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Beneficiaries behind the Iron Curtain

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CONCLUSION

It would seem that today esthetic zoning is a valid exercise of the police power. While at first the courts shied away from an ordinance that had beautification as its primary objective, they later began to uphold such an ordinance if it could in any way be coupled with some other recognized purpose of the police power. In the park cases, the courts began to broaden the concept of general welfare so that places of scenic beauty, maintained for public benefit, could be kept unblemished by nearby signs and billboards. Zoning ordinances which promoted that objective were upheld. Similar holdings have been to the effect that certain historic sections of a city could be kept intact, and that it was of benefit to the public so to maintain them.

The Supreme Court of the United States and the Supreme Court of Wisconsin seem to have enunciated the principle that valid zoning regulations may be enacted for esthetic considerations alone. Such regulations have thus been held to be within the exercise of the police power, since they promote the public welfare. But even though the courts have held that reasonable esthetic zoning does not violate due process of law, this by no means indicates that all forty-eight states will concur when the opportunity arises. Rather, it indicates that the concept of general welfare has been broadened to the point that esthetic considerations *may* be included as a proper application of the police power.

To what *extent* esthetic considerations will satisfy the general welfare test as a basis of zoning one may only conjecture. This much seems clear — the United States Supreme Court has indicated in *Berman v. Parker,* as in other cases, that it has adopted a liberal policy and will not interfere with the legislative function of giving content to the concept of general welfare in the use of the police power.[42] This attitude was well expressed by Mr. Chief Justice Waite in the famous case of *Munn v. Illinois*:[43] "We know that this is a power which may be abused, but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."

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Beneficiaries Behind the Iron Curtain

Consider the following hypothetical case: Decedent, a domiciliary of Ohio, leaves a will which directs that a legacy of $5000.00 be paid to his cousin A who lives in Hungary. The executor has affirmative evidence that

[42] *Cf.* Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Liggett v. Baldridge, 278 U.S. 105, 114 (1928) (Holmes, J., dissenting opinion).

[43] 94 U.S. 113, 134 (1876).

A is alive. In view of the existing political situation the executor is in a quandary. If the money is paid to A or his consular representative it is at least likely that some or all of the money would be confiscated by A's government. Thus, whether testator's direction is obeyed or disobeyed his intent will not in fact be fulfilled. The same problem would arise if A stood to inherit property by intestate succession.

Until recently there was no statute in Ohio which would aid the executor or administrator in his dilemma. The statute respecting the death of a devisee or legatee has no bearing on the case.[1] There was no statutory authorization to do anything but pay the legacy to A.

It was to provide for such situations that the Ohio General Assembly recently enacted two new statutes:

> Ohio Revised Code, Section 2113.81. Where it appears that a legatee or a distributee, or a beneficiary of a trust not residing within the United States or its territories will not have the benefit or use or control of the money or other property due him from an estate, because of circumstances prevailing at the place of residence of such legatee, distributee, or a beneficiary of a trust, the probate court may direct that such money be paid into the county treasury to be held in trust, or the probate court may direct that such money or other property be delivered to a trustee which trustee shall have the same powers and duties provided in section 2119.03 of the Revised Code for such legatee, distributee, beneficiary of a trust or such persons who may thereafter be entitled thereto. Such money or other property held in trust by such county treasurer or trustee shall be paid out by order of the probate judge in accordance with section 2113.82 of the Revised Code.
>
> The county treasury shall not be liable for interest on such money held in trust.

> Ohio Revised Code, Section 2113.82. When a person entitled to money or other property invested or turned into the county treasurer or to a trustee under section 2113.81 of the Revised Code satisfies the probate court of his right to receive it, the court shall order the county treasurer or the trustee to pay it over to such person.

These statutes became effective October 6, 1955. Thus under the circumstances of the hypothetical case, Ohio has authorized a deferment in the distribution of the property. It should be observed that Section 2113.81 does not treat the question of the *right* of such a person as A to be a legatee, distributee, or beneficiary of a trust. It leaves such right unaffected. It deals only with the distribution of property, and provides that while the requisite conditions obtain, distribution may be deferred.

The statute has a potentially wide application. Ohio, and this entire part of the country, has a substantial population of persons born in countries in which current conditions might justify its application. Table I indicates

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[1] OHIO REV. CODE § 2107.52.

the number of persons residing in four large Ohio cities who were born in five such countries.[2]

	Cincinnati	Cleveland	Columbus	Youngstown
Czechoslovakia	216	21,957	188	6,947
Hungary	1,913	21,204	694	4,120
Poland	918	23,054	413	3,351
Rumania	764	2,967	179	2,018
U.S.S.R.	2,628	12,265	1,001	1,987
Total	6,439	81,447	2,475	18,423

TABLE 1

Table 2 summarizes the same statistics for the entire state.[3]

Czechoslovakia	38,208
Hungary	43,410
Poland	41,820
Rumania	9,167
U.S.S.R.	23,114

TABLE 2

Thus, in 1950 there were living in Ohio more than 155,000 persons who were born in the above-mentioned five countries. They constituted more than 35% of the total foreign born population. These figures would seem to make it apparent that this statute is likely to be used quite frequently in the future.

The statute under consideration is not novel. Other states have adopted similar laws.[4] The New York and New Jersey statutes are somewhat broader than the Ohio statute, in that they declare that payment may be deferred, in addition to the same reasons mentioned in the Ohio statute, "where other special circumstances make it appear desirable that such payment should be withheld."

Quite a different statute has been enacted in California,[5] where the *right* of a non-resident alien to take any property (whether by succession or testamentary disposition) is made dependent on the right of citizens of the United States to take property upon the same terms and conditions as residents of the country where such alien is an inhabitant. Such *right* is also dependent upon the right of citizens of the United States living in the

[2] 1950 United States Census of Population, Report P-B35, p. 99 (Reprint of Vol. 2, Part 35, Ch.B.) U.S. Government Printing Office, 1952.

[3] *Id.* at 64.

[4] Examples of similar statutes are: 20 PA. STAT. (Decedents' and Trust Estates) § 1156; N. Y. Surrogates' Court Act § 269; N. J. STAT. 3A:25-10; MASS. GEN. LAWS, ch. 206 § 27A.

[5] CALIF. PROB. CODE § 259. See also CALIF. PROB. CODE § 1026 which requires a non-resident alien who becomes entitled to property by succession to appear and demand the property within five years from the time of succession or be barred.

United States to receive by payment to them money originating from the estates of persons dying in such foreign country. Thus, in California the *right* to receive property from a decedent's estate is conditioned by the above facts.[6]

It would appear that the Ohio statute has a double purpose. The principal objective is to preserve property for non-resident alien distributees until such time as they can actually receive, use, and enjoy such property. The second objective (a corollary of the first) is to prevent property from being confiscated by the government of the distributee's country of residence.

The statute should accomplish these purposes satisfactorily. The probate court is given the wide discretion which it needs to decide individual cases. Yet, in the administration of the statute, certain problems will arise which the statute itself does not resolve.

For instance, the statute sets no limitation on the length of time property may be held in trust. After a number of years a great deal of property may be tied-up in such trusts with little or no likelihood that the intended recipient will ever be able to have the enjoyment of it. Will such trusts last indefinitely or only for a "reasonable" time? There is no authority in the statute for the court to order such trusts terminated at the end of a reasonable

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[6] The two Ohio statutes that were enacted were contained in Amended Substitute House Bill 638, 101st General Assembly, Regular Session, 1955-1956. The bill as originally introduced, House Bill 638, was quite different from that enacted, and it bore a striking resemblance to CALIF. PROB. CODE § 259, *supra*. The original bill provided.

Sec. 2105.16. "No person who is capable of inheriting shall be deprived of the inheritance by reason of any of his ancestors having been aliens. Aliens may hold, possess, and enjoy lands, tenements, and hereditaments within this state, either by descent, devise, gift, or purchase, as fully as any citizen of the United States or of this state may do.

"The right of aliens, not residing within the United States or its territories, to take real property in this state by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States, is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. The right of aliens not residing in the United States or its territories to take personal property in this state by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States, is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents."

Sec. 2105.161. "The burden shall be upon such nonresident aliens to establish the fact of existence of reciprocal rights as set forth in section 2105.16 of the Revised Code."

Section 2105.162. "If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property."

time, or at any time, except as provided in Section 2113.82. It seems that such trusts will last indefinitely in the absence of additional legislation.

Is the statute mandatory? Must the probate court apply the statute when facts justifying its use are established? Must an executor attempt to have the statute applied when the circumstances are appropriate? Apparently the answer to all these questions is "no." The statute declares that the probate court "may direct" that property be held in trust. This is permissive. It gives no directions to the executor. There does not seem to be anything mandatory in the language of the statute. However, a declaratory judgment should be available to the executor who seeks direction from the court.

As has been mentioned, Section 2113.81 does not refer to the *right* of a legatee, distributee, or a beneficiary of a trust to take the proceeds of an estate, but rather it provides for a deferred distribution of such proceeds in certain circumstances. Yet Section 2113.82 declares that when a person entitled to property held in trust under the provisions of Section 2113.81 "satisfies the probate court of his right to receive it" the court shall order such property paid over to him. Thus, Section 2113.82 refers to a *right* to receive property, and there is an apparent contradiction between the two sections. A plausible construction is that one has a right to receive property under Section 2113.82 when the conditions calling for the application of Section 2113.81 have ceased to exist.

Does Section 2113.81 apply to inter vivos trusts? It refers to a beneficiary of a trust, but shortly thereafter refers to "money or other property due him from an estate." The word *estate* does not necessarily mean a decedent's estate, but may refer as well to a trust estate or the estate of a living person. However, the statute empowers only the probate court to act. Since the probate court has jurisdiction over testamentary trusts and the common pleas court has jurisdiction over inter vivos trusts, the statute apparently is applicable only to testamentary trusts, and the answer to the above question is "no." There is no reason for limiting the application of this statute to testamentary trusts, but the statute appears to do so.[7]

It is possible that Section 2113.81 is vulnerable to a constitutional attack. The United States Supreme Court has declared that,

> Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.[8]

[7] Title 21 of the OHIO REV. CODE is entitled "Courts — Probate — Juvenile." Chapter 2113 is entitled "Executors and Administrators — Appointment; Powers; Duties." Thus the location of section 2113.81 in the code gives no suggestion of an intended applicability to inter vivos trusts.

[8] Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942). This case involved the application of a state statute to prior antenuptial agreement.

However, the statute impels one to ask whether a state, having granted the power of testamentary disposition, and having declared that non-resident aliens may receive property from decedent domiciliaries, may qualify the distribution of such property as the statute under consideration would do. The question may properly be raised. Yet, since the issue is at least in doubt, the statute should be upheld because of the conditions precipitating its application. It is to be applied only when the intended recipient cannot then receive the property. The long-term effect of the statute's application is to attempt to carry out the testator's intention (or the direction of the statute of descent and distribuion) as soon as possible.[9]

May heirs, beneficiaries, or successors in interest of legatees, distributees, or beneficiaries of trusts claim money deposited with the county treasurer or property turned over to a trustee? The statutes are not altogether clear. Section 2113.81 declares that the probate court may order that money "be paid into the county treasury to be held in trust" or it "may direct that such money or other property be delivered to a trustee . . . for such legatee, distributee, beneficiary of a trust or such person who may thereafter be entitled thereto." Does this mean that successors to distributees may claim property which has received Section 2113.81 treament only if it has been turned over to a trustee but not if it has been turned into the county treasury? It is doubtful that the legislature intended this result. A liberal and realistic construction of the statute would result in the words "legatee, distributee, beneficiary of a trust or such person who may thereafter be entitled thereto" being applied to either of the alternative courses of action available to the probate court. But how liberal will be the treatment accorded this statute? Perhaps the question is answered in Section 2113.82 which refers to "a person entitled to money or other property invested or turned into the county treasurer or to a trustee." The distinction herein mentioned is unreasonable and without foundation, but does it exist?

Is property held in trust under Section 2113.81 subject to attachment? There is no reason why such property cannot be attached to the same extent that any other property in the state may be attached.

One of the most interesting problems in the application of this statute will lie in establishing the facts required to justify its utilization. It may become necessary to prove a political situation as a fact. What evidence will be sufficient to show such facts? What degree of likelihood that the

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[9] The New York Court of Appeals has declared that § 269 of the Surrogate's Court Act is not unconstitutional. *In re* Braier's Estate, 305 N.Y. 148, 111 N.E.2d 424 (1953). The United States Supreme Court dismissed an appeal for want of a substantial federal question. 346 U.S. 802 (1953). The U.S. Sup. Ct. denied certiorari in a case in which the above-mentioned CALIF. PROB. CODE § 259 was applied in *In re* Arbulich's Estate, 41 Cal.2d 86, 257 P.2d 433 (1953), 346 U.S. 897 (1953), 347 U.S. 908 (1954). See also 170 A.L.R. 953.

distributee will not receive his proceeds must be shown to justify the application of Section 2113.81? We are fortunately not without some indication of the treatment other jurisdictions have given these questions. Writers have declared that under such a statute the property may be directed to be paid into court "if it appears, even contingently possible, that it would be subject to confiscation in whole or in part if turned over to the foreign consul or an attorney-in-fact . . . "[10]

A New Jersey probate court has declared that funds should be preserved until there are "convincing assurances" that distributive shares will reach their proper destination.[11] Although this statement bears on the duration of the order rather than its being granted in the first place, it casts some light on the problem under consideration.

A California appellate court has declared that where treaties or statutes are before a court their construction may be a matter of law. The question of how a foreign country has construed and applied such treaties or statutes, however, is one of fact. This fact must be ascertained in order to determine the right of a non-resident alien to receive property under the California statute.[12]

A New York case involving legacies to persons in Czechoslovakia and Hungary placed great weight on the unfair exchange rate, the rationing and price conditions in Czechoslovakia under which the beneficiary could buy goods with the money only at greatly increased prices, and the extent of confiscation by the government. It concluded that the distributees could not be said to be getting "the benefit or use" of the property.[13] The court also referred to a federal statute which directs that no draft on the credit of the United States be sent to a foreign country where the postal, transportation, or banking facilities, or the local conditions, are such that the Secretary of the Treasury has determined that there is not a reasonable assurance that the payee will actually receive the check and be able to negotiate it for full value.[14] Hungary and Czechoslovakia had been determined by the Secretary to be in that category, and the court reasoned that there was no cause to suppose that a private draft had a greater probability of reaching a payee than a draft on the United States.

The testator also left a legacy of $5000.00 to a certain small town in

[10] 34 C.J.S., *Executors and Administrators,* § 497(c).

[11] *In re* Volencki's Estate, 35 N.J. Super. 351, 114 A.2d 26, 27 (1955). ". . . since nothing is taken away and all is preserved until the court receives convincing assurances that distributive shares will reach their proper destination, common obstacles on the way should be sufficient."

[12] *In re* Leefer's Estate, 127 Cal. App.2d 550, 274 P.2d 239 (1954).

[13] *In re* Wells' Estate, 126 N.Y.S.2d 441, 204 Misc. 975 (1953).

[14] 31 U.S.C. § 123. See also Treasury Department Circular 655, dated March 19, 1941, and especially amendments of February 19, 1951 and April 17, 1951.