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FUTURE INTERESTS - FEDERAL ESTATE TAX - ADMISSIBILITY OF EVIDENCE OF BARRENNESS OF DEVISEE

FUTURE INTERESTS — FEDERAL ESTATE TAX — ADMISSIBILITY OF EVIDENCE OF BARRENNESS OF DEVISEE — In an inquiry as to the value of an executory bequest to charitable institutions, conditioned on the death of the testator's daughter without issue surviving her, was evidence that at the time of the testator's death she had been rendered incapable of bearing children admissible for the purpose of determining the amount of a deduction from the federal estate tax? *Held*, that such evidence was admissible. *United States v. Provident Trust Co.*, (U. S. 1934) 54 Sup. Ct. 389.[1]

The usual rule of property law is that a woman is conclusively presumed to be capable of bearing children until the moment of her death. As was pointed out in an earlier note on the Court of Claims decision of the present case,[2] the reasons for the rule are two-fold; first the difficulty of determining, in a court of law, the issue of barrenness; and second, as a matter of public policy, to prevent attempts at premature sterility by artificial means in order more quickly to determine future interests conditioned on failure of issue. In the instant case, as was pointed out by the Court,[3] more than a mere matter of age made the birth

[1] Affirming the decision of the Court of Claims, 2 F. Supp. 472 (1933).

[2] 32 MICH. L. REV. 414 (1934). See Hill v. Sangamon Loan & Trust Co., 295 Ill. 619, 129 N. E. 554 (1920).

[3] "The important point to be emphasized is that the question arises with respect to a surgical operation, the inevitably destructive effect of which upon the power of procreation is established by tangible and irrefutable proof. Moreover, the case does not involve the rule against perpetuities, the devolution of property, the rights or title of living persons in or to property, or any other situation such as constituted the background of practically all the decisions which have sustained the conclusiveness of the presumption. . . . The sole question to be considered is — What is the value of the interest to be saved from the tax?" (At p. 477.)

But see Farrington v. Commissioner of Internal Revenue, (C. C. A. 1st, 1929) 30 F.

of children absolutely impossible,[4] and the question here did not involve any of the situations which give rise to the aforementioned public policy. It was simply a question of evaluating the future interest for purposes of taxation, and it would seem to be free from objection to allow such facts, which would be considered by any business man in estimating the present value of such an interest, to be judicially recognized, when strictly confined to the inquiry made in the principal case.[5]

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(2d) 915, in which the same tax deduction problem that arose in the principal case was presented. The court there considered the presumption of fertility as conclusive. The case may be distinguished, however, since there was no other fact than the age of the woman bearing on the issue of barrenness.

[4] It is interesting to note that in the principal case the daughter was deceased at the time that the tax question was first litigated. The Court, however, did not regard this fact as significant.

[5] For a collection and classification of the American and English cases, see 67 A. L. R. 538 (1930). The principal case cites the following cases as showing that the presumption is not conclusive: Ansonia Nat. Bank v. Kunkel, 105 Conn. 744, 136 Atl. 588 (1927), where, in determining the intent of a testator, it was held that the presumption of fertility would not be invoked to impute to the testator the thought that his aged sister might still bear children; Hill v. Spencer, 196 Ill. 65, 63 N. E. 614 (1902), where the court said that an allegation that a woman was past the time of life to bear children was meaningless, *unless more than a mere matter of age be stated in the bill* (italics ours); Male v. Williams, 48 N. J. Eq. 33, 21 Atl. 854 (1891), when the mother was sixty-seven years of age, a vested legacy to her children could be immediately divided and paid, there being a presumption that she would not have any further issue; Carney v. Kain, 40 W. Va. 758 at 811, 23 S. E. 650 at 657 (1895), which recognized that where a trust is limited to await the event of the death without issue of the beneficiary, and she has passed the age of childbearing childless, the event for practical purposes has come, and distribution can be made, except that in determining the quality or quantity of estates limited on such an event, the law presumes the possibility of issue to continue until death. See also cases in the note to Apgar's Case, 37 N. J. Eq. 501 at 502 (1883).