ORIGINAL

In the

Supreme Court of the United States

GEORGE F. JEWETT, JR., ET UX.,	)	
	)	
Petitioners,	)	
	)	
v.	)	NO. 80-1614
	)	
COMMISSIONER OF INTERNAL REVENUE	)	

Washington, D. C.

December 1, 1981

Pages 1 thru 46

ALDERSON REPORTING

400 Virginia Avenue, S.W., Washington, D. C. 20024

Telephone: (202) 554-2345

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE F. JEWETT, JR., ET UX.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

No. 80-1614

Washington, D.C.

Tuesday, December 1, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:11 o'clock p.m.

APPEARANCES:

JAMES D. ST. CLAIR, ESQ., Hale & Dorr, 60 State Street, Boston, Massachusetts 02109; on behalf of the Petitioners.

STUART A. SMITH, ESQ., Office of the Solicitor General, U.S. Department of Justice, Washington, D.C. 20530; on behalf of Respondent.

C O N T E N T S

- - -

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Jewett against the Commissioner of Internal Revenue.

Mr. St. Clair, you may start whenever you are ready.

ORAL ARGUMENT OF JAMES D. ST. CLAIR, ESQ.,

ON BEHALF OF THE PETITIONERS*

MR. ST. CLAIR: Mr. Chief Justice and may it please this Court:

This case comes before the Court on certiorari to the Ninth Circuit Court of Appeals and is to review the judgment of that court affirming the decision of the Tax Court sustaining assessments of deficiencies in gift taxes.

The case involves the question of whether or not effective disclaimers of bequests can be made by a contingent remainderman under a testamentary trust where the life estates that precede the contingent remainderman's interest still exist free of federal gift tax liability.

The facts are simple and not in dispute. My client, the taxpayer's, grandmother died in 1939 leaving a will. The will provided that the bulk of her estate would be left in trust with life estates to her husband, her son, and her son's wife -- the son and the wife being the father and mother of my client.

Both the husband of the settlor and my client's

father have died and died before the disclaimers in this case were executed. However, my client's mother still lives and is the remaining life beneficiary under the testatrix will. The will, as I may have said, was filed in probate in Massachusetts and was allowed in 1939. I should note also that at that time the taxpayer was 12 years old.

In 1972 at a time in which the taxpayer was 45 years old by two separate disclaimers, which are admittedly valid and effective under state law, he disclaimed his entire interest with the contingent remainderman under his grandmother's will. And it is agreed, as I understand it, that he had no interest thereunder after 1972.

QUESTION: Mr. St. Clair, it isn't important at all, but I'm interested. Why two disclaimers? Why not one?

MR. ST. CLAIR: I don't know why, but apparently that can be done. The first disclaimer was for 95 percent of his 50 percent interest under his grandmother's will, and the second one followed a few months later within the same taxable year for the remaining five percent.

QUESTION: Did that indicate a tenacious desire to hold on a little bit or something?

MR. ST. CLAIR: I don't know the answer to that. All I do know is that within the period of a few months he completely disposed of is interest by disclaimer and that those disclaimers even though partial were valid and

effective under state law.

QUESTION: In any event, he was holding on only to the tailfeathers of that fund, wasn't he?

MR. ST. CLAIR: Indeed, indeed. As I said, at that time he was 45 years old.

QUESTION: One other question, if I may.

MR. ST. CLAIR: Yes, Justice Stevens.

QUESTION: Who will take the property?

MR. ST. CLAIR: I'm sorry.

QUESTION: Who will be the beneficiary of the disclaimer?

MR. ST. CLAIR: One of my principal arguments is we don't now know. All of the interests following the life estate are contingent upon survival of the mother in this case, all of the interests -- not only my clients but my clients' issues' interest are contingent upon their survival.

Under the will there are gifts over to collateral heirs in the event my client's line runs out before the life tenant dies, and even those interests must survive to take. The ultimate disposition is in the descent and distribution laws.

QUESTION: Is the effect of the disclaimer to treat your client as though your client had died before the life tenant did?

MR. ST. CLAIR: Indeed, indeed.

QUESTION: That's the legal --

MR. ST. CLAIR: He drops out. And the traditional law of disclaimer is, and I think uniformly followed among all of the states, is precisely that. A disclaimer is not a conveyance. It is as if the person died with respect to that interest, and the property flows along as if it had never existed. For example, take a charitable gift, assuming there is an intervening estate that is disclaimed. The charitable gift is treated as a deduction from the original donor simply as if the intervening estate had never existed. And there are other examples to carry on that same theory.

QUESTION: One other question, if I may. Is the gift tax always payable by the donor, or is it ever payable by a donee?

MR. ST. CLAIR: I think that the primary liability is surely on the donor.

QUESTION: Supposing you had say a religicus person who took a vow of poverty and disclaimed. Would the gift tax be chargeable to the donees, and if so, who would pay it?

MR. ST. CLAIR: Well, of course we would say there would be no gift.

QUESTION: But assume the Government's right.

MR. ST. CLAIR: Then the Government may or may not

-- and I don't know the answer -- have a right to trace the assets through the donee of the gift and attempt to collect the tax.

QUESTION: Certainly there have been cases where the donee has been collected from.

MR. ST. CLAIR: Yes, indeed. And I think it's through the tracing of assets theory.

QUESTION: They're rare. Let me ask you another question.

MR. ST. CLAIR: I think it's fair to say that that problem is not facing us in this case.

QUESTION: While I have you interrupted, Mr. St. Clair.

MR. ST. CLAIR: Yes, Mr. Justice White.

QUESTION: The statute itself of course is broad and general.

MR. ST. CLAIR: Indeed.

QUESTION: And your case depends necessarily on the regulation.

MR. ST. CLAIR: Indeed. In fact, so does the Government's case. This case revolves around the proper application of regulation 25.2511-1(c).

QUESTION: If it weren't for the regulation, you'd be in a much harder predicament and more difficult predicament, would you not?

MR. ST. CLAIR: I don't think so. And of course I would like first to look at the express language of the regulation in the context of the law as it existed when the regulation was promulgated, and I would like to be able to persuade you that the language itself of the regulation makes it quite clear in this context that my client had a right to disclaim without gift tax liability.

First of all --

QUESTION: Of course, my question would have been isn't the regulation an act of grace to you really?

MR. ST. CLAIR: I beg your pardon?

QUESTION: I say isn't the regulation an act of grace for you?

MR. ST. CLAIR: Not as my brothers are interpreting it. It's a lodestone around our neck. As the Government interprets this, there is no way we could possibly have disclaimed our interest because of the timing of events. For example, in the Ninth Circuit --

QUESTION: Well, you can disclaim it. You just have to pay gift tax.

MR. ST. CLAIR: Indeed. When I say we can disclaim without the liability of gift tax.

When the will was probated, my client was 12 years old, a fact which incidentally the Ninth Circuit seemed to overlook entirely when they held that the period beyond

which you cannot disclaim commenced 33 years ago. They in effect held that my client had a duty at the age of 12 to make up his mind whether or not to disclaim and to have knowledge of the transfer and so forth.

QUESTION: Could a guardian have disclaimed for him validly?

MR. ST. CLAIR: If he had any reason to have a guardian.

QUESTION: Well, let's assume a guardian was appointed by someone.

MR. ST. CLAIR: I would assume that if a guardian had been appointed, a guardian could exercise this right for me; but it's not everyone who's 12 years old that necessarily feels the necessity for a guardian. And even the Government in its brief alludes to the proposition that maybe the period of time beyond which a tax-free disclaimer could be effected began at the tender age of 21.

Well, even that period of time I think was six -- well, that would be '48 to '58 would be ten years before the promulgation of this regulation, and that clearly would have been an unreasonable time.

So that if the Government's contention is correct under any basis, there is no way that we would have executed a valid and binding disclaimer and be free of tax. And yet, it would not be hard to establish a whole series of other

circumstances where other people could well have done so. And at one point in my argument I'm going to comment upon the unfairness and illogical results of the Government's contention.

QUESTION: Why do you think the Tax Court has been so tenacious in its position in this issue?

MR. ST. CLAIR: Well, the quick answer is I don't know. Clearly, they are tenacious. Judge Rahm in his opinion simply disregarded outstanding law in the Eighth Circuit in the Keinath case, which is the conflict among the circuits that I presume brings the case here. It's simply disregarded. And indeed, the Ninth Circuit essentially disregarded it except it says we disagree, and it didn't give much other reasoning behind their decision.

QUESTION: Of course, the first Tax Court case rested on Fuller.

MR. ST. CLAIR: Indeed.

QUESTION: Fuller is distinguishable?

MR. ST. CLAIR: Indeed.

I think it's important to an understanding of this case before we get to the precise provisions of the regulation itself which really govern the outcome to discuss very briefly the legal context that was in existence when this regulation was promulgated in 1958.

At that time it was quite clear that valid and

effective disclaimers as a matter of federal common law, if you will, did not affect a gift along the lines that you and I discussed, Mr. Justice Stevens. The case that decided that is the Brown against Routzahn, and that was an old case in the Sixth Circuit in Ohio, and had been followed, to the extent that these cases had been decided, I think without any exception except one, the Hardenbergh case, again in the Eighth Circuit.

In Hardenbergh there was an intestacy, and under the law of the state an intestacy automatically vested title to the beguest in the hands of the beneficiary. There was nothing you could do about it. It happened as a matter of law. Under those circumstances the Eighth Circuit said well, a disclaimer cannot be made under these circumstances because you can't avoid obtaining title to the property; the law gives it to you. And any disposition of it is subject to tax.

That was the status of the law at the time this was promulgated. The regulation itself by its provisions makes it quite clear that what was intended to be done was to codify this common law as it related to disclaimers insofar as the Internal Revenue Act of 1954 was concerned. And in fact there has been recently released a technical memorandum to that effect making it explicitly clear that that was the intent of the Internal Revenue Service in

advising the Treasury of the recommendation for the adoption of this regulation 1211-1(c).

The common law also, without exception, treated the beginning of the period beyond which a disclaimer could not be effected as being the point where the contingent remainderman in this case first obtained ownership of the property; that is, once it became vested fully it became then his property, and the time under state law within which it could thereafter be disclaimed began to run.

And that whole body of law, we submit, was embodied in this attempt to codify the law, with one exception; and that is, as the Keinath court pointed out, the regulation intended to install a common period of time. The duration of the period of time was to be a reasonable period beyond the date of transfer, and I'll get to that in a minute.

This is not the commencement of the time. It is the duration of the time that was said to be layered over, if you will, by the Internal Revenue Service; and we don't contest that at all. In fact, we quite readily recognize the Internal Revenue Service can adopt for federal tax purposes a different period of time than perhaps the various states have done.

Now, with that understanding of what the context of the law was, I would like to turn very briefly to the

language itself of the regulation in an effort to demonstrate to you that it, in effect, in express terms provides that the time beyond which my client could not effectively disclaim his interest without incurring a federal gift tax liability commences upon the date when he, if he ever does, obtains the full quality and quantity of vested ownership in the property; that is, if he survives the life tenant.

The full text is set forth in the petition for certiorari in the appendix at page 30, and I will make only brief references to the precise language, if I may.

The critical point reads as follows: "A refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer."

Now the question is well, what is the transfer that initiates this time period? Well, there are in fact two transfers referred to in the regulation. The first is, just briefly above that, is a transfer or rather a refusal to accept ownership of property transferred from a decedent. So that in one aspect the transfer has to be the transfer of the property from the decedent without any retained interest or without any rights of revocation or the like; and that is accomplished in this case.

The second reference is further down, and there it

says, "If a person fails to refuse to accept a transfer to him," -- note "transfer to him" -- "of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property."

Now we know that the transfer must be first from the settlor and also must be to the person who is disclaiming. That second step has not yet happened and had not yet happened in 1972, because at that time he had only a contingent interest dependent upon his ability to survive his mother.

QUESTION: Doesn't that depend on whether the word "property" refers to the contingent interest or to the assets that are transferred?

MR. ST. CLAIR: Well, it says "ownership of decedent's property."

Now, at one time this regulation in its early drafting had the word, instead of "transfer," it had "the existence of the interest," and "the interest" was changed to the word "transfer." And I suggest for the very purpose of making it clear that no period of time starts running under this regulation until the contingent remainderman has received ownership of the property by a conveyance to him.

Now, this goes further. This analysis goes further than the Eighth Circuit analysis in Keinath. They

said well, we cannot --

QUESTION: Let me interrupt you again, if I may, just to get your thinking.

What you're saying in effect is that the contingent remainder was never the decedent's property. That's a legal interest that was never the property of the decedent.

MR. ST. CLAIR: It is an interest in the decedent's property, but the regulation speaks of ownership.

QUESTION: Created by the decedent's will. I understand.

MR. ST. CLAIR: And doesn't say partial ownership or interest in the property. It says "ownership of the decedent's property." And I suggest to you the plain meaning of the langauge is that "ownership of property" means just that. It doesn't mean that you have to live until your mother dies to get it, and not only that, your issue have to live before your mother dies to get it.

My brothers would like to suggest, Your Honor, well, this disclaimer is nothing but a device to transfer this property from my client to my client's issue. Nothing could be further from the truth. We don't know for sure who's going to be around when my client's mother passes away, if anyone. And even if we did, it wouldn't go to them because of anything we did. It's because grandmother

decided it would be that way.

The Government further contends well, this is simply an assignment of this contingent remainder. Well, of course, it isn't an assignment. If it were an assignment, the taxpayer could direct persons to whomever he determines should have this contingent interest.

QUESTION: You mean it couldn't be an assignment unless you had an identifable assignee.

MR. ST. CLAIR: Yes. It could be one of the persons who would otherwise get it, or it could be somebody else. But even more importantly, there is another section of the regulations, 2511-1(h)(6), which deals with assignments of such interests. And as the court in Keinath pointed out, if 2511-1(c) covers assignments, then (h)(6) is superfluous. Of course, these things must be read together in pari materia and so forth.

As I was saying, the Keinath court went a little different route. Happily, they came out the same place. They said look, we can't find any specific reference in this regulation as to when this time period starts. We know how long it runs, but we don't know when it starts. And since the regulation doesn't tell us anything about it -- and we disagree on that point, as you know -- we will look to state law to determine when the time for disclaimers, valid disclaimers starts; and we find, without exception, that it

starts when the interest becomes fully vested in the beneficiary.

The facts with respect to that finding are even more so true today. More than I think 35 states have addressed the issue of the commencement of a period for a valid exercise of the right to disclaim under state law, and they all say when the contingent remainderman becomes fully vested. Not only that, but the various uniform laws of disclaimer and uniform probate practice laws all make the same provision.

QUESTION: How long has it been clear that the Commissioner gives this particular construction to his regulation?

MR. ST. CLAIR: Well, I think that in Keinath that he made that argument in the Tax Court, and Keinath overrruled it. He again repeated the argument in the Tax Court in this case, and the Ninth Circuit sustained it.

QUESTION: But were there ever any interpretive statements? When was the regulation issued?

MR. ST. CLAIR: 1958, November, made effective as of the Revenue Act of 1954.

QUESTION: Was it just assumed up until relatively recently that it meant what you say it meant?

MR. ST. CLAIR: Not by the Commissioner.

QUESTION: From the very start what was his view?

MR. ST. CLAIR: I think the Commissioner as far as litigated cases are concerned --

QUESTION: From the very start.

MR. ST. CLAIR: Has at least been consistent.

QUESTION: Well, this is an interpretation of his own regulation.

MR. ST. CLAIR: Indeed.

QUESTION: And do you suggest that the regulation, if interpreted the way he says it is, is invalid under this statute?

MR. ST. CLAIR: No, I don't say it's invalid under any means. I just say that their interpretation -- may I take that back? I would like to take it back in this context. It's not invalid qua regulation. It's within the power of the Internal Revenue Service and the Treasury Department.

QUESTION: Would it have been invalid under the statutes?

MR. ST. CLAIR: No, it would not.

QUESTION: Suppose it had said expressly what he now says it says.

MR. ST. CLAIR: Well, in fact, the point I hesitate in saying it would be invalid is Congress in 1976, in the Tax Reform Act of 1976 effectively did what they interpret this regulation to do.

QUESTION: I understand. But at the time would that have been an acceptable construction of the statute, to expressly --

MR. ST. CLAIR: It would have been a lawful construction of the statute.

QUESTION: All right. Lawful construction.

MR. ST. CLAIR: Illogical --

QUESTION: If it had expressly said what they say it says now.

MR. ST. CLAIR: I don't contest that. It would have been illogical. It would have placed undue harm, in my view, on the taxpayer. And under Section 7805, I guess, subsection B, I suggest that the Commissioner would have a responsibility under those circumstances, in effect changing the existing law, in effect imposing a significant hardship on my client and others similarly situated, to make it only prospective in its operation.

And he has the power to do that under 7805(B). He should have done it, and his failure to do it is judicially reviewable.

QUESTION: Well, all you're saying is that you had a vested right then not to disclaim, and you could wait to disclaim as long as you wanted to.

MR. ST. CLAIR: Not as long as we wanted to.

QUESTION: Well, you could wait to disclaim until

just before your mother died. You could wait at least as many years as you did here.

MR. ST. CLAIR: Oh, indeed.

QUESTION: After the regulation came into effect.

MR. ST. CLAIR: Indeed.

QUESTION: Even though you knew that the Commissioner was construing it the way he now construes it.

MR. ST. CLAIR: Well, we knew that the Commissioner was construing it that way if you read the Tax Court opinions, but the Keinath case, the Keinath case in 1973 said the Commissioner was wrong.

The next time the matter is definitively dealt with by any appellate courts is this case.

QUESTION: Yes.

MR. ST. CLAIR: Disclaimer cases, I have found, don't arise every day in the week. They, however, are becoming, I understand, a little more popular.

Now, I have mentioned that in 1976 the Congress addressed this question, and the Congress in the Tax Reform Act of 1976 made expressly the provisions that my brothers argue for are contained in this regulation, namely that any disclaimer must be made within -- they didn't say a reasonable time; they said nine months. And that's the only difference between the two positions. Within nine months of the creation of the interest. That is, in 1933 my client

would have had nine months within which to exercise -- to disclaim this gift if it were not for the fact that he was 12 years old.

The 1976 Act says as a second alternative if, however, the holder of the interest is a minor, then we will wait until nine months beyond the time he becomes 21, but he must do it then. And that's just what the Government is now arguing is the meaning of the 1958 regulation.

The critical point is, though, that the 1976 Act expressly made it prospective in application only to interest created after 1976. And the congressional, the House reports make it clear that the Congress now, not the Commissioner of Internal Revenue, but that the Congress intended the prior law to govern all transactions regarding interest created prior to that time.

QUESTION: If you're correct, Mr. St. Clair, would you say that Congress by legislation cut back on the Commissioner's interpretation prior to 1976?

MR. ST. CLAIR: Yes. ~~If at~~ There is no point in making it prospective only if the regulation meant what the Commissioner now says it means. That would be superflous in itself. What they're trying to do and what the effects of a decision sustaining the Ninth Circuit Court of Appeals would be would be to abrogate that portion of the act of Congress which says that this provision will be applicable only in

the future. If the regulation is construed as the Commissioner now urges, it would in effect abrogate that congressional provision.

And I suggest to you -- and the reason I hesitated, Mr. Justice White, in saying it would be lawful or unlawful, was that I think it is unlawful in the light of those circumstances because it contravenes an act of Congress in which the 1976 Act was made prospective only, and this is explicitly so. Because if they are right, they are making it retroactively applicable in contravention of the act of Congress.

I think in substance I would --

QUESTION: Was that provision made a catch to this particular provision?

MR. ST. CLAIR: I beg your pardon?

QUESTION: The prospectivity, was it --

MR. ST. CLAIR: It was an explicit provision within the statute itself.

QUESTION: How many subjects did the statute cover?

MR. ST. CLAIR: Well, the Tax Reform Act of 1976, a lot of them. But it's no question it was a deliberate act in effect obviously to change the previous law. And in the committee reports it is clear that they intend to change the previous law, and they say so; and they cite, for example, the Keinath case as the existing law, and they didn't like

it, so they decided we're going to enact legislation to change the Keinath law. And that is set forth in our briefs in the committee report itself. So there could be no question but this was not an accident on the part of Congress. This was a deliberate act to change what it understood the law to be up until that time, namely as embodied in Keinath.

QUESTION: Do you think it's got more authority then than any other congressional opinion about what a past statute means?

MR. ST. CLAIR: I think it has all the authority that any legislative history has with respect to legislation. Surely it explains the intent of Congress.

QUESTION: You're arguing more than that. You seem to be saying that Congress has specifically decreed that on old cases, on prior cases the rule the Government is contending for will not be applied.

MR. ST. CLAIR: I indeed so argue, and I am here arguing that --

QUESTION: That's a lot more than ordinary --

MR. ST. CLAIR: I'm here arguing at least it should not be applied for the reason that --

QUESTION: Well, you're arguing that this is corrective legislation and that that has a different status and posture from ordinary post-legislative history.

MR. ST. CLAIR: Indeed. First of all, it is legislation; it is not a regulation by any means. It is a recognition by Congress that the law should be changed to accomplish what my brothers say has always been the law. Those two thoughts cannot be accommodated. And this is not just in the legislative history, Mr. Justice White. I may have not made it clear to you. It's in the legislation itself.

QUESTION: I understand. I understand that. But it certainly --

MR. ST. CLAIR: There would be no point in making it effective only --

QUESTION: It certainly has happened an awful lot around where Congress passes a statute that confirms an agency's view of the law although is quite contentious; and we still have to decide what the old law meant, and it can end up and mean exactly what the Congress thought it meant.

MR. ST. CLAIR: Well, I'm only arguing that the Congress thought differently and provided legislation that contradicts, in effect, the position now being taken by my brother, because my brother's interpretation would abrogate the prospective only portion of the legislation.

QUESTION: Well, except you can explain the prospective application of the statute just by the fact they wanted the nine months rule to be prospective. Wouldn't

that be a sufficient explanation?

MR. ST. CLAIR: Well, no. They said it's not only nine months, but it starts when the original gift is made or when the individual becomes of age; so they deal with the duration and with the commencement of the time. They deal with the whole package.

QUESTION: But they also use the word "transfer" to refer to the creation of the interest. They talk about transfer creating an interest, and your argument is "transfer" refers to the transfer of assets rather than creation of a contingent remainderman.

MR. ST. CLAIR: When I talk about transfer I'm talking about as it is used in the regulation.

QUESTION: Right.

MR. ST. CLAIR: By the terms of the regulation itself. "Transfer" as an English word could mean a lot of things, including a transfer of an interest.

QUESTION: But in the statute the word "transfer" quite clearly would refer to the --

MR. ST. CLAIR: The original transfer and any interest thereafter in the property. It is a wide-ranging provision designed to do, as a corrective measure, what the Commission now argues was always the situation anyway.

QUESTION: At least you have Judge Harris below agreeing with you, don't you?

MR. ST. CLAIR: Well, it was only a majority opinion below, yes.

QUESTION: Of course, Judge Harris comes out of the Eight Circuit, too.

MR. ST. CLAIR: Well, you would know, sir, more about the Eighth Circuit perhaps than I would, except that I think, frankly, the Eight Circuit rationale, although it is not perhaps as precise our analysis of the regulation, is certainly a supportable one. The case is far better reasoned, with all due respect, than the Ninth Circuit decision. The Ninth Circuit decision was simply a denial of the validity of the Eighth Circuit and created this conflict.

Yes, sir.

QUESTION: To what did the act apply?

MR. ST. CLAIR: I beg your pardon?

QUESTION: To what kind of gifts did the act apply?

MR. ST. CLAIR: The new act?

QUESTION: As far as disclaimers.

MR. ST. CLAIR: All, all interest. Any disclaimer of any interest --

QUESTION: You said it was prospective only. Prospective from when?

MR. ST. CLAIR: From January 1, 1976 and thereafter.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Smith.

ORAL ARGUMENT OF STUART A. SMITH, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. SMITH: Mr. Chief Justice and may it please the Court:

The federal gift tax is imposed upon all gifts, direct and indirect. That is the teaching of Section 2511 of the Code. A disclaimer of the type involved in this case provides a mechanism for indirect gifts, because property which is directed to a person who doesn't want it, he can disclaim and in the act of disclaiming he causes that property, that interest to be directed to the next party in succession.

QUESTION: Is this indirect gift to an identifiable person or to a class?

MR. SMITH: This is not an indirect gift to an identifiable person, Mr. Chief Justice, but for gift tax purposes that is of no consequence. This Court in Robinette v. Helvering almost 40 years ago said gifts of future interest are taxable under the Act, and they do not lose this quality merely because of the indefiniteness of the eventual recipient.

The Petitioner is purported to give the property to someone whose identity could be later ascertained, and

this was enough. That is the purport and operation of the gift tax.

Now, there is an exception which takes a disclaimer outside the operation of the gift tax, and that is the exception, the grace period, the act of grace, as Mr. Justice Blackmun put it, which is involved in this case.

The regulation is Section 1.2511-1(c), and it provides that a disclaimer can be made free of gift tax if two requirements are fulfilled: one, it must be valid and effective under state law; and two, it must be made within a reasonable time after knowledge of the existence of the transfer. If those requirements are met, the tax law will consider that the disclaimant never had the property and did not transfer it to the next person or class in line, but that it passed directly from the settlor or the testate or here the testatrix to the next person in line.

QUESTION: Mr. Smith, do you think that the drafters of the 1958 regulations actually meant to establish a new federal standard of reasonable time beginning the moment the interest was created? The history seems to indicate that the drafters only meant to codify the Brown-Hardenbergh rule which really left it up to state law to determine the federal tax.

MR. SMITH: I don't think so, Justice O'Connor. I think that the Brown-Hardenbergh cases which have been

discussed in the brief deal solely with the question of the disclaimant's capability under state law. If you will recall, Hardenbergh was a case in which a person took by intestacy, and the Court held that under state law a person who took by intestacy was incapable under state law of disclaiming, that he had to take it, that state policy required it. In Brown that was the situation.

QUESTION: It certainly left it up to state law to determine the federal tax consequence.

MR. SMITH: Those cases dealt with the situation of the disclaimant's capability or lack of capability under state law. And indeed, the regulation uses state law as one of the requirements; that if a disclaimant, at least before the 1981 Act, was incapable of making a disclaimer under state law, he wasn't going to come within this exception, and he was going to have made a taxable gift. That's what happened in the Hardenbergh case, because under state law the disclaimant there was someone who took by intestacy, and as a result he couldn't disclaim, and he was deemed to have made a taxable gift. In Brown he wasn't such a person. It was a surviving husband who decided that he didn't want his wife's property.

But this much is clear, that the regulation has two requirements: one, capability under state law, and two, that the disclaimer must be made within a reasonable time

after knowledge of the existence of the transfer.

Now, how do these principles apply in this case? We have no quarrel here. The parties had no quarrel that this was a valid and effective disclaimer under Massachusetts law. But the parties do quarrel about whether Mr. Jewett made a disclaimer within a reasonable time after knowledge of the existence of the transfer.

Here the grandmother, Margaret, died in 1939, but Mr. Jewett, the grandson, did not disclaim until 1972, 33 years after the transfer. Now, that was 24 years after he obtained his majority because Mr. Jewett was born in 1927.

Now, this might have been valid and effective under state law because the policies of whether a disclaimer will be given effect under state law, as Judge Rahm ably pointed out in the opinion of the Tax Court, have little, if anything, to do with the policies underlying the gift tax. Under no stretch of the imagination, he concluded -- and we feel the facts fully support his conclusion -- were these disclaimers made within a reasonable time after knowledge of the existence of the transfer.

And indeed, my brother here does not argue, and indeed he really couldn't, that the 33-year period or the 24-year period would be a reasonable time, nor does he attempt to justify this inordinate delay on any special fact that knowledge was withheld from him.

How does he claim to meet this reasonable time after knowledge of the existence of the transfer? Well, he first claims on reliance on the Keinath case that state law is sufficient. Now, that is, in our view, a very peculiar opinion, because what it does is deal with the state law requirement and then say that in dealing with -- after acknowledging, as I think the Court must, that there is a federal timeliness requirement under the regulation, the court in Keinath said well, how do we know what's timely for federal purposes? Well, what can we do; we have to look to state law. So the court doubles back on its analysis and then finds a Minnesota statute that within the context of that case that the 19-year period was a reasonable time after knowledge of the existence of the transfer.

QUESTION: Mr. Smith, of course you don't know why, I suppose, the Solicitor General did not seek cert in the case.

MR. SMITH: In the Keinath case? Well, the Solicitor General I think had a healthy concern for the Court's docket, and I think in the absence of a conflict, the Keinath case would not have been an appropriate case to petition. Here we had --

QUESTION: You'd rather win one before you try to come here.

MR. SMITH: We always like to win. To that extent

we're no different than --

QUESTION: You like to come here on the bottom side, don't you?

MR. SMITH: No. I don't think that's necessarily so.

QUESTION: What do you do with the 1976 tax revision legislation?

MR. SMITH: I think, Mr. Justice Rehnquist, that the 1976 Act can only be viewed as entirely neutral on the question before this Court. In 1976 Congress established a nine-month period for purposes of establishing a uniform period of reasonable time, and in considering the legislation in 1976 it noted the Keinath opinion, and perhaps the most you could say about it is it viewed it somewhat as an aberration. It said in a footnote that indeed there is a case in which 19 years was regarded as a reasonable time, and I suppose Congress thought that that was entirely too long a period of time to be reasonable.

QUESTION: So that it in effect expressed dissatisfaction with Keinath.

MR. SMITH: Yes. But I don't think that -- I would not attempt to make anything affirmative out of the 1976 Act other than to say that for years involving transfers creating interest, after December 1976 the rule is nine months, and also valid and effective under state law.

Indeed, the law has been revised again, and the 1981 Tax Act has now abolished the requirement that the disclaimer be valid and effective under state law, because Congress found that there was a lack of uniformity within the states as to what would be a valid and effective disclaimer.

QUESTION: Did the '76 law also deal with becoming mature, becoming of age?

MR. SMITH: Well, yes, it did. It said nine months from either the -- to the time the interest was created or from the period --

QUESTION: But that wouldn't apply here, would it?

MR. SMITH: I mean the whole statute doesn't apply here by its terms, and I think it's really reading too much to say that Congress was attempting to do anything with respect to the pre-'76 years. And I take strong issue with Petitioner's attempt to attempt to --

QUESTION: Do I gather, Mr. Smith, that your feeling is that -- your submission is, in any event, that all that the 1976 Act in making it prospective intended to do was to say that it may be that more than nine months would be a reasonable time as to transfers that were made before 1976?

MR. SMITH: Indeed, indeed. And I think that --

QUESTION: And that that's the only reason for the prospective --

MR. SMITH: Exactly. I mean Congress normally in the estate and gift tax area normally legislates prospectively in order not to disturb, and when it does legislate retroactively, it usually provides for some sort of grace period to allow people to amend their instruments. And here they were simply legislating prospectively.

QUESTION: Is there any legislative history which supports that suggestion as the reason why it was made prospective?

MR. SMITH: No, no. But this is a traditional way that Congress acts in the estate and gift tax area.

QUESTION: Mr. Smith, let me ask a question I was pursuing very shallowly with Mr. St. Clair. The Tax Court opinion in Keinath was not reviewed by the Court. It was one by Judge Irwin who relied rather firmly on the earlier Tax Court case in Fuller.

Do you agree Fuller is distinguishable?

MR. SMITH: Yes. I think so.

QUESTION: Because of the use and benefit of income --

MR. SMITH: Yes. I think that's a different case. But of course here Judge Rahm's opinion was reviewed by the Court.

QUESTION: Yes, it was here, but it was not in Keinath.

MR. SMITH: That's correct.

QUESTION: I get the feeling that Judge Irwin in Keinath relied on rather unsure precedent when he relied on Fuller.

MR. SMITH: That may well be, but I think we're --

QUESTION: But having established that the Tax Court had been persistent all the way through the years on what seems to me to be somewhat of an unsure foundation in Fuller --

MR. SMITH: Well, I think that the foundation has been shored up effectively by the opinion in this case, which I think goes a long way to satisfy any concerns that one might have about whether this kind of case could meet the reasonable time requirements under the regulation.

Here we submit that the only way the Petitioner can prevail here is if he says -- and this is what I was getting to -- was that the interest -- that the time doesn't begin to run until the death of the life beneficiary. But in our view, and I think Judge Rahm pointed it out quite cogently, that this argument flies in the face of the whole structure of the gift tax. I mean, one can have a gift of a future interest. The court said that in Smith V. Shaughnessy, and the Fourth Circuit said it in Procter; that future interests are perfectly appropriate for gifts. And the fact that this was a contingent remainder, all that does

is go to value. In other words, one can sit down and figure out how valuable is an $8 million remainder when the intervening life beneficiary is 71 years old, as she was in 1972.

QUESTION: Mr. Smith, isn't there more -- I have to confess it's an awfully close question -- but isn't there more to your opponent's argument, when he points out the words "transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer," and that that language was adopted instead of the language "within a reasonable time after knowledge of the existence of the interest?" I mean "existence of the interest" would clearly have covered a contingent remainder.

MR. SMITH: In response I would simply say that the word --

QUESTION: Decedent's property.

MR. SMITH: But a contingent remainder is part and parcel of the decedent's property. I mean, you know, one can divide property up into --

QUESTION: Ownership of a decedent's property? The decedent never owned a contingent remainder.

MR. SMITH: No, but what she did was take her property and divide it up in a particular sort of way; and I submit that the contingent remainder to this grandson is a property interest. It's property. I mean, I don't really

think there's any quarrel about that, and the fact that one can -- future interests like this are subject to the gift tax. I don't think that --

QUESTION: Mr. Smith, I mean conceding that a future interest is property, let me go back with you again to the Brown case because I think it's crucial here.

The 1958 regulation appears to have been adopted for the purpose of adopting the Brown-Hardenbergh decisions, and when I asked you about those cases, you rather passed over them and said they didn't control.

Now, I want to read you some language from the Brown decision which apparently the regulation intended to adopt. "The Brown case established that the federal tax on transfers is levied on the transfer of property, not on the exercise of a right to renounce testamentary gifts."

Now, it seems to me if you look at that language and then say that the regulation was adopted to put that into place, that you come to the conclusion that the tax law applicable to this particular case is as the Petitioner says, even though Congress closed the loophole, if you will, in 1976.

Now, would you comment more specifically on Brown?

MR. SMITH: Well, I don't think that the Brown case, as the Tax Court pointed out here, really speaks to the issue. Brown was dealing with an estate tax question

under the 1921 Act.

QUESTION: Well, it was a testamentary gift --

MR. SMITH: That is true, but it really doesn't deal with -- it doesn't deal with the whole timeliness question I think the Court has to face in this case. It dealt simply with the question whether you were going to allow this sort of thing to pass as a marital bequest in that situation where the matter -- where the interest had or had not vested.

And I think that the technical memorandum that has been bandied about here and the question of whether the regulation meant to adopt or codify Brown v. Routzahn and Hardenbergh only speaks to the question of the disclaimant's capabilty under state law. And that is the first criterion of the regulation. There's nothing in any of the memoranda or really -- and I think Petitioner can cite nothing in Brown that has anything to do with timeliness with respect to the question that the Court has here.

The second requirement in the regulation, that the disclaimer be made within a reasonable time after -- I don't want to paraphrase -- within a reasonable time after knowledge of the existence of the transfer.

Here, the transfer the way the gift tax works occurred in 1939 when the grandmother died, and the transfer was made to the testamentary trust.

QUESTION: But the Brown case would say the transfer didn't occur, and that's the point.

MR. SMITH: The Brown case may have said that, but the Brown case didn't really deal with the question of timeliness. And I don't think, Justice O'Connor, that because the regulation talked about a reasonable time within which to make this after -- that yes, it did adopt the capability of state law aspect of Brown, but it went further. It also went to the question of reasonable time, and that really goes to the whole essence, I think, of what the gift tax is all about. And that's really what separates this case from the state law considerations that the Eighth Circuit considered in Keinath.

The essence of the gift tax in this area is time, because here this taxpayer, Mr. Jewett, to be sure he was 12 years old in 1939, but he was 21 years old in 1948. And yet, he didn't disclaim this interest until 1972. From 1948 to 1972 his family presumably developed. He was able to measure his assets to be able to figure out whether he needed the money from his grandmother's trust or not, who would take it if or perhaps what class of people would take it if he didn't disclaim or did disclaim. In fact, he was able to use the mechanism of disclaimer as an inter vivos estate planning device. And I don't say that with any disparagement, but I'm saying simply that that kind of

process, that kind of mental process of thinking what I would like to have done with grandmother's money is really what the gift tax was designed to reach. It was designed to reach that sort of thing. And if it persists over a 33 or a 24-year period, that really is what the gift tax was designed to reach.

This Court held in the Weams case that Congress intended by the gift tax to reach all sorts of arrangements, all sorts of protean arrangements that could devise to pass things. And the reasonable time requirement under the regulation was designed to say look, if you're going to have property come to you and interest come to you, and you don't want it, you have to make up your mind promptly to more or less cleanse yourself of the notion that you're attempting to jockey with this and to use it to place it with these people or this object of your bounty. I think it's important to --

QUESTION: Mr. Smith, let me get back to where I was in the Fuller-Keinath, this case in the Tax Court.

MR. SMITH: Yes.

QUESTION: You gave me your answer. You can make the same argument, or rather the Eighth Circuit can make the same argument on its side, can't it, because they had Cottrell come along after the Tax Court unanimous opinion here.

MR. SMITH: Well, there are aspects of Cottrell, as I recall, that --

QUESTION: They heard it en banc. There were three dissenting votes, but they adhered just as tenaciously to their point of view as the Tax Court has in this case.

MR. SMITH: Yes.

QUESTION: So your explanation, if it's good for the Tax Court, it's not good for the Eighth Circuit.

MR. SMITH: Well, that's right. I think that Keinath is wrong, and I don't think that -- I think that it's a kind of peculiar thing, as I was alluding to earlier, the fact that the court would say all right, this was valid and effective under state law, and now we do have the question of federal timeliness -- you know, there's no quarrel about that -- and how do we figure out what's timely under the federal statute. Well, we have to look to state law. I mean, it seems to me you're chasing yourself around a circle, and I really think that the fact that 19 years may have been effective under a timely period under Minnesota law doesn't really answer the question here. I think that the disclaimant in Keinath was equally engaged in the kind of thoughtful and leisurely estate planning mental process that Mr. Jewett was engaged in in this case, and indeed, I share --

QUESTION: Well, the Eighth Circuit decided

against you, and cert was not applied for for obvious reasons.

MR. SMITH: Well, I mean obviously in the absence of a conflict this is not the kind of case, I think, that the Solicitor General would seek to ask this Court to exercise its discretionary jurisdiction to review; but now that we do have a conflict, as we pointed out in response to the Petitioner, we acquiesced in this case because there are some $10 million worth of cases pending. And despite the fact that there have been two successive statutory actions by Congress in '76 and last summer as well that have issued more precise rules in this area, didn't make us want to resist what was a clear allegation of a conflict here.

We think that the Tax Court's tenacity was well exercised here. This is not the kind of case -- this is exactly the kind of case that the gift tax was designed to attack.

The state law that the Keinath court so heavily relied on deals with entirely different policies, deals with questions of competing claimants and creditors; and indeed, here where you have a 24 or 33-year period, I don't quarrel with the fact that a Massachusetts court would permit Mr. Jewett to disclaim his interest. It seems to me that that's entirely a matter for a state court to resolve on property law context.

But the essence of the gift tax is time. And I think that what Judge Rahm said, and if I may just read a few sentences from page 18 to the appendix to the petition, I think it really summarizes what this case is all about.

"The Petitioner possessed for 24 years the effective right to determine who shall ultimately receive the benefits of a 50 percent remainder interest of a trust which in 1972 had a corpus of approximately $8 million. He waited to act in respect of that remainder interest until the suriviving life beneficiary was over 70 years of age and until he himself was 45, and it appears a man of substantial means. In fact, he had given $2 million between '58 and '72. In 1972 by the execution of two disclaimers he elected to let the property pass according to the alternative provisions of his grandmother's will to the natural objects of his bounty. This, we hold, was an exercise of control over the disposition of property subject to the gift tax."

I don't really think that really one can quarrel with that kind of analysis on the facts in this case.

QUESTION: Mr. Smith, when was it first made as clear as can be that the regulation means or meant what you now say it means? From the very time it was issued? Do you think that's the only possible reading of the regulation is the reading you give it?

MR. SMITH: Well, one can read property to mean

the actual property that one puts in one's pocket, but the gift and estate tax is replete with the fact that for 40 years it has subjected itself -- the tax has been subject to future interest as well.

QUESTION: Well, do you think you've answered my question or not?

MR. SMITH: Well, one can always read things differently, but it seems --

QUESTION: But the first part of my question was when did it become perfectly clear that the Commissioner administered the regulation the way he is now administering it?

MR. SMITH: I can't answer that question because of the paucity of cases. I suppose that it became perfectly, absolutely clear with authority when the Tax Court decided the Keinath case because that was the first case that really dealt with the disclaimers. But it seems to me that the words --

QUESTION: That case got to the Tax Court. It certainly had the seeds long before that.

MR. SMITH: Well, perhaps the paucity of litigation suggests that people were disclaiming within a reasonable time and, you know, there just weren't any cases. I would simply say that the words --

QUESTION: At least the Commissioner didn't change

his mind.

MR. SMITH: Absolutely not. I would simply say that the words "within a reasonable time after knowledge of the existence of the transfer" means that, you know, that when you are the beneficiary under a will that knowledge of that transfer means the transfer that is effected by that will and not getting checks in the mail. It seems to me that that really almost is beyond quarrel.

QUESTION: Was it ever claimed in -- what's the Eight Circuit's case?

MR. SMITH: Keinath?

QUESTION: Yes. The Court of Appeals didn't suggest that the regulation, if construed the way the Commissioner construes it, is invalid under the statute.

MR. SMITH: No, no. It simply -- but it rendered the federal timeliness requirement superfluous by the way by simply saying that we look to state law, which of course no one quarreled about there or here, and then -- to consider what was timely under federal crime. And I would simply say that 33 years or indeed even 24 years is not a reasonable time within, you know -- after knowledge of the existence of the transfer.

QUESTION: What you're saying is that he played his options for 24 years.

MR. SMITH: Yes, Mr. Chief Justice. And playing

those options is exactly the kind of process and the kind of act that is the essence of the taxable gift under the gift tax.

QUESTION: Of course, in partial response to Justice White, Keinath was decided by Judge Irwin only in 1972. That isn't very long ago.

MR. SMITH: Well, I suppose, you know, when things become perfectly clear is in part when decisions get rendered in litigation, and also there is war of -- I think, Mr. Justice Blackmun, you're well aware of the fact that certain things are prefectly clear to tax lawyers even without the benefit of decisions or rulings or regulations.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3:13 p.m., the case stood submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

GEORGE F. JEWETT, JR., ET UX., vs. COMMISSIONER OF INTERNAL REVENUE

NO. 80-1614

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Sharon Hyer Connelly