



1963

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Recommended Citation

Hellmut A. Erwing, *Effect of the Widow's Election on the Texas Inheritance Tax Statute*, 17 Sw L.J. 143 (1963)
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ninety days to one year in confinement is not in itself cruel and unusual.

IV. CONCLUSION

The reversal of the conviction by the Court is correct, even though the theory of the decision is questionable. The Court failed to recognize that the offense and not the punishment was contrary to the principles of justice. Society wishes to prevent crime, but in doing so a legislature must not infringe upon individual liberty. Any criminal sanction which is *not* defined in terms of conduct and which merely assumes a causal connection between the condemned "status" and eventual anti-social behavior does seriously threaten individual liberty and is, therefore, a denial of due process of law. Furthermore, any criminal statute which defines an offense in terms so vague that the boundaries of the offense are indefinite and uncertain is also repugnant to the due process clause. The *Lanzetta*⁸⁸ rationale should be applied in cases like *Robinson* to put an end to uncertain wording in criminal statutes.

The solution of the various problems of "status" criminality is not simple. Nevertheless, there should be a complete revision of existing vagrancy and addiction statutes so that all such offenses can be defined in terms of acts based upon traditional principles of conduct-causation. Before revising the statutes, however, a thorough study of the problem of narcotics addiction in the United States and its relationship to anti-social behavior must be made in order to draft enactments that will be in accord with modern concepts of treatment and rehabilitation. Then, a return to the concept of conduct-causation criminality will provide tangible standards that can be effectively determined by the judiciary and will provide guideposts by which the citizenry can act.

Robert Ted Enloe, III

Effect of the Widow's Election on the Texas Inheritance Tax Statute

Decedent's will disposed of all of his separate property and the entire community estate. Decedent's widow elected to take under the will; she received the income for life from a testamentary trust, or 500 dollars per month, whichever was greater. The remainders were to be divided equally between the heirs of Decedent and three rela-

⁸⁸ 306 U.S. 451 (1939); see notes 48-52 *supra* and accompanying text.

tives of the widow. Upon the widow's election to take under the will, the Texas inheritance tax¹ was assessed against the trustee for the beneficiaries other than the widow. The tax was computed on the basis of the entire community estate as well as on Decedent's separate property. *Held*: When a surviving spouse elects to take under a will which disposes of the entire community and separate estates by leaving the income for life to the survivor and the remainders to a trustee for named beneficiaries, there is no Texas inheritance tax liability on the survivor's share of the community estate passing to the trustee, since such share does not "pass" under the will for purposes of the Texas inheritance tax statute. *Calvert v. Fort Worth Nat'l Bank*, — Tex. —, 356 S.W.2d 918 (1962).

"Historically, death duties 'in all countries rest . . . upon the principle that death is the generating source from which the particular taxing power takes its being . . .'"² With the exception of Nevada, all of the states, the District of Columbia, and the federal government have some form of death tax.³ The typical state death tax is an inheritance tax, although some states have adopted an estate tax or a combination of both.⁴ Since the formal subject of

¹ Tex. Tax-Gen. Ann. art. 14.01 (1960); see also discussion note 8 *infra*.

² *Calvert v. Fort Worth Nat'l Bank*, — Tex. —, 356 S.W.2d 918, 921 (1962), quoting from *Knowlton v. Moore*, 178 U.S. 41, 47-48 (1900); see also *Tyler v. United States*, 281 U.S. 497 (1930); Paul, *Federal Estate and Gift Taxation* 3-6 (1942); Shultz, *Taxation of Inheritance* 6 (1926).

³ See note 4 *infra* for the list of statutes. The first state inheritance tax law was "An Act Relating to Collateral Inheritances" enacted in 1826 by Pennsylvania. Pa. Laws c. 72 (1825-1826).

As early as 1797, Congress enacted a legacy duty, 1 Stat. 527, 536 (1797), which was repealed in 1802, 2 Stat. 148 (1802). The next federal death tax, enacted during the Civil War, first applied to personal property only but was later extended to encompass real property. 12 Stat. 432, 485 (1862); 13 Stat. 223, 285-89 (1864); 14 Stat. 98, 140 (1866). The present federal estate tax found in the Internal Revenue Code of 1954, §§ 2001-2209, has had a continuous history since September 8, 1916, when the Revenue Act of 1916, 39 Stat. 777-80, 1002, became effective.

⁴ The basic difference between an "estate" tax and an "inheritance" tax is that the former is imposed upon the decedent's estate; whereas, the latter falls upon the beneficiary's share of the estate. Nearly all of the early state and federal death duties were *inheritance* taxes. For the most recent attempt to convert the federal *estate* tax into an *inheritance* tax, see H.R. Rep. No. 1681, 74th Cong., 1st Sess. 8-10 (1935).

Only the federal government and eleven states employ the *estate* tax system exclusively: Federal Government: Int. Rev. Code of 1954, §§ 2001-2209; Alabama: Ala. Code tit. 51, §§ 432-49 (1940); Arizona: Ariz. Rev. Stat. Ann. §§ 42-1501 to -1535 (1956); Arkansas: Ark. Stat. Ann. §§ 63-101 to -151 (1947); Florida: Fla. Stat. Ann. §§ 198.01-44 (1958); Georgia: Ga. Code Ann. §§ 92-3401 to -3404 (1933); Mississippi: Miss. Code Ann. §§ 9262-99 (1942); New York: N.Y. Tax Law §§ 220-45; North Dakota: N.D. Cent. Code §§ 57-37-01 to -32 (1960); Oklahoma: Okla. Stat. Ann. tit. 68, §§ 988-89t (1954); South Carolina: S.C. Code §§ 65-451 to -529 (1952); Utah: Utah Code Ann. §§ 59-12-1 to -44 (1953).

All other jurisdictions (except Nevada) have an *inheritance* tax: Alaska: Alaska Comp. Laws Ann. §§ 48-4-1 to -19 (1949); California: Cal. Rev. & Tax Code §§ 13301-14901; Colorado: Colo. Rev. Stat. Ann. §§ 138-4-1 to -73 (1953); Connecticut: Conn. Gen. Stat. Rev. §§ 12-340 to -399 (1958); Delaware: Del. Code Ann. tit. 30, §§ 1301-1701 (1953);

either type of death tax is the transfer of property, both taxes are indirect and need not be apportioned under the Federal Constitution.⁵ An estate tax is levied on the privilege of transmitting property

District of Columbia: D.C. Code Ann. §§ 47-1601 to -1620 (1961); Hawaii: Hawaii Rev. Laws §§ 122-1 to -43 (1955); Idaho: Idaho Code Ann. §§ 14-401 to -430 (1947); Illinois: Ill. Ann. Stat. ch. 120, §§ 375-403b (Smith-Hurd 1954); Indiana: Ind. Ann. Stat. §§ 7-2401 to -42 (1953); Iowa: Iowa Code §§ 450.1-.96 (1958); Kansas: Kan. Gen. Stat. Ann. §§ 79-1501 to -1532 (1949); Kentucky: Ky. Rev. Stat. §§ 140.010-.990 (1960); Louisiana: La. Rev. Stat. Ann. §§ 47:2401-2423 (1950); Maine: Me. Rev. Stat. Ann. ch. 155, §§ 1-69 (1954); Maryland: Md. Ann. Code art. 62A, §§ 1-12, art. 81, §§ 149-93 (1957); Massachusetts: Mass. Ann. Laws ch. 65, §§ 1-36 (1953); Michigan: Mich. Stat. Ann. §§ 7.561-.592 (7) (1960); Minnesota: Minn. Stat. Ann. §§ 291.01-.47 (1962); Missouri: Mo. Ann. Stat. §§ 145.010-.350 (1949); Montana: Mont. Rev. Codes Ann. §§ 91-4401 to -4459 (1947); Nebraska: Neb. Rev. Stat. §§ 77-2001 to -2037, §§ 77-2101 to -2107 (1958); New Hampshire: N.H. Rev. Stat. Ann. §§ 86:1-89 (1955); New Jersey: N.J. Stat. Ann. §§ 54:33-1 to :38A-6 (1960); New Mexico: N.M. Stat. Ann. §§ 31-16-1 to -25 (1953); North Carolina: N.C. Gen. Stat. §§ 105-2 to -32 (1958); Ohio: Ohio Rev. Code Ann. §§ 5731.01-.56 (Page 1954); Oregon: Ore. Rev. Stat. §§ 118.005-.990 (1961); Pennsylvania: Pa. Stat. Ann. tit. 72, §§ 2301-2484 (1949); Puerto Rico: P.R. Laws Ann. tit. 13 §§ 881-905 (1962); Rhode Island: R.I. Gen. Laws Ann. §§ 44-22-1 to -25 (1956); South Dakota: S.D. Code §§ 57.2101-.2507 (1939); Tennessee: Tenn. Code Ann. §§ 30-1601 to -1643, §§ 30-1701 to -1720 (1955); Texas: Tex. Tax-Gen. Ann. arts. 14.01-.27, arts. 15.01-.16 (1960); Vermont: Vt. Stat. Ann. tit. 32, §§ 6501-6952 (1959); Virginia: Va. Code Ann. §§ 58-152 to -217.14 (1959); Washington: Wash. Rev. Code Ann. §§ 83.04.010-98.050 (1962); West Virginia: W. Va. Code Ann. §§ 842-68 (1961); Wisconsin: Wis. Stat. Ann. §§ 72.01-.81 (1957); Wyoming: Wyo. Stat. Ann. §§ 39-336 to -369 (1959).

All of these jurisdictions, with the exception of Oregon, Puerto Rico, South Dakota, and West Virginia, also impose an estate tax which is included only for the purpose of absorbing the state death tax credit under the federal statute. The Revenue Act of 1916, 39 Stat. 777-80, 1002, which forms the basis of the present federal estate tax, Int. Rev. Code of 1954, § 2001-2209, was conceived as an emergency measure in view of the entry of the United States into the First World War. After the war, the estate tax was attacked on the ground that the federal government should not invade the death tax field, reserved traditionally to the states, except in times of emergency. The federal estate tax credit was introduced to placate the states in order to preserve the federal estate tax. The credit device was first introduced in the 1924 Act, 43 Stat. 303, and was limited to 25% of the federal tax. In the 1926 Act, 44 Stat. 70, the credit was increased to 80%.

Under the federal estate tax credit for states, an estate is not permitted to make any deductions, for federal tax purposes, from the gross estate as a result of state inheritance taxes. The credit is more favorable than this arrangement; it permits the estate a set-off against the amount of the federal tax in full. Therefore, if the federal tax were \$100,000 and the state inheritance tax were \$80,000, the estate would pay the federal government only \$20,000. Thus the states, encouraged by this device, could before 1954 increase their revenues by increasing their rates, or by imposing a supplemental estate tax, without adding to the burden of the estate. This result, of course, is based on the states' keeping their rates within 80% of the federal tax, because the total tax payable by an estate could not exceed the federal tax before the allowance.

Now, under § 2011 of the Int. Rev. Code of 1954, a credit is provided for "any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, or any possession of the United States." As to estates of decedents dying on or after August 17, 1954, § 2011(b) of the Int. Rev. Code of 1954 provides a schedule for maximum credits for state taxes for estates of various sizes, in place of the former 80% credit.

⁵ Art. I, § 8, cl. 1; art. I, § 9, cl. 4; see *New York Trust Co. v. Eisner*, 256 U.S. 545 (1921) (modern federal estate tax); *Knowlton v. Moore*, 178 U.S. 41 (1900) (old federal inheritance tax). In *Frick v. Pennsylvania*, 268 U.S. 473 (1925), the Court held that federal and state death duties could be imposed on the same subject at the same time. See generally Lowndes, *Current Constitutional Problems in Federal Taxation*, 4 Vand. L. Rev.

at death and is based generally on the size of the decedent's estate.⁶ On the other hand, an inheritance tax is imposed upon the privilege of succeeding to property upon a decedent's death⁷ and is usually computed according to the beneficiary's share and his relationship to the decedent. An inheritance tax, such as Texas Tax.-Gen. art. 14.01,⁸ presents difficult problems of evaluating the interest of each beneficiary; whereas, an estate tax is easier to administer since it depends only upon the size of the decedent's estate.⁹ An application of both types of taxes levied at the same rates will indicate the greater revenue yielding power of the estate tax. That tax is an effective instrument to promote the dispersion of great concentrations of wealth. A similar result is often achieved by the inheritance tax, since it encourages people to divide their estates and thereby minimize the revenue burden on any one beneficiary. Because the estate tax falls upon the decedent's estate, it often frustrates attempts to provide for dependents and relatives. In contrast, the inheritance tax is more equitable in that it proportionately burdens those who benefit from the decedent's estate.¹⁰ By adopting the inheritance tax

469 (1951); Lowndes, *The Constitutionality of the Federal Estate Tax*, 20 Va. L. Rev. 141 (1933).

⁶ United States v. Stewart, 270 F.2d 894 (9th Cir. 1959), *cert. denied*, 361 U.S. 960 (1960); Commissioner v. Clise, 122 F.2d 998 (9th Cir.), *cert. denied*, 315 U.S. 821 (1941); Central Trust Co. v. James, 120 W. Va. 611, 199 S.E. 881 (1938). Even under the federal estate tax the beneficiary's relationship to the decedent and the size of the share affect the amount of tax if the beneficiary is the decedent's spouse and the marital deduction is involved. Int. Rev. Code of 1954, § 2056.

⁷ Cahn v. Calvert, 159 Tex. 385, 321 S.W.2d 869 (1959); State v. Hogg, 123 Tex. 568, 72 S.W.2d 593 (1934); Thompson v. Calvert, 301 S.W.2d 496 (Tex. Civ. App. 1957).

⁸ Tex. Tax-Gen. Ann. art. 14.01 (1960). Article 14.01 is identical to former Tex. Rev. Civ. Stat. art. 7117 (1925). The Texas inheritance tax is a special tax upon a beneficiary's privilege of succession to property either by will or intestacy and is not levied upon the property which constitutes the decedent's estate. State v. Hogg, 123 Tex. 568, 72 S.W.2d 593 (1934); State v. Jones, 290 S.W. 244 (Tex. Civ. App. 1927), *rev'd on other grounds*, 5 S.W.2d 973 (Tex. Comm. App. 1928); Dodge v. Youngblood, 245 S.W. 225 (Tex. Comm. App. 1922); Thompson v. Calvert, 301 S.W.2d 496 (Tex. Civ. App. 1957); Lewis v. O'Hair, 130 S.W.2d 379 (Tex. Civ. App. 1939).

⁹ In the case of the federal estate tax, the various items in the gross estate must be valued. Frequently, the interest of a particular beneficiary and a future interest must be evaluated, as when a decedent leaves a remainder to charity. Also, if the tax is to be paid out of the shares of the beneficiaries of the estate instead of out of the residue, their shares must be appraised to prorate the tax burden. Int. Rev. Code of 1954, § 2055.

¹⁰ Myers, *The Ending of Hereditary American Fortunes* (1939); Hall, *Incidence of Death Duties*, 30 Am. Econ. Rev. 46 (1940). In the absence of some effective provision to the contrary, the federal estate tax is payable out of the residue of the estate. Int. Rev. Code of 1954, § 2205. In order to overcome the potentially inequitable consequences of this provision some states have enacted statutes which provide that in the absence of a direction in the will to the contrary, the federal estate tax "shall be equitably prorated among the persons interested in the estate." See Ark. Stat. Ann. § 63-150 (1948); Md. Ann. Code art. 81, § 162 (1957). Such statutes were upheld in Riggs v. del Drago, 317 U.S. 95 (1942). For a discussion of a general federal provision for apportionment of the estate tax, see Fleming, *Apportionment of Federal Estate Taxes*, 43 Ill. L. Rev. 153 (1948); La Plante, *Proration of Estate Taxes in Connecticut*, 33 Conn. B.J. 397 (1960); Lauritzen, *Apportion-*

as the means of death taxation, a majority of the common law states¹¹ as well as almost all of the community property states¹² have recognized this equitable feature of the inheritance tax.

In Texas¹³ and other community property states¹⁴ each spouse has a vested interest in one-half of the entire community estate. The wife acquires title to her share by virtue of her legal interest in the property, which attaches at the time of its acquisition.¹⁵ In Texas, despite the husband's exclusive power to manage and control the community estate, his power of testamentary disposition is limited to his one-half interest.¹⁶ Upon the husband's death the wife is not only vested with full management and control over what was previously her community interest, but the community estate itself is terminated, thus extinguishing any rights the husband or his estate may have had in the wife's community share.¹⁷ As survivor of the community, the widow is entitled to her one-half interest, not by virtue of the decedent's will but because of her previously vested right in that one-half share.¹⁸ The widow's property rights are

ment of Federal Estate Taxes, 1 Tax Counsellor's Q. No. 2, at 55 (1957); Mitnick, *State Legislative Apportionment of the Federal Estate Tax*, 10 Md. L. Rev. 289 (1949).

¹¹ See note 4 *supra*.

¹² The community property states using an inheritance tax are California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington. See note 4 *supra* for a list of the statutes.

¹³ *Dakan v. Dakan*, 125 Tex. 305, 83 S.W.2d 620 (1935); *George v. Taylor*, 296 S.W.2d 620 (Tex. Civ. App. 1956) *error ref. n.r.e.*; *Magnolia Petroleum Co. v. Still*, 163 S.W.2d 268 (Tex. Civ. App. 1942) *error ref.* See generally de Funiak, *Principles of Community Property* (1943); Huie, *Some Principles of Texas Community Property Law* 115 (Charmatz & Daggett ed. 1955).

¹⁴ Arizona: *Goodell v. Koch*, 282 U.S. 118 (1930); *La Tourette v. La Tourette*, 15 Ariz. 200, 137 Pac. 426 (1914); California: Prior to 1927 the wife had only an "expectancy" in the community property, but since that time she has been considered the owner of an undivided half interest. *United States v. Malcolm*, 282 U.S. 792 (1931) (post-1927); *United States v. Robbins*, 269 U.S. 315 (1926) (pre-1927); Cal. Civ. Code § 161a; Idaho: *Peterson v. Peterson*, 35 Idaho 470, 207 Pac. 425 (1922); *Ewald v. Hufton*, 31 Idaho 373, 173 Pac. 247 (1918); *Kohny v. Dunbar*, 21 Idaho 258, 121 Pac. 544 (1912); Louisiana: *Bender v. Pfaff*, 282 U.S. 127 (1930); *Phillips v. Phillips*, 160 La. 813, 107 So. 584 (1926); Nevada: *In re Williams' Estate*, 40 Nev. 241, 161 Pac. 741 (1916); New Mexico: *Beals v. Ares*, 25 N.M. 459, 185 Pac. 780 (1919); Washington: *Poe v. Seaborn*, 282 U.S. 101 (1930).

¹⁵ *United States v. Rompel*, 326 U.S. 367 (1945); *Commissioner v. Chase Manhattan Bank*, 259 F.2d 231 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959) (construing Texas law); *Bacon v. Hopkins*, 27 F.2d 140 (N.D. Tex. 1928) (construing Tex. Const. art. 16, § 15); *Hall v. Hall*, 241 S.W. 624 (Tex. Civ. App. 1922).

¹⁶ *Smith v. Butler*, 85 Tex. 126 (1892); *Carroll v. Carroll*, 20 Tex. 732, 743 (1858); *Verhalen v. Klein*, 268 S.W. 975 (Tex. Civ. App. 1924); see Tex. Rev. Civ. Stat. Ann. art. 2578 (1951).

¹⁷ *Commissioner v. Chase Manhattan Bank*, 259 F.2d 231 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959); *Missouri-Kansas-Texas R.R. v. Hamilton*, 314 S.W.2d 114 (Tex. Civ. App. 1958) *error ref. n.r.e.*; *Smitheal v. Smith*, 31 S.W. 422 (Tex. Civ. App. 1895); Tex. Rev. Civ. Stat. Ann. art. 4619 (1960).

¹⁸ *Kemp v. Metropolitan Life Ins. Co.*, 205 F.2d 857 (5th Cir. 1953); *Jones v. State*, 5 S.W.2d 973 (Tex. Comm. App. 1928); *King v. Morris*, 1 S.W.2d 605 (Tex. Comm. App. 1928).

secured further by several presumptions relating to the interpretation of wills. Texas courts interpret the testator's will on the basic presumption that the testator meant to dispose only of his own property, which excludes the widow's one-half interest in the community estate, or of his interest in property owned in common with another person.¹⁹ In order for a will to be given the effect of an attempted disposition of property *not* owned by the testator, such as the widow's share of the community, that presumption must be overcome by clear, conclusive language to that effect.²⁰

With a few constitutional exceptions,²¹ Texas²² prohibits contracts which "alter the legal orders of descent."²³ However, even though it is not an express exception to the prohibition, the doctrine of election makes possible the decedent's disposition of the entire community if the survivor elects under the will to take property in lieu of the relinquished community share.²⁴ Because the testator withdraws an interest of the electing spouse, he must make some provision for the survivor from his share of the community estate or from his separate property.²⁵ The widow's election to take property in lieu of her community share constitutes a surrender of that share and a consent for it to pass by the terms of the decedent's will. Thus, the widow's election is essential to effectuate the decedent's devise of the widow's community share to beneficiaries.²⁶

In view of the possibly deceptive tenor of the opinions of the

¹⁹ *Avery v. Johnson*, 108 Tex. 294, 302, 192 S.W. 542, 544 (1917); *Long v. Long*, 252 S.W.2d 235 (Tex. Civ. App. 1952) *error ref. n.r.e.*; *Ellis v. Scott*, 58 S.W.2d 194 (Tex. Civ. App. 1933) *error dism.*

²⁰ In *Commissioner v. Chase Manhattan Bank*, 259 F.2d 231 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959), Judge Wisdom summarized the relevant Texas law as follows:

1. A presumption exists that a testator intends to dispose of his property only.
2. Only where the testator's intention to dispose of property that is not his own is shown by clear and unequivocal language is a husband's will construed to devise his wife's property.
3. The language of the will must be susceptible of no other construction.
4. Use of the first person singular pronoun shows an intention to dispose of the testator's property only.
5. The will must give some benefit to replace the property surrendered by the election. 259 F.2d at 240.

²¹ Tex. Const. art. 16, § 15.

²² Tex. Rev. Civ. Stat. Ann. art. 4610 (1960).

²³ See generally Wren, *Recent Texas Statutes Affecting Estate Planning*, 15 Sw. L.J. 479, 484 (1961); Comment, *Hailey, Hilley, and House Bill 670*, 15 Sw. L.J. 613 (1961); Comment, *The Widow's Election*, 15 Sw. L.J. 85, 126-32 (1961).

²⁴ De Funiak, *Community Property* 217 (1943). See generally Comment, 6 Baylor L. Rev. 84 (1953); Comment, *The Widow's Election*, 15 Sw. L.J. 85 (1961).

²⁵ The will must give the donee "some free disposable property" which can become "compensation for what the testator sought to take away," and the benefit must be a material one. *Dunn v. Vinyard*, 251 S.W. 1043, 1046 (Tex. Comm. App. 1923); see *Delevan v. Thom*, 244 S.W.2d 551 (Tex. Civ. App. 1951).

²⁶ *Mayo v. Tudor's Heirs*, 74 Tex. 471, 12 S.W. 117 (1889).

court of civil appeals²⁷ and the supreme court in the principal case,²⁸ it is emphasized that *Calvert v. Fort Worth Nat'l Bank* does not involve the widow's tax liability which arises when she receives her community share, or property in lieu of her community share, as a result of the testator's death. It is established law in Texas that there is no inheritance tax levied if the widow receives her community share, or property in lieu of such share, by virtue of her election to take under a will disposing of the entire community estate.²⁹ This view has been followed by the Attorney General of Texas consistently³⁰ and was conceded by the Comptroller in the present case.³¹ It is also uncontroverted that upon the death of one spouse only his separate property and his one-half interest in the community are subject to the Texas inheritance tax.³² However, the proper method for computing the tax liability of beneficiaries receiving property under a will as a result of the election of the owner of such property to accept under the will has been in a state of confusion because of the conflicting opinions of the various Texas Attorneys General.³³ Thus, the instant case resolved for the first time in Texas an issue previously considered only by the Attorneys General: the inheritance tax liability of beneficiaries of a will which disposes of the entire community estate with the result that the widow's one-half community share passes to such beneficiaries upon her election to take under the will.

In arriving at a solution, the supreme court relied³⁴ upon *Jones v. State*³⁵ and *Bethea v. Sheppard*.³⁶ The *Jones* case involved a husband's bequest of certain property to his wife with the stipulation that the same was in lieu of her entire community interest. As the result of

²⁷ 348 S.W.2d at 19.

²⁸ 356 S.W.2d at 919.

²⁹ *Hansen v. Blackmon*, 140 Tex. 536, 169 S.W.2d 962 (1943); *Jones v. State*, 5 S.W.2d 973 (Tex. Comm. App. 1928); *Bethea v. Sheppard*, 143 S.W.2d 997 (Tex. Civ. App. 1940) *error ref.*

³⁰ Ops. Tex. Att'y Gen.: No. WW-1013 (March 13, 1961); No. WW-698 (Sept. 9, 1959); No. S-177 (Sept. 30, 1955); No. V-914 (Sept. 27, 1949); No. O-5063 (Dec. 13, 1943); No. O-5211 (May 15, 1943); No. O-2819 (Oct. 30, 1940).

³¹ 356 S.W.2d at 920. The court stated: "No tax was assessed against Mrs. Taylor [the widow] for the reason . . . that she did not receive more than her community interest plus the \$25,000.00 statutory exemption."

³² See note 30 *supra* for the Attorney General's recognition of this result.

³³ Ops. Tex. Att'y Gen.: No. O-4109 (Oct. 22, 1941) (widow's relinquished community share included in computation of beneficiary's tax liability); No. V-704 (Oct. 21, 1948) (widow's community share not included in computation); No. V-1146 (Jan. 24, 1951) (widow's community share not included in computation); No. WW-343 (Jan. 22, 1958) (widow's community share included in computation, overruling Ops. V-704 and V-1146, reinstating O-4109).

³⁴ 356 S.W.2d at 921-22.

³⁵ 5 S.W.2d 973 (Tex. Comm. App. 1928).

³⁶ 143 S.W.2d 997 (Tex. Civ. App. 1940) *error ref.*

the widow's election to take the bequest, the value of which was less than her community interest plus the statutory exemption, it was held that the will effected only a partition between the widow and the other beneficiaries and that no property passed to her within the contemplation of the Texas inheritance tax statute. The supreme court in the instant case specifically pointed out that the issue of the tax liability of testamentary beneficiaries who receive part of the widow's community interest as a result of her election was not reached in the *Jones* case.³⁷

In the *Bethea* case, Henry Henke and his wife Catherine executed a joint will and trust agreement which provided that the entire community estate should pass to a named trustee in the event the husband died first. Mrs. Henke and a daughter were to receive specified annual payments from the trust during the lifetime of the former, and the payments to the daughter were to be increased and continued for eight years after Mrs. Henke's death. At the end of that period the corpus of the trust was to be distributed to the daughter if she were alive, but if the daughter were not living at that time, the property was to be held in trust for an additional five years and then delivered to the daughter's children. The husband died first, and an inheritance tax was paid on his half of the community estate. Upon the subsequent death of Mrs. Henke it was held that the right of the daughter to succeed to her mother's community interest was taxable as a transfer by Mrs. Henke made or intended to take effect in possession or enjoyment after death. In comparing the *Bethea* case with the principal case the supreme court stated:

A necessary corollary of that holding is the proposition that Mrs. Henke's community interest did not pass by Mr. Henke's will within the meaning of the inheritance tax statutes. There the wife consented in advance for her half of the community property to be placed in trust as directed by the husband's will. Here the same result is accomplished by the widow's election to accept under the will subsequent to the death of the husband. We cannot believe that the Legislature intended to tax the one transaction as an inter vivos transfer by the consenting wife and the other as a passage of title by the husband's will.³⁸

The cases, including other decisions³⁹ involving the Texas inheritance tax, are based upon three theories: (1) the decedent did not

³⁷ 356 S.W.2d at 922.

³⁸ *Ibid.* In conjunction with the instant case it should be noted that the court did not pass on the question of whether the right to succeed to the widow's interest was taxable as a transfer made by her in contemplation of death or intended to take effect in possession or enjoyment after death. 356 S.W.2d at 922.

³⁹ See cases cited note 29 *supra*.

own the devised property at the time of his death; (2) the passing of property under a will is not a passing within the meaning of the tax statute if the owner could have taken the property tax-exempt in the absence of such a will; and (3) the designation of property which, by the terms of the will, is to be transferred to a beneficiary is not necessarily a passing of such property for inheritance tax purposes. These recognized considerations, in determining the concept of property passing within the meaning of the tax statute, clashed with the Comptroller's argument. He had urged that upon the widow's election to accept the disposition made by her husband's will, she and the other beneficiaries took under the will with the legal result that her community interest passed under the will as if it had always belonged to the testator.⁴⁰ The supreme court rejected this argument by differentiating between the "passing" of property for inheritance tax purposes and the "passing" of property as a consequence of the widow's election in title controversies between the widow or her heirs and the other beneficiaries of the will.⁴¹

In addition to relying on cases involving the problem of property "passing" for inheritance tax purposes, the court interpreted the inheritance tax statute⁴² in the light of prevailing principles of community property. After noting that the only property ordinarily regarded as passing by will or descent was property *owned* by the testator,⁴³ the court referred to the statutory limitation on the state's power to tax the succession to property not owned by the decedent at the time of his death.⁴⁴ The court felt that to extend the state's powers beyond these enumerated statutory provisions would be in clear violation of accepted rules of statutory interpretation.⁴⁵ It is universally recognized that a special tax such as the inheritance tax must be strictly construed against the government, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that in case of doubt all presumptions of interpretation are in favor of the taxpayer.⁴⁶

⁴⁰ 356 S.W.2d at 922. The court of civil appeals also rejected the Comptroller's position. 348 S.W.2d at 25.

⁴¹ 356 S.W.2d at 922.

⁴² Tex. Tax-Gen. Ann. art. 14.01 (1960).

⁴³ 356 S.W.2d at 921.

⁴⁴ *Ibid.* Tex. Tax-Gen. Ann. art. 14.01 (1960) taxes, *inter alia*, (1) property which passes under a general power of appointment, (2) certain life insurance proceeds, (3) transfers made or intended to take effect in possession or enjoyment after death, and (4) transfers in contemplation of death.

⁴⁵ *Cf.* *Eidman v. Martinez*, 184 U.S. 578 (1902) (sovereign is bound to express its intention to tax in clear and unambiguous language); *Estate of Gates*, 243 N.Y. 193, 153 N.E. 45 (1926); *Lewis v. O'Hair*, 130 S.W.2d 379 (Tex. Civ. App. 1939).

⁴⁶ 28 Am. Jur. *Inheritance, Estate, Succession and Gift Taxes* § 47, at 50 (1959), cited by the supreme court, 356 S.W.2d at 921.

Finally, the court gave effective recognition to one concomitant of the community property system and the presumptions relating to the interpretation of wills, namely, the widow's power to defeat the terms of her husband's will to the extent that it purports to dispose of her property.⁴⁷ Thus, at the time of a testator's death, regardless of whether the will disposes of the entire community or not, the state is without power to levy a tax on the widow's share. It is the widow's election to take under the will which creates the beneficiary's privilege of succession to property; absent the election, the decedent's disposition of the widow's share is void. Though the terms of a will do pass the widow's share to beneficiaries for purposes of ownership and title controversies,⁴⁸ such is not the "passing of property" contemplated by the Texas inheritance tax statute.⁴⁹

It is interesting to compare the holding in the present case with the federal estate tax consequences that would result in an identical situation. Taxation of a decedent's estate under the federal estate tax rests upon the taxing of transfers by will and intestacy.⁵⁰ For this purpose the taxable estate is the decedent's gross estate, which includes all of his separate property and his share of the community property.⁵¹ Hence, under the present federal estate tax the widow's community share is not included in the husband's gross estate.⁵² Even

⁴⁷ *Logan v. Logan*, 112 S.W.2d 515 (Tex. Civ. App. 1937) *error disp.*; *Munger v. Munger*, 298 S.W. 470 (Tex. Civ. App. 1927) *error ref.*

⁴⁸ 356 S.W.2d at 922.

⁴⁹ *Ibid.* The court implied that in the absence of the widow's election made after the husband's death, the widow's share could not pass by the will. The court here relied on the analysis of Falknor in *Liability of the Entire Community Estate for the Payment of State Inheritance Tax Where Husband Undertakes To Dispose of Entire Community Estate by Will and Wife Elects To Take Under the Will*, 5 Wash. L. Rev. 55 (1930).

⁵⁰ Int. Rev. Code 1954, § 2001.

⁵¹ Section 2033 provides: "The value of the gross estate shall include the value of all property . . . to the extent of the interest therein of the decedent at the time of his death." Section 2051 provides that, except for certain exemptions and deductions, the taxable estate is the gross estate of the decedent.

In the federal estate tax cases, attention is directed to the composition of the decedent's gross estate since this indicates what is taxed at the time of his death. *United States v. Stewart*, 270 F.2d 894 (9th Cir. 1959), *cert. denied*, 361 U.S. 960 (1960); *Commissioner v. Chase Manhattan Bank*, 259 F.2d 231 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959); *Estate of Bluestein*, 15 T.C. 770 (1950); *In re Buckhantz' Estate*, 120 Cal. App. 2d 92, 260 P.2d 794 (Dist. Ct. App. 1953).

⁵² This has not always been the case. In the periods prior to 1942 and after 1948, only the decedent's half interest in the community was includible in his gross estate for estate tax purposes; that is, local law was followed in taxing community property. *Lang's Estate v. Commissioner*, 304 U.S. 264 (1938); *Greenwood v. Commissioner*, 134 F.2d 915 (9th Cir. 1943); *Commissioner v. Cadwallader*, 127 F.2d 547 (9th Cir. 1942); *United States v. Goodyear*, 99 F.2d 523 (9th Cir. 1938); *Wardell v. Blum*, 276 Fed. 226 (9th Cir. 1921), *cert. denied*, 258 U.S. 617 (1921).

However, from 1942 to 1948 the interest of the surviving spouse in the community property was included in the gross estate of the deceased spouse pursuant to an amendment of 1942. Int. Rev. Code of 1939, § 811(e)(2), 56 Stat. 798 (1942). See *Rompel v. United States*, 326 U.S. 367 (1945); *Fernandez v. Wiener*, 326 U.S. 340 (1945); *Steen v. United*

if the widow elects to take under a will disposing of her community share, as in the principal case, the decedent's taxable gross estate does not contain the widow's relinquished community property.⁵³ If the widow's election were to cause her property to be included in the decedent's estate, community property state residents would be subject to the same federal tax consequences as those which existed from 1942 to 1948. Consequently, the tax exemption of the community share that is relinquished by the electing spouse and devised to beneficiaries under the decedent's will is in harmony with the basic purpose of the 1948 Revenue Act, which was to remove pre-1948 discriminations against community property states.⁵⁴

The Comptroller's proposed application of the Texas inheritance tax statute would have precipitated several absurd consequences. First, an interpretation upholding the tax on the theory that the decedent's testamentary disposition was the effective legal act by which the beneficiaries took the widow's share would have extended the decedent's power of disposition to property not owned by him during his lifetime. That construction would have contravened well-established limitations on such a power⁵⁵ and would have been tantamount to the abrogation of the rights of the spouse as wife or widow under the community property system. Second, the imposition of the inheritance tax on the theory that the widow's election was the legally effective act by which property passed to the beneficiaries would clearly have involved the taxation of the succession to property belonging to a living person.⁵⁶ Finally, under the Comptroller's theory, it could be argued that when the decedent made provision

States, 195 F.2d 379 (9th Cir. 1952). When the Revenue Act of 1948 restored the estate tax advantage to community property owners by reinstating the law of the pre-1942 period, the common law state residents were permitted to "split" the estate on the death of one of the spouses by exempting the property passing to the surviving spouse in an amount up to one-half of the total estate.

⁵³ Pre-1942 cases: Pacific Nat'l Bank, 40 B.T.A. 128 (1939); Roland I. Smith, 8 P-H B.T.A. Mem. 707 (1939), G.C.M. 7773, XI-2 Cum. Bull. 426 (1930); Coffman-Dobson Bank & Trust Co., 20 B.T.A. 890 (1930), *acq.*, X-I Cum. Bull. 13 (1931).

1942-1948: During this period the question under discussion was moot since the federal estate tax held the widow's community share includible anyway.

Post-1948: Stapf v. United States, 189 F. Supp. 830, 837 (N.D. Tex. 1960), *rev'd on other grounds*, 309 F.2d 592 (5th Cir. 1962); Zillah Mae Turman, 35 T.C. 1123 (1961). See generally Brookes, *The Tax Consequences of Widow's Election in Community Property States*, 1951 So. Calif. Tax Inst. 83, 99; Christian, *Tax Aspects of Widow's Election*, 1 Ariz. L. Rev. 105 (1959); Nossamann, *The Impact of Estate and Gift Taxes Upon the Disposition of Community Property*, 38 Calif. L. Rev. 71, 74 (1930); Wren, *Estate Planning and the Widow's Election*, 34 Rocky Mt. L. Rev. 281 (1962); Wren, *The Widow's Election*, 100 Trusts & Estates 13, 108 (1961).

⁵⁴ Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 Harv. L. Rev. 1097, 1150 (1948).

⁵⁵ See text accompanying note 16 *supra* on the husband's limited power of testamentary disposition.

⁵⁶ See Knowlton v. Moore, 178 U.S. 41, 47-48 (1900).

for the widow to take property in lieu of her relinquished community share, the transaction was to be viewed as the decedent's posthumous acquisition of property of which he disposed during his lifetime. Such a transformation of the ownership of property cannot be supported in view of recognized principles of the law of wills.⁵⁷

The only justifiable means of obtaining revenue from such a testamentary arrangement as the one in the instant case could be based upon the theory of a gift to the beneficiaries. This theory, however, would involve the taxation of the widow and not of the beneficiaries and could be justified only by legislation—not by judicial fiat.⁵⁸

Despite the soundness of the decision, the theory that the property did not "pass" for purposes of the inheritance tax statute left at large the crucial point of who owned the property to which the beneficiaries succeeded. Having recognized that the widow's community share was not owned by the testator at the time of his death on community property principles, the court also upheld the validity of the consequences of the widow's election to take under a decedent's will. This meant that at the moment of the election to take under the will in the instant case, the property that "passed" to the trustee for the beneficiaries was not owned either by the decedent's estate or by the surviving spouse. Thus, although there was no "passing" of property for inheritance tax purposes, it is not clear whose property the beneficiaries are deemed to have received. However, the decision does indicate that it is sufficient to show that the property received by beneficiaries as a result of a widow's election to take under a will disposing of her community share is not property which belonged to the decedent at the time of his death.

Hellmut A. Erwing

⁵⁷ Tex. Prob. Code Ann. § 58 (1956) provides for the passing of interests under a will of all the estate, right, title, and interest in possession, expectancy, reversion, or remainder, which the testator has or at the time of his death shall have. See *Turner v. Montgomery*, 293 S.W. 815 (Tex. Comm. App. 1927); *Grigsby's Legatees v. Willis' Estate*, 59 S.W. 574 (Tex. Civ. App. 1900) *error ref.* Former art. 8282 of Tex. Rev. Civ. Stat. (1925) provided that an individual was empowered to dispose by will of every estate or interest which, in the absence of a will, would pass to his heirs or next of kin. See *Baker v. Johnson*, 64 S.W.2d 1037 (Tex. Civ. App. 1933).

⁵⁸ Texas has no gift tax statute.