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Decedent Estates—Estate Tax

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THE COURT OF APPEALS, 1953 TERM

effect, i. e., not only is he restricted to matters which a layman could observe but in addition he may not give any testimony which would tend to disgrace the memory of the patient.¹⁴

Estate Tax

a. *Effect of taxes on elective share:* A widow electing to take against the will of her deceased husband is granted her share of the estate as in intestacy, "but shall in no event be entitled to take more than one half of the net estate of the decedent after the deduction of . . . any estate tax."¹⁵ [Emphasis added.]

If the testator makes no provision for the payment of estate taxes, the burden of the tax is apportioned among the beneficiaries and "any exemption or deduction allowed under the law imposing the tax by reason of the relation of any person to the decedent . . . shall inure to the benefit of the person bearing such relationship."¹⁶ Thus, to the extent of the state and federal marital deductions,¹⁷ a widow is to be unaffected by taxes on the estate.

The conflict with the election statute which, literally read, imposes a tax burden on an electing widow by requiring deduction of taxes on the estate as a whole before calculating the maximum elective share, was recently resolved by allowing the apportionment statute to control.¹⁸ As the widow's share added nothing to the total tax burden, the maximum limitation was calculated before deducting any estate taxes.¹⁹

The court held that the statutes must be read together, and since the purpose of each is to increase the share of a surviving spouse,²⁰ they must be so interpreted. Therefore "any estate tax" refers to the tax allocable to the widow's share.²¹

The dissent insists that only the Legislature can make "before taxes" mean "after taxes."

14. See dissent of Judge Van Voorhis in instant case.

15. DECEDENT ESTATE LAW § 18(1) (a).

16. DECEDENT ESTATE LAW § 124(3).

17. TAX LAW § 249-s (4) (a); INT. REV. CODE § 812(e).

18. In re *Wolf's Estate*, 307 N. Y. 280, 121 N. E. 2d 224 (1954); noted in Appellate Division stage, 3 BFLD. L. REV. 328 (1954).

19. This also has the effect of reducing the total tax burden on the estate.

20. See *Matter of Byrne's Will*, 260 N. Y. 465, 472, 184 N. E. 56, 58 (1933) (relative to section 18); COMBINED REPORTS OF COMMISSION TO INVESTIGATE DEFECTS IN THE LAW OF ESTATES, 1928-1933, 338 (Reprint ed.) (relative to section 124).

21. Where the apportionment statute is not applicable, (as where the testator provides that taxes be paid from the residuary estate), the maximum limitation is calculated after the deduction of taxes. In re *Ryan's Will*, 280 App. Div. 410, 114 N. Y. S. 2d 1 (1st Dep't 1952). (Cited with approval in the instant case.)

BUFFALO LAW REVIEW

b. *Apportionment statute*: Prior to the enactment of Section 124 of the Decedent Estate Law, estate taxes were generally payable out of the residuary estate.²² This resulted in hardship and injustice in many cases since the residuary legatees are usually the ones most favored by the testator. As a consequence the Legislature enacted Section 124, which provides that in the absence of a contrary direction in a will, the estate taxes are to be prorated by the surrogate among the persons interested in the estate in proportion to the value of their gifts.

In the case of *In re Pepper's Estate*,²³ the testator, in one clause, directed that three trusts be created out of his residuary estate and be set up tax free. In the same clause he directed that the estate tax be paid out of the residuary. By a subsequent clause he apportioned the entire residuary to the three trusts according to percentages, i. e., one trust was composed of 50% of the residuary and the other two of 25% each.

The Court of Appeals in holding against the avoidance of Section 124, said that in order to avoid the apportionment statute a direction to pay the estate tax in some other manner must be clear and unambiguous.²⁴ Here the will is ambiguous and contradictory. If the trusts be set up freed from all deductions for inheritance tax and then the direction that the taxes be paid out of the residuary is meaningless since the property going into the trusts comprises the entire residuary, hence there is no residuary to pay the tax. On the other hand if the direction that the taxes be paid out of the residuary estate is followed the result is that the trusts created are not set up freed of taxes as the testator directed, but are set up each having borne its share of the tax since the residuary is scheduled by the payment of the tax.

Judge Froessel dissented purely on the matter of construction. He interpreted the will as meaning that the estate tax first be paid out of the residuary and then the trusts be set up according to the disposition clause. By such a construction, he concluded, the intent of the testator is clear and unambiguous.

c. *Transfer to take effect at death*: The New York Estate Tax is applicable to a transfer by a decedent which is "intended to take effect in possession or enjoyment at or after his death."²⁵

22. 5 JESSUP, REDFIELD ON SURROGATES, LAW AND PRACTICE 398 (Bohm ed. 1950).

23. 307 N. Y. 242, 120 N. E. 2d 807 (1945).

24. See *Matter of Mills' Estate*, 189 Misc. 136, 141, 64 N. Y. S. 2d 105, 109 (Surr. Ct. 1946), aff'd, 272 App. Div. 229, 70 N. Y. S. 2d 746, (1st Dep't 1947) aff'd, 297 N. Y. 1012, 80 N. E. 2d 535 (1948); *Matter of Walbridge's Estate*, 170 Misc. 127, 9 N. Y. S. 2d 907 (Surr. Ct. 1939); *In re Durkce's Estate*, 183 Misc. 382, 47 N. Y. S. 2d 721 (Surr. Ct. 1944).

25. TAX LAW § 249-r(3).

THE COURT OF APPEALS, 1953 TERM

If a transfer has been made which will benefit others upon the death of the transferor, it is taxable.²⁶ This principle has been applied in cases involving commercial and private pension plan annuities.²⁷

In a recent case, decedent, a member of the New York City employee's retirement system, made an irrevocable election of an "option" which reduced his retirement benefits and gave his wife an annuity for life in the event that she survived him. A unanimous court held the value of the annuity to be taxable to decedent's estate.²⁸

The instant situation was analogized to commercial annuities, the court finding that in effect decedent had purchased a joint and survivorship annuity *i. e.* a transfer to take effect in possession or enjoyment on his death.

It was held that the value of the gift to the widow is to be determined by formulae pursuant to Tax Law § 249-v.²⁹

A claim, upheld by the Surrogate,³⁰ that Article XVI, Section 5 of the New York Constitution³¹ forbids estate taxation of "pensions" was rejected on the ground that the Constitution refers to income taxes only.

Wrongful Death Actions

a. *Distribution:* Section 29 of the Workmen's Compensation Law provides that if an employee be injured under circumstances entitling him to compensation through the wrongful act of another, not in the same employ, he or in the case of death, his dependents, may accept workmen's compensation and commence an action against the third party wrongdoer. If the judgment recovered is greater than the compensation payable, the compensation carrier is entitled to reimbursement therefrom. If the recovery is less than the compensation payable the claimant is entitled to deficiency payments from the employer or the insurance carrier.

26. *Spiegel's Estate v. Commissioner*, 335 U.S. 701 (1949); *Commissioner v. Church's Estate*, 335 U.S. 632 (1949); *Helvering v. Hallock*, 309 U.S. 106 (1939).

27. *Mearkle's Estate v. Commissioner*, 129 F. 2d 386 (3d Cir. 1942); *Commissioner v. Clise*, 122 F. 2d 998 (9th Cir.), *cert. denied*, 315 U.S. 821 (1941); *Commissioner v. Wilder's Estate*, 118 F. 2d 281 (5th Cir.), *cert. denied*, 314 U.S. 634 (1941).

28. *In re Endemann's Estate*, 307 N.Y. 100, 120 N.E. 2d 514 (1954).

29. The Appellate Division had made an independent computation based on the "actual value" of the gift. This was determined by the decrease in the "initial reserve" fund in the pension records for decedent's own benefits, due to his electing the annuity option. 282 App. Div. 768, 122 N.Y.S. 2d 682 (2d Dep't 1953).

30. 201 Misc. 1077, 106 N.Y.S. 2d 849 (Surr. Ct. 1951).

31. § 5 "All salaries, wages and other compensation, *except pensions*, paid to officers and employees of the state and its subdivisions and agencies shall be subject to taxation". [Emphasis added].