4/6/70

Memorandum 70-41

Subject: New Topic - Renunciation and Disclaimer by Heir or Legatee

Commissioner Sneed has suggested the topic described in Exhibit I attached. Does the Commission wish to request authority to study this topic?

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 70-41 EXHIBIT I

DATE: April 2, 1970

TO : John DeMoully, California Law Revision Commission

FROM : Joseph T. Sneed

SUBJECT:

During the March meeting of the Commission I mentioned the possibility of a study of the problem of a renunciation and disclaimer by an heir or legatee. There exists in federal gift tax law a liability of a gift tax following a renunciation or disclaimer where local law does not permit such renunciation or disclaimer to prevent the passage of title from the decedent to the renouncing or disclaiming party. In most jurisdictions local law does permit a renunciation by a legatee to preclude the passage of title; however, a different result usually is provided in the case of a renunciation or disclaimer by an heir.

The California position is set out in In Re Meyer's Estate, 238 Pac.2d 597. Here it was said:

> "A legatee or devisee, under a will, is not bound to accept, but may renounce or disclaim his right under it, if he has not already accepted; and the renunciation or disclaimer relates back to the time the gift was made and no estate vests in him. The rule is different as to succession by a dissent. The estate vests in the heir eo instante upon the death of the administrator; and no account of his is required to perfect title . . . he cannot, by any renouncer or disclaimer, prevent the passage of title to himself."

This California position has resulted in adverse gift tax consequences to disclaiming intestate takers. See Maxwell, 17 T.C. 1589 (1952).

A number of other states faced with this problem have enactad legislation, the principal thrust of which is to permit an heir disclaimer to prevent the passage of title to him. E.g., Ill. Ann. Stat., c.3, §§ 15b, 15c, 15d; Colo. Rev. Stat. Ann., § 153-5-43; N.Y. Estates Powers and Trust Law, § 4-1.3; Minn. Stat. Ann. §§ 501.211, 525.532.

A hasty review of these statutes will reveal that a number of problems will be encountered in drafting an appropriate California version. First, there will be the question of the effect of such a statute on the California inheritance tax. At present the Revenue and Taxation Code, § 14309, prevents a renunciation from altering the inheritance tax consequences that would have been applicable in absence of any such renunciation. See In Re Estate of Nash, 64 Cal. Rptr. 298 (1968); Estate of Varian, 70 Cal. Rptr. 335 (1968). A renunciation statute could be drafted so as to leave this unimpaired.

Another problem which the draftsmen of a comprehensive disclaimer statute will encounter is whether partial disclaimer can be made. Also, it will be necessary to fix a time limit within which disclaimer must be made in order to prevent divesting of title.

In addition, it will be necessary to consider what interests can be disclaimed. For example, can limited interests such as life estates, title by survivorship and powers of appointment effectively be disclaimed? These last issues merge into the problem of distinguishing between a renunciation and disclaimer for the purposes of the proposed statute and an autonomous redirection of the property. Put another way, the draftsmen would have to grapple with what they mean by a renunciation or disclaimer.

One final development should be mentioned. It is possible that within the near future federal law will be altered so as to eliminate the gift tax liability of the renouncing heir without regard to the provisions of local law. Should this happen, the need for such a statute as described here would diminish substantially.

Joseph T. Sneed

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