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Acts of 1957, Ch. 319, *supra*. It then must certify either the classification first established by it, or the newly established classification, whichever is the higher. Thus, the 1961 Act would not prevent a salary raise, but would prohibit a salary lower than that established and paid pursuant to the July 1, 1957 certification for county officers, and that of July 1, 1959 for judges and prosecuting attorneys of the various judicial circuits.

OFFICIAL OPINION NO. 60

November 28, 1961

Mr. T. Michael Smith, Administrator
Inheritance Tax Division
106 State Office Building
Indianapolis 4, Indiana

Dear Mr. Smith:

This is in response to your letter of recent date in which you request an Official Opinion upon the following subject:

“Would you please advise me, in the form of an Official Opinion, whether the lump sum benefits payable under the Railroad Retirement Act and the Social Security Act are taxable for inheritance tax purposes.

* * *”

All questions concerning liability for the inheritance tax imposed by the Acts of 1931, Ch. 75, as found in Burns' (1953 Repl.), Section 7-2401 *et seq.*, depend upon the basic determination of whether the particular transfer involved is one includible within the transfers enumerated by said Act upon which it imposes a tax. The transfers to which the Act applies are specified in Section 1 of that Act, as found in Burns' (1953 Repl.), Section 7-2401, and, for the most part, are contained in the fourth grammatical paragraph of that section, which provides as follows:

“All transfers enumerated in this section shall be taxable, if made by will; or if made by the statutes regulating intestate descent; or if made in contempla-

tion of death of the transferor, and any transfer of property made by a person within two [2] years prior to death, shall, unless shown to the contrary, be deemed to have been made in contemplation of death; or if made by gift or grant intended to take effect in possession or enjoyment at or after the death of the transferor; or if made in payment of a claim against the estate of a deceased person arising from a contract or antenuptial agreement made by him and payable by its terms by will or contract at or after his death; and if any transfer falling under the foregoing provisions is made for valuable consideration, excepting love and affection, so much thereof as is the equivalent in money value of consideration received by the transferor shall not be taxed but the remaining portion shall be."

The balance of said section, concerning jointly held property, proceeds of life insurance policies, transfers of property by deed of trust, and property transferred to executors or trustees, has no possible application in answering your questions. It is only if the lump-sum benefits payable under the Railroad Retirement Act and the Social Security Act are includible among the transfers described in the foregoing quotation, that they may be liable to taxation under the Indiana Inheritance Tax Law.

In brief, the Indiana Inheritance Tax Law has been described in Indiana Department of State Revenue, Inheritance Tax Div. v. Kitchin (1949), 119 Ind. App. 422, 425, 86 N. E. (2d) 96, as follows:

"Our tax is upon the transfer of property by will, by intestate laws or in contemplation of death. * * *"

It is, of course, obvious that lump-sum payments under the Railroad Retirement Act and the Social Security Act are not transfers made by will.

The next type of transfer to which the Inheritance Tax Law applies, is that "made by the statutes regulating intestate descent; * * *." Section 33 of the Act, as found in Burns' (1953 Repl.), Section 7-2433, contains statutory definitions of terms used in that act, one of which concerns "intestate de-

scent," which is defined in the fifth grammatical paragraph of that section to mean the following:

"The words 'intestate descent' or 'intestate succession,' as used in this act, shall be taken to refer to all transfers of property or any beneficial interest therein, affected [effected] by the statute of descent and distribution and the transfer of any property, or any beneficial interest therein, affected [effected] by operation of law upon the death of a person omitting to make a valid disposition thereof."

From this definition it is clear that the Legislature, by referring to "statutes regulating intestate descent," meant statutes by which to determine the distribution of a decedent's property in the absence of a will and those concerning the transfer of property by operation of law upon the death of a person who could have made a valid disposition by will of the property involved. This is in accord with the generally understood concept as to what is meant by "intestate laws," as meaning those governing the devolution of property which could be, but is not, disposed of by will. Thus, laws which control the disposition of property which could not be transferred by will, are not intestate laws.

See: *In re Rogers' Estate* (1923), — Mo. —, 250 S. W. 576, 578.

For example, it has already been held in Indiana, in the case of *Indiana Department of State Revenue, Inheritance Tax Div. v. Estate of Alexander* (1953), 232 Ind. 661, 664, 115 N. E. (2d) 747, that:

"In addition it has been the established rule of this court that the *statutory* allowance to the widow does not pass to her by reason of any law of descent or as an heir. *In re Mertes Estate* (1914), 181 Ind. 478, 480, 104 N. E. 753. *Mugg v. Fenn, supra*, at page 375." (Our emphasis)

This is in line with case law from other states to the effect that "statutes regulating intestate descent" do not refer to statutory provisions for benefits payable to the widow.

See: In re Dean's Estate (1942), 350 Mo. 494, 166 S. W. (2d) 529, 534.

Therefore, unless lump-sum benefits payable under the Railroad Retirement Act and the Social Security Act are such that the decedent has a vested interest therein in his lifetime, so that the same are capable of disposition by will, then they would not be transfers made by statutes regulating intestate descent.

Next, it is clear that such lump-sum payments do not constitute transfers made in the lifetime of the decedent in contemplation of the death of the transferor, since in no instance are they paid until the death of the person covered by the Railroad Retirement Act or the Social Security Act.

Proceeding to the next type of transfer enumerated by the Inheritance Tax Law, we see that it concerns gifts or grants "intended to take effect in possession or enjoyment at or after the death of the transferor; * * *." This language again contemplates that the property involved, of which transfer is made, is such as would be under the control of the decedent in his lifetime so as to be capable of disposition by will.

The last transfer mentioned in the foregoing quotation concerns the transfer of property made in payment of a claim against the estate of a deceased person arising from a contract or antenuptial agreement made by him or payable by its terms by will or contract at or after his death. This type of transfer clearly would not be involved, because there would be no claim against the estate of the decedent which was being extinguished by the payment of lump-sum benefits from the Railroad Retirement Act or the Social Security Act.

With the foregoing resumé of the types of transfers included in the fourth grammatical paragraph of Burns' 7-2401, *supra*, your question is narrowed to whether lump-sum benefits, payable under the Railroad Retirement Act and the Social Security Act, constitute transfers made by statutes regulating intestate descent, or whether they constitute gifts or grants intended to take effect in possession or enjoyment at or after the death of the transferor. As heretofore stated as to each of these types of transfers, the property must be such as is capable of being passed by will; that is, it must be property

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vested in and controllable by the decedent. The lump-sum benefits payable pursuant to the Railroad Retirement Act are payable by reason of the provisions of the Federal statute as contained in 45 U. S. C. A. § 228e(f), (1960 Supp.).

That subsection of the Railroad Retirement Act is of considerable length and technicality, and for our purpose it is not necessary to burden this Opinion with a verbatim recitation of the entire subsection. Although this subsection formerly provided for payment of the lump sum to the widow or widower of the deceased, or, if none, then to children of the deceased and to any other person who, under the intestacy law of the state of the decedent's domicile, would have been entitled to share with such children and in such proportions as provided by the state law, the present form of that subsection, as last amended on September 13, 1960, eliminates any reference to the intestacy law of the state of the decedent's domicile. The 1960 version of that subsection now provides, in part, as follows:

“Upon the death, after the month in which this Act is enacted, of a completely or partially insured employee who will have died leaving no widow, widower, child, or parent who would on proper application therefor be entitled to receive an annuity under this section for the month in which such death occurred, a lump sum of ten times the employee's basic amount shall be paid to the person, if any, who is determined by the Board to be the widow or widower of the deceased employee and to have been living with such employee at the time of such employee's death and who will not have died before receiving payment of such lump sum. If there be no such widow or widower, such lump sum shall be paid to any person or persons, equitably entitled thereto, to the extent and in the proportions that he or they shall have paid the expenses of burial of such deceased employee. If a lump sum would be payable to a widow or widower under this paragraph except for the fact that a survivor will have been entitled to receive an annuity for the month in which the employee will have died, but within one year after the employee's death there will not have accrued to survivors of the employee, by reason of his death annuities

which, after all deductions pursuant to paragraph (1) of subsection (i) of this section will have been made, are equal to such lump sum, a payment equal to the amount by which such lump sum exceeds such annuities so accrued after such deductions shall then nevertheless be made under this paragraph to the person (or, if more than one, in equal shares to the persons) first named in the following order of preference: the widow, widower, child, or parent of the employee then entitled to a survivor annuity under this section. * * *

It is clear from the above-quoted portion of the subsection that the federal law no longer makes the eligibility of persons to receive the original lump-sum payment to depend upon the intestacy law of the state of the decedent's domicile. Instead, it is the federal statute which specifically designates the beneficiaries of such original lump-sum payment.

Only with respect to subparagraph (2) of the subsection concerning the residual lump-sum payment is there any right vested in the employee to designate a beneficiary if there should remain any amount for the payment of a residual lump sum. If such a designation is not made, then the residual lump sum is, by the federal statute, to be paid to the widow or widower who was living with the employee at the time of his death, or, if none, then to children or grandchildren, or, if none, then to any parent or parents, or, if none, then to any brother or sister. If there be a widow, widower or parent, the residual lump-sum payment provided by subparagraph (2) is not to be paid unless such person files an irrevocable election to accept such sum "in lieu of all benefits to which such widow, widower or parent might otherwise become entitled under this section or, * * *" under specified sections of the Social Security Act. If there be no designated beneficiary, or no such widow, widower, child, grandchild, parent, brother or sister, in that event, the residual lump sum provided by subparagraph (2) is payable to the estate of such employee. Although in the latter instance there is one circumstance under which this residue may be paid to the decedent's estate, nevertheless, in the case of *Succession of White (1957)*, — La. —, 96 So. (2d) 355, 356, it was held:

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“Perhaps the basic error upon which able counsel for appellant proceeds is the assumption that the federally created railroad retirement benefits which the succession administrator seeks to recover herein are necessarily an asset of decedent’s estate and, as such, to be administered under State community property and inheritance law.

“While the retirement or survivors’ benefits, once vested by the occurrence of the statutory conditions, become a property right which may be asserted in the courts (at least, in the forums designated by statute), *Dismuke v. U. S.*, 297 U. S. 167, 56 S. Ct. 400, 80 L. Ed. 561; *Ewing v. Gardner*, 6 Cir., 185 F. 2d 781; until so vested, ‘any claim of the beneficiary is a mere expectancy created by the law,’ *Freeman v. Railroad Retirement Board*, 5 Cir., 192 F. 2d 51, 52, certiorari denied 343 U. S. 909, 72 S. Ct. 640, 96 L. Ed. 1326. ‘The right to benefits under railroad retirement statutes, and the eligibility of particular individuals for such benefits, are to be determined in accordance with the statutory provisions.’ 81 C. J. S. Social Security and Public Welfare § 50, p. 92.

“Under 45 U. S. C. A. § 228e(f) (2), the right or eligibility of decedent’s estate to obtain the lump-sum payment under the act arises only in the absence of surviving widow, child, parent, or beneficiary specially-designated by the decedent. * * *”

It is clear that the lump-sum payment is not considered by the Act to be a part of the decedent’s estate when there are persons eligible to receive such directly, but is paid to the persons specified by the federal law, whose relationship to the deceased employee is determined by the Railroad Retirement Board. That this payment is not to be considered as a part of the decedent’s estate, is shown by reference to 45 U. S. C. A. § 228 (1), which provides as follows:

“Notwithstanding any other law of the United States, or of any State, Territory, or the District of Columbia, no annuity or pension payment shall be assignable or be subject to any tax or to garnishment, attachment, or

other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.”,

from which it is clear that the Congressional intent is that benefits received under the Railroad Retirement Act shall not be subject to state taxes. Therefore, with respect to the lump-sum benefit payable under the Railroad Retirement Act directly to eligible beneficiaries, it would appear that such is not a transfer made by a statute regulating intestate descent; that such lump-sum benefit is not a vested property interest under the control of the decedent so as to constitute a gift or grant intended to take effect in possession or enjoyment at or after death; and that the Federal act itself indicates the intent that the proceeds payable directly to eligible beneficiaries pursuant to the Act shall not be subject to any tax.

Referring next to the lump-sum death payments payable under the Social Security Act, reference is made to 42 U. S. C. A. § 402(i), (1960 Supp.). This subsection of the Social Security Act (as amended Sept. 13, 1960) is, likewise, of considerable length and no particular purpose will be served by reciting the same verbatim herein. In general, it provides for a lump-sum payment in “an amount equal to three times such individual’s primary insurance amount, or an amount equal to \$255, whichever is the smaller, * * *.” This payment is to be made to the widow or widower of the deceased if living in the same household with the deceased at the time of death, or, if there is no such person, then the section provides for payment to others, including a funeral home, for the payment of unpaid funeral and burial expenses or for the reimbursement of individuals who have incurred such expenses to the extent that such have been paid. Here, again, is a situation, as in the case of *Indiana Department of State Revenue, Inheritance Tax Div. v. Estate of Alexander, supra*, and as is the case with respect to lump-sum benefits under the Railroad Retirement Act, in which the payment is pursuant to federal statute. Thus, it is not pursuant to a statute regulating intestate descent, nor does such constitute a gift or grant intended to take effect in possession or enjoyment at or after death, because the decedent has no vested interest in, or control over, the lump-sum payment pursuant to said Act. Therefore, it would appear that the lump-sum death payment, pursuant to

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the Social Security Act, is not subject to liability under the Indiana Inheritance Tax Law.

The subject of the liability of railroad retirement benefits, payable upon the death of a railroad employee, and as to their liability under a state inheritance tax law, was considered by the Attorney General of the State of Washington in his Official Opinion dated December 22, 1958, in which he concluded that such benefits were not subject to the inheritance tax of that state. In that Opinion the Attorney General quoted at length from an opinion of the Railroad Retirement Board concerning the character of these benefits, stating:

“There have been no federal cases deciding this particular problem or construing the exemption provisions of the federal code here in question. However, the case in question has been decided administratively by the Railroad Retirement Board as follows:

“* * * While these benefits are called “insurance annuities” they are not derived from any insurance policy.

“Annuities under the Railroad Retirement Act are paid by the Federal Treasury at the direction of the Railroad Retirement Board to widows and certain other survivors or railroad employees who qualify on the basis of a statutory right. While these annuities may be to a certain extent measured by compensation received by railroad employees with respect to which they and their employers were liable for taxes under the Railroad Retirement Tax Act, the annuities bear no necessary relation to such taxes. These annuities are in nowise paid in consideration of, and their amounts are not dependent upon, the taxes paid by railroad employees under the Railroad Retirement Tax Act, which is entirely independent of the Railroad Retirement Act. The Tax Act is a revenue raising measure adopted under the general taxing power of Congress and administered not by the Railroad Retirement Board but by the Internal Revenue Service. Cf. *Steward Machine Co. v.*

Davis, 301 U. S. 548 (1936) ; *Helvering v. Davis*, 301 U. S. 619 (1936). Coverage is not voluntary, and the railroad employee has no alternative but to pay the tax imposed; under no circumstances is he entitled to a refund except to the extent the tax was improperly collected in the first instance. Many railroad employees, whose widows and certain other survivors receive annuities under the Railroad Retirement Act, have not been obligated to pay any taxes under the Tax Act and many other such employees have been liable for only negligible amounts. The Tax Act applies only to compensation received after 1936.

“ ‘Mrs. Johnson and her children receive their insurance annuities, not because of any designation of beneficiary, but only because the Railroad Retirement Act provides that insurance annuities shall be paid to them. Under the Act, no individual has the power to designate any person to receive any kind of an annuity. A railroad employee has no control whatever over the right of his wife to a widow’s insurance annuity, or the right of any of his children to a child’s insurance annuity, under the Railroad Retirement Act upon his death; and, of course, no State has the power to determine or enforce payment of these annuities as it might have if they represented a contractual right. Thus, the character of these annuities makes it appear, without regard to the tax exemption provisions applicable to all annuity payments contained in section 12 of the Railroad Retirement Act, that a right to receive such annuities is not subject to the inheritance tax laws of the State of Washington.’ (Letter of February 7, 1958 from the Railroad Retirement Board to Mr. Burns Poe, Attorney at Law.)”

Although the foregoing opinion apparently is concerned only with the annuities and not the lump-sum payment, it would seem that the reasons for concluding that such annuities

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are not subject to the state tax would be equally applicable to the lump-sum payment.

Upon the question of the liability for inheritance tax in the case of the receipt of lump-sum benefits under the Social Security Act, reference is made to an Opinion of the Attorney General of the State of Texas issued September 9, 1959 in which he held that such benefits were not subject to the inheritance tax law of that state. In that Opinion the Attorney General of the State of Texas stated as follows:

“In 1940, the Treasury Department ruled that amounts payable under Title II of the Social Security Act, as amended by the Act of August 10, 1939, to a widow were not to be included in the gross estate of the decedent for Federal estate tax purposes. CB 1940-2, 285. The reasons given for such ruling were that the decedent had no control over the designation of the beneficiaries or the amounts payable to them, said beneficiaries and amounts being fixed by the provisions of the Social Security Act, as amended, and the payments being made directly to the beneficiaries. The ruling further pointed out that the decedent had no property interest in the ‘Federal Old-Age and Survivors Insurance Trust Fund’ created under Section 201(a) of Title II of the Social Security Act, as amended.

“Revenue Ruling 55-87, CB 1955-1, 112, is to the effect that lump-sum payments under Title II of the Social Security Act are not includible in the decedent’s gross estate for estate tax purposes.

“Due to the basic differences in the nature of inheritance and estate taxes, this office has held in certain instances that rulings of the Federal Government in connection with Federal estate taxes are inapposite in a determination of liability for Texas inheritance taxes. However, we think the provision of our statute necessitates the same result. The only provision of Article 7117, Vernon’s Civil Statutes, which could subject the Social Security benefits to a tax is the one which taxes transfers made by ‘* * * deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor or donor. * * *’ The

covered employee having no choice in the matter of coverage, nor in the selection of beneficiaries, nor indeed any assurance that either he or anyone else will ever receive any Social Security benefits, can scarcely be said to have made a gift intended to take effect in possession or enjoyment after his death. You are therefore advised that the Social Security lump-sum death payment to the widow is not subject to inheritance tax."

Before concluding, it should be noted that the sixth grammatical paragraph of Burns' 7-2401, *supra*, exempts from the Indiana inheritance tax

"Proceeds of life insurance policies * * * payable either directly or in trust for the use of any person or persons other than the estate so that it does not become a part thereof * * *."

I have heretofore stated that this provision is not applicable in answering your questions, for, as stated by the Attorney General of the State of Washington in his Official Opinion dated December 22, 1958, *supra*, benefits under the Railroad Retirement Act are not derived from an insurance policy and the same is, likewise, true of benefits under the Social Security Act. However, in one sense, the Railroad Retirement Act and the Social Security Act constitute a form of insurance provided by federal law. Because the proceeds from life insurance policies payable directly to named beneficiaries are not taxable under the Indiana Inheritance Tax Law, it may be observed that to conclude that benefits payable under the Railroad Retirement Act and the Social Security Act (if considered to be in the nature of insurance) are, likewise, not subject to the Inheritance Tax Law, when payable directly to beneficiaries, is in harmony with the theory of the Indiana law that income of such character becomes subject to taxation only if it becomes a part of the assets of the estate so as to be subject to the payment of claims against the estate and distributable either pursuant to the terms of a will or by reason of the laws of intestate succession.

In conclusion, therefore, it is my opinion that neither the lump-sum benefits payable under the Railroad Retirement Act,

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nor those payable under the Social Security Act, when payable directly to eligible beneficiaries, constitute transfers which are subject to the tax imposed by the Indiana Inheritance Tax Law from which follows the ultimate conclusion that such lump-sum benefits are not taxable under that act.

OFFICIAL OPINION NO. 61

November 29, 1961

Honorable George W. Stocksdale
State Representative
407 Riverside Drive
Huntington, Indiana

Dear Representative Stocksdale:

This is in reply to your recent request for an Official Opinion in reference to the Acts of 1957, Ch. 319, Sec. 10. Your first question is as follows:

“Is a County Surveyor who is registered under the Indiana Board of Registration for Engineers and Land Surveyors, as a Land Surveyor, entitled to the \$2.00 per mile provision for each mile of active court drains and ditches as set out in Section 10, paragraph 2, chapter 319 of the Acts of 1957?”

Your second question is summarized as follows:

Is a county surveyor who is a mechanical, electrical or chemical engineer, if licensed as a professional engineer, entitled to the \$2.00 per mile provision for each mile of active court drains and ditches as set out in Section 10, Chapter 319, of the Acts of 1957, even though he may have no actual experience in land surveying?

The Acts of 1957, Ch. 317, Sec. 10, as found in Burns' (1961 Supp.), Section 49-1062, establishes the salary and mileage allowance for the county surveyor. As indicated by your letter, many questions have arisen in regard to the amounts to which such surveyors are entitled when they are registered professional engineers or registered land surveyors as opposed