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Widow's Success in Common-Law Property State to Husband's Rights in Her Half of Community Property Is Taxable and Valued at One-Half of Entire Community--In re Kessler's Estate

Bailey H. Kuklin
Brooklyn Law School, bailey.kuklin@brooklaw.edu

law recognizing a right to be free from unauthorized interference with privacy,[39] and with the prior cases which have not demanded state action as a prerequisite to the exclusion of objectionably obtained evidence.[40] While it is clear that because of the absence of official participation in the search and seizure the exclusion was not compelled by *Mapp*, the general aim of the case—to deter direct or indirect invasions of privacy—is consistent with the broad policy of the exclusionary rule. The exclusion seems justified on the ground that the integrity of law enforcement demands that its operations not conflict with public policy. In resolving the issue posed by the competing considerations of law enforcement and the individual's right to privacy, the principal case has accepted the basic proposition that law enforcement and society in general are not benefited in the long run when they permit a criminal conviction at the expense of humiliating intrusions by unauthorized persons upon the defendant's privacy.

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While residing with his wife in California, decedent purchased stock, which under California law became community property.[1] The couple later moved to Ohio, a common-law property state, where decedent died. An Ohio probate court approved the executor's determination that the widow's one-half interest in the stock was not subject to the Ohio succession tax.[2] On appeal by the state tax commissioner to the Ohio Supreme Court, *held*, reversed, three judges dissenting. A wife's succession to her husband's right to manage and control her half of the community property is subject to the Ohio succession tax on joint and survivorship property.

One of the most perplexing problems facing estate planners in our highly mobile society is that of calculating the tax consequences

39. See generally Plant, *The Right of Privacy in Michigan*, Mich. State B. J., March 1954, p. 8.

40. Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958); People v. Corder, 244 Mich. 274, 221 N.W. 309 (1928), discussed in note 8 *supra*.

* 177 Ohio St. 136, 203 N.E.2d 221 (1964).

1. Cal. Civ. Code § 161.

2. Ohio Rev. Code Ann. § 5731.02(E) (Page 1954).

of a plan which encompasses both community and common-law property rights. Because the concept of community property is unfamiliar in many states, it is often difficult to forecast how a particular state succession tax will be applied to community property. This problem is partially alleviated by the general rule that the changing of domicile from a community property state to a common-law property state or vice versa does not alter the status of property acquired in the original domicile.[3] The principal case, however, furthers the perplexity by misconstruing the Ohio succession tax statute and incorrectly analyzing the interests of spouses in California community property.

Despite the contrary holding in *Kessler*, it is arguable that the Ohio succession tax on jointly owned property should not be construed so as to include the rights of a surviving spouse in community property. The very language of the statute seems to exclude community property.[4] To be taxed under this statute the survivor of the jointly owned estate must succeed to the "right to the immediate ownership or possession and enjoyment of the *whole property*."[5] Under California community property law, the surviving widow "succeeds" to rights in only her share or *one-half* of the entire community estate.[6] The *Kessler* court, however, considered that the

3. See, *e.g.*, Rozan v. Rozan, 49 Cal. 2d 322, 317 P.2d 11 (1957); RESTATEMENT (SECOND), CONFLICT OF LAWS § 292 (Tent. Draft No. 5, 1959). See generally Cantwell, *Estate and Tax Planning*, 99 TRUSTS & ESTATES 922 (1960); Deering, *Separate and Community Property and the Conflict of Laws*, 30 ROCKY MT. L. REV. 127 (1958); Leflar, *From Community to Common Law State*, 99 TRUSTS & ESTATES 882 (1960); Neuner, *Marital Property and the Conflict of Laws*, 5 LA. L. REV. 167 (1943); Thomas & Thomas, *Community Property and the Conflict of Laws—A Recapitulation*, 4 SW. L.J. 46 (1950). *But see* Polasky, Mullin & Pigman, *Estate Planning for Migrating Clients*, 101 TRUSTS & ESTATES 876, 878-79 (1962).

Legislation in California at one time classified as community property items of personalty which were acquired by California residents during a previous period of domicile in a common-law property state. The property, originally held by the owner as separate property, was to be changed to community property status if it would have been community property had the owner been a California resident when the property was acquired. This "quasi" community property legislation was declared unconstitutional in *In re* Thornton's Estate, 1 Cal. 2d 1, 33 P.2d 1 (1934). The *Thornton* decision was severely limited, however, in Addison v. Addison, 399 P.2d 897, 43 Cal. Rptr. 97 (Sup. Ct. 1965).

4. "A tax is hereby levied upon the succession to any property passing, in trust or otherwise, for the use of a person, institution, or corporation, in the following cases: . . . (E) Whenever property is held by two or more persons jointly, so that upon the death of one of them the survivor has a right to the immediate ownership or possession and enjoyment of the whole property, the accrual of such right by the death of one of them shall be deemed a succession taxable under this section, in the same manner as if the enhanced value of the whole property belonged absolutely to the deceased person, and he had bequeathed the same to the survivor by will, provided when the persons holding said property jointly are a husband and wife, the survivor shall be deemed to have a succession taxable to the extent of one-half the total value of the property without regard to enhancement . . . ." OHIO REV. CODE ANN. § 5731.02 (Page 1954).

5. *Ibid.* (Emphasis added.)

6. See note 16 *infra* and accompanying text.

words "whole property" meant the "whole" of the widow's share and that the succession tax was to be applied to the value of the rights acquired by the widow in this share of the community estate.[7] This interpretation strains not only the words of this statute but also the language of the California statutes defining the interests of spouses in community property.

Under California law, the respective interests of the spouses in community property are "present, existing and equal."[8] The husband manages and controls the property in a fiduciary capacity[9] as statutory agent of the conjugal partnership.[10] The creation of this statutory agency was motivated by the policy considerations that third parties should be assured that transactions with one spouse involving the community property will not be nullified by the other spouse[11] and that litigation between husband and wife over the right to manage the property should be discouraged.[12] Despite the husband's broad management and control rights, however, he can neither dispose of his wife's share by testamentary gift without her consent[13] nor dispose of her property inter vivos without receiving valuable consideration.[14] The wife is entitled to legal and equitable relief for violation of the husband's fiduciary duties.[15] Thus, at the husband's death, the wife, who is already the owner of her half of the community property, merely receives the right to manage it.[16] However, the majority in *Kessler* felt that the wife was not the outright owner of her share until dissolution of the marriage and, therefore, only on the death of the husband did the wife acquire outright ownership in her half.[17] The court thus misconstrued the actual

7. 177 Ohio St. at 143, 203 N.E.2d at 225. The majority admitted that the statute would not apply if "whole property" means the entire community estate. *Ibid.*

8. CAL. CIV. CODE § 161a.

9. See, *e.g.*, Vai v. Bank of America Nat'l Trust & Savings Ass'n, 56 Cal. 2d 329, 364 P.2d 247, 15 Cal. Rptr. 71 (1961).

10. CAL. CIV. CODE § 161a.

11. Poe v. Seaborn, 282 U.S. 101, 112 (1930); see Smith v. Smith, 12 Cal. 216, 224-25 (1859).

12. Poe v. Seaborn, *supra* note 11, at 112. The husband was selected as agent because historically he has assumed the role of manager of marital properties. In modern society he is considered the head of the household, and he is usually better qualified and experienced to manage the property. La Tourette v. La Tourette, 15 Ariz. 200, 206, 137 Pac. 426, 428 (1914); 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 113 (1943); Horne, *Community Property—A Functional Approach*, 24 So. CAL. L. REV. 42, 60 (1950).

13. CAL. PROB. CODE § 201.

14. CAL. CIV. CODE §§ 172, 172a.

15. See, *e.g.*, Britton v. Hammell, 4 Cal. 2d 690, 52 P.2d 221 (1935); McKay v. Lauriston, 204 Cal. 557, 269 Pac. 519 (1928); Lynn v. Herman, 72 Cal. App. 2d 614, 165 P.2d 54 (Dist. Ct. App. 1946). See generally 1 ARMSTRONG, CALIFORNIA FAMILY LAW 610-18 (1953).

16. The husband's half passes either by intestacy or according to his will. CAL. PROB. CODE § 201.

17. 177 Ohio St. at 140, 203 N.E.2d at 223.

ownership interests of the spouses as settled by California law.[18]

In addition, an examination of the history of the statutory language of the specific section involved indicates that the legislature did not intend to tax the succession to rights in community property, but rather to tax only the succession to joint and survivorship property.[19] Under the Ohio constitution, the objective of all taxes must be stated distinctly in the statute.[20] Nowhere in the Ohio succession tax statute is community property expressly mentioned.[21] Furthermore, since community property is foreign to Ohio law, it is probable that the legislature did not even consider taxing the succession to such property under this statute.[22]

After finding that community property was susceptible to the Ohio succession tax, the court, in determining how much of the estate was to be taxed, valued the succession at one-half of the entire community. In so doing, the court considered that this result was dictated by the statute, which provides that when the joint owners are husband and wife, the surviving spouse "shall be deemed to have a succession taxable to the extent of *one-half the total* value of the property . . . ."[23] Although the court had held, in finding the wife's succession to be within the statute, that "right to . . . the whole property" meant the right to the "whole" of the wife's share of the property,[24] yet in valuing the wife's succession the court held that "one-half the total value of the property" referred not to one-half of the wife's share, but rather to one-half of the *entire* community estate.[25] A more consistent construction of the statute would have

18. The dissenting judges in *Kessler* noted that the majority had confused *management* rights with *ownership rights*. 177 Ohio St. at 146, 203 N.E.2d at 227 (dissenting opinion). On the respective rights of each of the spouses, see generally 1 DE FUNIAK, *op. cit. supra* note 12, §§ 131-54; Horne, *supra* note 12; Kirkwood, *The Ownership of Community Property in California*, 7 SO. CAL. L. REV. 1 (1933); Simmons, *The Interest of a Wife in California Community Property*, 22 CALIF. L. REV. 404 (1934).

19. See *In re* Evans' Estate, 173 Ohio St. 137, 142, 180 N.E.2d 827, 831 (1962); *In re* Kaski's Estate, 86 Ohio L. Abs. 408-09, 177 N.E.2d 65, 66 (Ct. App. 1961); 1941 OPS. ATT'Y GEN. 164, 172 (Ohio). In community property there are no rights of "survivorship," as this term is commonly known in joint tenancy. See note 16 *supra* and accompanying text.

20. "No tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied." OHIO CONST. art. XII, § 5.

21. See statute quoted in note 4 *supra*.

22. The court in the principal case recognized this probable lack of specific intent on the part of the legislature. 177 Ohio St. at 142, 203 N.E.2d at 225.

23. OHIO REV. CODE ANN. § 5731.02(E) (Page 1954). (Emphasis added.)

24. See text accompanying note 7 *supra*.

25. 177 Ohio St. at 143, 203 N.E.2d at 226. Since the husband's half of the community passed through his estate, the value placed on the widow's "succession" by the court included property in which she did not actually succeed to any rights. This construction of the statute violates the general Ohio concepts of statutory interpretation that words should be interpreted consistently throughout the statute. State *ex rel.* Bohan v. Industrial Comm'n of Ohio, 146 Ohio St. 618, 67 N.E.2d 536 (1946), *affirmance upheld on rehearing*, 147 Ohio St. 249, 70 N.E.2d 888 (1946), and that tax statutes should

been to value the succession at one-half of the wife's share of the community—one-fourth of the entire estate.[26]

The court's application of the statute arguably violates both the federal and the Ohio constitutions. First, in holding that the widow's succession is to be taxed at one-half the value of all of the community holdings, the court used the same value that would be placed on the estate if it had been held by the decedent and his wife as joint and survivorship property.[27] In the latter situation the wife would receive the entire jointly owned estate, not merely the half to which she would be entitled in a community property estate. Although it has been held by the United States Supreme Court that the succession to rights in community property may be taxed on the basis of the value of the entire estate,[28] the Ohio court's interpretation seems to deny equal protection by taxing unequally properties within the same classification.[29] Under the *Kessler* ruling the surviving community owner pays twice as much tax as the survivor of joint and survivorship property per dollar value of property in which rights are acquired.[30] Second, the Ohio constitution requires that succession taxes be either uniform in rate or progressively graduated.[31] Taxing the community survivor at twice the rate of the survivor of joint and survivorship property for the acquisition of rights in properties of equal value is neither taxation at a uniform rate nor taxation at a progressively graduated rate.[32]

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be strictly construed against the state, Tax Comm'n v. Farmers Loan & Trust Co., 119 Ohio St. 410, 164 N.E. 423 (1928).

26. See example, note 32 *infra.*

27. See statute quoted note 4 *supra.*

28. Fernandez v. Wiener, 326 U.S. 340 (1945).

29. U.S. CONST. amend. XIV, § 1. The court in the principal case included community property in the same classification, for succession tax purposes, as joint and survivorship property. In Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283 (1898), the Court stated at 296 that "if the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates 'equally and uniformly upon all persons in similar circumstances.'" See Great Atl. & Pac. Tea Co. v. Grosjean, 301 U.S. 412, 424 (1937); Fox v. Standard Oil Co., 294 U.S. 87, 101 (1935); State *ex rel.* Struble v. Davis, 132 Ohio St. 555, 9 N.E.2d 684 (1937); State *ex rel.* Zielonka v. Carrel, 99 Ohio St. 220, 124 N.E. 134 (1919).

30. If the *Kessler* court had valued the succession at one-half of the wife's moiety, or one-fourth of the entire community, the equal protection objection would have been avoided. See text accompanying note 26 *supra.*

31. "Laws may be passed providing for the taxation of the right to receive, or to succeed to, estates, and such taxation may be uniform or it may be so graduated as to tax at a higher rate the right to receive, or to succeed to, estates of larger value than to estates of smaller value. . . ." OHIO CONST. art. XII, § 7.

32. OHIO REV. CODE ANN. § 5731.12(D) (Page 1954) provides a progressively graduated rate for the succession to joint and survivorship property. However, the *Kessler* interpretation destroys this rate. For example, if a community survivor's one-half share were valued at $200,000, under *Kessler* she would pay approximately $18,750 in succession taxes. A survivor of joint and survivorship property would pay $8,750 upon succeeding to an estate valued at $200,000. If the survivor of joint and survivorship property were to pay $18,750 in taxes, she would be succeeding to an estate valued at