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COMMENT

THE DEMISE OF THE "IRON CURTAIN" STATUTE

From Stettin in the Baltic to Trieste in the Adriatic, an *iron curtain* has descended across the Continent.¹

Let us not be deceived — today we are in the midst of a *cold war*.²

I. INTRODUCTION

The American belief that these two metaphors, "iron curtain" and "cold war," aptly described the political aftermath of World War II resulted in a number of legal restrictions on the ability of residents of countries behind the "iron curtain" to inherit property of American decedents. The United States was the only country that presented obstacles to the distribution of funds to "iron curtain" beneficiaries.³ There were, however, never any limitations under American laws, state or federal, upon the transfer of funds by living American citizens.⁴ Thus, a decedent whose estate funds during this period could not be sent to his relatives because of an "iron curtain" statute, could at any time during his life have forwarded gifts through any American bank to those same relatives or friends.

At the outset, it should be noted that no "iron curtain" act makes mention of any "iron curtain" and none contains any geographic limitations on the scope of its application. During the post-war period, however, these statutes became commonly known as such because they were consistently applied to beneficiaries residing in the Soviet Union and the Eastern European countries.⁵

A great many states, primarily on the east and west coasts of the United States, have enacted "iron curtain" statutes and much has been written in legal literature concerning them.⁶ The statutes are of two

1. Address of Winston Churchill, Westminster College, Fulton, Mo., Mar. 5, 1946, in E. GOLDMAN, *THE CRUCIAL DECADE* 37 (rev. ed. 1960) (emphasis added).

2. Address of Bernard Baruch, Columbia, S.C., Apr. 16, 1947, in E. GOLDMAN, *supra* note 1, at 60 (emphasis added). The phrase was picked up by Walter Lippman and made a commonplace of American language. *Id.*

3. See Birman, *Soviet Heirs in American Courts*, 62 COLUM. L. REV. 257, 258 (1962).

4. *Id.* The relevant period herein extended from approximately 1953 to the present. One can purchase a dollar remittance from an American bank which will transfer the dollars to the U.S.S.R. Bank for Foreign Trade, located in Moscow, which will in turn deliver rubles to the Soviet payee at the official exchange rate.

5. See Heyman, *The Nonresident Alien's Right to Succession under the "Iron Curtain Rule"*, 52 Nw. U.L. REV. 221 (1957).

6. See, e.g., Bader, Brown & Grzybowski, *Soviet Inheritance Cases in American Courts and the Soviet Property Regime*, 1966 DUKE L.J. 98; Birman, *supra* note 4; Chaitkin, *The Rights of Residents of Russia and its Satellites to Share in Estates of American Decedents*, 25 S. CAL. L. REV. 297 (1952); Heyman, *supra* note 5; Comment, *The Statutory Regulation of Inheritance by Nonresident Aliens*, 13 VILL. L. REV. 148 (1968).

general types: custodial,⁷ providing that distribution not be made where it appears that the beneficiary would not receive the use, benefit, enjoyment, and control of the funds if sent to him; and reciprocal,⁸ providing that distribution not be made unless the country of the alien's residence grants inheritance rights to American citizens. The operative provision of the Pennsylvania act, a typical custodial statute, provided that:

Whenever it shall appear to the court that if distribution were made a beneficiary would not have the *actual benefit, use, enjoyment or control* of the money or other property distributed to him by a fiduciary, the court shall have the power and authority to direct a fiduciary (a) to make payment of the share of such beneficiary at such times and in such manner and amounts as the court may deem proper, or (b) to withhold distribution of the share of such bene-

7. Custodial statutes exist in: Connecticut, CONN. GEN. STAT. ANN. § 45-278 (Supp. 1972) (burden of proof on state), *construed in* Lamb v. Estate of Szabo, 27 Conn. Supp. 247, 235 A.2d 849 (Super. Ct. 1967); Florida, FLA. STAT. ANN. § 731.28 (1964), *discussed in* 21 U. FLA. L. REV. 412, 415 (1969); Maryland, MD. ANN. CODE art. 93, § 9-108 (1957); Massachusetts, MASS. GEN. LAWS ANN. ch. 206, § 27A (Supp. 1972), *construed in* *In re Mazurowski*, 331 Mass. 33, 116 N.E.2d 854 (1954); Michigan, MICH. COMP. LAW § 27.3178(306a) (Supp. 1972); New Jersey, N.J. REV. STAT. § 3A:25-10 (1953) (burden of proof on state), *held constitutional in* *In re Kish's Estate*, 52 N.J. 454, 246 A.2d 1 (1968) (*see* text accompanying notes 65-78 *infra*); New York, N.Y. Surr. Ct. Pro. § 2218 (McKinney Supp. 1971) (burden of proof on alien; assignment prohibited), *held constitutional in* *In re Leikind*, 22 N.Y.2d 346, 239 N.E.2d 550, 292 N.Y.S.2d 681 (1968), *appeal dismissed sub nom.* Laikind v. Attorney Gen., 397 U.S. 148 (1970), *and in* Bjarsch v. DiFalco, 314 F. Supp. 127 (2d Cir. 1970), *noted in* 12 HARV. INT'L L.J. 120 (1971) (*see* text accompanying notes 44-64 *infra*); Ohio, OHIO REV. CODE ANN. § 2113.81 (Page 1968), *held unconstitutional in* Mora v. Battin, 303 F. Supp. 660 (N.D. Ohio 1969) (*see* text accompanying notes 79-87 *infra*); Oregon, Law of Mar. 6, 1937, ch. 217, §§ 1 & 2, [1937] Ore. Laws 306-08, *held unconstitutional in* Zschernig v. Miller, 389 U.S. 429 (1968), *repealed by* Law of June 1, 1969, ch. 591, § 305, [1969] Ore. Laws 1221 (effective July 1, 1970); Rhode Island, R.I. GEN. LAWS ANN. § 33-13-13 (1970); Wisconsin, WIS. STAT. ANN. § 863.37 (1971).

8. Reciprocity statutes exist in: Arizona, ARIZ. REV. STAT. ANN. § 14-212(c) (1956), *construed in* Podret v. Superior Ct., 80 Ariz. 182, 294 P.2d 670 (1956); California, CAL. PROB. CODE § 259 (West 1956) (burden of proof on alien; escheat if no other heirs), *held unconstitutional in* Estate of Kraemer, 276 Cal. App. 2d 715, 81 Cal. Rptr. 287 (1969); Iowa, IOWA CODE ANN. § 567.8 (Supp. 1972) (burden of proof on alien; escheat if no other heirs), *construed in* *In re Millers' Estate*, 159 N.W.2d 441 (Iowa 1968), *discussed in* Ginsburgs, *Inheritance by Foreigners under Soviet Law*, 51 IOWA L. REV. 16 (1965), *and in* Note, *Property Rights of Aliens under Iowa and Federal Law*, 47 IOWA L. REV. 105 (1961); Louisiana, LA. CIV. CODE ANN. art. 1490 (West 1952), *discussed in* *In re Herdman*, 154 La. 477, 97 So. 664 (1923), *and in* Comment, *The Application of the Reciprocal Rights and Benefit Rules to Foreign Legacies*, 36 TUL. L. REV. 799 (1962); Montana, MONT. REV. CODES ANN. § 91-520 (1964) (burden of proof on alien; escheat if no other heirs), *held constitutional in* Gorun v. Fall, 287 F. Supp. 725 (D. Mont.), *aff'd per curiam*, 393 U.S. 398 (1968), *and in* Giurgiu Estate, 155 Mont. 18, 466 P.2d 83 (1970) (*see* text accompanying notes 37-43 *infra*); Nevada, NEV. REV. STAT. § 134.230 (1967) (burden of proof on alien; escheat if no other heirs); North Carolina, N.C. GEN. STAT. § 64-3 (1965) (burden of proof on alien); Oklahoma, OKLA. STAT. tit. 60, § 121 (1971) (personal property); Wyoming, WYO. STAT. ANN. § 2-43 (Supp. 1971) (escheat if no other heirs).

Reciprocity is not a matter of quantity of funds passing between the United States and the country involved. For various economic reasons, more funds have been accumulated by citizens of the Soviet Union and Eastern European countries residing in the United States than by such citizens living in their own countries. Reciprocity, it will be seen, means merely that, upon a "routine reading" of foreign law, no barriers exist to distribution to heirs in this country. *See* text accompanying note 17 *supra*.

fiary, convert it to cash, and pay it through the Department of Revenue into the State Treasury without escheat.⁹

This Comment will focus on the demise of "iron curtain" statutes generally, and, in particular, on the Pennsylvania statute recently held unconstitutional by the Supreme Court of Pennsylvania.¹⁰

II. THE CONSTITUTIONAL DILEMMA

Two United States Supreme Court cases address themselves to the constitutionality of "iron curtain" statutes. In *Clark v. Allen*,¹¹ Justice Douglas, writing for the Court, upheld the constitutionality of section 259 of the California Probate Code,¹² a reciprocity statute. At that time, the objection that the statute interfered with international relations appeared to him to be "farfetched."¹³ What California had done, it was felt, would have "some incidental or indirect effect in foreign countries,"¹⁴ but would not constitute an incursion upon the federal government's power to conduct foreign affairs.¹⁵

Twenty-one years later, in *Zschernig v. Miller*,¹⁶ Justice Douglas again had occasion to consider the constitutionality of these statutes. In the meantime, probate courts in the various states had developed a body of precedent indicating a distinctly hostile judicial attitude toward claimants and their counsel who sought to transmit American funds through state courts to beneficiaries behind the "iron curtain." As Justice Douglas made explicit in *Zschernig*:

At the time *Clark v. Allen* was decided, the case seemed to involve no more than a routine reading of foreign laws. It now appears that in this reciprocity area under inheritance statutes, the probate courts of various States have launched inquiries into the type of governments that obtain in particular foreign nations — whether aliens under their law have enforceable rights, whether the so-called "rights" are merely dispensations turning upon the whim or caprice of the government officials, whether the representation of consuls, am-

9. Act of July 23, 1953, Pamph. L. 674, § 2 (emphasis added). Section 737 of the Fiduciaries Act of April 18, 1949, Pamph. L. 512, § 737, added by the Act of Feb. 23, 1956, Pamph. L. [1955] 1084, § 6, contained a similar provision and was likewise unconstitutional in light of *Demczuk Estate*, 444 Pa. 212, 282 A.2d 700 (1971). See text accompanying notes 94-108 *infra*.

Both of these acts have recently been repealed by the new Probate, Estates and Fiduciaries Code, PA. STAT. tit. 20, § 3 (effective July 1, 1972).

10. *Demczuk Estate*, 444 Pa. 212, 282 A.2d 700 (1971).

11. 331 U.S. 503 (1947).

12. CAL. PROB. CODE § 259 (West 1956). See text accompanying notes 89-93 *supra*.

13. 331 U.S. at 517.

14. *Id.*

15. U.S. CONST. art. VI, cl. 2, provides, in relevant part:

This Constitution, and the Laws of the United States . . . and all Treaties . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

16. 389 U.S. 429 (1968).

bassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation.¹⁷

Justice Douglas explicitly did not accept the invitation to re-examine the Court's ruling in *Clark v. Allen*,¹⁸ but instead relied on the history and operation of the statute¹⁹ in holding it, *as applied*, to be "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."²⁰

Justice Douglas appeared to be quite conscious of his dilemma — attempting to maintain the vitality of *Clark v. Allen* and at the same time, in the light of later learning, to hold unconstitutional a practically identical statute:

We held in *Clark v. Allen* that a general reciprocity clause did not on its face intrude on the federal domain . . . [noting] that the California statute, then a recent enactment, would have only "some incidental or indirect effect in foreign countries."²¹

The *Zschernig* Court seemed to plead the *Clark* Court's ignorance of the potential for interference with foreign affairs inherent in such statutes:

[W]e had no reason to suspect that the California statute in *Clark v. Allen* was to be applied as anything other than a general reciprocity provision, requiring a just matching of laws.²²

Had the case appeared in the posture of the present one, a different result would have been obtained. We were there concerned with the words of a statute on its face, not the manner of its application.²³

Justice Douglas noted that decisions in the wake of *Clark v. Allen* radiated attitudes of the "cold war."²⁴ Due to their "great potential for disruption or embarrassment,"²⁵ Justice Douglas now considered them to have more than "some incidental or indirect effect in foreign countries . . ."²⁶ "The statute as construed" now seemed "to make *unavoidable* judicial criticism of nations established on a more authoritarian basis than our own."²⁷ It was now "*inescapable*"²⁸ that this type of probate law would affect international relations in a "persistent and subtle way," would have a "direct impact upon foreign relations," and might

17. *Id.* at 433-34.

18. *Id.* at 432.

19. Law of Mar. 6, 1937, ch. 217, §§ 1 & 2, [1937] Ore. Laws 306-08 (repealed, Law of June 1, 1969, ch. 591, § 305, [1969] Ore. Laws 1221 (effective July 1, 1970)).

20. 389 U.S. at 432.

21. *Id.* at 432-33.

22. *Id.* at 433 n.5.

23. *Id.* at 433.

24. *Id.* at 435.

25. *Id.*

26. *Id.* at 434.

27. *Id.* at 440 (emphasis added).

28. *Id.* (emphasis added).

well "adversely affect the power of the central government to deal with those problems."²⁹

Justices Stewart and Brennan, concurring, rejected Justice Douglas' distinction between the constitutionality of these statutes on their face and as applied and would have explicitly overruled *Clark v. Allen*.³⁰ Academic criticism has likewise been unsympathetic to the distinction.³¹

Justice Harlan, while concurring in the result, dissented on the constitutional issue.³² In his opinion, "nothing [had] occurred which could not readily have been foreseen at the time *Clark v. Allen* was decided."³³ His was, perhaps, the first indication of the uncertainty which the Court's opinion would create among the states as to its scope as evidenced by his statement that "the Court *seems to have found* the statute unconstitutional only as applied."³⁴

III. THE CONFUSED RESPONSE

The response of the various state supreme courts to the Supreme Court's decision in *Zschernig* has been mixed. New Jersey, New York, Montana, and Ohio statutes have been upheld as constitutional, although for all practical purposes rendered impotent;³⁵ California and Pennsylvania statutes have been struck down as unconstitutional.³⁶

It is perhaps best to first consider developments in those states which upheld the constitutionality of their statutes. The narrow scope of their constitutionally permissible application, however, will indicate the slight practical effect such statutes will have in the future.

In *Gorun v. Fall*,³⁷ a three-judge federal district court in Montana held that state probate courts, "advised by *Zschernig* of the boundaries of

29. *Id.* at 440-41.

30. *Id.* at 442 (Stewart & Brennan, JJ., concurring).

31. *Zschernig* was noted and the distinction criticized in 72 DICK. L. REV. 675, 678-79 n.16 (1968); 82 HARV. L. REV. 238, 239 (1968); 53 IOWA L. REV. 1347, 1359 (1968); 2 N.Y.U.J. INT'L L. & POL. 363, 368-71 (1969); 20 SYRACUSE L. REV. 661, 680 (1969). *But see* 32 ALBANY L. REV. 646, 653 (1968); 13 VILL. L. REV. 672, 674-80 (1968).

32. Justice Harlan would have preferred to avoid the constitutional issue as did Justice Rutledge, in his concurring opinion in *Clark v. Allen*, by describing the constitutional issue as "premature."

It is more important that constitutional decisions be reserved until the issues calling for them are squarely and inescapably presented, factually as well as legally, than it is to expedite the termination of litigation or [*sic*] the procedural convenience of the parties.

331 U.S. at 518. Harlan expressed similar sentiments in *Zschernig* and would have reached the same result as the majority by a different interpretation of the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany, Dec. 8, 1923, 44 Stat. 2132, T.S. No. 725. 389 U.S. at 443-62. The Court had earlier established that, where such statutes conflicted with federal treaties, the supremacy clause clearly rendered them unconstitutional. *See* *Kolovrat v. Oregon*, 366 U.S. 187 (1961); *Belemecich's Estate*, 411 Pa. 506, 192 A.2d 740 (1963), *rev'd sub nom.* *Consul Gen. v. Pennsylvania*, 375 U.S. 395 (1964).

33. 389 U.S. at 458.

34. *Id.* at 459 (emphasis added).

35. *See* notes 37-87 and accompanying text *infra*.

36. *See* notes 88-108 and accompanying text *infra*.

37. 287 F. Supp. 725 (D. Mont.), *aff'd per curiam*, 393 U.S. 398 (1968).

the constitutional power of the state . . . should be free to fashion a procedure for applying [Montana's reciprocity statute] in a manner not offensive to the Federal Constitution."³⁸ Although *Gorun* was affirmed per curiam, Justice Douglas, writing for four members of the Court, concurred, suggesting that federal foreign policy would require that, on remand, the state court not find reciprocity to be lacking.³⁹ On remand,⁴⁰ the Supreme Court of Montana returned the estate involved to the lower probate court, which it believed to be quite "capable of fashioning the procedures by which a determination can be made whether the Country of Romania allows reciprocity of transfer and reciprocity of inheritance between it and citizens of Montana."⁴¹ It is submitted that such a restrained reading of the Court's opinions in this area was unfortunate. The result was a remand to determine reciprocity in which the burden of proof was on the foreign claimant.⁴² Thus, even after the decision in *Zschernig*, a nonresident alien claiming funds in Montana must carry the burden of proving reciprocity of inheritance in favor of American citizens in the country of his residence. However, after *Zschernig*, the burden must be reasonable and may only be satisfied by a showing that, upon a "routine reading"⁴³ of the foreign law involved, no confiscation is apparent. The burden, therefore, may be more apparent than real.

Similarly in *In re Leikind*,⁴⁴ the Court of Appeals of New York upheld the constitutionality of its custodial statute,⁴⁵ holding that :

[I]f the courts of this State, in applying the "benefit or use or control" requirements, simply determine, without animadversions, whether or not a foreign country, by statute or otherwise, prevents its residents from actually sharing in the estates of New York decedents, the statute would not be unconstitutional under the explicit rationale of the *Zschernig* case.⁴⁶

The *Leikind* decision is a masterpiece of legal make-weighting. In its apology for the New York statute, the court mentioned that it, unlike Oregon's statute, contained no provision for reciprocity or escheat, and suggested that "even though the Oregon escheat provision was not discussed or made a ground of decision by the Supreme Court," that fact might be of "critical importance" in upholding New York's statute.⁴⁷

38. *Id.* at 728.

39. 393 U.S. at 399.

40. *Giurgiu Estate*, 155 Mont. 18, 466 P.2d 83 (1970).

41. *Id.* at 21, 466 P.2d at 84.

42. *See* MONT. R. CIV. P. 44.1, in MONT. REV. CODES ANN. § 93-2701 (Supp. 1971).

43. *See* text accompanying note 17 *supra*.

44. 22 N.Y.2d 346, 239 N.E.2d 550, 292 N.Y.S.2d 681, *cert. denied*, 397 U.S. 148 (1970).

45. N.Y. SURR. CT. PRO. § 2218 (McKinney Supp. 1971).

46. 22 N.Y.2d at 352, 239 N.E.2d at 553, 292 N.Y.S.2d at 685.

47. *Id.* at 351, 239 N.E.2d at 553, 292 N.Y.S.2d at 685. "Escheat" is the "reversion of property to the state in consequence of a want of any individual competent to inherit." BLACK'S LAW DICTIONARY 640 (rev. 4th ed. 1968).

It was only in a footnote that the court indicated that "the sweep of the [Zschernig] opinion *might suggest to some that in a later case the court might hold that in reality no such statute could ever be restricted to a 'routine reading'*,"⁴⁸ and, therefore, that such statutes are impossible of constitutional application.

The New York court also emphasized that the claimant in *Leikind* had "made no showing that the lower courts . . . have currently engaged in the conduct criticized"⁴⁹ in *Zschernig* as interfering with foreign relations. It is clear, however, that the *Zschernig* Court made no mention of the conduct of the Oregon courts in that particular case, but rather emphasized only the general tendency of probate courts across the country to interfere with foreign relations.⁵⁰ It was again, however, only in a footnote, that the court confessed that "certain of the examples cited by the Supreme Court in the *Zschernig* case as prohibited conduct purportedly occurred in New York courts . . ."⁵¹

It should be noted that lower courts in New York, even before the *Zschernig* decision, had begun to make distribution to certain Eastern European beneficiaries.⁵² The New York legislature reacted adversely to *Zschernig* by passing a new statute⁵³ which tied estate distribution to the practice of the United States Treasury Department in transmitting federal benefits, such as those from the Social Security Administration and from the Veterans Administration, to Eastern European beneficiaries.⁵⁴ However, this legislative attempt to further frustrate distribution met with little success, since the Soviet Union and most Eastern European countries, with the exception of Albania and East Germany, were soon removed from this "Treasury list."⁵⁵ Thus, even though New York's

48. 22 N.Y.2d at 352 n.2, 239 N.E.2d at 553 n.2, 292 N.Y.S.2d at 685 n.2.

49. *Id.* at 352, 239 N.E.2d at 553, 292 N.Y.S.2d at 685-86.

50. 389 U.S. at 440-41.

51. 22 N.Y.2d at 352 n.3, 239 N.E.2d at 553 n.3, 292 N.Y.S.2d at 686 n.3.

52. *See, e.g.,* Kina's Estate, 29 App. Div. 2d 563, 286 N.Y.S.2d 773, *aff'd*, 23 N.Y.2d 720, 244 N.E.2d 57, 296 N.Y.S.2d 366 (1967) (Poland); Krasowski's Estate, 28 App. Div. 2d 180, 283 N.Y.S.2d 960, *appeal denied*, 22 N.Y.2d 827, 239 N.E.2d 658, 292 N.Y.S.2d 919 (1967) (Poland); Padworski's Estate, 53 Misc. 2d 1043, 281 N.Y.S.2d 276 (Sur. Ct. 1967) (U.S.S.R.).

53. N.Y. SURR. CT. PRO. § 2218(1) (McKinney Supp. 1971) (effective June 22, 1968).

54. U.S. Treas. Dep't Circular 665, 31 C.F.R. § 211.2 (Supp. 1972). 31 U.S.C. § 123 (1970) provides, in relevant part, that:

[N]o check or warrant drawn against funds of the United States, or any agency or instrumentality thereof, shall be sent from the United States . . . for delivery in a foreign country in any case in which the Secretary of the Treasury determines that postal, transportation, or banking facilities in general, or local conditions in the country to which such check or warrant is to be delivered, are such that there is not a reasonable assurance that the payee will actually receive such check or warrant and be able to negotiate the same for full value . . .

55. Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, and the Union of Soviet Socialist Republics were dropped from the list on July 14, 1968. 33 Fed. Reg. 9708 (1968). Albania, communist-controlled China, Cuba, North Korea, North Vietnam, the Russian Zone of Occupation of Germany, and the Russian Sector of Occupation of Berlin, Germany, remain on the list. 31 C.F.R. § 211.2(a) (Supp. 1972).

“iron curtain” statute is formally still in effect, in practice, it does not prevent distribution to any socialist country.⁵⁶

A lower court case illustrating the limited area wherein Eastern European beneficiaries are still having some difficulty obtaining distribution in New York is *In re Becher*.⁵⁷ In *Becher*, an East German beneficiary personally appeared before the surrogate to claim funds. The claimant argued that, since the federal government allowed money to be paid to aliens if they appear in countries to which funds may be transmitted, the provision in the New York statute based on the Treasury regulation likewise was avoided by his appearance in the United States.⁵⁸ The surrogate disagreed, stating that “the Federal regulation and the New York statute are neither co-extensive nor do they necessarily have the same purpose.”⁵⁹ The court held that since the statute on its face applied to any alien legatee “domiciled or resident within” one of the proscribed countries, no exception could be judicially imposed in favor of one who temporarily left the place of his domicile or residence to collect such funds.⁶⁰ Although the claimant was found to have sustained his burden of proof in establishing that he would indeed have the use, benefit, and control of the funds, and although distribution was, in fact, made to him, the dicta of the court was clearly the same type of embarrassing opinionating which the Supreme Court criticized at length in *Zschernig*.⁶¹ In *Becher*, the surrogate stated:

Apparently, it is even possible for petitioner to engage in a small business even employing a few employees if he wishes, *though of course as I think is well known, Communist countries discourage or prohibit private enterprise that involves the employment — “exploitation” in their terms — of employees in commercial and economic enterprises, or private ownership of the means of production or distribution*

On the whole, I am satisfied that if petitioner is permitted to receive the . . . inheritance . . . he will have the use, benefit and control of that money roughly comparable, *within the limitations of the Communist system*, to the use, benefit and control of a similar amount in this country.⁶²

On the face of the statute, a nonresident alien claiming funds in New York must carry the burden of proving that he will enjoy the use, benefit, and control of the funds if distributed to him.⁶³ In reality, however, once “use, benefit and control” are established in a “test case,” the issue is not

56. Telephone interview with Robert J. Silberstein, Esq., Wolf Popper Ross Wolf & Jones, New York City, attorneys-in-fact for claimants in *Becher* and *Demczuk*, Oct. 6, 1972 [hereinafter cited as Silberstein Interview].

57. 61 Misc. 2d 46, 304 N.Y.S.2d 628 (Sur. Ct. 1969).

58. *Id.* at 48, 304 N.Y.S.2d at 629.

59. *Id.*

60. *Id.* at 48, 304 N.Y.S.2d at 630.

61. 389 U.S. at 437-39 n.8.

62. 61 Misc. 2d at 49, 304 N.Y.S.2d at 631.

63. N.Y. Surr. Ct. Pro. § 2218(1) (McKinney Supp. 1971).

retried in the absence of an offer of proof of change of condition or an offer of new evidence.⁶⁴

The Supreme Court of New Jersey, in *In re Kish's Estate*,⁶⁵ upheld the constitutionality of New Jersey's statute.⁶⁶ In doing so, it was, it is submitted, more honest to the *Zschernig* rationale than were the courts in Montana and New York. The *Kish* court admitted that "[t]here can be no doubt that the application of [the statute] by New Jersey courts in the past — and, indeed, in this very case — has been constitutionally erroneous under *Zschernig*."⁶⁷ According to its interpretation of *Zschernig*, New Jersey's statute was valid, but only (1) when transmission or delivery is prohibited by the federal government or (2) "where it is clear that receipt or use is forbidden or made impossible by the law of the beneficiary's country, in whatever form such law may take under that nation's governmental or jurisprudential system, to be ascertained by what Mr. Justice Douglas referred to as 'a routine reading of foreign laws'."⁶⁸ The court directed that probate courts not involve themselves in "matters of the practical administration of foreign laws, not prohibitory or confiscatory on their face."⁶⁹ Moreover, they should not predicate a decision on a comparison of political, social, or economic systems or take judicial notice of "common knowledge" of conditions in foreign countries.⁷⁰

The *Kish* court addressed itself to another recurring suggestion made when distribution to "iron curtain" beneficiaries is attempted. The New Jersey Attorney General had argued that the manner of transmission of funds to the Hungarian claimant would result in substantial diminution of the beneficiary's share, since more Hungarian forints to the dollar might be purchased on the so-called "free" or "black market" foreign exchange market in New York City than on the official, non-commercial rate of exchange established by Hungary.⁷¹ The court, noting that "[w]e do not think that the rate of exchange of dollars for local currency is ordinarily an appropriate consideration under *Zschernig*,"⁷² rightly held that "[n]o court of this state should be a party to a violation of foreign law by authorizing purchase of currency on the 'free' market for attempted transmission to a foreign nation in payment of a distributive share," since, in common with the foreign exchange regulations of many nations, it is illegal to bring or transmit forints into Hungary.⁷³ As with the New York court in *Becher*,⁷⁴ the New Jersey court held that:

64. Silberstein Interview, *supra* note 56.

65. 52 N.J. 454, 246 A.2d 1 (1968).

66. *Id.* at 466, 246 A.2d at 8. See N.J. REV. STAT. § 3A:25-10 (1953).

67. 52 N.J. at 468, 246 A.2d at 8-9.

68. *Id.* at 466, 246 A.2d at 8.

69. *Id.*

70. *Id.*

71. *Id.* at 469, 246 A.2d at 9.

72. *Id.*

73. *Id.* at 469-70, 246 A.2d at 9-10.

74. See note 57 and accompanying text *supra*.

[A]lthough the inclusion of a country on the Treasury list has been utilized as a basis for withholding distribution of estate shares, we do not consider this to be a valid basis for such action, so long as there are reliable means of delivery of private monies to the beneficiary in the particular country and the law of that country does not dictate confiscation.⁷⁵

The court correctly pointed out that the Treasury regulation does not constitute a prohibition with respect to nongovernmental funds, and noted specifically that it was not considered at all in the *Zschernig* opinion, in which the claimants were from East Germany, a country still on the list.⁷⁶ The court explained that Treasury determination might well "involve political or other considerations not relevant to remittances of private funds."⁷⁷ Thus, in New Jersey, although its custodial statute is nominally still valid, the burden of proof rests upon the party seeking to bring it into operation, and not on the foreign claimant.⁷⁸

Ohio has dealt similarly with its statute.⁷⁹ In *Mora v. Battin*,⁸⁰ Czechoslovakian heirs to an Ohio estate brought suit in federal district court, on behalf of all Czechoslovakian nationals similarly situated, against the probate judge of the county in which the decedent was domiciled at death challenging the constitutionality of the Ohio act. The defendant moved to dismiss the action as moot, submitting an affidavit to the effect that, in light of the *Zschernig* decision, he had abandoned "his practice of refusing, as a matter of policy, distribution of assets to heirs residing in Communist countries."⁸¹ His new policy, he averred, would be "simply to follow normal practices with respect to ascertaining the identity of foreign heirs and their right and ability to receive their distributive shares."⁸² The defendant-judge's representations as to his future conduct were not, of course, sufficient to render the controversy moot; not only were the plaintiffs entitled to more than such assurances, but the court pointed out that the defendant was required by his oath of office to uphold the law of Ohio and would be powerless to give such a guarantee of nonenforcement.⁸³ It was, therefore, specifically to prevent applications of the challenged provision "either in whole or in part, indirectly, or in a limited manner, in the future" that the court decided plaintiffs' case on the merits.⁸⁴ The Ohio court, mindful of *Zschernig*'s precise mandate, held its statute unconstitutional in part. To the extent

75. 52 N.J. at 470, 246 A.2d at 10.

76. *Id.*

77. *Id.*

78. *Id.* at 462, 246 A.2d at 8.

79. OHIO REV. CODE ANN. § 2113.81 (Page 1968).

80. 303 F. Supp. 660 (N.D. Ohio 1969). A three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284 (1970).

81. 303 F. Supp. at 661.

82. *Id.*

83. *Id.* at 662.

84. *Id.*

the statute called for a determination of lack of "benefit or use or control . . . because of circumstances prevailing at the place of residence"⁸⁵ of the payee and to the extent it required "an inquiry into the operations of the foreign government and into the political, economic, and social conditions prevailing in the foreign country," it was deemed invalid;⁸⁶ to the extent it merely directed the local court's attention to the statutory law of a foreign country, it was deemed valid.⁸⁷

California and Pennsylvania have followed the broader outline of the *Zschernig* doctrine. These states have adopted the position of Justices Stewart and Brennan, concurring in *Zschernig*, that such statutes were impossible of constitutional application. In every case they called for a *nisi prius* judge to evaluate economic systems of various foreign governments, and thus interfered with the exclusive right of the federal government to conduct foreign affairs.⁸⁸

California's reciprocity statute⁸⁹ had been upheld as constitutional on its face without any evaluation of the manner of its application in *Clark v. Allen*.⁹⁰ However, the California Court of Appeals held in *Estate of Kraemer*⁹¹ that, "under the same [*Zschernig*] rationale, section 259 of the Probate Code of the State of California, which is substantially a restatement of sub-division 1 of the Oregon Revised Statute, must also fall, and for the same reason."⁹² This is particularly appropriate in light of Justice Douglas' assertion, in distinguishing *Clark v. Allen* from *Zschernig*, that "had we been reviewing the later California decision of *Estate of Gogabashvele* . . . the additional problems we now find with the Oregon provision would have been presented."⁹³

In *Demczuk Estate*,⁹⁴ the Supreme Court of Pennsylvania, noting that "[c]onsiderable doubt concerning the constitutionality of the Iron Curtain Act was raised by the decision of the United States Supreme Court in *Zschernig v. Miller*, expressed its wish to "lay to rest any questions concerning the validity of the Iron Curtain Act of 1953."⁹⁵ The Attorney General of the Commonwealth had previously "conceded" that the act was unconstitutional.⁹⁶ "In the interest of clarification for bench and bar alike," the court straightforwardly declared the statute "constitutionally infirm."⁹⁷ As the court stated, there could be no serious ques-

85. OHIO REV. CODE ANN. § 2113.81 (Page 1968).

86. 303 F. Supp. at 664.

87. *Id.*

88. 389 U.S. at 442.

89. CAL. PROB. CODE § 259 (West 1956).

90. See text accompanying notes 11-34 *supra*.

91. 276 Cal. App. 2d 715, 81 Cal. Rptr. 287 (Ct. App. 1969).

92. *Id.* at 725, 81 Cal. Rptr. at 294.

93. 389 U.S. at 432 n.5 (citation omitted).

94. 444 Pa. 212, 282 A.2d 700 (1971).

95. *Id.* at 216, 282 A.2d at 701-02.

96. *Id.* at 216, 282 A.2d at 702.

97. *Id.*

tion but that the Pennsylvania statute had been unconstitutionally applied in the past;⁹⁸ for the future, the act would be "of no further force or effect in this Commonwealth."⁹⁹

Earlier, in *Krepinevich Estate*,¹⁰⁰ the same court had offered the Commonwealth, on remand, an opportunity to prove that the claimant therein would not have had the actual benefit, use, enjoyment, or control of the money or other property as required by the act, but warned that if the Commonwealth were to decide to raise the issue it should be prepared to argue the statute's constitutionality in light of *Zschernig*.¹⁰¹

Previously, in *Struchmanczuk Estate*,¹⁰² the Orphans' Court of Philadelphia County had held the act unconstitutional, relying on *Zschernig*. It should be noted that the Attorney General of the Commonwealth was represented in *Struchmanczuk* but took no appeal. In *Sapcaru v. Klein*,¹⁰³ a three-judge federal court dismissed as moot a suit to enjoin as unconstitutional the further use of the act on the stipulation of the Attorney General that he would take no appeal from the decision in *Struchmanczuk*. Similarly, other Pennsylvania orphans' courts had also ruled the act invalid.¹⁰⁴

The Pennsylvania Supreme Court in *Demczuk* did not simply stop with declaring the "iron curtain" act unconstitutional. It completely re-characterized the "unclean" status which a claimant residing in a communist country had had before the orphans' courts of Pennsylvania, thus removing any possible doubt as to the viability of the "iron curtain" act, regardless of how carefully it was applied. The court stated that a foreign claimant is "to be treated no differently than if he were living in a sister state . . ."¹⁰⁵ In *Demczuk*, decedent's son, being the sole legatee and residing in the Soviet Union, claimed funds on deposit with the Commonwealth. The lower court,¹⁰⁶ although accepting the unconstitutionality of the act, attempted to avoid distribution by imposing a traditionally more stringent burden of proof upon the Soviet claimant, while at the same

98. See *Belemecich's Estate*, 411 Pa. 506, 192 A.2d 740 (1963), cited in *Zschernig v. Miller*, 389 U.S. 429, 437-38 n.8 (1968). See generally Jones, *Iron Curtain Distributees: A Mounting Problem in Pennsylvania's Orphans' Courts*, 69 DICK. L. REV. 227 (1965); Jones, *Pennsylvania's Custodial Statutes: Orphans' Court Proceedings for Recovery of Nonescheated Funds*, 39 TEMP. L.Q. 153 (1966) (remarkably similar to his first-cited article, but with a procedural gloss); Snyder & Stander, *Distributive Rights of Foreign Beneficiaries as Affected by State Action — Recent Pennsylvania Developments*, 63 DICK. L. REV. 297 (1959).

99. 444 Pa. at 217, 282 A.2d at 703.

100. 433 Pa. 78, 248 A.2d 844 (1969).

101. Distribution was eventually made to decedent's widow, the claimant in *Krepinevich*, by decree of the lower court. *In re Estate of Krepinevich*, No. 418 (Orphans' Ct. Butler, May 26, 1972).

102. 44 Pa. D. & C.2d 155 (Orphans' Ct. Phila. 1968).

103. Civil No. 68-239 (E.D. Pa., Nov. 14, 1968).

104. See *Adams Estate*, 19 Fiduc. Rep. 442 (Orphans' Ct. Mont. 1969); *Kwiedorawicz Estate*, 19 Fiduc. Rep. 568 (Orphans' Ct. Schuyl. 1969); *Kuhn Estate*, 18 Fiduc. Rep. 396 (Orphans' Ct. Bucks 1968).

105. 444 Pa. at 218, 282 A.2d at 703.

106. 20 Bucks 218 (Orphans' Ct. 1970).

time denying letters rogatory¹⁰⁷ which might have enabled the claimant to meet such a burden.¹⁰⁸

Although the law pursuant to which funds were deposited with the Commonwealth indefinitely may no longer be employed in Pennsylvania, it is not clear whether probate judges, who have routinely applied the act in the past, will be anxious to apply the new law favoring distribution to Eastern European claimants. An attorney presenting a claim on behalf of a client residing halfway around the world, and with whom he has no personal, direct contact, has a uniquely difficult task. A judge at *nisi prius*, intent on frustrating distribution of funds behind what he still regards as an "iron curtain," can thwart distribution by imposing unreasonable requirements on proof of identity. Counsel, whose claim is based on foreign documents and whose only contact with his client is a signature on a power of attorney, faces evidentiary problems not common to most estate cases. Therefore, the remainder of this Comment will review, using Pennsylvania as an example, certain problems in identification of heirs, counsel's proof of authority to appear on an heir's behalf, and problems presently involved in collecting funds previously withheld.

The problem of proving the identity of foreign claimants in these cases has always posed a great problem for local counsel. It can easily be imagined how difficult it might be to satisfy a skeptic of one's identity were he to refuse to believe that one was in fact the person one claimed to be. The traditional burden of proof on foreign claimants in these cases derives from *Link's Estate*,¹⁰⁹ and has been followed in a line of Pennsylvania cases:¹¹⁰

[T]he evidence must be so *clear, precise and definite* in quality and quantity as to satisfy the court below that the relationship claimed existed.¹¹¹

107. A letter rogatory is "[t]he medium whereby one country, speaking through one of its courts, requests another country, acting through its own courts . . . to assist the administration of justice in the former country." BLACK'S LAW DICTIONARY 1050 (rev. 4th ed. 1968).

108. 20 Bucks at 222. Since the supreme court held the statute unconstitutional and found that claimant had established his identity and entitlement to the funds, it did not reach the issue as to whether denial of letters rogatory by the lower court constituted reversible error. It seems clear, however, that a resident of the U.S.S.R. is entitled to the use of letters rogatory in order to prove his claim in any American court. See *Execution of Letters Rogatory, Exchange of Notes with the Soviet Union*, Nov. 22, 1935, 49 Stat. 3840 (1935), E.A.S. No. 83. In particular, the agreement provided that "should a Soviet court encounter [difficulty in obtaining the execution of letters rogatory by American courts], my Government [United States] would, it is understood, upon its attention being drawn thereto through the diplomatic channel, consider what steps it might appropriately take with a view to eliminating further difficulty." *Id.* at Para. 1. Cf. PA. R. Civ. P. 4003, 4015. Thus, with regard to the Soviet Union, it would seem that any unusual requirements imposed by local probate courts would be violative of express national foreign policy. See also *Consular Convention with Russia*, June 1, 1964, [1968] 19 U.S.T. 5018, T.I.A.S. No. 6503 (effective July 13, 1968).

109. 319 Pa. 513, 522-23, 180 A. 1, 5 (1935).

110. See *Krepinevich Estate*, 433 Pa. 78, 248 A.2d 844 (1969); *Bokey Estate*, 412 Pa. 244, 194 A.2d 194 (1963); *Garrett Estate*, 371 Pa. 284, 89 A.2d 531 (1952); *Davis Estate*, 365 Pa. 605, 76 A.2d 643 (1950).

111. 319 Pa. at 522-23, 180 A. at 5 (emphasis added).

The nature of the burden of proof that a foreign claimant must establish is critical in that, if he fails to establish his "identity," even with the "iron curtain" act inoperative, his inheritance is deposited with the Commonwealth of Pennsylvania.¹¹²

In *Demczuk*, the decedent had a will leaving his entire estate to his son, whose name and address were recited therein.¹¹³ The court indicated that, in such a case, the "severe" burden of proof articulated in *Link's Estate* was inapplicable.¹¹⁴ Justice Roberts explained that in an intestacy, a claimant must prove both (1) that the decedent died survived by qualified statutory heirs and (2) that he is one of such heirs.¹¹⁵ In a will case, however, the existence of an heir is attested to by the will, and the claimant need only establish that he is that heir. The "clear, precise, and definite" standard is, therefore, "inappropriate."¹¹⁶ The absence of an adverse claimant over a long period of time itself constitutes an item of evidence in favor of a claimant.¹¹⁷ This fact is particularly significant in these cases, since in a great many estates the same people have sought their inheritance over a period of twenty years or more.¹¹⁸ A claimant under a will need simply prove "by a preponderance of competent evidence" that he is, in fact, the individual named in the will.¹¹⁹

A related aspect in the representation of "iron curtain" claimants is that even an attorney's authority to act on behalf of his client may be questioned. Although attorneys who have been admitted to the bars of the various counties as officers of the court regularly appear on behalf of estate claimants without proof of any authority to act on behalf of anyone, in "iron curtain" cases some probate courts continue to question

112. See Act of Apr. 9, 1929, Pamph. L. 343 § 1314 (repealed by Disposition of Abandoned and Unclaimed Property Act, PA. STAT. tit. 27, § 1-30(a) (5) (Supp. 1972)). The relationship of the Act of 1929 to the "iron curtain" act is set forth in *Bokey Estate*, 412 Pa. 244, 253-54, 192 A.2d 194, 198-99 (1963):

The legislative intent in the 1953 statute is clear; authority was thereby conferred upon a court to withhold the distribution of property to persons behind the Iron Curtain where the court is convinced that the "beneficiary would not have the actual benefit, use, enjoyment or control of . . . the property to be distributed." To bring into play the 1953 Act two conditions must be established; (1) the identity of the person or persons entitled to distribution and (2) a conviction on the part of the court that, if the property is distributed, such person or persons will not receive the actual benefit, use, enjoyment or control of the property.

The Act of 1929 applies (a) where moneys have not been awarded, i.e., where there is a possibility of heirs but their identities have not been established, or (b) where moneys have been awarded but the whereabouts of the heirs are unknown, i.e., where the identities of the heirs but not their whereabouts have been established.

Application of the Act of 1929 has, in fact, generally only come about where no claim was made by counsel for the heirs at the audit. Interview with James Francis Lawler, Esq., counsel for claimants in *Demczuk*, in Philadelphia, Sept. 23, 1972 [hereinafter cited as Lawler Interview].

113. 444 Pa. at 213-14, 282 A.2d at 701.

114. *Id.* at 217-18, 282 A.2d at 703.

115. *Id.* at 218, 282 A.2d at 703.

116. *Id.*

117. *Id.*

118. Lawler Interview, *supra* note 112.

119. 444 Pa. at 218, 282 A.2d at 703.

an attorney's standing, even when presented with a duly executed power of attorney authenticated by a United States Consul."¹²⁰ The Pennsylvania courts have consistently held that such a power of attorney proved "nothing more than that the person signing the document claimed to be the person whose name he signed unless there is additional corroborative evidence . . ."¹²¹ Although the weight to be given such a power of attorney on the issue of identity was thus severely limited, it is interesting to note that *Bokey Estate*,¹²² from which the doctrine stems, was, in fact, a victory for the Soviet heirs involved. The appeal in *Bokey* was by a local resident claiming to be a first cousin whose claim had been rejected in the lower court. Even while holding that the Soviet claimants had not established their own entitlement to the funds, the supreme court did find that their claim was sufficiently proven to deny the funds to the appellant.

Demczuk also represents a major step forward in this area. The power of attorney of the decedent's son in *Demczuk* contained a certificate of acknowledgment executed by the United States Consul at Moscow in which he certified that "before me personally appeared [the claimant] to me personally known and known to me to be the individual described in, whose name is subscribed to, and who executed the annexed instrument."¹²³ The court indicated that such an acknowledgment was not merely the "official act of a foreign notary . . . authenticated by the local American consul . . . but rather one where the Consul himself has certified that he personally knows the individual in question. . . . This particular certificate is of significant probative value in determining claimant's identity."¹²⁴ Although the court relied heavily on the power

120. Lawler Interview, *supra* note 112.

121. *Krepinevich Estate*, 433 Pa. 78, 85, 248 A.2d 844, 847 (1969). See *Bokey Estate*, 412 Pa. 244, 251-52, 194 A.2d 194, 198 (1963); *Slotkin's Estate*, 40 Pa. D. & C.2d 334, 339 (1965), *aff'd per curiam*, 423 Pa. 628, 222 A.2d 597 (1966); *Malika's Estate*, 31 Pa. D. & C.2d 736, 739 (1963).

122. 412 Pa. 244, 194 A.2d 844 (1969).

123. 444 Pa. at 219-20, 282 A.2d at 704. 22 C.F.R. §§ 92.30 *et seq.* (Supp. 1972), provides, in relevant part, as follows:

§ 92.30 Acknowledgment defined.

An acknowledgment is a proceeding by which a person who has executed an instrument goes before a competent officer or court and declares it to be his act and deed, to entitle it . . . to be received in evidence without further proof of execution . . .

§ 92.31 Taking an acknowledgment.

(c) Satisfactory identification of grantor(s). The consular officer must be certain of the identity of the parties making an acknowledgment. If he is not personally acquainted with the parties, he should require from each some evidence of identity, such as a passport, police identity card, or the like. . . . Mere introduction of a person not known to the notarizing officer, without further proof of identity, is not considered adequate identification for acknowledgment purposes.

124. 444 Pa. at 220, 282 A.2d at 704, *citing* Act of April 27, 1876, PA. STAT. tit. 28, § 223 (1958), which provides that the official acts and exemplifications of foreign notaries in accordance with the laws of their respective countries, authenticated by the local American consul, "shall be prima facie evidence of the matter therein set forth." The Act has been construed to refer solely to the matters set forth by the notary, and not to those of the affiants, since the notary's authority is simply to certify the fact of execution. *Bokey Estate*, 412 Pa. 244, 251-52, 194 A.2d 194, 198 (1963), *citing* Act of July 24, 1941, PA. STAT. tit. 21, §§ 291.4, 291.5 (1955).

of attorney executed personally before the United States Consul, it did not hold such a power to be a necessary item of proof in all such cases. It is submitted that it would be neither realistic nor fair to demand, as a rule in these cases, powers executed before the Consul. At present, the United States maintains only one consulate in the Soviet Union, and that is in Moscow.¹²⁵ It would not be feasible for a claimant of a smaller estate to make the journey from his village to Moscow — sometimes thousands of miles across the Soviet Union — to obtain a relatively small legacy.

Closely related to the problem of establishing "identity" are evidentiary questions regarding the admissibility and weight to be accorded documents and affidavits prepared in foreign countries. Quite often a claimant's case is based entirely on documents of vital statistics, often necessarily reconstructed because of destruction of archives during the wartime period, and on statements concerning the family of the decedent by disinterested residents from the village of the decedent's emigration. In *Link's Estate*,¹²⁶ the court rejected such ex parte affidavits as incompetent, holding them to be "generally inadmissible as not being the best evidence, especially when the persons making them are living and able to testify either in court or by deposition."¹²⁷ The estate left by Link was, in the court's opinion, "well worth a trip from Germany . . . if [claimants] had sufficient faith in their cause . . ."¹²⁸ Direct testimony, the court advised, should be insisted upon in pedigree cases: "If a chain of relationship [could] be built up through birth certificates and ex parte statements, as offered here, there would be no escheated estates in Pennsylvania."¹²⁹

In *Bokey Estate*, the court rejected a letter, from one of the claimants to her counsel, dated after the death of the decedent, which it considered to be "obviously a self-serving, ex parte statement . . . clearly inadmissible in evidence."¹³⁰ Emphasizing the importance of the right to confrontation of witnesses — to test by cross-examination the reliability of the

125. Lawler Interview, *supra* note 112.

126. 319 Pa. 513, 180 A. 1 (1935).

127. *Id.* at 519, 180 A. at 4.

128. *Id.* The dissenting opinion of Justice Maxey explained, however, that affiants were 66, 69, and 81 years of age at the time of making their affidavits:

It is easily understandable that these persons may have been unable, physically or financially to have made the tedious and expensive trip to the United States from Germany to testify in this proceeding.

Id. at 542-43, 180 A. at 14.

In larger estates it was often requested that the heirs present themselves in person before the court, and the circumstances of old age, illness, and fear of traveling abroad often made it difficult to convince claimants to make the trip. Lawler Interview, *supra* note 112.

129. *Id.* at 522, 180 A. at 5. Pedigree may be proved by certain limited types of hearsay evidence, including *inter alia* church records, birth, baptismal, marriage, and death certificates, family Bibles, ancient documents, tombstones or monuments on graves with inscriptions thereon, and declarations of members of the family. See 5 J. WIGMORE, EVIDENCE § 1495 (3d ed. 1940). Identity of names, religion, and place of nativity are competent evidence to show kinship or pedigree, but alone and of themselves are insufficient to establish a finding of kinship. Garrett Estate, 371 Pa. 284, 287-88, 89 A.2d 531, 532 (1952).

130. Bokey Estate, 412 Pa. 244, 252, 194 A.2d 194, 198 (1963).

evidence given and to enable the court to see and observe the witness to better test his credibility, the court directed that "no consideration whatever" should have been given to the contents of a letter which "by its very nature . . . could not be received into evidence nor made the basis for any findings."¹³¹

The lower court in *Demczuk* had before it the standard documentation in these cases — copies of birth, death, and marriage certificates, and affidavits of heirship executed by members of the village in which decedent's family resided. The handwriting on a series of three successive powers of attorney was identifiably the same. The attitude of the lower court was clear from its remarks: "three times zero is still no more than zero;" the vital statistics certificates were only copies (*i.e.*, not the original volumes from the belly of archives in the breadbasket of the Soviet Union); and the affidavits were suspect because made in similar language (indicating presumably an assembly-line production of documents in order to purloin estate funds from the coffers of the state treasury).¹³² The Pennsylvania Supreme Court's attitude was markedly more receptive:

While these pieces of evidence viewed separately might not establish claimant's identity beyond a reasonable doubt, in the aggregate they are sufficient to satisfy the requisite burden¹³³

It seems clear, after *Demczuk*, that courts at nisi prius in Pennsylvania may no longer rule inadmissible nor discredit the value of this type of foreign evidence. Where corroborated by testimony of local heirs or friends of the decedent or where "real evidence," such as letters from the decedent in possession of the claimants, or to the decedent found among his effects, such additional documentary evidence should be conclusive.

IV. DISTRIBUTION DENIED AND DELAYED

Obtaining payment of funds which are on deposit with the Commonwealth of Pennsylvania pursuant to an admittedly unconstitutional statute has been more difficult than might be expected. A suit following the most direct route, an assumpsit action against the Commonwealth in the newly created commonwealth court, was dismissed in *Kremin v. Commonwealth*.¹³⁴ The court, while acknowledging the unconstitutionality of the statute,¹³⁵ held that its provisions pertaining to methods and procedures for the repayment of such funds from the state treasury were fully applicable, a conclusion no longer tenable.¹³⁶ In addition, the court held

131. *Id.* at 253, 194 A.2d at 198.

132. 444 Pa. at 221 n.6, 282 A.2d at 704 n.6.

133. *Id.* at 221, 282 A.2d at 704-05.

134. 1 Pa. Comm. 642 (1971). Distribution has since been made to the decedent's widow, claimant in *Kremin*, in *In re Estate of Kreminy*, No. 1128 of 1961 (Orphans' Ct. Alleg., Jan. 10, 1972).

135. *Id.* at 645 n.*.

136. The Act has since been repealed *in toto*. See note 140 *infra*.

that it did not have jurisdiction over such an action due to the Commonwealth's immunity from suit.¹³⁷ Justice Manderino, in his dissent, termed such a denial of a forum to the decedent's widow, whose funds the Commonwealth had taken "without just compensation," an imposition of a "confiscatory shield:"

Legislative permission to sue the Commonwealth certainly is unnecessary when the Commonwealth is holding property which does not belong to the Commonwealth and a claim is made that the property belongs to the individual bringing suit to recover the property.¹³⁸

The court refused to assert its jurisdiction, in spite of the fact that the Appellate Court Jurisdiction Act of 1970¹³⁹ vested jurisdiction of "all civil actions and proceedings against the Commonwealth" in the commonwealth court.

The "iron curtain" act itself provided that "[a]ny beneficiary or person, legally entitled to" any money paid into the state treasury under the act might "at any time" apply for distribution from the court which had directed such payment.¹⁴⁰ Upon satisfactory proof of his entitlement and that he would have "actual possession, benefit, use, enjoyment or control" of the funds, the court was empowered to order payment out of the state treasury, with interest at two per cent (2%) from date of deposit to date of distribution.¹⁴¹ Where funds have been previously awarded to a nonresident alien pursuant to the act, his identity and whereabouts have already been established. In such a case, the funds would have been distributed to him but for the alleged lack of benefit, use, or control.¹⁴² Now that the use, benefit, and control restrictions are invalid, a subsequent claim by that person should involve no issue which would call for the expertise of a probate court. The claim would be in the nature of a claim on a savings bank for funds deposited with the institution in one's own name.

In 1946, when Churchill coined the phrase, there was some justification for his metaphor of the "iron curtain." There was a period when little communication could be had with residents of Eastern European countries; in fact, some local relatives requested that no letters of inquiry be sent to their kin in "the old country," because the idea prevailed that correspondence with capitalist countries might arouse the disfavor of the government.¹⁴³ But the "iron curtain" exists today only as a border, across which trade and commerce and all the elements of human society

137. 1 Pa. Comm. at 646.

138. *Id.* at 648.

139. PA. STAT. tit. 17, § 211.401(a)(1) (Supp. 1972).

140. Act of July 28, 1953, Pamph. L. 674, § 4 (repealed by Probate, Estates and Fiduciaries Code, PA. STAT. tit. 20, § 3 (effective July 1, 1972)).

141. *Id.*

142. See note 112 and accompanying text *supra*.

143. Lawler Interview, *supra* note 112.

may pass. The goal must be to treat foreign claimants to American estates equally, whether from Ireland, Israel, or the Soviet Union.

There is a paradigm for the facts of these cases: a Russian peasant emigrates from Russia to the United States at the time of the Revolution of 1917 intending to work and save so that his family might follow; he arrives in the United States, finds a job as a laborer, and lives frugally while amassing a small estate until his family can join him. It is the probate courts' responsibility to those men to insure that their estates, the products of a life of self-denial, are distributed to their kin. In many of the estates in which the reported cases denied distribution, the judiciary has since yielded to the spirit of *Zschernig*.¹⁴⁴ Time has worn holes in the rhetorical "iron curtain," and has metamorphosed it, for the purpose of estate distribution at least, into a harmless, neighborly cyclone fence.

Denis James Lawler

144. See, e.g., Bokey Estate, 412 Pa. 244, 194 A.2d 194 (1963), *distributed*, No. 139 of 1960 (Orphans' Ct. Lack., Sept. 9, 1972); Hryszko's Estate, 27 Leh. Co. L.J. 39 (Orphans' Ct. 1957), *distributed*, No. 43109 (Feb. 14, 1972); Kulchinsky's Estate, 37 Pa. D. & C.2d 633 (Orphans' Ct. Phila. 1966), *distributed*, No. 2445 of 1964 (Nov. 18, 1968); Mackarus Estate (No. 3), 41 Pa. D. & C.2d 267 (Orphans' Ct. Phila. 1967), *distributed*, No. 3494 of 1962 (June 10, 1971); Malika's Estate, 31 Pa. D. & C.2d 736 (Orphans' Ct. Phila. 1963), *distributed*, No. 2402 of 1946 (Oct. 20, 1970); Martinzik Estate, 25 Pa. D. & C.2d 701 (Orphans' Ct. Phila. 1962), *distributed*, No. 587 of 1953 (May 8, 1970); Prusak's Estate, 20 Pa. D. & C.2d 329 (Orphans' Ct. Phila. 1964), *distributed*, No. 2728 of 1959 (Aug. 2, 1972); Slotkin Estate, 40 Pa. D. & C.2d 334 (Orphans' Ct. Phila. 1965), *distributed*, No. 2062 of 1957 (Oct. 30, 1970); Soter's Estate, 34 Pa. D. & C.2d 1 (Orphans' Ct. Phila. 1964), *distributed*, No. 689 of 1960 (Nov. 14, 1968); Zupko's Estate, 15 Pa. D. & C.2d 442 (Orphans' Ct. Phila. 1959), *distributed*, No. 2405 of 1957 (Oct. 8, 1968).