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Decedent Estates—Surrogate Court Act § 269

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position of the Surrogate's Court, New York County[9] was to deny probate for the instrument; the Appellate Division reversed[10] and the Court of the Appeals reinstated the judgment of the surrogate stating that there had been no publication.

The Court of Appeals in denying the probate bases its finding upon the fact that the testator had not shown unequivocably to the witnesses that this instrument was testamentary in character. The court held that the witnesses had not been told in absolute terms that the instrument was testamentary and that the acts were not sufficient to convey the same idea. Acts in themselves may constitute publication.[11] The words and acts used by the testator ("something taken care of in case anything happened to him") could be taken to mean that he was making an inter vivos gift or even that he was granting of a power of attorney. This contention was outweighed by the Appellate Division in its opinion[12] which cited a case where practically the same words were used by the testator.[13]

It is the opinion of the writer that the decision of the Appellate Division was more sound in its interpretation of the testimony of the witnesses than that of the Court of Appeals. The fact that the instrument is holographic and that the two witnesses must have understood that they were witnessing a paper of some importance, in that it did require witnesses, would seem to satisfy the requirement of publication.

Surrogate Court Act § 269

In time of national emergency, the Federal Government is empowered to enacted legislation under its war power which in time of peace would be unconstitutional. Such is the Trading with the Enemy Act.[14] Under this act the President of the United States is authorized to "regulate . . . or prohibit, any acquisition, holding, withholding, use, transfer . . . importation or exportation of . . . any property in which any foreign country or national thereof has any interest," except. "upon such terms and conditions as (he) may prescribe."[15] The President so ordered, in respect to Hungary, in April of 1940, and he issued Executive Order No. 8389, and by § 3 of this order the effective date as respect to

9. In re *Pulvermacher's Will*, 111 N. Y. S. 2d 474 (Surr. Ct. 1952).
10. In re *Pulvermacher's Will*, 280 App. Div. 575, 116 N. Y. S. 2d 110 (1st Dep't 1952).
11. See note 7 *supra*.
12. See note 10 *supra*.
13. *In Matter of Palmer's Will*, 42 Misc. 469, 87 N. Y. Supp. 249 (Surr. Ct. 1904).
14. 50 U. S. C. A. Appendix.
15. *Ibid.* § 5 (b).

Hungarian nationals was March 13, 1941.[16] Its prime purpose was to stop uses of foreign property rights that might imperil national defense.[17] Under its provisions, any bequest to a Hungarian national must be deposited in a "blocked account" at a domestic bank, or with a public officer, agency, or instrumentality designated by a court having jurisdiction of the estate.[18]

In In re *Braier's Estate*[19] the testatrix bequeathed all her property to her sister, a resident and national of Hungary, as sole legatee. The surrogate ordered that the money be deposited by the executor with the Treasurer of the City of New York for the account of the legatee and prohibited withdrawals except upon court order. This action was pursuant to § 269 of the Surrogate's Court Act which provides that, "Where it shall appear that a legatee . . . 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 paid into the Surrogate's Court for the benefit of such legatee." The Hungarian Consular Section of the Hungarian Legation, appearing as attorney for the legatee, contested such deposit and desired to have the money placed in a "blocked account" maintained by the Hungarian Consular General in a domestic bank.

Their first objection was that the deposit ordered by the surrogate was in contravention of a treaty provision between Hungary and the United States.[20] This provision provided that the consular officer of either country could receive, for their own nationals, distributive shares derived from estates in the process of probate, "*provided he remit any funds so received through the appropriate agencies of his government to the proper distributees.*"[21] The court reasoned that by the freezing order of the President there was an inference that such shares would not reach the distributee if paid over to the agent of the Hungarian government, and consequently the refusal to pay the money would not be in violation of the treaty since there was no assurance that the Hungarian government could carry out its part of the treaty.

The next contention of the Hungarian Consul was that § 269 was incontravention of the federal power to control commerce

16. 12 U. S. C. A. § 95(a).

17. *Commission for Polish Relief v. Banca Nationala a Rumaniei*, 288 N. Y. 332. 43 N. E. 2d 345 (1942); see also *Alexewicz v. General Aniline & Film Corp.*, 181 Misc. 181, 43 N. Y. S. 2d 713 (Sup. Ct. 1943).

18. Public Circular No. 20, 31 CODE FED. REGS. 8926 (Cum. Supp. 1942), explaining General License 30A, 31 CODE FED. REGS. § 131.30a (Cum. Supp. 1942), issued under Executive Order No. 8389.

19. 305 N. Y. 148, 111 N. E. 2d 424 (1953).

20. 44 STAT. 2459, Art. XXI.

21. *Ibid.* [italics added].

with foreign countries, and as such it must fall as unconstitutional.[22] But it has been held that each state possesses the power to control the manner in which property within its own jurisdiction passes by last will and testament.[23] Along with this power the state may direct how both the procedure for the probate of the will and the process of administration is effectuated.[24] Actually the executive freezing order could be terminated without altering the conditions for which § 269 was enacted; for there would still be no guarantee that the distributee would receive the bequest and this uncertainty would frustrate New York's attempt to safe guard the testatrix's desires to protect the legatee's property.[25] Furthermore, the court overlooked the possibility of Executive Order No. 8389 which provides that such funds may be in the alternative deposited "in a blocked account or *with a public officer, agency, or instrumentality designated by a court having jurisdiction of the estate.*"[26] This could have well been interpreted as giving the state courts the express power to direct where the money should be deposited. Thus the question of constitutionality might have been avoided.

Settlement For After-born Children

The Court of Appeals has finally in a 5 to 2 opinion settled the question of what constitutes a settlement for an after-born child not provided for in the last will and testament of his parent. The holding of In re *Faber's Estate*[27] was that a settlement is dependent upon the intent of the testator and the facts of the individual case. In the instant case the testator left a net estate of $54,000 in trust for his wife and father with a weekly amount to be paid to both of them, and in the case that the wife's weekly amount was not sufficient, then additional amounts of any size were to be made from the principal. The principal was to go to the older child upon the death of the testator's father's and wife's deaths. The only other child, after-born, was the co-beneficiary, with her sister, of insurance policies which amounted to $14,500 for each child. The executors brought an action to determine if the amount of insurance policies constituted a settlement for the after-born child. The court found that they did constitute a settlement.

22. U. S. Const. Art. I, § 8.
23. *Mager v. Grima*, 8 How. 490 (U. S. 1850); see also *Rocca v. Thompson*, 223 U. S. 317 (1912).
24. *Lyeth v. Hoey*, 305 U. S. 188 (1938).
25. *Matter of Weidberg*, 172 Misc. 524, 15 N. Y. S. 2d 252 (Surr. Ct. 1939).
26. See note 18 *supra* [italics added].
27. 305 N. Y. 200, 111 N. E. 2d 883 (1953).