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R. Michael Mullikin

TAXATION — Federal Estate Tax and State Inheritance Tax — Sufficiency of a Testamentary Tax Directive to Defeat the Operation of the Uniform Estate Tax Apportionment Act — In re Ogburn's Estate, 406 P.2d 655 (Wyo. 1965).

The decedent's estate consisted of joint property and insurance proceeds in addition to property which passed under her will.[1] In the first provision of her will, testatrix directed the payment of "*all my* just debts, *taxes,* funeral expenses and expense of administration *of my estate.*"[2] The remaining provisions in the will consisted of two specific bequests and a residuary bequest. The Uniform Estate Tax Apportionment Act, adopted by the Wyoming Legislature in 1959,[3] provides for apportionment of the federal estate tax among all the beneficiaries to the estate according to the value of their respective interests unless a contrary intention is manifested in the will. In administering the Ogburn Estate, the executor charged all of the federal estate and state inheritance taxes to the residue of the probate estate. The District Court approved the executor's accounting procedure and held the tax directive indicated an intention that the residue should bear all federal estate and state inheritance taxes. On appeal the Supreme Court of Wyoming *held* that a testamentary provision directing payment of "all my taxes of my estate" is sufficient to direct non-apportionment of federal estate taxes due on account of property included in decedent's *probate* estate but does not extend to non-testamentary property.

There are two types of taxes connected with the transfer of property at death, estate taxes and inheritance taxes. Estate taxes are taxes on the privilege of transmitting property at death[4] and hence fall on the estate as such. The federal estate tax[5] is the primary example of this type of tax although some states have also adopted this manner of taxation exclusively[6] while others have an estate tax to supplement the state inheritance tax.[7] Inheritance taxes are taxes

1. All of this property was includible in decedent's gross estate for federal estate tax purposes. INT. REV. CODE OF 1954, §§ 2031, 2033, 2040, 2042.
2. *In re.* Ogburn's Estate, 406 P.2d 655, 657 (Wyo. 1965) (Emphasis added.).
3. WYO. STAT. §§ 2-336 to -346 (Supp. 1965). (Hereinafter referred to as the Uniform Act.).
4. New York Trust Co. v. Eisner, 256 U.S. 345 (1921).
5. INT. REV. CODE OF 1954, §§ 2001-2209.
6. *E.g.,* FLA. STAT. § 198.02 -.03 (1963).
7. *E.g.,* MINN. STAT. § 291.34 (1961).

on the right of one to succeed to property passing at death. This is the type of tax usually levied at the state level.[8] Estate taxes, which are levied on the right to transmit property at death, present an apportionment problem because they are levied on the estate as a whole. The inheritance taxes, unlike estate taxes, are self-apportioning because they are levied on the interest of the person succeeding to the property rather than on the estate. However, a testator always has the right to direct in his will what fund will be used to pay either estate taxes or inheritance taxes.[9]

Absent a tax directive, there are two rules concerning how the estate taxes should be apportioned, the residue rule and the apportionment rule. The residue rule, the majority rule at common law,[10] provides that the residue of the probate estate should bear the estate tax on the assumption that the testator intended the specific devises and legacies be given undiminished by taxes. The apportionment rule, which developed as a minority view at common law,[11] has also been established by statute in many states.[12] Essentially, the apportionment rule provides that each beneficiary shall be taxed that part of the total estate tax which bears the same ratio as the beneficiary's interest bears to the total estate. The principle of apportionment of estate taxes according to the value of each beneficiary's interest finally culminated in the Uniform Act.[13]

The problem in the principal case is whether the tax directive was sufficient to defeat, in whole or in part, the operation of the Uniform Act concerning the apportionment

8. The state inheritance tax statutes in Wyoming are: WYO. STAT. §§ 39-336, -337 (1957).

9. *In re* Gallagher's Will, 57 N.M. 112, 255 P.2d 317 (1953); *In re* Bourquin's Estate, 87 Colo. 144, 286 Pac. 114 (1930).

10. Sutter, *Apportionment of the Federal Estate Tax in the Absence of Statute or an Expression of Intention*, 51 MICH. L. REV. 53 (1952); Fleming, *Apportionment of Federal Estate Taxes*, 43 ILL. L. REV. 153, 159 (1948).

11. *In re* Gallagher's Will, *supra* note 9.

12. *E.g.*, CAL. PROB. CODE § 971. State apportionment statutes were upheld as constitutional in Riggs v. Del Drago, 317 U.S. 95 (1942).

13. The crux of the act is found in WYO. STAT. § 2-338 (Supp. 1965) wherein it is provided: "Tax to be apportioned among all persons interested.—Unless the will otherwise provides, the tax shall be apportioned among all persons interested in the estate. The apportionment shall be made in proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax shall be used for that purpose."

of *estate* taxes.[14] The appellee in this case contended that the tax directive was sufficient to defeat the operation of the Uniform Act with respect to the whole estate.[15] Appellants contended that the directive was so ambiguous as to be of no effect and therefore the Uniform Act should have applied to the whole estate.[16] The Wyoming Supreme Court rejected both arguments and based its decision on the accepted rules of construction as applied to the words used in the tax directive. The court reasoned the tax directive manifested an intention that at least part of the taxes were to be paid out of the residuary estate.[17] However, the court indicated that because the words "all my taxes" were qualified by the words "of my estate," the testatrix meant only her probate estate and not her estate for federal estate tax purposes.[18] The question of whether the state inheritance tax[19] came within the testatrix's tax directive presented no problem to the court. As the words directing payment of "all my taxes" were qualified by the words "of my estate," the court found her intention was that only *estate* taxes were to be included in the directive and not the Wyoming state inheritance tax.[20] Thus, the court arrived at the conclusion the tax directive indicated only that *estate taxes* on the *probate estate* should be borne by the residuary devisees and legatees while the burden of paying the balance of the taxes should have been left to the operation of law.

The compromise reached by the court in the principal case appears to be the product of a struggle between two opposing rules of construction. The court acknowledges the

14. See WYO. STAT. § 2-337 (a) (Supp. 1965) for the scope of the Uniform Act. Therein "estate" is defined as "the gross estate of a decedent as determined for the purpose of federal estate tax."
15. *In re* Ogburn's Estate, *supra* note 2, at 656.
16. *Id.* at 658-59.
17. *Id.* at 659; Annot. 37 A.L.R.2d 7, 124 (1954). It is not entirely clear to the author that this annotation supports the conclusion the court reached here.
18. *Id.* at 659-61. The proposition that the words "my estate" when contained in a will provision mean only the testator's probate estate is supported by reason and clearly established by prior case law. Norton v. Jones, 210 S.W.2d 820, 821-2 (Tex. Civ. App. 1948); Union Trust v. Watson, 76 R.I. 223, 68 A.2d 916, 919 (1949).
19. *Supra* note 8.
20. *In re* Ogburn's Estate, *supra* note 2, at 661, citing *In re* Young's Estate, 33 Wyo. 317, 321-23, 239 Pac. 286, 287 (1925). Therein the Wyoming Supreme Court distinguished the state inheritance tax for which the interests of the individual beneficiaries are liable from an estate tax for which the whole estate is liable.

view that in order to defeat the Uniform Act, there must have been a clear and unambiguous manifestation of intention against statutory apportionment or "the burden of the taxes must be left where the law places it."[21] That the lack of clarity in the tax directive was self-evident was admitted by the court.[22] However, the court also recognized the well established rule concerning will construction, that there is a presumption all parts of a will have meaning or will be given meaning in so far as consistent with the will when read as a whole.[23] In this way the court reached the conclusion that notwithstanding the fact that the tax directive was ambiguous, the tax directive meant something and would not be treated as mere surplusage.[24]

At this point the court commenced to ascertain the meaning of the will directive. Two questions were dealt with: (1) whether the tax burden was shifted by the clause, and (2) to what extent the death taxes were affected by the directive. The Court's conclusion that the tax directive applied only to the estate tax on probate assets is well established by the authorities and is not questioned here; however, it is not entirely clear that the tax directive was sufficient to shift the estate tax burden solely to the residuary estate.

An introductory clause directing the payment of all just debts and expenses without designation of a fund from which to pay them, is commonly used in drafting a will[25] but is generally regarded as ritualistic and meaningless.[26] The clause in the *Ogburn* case was a clause of this type except that it also provided for the payment of taxes. In reaching the conclusion that the tax directive was effective to shift the tax burden to the residuary estate, the court relied on an anno-

21. *Id.* at 658.
22. *Id.* at 658-59.
23. *Id.* at 658; Succession of Jones, 172 So. 2d 312, 316 (La. Ct. App. 1965).
24. *Id.* at 659.
25. 13 AM. JUR. LEGAL FORMS ANN. Form 13:1771 to :1779 (1955); MODERN LEGAL FORMS § 9656 (1965).
26. *In re* Porter's Estate, 138 Cal. 618, 72 Pac. 173, 174 (1903); Annot. 37 A.L.R.2d 7, 136 (1954).

tation[27] stating the rule that "where . . . there is a general direction . . . to pay all debts, expenses . . . and taxes, there is an implied direction that the taxes are to be paid *from the fund which also bears the burden of debts and expenses of administration.*" The rationale for the rule stated above is that a specification for the payment of taxes ordinarily has no place in such an introductory clause and must have been deliberately inserted there for a special purpose.[28] In Wyoming, according to statute, the burden of payment of debts and expenses is apportioned among all the beneficiaries of the probate estate "but specific devises or legacies are exempt from such liability, *if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate.*"[29] It is notable with regard to the debt and expense liability statute that, in order to exempt the specific bequests from liability, it is not required that the testator manifest an intention contrary to apportionment but only that the bequests will be exempted if the *court* feels it is necessary to effectuate the testator's intention.[30] The court relied wholly on the rule cited above from the annotation to support its findings that the residuary estate should pay the tax on probate assets. It is important to note that there was *no discussion* of the *statute* just cited concerning liability for debts and expenses in the principal case. This is surprising in view of the relevance of the statute to the rule relied on by the court. In the event the statute was considered, it is not clear from a reading of the principal case what the determining factor was which made the court feel that the testatrix's intention would have been frustrated by apportionment of the debts and expenses among all beneficiaries.

An indication that the court is not disposed to interfere with specific legacies or devises is found in the case of *Dixon*

27. Annot. 37 A.L.R.2d 7, 124 (1954) (Emphasis added.). Therein § 35 is entitled: "Effect of single direction to pay debts, expenses of administration, and taxes without designating fund which is liable." Starr v. Watrous, 116 Conn. 448, 165 Atl. 459 (1933), the first illustrative case in § 35 of the annotation, placed the tax burden on the residuary estate, but in that jurisdiction, the rule was that debts and expenses should be paid out of the residuary estate.
28. Starr v. Watrous, *supra* note 27.
29. WYO. STAT. § 2-297 (1957) (Emphasis added.).
30. It would appear that, in view of the way in which the debt liability statute is worded, the court rather than being restricted to the construction of the will, is allowed to second-guess the testator.

v. Dixon.[31] Therein the court approved the policy that the provisions in the will should be disturbed as little as possible when a spouse elects to take the forced share. The rationale appears to be that to take property from a specific bequest to satisfy a statutory forced share would be to do harm to the testator's intent. Reasoning in this way, the result reached in the principal case may be justified. That is, on the basis of the *Dixon* case, the court could have found it necessary to exempt the specific bequests in order to effectuate the testatrix's intention. This rational works very well when applied to an estate such as the one in the principal case, which contained only specific bequests and a residuary bequest; however, it breaks down in a case where a general bequest is added. A literal reading of the debt and expense liability statute would seem to indicate that in Wyoming general and residuary bequests abate together. The debt liability statute clearly makes the court the guardian of the testator's intent; but even in view of the *Dixon* case, the statute only allows specific bequests to be exempted.

It would appear that the rule of the *Dixon* case must be limited by the statute. To say that general bequests should be preferred over residuary bequests in order to effectuate the testator's intention even on the authority of the *Dixon* case would be to contradict the positive mandate of the statute. At any rate, in view of the court's apparent disregard for the debt and expense liability statute, there is clearly a need for further clarification on the matter of abatement in Wyoming.

The principal case illustrates the importance of drafting a clear and unambiguous directive which embraces all tax consequences of transmitting property at death. The residuary estate in this case contained $96,000 of a total estate of $270,000. Had it been found that the residuary estate was to bear the burden of all the federal estate tax, as would have been the case if the directive had been construed as indicating an intent to charge the residuary the total tax for the estate, or if this case had occurred in a jurisdiction following the residue rule, the residuary share would have been reduced

31. 73 Wyo. 236, 250-51, 278 P.2d 258, 262 (1954).

from $96,000 to $23,740. Approximately three-fourths of the residuary estate would have been taken for the payment of taxes. This result appears especially inequitable in the case where the residuary beneficiaries are the testator's spouse or children, who are generally the natural objects of his bounty. Such a result is what the Uniform Act and other apportionment statutes were meant to prevent. These statutes are effective to this end in a situation where there is no tax clause. However, in view of the fact that the testator is still given the power to direct what fund will pay the tax, these statutes may be foiled by unclear tax clauses. The clause considered in the principle case was admittedly such a clause.[32] It is important that one drawing up a will consult an attorney; but it is even more important that the attorney advise his client as to the tax consequences involved in the disposition of the client's property at death. In order to protect adequately his client, an attorney should be able to draw up a clear and comprehensive tax clause concerning the entire estate, testamentary and non-testamentary, to the end that his client's wishes will not be subject to defeat due to unclear or inadequate information in the tax clause.

R. MICHAEL MULLIKIN

MUNICIPAL CORPORATIONS — Waiver of Governmental Immunity — Defective Traffic Control Devices. Fanning v. City of Laramie, 402 P.2d 460 (Wyo. 1965).

Plaintiff's son was killed at an intersection of a through street. In a suit against the City of Laramie, it was alleged that the proximate cause of the accident was due to the city's failure to remove limbs and foliage of trees which obscured a stop sign and thereby created a condition dangerous to motorists. The complaint was dismissed by the trial court on the grounds that the city possessed governmental immunity from suit. Upon appeal, the Wyoming Supreme Court *held*

32. *In re* Ogburn's Estate, *supra* note 2, at 658.