NEBRASKA INHERITANCE AND ESTATE TAXES

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I. INTRODUCTION

Compared to other sources of revenue, the inheritance tax in Nebraska contributes little to the public finance.1 However, for the attorney who handles the administration of estates, the inheritance tax is a detail which must be dealt with even in the smallest estate.

Because it is thought that property belongs to the living, any control over the devolution of property by the dead is treated as a privilege granted by the state and not as a right.2 A death tax is an excise imposed by the state on the privilege of transferring property at death.3

There are two general types of death taxes, estate taxes and inheritance taxes. An estate tax is imposed upon the privilege of transmitting property, while an inheritance tax is imposed upon the privilege of receiving property. The major practical effect of this distinction is that estate taxes are measured by the decedent's estate, while inheritance taxes are measured by the beneficiary's share of the estate. In addition an estate tax is ordinarily graduated according to the size of the net estate, while it is common for an inheritance tax to be graduated not only according to the size of each beneficiary's share, but also according to his relationship to the decedent. For example, if a decedent left a million-dollar estate, the federal estate tax would be the same if he divided his estate equally among his five children or if he left the entire

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[T]he tax is imposed and is sustainable upon the theory that a state which confers the privilege of succeeding to property may attach thereto the condition that a portion of the property shall be contributed to that state.
3. The concept that a death tax is on the privilege of transferring property, though measured by the value of the property transferred, is important because of constitutional limitations on taxation of property. See, e.g., Neb. Const. art. VIII, § 1:
Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, except that the Legislature may provide for a different method of taxing motor vehicles . . . .
amount to a nonrelative. However, the effect of the two dispositions would differ radically for inheritance tax purposes. Under Nebraska rates the five children would pay a total of $9,500 while the tax on the nonrelative would be $177,420.

II. THE INHERITANCE TAX

A. RATES AND EXEMPTIONS

Inheritance taxes in Nebraska are divided into three categories, in each of which the rates and amount of exemption are different. The category into which a beneficiary falls depends upon his relationship to the deceased.

Close relatives fall into the first category. The rate of the tax is one per cent of the “clear market value” of property in excess of $10,000 received by each beneficiary.

The second category includes remote relatives of the deceased. Inherited property of a value in excess of $2,000 received by persons in this class is taxed at the rate of six per cent, and any excess over $60,000 is taxed at the rate of nine per cent.

The third category covers transfers to all beneficiaries who are not so related to the deceased as to fall within one of the two foregoing categories. The rate of tax in this category is graduated from six per cent on the first $5,000 in excess of the $500 exclusion to 18 per cent on amounts received in excess of $50,000 over the exclusion.

5. Beneficiaries who are close relatives of the decedent for purposes of the statutory classification are:

   a. a father, mother, husband, wife, child, brother, sister, wife or widow of a son, husband of a daughter, child or children legally adopted as such in conformity with the laws of the state where adopted, any lineal descendant born in lawful wedlock, or any lineal descendant legally adopted as such in conformity with the laws of the state where adopted; [and] any person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent [unless such person did not have his permanent home in the home of the deceased for at least five continuous years during his minority] . . .

7. Beneficiaries who are remote relatives of the deceased, for the purposes of the statutory classification are: “an uncle, aunt, niece, or nephew related to the deceased by blood or legal adoption, or other lineal descendant of the same . . . .” See Neb. Rev. Stat. § 77-2005 (Reissue 1966).
B. CONSTITUTIONALITY

Because inheritance tax laws traditionally have discriminated in favor of close relatives, the laws were early attacked on the ground that such discrimination, as well as the progressive rates of the taxes, violated the equal protection clauses of federal and state constitutions. The issue was settled in 1898, when the Supreme Court of the United States upheld the Illinois inheritance tax, declaring that discrimination based upon relationship to the decedent was a reasonable classification, and, furthermore, that the progressive rates of the tax were not contrary to the rule of equality.  

The first Nebraska statute imposing an inheritance tax was passed in 1901. The constitutionality of the Act was considered in State ex rel. Slabaugh v. Vinsonhaler, which was a mandamus action arising out of the refusal of the Douglas County Judge to appoint an appraiser for inheritance tax purposes because of his belief that the statute violated the state constitutional requirement that property taxes must be uniform and proportionate. The Supreme Court of Nebraska upheld the Act on the ground that, since the inheritance tax was not a property tax but a transfer tax, the constitutional requirement was not violated.

C. TAXABLE TRANSFERS

There are three types of transfers of property which may give rise to a liability for inheritance taxes: (1) transfer by probate; (2) transfer through joint ownership; and (3) certain lifetime transfers. In all three types of transfers, the common factor is that death is the operative event.

1. Transfer by Probate

The Nebraska inheritance tax applies to all property subject to probate, including the following:

(1) Real estate, securities, and bank accounts standing in the decedent’s name alone.
(2) Life insurance proceeds payable to the estate.\(^{19}\)

(3) Pension and profit-sharing proceeds payable to the estate.\(^{20}\)

(4) Property passing by power of appointment where the decedent is the donor.\(^{21}\)

(5) Specific bequests in discharge of contracts.\(^{22}\)

(6) Forgiveness of debts.\(^{23}\)

A will, of course, may provide that all death taxes are to be paid out of the residue of the estate rather than charged to each beneficiary. Such a provision permits distribution of the full sum intended for particular beneficiaries and is popular enough to be found in most wills. However, in computing the tax, the amount to be paid from the residuary estate must be added to the beneficiary's share.

**Example.** A bequest of $10,000 is made to X, a nephew of the testator, in a will having a clause providing that the residue shall bear all inheritance taxes. The nephew would be a remote relative and the rate of six per cent would apply to his beneficial share in excess of $2,000. Disregarding deductions, the amount of tax on X's share would be computed as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct Bequest</td>
<td>$10,000.00</td>
</tr>
<tr>
<td>Exemption</td>
<td>2,000.00</td>
</tr>
<tr>
<td>Taxable Bequest</td>
<td>$8,000.00</td>
</tr>
<tr>
<td>Tax on Direct Bequest</td>
<td>(8,000 \times .06 = 480.00)</td>
</tr>
</tbody>
</table>

Series of Indirect Bequests

<table>
<thead>
<tr>
<th>Indirect Bequests</th>
<th>Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>$480.00 (\times .06 = 28.80)</td>
<td>1.73 (\times .06 = .10)</td>
</tr>
<tr>
<td>28.80 (\times .06 = 1.73)</td>
<td>.10 (\times .06 = .00)</td>
</tr>
</tbody>
</table>

Tax on Indirect Bequest\(\$30.63\)

\(\$510.63\)

2. **Jointly-Owned Property**

The statutory scheme for taxation of jointly-owned property is

\(^{19}\) Id.

\(^{20}\) Id.


relatively simple. Basically, the statute ignores the technical property concept of joint ownership and taxes the survivor according to the source and nature from which the jointly-held property was acquired. Thus, if the decedent furnished the entire consideration, the full value of the property is taxable to the survivor. However, if the survivor contributed all or a part of the consideration, the proportionate value attributable to the survivor's contribution is excluded.24

Example 1. H and W purchase a residence for $20,000 taking title as joint tenants. W provides a $2,000 down payment and both sign the security instrument and a note for $18,000. If H died after having paid the $18,000 balance from his own funds at a time when the residence is worth $30,000, W would include $27,000 in her taxable share (disregarding other exemptions). Her $3,000 exclusion is computed as follows:

\[
\frac{\$2,000 \text{ (consideration)}}{\$20,000 \text{ (original cost)}} \times \$30,000 \text{ (date of death value)} = \$3,000
\]

Example 2. If in example 1 there was a $5,000 balance due on the note when H died and this balance was paid by W, it would seem that W would be able to exclude $10,500, computed as follows:

\[
\frac{\$7,000 \ ($2,000 + 5,000)\text{ (consideration)}}{\$20,000 \text{ (original cost)}} \times \$30,000 = \$10,500
\]

When a husband and wife purchase property jointly, the question frequently arises as to whether the value of the wife's household or farm work can be added to her share of the consideration. Since the statute provides that only money or property will be treated as consideration,25 the value of services cannot be directly added to a wife's share of the consideration. However, in cases where a farmer's wife actually performs tasks directly related to producing farm income, it could be argued that a portion of the farm income is hers and when that income is used to pay off a note on the farm the statutory requirement would be satisfied.

If the property was acquired by gift or inheritance, the surviving joint owner's share is taxed only to the extent of the deceased owner's fractional interest.26

3. Lifetime Transfers

In order for a death tax to be effective, it must tax certain lifetime transfers which resemble in effect testamentary transfers.

25. Id.
26. Id.
A transfer in contemplation of death is taxable in Nebraska under the same circumstances as would render such a transfer taxable under the federal estate tax. The Nebraska statute creates a rebuttable presumption that gifts made by a decedent within three years prior to death were made in contemplation of death and are subject to the tax. There is a conclusive presumption that transfers prior to the three-year period were not made in contemplation of death.

Transfers made within three years of death are taxable under the Nebraska inheritance tax unless the beneficiary can rebut the statutory presumption by a showing that the transfer was made with life motives. Thus, where it can be demonstrated that the transfer was made for the financial assistance of family or friends, or that the decedent transferred control of his business to his children in order to develop their responsibility, further their education, or to retire himself from active business, the statutory presumption may be rebutted. Similarly, if the decedent had, at the time of the transfer, a history of making similar gifts, or was young and in sound physical condition, sufficient life motives for the transfer may be demonstrated.

In addition to gifts in contemplation of death, the Nebraska inheritance tax includes as taxable those transfers which are "intended to take effect in possession or enjoyment, after ... death," and transfers whereby "any person shall become beneficially entitled in possession or expectation to any property or income thereof," by reason of death. An example of a transfer clearly subject to the tax is a conveyance of property where the transferor retains a life estate. Although the federal estate tax expressly taxes revocable transfers, the status of such transfers under the Nebraska statute is uncertain.

33. NEB. REV. STAT. § 77-2002(b), (c) (Reissue 1966).
35. INT. REV. CODE of 1954, § 2038.
36. For an analysis of cases from other jurisdictions, see ANNOT., 167 A.L.R. 438 (1947).
Life insurance proceeds payable to a named beneficiary are not taxable under the Nebraska Act. The same is true with respect to the decedent’s exercise or failure to exercise a power of appointment.

Because an employee is ordinarily given the power to designate a beneficiary of death benefits due him under pension and profit-sharing plans, such plans also create a potential inheritance tax liability. In Pennsylvania, under a statute similar to the Nebraska Act, it has been held that contributions of the employer are subject to inheritance tax.

D. Valuation and Deductions

All property subject to the inheritance tax is valued for purposes of the tax at its “clear market value” at the date of death of the decedent. The valuation takes on added importance because of its consequences upon federal income tax liability for capital gains realized from dealings in property passing from a decedent.

For purposes of the federal income tax, the basis of property acquired from a decedent is ordinarily the fair market value of the property at the time of the decedent’s death. Where no federal estate tax return is required to be filed, the fair market value for determining basis for federal tax purposes is considered to be “the value of the property appraised as of the date of the decedent’s death for the purpose of State inheritance or transmission taxes. . . .” Thus, the undervaluing of an asset, such as a home owned by the decedent and his spouse in joint tenancy, for the purpose of saving a small amount of inheritance tax, may result in a tax detriment because of substantial capital gains arising when the property is ultimately sold.

In order to determine the clear market value of property subject to the inheritance tax, the county judge has authority to appoint an appraiser. After a hearing to determine the value of the property, given upon notice to all interested parties, the appraiser must file his report of the valuation with the county

43. Treas. Reg. § 1.1014-3(a) (1957).
The appraiser's fee is fixed by the county judge, and when there is tax due or when the case is brought by the county attorney the fee is paid by the county. In other cases the fee is paid by the person petitioning for appraisal.

While deductions are not expressly allowed by the statutes, debts, funeral expenses, and expenses of administration are in fact deductible, since the tax is levied upon the beneficial interest passing to each beneficiary. For the same reason, litigation expenses independent of the estate are not deductible.

E. Exemptions

The homestead interest of the surviving spouse, which for purposes of the inheritance tax is not limited to $2,000 but encompasses the right of the surviving spouse to live on the homestead for life, is exempt from tax. In order to arrive at the amount of the exemption, the life estate is translated into dollar amounts through the use of actuarial tables issued by the office of the state tax commissioner.

In addition to the homestead exemption, there is deducted from the amount subject to tax the succession interest of the deceased's spouse which would pass under the statutes relating to the descent of property, whether the spouse takes by will, by transfer in contemplation of death, or under such statutes. All property which is considered part of the decedent's estate for inheritance tax purposes is considered to be a part of the estate for the purpose of determining the value of the spouse's succession interest.

Also exempt from the tax is property received by the decedent from a person who died within five years prior to the death of the decedent. It is to be noted, however, that this exemption is limited to the amount of property as to which inheritance taxes were assessed and paid to Nebraska upon the previous death.

47. Id.
55. Id.
F. JURISDICTION

Even though the inheritance tax is a transfer tax and not a property tax, the general rule is that property transferred must be subject to the jurisdiction of the taxing state and thus must have a situs therein. The following principles are applicable in determining whether property has a tax situs in Nebraska and is therefore subject to the Nebraska inheritance tax:

1. **Real property.** Regardless of the statute's all-inclusive language, only real estate located within Nebraska has a tax situs in Nebraska.\(^56\)

2. **Tangible personal property.** Tangible personal property owned by a decedent who was domiciled in Nebraska has a tax situs in Nebraska unless it is permanently located outside of the state.\(^57\)

3. **Intangible personal property.** Although intangible personal property can have a dual tax situs,\(^58\) it always has a tax situs at the owner's domicile.\(^59\)

G. ADMINISTRATION AND PROCEDURE

The Nebraska inheritance tax is due and payable upon death of the decedent, and interest is charged at the rate of seven per cent from the date of death until the tax is paid.\(^60\) However, if the tax is paid within 16 months from the date of death, no interest is charged.\(^61\)

The amount of the inheritance tax due under the Nebraska Act may be determined either by application therefor in a probate proceeding,\(^62\) or, in the absence of a probate proceeding, by a petition filed solely for the purpose of determining the tax.\(^63\)

Proceedings for determination of the tax in a probate proceeding may be initiated either by order of the county judge or by application of the administrator, executor, county attorney, or any person having a legal interest in the property involved in the deter-

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61. *Id.*


In the absence of a probate proceeding, a proceeding for determination of the tax may be instituted by petition of either the county attorney or any person having a legal interest in the property involved in the determination. The statute requires that notice by publication be given to the county attorney and to all persons interested in the estate. Where notice is given by publication, the general requirements of mailing and affidavit should be followed. Moreover, personal service of notice upon the county attorney of each county in which property involved is located must be had. It should be noted, however, that the notices and publication may be dispensed with if a voluntary appearance and waiver of notice is obtained from each such county attorney and from each person who may be required to pay an inheritance tax, in which case hearing may be had and the tax determined without further delay.

The procedure for determining the tax in an estate proceeding is generally initiated by the filing of an application by the executor or administrator. If a voluntary appearance and waiver of notice is obtained from the county attorney, no further notice need be given him and the tax may be determined forthwith.

The executor or administrator must pay the tax and deduct the amount paid from the property of the person liable therefor. The executor or administrator is authorized to sell property in the estate in order to pay the tax. Any unpaid tax creates a lien upon the property appraised except as to bona fide purchasers for value without notice, which extends for a period of five years from the date the amount of the tax is finally determined.

### III. THE ESTATE TAX

In addition to the inheritance tax, Nebraska levies an estate tax on the estate of every resident decedent. The amount of this tax is based upon the state tax credit allowed by the federal estate tax credit.
In the case of decedents dying after August 16, 1954, the Nebraska estate tax is the amount by which the maximum credit allowable upon the federal estate tax exceeds the aggregate amount of all estate, inheritance, legacy, or succession taxes paid to any state or territory, the District of Columbia, or any possession of the United States in respect to any property included in the gross estate.\textsuperscript{75}

The estate tax is due and payable to the state treasurer within 16 months from the date of death of the decedent, and the limitation of time in which the tax return is open to inspection and examination is three years from the date of filing.\textsuperscript{76} Executors, administrators, trustees, grantees, donees, beneficiaries, and surviving joint owners are liable for the tax until it is paid, and the tax is a lien on the property subject thereto until paid.\textsuperscript{77} If the tax is not paid when due, it draws interest at the rate of six percent per annum from the due date.\textsuperscript{78}