



# THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS

**GERALD G. MANN**  
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ATTORNEY GENERAL

Honorable George M. Sheppard  
Comptroller of Public Accounts  
Austin, Texas

Dear Sir:

Opinion No. 0-1950

Re: Computation of the Texas Inheritance Tax in a case where subsequent to the time the testator makes his will leaving his property to his surviving spouse, a child is born, and also subsequent to his death a second child is born.

We are in receipt of your letter of September 11, 1941, in which you request the opinion of this department as to the application of the Texas Inheritance Tax Law to the facts set out therein as follows:

"Joseph J. Hebert died a resident of Beaumont, Jefferson County, Texas, on or about the 7th day of March, 1940.

"The decedent and his surviving widow, Annie Lee Hebert, executed a joint will, a copy of which is included in the office file furnished for your information. Under clause three, the decedent willed all of his property to his surviving widow to be occupied, enjoyed, conveyed, expended and encumbered by and during the life of such surviving spouse as such survivor shall desire, and that at the death of such surviving spouse any property remaining undisposed of shall descend as under the laws of descent and distribution of the State of Texas, subject, however, to the further provisions of this will. The decedent left surviving him in addition to Annie Lee Hebert, his surviving widow, one son, Joseph James Hebert, who was born September 21, 1936.

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On May 13, 1940, a posthumous child was born named Benj. Chapman Hebert, who is still living.

"The representatives of the estate contend that the tax should be computed under a distribution of a life estate to Annie Lee Hebert, surviving widow, and the remainder distributed equally between the two new living children and they and each of them be assessed a tax on their taxable part of the estate, if any."

Apparently the representatives of the estate are making the contention that Article 8293 of the Revised Civil Statutes is applicable in this case so that both of the children born subsequent to the time the will was originally made by the testator would be entitled to participate in the proceeds of his estate. Article 8293 provides as follows:

"Every last will and testament made when the testator had no child living, wherein any child he might have is not provided for or mentioned, if at the time of his death he shall leave a child, or leave his wife enceinte of a child which shall be born, shall have no effect during the life of such after-born child, and shall be void, unless the child die without having been married and before he shall have attained the age of twenty-one years."

The facts in this case qualify the will under the first portion of Article 8293, supra, as one made by a testator when he had no child living. The only question arises over whether or not the will "mentions or provides for" any child that he might have in the future.

Paragraph 3 of the will of the deceased reads as follows:

"It is our will and desire and the will and desire of each of us, that the survivor of us, Joseph J. Hebert or Annie Lee Hebert, as the case may be, shall have and be entitled to receive, and there is hereby bequeathed to such survivor, all of the right, title and estate that the pre-deceasing spouse may have in and to all property of every kind and character, real, personal or mixed, of which such predeceased spouse

**may die, seized and possessed, either in his or her separate right or in community, to be owned and used by such survivor and to be occupied, enjoyed, conveyed, expended and encumbered by and during the life of such surviving spouse as such survivor shall desire, and that at the death of such surviving spouse any property remaining undisposed of shall descend as under the laws of descent and distribution of the State of Texas, subject however, to the further provisions of this will."**

**In the above quoted paragraph the deceased left all of his property of every kind whatsoever to his surviving spouse to be occupied, enjoyed, conveyed, expended and encumbered by her during her life time as she may see fit, and further provided that if any of said property remained at the time of the death of his surviving spouse that the same should descend under the laws of descent and distribution of the State of Texas.**

**Paragraph 5 of the decedent's will provides as follows:**

**"It is our further will and desire and the will and desire of each of us, that in the event of the death of us simultaneously or in the event our deaths shall be so nearly concurrent that no administration could be had under this will of the estate of the first decedent by the survivor of us as executor or executrix, then and in that event all property of every kind and character, real, personal and mixed, whether separate or community, of which we may die, seized and possessed shall pass to and vest in our child or children, if any, share and share alike, and if said child or children, or either of them, shall be under the age of twenty-one years then and in that event that part of our estate to which such minor child or children is entitled to receive shall be held in trust by our executor to be hereinafter named, until and after such minor child or children shall reach the age of twenty-one years when same shall be delivered to it or them in full. It is our desire, however, that our said executor shall, and it is hereby authorized and empowered to expend so much of said minor child's or children's**

**interest in said estate as may be necessary for the reasonable support and education of such minor child or children pending the arrival of its or their majority."**

**In said paragraph 5 of the decedent attempted to take care of the situation where his surviving spouse would die either simultaneously with him or so nearly concurrent that no administration could be had under the will. In such event it was the decedent's desire that all of his property pass and vest to his children, if any, provided further that of his child or children were under the age of twenty-one years that a trust should be created to hold such property until said child or children attained their majority.**

**The question in this case is whether the provisions in paragraph 5, above quoted, are sufficient so that it may be said the possibility of the decedent having children was "mentioned" in his said will within the meaning of Article 8293, supra.**

**We believe that this question has been answered by the Supreme Court of Texas in the case of Pearce v. Pearce, 134 S.W. 210. In that case the decedent's will contained the following provisions:**

**"Item 1: 'To my husband, James E. Pearce, I bequeath lot 12 and adjacent one-half of lot 11, block 108, city of Austin, on which our home is built and which are my individual property together with any and all rights to and interests in the buildings and improvements that may exist on said lot and a half at the time of my death; the same to be held by him in fee simple without condition.'**

**"Item 2: 'I bequeath to my husband James E. Pearce, my interest in 1080 acres of Eislín and other surveys now owned jointly by my sister Lillian and myself, together with all the buildings and improvements upon and appurtenant to same to be held and enjoyed by him in absolute right and fee simple.'**

**"Item 4: 'I bequeath my one-fourth interest in the homestead lots of my father's estate lots 7, 8, and 9 in block 108, city of Austin, to my mother;**

in case of her death previous to my own to my two sisters, Lillian and Maude. This section is to be null and void in case of living issue born to my body. (Underlining ours)

The last sentence in Item 4 which provided that said item was to be null and void in case of living issue being born to the decedent's body was the only time that the possibility of children being born was referred to by the decedent in her will. The court stated the question involved in the case as follows:

"It is the contention of the defendant in error that she was never 'mentioned' in the will of her mother, as that term was intended to be construed in the law; nor was any provision made for her. This view is antagonized and resisted by her father, who claims that she was both mentioned and provided for in the will. We think there can be no doubt that, as the law meant that term to be understood, she was mentioned in the will, even if it could be held that she was not provided for in same, and that there was no revocation, and that the estate passed in fee simple to her father, James E. Pearce. . ."

The Supreme Court in arriving at the conclusion reached referred to the numerous decisions of courts of other states for the purpose of setting out the test employed by them--that is whether or not the child was "mentioned" within the meaning of Article 8293, supra, depended on whether from a reading of the will in the light of all the circumstances it appeared that the failure to make provisions for a child being born was not due to inadvertence or oversight. The court referred to the case of Chicago, B. & Q.R.Co. v. Wasserman, 22 Fed. 872, and stated as follows:

". . . That case is distinguishable from the one at bar in other important respects. The will is set out at length in the opinion and contains no kind of reference, express or implied, to any child, or to the possibility of the existence of children; whereas, in the case before us, in the fourth clause copies above, Mrs. Pearce seems to have had in view the contingency of having living issue born of her body. When the difference in the statutes is

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considered, and when we test the Wasserman Case, supra, by the recitals of the will there considered, the difference is demonstrable."  
(Underscoring ours)

The court referred to the case of Breece v. Stiles, 22 Wis. 120, and stated as follows:

" . . . While in that case the will is not set out at length, a summary of its terms is given, and there is no reference, direct or indirect, or by the remotest inference, to the possible existence of other children not then born. . ." (Underscoring ours)

The court referred to the case of Waterman v. Hawkins, 63 Me. 156, and stated as follows:

" . . . The opinion in that case also contains the significant remark that: 'There is nothing in such a provision to suggest that the child was thought of by the testator. The form of expression would indicate the contrary.'"  
(Underscoring ours)

The court referred to the case of Hecksmith v. Slusher, 26 Mo. 237, and quoted from the Supreme Court of Missouri in said case as follows:

" . . . 'This provision of the statute has been several times before this court for judicial construction, and it may now be considered as settled that the object of it is to produce an intestacy only when the child or the descendant of such child is unknown or forgotten, and thus unintentionally omitted; and the presumption that the omission is unintentional may be rebutted when the tenor of the will or any part of it indicates that the child or grandchild was not forgotten. . .' (Underscoring ours)

The court quoted from the opinion in the case of Guitar v. Gordon, 17 Mo. 408, and stated as follows:

" . . . The object of the section must be borne in mind. It is not to prevent parents from disinheriting their children, but merely to make provision for those, who may have been unintentionally omitted. . " (Underscoring ours)

The Supreme Court then laid down the test to be applied to a situation such as we have here in this case and stated as follows:

"It should be remembered in this case that, as we have seen, the property in question was the separate estate of Mrs. Pearce. Under the law she might deed same, when joined by her husband, to any person for any consideration satisfactory to her, and no child or children could complain. Under the law she is authorized to direct the disposition of the same by will, either to the natural objects of her bounty, or to dedicate it to charity, or to convey it to strangers. And her right so to do cannot be abridged or denied unless inhibited under a fair construction of the statute relied on. We think the true construction of the word 'mentioned,' in article §345, is not designation by name, but means referred to or having in mind, and as indicating that the child was in her memory, and that her will was made with reference to its possible existence and early birth, and that it was not overlooked or forgotten. In other words, the true interpretation of the statute is that it should appear either that provision should be made for the child, or that, if no provision was made for such child, it should appear from the will interpreted in the light of all the circumstances that the failure to make such provision was not accidental, due to inadvertence or oversight. . ." (Underscoring ours)

In our case the decedent left his property under the terms of paragraph 3 to his surviving spouse. However, it is our opinion from a reading of the will, and especially paragraph 5 thereof, that the decedent's children, if any, were "mentioned" in the will. It is our opinion that paragraph 5 shows conclusively that the possibility of children being born was had in mind when the will was executed by the decedent, yet he prefers to leave his property to his surviving

spouse which he had a right to do under the law. Therefore it is our conclusion that Article 8293, supra, has no application to the will in this case because the possibility of children being born was recognized by the decedent and he "mentions" them in his will within the meaning of said article.

The further contention is made in this case that an inheritance tax should not be imposed against the surviving spouse because she is not given fee simple title to the property under the terms of the will. In paragraph 3 of the will the surviving spouse receives all the right, title and estate that the decedent had in all of his property of every kind and she was given the right to occupy, enjoy, convey, expend and encumber the same during her life time. If any remained at her death the same was to pass under the laws of descent and distribution of the State of Texas. We call your attention to Opinion No. 0-2351 of this department in which we considered the provisions of a will which read as follows:

" 'SECOND: - I give, devise and bequeath unto my wife, Mary Pettibone, all of my property, real, personal and mixed, and wheresoever situated, of every sort and description, with full power to sell and convey and dispose of same, or any part thereof, as she may desire, and at any time and in such manner and upon such terms as she may elect, and with full power in the premises to convey the absolute fee simple title thereto.

" 'THIRD: - It is my will and desire that upon the death of my beloved wife, Mary Pettibone, should there remain any of said property in her possession not disposed of or used by her, such remaining property shall pass to and become the property of my daughter, Mary Lednum Poole, now of New York, New York.' "

In that opinion addressed to you we held that the total amount of tax should be assessed against the wife of the decedent, despite the fact that by the terms of the will she got something less than a fee simple title to the property. We believe that that opinion answers the question in the case you now submit to us. In this respect we fail to note any distinction between the Pettibone will discussed in Opinion No. 0-2351 and the Hebert will discussed in this opinion.

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**You are advised therefore that in our opinion the Texas inheritance Tax should be assessed on all of the property against the surviving spouse in accordance with the terms of the will as written by the testator.**

**In answering this question we have treated the issue of the validity of the will as written as a matter of first impression despite the fact that on the 26th day of March, 1940, the Probate Court of Jefferson County, Texas, probated the will of the decedent and stated in said order that the surviving spouse was entitled to all of the testator's property to the entire exclusion of the children born subsequent to the time the will was executed. We do so for the reason that such a provision in an order of a Probate Court probating a will is of no force and effect in a situation where the children under Article 8293 supra, are in fact entitled to a participation in the estate of the testator. See *Burton v. Connecticut General Life Insurance Company*, 72 S.W.(2d) 318, by the Fort Worth Court of Civil Appeals, writ of error refused by the Supreme Court, and *Conroy v. Conroy*, 130 Tex. 508, 110 S.W.(2d) 568. We have therefore considered the rights of the children under Article 8293 without any reference whatsoever to the portion of the Probate Court order which attempts to exclude the children from any participation in the estate of the testator.**

**Yours very truly,**

**ATTORNEY GENERAL OF TEXAS**

**By s/ Billy Goldberg  
Billy Goldberg  
Assistant**

**BG:LM:v**

**APPROVED OCT 7, 1941  
s/ GROVER SELLERS  
FIRST ASSISTANT  
ATTORNEY GENERAL**

**APPROVED;  
OPINION COMMITTEE  
BY BWB, CHAIRMAN**