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Distribution of Estates to Beneficiaries Behind the Iron Curtain

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compulsory insurance laws are passed, from whose injury the claim for damages, compensatory and punitive, arises. Thus, recovery from insurance companies for punitive as well as compensatory damages should be possible.

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DISTRIBUTION OF ESTATES TO BENEFICIARIES BEHIND THE IRON CURTAIN

Three perplexing questions are manifest in the area of distribution of estates to beneficiaries residing behind the Iron Curtain. First, will the legatees actually receive the beneficial use or control of the funds so that the intent of the testator will be effectuated? Should these funds be allowed to leave the country despite the possibility that they might be used to aid our nation's enemies? Finally, should the state or the federal government control this area? Distribution of these estates is, of course, important to the parties directly involved. Furthermore, the interested countries have shown concern about these funds. In fact, Iron Curtain powers have even interpreted their currency regulations in an attempt to facilitate distribution of estates to beneficiaries residing within their borders.[1]

Mechanically, the administration by the surrogate is easily explained. If the decedent leaves funds to be distributed in a Communist-controlled country, the surrogate determines whether the beneficiary will receive the actual control of the legacy. If he decides that the beneficiary will not receive such benefit, then the funds are deposited with an appropriate treasurer.[2] The focal point of this article will be an analysis of the criteria used by a surrogate in New York in determining whether the amount should be distributed or deposited, and whether in making such a decision the surrogate is invading or encroaching upon the foreign relations power of our federal government. Section 269-a(1) of the Surrogate's Court Act provides in part:

> Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld, the decree may direct that such money or other property be paid into the surrogate's court for the benefit of such legatee, distributee, beneficiary of a trust or such person or persons who may thereafter appear to be entitled thereto.

There are similar provisions in the New York Civil Practice Act.[3] Section 269-a

1. In the Matter of Tybus, 28 Misc. 2d 278, 279, 217 N.Y.S.2d 913, 915 (Surr. Ct. 1961), citing 9 Polish Law Reg. or Journal (Feb. 19, 1951) containing decree of Feb. 3, 1947 (translated in decree of Feb. 3, 1947, Title I, article 4 on file with U.S. Embassy in Warsaw).
2. N.Y. Surr. Ct. Act § 269-a(1) (1939), as amended L. 1960, ch. 975.
3. N.Y. Civ. Prac. Act §§ 474, 978 (1939).

(1), formerly section 269,[4] was proposed at the time Nazi Germany was beginning to extend its arm over Europe.[5] The avowed purpose of this statute was to "authorize the deposit of money or property by the Surrogate's Court in cases where the transmission or payment to a . . . resident in a foreign country might be circumvented by confiscation in whole or in part."[6]

There have been approximately fifty-one cases dealing with this area that have been reported since the enactment of this statute. The cases have involved only Nazi-dominated or Communist-controlled nations, although by its definition section 269-a(1) could be directed against countries with whom we are basically friendly. In these fifty-one cases, the surrogates generally have used two criteria to determine whether to distribute or deposit the funds. These criteria fall into the self-labeled categories of Treasury regulation and stare decisis. The first of these criteria is based on a *Treasury Department* regulation dealing with the matter of United States Government checks payable in Communist-controlled countries. It states:

> The Secretary of the Treasury hereby determines that postal, transportation, or banking facilities in general or local conditions in Albania, Bulgaria, Communist-controlled China, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, Rumania, The Union of Soviet Socialist Republics, the Russian zone of occupation of Germany, and the Russian sector of occupation of Berlin, Germany are such that there is not a reasonable assurance that a payee in those areas will actually receive checks or warrants drawn against funds of the United States, or agencies or instrumentalities thereof, and be able to negotiate the same for value.[7]

In *In the Matter of Braier*[8] the New York Court of Appeals expressed its approval of the surrogate's reliance upon this declaration and stated that despite such reliance the distribution of such estates was "beyond and outside the scope of the federal law."[9] The Court added that "the area covered by the New York provision (section 269) could not have been pre-empted by the national enactment."[10] Thus, a Treasury regulation applying to an area of negotiable instruments was interpreted to be official federal policy controlling distribution of estates under state law—although the United States State Department has never expressly endorsed such an application of the Treasury regulation. On the contrary, it has repeatedly stated that distribution of estates to heirs in Communist countries is not restricted by Federal law.[11] The use

4. N.Y. Surr. Ct. Act § 269-a(1) (1939), as amended L. 1960, ch. 975.

5. Chaitkin, *The Rights of Residents of Russia and Its Satellites to Share in Estates of American Decedents*, 25 So. Cal. L. Rev. 297, 298 (1952).

6. Comment, 14 Nichols-Cahill, N.Y. Ann. Civ. Prac. Acts, 398; see, to the same effect, Chaitkin, *supra* note 5 at 300.

7. 31 C.F.R. § 211.3 (1957). Poland had been listed, 16 Fed. Reg. 1818 (1949).

8. 305 N.Y. 148, 154, 11 N.E.2d 424, 426 (1953), *appeal dismissed sub. nom.* Kalmane v. Green, 346 U.S. 802 (1953).

9. *Ibid.*

10. *Supra* note 8.

11. Berman, *Soviet Heirs in American Courts*, 62 Colum. L. Rev. 257, 265 (1962).

Year	Country	Criteria stare decisis	Criteria Treas. Reg.	Criteria Other	Funds Distributed	Name of Case and Citation	Comment
1939	Italy	x			Yes	In the Matter of Blasi, 172 Misc. 587, 15 N.Y.S.2d 682 (Surr. Ct.)	Criteria of statute not met.
	Belgium Palestine Denmark			Presidential Executive Order	No	In the Matter of Weidberg, 172 Misc. 524, 15 N.Y.S.2d 252 (Surr. Ct.)	Beneficiaries all nationals of Germany, 1 Israeli beneficiary.
	Russia			x	No	In the Matter of Landau, 172 Misc. 651, 16 N.Y.S.2d 3 (Surr. Ct.)	
1940	Norway			Executive Order	No	In the Matter of Ramburg, 174 Misc. 306, 20 N.Y.S.2d 619 (Surr. Ct.)	Nazi occupied.
	Russia			x	No	In the Matter of Bold, 173 Misc. 545, 18 N.Y.S.2d 291 (Surr. Ct.)	Testimony of a Russian resident was used.
1941	Hungary			Executive Order	No	In the Matter of Plemich, 176 Misc. 560, 28 N.Y.S.2d 86 (Surr. Ct.)	Nazi occupied.
	Poland			Same	No	In the Matter of Zalewski, 177 Misc. 384, 30 N.Y.S.2d 658 (Surr. Ct.)	Wartime
1942					No	In re Loeb's Estate, 34 N.Y.S.2d 65 (Surr. Ct.)	No country named or criteria stated.
	Poland			x	No	In re Skewry's Will, 33 N.Y.S.2d 610 (Surr. Ct.)	
1943	Denmark			Executive Order	No	In the Matter of Miller, 181 Misc. 88, 45 N.Y.S.2d 485 (Surr. Ct.)	Nazi occupied.
	Netherlands			x	Yes	In re Van Dam's Estate, 43 N.Y.S.2d 184 (Surr. Ct.)	Will left instructions for distribution.
	Germany				No	In re Katz' Will, 45 N.Y.S. 2d 132 (Surr. Ct.)	No criteria stated.

Year	Country	Criteria: stare decisis	Criteria: Treas. Reg.	Criteria: Other	Funds Distributed	Name of Case and Citation	Comment
1945	Russia			x	Yes	In re Alexandroff's Estate, 61 N.Y.S.2d 866 (Surr. Ct.)	
1951	China	x	x		No	In the Matter of Wank, 199 Misc. 1119, 107 N.Y.S. 2d 407 (Surr. Ct.)	
			x	Judicial Notice	No	In the Matter of Mulligan, 200 Misc. 499, 107 N.Y.S.2d 221 (Surr. Ct.)	
	East Germany		x		No	In the Matter of Thomae, 199 Misc. 941, 107 N.Y.S.2d 844 (Surr. Ct.)	
	Lithuania		x		No	In the Matter of Geffan, 199 Misc. 756, 104 N.Y.S.2d 490 (Surr. Ct.)	
	Russia		x		No	In the Matter of Best, 200 Misc. 332, 107 N.Y.S.2d 244 (Surr. Ct.)	
	Hungary		x		No	In the Matter of Terry, 200 Misc. 543, 107 N.Y.S.2d 225 (Surr. Ct.)	
1952	Lithuania	x			No	In the Matter of Aronson, 202 Misc. 244, 114 N.Y.S. 2d 280 (Surr. Ct.)	
	Czechoslovakia		x	x	No	In the Matter of Klien, 203 Misc. 762, 123 N.Y.S.2d 866 (Surr. Ct.)	
	Czechoslovakia	x			No	In the Matter of Bondy, 203 Misc. 924, 118 N.Y.S. 2d 93 (Sur. Ct.)	
	Estonia			Judicial Notice	No	In the Matter of Niggol, 202 Misc. 290, 115 N.Y.S.2d 557 (Surr. Ct.)	

Year	Country	Criteria stare decisis	Criteria Treas. Reg.	Criteria Other	Funds Distributed	Name of Case and Citation	Comment
	Russian Sector of Berlin	x			No	In re Mark's Estate, 115 N.Y.S.2d 174 (Surr. Ct.) In re Miller's Will, 115 N.Y.S.2d 255 (Surr. Ct.)	
	Poland	x	x		No	In re Rysiakiewicz, 114 N.Y.S.2d 504 (Surr. Ct.)	
1953	Hungary	x	x		No	In the Matter of Braier, 305 N.Y. 148, 111 N.E.2d 424.	
		x	x	x	No	In the Matter of Wells, 204 Misc. 975, 126 N.Y.S. 2d 441 (Surr. Ct.)	Also a beneficiary of Czechoslovakia.
1954	Hungary	x	x	x	No	In the Matter of Pangman, 284 App. Div. 436, 132 N.Y.S.2d 392 (3d Dep't)	
	Lithuania			Judicial Notice	No	In re Lauraitis' Wills 134 N.Y.S.2d 907 (Surr. Ct.)	
1956	East Germany				No	In the Matter of Nezoid, 1 Misc.2d 611, 148 N.Y.S. 2d 197 (Surr. Ct.)	
1958	Poland				No	In the Matter of Baranski, 11 Misc.2d 1062, 171 N.Y. S.2d 980 (Surr. Ct.)	
	Czechoslovakia				No	In the Matter of Jedlicka, 12 Misc.2d 1069, 175 N.Y. S.2d 427 (Surr. Ct.)	
	Hungary	x		x	No	In the Matter of Herz, 7 Misc.2d 217, 163 N.Y.S.2d 349 (Surr. Ct.)	
	Russia			x	No	In the Matter of Von Der Heid, 33 Misc.2d 812, 227 N.Y.S.2d 807 (Surr. Ct.)	Lack of proof that beneficiary could have use, benefit or control was the criteria.

Year	Country	Criteria: stare decisis	Criteria: Treas. Reg.	Criteria: Other	Funds Distributed	Name of Case and Citation	Comment
1959	Hungary	x		x	No	In the Matter of Geiger, 7 N.Y.2d 109, 164 N.E.2d 99, 195 N.Y.S.2d 831.	Food packages were asked to be distributed.
	Poland		x	x	Yes	In the Matter of Doktor, 18 Misc.2d 223, 183 N.Y. S.2d 60 (Surr. Ct.)	
					No	In the Matter of Buzta, 18 Misc.2d 716, 186 N.Y.S.2d 192 (Surr. Ct.)	
1960	Hungary	x			No	In the Matter of Gargyan, 27 Misc.2d 137, 211 N.Y.S. 2d 232 (Surr. Ct.)	
	East Germany	x			No	In the Matter of Waessel, 27 Misc.2d 694, 210 N.Y.S. 2d 648 (Surr. Ct.)	
	Russia			x	No	In the Matter of Sorock, 25 Misc.2d 450, 207 N.Y.S. 2d 190 (Surr. Ct.)	Will gave executor discretion.
		x		x	No	In the Matter of Kuzmic, 23 Misc.2d 604, 206 N.Y. S.2d 297 (Surr. Ct.)	
1961	Poland				Yes	In the Matter of Wichlinski, 28 Misc.2d 253, 218 N.Y.S.2d 112 (Surr. Ct.)	The beneficiary came to New York.
				Visit to Poland	Yes	In the Matter of Tybus, 28 Misc.2d 278, 217 N.Y.S.2d 913 (Surr. Ct.)	
					No	In the Matter of Moroz (Surr. Ct.) (Massena, N.Y.)	Cited by Berman, Soviet Heirs in American Courts, 62 Colum. L. Rev. 257, 259. Both a Polish and a Russian beneficiary were involved in this unreported case.

Year	Country	Criteria: stare decisis	Criteria: Treas. Reg.	Criteria: Other	Funds Distributed	Name of Case and Citation	Comment
	Hungary	x			No	In the Matter of Bela Bartok, 28 Misc.2d 324, 215 N.Y.S.2d 818 (Surr. Ct.)	
	Yugoslavia		x	x	Yes	In the Matter of Offinger, 28 Misc.2d 633, 215 N.Y.S. 2d 642 (Surr. Ct.)	
1962	Czechoslovakia				No	In the Matter of Marek, 11 N.Y.2d 740, 181 N.E.2d 456, 226 N.Y.S.2d 444 app. dis'm. sub nom Ioannou v. New York, 371 U.S. 30.	
					No determination reported	In the Matter of Braun, 36 Misc.2d 692, 233 N.Y. S.2d 398 (Surr. Ct.)	Food packages were asked to be sent.
	Russia			x	No	In the Matter of Torsky, 36 Misc.2d 101, 232 N.Y. S.2d 183 (Surr. Ct.)	Food packages were asked to be sent.

of the regulation is questionable for if the purpose of section 269-a(1) was *only* to effectuate the intention of the testator, reliance on the regulation to determine whether the fund should be distributed presents a basis for arguing that the New York statute is *now* interpreted with the effect of regulating foreign policy.

Many post-1953 cases, by citing *In the Matter of Braier*[12] indirectly rely upon the Treasury regulation. Thus the principle of stare decisis is the second criterion used by the surrogates.

Additionally, and perhaps rather independently, some surrogates have used other criteria in rendering their decision. These include: judicial notice that the country of which the distributee is a resident is Communist-controlled,[13] lack of proof that the distributee will have the benefit, use or control of the fund,[14] letters received from the executive departments of the Federal government which state that distributees will not have the benefit, use or control of the fund,[15] and evidence that the exchange rate in existence will not allow the distributee to have benefit, use or control of the fund.[16] The most unusual criterion used to date was a visit to Poland by a surrogate to determine whether the distributee would have the benefit, use or control of the fund.[17]

Of the fifty-one cases examined, four used the Treasury regulation exclusively. Three relied on judicial precedent in conjunction with the Treasury regulation. Others cited the Treasury regulation in conjunction with some of the miscellaneous factors.

Two recent decisions in this area are of special interest. In *Ioannou v. New York*[18] a resident of England, the niece and assignee of the beneficiary residing in Czechoslovakia, was refused permission to withdraw the funds deposited for her aunt under the New York statute. On appeal, petitioner argued that section 269 (now 269-a(1)) did not prohibit this gift nor the release of the funds to a resident of England. However, the New York Court decided that the assignee, resident of England, could not be placed in a more preferred position than the assignor, resident of Czechoslovakia (a member of the Soviet Bloc).

In the second case, *In the Matter of Tybus*,[19] the surrogate decided, after traveling to Poland, that the fund should be distributed. During his visit he conferred with the United States Ambassador to Poland, the Secretary to the Embassy, the American Consul, members of the Association des Juristes Polonais, members of the Bar Association of Warsaw, the Director-General of

12. 305 N.Y. 148, 11 N.E.2d 424.
13. See attached chart for year 1952.
14. See attached chart for year 1962.
15. See attached chart for years 1957 and 1959.
16. See attached chart for year 1959.
17. In the Matter of Tybus, 28 Misc.2d 278, 217 N.Y.S.2d 913 (Surr. Ct. 1961) (Poland).
18. 371 U.S. 30 (1962). See attached chart.
19. 28 Misc.2d 278, 217 N.Y.S.2d 913 (Surr. Ct. 1961).

the Ministry of Finance and many other people both of official and unofficial capacity. From these consultations, he concluded that the Polish beneficiaries would receive use and control of the fund.

In order to determine whether the action by New York surrogates in this group of cases interferes with the federal foreign relations power, it is necessary to delve into analogous constitutional law problems. These collateral problems were discussed by Justice Douglas in *Ioannou v. New York*.[20]

When a state law conflicts with a treaty the state law will be superceded.[21] The question arises—is it necessary to await treaty action in this area? "Yet even in absence of a treaty a state's policy may disturb foreign relations."[22] If a state statute were to bar admission of a Czechoslovakian visitor or if the state were to prohibit travel of its citizens to foreign countries, it would be struck down.[23] The administration of our foreign relations is committed to the Executive and Legislative branches of our government. These are the political departments of the Federal Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry.[24]

In the field of commerce a state is prevented from regulating even its local affairs if their regulation imposes a direct undue burden upon interstate commerce.[25] A slight burden may come within this definition of direct burden if "the purpose for imposing it does not justify a regulation that in fact interferes with interstate commerce."[26] Section 269-a(1) may only be a slight regulation of the federal foreign power. Even this slight regulation should not have to await an "overriding federal policy,"[27] to be superceded as an interference with powers vested solely in our national government.

Each state may, of course, establish procedures for probating wills and administering them,[28] and if there is no overiding federal policy, the state procedure should be honored.[29] Descent and distribution of property in one state to the citizens of another state is clearly a proper subject of international relations.[30] However, "complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference of the part of the several states."[31] Despite the holding in *In the Matter of Braier*,[32] have the New York courts regulated an area of our international relations? Certainly the use of Treasury regulations as an aid to determin-

20. *Supra* note 18.
21. Kolovrat v. Oregon, 366 U.S. 187 (1961).
22. Ioannou v. New York, *supra* note 18, at 31.
23. *Ibid.*
24. Oetjen v. Central Leather Company, 246 U.S. 297 (1918).
25. Rottschaffer, Handbook of American Constitutional Law 277 (1939).
26. *Id.* at 284, citing Real Silk Hosiery Mills, Inc. v. Portland, 286 U.S. 325 (1925).
27. Clark v. Allen, 331 U.S. 503 (1947).
28. Lyeth v. Hoey, 305 U.S. 188, 193 (1938).
29. Ioannou v. New York, *supra* note 18, at 31.
30. Asakura v. Seattle, 256 U.S. 332 (1942); Geofroy v. Riggs, 133 U.S. 258 (1890); Haunstein v. Lynham, 100 U.S. 483 (1879).
31. United States v. Belmont, 301 U.S. 324, 331 (1937).
32. *Supra* note 12.

ing whether to distribute the funds indicates that the surrogates are effectuating foreign policy. Furthermore, the fact that money was distributed to Yugoslavia[33] and Poland,[34] countries which though behind the Iron Curtain are on friendlier terms with the United States than the other Communist-controlled nations, indicates that the New York surrogates are actually deciding these cases on the basis of foreign policy rather than on the intention of the testator. Of course, this conclusion can only be tested by a case involving a country that is basically unfriendly with the United States but that has a favorable currency system. The surrogate's visit to Poland in the *Tybus*[35] case is a prime example of the problems that can arise in this area if the federal government does not assert control. The surrogate in that case acted in the capacity of an unofficial ambassador. The Supreme Court of the United States had an opportunity in the *Ioannou*[36] case to clarify this muddied area. However, the majority believed that the case did not raise any substantial federal question.

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33. In the Matter of Offinger, 28 Misc.2d 633, 215 N.Y.S.2d 642 (Surr. Ct. 1961).
34. In the Matter of Tybus, *supra* note 17.
35. *Ibid.*
36. Ioannou v. New York, *supra* note 18.