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Wills—Effect of Taxes on Elective Share

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effect as in *Garner,* for purposes of § 8(b)(1) and (2)) though its rationale is not (once it is determined that the activity is neither prohibited nor protected by the federal act, it may be dealt with by the states).

The case illustrates the continuing trend of removing labor controversies from the sphere of state action. To the argument that it is desirable that labor relations be governed by a uniform law, it may be answered that in many cases involving small, predominantly local businesses, conduct such as that in the principal case is likely to cause irreparable harm within too short a space of time for federal procedures to be effective. It is suggested that state action rather than federal is more appropriate where such is the case. Congressional action in the direction of clarifying legislative intent as to these jurisdictional problems seems warranted.

John J. Cooney

WILLS — EFFECT OF TAXES ON ELECTIVE SHARE

A widow elected to take against the will of her deceased husband. *Held* (4-1): The maximum limitation on her elective share is calculated before deducting estate taxes, and not after as contended by the principal legatee. In re *Wolf's Will* 282 App. Div. 1018, 126 N. Y. S. 2d 302 (1st. Dep't 1953), *affirming per curiam,* 204 Misc. 356, 121 N. Y. S. 2d 412 (Surr. Ct. 1953).

N. Y. Decedent Estate Law § 18(1)(a) grants the widow her share of the estate as in intestacy, but "in no event . . . [is she] entitled to take more than one half of the net estate of the decedent, after the deduction of . . . any estate tax."

If the testator makes no provision for the payment of estate taxes, as in the instant case, 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." N. Y. DECEDENT ESTATE LAW § 124(3). Thus to the extent that a marital deduction results in a tax saving to the estate, the widow is to receive its full benefit.

The conflict with § 18(1)(a), which literally read imposes a tax burden on the widow by requiring deduction of taxes on the estate as a whole before calculating the maximum limitation on the elective share, was resolved by allowing the apportionment statute to control.

The surrogate reached his decision primarily on authority of an Appellate Division case, not directly in point as the maximum limitation was not litigated, which stated that "the term 'any estate tax' used in section 18 subdivision 1(a), Decedent Estate

Law, relates to a tax allocable to the share of the surviving spouse theretofore determined." In re *Peters' Will* 275 App. Div. 950, 89 N. Y. S. 2d 651, 652 (2d Dep't 1949), *affirming,* 88 N. Y. S. 2d 142 (Surr. Ct. 1949). Apparently the First Department has, in the instant case, adopted that statement as a logical resolution of the two statutes.

However, if a testator directs that taxes be paid from the residuary estate, the apportionment statute by its own terms does not apply and the limitation on the widow's maximum share is calculated after deducting taxes on the estate as a whole. In re *Ryan's Will* 280 App. Div. 410, 114 N. Y. S. 2d 1 (1st Dep't 1952).

As the right of election is by definition intended to guarantee the widow a minimum amount regardless of her husband's wishes, it seems anomolous that the testator be allowed to reduce the statutory grant by providing for payment of taxes.

Though the court in the instant case has reached a just result by interpreting "any estate tax" to mean the tax allocable to the widow's share of the estate, it is submitted that the legislature should resolve the conflict with the definition of the *Ryan* case that the same words mean all estate taxes.

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WILLS — RIGHT OF ILLEGITIMATE CHILD UNDER ANTI LAPSE STATUTE

Testator named his sister residuary legatee of his will. She predeceased him leaving as her only survivor a child allegedly born out of wedlock. Testator's two brothers, who are his sole heirs, contend the bequest lapsed and they take by intestacy. *Held:* assuming illegitimacy, such a child is a child within the meaning of the "anti lapse" statute. *In re Anonymous' Estate,* 204 Misc. 1045, 126 N. Y. S. 2d 749 (Surr. Ct. 1953).

Under the laws of intestacy, an illegitimate child may take from his mother providing there are no other lawful issue. N. Y. Decedent Estate Law § 83 (13); *In re Anonymous,* 165 Misc. 62, 300 N. Y. Supp. 292 (Surr. Ct. 1937). However he may not take from his father, *In re Vincent's Estate,* 189 Misc. 489, 71 N. Y. S. 2d 165 (Surr. Ct. 1947); nor his mother's collateral relatives either as a direct heir or as a representative. *Matter of Cady,* 257 App. Div. 129, 12 N. Y. S. 2d 750 (3d Dep't 1939), *aff'd,* 281 N. Y. 688, 23 N. E. 2d 18 (1939). On the other hand, an adopted child may take from his foster mother or father even though there are natural children. N. Y. Domestic Relations Law § 115; but he may not take from the collaterals of his foster parents. *Hopkins v. Hopkins,* 202 App. Div. 606, 195 N. Y. Supp. 605 (4th Dep't 1922), *aff'd,* 236 N. Y. 545; 142 N. E. 277 (1923).