaries.

There are dicta which appear to state that personal influence of a transferor over the beneficiary is such control as to render the transfer a "transfer intended." *Koch v. McCutcheon* involved a trust to be terminated at the death of the survivor of the settlor and his wife, the life tenant, with corpus to the settlor's children.[11] The New Jersey Supreme Court in holding the transfer taxable, said: "This case presents a typical one of a donor possessed of large property interests denuding himself of his possessions and placing them in the hands of his immediate family, taking care to see that they do not get away from his own superior con-

7. Fuller v. Bassett's Estate, 246 Mich. 440, 224 N.W. 639 (1929).
8. *Id.* at 448, 450, 224 N.W. at 641, 642.
9. *In re* Glosser's Estate, 355 Pa. 210, 49 A.2d 401 (1946).
10. *Id.* at 218, 49 A.2d at 405.
11. 111 N.J. Eq. 324, 162 Atl. 651 (Preg. Ct. 1932) *rev'd* 111 N.J.L. 154, 167 Atl. 752 (Ct. Err. & App. 1933).

trol as head of the family during his lifetime."[12] *In re Madison's Estate* involved an inter vivos trust which was to continue during the life of the settlor for the benefit of his three children who were to receive the corpus at his death.[13] The California court quoted with approval the *Koch* court as it noted the close family relationship involved and the transfer of the property into so-called "friendly hands."

The primary emphasis in each of these opinions was upon the significance of the settlor's death under the terms of the instrument to the ultimate possession of the trust corpus.[14] The dicta regarding personal influence appear to be part of a marshalling of all possible arguments to support the result of taxation. The absurdity of the dicta as propositions of law is apparent for they would place an inheritance tax upon every absolute inter vivos gift between the head of a family and its members. A transfer absolute in form may, of course, be proved illusory by the events which follow, but the dicta of the *Koch* and *Madison* cases suggest a conclusive presumption of illusion through close personal relationship alone.

Although in general agreement as to retention of a beneficial interest, the courts are in conflict as to whether the "transfer intended" clause encompasses a transfer whereby the transferor has completely and absolutely divested himself of any estate or economic interest in the transferred property but has stipulated that the beneficiary's enjoyment be postponed until his, the transferor's death.[15] Out of this conflict two fundamental tests of taxability have developed. The "receipt" test affixes tax liability if there is an enlargement of the beneficiary's enjoyment at the transferor's death while the "divestment" test affixes liability only if the transferor retains an interest during his life.

The most widely accepted test is expressed in a leading California case where the decedent had established during his life an irrevocable

12. *Id.* at 156, 167 Atl. at 753.

13. 26 Cal. 2d 453, 159 P.2d 630 (1945).

14. In general, the courts seem uniformly to assume that the intent portion of the "transfers intended" clause is a general one. The decedent will be conclusively presumed to have intended the result of his written act.

15. The "receipt" test considers this a "transfer intended" since the beneficiary does not receive possession or enjoyment until the transferor's death. Worcester Co. Nat'l Bank v. Commissioner of Corps. and Taxation, 275 Mass. 216, 175 N.E. 726 (1931); State St. Trust Co. v. Stevens, 209 Mass. 373, 95 N.E. 851 (1911); Chase v. Commissioner of Taxation, 226 Minn. 521, 33 N.W. 2d 706 (1948). Under the "divestment" test this transfer is not taxable since the settlor has not retained any interest. People v. Northern Trust Co., 330 Ill. 238, 161 N.E. 525 (1928); People v. Moses, 363 Ill. 423, 2 N.E. 2d 724 (1936); *In re* Estate of Hazelton, 148 Ohio St. 127, 73 N.E. 2d 799 (1947); *In re* Estate of Heine, 61 Ohio L. Abs. 385, 45 Ohio Op. 181, 100 N.E. 2d 545 (P. Ct. 1950).

trust without reservation for each of his three children.[16] The income of the son's trust was to accumulate while the income from the daughters' trusts was to be distributed. The trusts were to cease at the settlor's death with corpus and accumulated income to the children. The beneficiaries of the trusts argued that the trusts were absolute inter vivos gifts and not taxable as "transfers intended" since neither title, possession nor enjoyment had been retained by the settlor until his death. The California Supreme Court found that the beneficiaries received increased enjoyment at the settlor's death through receipt of the principal and held the transfers taxable. The court's test was not the reservation of an interest by the settlor but "whether he tied up the property with . . . strings, which could not be loosened until his death."[17]

The minority test is explained in a leading Illinois case where the deceased settlor had reserved a life interest in the income of the trust.[18] The Illinois Supreme Court, in holding the transfer taxable, defined a "transfer intended" as "a disposition in which the donor retains the economic interest or enjoyment of the property during his life."[19] The court further said that the common reason inducing a man to make a gift by will is his desire to retain enjoyment and control of the transferred property until his death. Therefore, when the donor retains the fruits of the property during his life the transfer is taxed as a testamentary disposition. Then, in dictum, the court, as had other Illinois courts before it, addressed itself to the situation of postponed enjoyment and stated that the mere use of the donor's life as a measuring device does not make a transfer taxable where the donor has immediately and absolutely divested himself of all enjoyment of the property.[20] In this test it is the settlor's part in the transaction which is of controlling importance.

Jurisdictions which have adopted the "receipt" test include California, Connecticut, Massachusetts, Minnesota, New Jersey and Texas.[21]

16. *In re* Madison's Estate, 26 Cal. 2d 453, 159 P.2d 630 (1945).

17. *Id.* at 457, 159 P.2d at 633.

18. People v. Moses, 363 Ill. 423, 2 N.E. 2d 724 (1936).

19. *Id.* at 42, 2 N.E. 2d at 726.

20. Cases cited note 15 *supra.*

21. *In re* Madison's Estate, 26 Cal. 2d 453, 159 P.2d 630 (1945); Bryant v. Hackett, 118 Conn. 233, 171 Atl. 664 (1934); *but see* Connelly v. Waterbury Nat'l Bank, 136 Conn. 503, 72 A.2d 645 (1950); Worcester Co. Nat'l Bank v. Commissioner of Corps. and Taxation, 275 Mass. 216, 175 N.E. 726 (1931); however, Massachusetts courts have held that it is immaterial whether or not the creator of the trust had the power to revoke; State St. Trust Co. v. Stevens, 209 Mass. 373, 95 N.E. 851 (1911); Dexter v. Jackson, 243 Mass. 523, 137 N.E. 877 (1923); this exception is inconsistent with the court's policy of taxing the shift of economic interests although prior transfer of title inter vivos as, at the transferor's death, such a shift occurs in that only then does the beneficiary receive an absolute and indefeasible interest in the transferred property; Chase v. Commissioner of Taxation, 226 Minn. 521, 33 N.W. 2d 706 (1948) questioned in Brink, *Minnesota Inheritance Tax,* 43 MINN. L. REV. 443 (1959); *In re* Hollander's Estate, 123 N.J. Eq. 52,

The courts of Delaware, Illinois, Pennsylvania and Ohio have indicated their acceptance of the "divestment" theory; in dictum the courts of Michigan, Washington and Wisconsin have expressed their approval of the latter test.[22] There is a conflict in the New York cases with authority in support of both theories.[23] The adoption of the "divestment" test by the Pennsylvania and Delaware courts, however, was based upon interpretation of statutory language outside the "transfer intended" clause. The Pennsylvania court said that the statute's title imposing a tax on property "passing from a decedent . . . at the time of his death" required the adoption of the "divestment" test.[24] The title of the Delaware statute imposed a tax upon "all property belonging to any person who at the time of his death was a resident of the State of Delaware, and which passes by will or by the intestate laws of this State, or by deed, grant, gift or settlement . . . intended to take effect in possession or enjoyment after the death of the grantor, donor, or settlor. . . ."[25] The court construed "at the time of his death" to modify "belonging to any person."[26] However, it is submitted that such a construction is grammatically untenable and that "at the time of his death" correctly modifies "resident."

A transfer may be considered as a continuum involving transmittal, time of transmittal, receipt, and time of receipt. The "receipt" test deems the last two to be the conclusive factors. The "divestment" test, however, focuses attention on the entire continuum as a single transaction, and since date of death is the time factor the taxable events become

---

195 Atl. 805 (Preg. Ct. 1938); Hartford v. Martin, 122 N.J.L. 283, 4 A.2d 31 (Ct. Err. & App. 1939); however, a recent statute, N.J. STAT. ANN. § 54: 34-1.1 (Supp. 1957) permits grantor to dispose of his rights and thereby escape taxation; Bethea v. Sheppard, 143 S.W. 2d 997 (Tex. Civ. App. 1940).

22. Highfield v. Equitable Trust Co., 34 Del. 509, 155 Atl. 724 (1931); People v. McCormick, 327 Ill. 547, 158 N.E. 861 (1927); People v. Northern Trust Co., 330 Ill. 238, 161 N.E. 525 (1928); People v. Moses, 363 Ill. 423, N.E. 2d 724 (1936); *In re* Townsend's Estate, 349 Pa. 162, 36 A.2d 438 (1944); *In re* Glosser's Estate, 355 Pa. 210, 49 A.2d 401 (1946); *In re* Cowan's Estate, 78 Pa. D. & C. 543. (Westmoreland County Ct. 1951); *In re* Estate of Hazelton, 148 Ohio St. 127, 73 N.E. 2d 799 (1947); *In re* Estate of Heine, 61 Ohio L. Abs. 385, 45 Ohio Op. 181, 100 N.E. 2d 545 (P. Ct. 1950); Fuller v. Bassett's Estate, 246 Mich. 440, 224 N.W. 639 (1929); *In re* Ellis, 169 Wash. 581, 14 P.2d 37 (1932); Inheritance Tax Div. v. Chamberlin, 21 Wash. 2d 790, 153 P.2d 305 (1944); Prange's Will, 201 Wis. 636, 231 N.W. 271 (1930).

23. *In re* Patterson's Estate, 127 N.Y. Supp. 284 (Surr. Ct. 1910) *aff'd* 146 App. Div. 286, 130 N.Y. Supp. 970 (1911) *aff'd w/o op* 204 N.Y. 677, 98 N.E. 1109 (1912); *In re* Dunlap's Estate, 115 Misc. 580, 188 N.Y. Supp. 762 (Surr. Ct. 1921) *aff'd* 205 App. Div. 128, 199 N.Y. Supp. 147 (1923). But see *In re* Schweinert's Estate, 133 Misc. 762, 234 N.Y. Supp. 307 (Surr. Ct. 1929); *In re* Kirby's Estate, 228 App. Div. 171, 239 N.Y. Supp. 390, *aff'd* 254 N.Y. 624, 173 N.E. 894 (1930). However, in 1930 the New York legislature repealed its inheritance tax in favor of an estate tax.

24. *In re* Spangler's Estate, 281 Pa. 118, 126 Atl. 252 (1924) interpreting PA. STAT. tit. 72 § 2301 (1949).

25. DEL. CODE ANN. tit. 7, § 1 (1953).

26. Highfield v. Equitable Trust Co., 34 Del. 509, 155 Atl. 724 (1931).

transmittal *and* receipt at the date of death. Under this latter test a transfer is taxable only when it takes effect as to both transferor and transferee at death.

The language of the "transfer intended" clause is sufficiently vague to be adaptable to either construction. It is submitted, however, that the most significant event is *transmittal* at death. The courts uniformly recognize that a death tax is not intended to tax an absolute inter vivos gift;[27] and the only meaningful distinction between an inter vivos gift and a testamentary gift is that in the latter the *transferor* enjoyed the property throughout his life. It is of no economic significance to the beneficiary that he receives property at someone's *death*. To the beneficiary there is no economic distinction between two gifts of equal value received the same day although one is from a decedent and the other from a living person.

Legislatures early seized upon the circumstance of property reallocation at death as a source of revenue.[28] The death tax was explained as a tax upon a state-conferred privilege of transferring property at death, in the absence of which, the property would have escheated to the state.[29] This explanation which was offered to support the constitutionality of the tax does not presume a legislative preoccupation with the position of the transferee, and in the absence of explicit language in the statute there appears no reason to assign to the legislature an intent or understanding contrary to the affairs of men in which the transferor's enjoyment of the property throughout his life distinguishes a testamentary transfer.

The text of the Indiana statute, considered as a whole, supports the "divestment" test.[30] The "transfer intended" clause is in a context of more precisely defined transfers which involve enjoyment by the transferor of the property throughout his life. The statute taxes transfers by will, by intestate descent, under a contract or antenuptial agreement made by a decedent during life and payable by its terms at or after his death, by right of survivorship, and by deed of trust wherein the settlor has re-

27. 28 AM. JUR. *Inheritance, Estate, Succession and Gift Taxes,* § 114 (1959). Armstrong v. State *ex rel.* Klaus, 72 Ind. App. 303, 120 N.E. 717 (1919).

28. A death duty was enacted in England in 1694; the first state to adopt such a tax was Pennsylvania in 1826. 28 AM. JUR. *Inheritance, Estate, Succession, and Gift Taxes,* §§ 9, 11 (1959).

29. Dr. William J. Shultz has pointed out that the first American statement of the doctrine on which the right of a state to tax is rested was contained in a letter from Jefferson to Madison dated September 6, 1789, in which the former said: "The earth belongs in usufruct to the living: the dead have neither powers nor rights over it. The portion occupied by any individual ceases to be his when he himself ceases to be, and reverts to society." 1 P-H INH. & TRANS. TAX SERV. ¶ 101 (1956). Saltonstall v. Saltonstall, 216 N.Y. 79, 110 N.E. 116 (1915).

30. IND. ANN. STAT. §§ 7-2401 to 7-2442 (Burns 1948).

served to himself any income or interest. In each of these situations the transferor has enjoyed the property until his death. Also taxed are transfers in contemplation of death where, in effect, the transferor has enjoyed the property all his life, and only when death is imminent has he seen fit to terminate his control and interest therein. Proceeds of an insurance policy paid as part of the insured's estate are also taxed as another instance in which the decedent keeps benefits within his dominion and control until his death makes effective his last will and testament. Finally, the statute taxes a transfer wherein the settlor reserves to himself and others a power of revocation, alteration, or amendment if upon its exercise, the property would revest in the settlor. Here, although the transferor may not in fact receive enjoyment throughout his life, it is within his power to resume it at any time or at least to bargain for economic benefit in return for directing enjoyment in a particular manner.

The approach suggested by the preceding analysis presents the same basic emphasis as the federal estate tax—emphasis on property passing from a decedent at his death.[31] The courts have considered this analogy. Those courts which adopt the "receipt" test summarily distinguish an estate tax from an inheritance tax with the observation that the former is a tax on the privilege of giving while the latter is a tax on the privilege of receiving.[32] On the other hand, courts which have adopted the "divestment" test have occasionally cited federal estate tax cases as authority while conceding that an inheritance tax is a tax on the privilege of receiving property.[33] A comparison of the statutes suggests that the estate and inheritance taxes involve the same approach to taxable events and differ only as to the incidence of the tax. It is this difference in "who pays the tax" which is achieved through the emphasis on the transferor's privilege in the estate tax and the transferee's privilege in the inheritance tax.

The foregoing discussion together with the specific transfers enumerated in the present Indiana statute appear to make the "transfer intended" clause superfluous.[34] The history of the statutes further sup-

31. Reinecke v. Northern Trust Co., 278 U.S. 339 (1929).

32. *In re* Madison's Estate, 26 Cal. 2d 453, 159 P.2d 630 (1945); *In re* Kohrs', 122 Mont. 145, 199 P.2d 856, 5 A.L.R. 2d 1046 (1948); Hartford v. Martin, 122 N.J.L. 283, 4 A. 2d 31 (Ct. Err. & App. 1939).

33. People v. McCormick, 327 Ill. 547, 158 N.E. 861 (1927); People v. Moses, 363 Ill. 423, 2 N.E. 2d 724 (1936); *In re* Estate of Hazelton, 148 Ohio St. 127, 73 N.E. 2d 799 (1947); *In re* Estate of Heine, 61 Ohio L. Abs. 385, 45 Ohio Op. 181, 100 N.E. 2d 545 (P. Ct. 1950).

34. It is suggested that the clause was a general phrase formulated and copied by legislatures that subsequently was found to be inadequate, inarticulate, and vague. Therefore, to make explicit the intent of the clause and to avoid any misinterpretation by the

ports this conclusion. The original Indiana act listed the same transfers as the present statute.[35] However, the development in those statutes from which the Indiana act was copied is more revealing.[36] An Illinois 1909 act which taxed "transfers intended" was amended in 1933 to include any transfer the terms of which might be changed in the lifetime of the transferor by reason of a power reserved by the transferor to alter, amend, or revoke.[37] The California statute had a similar development. The "transfer intended" clause was included in an 1893 statute.[38] An amendment in 1935 added transfers with a reservation of income or interest by the transferor and transfers in which the transferee promises to make payments to or care for the transferor.[39] The Wisconsin statutes underwent a similar development.[40] Thus, the legislatures have by amendments eroded away the substance of the clause which by itself was so vague as not to furnish an adequate guide in the conduct of human affairs.

No Indiana cases adopt either the "receipt" test or the "divestment" test for the postponed enjoyment situation. Hence, the Indiana courts are free to adopt the approach that the "transfer intended" clause is properly a tax on transfers in which the transferor reserves a lawful economic interest so that in fact there is no absolute and irrevocable gift until his death, *i.e.*, that a transfer must take effect as to both the transferor and transferee at the former's death to be taxable within the "transfer intended" clause.

A possible impetus to broadening the scope of the clause is the absence of a gift tax. However, this subject with its enormous policy im-

---

courts the legislatures enacted amendments to the original statutes to codify those transfers desired to be taxed.

35. Indiana first imposed an inheritance tax in 1913 on transfers by will, by the intestate laws, in contemplation of death, intended to take effect in possession or enjoyment at or after death, and by exercise of a power of appointment. IND. ACTS 1913, ch. 47, § 1 at 79. In 1929 the 1913 statute with amendments was repealed and a new statute, IND. ACTS 1929, ch. 64, § 1 at 186, passed, which in turn was repealed in 1931 when the present statute was adopted. The transfers taxed by the 1929 act were the same as those taxed by the 1931 statute. IND. ACTS 1931, ch. 75, § 1 at 192.

36. The Indiana inheritance tax of 1913 was modeled after the statutes of Illinois, New York, Wisconsin, and California. Ullum, *Inheritance Tax Law*, 7 IND. L. J. 124 (1931). When Indiana adopted her statute the courts of Illinois, California, and Wisconsin had not spoken with reference to the "transfer intended" clause. The New York courts had emphasized retention of an interest but had not faced the situation of postponed possession and enjoyment without a reserved life estate.

37. ILL. LAWS, § 1(3) at 312 (1909); ILL. ANN. STAT. ch. 120, § 375 (Smith-Hurd 1954).

38. CALIF. STAT. ch. 168, § 1 (1893).

39. CALIF. STAT. ch. 358, § 2(3) (1935).

40. WIS. STAT. ANN. § 72.01 (1957); WIS. LAWS ch. 355, § 1 (1899).

plications would be better served by legislative, rather than judicial, pronouncement.[41]

41. The federal government has come to an explicit statement of taxable transfers that may well be used as an example. Specifically, the "transfer intended" clause was deleted in the present code and a provision inserted providing that estates of persons dying on or after August 17, 1954, are to be taxed only if the survival by the beneficiary is a condition precedent and the decedent retains a reversionary interest in the property valued at an amount in excess of five per cent of the value of the property. INT. REV. CODE OF 1954, §§ 2036, 2037, 2041.