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ESTATE PLANNING UNDER THE MISSOURI INHERITANCE TAX

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This article deals with those problems of estate planning which involve the Missouri inheritance tax. No attempt will be made to deal with problems which involve the federal estate tax alone. It will be assumed that the reader is familiar with these, or will inform himself elsewhere of them.¹ Therefore, such problems will be mentioned only when they bear upon a Missouri problem. In many instances, especially with large estates, considerations of the federal estate tax will outweigh considerations of the Missouri inheritance tax. Where it appears that this is the case, the estate planner should adjourn any consideration of Missouri inheritance tax until the federal problems have been tentatively solved. Any other procedure would be a case of the tail wagging the dog.

The Missouri inheritance tax is assessed according to the estate which passes to the various takers and, therefore, necessarily allows full deduction for federal estate tax. The federal estate tax does not treat state inheritance or estate taxes as a deduction, but does allow a credit² against the federal estate tax to a limited extent. Therefore, in

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His new book, *Standard Clauses for Wills—Revised Edition* has recently been published by Fiduciary Publishers, Inc., New York. This is a will-form paragraph system devised by the author and has met with wide acceptance. Banks in more than 42 cities have purchased it for distribution to lawyers in their cities. Mr. Neuhoff's article, "Estate Planning Under the Missouri Inheritance Tax," brings to bear experience in that field extending over a period of more than 40 years.

1. See, e.g., LASSER, *ESTATE TAX TECHNIQUES* (1957); NOSSAMAN, *TRUST ADMINISTRATION AND TAXATION* (1957); Schaefer, *Estate Planning—Some Important Estate and Gift Tax Provisions of the 1954 Code*, St. Louis B.J., Dec. 1954, p. 12.

2. INT. REV. CODE OF 1954, § 2011.

particular estates, there may be infinite variations of the interplay between Missouri inheritance tax and federal estate tax. It is not possible to deal with all of them, and in many situations they are relatively unimportant. The purpose of this article will be to lay down general rules without too much consideration of how they are correlated in particular instances.

The inheritance or estate taxes of other states will not be referred to, except to point up the Missouri situation. We shall, however, discuss Missouri inheritance tax problems of non-residents of Missouri.

In the examples given below, it will usually be assumed that the husband dies before the wife and that she is the "surviving spouse." It should be understood that this is for convenience of discussion only and that the same example could be restated identically by interchanging the positions of husband and wife, if she should be the first to die. The Missouri law uses the term "surviving spouse," or the phrase, "surviving husband or wife."

Those familiar with the subject matter will realize that estate planning, so far as concerns the Missouri inheritance tax, involves three categories:

- (1) Estates which are too small to have a federal estate tax;
- (2) Estates which exceed the \$60,000 exemption, but have no federal estate tax because of the marital deduction; and
- (3) Estates which have a federal estate tax.

These will be discussed in order, and where the same problem is involved in more than one category, it will be dealt with in detail in connection with the category where it appears to be of greatest significance and simply referred to in connection with the other category or categories. However, some problems which apply generally to all three of the categories will be discussed later under separate headings.³

As has been well stated elsewhere,⁴ whenever a person has property which may be left to others upon his death, he has an estate, and if he gives consideration to the manner of leaving it and the effect of leaving it, this is in the broad sense of the word "estate planning."

3. See pt. IV, *infra*.

4. LASSER, *op. cit. supra* note 1, at iii.

Obviously the estate of an individual who resides in the State of Missouri will be subject, if it is large enough, to the federal estate tax as well as to the Missouri inheritance tax. It may frequently happen that the solution of the federal estate tax problem will automatically solve the Missouri inheritance tax problem, but in many other instances action taken to solve the federal estate tax problem will not impinge upon the Missouri problem, which can then be dealt with in its own right. It is our purpose to deal primarily with the latter group of problems.

There is a tendency of state tax administrators to follow federal rules and practices, even to an undue extent, but this will not be relied upon in the discussion which follows.

I. FIRST CATEGORY—ESTATE IS TOO SMALL TO HAVE A FEDERAL ESTATE TAX

In those instances in which it is anticipated the estate of the property owner will be so small that a federal estate tax will not be imposed, the problem of estate planning resolves itself to planning under the Missouri inheritance tax. Under this hypothesis, we may assume for planning purposes that the taxable estate under the federal estate tax provisions is expected not to exceed \$60,000. A table showing the brackets and rates under the Missouri inheritance tax appears in an Appendix immediately following this Article. Reference to this table will show that an estate of \$60,000 would reach only into the third bracket, that is \$40,000 to \$80,000, even if the exemption is small, such as \$100; and if it be assumed that the exemption is \$20,000 plus one-half or one-third of the estate, as the case may be, which is the exemption granted to husband or wife,⁵ then it would be impossible for an estate in our First Category to reach even the third bracket. On the other hand, it is possible for a portion of the estate in the First Category to be taxed at a rate as high as 15 per cent, which is the amount appearing in the third bracket on the bottom line of the table, applicable to "all others."

The existence of such a wide variation in possible rates of taxation indicates that if the testator is sufficiently flexible in his objectives, he may achieve considerable control over the amount of Missouri inheritance tax which will be levied upon his estate, even to the extent of eliminating it entirely in some instances.

5. See Appendix, line 1.

Even a casual inspection of the rate structure will indicate the direction which planning should take to reduce taxes. For example, the following observations may be made, it being understood, of course, that the primary objective of our hypothetical testator is to give the property to the right people, not to save the most taxes:

First. Since *exemptions* vary widely according to the taker, other things being equal, the disposition should be to the taker who can receive the largest amount of bequest tax free.⁶

Second. Since the *rates* vary in brackets for any particular taker, the bequests should be made to take advantage of the lower brackets. For example, if the testator instead of leaving \$20,000 to his brother, leaves \$10,000 apiece to the brother's two children, the top bracket is 3 per cent instead of 6 per cent and there will be two \$500 exemptions instead of one.⁷

Third. Since rates vary according to the *relationship* of the taker, other things being equal, the property should go to the taker enjoying the lowest rate.

Fourth. If *charitable*, bequests are made, they should be such as qualify for deduction under section 145.100.⁸

There are certain expedients which might be considered theoretically possible but which are generally inadvisable from a practical standpoint in an estate small enough to fall into our First Category. These are: (1) gifts prior to death, and (2) trusts with a life estate to the first beneficiary, remainder to others. Accordingly, it is suggested that these be eliminated from consideration in planning estates in the First Category.

To summarize the discussion thus far:

First General Rule. In estates which are too small to have a federal estate tax, saving of Missouri inheritance taxes is

6. Reference in this article to a disposition by a testator as a "bequest" should be understood to mean "bequest or devise" unless the context indicates otherwise.

7. See Appendix, line 4. If \$20,000 is left to the brother, the tax would be 3% on \$9,500 (\$10,000 less \$500 exemption), or \$285, plus 6% on \$10,000 or \$600; total \$885. If \$10,000 apiece is left to the brother's two children, each will be taxed 3% on \$9,500 (\$10,000 less \$500 exemption) or \$285, making the total tax on both \$570. See also the discussion of the Second Category, pt. II, *infra*.

8. RSMo 1957 Supp. See pt. IV, § B, *infra*.

accomplished best by first taking advantage of the exemptions, particularly the exemption of the surviving spouse, and then dividing the remainder of the estate in such a way as to enjoy the largest amount of exemptions and the lowest overall rate of taxation in the aggregate.⁹

Second General Rule. In such estates, gifts prior to death and trusts not otherwise indicated should be avoided.

II. SECOND CATEGORY—ESTATE EXCEEDS \$60,000, BUT NO FEDERAL ESTATE TAX BECAUSE OF MARITAL DEDUCTION

An estate which would fall into this category might have an adjusted gross estate up to \$120,000, with no life insurance or previous transfers includible in the estate, provided that the widow receives at least one-half of the adjusted gross estate in a way which qualifies for the marital deduction under the Federal Internal Revenue Code. If the adjusted gross estate is \$120,000, and the marital deduction is \$60,000, the remaining \$60,000 will be no greater than the exemption for federal estate tax purposes, leaving no taxable estate under the federal estate tax.

Applying the Missouri inheritance tax law,¹⁰ if there were no lineal descendants, the widow could receive up to one-half of the estate, or \$60,000, plus \$20,000, making a total of \$80,000, without incurring any Missouri inheritance tax. If she received any more than this, she would presumably be subject to tax. This example assumes that the widow is not receiving life insurance paid directly to her and does not take by survivorship property which had been held as an estate by the entireties or in joint ownership with her deceased husband, none of which, as we shall see later, is subject to Missouri inheritance tax.¹¹

It may be that for federal estate tax planning purposes it is considered by a particular testator to be undesirable to increase the estate of the widow beyond the amount necessary to entitle the estate to the maximum marital deduction, which, in the example given, would be \$60,000. This would then leave \$60,000 to go to other takers, and this

9. It should be remembered that the "General Rules" offered in this article are not intended as thoroughgoing scientific principles admitting of no exception, but rather as guides to a quick hypothetical solution applicable in most instances, which will then be tested by appropriate "sample" calculations.

10. § 145.090 (3), RSMo 1957 Supp.

11. See pt. IV, § E, *infra* (insurance), and note 26 *infra* (jointly held property). With respect to property placed in joint tenancy within two years from the date of death, see Opinion of Attorney General of Missouri, December 9, 1957, CCH INV., EST. & GIFT TAX REP. ¶ 18,716.

might, and probably would, cause a Missouri inheritance tax to be incurred. It becomes a complicated problem with some estates to decide whether or not it is better to incur a Missouri inheritance tax on the first death, that of the husband in the case supposed, even though one could avoid it, at least in part, by increasing the amount passing to the widow under circumstances exempting it from Missouri inheritance tax, and of course, without increasing the federal estate tax upon the husband's estate. The difficulty is that upon the widow's subsequent death (assuming she will retain all of the property intact and not decrease it, by gifts, for example) her estate will be entitled for federal estate tax purposes to a deduction of only \$60,000, and the additional amount which has been transferred to her will be subject to federal estate tax.

Due to the fact that the federal estate tax will, in general, be larger than the Missouri inheritance tax imposed on the children or lineal descendants, upon the husband's death in the case supposed, the practical solution in this category will probably be to see to it that the aggregate federal estate tax on the death of both spouses is kept at a minimum, and to undergo whatever Missouri inheritance tax is entailed as a consequence.

As was indicated previously,¹² other things being equal, it is desirable to leave property to persons who will enjoy the lowest rates, that is, those beginning with 1 per cent and running up to 6 per cent, and furthermore leave it in as many "packages" as possible, so that at least each one of these will get a \$5,000 exemption and start its own series of rates beginning at 1 per cent. If there are enough takers, the package left to each taker can be limited to \$20,000 over and above the exemption (\$5,000 exemption for children). This will mean that no package is taxed at a rate exceeding 1 per cent. This is obviously cheaper than reaching for Missouri inheritance tax exemption by giving a larger estate to the widow.¹³

As is noted below,¹⁴ the Missouri and the federal rules are different with respect to gifts in contemplation of death. It is to be observed also,

12. See pt. I, *supra*.

13. It is obvious the foregoing discussion assumes the family solidarity is such that the disposition of the estate may be governed almost entirely by considerations of tax saving. Such is not always the case, especially in the First Category, but "tax saving" becomes of necessity a prime consideration in the estate planning of wealthy persons.

14. See pt. IV, § C, *infra*.

that the marital deduction is one-half of the *adjusted gross estate* under the federal law, while the exemption under the Missouri inheritance tax for a widow when lineal descendants survive the decedent is \$20,000 plus only one-third of the "estate," which means the estate after deduction of debts, etc., and federal estate taxes.

Since the "adjusted gross estate" for federal tax is computed before deduction of federal estate tax on the one hand and the "estate" for Missouri tax is computed after deduction of federal estate taxes on the other hand, another large discrepancy is introduced. As a result, no easy comparison is possible between the marital deduction and the exemption to the surviving spouse, but in general the federal marital deduction is likely to be very much larger than the Missouri exemption to a surviving spouse, despite the addition of the flat sum of \$20,000 permitted by Missouri.

In our Second Category, however, where by hypothesis there is no federal estate tax, the adjusted gross estate to start with will be substantially or exactly the same figure as the "estate" for Missouri inheritance tax. Accordingly, since the difference between one-half and one-third is one-sixth, the federal deduction and the Missouri exemption will tend to become identical at the point where the adjusted gross estate is such that \$20,000 exactly equals one-sixth thereof, or, in other words, at \$120,000. If the estate is further increased, the advantage is in favor of the federal deduction, since it "grows" at a rate of 50 per cent of the increase, whereas the Missouri exemption "grows" at a rate of $33\frac{1}{3}$ per cent of the increase. At this point, however, there will probably be a federal estate tax and the estate falls into the Third Category.

The foregoing relationship may be expressed in the form of a rule:

Third General Rule. If there are lineal descendants, so that the fraction applicable to the surviving spouse is one-third, rather than one-half, and there is a federal estate tax, the maximum marital deduction for federal estate tax will exceed the maximum exemption to the surviving spouse for Missouri inheritance tax.

Let us consider now the relationship in the example previously stated in the event that there are no lineal descendants. In such event the exemption for the surviving spouse is \$20,000 plus one-half of the estate.

Here the *fraction* is the same as that used for federal estate tax, namely, one-half, but it is applied to a different *base*, namely, the "estate" rather than the "adjusted gross estate." As has been previously stated, the primary difference between these two quantities will be the amount of federal estate tax, which is not deducted in arriving at the adjusted gross estate used in the federal calculation, but is deducted in arriving at the estate used in the Missouri calculation. Therefore, the federal deduction would tend to exceed the Missouri exemption by one-half of the difference between the two "estates" which difference is, of course, the amount of the federal estate tax.

On the other hand, the Missouri exemption for the surviving spouse starts out with an initial advantage, namely, the statutory sum of \$20,000. It follows, therefore, that the Missouri exemption will be greater if the federal estate tax in a particular estate is zero. And it will continue to be greater as the estate increases up to the point where the federal estate tax exactly equals \$40,000.¹⁵ At this point, the federal deduction and the Missouri exemption will be the same. Thereafter, upon any further increase in the estate and consequent increase in the federal estate tax thereon, the maximum marital deduction for federal estate tax will exceed the maximum exemption for the surviving spouse for Missouri inheritance tax by a sum equal to one-half of the amount of the increase in federal estate tax, which we are assuming in our example is the measure of the difference between the adjusted gross estate (federal) and the estate (Missouri).

This permits us to formulate another generalization:

Fourth General Rule. If there are no lineal descendants so that the fraction applicable to the surviving spouse is one-half, and there is a federal estate tax, the maximum marital deduction will be less than the maximum exemption to the surviving spouse for Missouri inheritance tax, so long as the federal estate tax is less than \$40,000, but upon any increase in federal estate tax, above \$40,000 the maximum marital deduction (federal) will exceed the maximum exemption to the surviving spouse (Missouri) by an amount equal to one-half of the increase in federal estate tax.

Application of the Third and Fourth General Rules will probably

15. 2 times \$20,000.

enable the estate planner to ascertain quickly the point beyond which he need give no separate consideration to the exemption for the surviving spouse for Missouri inheritance tax because the provision which is made for obtaining the maximum marital deduction for federal purposes will automatically provide more than the maximum exemption for Missouri purposes to the surviving spouse. The rules will also indicate the range in which it is not possible to obtain the maximum exemption for the surviving spouse for Missouri purposes without causing the surviving spouse to receive more than the amount of the maximum marital deduction (federal).¹⁶

III. THIRD CATEGORY—ESTATE HAS A FEDERAL ESTATE TAX

In a particular estate, there may be a federal estate tax on account of the fact that there is no marital deduction—on the one hand because there is no surviving spouse or because, as a matter of policy, it is not desired to utilize the marital deduction; or on the other hand, because, although the marital deduction may be claimed, there may nevertheless be a federal estate tax on account of the size of the estate, *e.g.* if the adjusted gross estate exceeds \$120,000. It is in this category, *i.e.* where there is a federal estate tax, that in practice most problems arise which may concern the state inheritance tax. This is particularly so when the estate is not large enough to permit a credit under the federal estate tax for payment of state inheritance tax¹⁷ or where such credit, although allowed, is less than the aggregate state inheritance taxes, so that the amount of state inheritance taxes is a significant figure.

The exemption allowed the surviving spouse under Missouri law has undergone wide swings, the most recent one being a great increase in the amount of the exemption which restored the situation that had obtained immediately before the enactment of the probate code of 1956.¹⁸

16. These general rules may also be helpful in ascertaining the probable effect of a "formula" clause for purposes of the federal marital deduction. For a discussion by the author of formula clauses in general, see NEUHOFF, *STANDARD CLAUSES FOR WILLS* 24 (rev. ed. 1958), 96 *TRUSTS & ESTATES* 166 (1957).

17. See *INT. REV. CODE OF 1954*, § 2011. The credit is inapplicable where the estate before deduction of the specific exemption of \$60,000 (provided by § 2052 of the Code) does not exceed \$100,000.

18. The attorney general of Missouri had held that after adoption of the probate code of 1956 (*Mo. Laws 1955*, at 390) § 145.090(3) (*Mo. Laws 1953*, at 738) of the inheritance tax chapter, *Revised Statutes of Missouri*, referring to "marital rights" of the surviving spouse properly interpreted meant only the "exempted property rights,

As a result, the importance of Missouri inheritance taxes in estate planning has been greatly decreased, especially in estates of considerable size where there will be a Missouri "estate tax" as provided in section 145.070.¹⁹

Where there is no Missouri estate tax, the Missouri inheritance tax is important in its own right, albeit the amounts involved are, generally speaking, not as large as the amounts involved in the federal estate tax.

IV. THE MISSOURI INHERITANCE TAX—IN GENERAL

Naturally the objects of the owner's bounty are not determined by tax rates, at least in the first instance and with most owners. Therefore, an approach to the inheritance tax problem with respect to the estate plan may well consist of ascertaining the wishes of the owner, absent any consideration of Missouri inheritance tax, and then attempting to implement these wishes as closely as possible without incurring undue amounts of Missouri inheritance tax.

family allowance and homestead allowance." Opinion of Attorney General of Missouri, June 15, 1956, CCH INTL, EST. & GIFT TAX REP. ¶ 18,526. This would have greatly reduced the exemption to a surviving spouse in most instances. In 1957 § 145.090(3), *supra* was amended to provide an exemption for a surviving spouse of \$20,000 plus one-half of the estate of the decedent if the decedent is not survived by lineal descendants and one-third of the estate of the decedent if the decedent is survived by lineal descendants. Mo. Laws 1957, at 780. This provision will go far toward eliminating the Missouri inheritance tax where the testator is survived by a spouse and leaves to that spouse the sum of \$20,000 plus one-half or one-third of the estate, as the case may be.

Under the former situation, the case law had favored the widow by exempting the amount which she could have obtained by renouncing the will, even though she did not renounce but took under the will. *In re Dean's Estate*, 350 Mo. 494, 166 S.W.2d 529 (1942) (en banc). See also *In re Rogers' Estate*, 250 S.W. 576 (Mo. 1923). After the 1957 amendment of § 145.090(3), the Missouri supreme court, in construing the unamended provisions of § 145.090(3) and the probate code of 1956, held in favor of the widow who took under the will and against the contention of the attorney general. *Estate of Atkins*, 307 S.W.2d 420 (Dec. 9, 1957).

19. § 145.070, RSMo 1949 reads as follows: "In the event that the total of the estate, inheritance, legancy and succession taxes imposed upon the several interests and property comprising the estate of the decedent, by law, less exemptions allowed by law, and all other state inheritance and estate taxes, shall not equal the maximum credit now or hereafter allowable to the estate of such decedent against the United States federal estate tax imposed with respect thereto, whenever the federal estate tax is determined, an additional tax shall then be imposed upon the value of the net estate of said decedent as of the date of such determination equal to the difference between the total of the tax imposed under said section 145.060, including all other state inheritance and estate taxes, and the credit for estate, inheritance, legacy and succession taxes allowable to the estate of such decedent against the United States federal estate tax." It is obvious that wherever there is a Missouri estate tax, the arithmetical sum of Missouri inheritance taxes and Missouri estate tax is a constant figure, so that the size of the Missouri inheritance tax, considered separately, becomes immaterial.

A. *Contingent Estates*

The Missouri inheritance tax is imposed by chapter 145 of the Missouri Revised Statutes, 1949, as amended. Section 145.220 attempts to deal with future, contingent or limited estates. Contingent incumbrances are dealt with in section 145.230 and property transferred subject to any charge, estate or interest determinable by the death of any person or at any period ascertainable only by reference to death, is dealt with in section 145.240.

It would appear that the foregoing sections do not furnish a complete system adequate to take care of all of the complex situations which are met with in the modern day trust estate, and it is not easy to ascertain just how all of these complications are, in practice, being dealt with at the working level by appraisers operating under the Missouri inheritance tax law. The opinions of the attorney general, so far as readily available in the tax services, do not cover nearly all of the doubtful cases.

Section 145.240-2 provides in part that "when the property is transferred in trust or otherwise, and the rights, interest, or estates of the transferees are wholly dependable upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the lowest rate which, on the happening of any of said contingencies or conditions transferring property to a natural person, would be possible under the provisions of this chapter, and such tax so imposed shall be due and payable forthwith by the executor, administrator, or trustee out of the property transferred." Accordingly, the tax in the first instance is payable at the lowest possible rate which could apply if the transfer were to a natural person, with provision in the same section for further payment of tax when the contingencies happen which call for a higher amount of tax.

Despite the provisions mentioned in the preceding paragraph, it might be suggested as a precaution that estates which are subject to change by a contingency should be avoided, if possible. It is not practical, however, to completely eschew contingent provisions in trust. Also, it has been found that, in general, the administration of the Missouri inheritance tax at the working level does not make such contingencies unduly burdensome upon the estates containing them.

It should be observed that the provisions of the Missouri statute with respect to transfers, e.g. section 145.020, section 145.030 and section

145.040, are not identical with the corresponding sections of the Internal Revenue Code of 1954,²⁰ and, therefore, where the estate is small enough, the transfer should be judged entirely by consideration of the Missouri inheritance tax provisions.

Practical considerations may militate against an inter vivos trust, because a small trust may not justify the expense of maintaining it.

B. Charitable Bequests

Exemption is granted to charitable bequests in section 145.100 set out in the footnote.²¹ The portion contained in subsection 1 had been in effect for many years. The present subsection 2 providing for reciprocity was enacted in 1953.²² Since only approximately fifteen states have reciprocity statutes,²³ the exemption of a particular bequest by a Missouri testator will in many instances be determined by subsection 1 of section 145.100.

While the purpose of subsection 1 seems to be to set up two classes of exempt bequests: (1) to or for the use of any hospital, charitable, etc., purpose in this state, or (2) to any trustee, etc., in this state to be held and used and actually held and used exclusively for charitable, etc., purposes, the interpretation tends to require the use to be *in the state* even where the trustee or other recipient is in the state.²⁴

20. INT. REV. CODE OF 1954, §§ 2035-38.

21. § 145.100, RSMo 1957 Supp.: "1. When any property, benefit or income shall pass to or for the use of any hospital, religious, educational, Bible, missionary, scientific, benevolent, or charitable purpose in this state, or to any trustee, association, or corporation, bishop, minister of any church, or religious denomination in this state, to be held and used and actually held and used exclusively for religious, educational, or charitable uses and purposes, whether such transfer be made directly or indirectly, the same shall not be subject to any tax, but this provision shall not apply to any corporation which has a right to make dividends or distribute profits or assets among its members.

"2. The exemption herein granted shall extend to persons, organizations, associations, and corporations organized under the laws of other states and resident therein, provided the law of the other state grants to persons, organizations, associations, and corporations organized under the law of Missouri and resident therein, a like and equal exemption."

22. Mo. Laws 1953, at 743. A 1953 amendment of § 145.090 (Mo. Laws 1953, at 738), also contained a provision relating to reciprocal exemptions for charitable bequests, which currently remains a part of that section. The attorney general has ruled that the reciprocity provisions of these two sections are not inconsistent. Opinion of Attorney General of Missouri, December 31, 1953, CCH INH., EST. & GIFT TAX REP. ¶18,128.

23. CCH INH., EST. & GIFT TAX REP. ¶ 1310F lists only California, Colorado, Connecticut, Illinois, Indiana, Kentucky, Maine, Massachusetts, Minnesota, Nebraska, North Carolina, Rhode Island, South Carolina, South Dakota, and Wyoming.

24. See Opinions of Attorney General of Missouri cited in CCH INH., EST. & GIFT TAX REP. ¶ 1310.20. See also Neuhoff, *Deductions, Exemptions and Credits in State Inheritance and Estate Taxation*, 26 IOWA L. REV. 592, 624 (1941) referring to the Missouri statute.

It is quite important to know whether a charitable bequest is exempt, because if it is not entirely exempt, it carries the highest series of tax rates with no flat monetary exemption, namely, those appearing on line 7 in the table in the Appendix. Accordingly if a will which provides, as is so frequently done, that all bequests and devises shall be paid without deduction for Missouri inheritance tax, the burden of payment of such a tax may be unexpectedly great and decrease the residue of the estate in an unintended manner.

C. *Gifts*

Since Missouri has no gift tax, it would be possible to decrease or indeed eliminate Missouri inheritance tax through the expedient of making gifts during the lifetime of the owner, provided such gifts were held not to be in contemplation of death. In small estates this possibility is rarely availed of, and on practical grounds it should not be recommended. It is, of course, much availed of in large estates in order to decrease the federal estate tax.

It should be noted in this connection that the problem of contemplation of death is not the same under the federal law as the Missouri law, for the reason that the Missouri provision, section 145.020 (3), subjects to the tax "a transfer made in contemplation of the death of the grantor, vendor or donor" and provides that every such transfer made within two years prior to the death of the grantor, vendor or donor of a material part of his estate "shall be considered to have been made in contemplation of death" within the meaning of the section. However, it does not provide, as does the Federal Internal Revenue Code,²⁵ that conveyances made more than three years prior to the death shall not be considered in contemplation of death as a matter of law. There may be a tendency on the part of estate planners to ignore the possibility that for purposes of Missouri inheritance tax, a gift will nevertheless be considered to have been made in contemplation of death under particular circumstances, and therefore, subject to tax, although it is in the clear so far as concerns the federal estate tax.

D. *Jointly Held Property*

One significant variance of the Missouri inheritance tax law from

25. INT. REV. CODE OF 1954, § 2035(b).

the federal estate tax law is that jointly held property is not subject to taxation.²⁶

E. Life Insurance

The proceeds of life insurance policies payable because of the death of the insured, in trust or otherwise, to beneficiaries other than the insured's estate, are expressly exempted under section 145.020-3(3).

F. Bequests Free of Tax

A bequest free of tax, that is to say one under a will which provides that the inheritance tax on the bequest should be paid separately as an additional sum from the residue, is presumably subject to additional tax on the amount of the tax on the first gift. However, in practice, this may not always be followed by appraisers in Missouri. It appears that in the states generally there are two rules on this problem—one providing that the additional benefit to the legatee should be ignored and the other providing that it should be taken into account.²⁷ Missouri seems to be in the former category.²⁸

G. Powers of Appointment

Considerations of federal estate tax, where applicable, loom so large compared to considerations of Missouri inheritance tax that the handling of powers of appointment is likely to be dictated entirely by the federal situation. It will probably introduce unprofitable complications for the planner to consciously attempt to comply with both the federal and the Missouri requirements as to powers of appointment.

It should be observed, however, that Missouri is among the states which postpones the tax on property subject to a power of appointment at

26. *In re Gerling's Estate*, 303 S.W.2d 915 (Mo. 1957) (holding *Commissioner v. Estate of Church*, 335 U.S. 632 (1949) inapplicable). See also CCH *INH., EST. & GIFT TAX REP.*, *Missouri* ¶ 1570, referring to an official letter of the attorney general dated July 18, 1928, advising that property vesting by virtue of joint ownership is not taxable unless such joint ownership is effected in contemplation of death.

27. CCH *INH., EST. & GIFT TAX REP.*, *All States* ¶ 1910.

28. Opinion of Attorney General of Missouri, October 24, 1938, cited in CCH *INH., EST. & GIFT TAX REP.*, *Missouri* ¶ 1910.85. Cf. *Unander v. Pasquill*, 319 P.2d 579 (Or. 1957) digested in 97 *TRUSTS & ESTATES* 173 (1958) (to the effect that the legatee under such a clause actually receives the full bequest including the amount paid by the executor to the state treasurer as a tax on the legatee's share).

the time of the death of the creator of the power.²⁹ The tax is levied at the *time of exercise* of the power or at the time of death of the donee of a power without exercising the same.

The statutes do not distinguish between general powers, which could well be deemed equivalent to ownership, and special powers, which might be not at all equivalent to ownership. Apparently the constitutional right of the State of Missouri to levy a tax upon the exercise (or non-exercise) of a power of appointment by the *donee*³⁰ of the power has not been specifically ruled on in Missouri,³¹ but the question was squarely decided by the United States Supreme Court in favor of the constitutional power of the states to levy such a tax.³²

However, in the case cited is an old one and in view of the development of constitutional doctrines in connection with the federal internal revenue laws since that time, there would appear to be some chance of successful attack upon the statute so far as concerns *non-exercise* of a *special* power of appointment which was clearly not equivalent to ownership.

SUMMARY

The significance of the Missouri inheritance tax in estate planning for a resident of Missouri will depend primarily upon the federal estate tax situation. It is possible to make a preliminary survey which will indicate the probable importance of the Missouri inheritance tax in the estate plan as a whole. The first problem is to determine whether the amount of the Missouri inheritance tax is a significant figure, because if it is not, then it is labor wasted to take pains to reduce the amount of Missouri inheritance taxes. Once it is determined that the amount of the Missouri inheritance tax is a significant figure, attention should first be given to the saving of Missouri inheritance taxes by taking advantage of the

29. CCH INH., EST. & GIFT TAX REP., *All States* ¶ 1540C. See § 145.030, RSMo 1949.

30. The phrase in § 145.030, RSMo 1949 is "had been bequeathed or devised by the donor," (Emphasis added.) but the attorney general is quoted as having stated in an official letter dated July 18, 1928, that it was probably intended to read "donee." CCH INH., EST. & GIFT TAX REP., *Missouri* ¶ 1114.

31. See Allen, *Powers of Appointment and the Drafting of Missouri Wills*, 1954 WASH. U.L.Q. 408, 416, where the author states that it does not seem to make any difference so far as Missouri inheritance tax is concerned whether the power is general or special.

32. *Orr v. Gilman*, 183 U.S. 278 (1902). MONTGOMERY, *Federal Taxes—Estates, Trusts and Gifts*, 1942-43, at 342, states, "However, the non-exercise of a power is subjected to inheritance tax by several states and even a limited power of appointment may be taxed." Cited in support of this statement are: *Orr v. Gilman*, *supra*, and *Bullen v. Wisconsin*, 240 U.S. 625 (1916). See also Annots., 18 A.L.R. 1470, 23 A.L.R. 738, 64 A.L.R. 740.

exemptions, particularly the exemption of the surviving spouse, and then dividing the remainder of the estate in such a way as to enjoy the largest amount of exemptions and the lowest overall rate of taxation in the aggregate.

In many estates, the effort will be to obtain the maximum marital deduction for purposes of federal estate tax. As has been indicated in this Article, this may or may not automatically insure the maximum exemption to the surviving spouse for purposes of Missouri inheritance tax, depending upon the circumstances. In many instances, it will be necessary to be guided entirely by the federal estate tax situation so far as concerns provision for the surviving spouse. In other cases, this will not be necessary and in that event the nature of the provision for the surviving spouse will be significant from a tax saving standpoint.

Attention should be paid particularly to charitable bequests, especially those made to recipients located outside of the State of Missouri or bequests for use outside of the State of Missouri. Here the existence or not of reciprocal exemption for charitable bequests becomes of great importance. It should be remembered that successful estate planning depends upon a nice balance between tax saving and reasonable approximation of fulfillment of the testator's desires concerning the disposition of his estate. Finally, it should be so arranged if possible that fluctuations in the amount of the estate at death will not have an unnecessarily great effect upon the Missouri inheritance tax and the federal estate tax.

APPENDIX

MISSOURI INHERITANCE TAX RATES
 (As amended effective August 29, 1957)

	Exemption \$20,000*	\$1.00 to \$20,000	\$20,000 to \$40,000	\$40,000 to \$80,000	\$80,000 to \$200,000	\$200,000 to \$400,000	Over \$400,000
1 Husband or Wife -----							
2 Idiotic, Blind, Insane, De- formed or Defective Lineal Descendants -----	15,000	} 1%	} 2%	} 3%	} 4%	} 5%	} 6%
3 Lineal Ancestor, Lineal Descendant, Adopted Child or its Descendant, or Illegitimate Child -----	5,000†						
4 Brother, Sister or their Descendants, Son-in-Law and Daughter-in-Law -----	500	3%	6%	9%	12%	15%	18%
5 Aunt, Uncle or their Descendants -----	250	3%	6%	9%	12%	15%	18%
6 Brother or Sister of Grand- parents or their Descendants -	100	4%	8%	12%	16%	20%	24%
7 All others -----	Bequest under \$100 Exempt	5%	10%	15%	20%	25%	30%

Sources: § 145.090, RSMo 1957 Supp.; § 145.060 RSMo 1949.

* This amount includes and is not in addition to homestead allowance, but is in addition to the clear market value of one-half of the estate if decedent is not survived by lineal descendants, or one-third of the estate if there are lineal descendants, in each instance computing the estate without deducting the exemptions or homestead allowance. § 145.090(3), RSMo 1957 Supp.

† Homestead allowance is deducted instead if greater than \$5000. §145.090(5), RSMo 1957 Supp.