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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

In the Matter of the Estate of
CORR E. FENNER,
Deceased.

} Case No.
8086

APPELLANT'S REPLY BRIEF

Appeal From the District Court of the
Second Judicial District,
In and For Weber County, State of Utah,
Honorable Charles G. Cowley, Judge

FILED
DEC 28 1953

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IN THE SUPREME COURT of the STATE OF UTAH

In the Matter of the Estate of CORA E. FENNER, <i>Deceased.</i>	} Case No. 8086
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APPELLANT'S REPLY BRIEF

STATEMENT OF FACTS

The many additional facts set forth in respondent's brief, ostensibly for the commendable purpose of adding a touch of "human interest" to this appeal, are entirely de hors the record and, of course, appellant has no basis for ascertaining their truth or falsity. Since, however, they are clearly irrelevant and immaterial to the issues before this Court, appellant submits that respondent's Statement of Facts is entitled to no persuasive weight.

PRELIMINARY STATEMENT

Since the respondent has failed to include a statement of points upon which he relies and further, has failed to summarize his position, it behooves us to attempt a brief restatement of his apparent contentions in order to frame our reply. Respondent seems to contend that the interest created in Mrs. Fenner by the "Special Provision" was a "power of appointment" and that since our gross estate statute (59-12-3, Utah Code Annotated, 1953) does not, in terms, levy a tax on such a power, it was properly excluded from her gross estate inventory and appraisal. Respondent alludes to federal authority to sustain this proposition.

ARGUMENT AND AUTHORITIES

POINT I.

THE INTEREST MRS. FENNER OWNED AT THE TIME OF HER DEATH IN THE PROCEEDS OF THE THREE INSURANCE POLICIES WAS NOT A POWER OF APPOINTMENT BUT A FEE, AND, THEREFORE, SHOULD HAVE BEEN INCLUDED IN THE DECEDENT'S GROSS ESTATE FOR TAX PURPOSES.

On page 11 of Respondent's brief there is cited authoritative definition of a power of appointment. This definition reads, in part:

"Such a power has been defined as an authority enabling one person to dispose of the interest which is *vested in another* * * * a power of appointment is not an absolute right of property nor is it an estate, *for it has none of the elements of an estate.*" (Emphasis added)

Did Mrs. Fenner have “none of the elements of an estate” and what are these elements?

Who was “another” in whom the title to the proceeds have vested?

“One of the tests of ‘ownership’ of money or property is the right to dispose of, sell, convey, assign or give away.” (*Standard Oil Company of N.J. vs. Powell P. Co. Plumbing and Contracting*, 144 S.C. 354, 142, S. E. 612, at 615)

There can be no dispute that Mrs. Fenner had the legal right to dispose of the proceeds, to sell her interest, convey it, assign it or give it away. She *lacked none* of the perquisites of absolute fee ownership. In every real sense she “owned” the proceeds. As one authority has indicated, “the holder of an unrestricted right to appropriate principal enjoys the basic delights of ownership.” (I Paul, *Fed. Estate and Gift Taxation*, Note 7, P. 223 (1942).) Under such a right to invade the corpus as was given Mrs. Fenner, “the life tenant enjoys all the attributes of ownership except the formal trappings of title.” (52 *Harvard Law Review*, 494 at 522)

Quoting again Respondent’s definition of a “power of appointment” (at p. 12 of her brief):

“Whether a power of appointment is or is not exercised, the property that was subject to the appointment is not subject to distribution as part of the estate of the donee.”

Here again, the interest created in Mrs. Fenner fails to meet Respondent's definition for, as provided in the last sentence of paragraph 2 of the Special Provision and cited at page 6 of Respondent's brief, "Should none of the Insured's said nieces" etc. "be surviving at the death of the Insured's said wife, as aforesaid, the amount held under said Option 1, together with any interest accrued thereon, or the commuted value of any unpaid certain installments under said Option 3, as the case may be, *shall be paid in a single sum to said wife's executors or administrators.*" Thus Mrs. Fenner was named as residual legatee under the policies and the proceeds of the policies were *not*, "not subject to distribution as part of the estate of the donee."

"DUE" AND "HELD ON DEPOSIT."

Appellant feels it cannot overstress the significance of the language employed in the policies and the Special Provision. 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.

Paragraph one of the Special Provision, reads:

"It is hereby specially provided that the settlement of *the amount becoming due* by reason of the death of the Insured shall be made with the

Insured's wife, CORA E. FINNER, if living, as provided in paragraph 2, if not living, such amount shall be divided into the number of equal shares that will provide: . . . " one share for each of Insured's said nieces, etc.

Paragraph 2 reads:

The amount becoming due to the Insured's said wife under paragraph 1 shall be *left on deposit with the Society* in accordance with Option 1 of the Modes of Settlement at Maturity of Policy during her lifetime, interest payable monthly, except that said wife shall have the following privileges: * * (a) On an interest due date of withdrawing *the amount held on deposit*, or (b) At any time of having *the amount held on deposit* paid as a life income in accordance with Option 3 of the said Modes of Settlement. (Emphasis added)

* * (The use of the word "privileges" here is clearly a misomer. Prior language [e.g., " . . . settlement of the amount due shall be made. . . " etc.] created a *duty* to pay in the Society. In Hohfeldian terminology, Mrs. Fenner had more than a "privilege," she had a "*right*" and the Society was under a "*duty*" to pay over the amounts "held on deposit" and "due" her.)

To lawyer and layman alike these phrases, "due" and "held on deposit" unequivocally mean actual *ownership*, not merely "the means of acquiring" title. (Cf. Resp. Brief, P. 10.) Indeed, these same phrases often appear as part of the agreement between bank and

depositor under an ordinary savings account. No one has yet successfully contended that because a bank may require advance notice of withdrawal and may determine to pay out only on specific days, that the person in whose name the account is carried is anything but the absolute owner. Likewise, the administrative provision in these policies that the beneficiary could not withdraw the sums “due” and “held on deposit”, except on given days and after notice, in nowise deprived her of any perquisite of absolute fee ownership. All Mrs. Fenner needed to do under the Special Provision of the policies in order to spend the money in any way she desired was to notify the Society. It seems clear, therefore, that the language of the policies created precisely the same rights, duties and obligations between herself and the company as any other debtor-creditor relationship—such as an ordinary bank deposit.

Again, even the most cursory reading of the policies themselves bears out Appellants contention that title was not “vested in another,” but in the decedent, Mrs. Fenner. (Respondent, quite understandably, has neglected to suggest who this “another” could conceivably have been.)

Clearly, the interest which decedent took “looks like, sounds like and walks like” a fee.

POINT II.

SHOULD THIS COURT CHARACTERIZE THE INTEREST TAKEN BY MRS. FENNER IN THE INSURANCE POLICIES AS A GENERAL POWER OF APPOINTMENT, SUCH AN INTEREST IS, NEVERTHELESS, WITHIN THE INCLUSION OF TITLE 59-12-3, UTAH CODE ANNOTATED, 1953.

(A) The Common Law Theory of Powers of Appointment is Anachronistic and Entirely Unjustified by Present Concepts of Property Ownership and Responsibility.

Our position is well summarized by Professor Eisenstein in Volume 52 of the Yale Law Journal at page 296. He writes:

“‘For what good reasons should contemporary American taxpayers be allowed to escape a generation or two of estate and inheritance taxes by the use of a verbal form [A power of appointment] invented several centuries ago to enable an English gentleman to make a will of land.’ This query is particularly relevant at a time when the Supreme Court is openly contemptuous of the ‘shadowy and intricate distinctions of common law property concepts and ancient fictions,’ (U. S. v. Jacobs, 306 U.S. 363, 369) and ‘elusive and subtle casuistries which feed upon the unwitty diversities of the law of property.’ (Hilvering v. Hallock, 309 U.S. 106, 118.)”

The common law concept of a power of appointment was that the donor of the power created something akin to an agency in the donee, the latter merely acting as an instrument of the donor in filling in the blanks — the

title, in theory, passing directly from the donor to his appointed objects. Thus, no interest in the property was deemed to have vested in the donee, even though the donee might be given a general power to invade the corpus, consume in whole or part, or appoint to any object of his, the donee's, choice.

One writer suggests that the more recent trend toward the taxing of powers of appointment was prompted by recognition "that the power to appoint might be so broad as to be tantamount to economic ownership of the appointed property." (Estate Taxation of Powers of Appointment, 77 North Carolina Law Review, 1948)

Many old common law technicalities (e.g., the requirement of a seal to validate a deed), have long since been abandoned as unworkable, and where public policy once favored retention of larger estates in one family line, it now favors freer alienation and the imposition of a just tax burden on each citizen enjoying the privileges of land ownership. This same policy reasoning applies to personalty. To allow the wealthy owner, by employing careful draftsmen, to call his absolute gift something else and thus escape his just tax incidence is simply to perpetuate an unjust and unfair legalism born of early English aristocratic dictate.

To label an absolute fee something else does not, for tax purposes, make it so.

(B) Many Courts Realistically Treat a General Power of Appointment as the Substantial equivalent of Ownership, and as such, Have Characterized it as a Fee for Tax Purposes.

The state may lawfully include within its estate tax, property not technically owned by the decedent at death if the decedent stood in a relationship to the property which might fairly be regarded as the equivalent of ownership. (*Bullen v. Wisconsin*, 240 U.S. 625; *Leser v. Burnet*, 46 Fed. 2d, 156.)

The inclusion of property in respect of which the decedent owned a general power of appointment is valid because a general power gives the grantee of the power the substantial equivalent of ownership, since he is free to exercise it in favor of his creditors and thus use the property for his own benefit. See:

Ballard v. Helburn, 9 F. Supp. 812; aff'd. 85 F. 2d 613; T. C. 4729, March 18, 1937; Reg. 80, Art. 25; *Chandler v. Kelsey*, 205 U.S. 466, 51 L. Ed. 882, 27 Sup. Ct. 550; *Chase Nat. Bank v. United States*, 278 U.S. 327; *Curry v. McCanless*, 123 A.L.R. 162, 307 U.S. 357, 83 L. Ed. 1339, 59 Sup. Ct. 900; *Fidelity-Philadelphia Trust Co. v. McCaughn*, 34 F. 2d 600, 604, cert. den., 280 U.S. 602; *Graves v. Schmidlapp*, 141 A.L.R. 948, 315 U.S. 657, 86 L. Ed. 1097, 62 Sup. Ct. 870; *Helvering v. Barker*, 84 F. 2d 838; *Levy's Estate v. Commissioner*, 65 F. 2d 412; *Morgan v. Commissioner*, 309 U.S. 78; *McKelvy v. Comm.*, 82 F. 2d 393; *Orr v. Gilman*, 183 U.S. 278, 46 L. Ed. 196, 22 Sup. Ct. 213; *Pennsylvania Co. v. Comm.*, 79 F. 2d 295; cert. den., 296 U.S. 651; *Whitney vs. State Tax Commission*, 309 U.S. 530, 84 L. Ed. 909, 60 S.C. 635.

“For tax purposes a general power of appointment is equivalent to ownership of the property subject to the power.” (Quoted in Vol. 10 A.L.R. Digest, Succession and Estate Taxes, Sec. 38, P. 683, and cases cited thereat).

Respondent has presented no reason, and Appellant submits there is none, why a person holding the absolute power over chattels, however the absolute power is labeled, should not bear his proportionate responsibility for maintenance of his government by paying his share of the tax load.

(C) The Case of U. S. vs. Field is not Controlling and is not Persuasive inasmuch as the Federal Revenue Statute which was Construed in 1921 Differed Materially from our Present Utah Estate Tax Statute.

Respondent has cited us the *Field* case (*U. S. v. Stanley Field*, 255 U.S. 257, 65 L. Ed. 617, 41 Sup. Ct. Rep. 256, 18 A.L.R. 1461) in which the Supreme Court held that the 1916 Internal Revenue Code provision for taxation of decedents' estates did not authorize the taxation of powers of appointment. Respondent suggests that the *Field* case governs the disposition of the case before this court.

The statute construed in the *Field* case (U.S. Statutes at Large, Vol. 39 p. 777-778) taxed:

“ * * * all property real or personal, tangible or intangible * * * .”

Whereas our Utah statute (Title 59-12-3, U.C.A. 1953) includes:

“ * * * all property real or personal, * * * and *any interest therein* whether tangible or intangible *which shall pass to any person in trust or otherwise* * * *.” (Emphasis added)

Appellant submits that the substantial difference in wording, emphasis, and intended scope of the two statutes, destroys any compelling, or even persuasive, weight to be attached to the *Field* case.

CONCLUSION

Appellant submits that the policies gave Mrs. Fener absolute title to the proceeds “held on deposit” for her, and suggests that the provisions for withdrawal did not in any real way limit her title. Furthermore, should this court choose to call these withdrawal provisions a power of appointment, there is no reason in law, and certainly none in equity, why Respondent should thereby be allowed to evade payment of her fair share of this state’s tax incidence.

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