1953

In the Matter of the Estate of Cora E. Fenner : Brief of Appellant

Utah Supreme Court

C. Preston Allen; Adam M. Duncan; Attorneys for Appellant;

8086

IN THE SUPREME COURT
of the
STATE OF UTAH

In the Matter of the Estate of CORA E. FENNER, *Deceased.*

Case No. ~~8474~~

APPELLANT'S BRIEF

Appeal From the District Court of the Second Judicial District, In and For Weber County, State of Utah,

Honorable Charles G. Cowley, Judge

C. PRESTON ALLEN,
ADAM M. DUNCAN,
Attorneys for Appellant,
Utah State Tax Commission

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STATEMENT OF FACTS

Mrs. Cora E. Fenner was, at the time of her death in an Ogden hospital on February 10, 1952, beneficiary of the proceeds of three life insurance policies taken out on the life of her deceased husband, Walter E. Fenner. These policies were written by the Equitable Life Assurance Society of the United States, hereinafter referred to as "the Society." Each of these policies contained an identical "Special Provision" which gave Mrs. Fenner several choices as to the method of payment of the amounts "held on deposit" for her (Exhibit 1, P. 4). The Society accepted proof of the death of Walter E. Fenner on the 28th day of December, 1951, and the 28th of each month was thereafter treated as the "interest due

date" within the terms of payment on the policies. The policies provided for payment of the "amount becoming due" on "the amount held on deposit." (Exhibits 1, 2(b), P. 4). Pursuant to this clause, the Society mailed to Cora E. Fenner two checks, the first in the amount of $64.80 dated the 24th day of January, 1952, as payment for interest due on the amounts held on deposit with the Society as proceeds of the three policies from the date of the decedent's death, November 19, 1951, to the first interest due date, December 28th, 1951; the second check for $52.65 dated January 28, 1952, was payment for the interest due on the deposits from December 28, 1951 to January 28, 1952. No demand was ever made for payment and the checks representing the amount due on the amounts held on deposit were sent to her as of course. On January 2nd, 1952, Cora E. Fenner withdrew the sums held on deposit with the Society under two other policies identical except as to the amounts. Inheritance tax was paid on these sums without protest. (Except where otherwise designated, the State of Facts *supra* is taken from the Stipulation of the parties which was entered into the Record on Appeal by Order of this Court on the 10th day of October, 1953.)

PRELIMINARY STATEMENT

The position of the Utah State Tax Commission is that Mrs. Fenner clearly had the absolute use of and title to the amounts "held on deposit" which were "due" (Ex. 1, P. 4, 6) and "payable" (Ex. 1, P. 3) and the mere

fact that she chose not to withdraw the sums and consume them for her own objects, but rather elected to have the sums paid over upon her death to the named nieces and nephews, (who received the same proportionate share either under her will or as contingent beneficiaries under the policies [Stipulation, Par. 8 and Exhibit Two]), should not affect her duty to pay the tax due on all property which she owned. We contend that Mrs. Cora E. Fenner was the *owner* of the proceeds with no restriction on the use thereof, and that these proceeds should have been included in the inventory as part of her gross estate.

POINT I.

MRS. CORA E. FENNER WAS AT THE TIME OF HER DEATH OWNER IN FEE OF THE PROCEEDS OF THREE LIFE INSURANCE POLICIES WHICH SHOULD HAVE BEEN INVENTORIED WITH HER OTHER ASSETS AS PART OF HER GROSS ESTATE, AS PROVIDED IN TITLE 59-12-3, UTAH CODE ANNOTATED (1953).

(A) WHETHER THE ESTATE CREATED IN MRS. CORA E. FENNER IS DEEMED BY THIS COURT A FEE SIMPLE ABSOLUTE WITH VOID REMAINDER OVER, OR A FEE SIMPLE DEFEASIBLE, SUCH ESTATE IS WITHIN THE PURVIEW OF OUR INHERITANCE TAX STATUTE.

Any litigation involving estates gives rise to the problems of semantics. The Minute Entry of the District Court does not set forth the grounds for the exclusion from the inventory of the amounts held on deposit by the Society. Thus the task falls to this Court to append a legal label to the estate created by the insurance con-

tract, which is set forth in full in the Record on Appeal. The Commission submits, however, that whichever of the possible and plausible labels chosen, the particular interest or estate created upon the death of Walter E. Fenner falls within the purview of our inheritance tax statute.

Our Utah statute setting forth the property to be included in the evaluation of a decedent's gross estate reads:

> 59-12-3.
>
> "Gross estate, how determined—Election by executor.—The value of the gross estate of a decedent shall be determined by including the value at the time of his death, or as of a time nine months after his death whichever the executor within ten months after such death elects by filing an election with the clerk of the district court and the tax commission, of *all property, real or personal,* within the jurisdiction of this state, *and any interest therein, whether tangible or intangible, which shall pass to any person, in trust or otherwise,* by testamentary disposition or by law of inheritance or succession of this or any other state or country, or by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after his death. Provided, (1) property included in the gross estate on the date of death and, within nine months after the decedent's death, distributed by the executor or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other

disposition, whichever first occurs, instead of its value as of the date nine months after the decedent's death, and (2) *any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death* (instead of the later date), with adjustment for any difference in its value as of the later date not due to mere lapse of time. No deduction under this title of any item shall be allowed if allowance for such item is in effect given by the valuation under this subdivision. Wherever in any other section of this chapter reference is made to the value of property at the time of the decedent's death, such reference shall be deemed to refer to the value of such property used in determining the value of the gross estate." (Emphasis added)

There can be no dispute that the legislature intended to include all legal estates in realty and personalty which were not otherwise exempt. It would also seem abundantly clear that the interest of Mrs. Fenner, however characterized, was within the provisions of this statute.

The insurance contract may have created in the beneficiary either (a) a title in fee simple; or (b) a title in fee simple defeasible. The Restatement of Property defines an Estate in Fee Simple as one which,

"(a) has a duration

(i) potentially infinite; or

(ii) terminable upon an event which is certain to occur but is not certain to occur within a fixed or computable period of time or within the duration of any specified life or lives; or

(iii) terminable upon an event which is certain to occur, provided such estate is one left in the conveyor, subject to defeat upon the occurrence of the stated event in favor of a person other than the conveyor; and

(b) if limited in favor of a natural person, would be inheritable by his collateral as well as by his lineal heirs." (A.L.I. Restatement of Property, Sec. 14.)

The interest Mrs. Fenner took falls within this definition, although it may be argued that her failure to designate one of the optional modes of payment amounted to a failure to perfect her fee. Clearly, had she made the positive move of withdrawing the amounts held on deposit, her estate would be required to account therefor. By their conduct in paying without protest inheritance tax on the two other identical policies, the proceeds of which were consumed by Mrs. Fenner, counsel thus admit this point. The distinction then between a fee absolute and the interest Mrs. Fenner took is the artificial one that she omitted to notify the Society of her desires to withdraw the funds "held on deposit."

She had all of the perquisites of a fee holder, viz., she had the right and power to sell or assign her interest or spend the amount on deposit at any time with no restrictions. (The administrative limitation requiring her to give notice of withdrawal prior to an interest due date is not material here.) In addition, the interest

accruing on the amounts "held on deposit" was paid to her as a matter of course.

An equally tenable construction would be that the interest which Mrs. Fenner took was an estate in Fee Simple Defeasible. The Restatement of Property defines such an interest as:

> "An estate in fee simple which is subject to a special limitation, a condition subsequent, an executory limitation, or a combination of such restrictions." (A.L.I. Restatement of Property, Sec. 16.)

Notwithstanding the intent of the husband, Walter E. Fenner, to create a given interest, if the grant to his widow was — as we submit is the case — absolute, any subsequent attempted grant of a contingent remainder to the named nieces and nephews must be treated as a nullity and void. (Inheritance and Estate Taxes, Pinkerton and Millsaps, Sec. 174, p. 139 (1952).)

SUMMARY

Thus, this court may construe the interest created in Mrs. Cora E. Fenner as either a Fee Simple Absolute with a void remainder over or as a Fee Simple Defeasible —defeasible upon her failure to withdraw, assign, consume or otherwise dispose of the principal held on deposit. Upon either hypothesis our statute (Title 59-12-3, Utah Code Annotated, (1953) encompasses within its terms the particular estate created.

(B) OUR INHERITANCE TAX STATUTE IS TO BE CONSTRUED SO AS TO BE "FAIR AND REASONABLE" AND ANY CONSTRUCTION WHICH EXCLUDES SUCH INTERESTS AS THOSE OF THE DECEDENT IN THE PROCEEDS OF THESE POLICIES WOULD RENDER PARTS OF THE STATUTE NUGATORY AND, HENCE, WOULD BE NEITHER FAIR NOR REASONABLE.

The statute which must be construed in the determination of this case (Title 59-12-3, Utah Code Annotated, (1953) reads, in part:

> "The value of the gross estate of a decedent shall be determined by including * * * all property real or personal * * * or *any interest therein*, whether *tangible or intangible*, which shall pass to any person in trust or *otherwise* * * * intended to take effect in possession or enjoyment at or after death." (Emphasis added)

To exclude the interest Mrs. Fenner took as beneficiary of the three policies would be to ignore, for example, such phrases as "*any* interest" and "tangible or *intangible.*"

The Supreme Court of this state held in the case of *In re Osgood's Estate,* (52 Utah 185 at 195, 173 Pac. 152 (1918)), that:

> "While we are aware of and approve the general rule that a law which imposes a tax of any kind or character cannot be extended by construction beyond the literal terms of the statute * * * At all events the inheritance tax statute of this state should receive a fair and reasonable construction both in favor of the state and against it."

See Also, *Norville vs. State Tax Commission,* 98 Ut. 170, 97 P 2d 937 (1940); and *Sutherland, Infra,* Sec. 6703 and 6710.

> "It is the policy of the law to insure the collection of all taxes and whenever it is possible on any theory to do so, the courts will construe the statutes to accomplish that result." Sutherland, Statutory Construction, (3rd Ed.) Vol. 3, Sec. 6706, p. 302 and cases cited thereat.

(C) THE LANGUAGE OF THE POLICIES CLEARLY INDICATES THAT MRS. CORA E. FENNER TOOK TITLE IN FEE TO THE PROCEEDS OF THE POLICIES.

One of the more compelling reasons sustaining the commission's position that the interest created in Mrs. Fenner is includable in her gross estate is simply that the unambiguous language of the insurance contract itself so establishes. Throughout the policy and its several addenda the proceeds are referred to as being "due" (Exhibit one, p. 4, par. 2 and 2(b); p. 6), "payable" (Exhibit one, p. 3), "held on deposit" (Exhibit One, p. 4, par. 2 (b)), and "left on deposit" (Exhibit One, p. 4, par. 2; p. 6, par. 1). Such phrases are inconsistent with any other conclusion than that Mrs. Fenner was absolute owner of the proceeds.

Perhaps the most explicit statement establishing title in Mrs. Fenner is found in Exhibit One, p. 3, which reads:

> "This policy having matured by the death of the insured, the net proceeds, to-wit: TEN THOUSAND FIVE HUNDRED THIRTY ONE

> and 92/100 DOLLARS ($10,351.92) *have become payable* as provided in the policy." (Emphasis Added).

It has been held by many courts that the word "Due" means owing and immediately payable, i.e., that the person to whom something is "Due" is the owner of the property and has title to the res.

> See e.g., *Bank of America Nat. Trust and Sav. Ass'n. v. Gillett,* 36 Cal. App. 2d 453, 97 P. 2d 875 (1940); *Northwestern Mut. Life Ins. Co. v. Greiner,* 115 Mich. 639, 74 N.W. 187 (1898).

> "Due means having reached the date at which payment is required; payable; said especially of a note or obligation in which the time for payment is specified." Syl. 5, 56 Ariz. 247, 107 P. 2d 212 (1940).

CONCLUSION

In conclusion, the Tax Commission submits that our Utah inheritance tax statute by its express terms covers the estate granted to Mrs. Fenner—however that estate may be characterized by this Court. The intended coverage and scope of the statute — as drawn from the plain meaning of the words themselves — compels the inclusion of such an estate within the inventory of a decedent's gross assets. Furthermore, the insurance contract itself in using language as "due" "payable" and "held on deposit", seems clearly to create an interest in the deposited sums akin to an ordinary bank deposit. Indeed,

banks often require notice of withdrawal as a condition to the maintenance of such accounts—much as was provided for in the policies in issue.

It is submitted, therefore, that Mrs. Fenner was the owner of the proceeds of the life insurance policies on the life of her husband, Walter E. Fenner, and the District Court erred in failing to order their inclusion within the inventory of Mrs. Fenner's gross estate.

C. PRESTON ALLEN,
ADAM M. DUNCAN,
Attorneys for Appellant,
Utah State Tax Commission