Buffalo Law Review

Volume 12 | Number 1 Article 53

10-1-1962

Taxation—Apportionment of Estate Taxes Among Individual And Charitable Legatees

Walter W. Miller Jr.

since it has modified the common law rule. The minority view would call for an extension of the scope of the notice which under a restrictive interpretation would appear to be unwarranted. The protection afforded by lis pendens would not aid the plaintiff in this matter. As hereinbefore mentioned, whether the lis pendens is continued or not will have no bearing on the effectiveness of the court's decision concerning the nuisance, and plaintiff's rights acquired by a favorable judgment can not be lost by a transfer of defendant's interests. Conversely, the notice to a purchaser of the encroachment is obvious without the aid of a pendency in action. The Court's construction of the word "use" is reasonable. If it is extended, as the minority advocates, to cases where the claim is simply a nuisance, the door will be open for its use in all cases, with the attendant ill of injuring marketability, even where the cause of action is remotely associated with the land, since the possession and title to the land are not crucial to the judgment. This would not be consonant with the purposes of the statute to prevent the alienation of the res, which would cause the decision to be ineffective. Certainly it would benefit both the litigants and the bench to take notice of the advantageous results of a lis pendens order, such as putting a purchaser on notice by making plaintiff's claim a public record for all to see. However, as previously mentioned, affirming the order would not effectuate the relevant considerations.

G. S. L.

TAXATION

APPORTIONMENT OF ESTATE TAXES AMONG INDIVIDUAL AND CHARITABLE LEGATEES

A codicil to a will provided that all taxes, including those on $1,050,000 in pre-residuary gifts, were to come from the $17,500,000 residue. The residue was to be equally divided between a charitable trust, which enjoyed a charitable exemption, and three individual trusts. Section 124 of the New York Decedent Estate Law provides that, where express provisions of the will are not to the contrary, the residue will be apportioned and taxes paid out of the individual gifts. Surrogate's Court held that section 124 applied to the estate and death taxes attributable to the residue, and also that income during the time that the estate was being settled be paid according to ratios established after apportionment and tax. A provision of the will directed that taxes on pre-residuary gifts be deducted from the residuary estate prior to computation of residuary shares. The intermediate court modified the Surrogate's Court determination by ordering that during the period of administration, the ratios set up in the will be used to determine the payment of income in accordance with section 17-b of the New York Personal Property Law. On appeal, *held*, affirmed. The testator did not expressly state that he did not want section 124 to apply and thus did not rule out apportionment. So, apportionment must

stand. Income will be distributed as determined by the intermediate court. *In the Matter of the Will* of *Shubert*, 10, N.Y.2d 461, 180 N.E.2d 410, 225 N.Y.S. 2d 13 (1962).[1]

Section 124 of the New York Decedent Estate Law provides that federal and state estate taxes be apportioned among the legatees and devisees in the proportion that the value of the property left to each bears to the value of the whole of the property. This rule does not apply if the testator directs otherwise in his will. Also, any exemption or deduction which the law allows because of the charitable purposes of the gift goes to the benefit of the person receiving such charitable gift. Thus, if the statute applies and part of the estate goes to a non-taxable charity or foundation or person, all of the estate taxes, though their total would be substantially reduced, would have to be paid by the other devisees of the estate. Because the amount payable by the taxable recipients of property would probably be higher in such a case, these persons try to reduce their share of the tax load by endeavoring to show that section 124 does not apply. Non-taxable recipients attempt to apply the statute and escape tax liability by receiving their shares before the tax is assessed. The burden of proof is on him who wishes to show that the statute does not apply.[2] By the language of the will a testator may place the tax burden on one who would normally be exempt, but the Court will not assume such intent. Thus, a husband leaving property to his widow and two sisters may burden the widow by specifically stating that section 124 does not apply and in this way causing the whole amount to be taxed and the widow to pay her share. If he does not so state, the widow is exempt, and the sisters pay all applicable estate taxes.[3] To determine whether testator meant section 124 to apply, the Court must look for an unambiguous direction, and look at the will as a whole.[4] When equality is spoken of, that is, equality of shares, this does not necessarily mean equality of tax burden. It may simply mean dividing the whole amount, before any taxes, and then deducting applicable taxes only from the taxable shares.[5] In the instant case, equality prior to tax is termed "gross equality"; equality after tax as "net equality." Income distribution makes up the second major point in the case. Two factors are paramount. Simplicity of accounting procedures[6] and the intention of the testator as expressed in the proportions set up by him in the will[7] require distribution of income according to the ratios in the will, not according to constantly changing estimates of what each share of the residue

1. Affirming 10 A.D.2d 823, 200 N.Y.S.2d 349 (1st Dep't 1960).
2. In the Matter of the Estate of Pepper, 307 N.Y. 242, 250, 120 N.E.2d 807, 811 (1954).
3. In the Matter of the Estate of Pepper, 307 N.Y. 242, 120 N.E.2d 807 (1954).
4. Id. at 251, 120 N.E.2d at 811.
5. In the Matter of the Estate of Williams, 12 Misc. 2d 136, 176 N.Y.S.2d 895 (Surr. Ct. 1958).
6. Id. at 139, 176 N.Y.S.2d at 899.
7. In the Matter of the Estate of Mattes, 12 Misc. 2d 502, 172 N.Y.S.2d 303 (Surr. Ct. 1958).

will be worth after tax. The intention of the testator regarding residue and income during administration is what the Court strives to discover.

In the instant case, the Court held without dissent in favor of statutory apportionment. It stated that the testator is presumed to know the law and the impact of estate taxes. "Since he did not expressly make a direction against apportionment within the residuary, he must be presumed to have intended 'gross equality' or equality prior to taxes . . . ."[8] To determine this intention the Court first looked to the words of the will. It also looked at the whole will, including earlier provisions which were overruled by codicils. Discussing the use of the word "equal" in an earlier provision, the Court pointed out that because all beneficiaries would have been subject to tax and would have enjoyed equality after tax, does not mean that the intention of the testator was that all should share equally in the residue after tax according to the final testamentary scheme. Indeed, the Court stated that his creation of a charitable trust and his change of the prior provision indicates an intention to favor this trust. This seems to be reinforced in the Court's reasoning by the fact that the individuals for whom trusts are set up are "collateral relations." These persons, under the codicil, receive no portion of the remainders or principal of the residuary estate which all goes to the charitable trust; under the original will, the individual income beneficiaries received remainders; the charitable foundation received only a contingent remainder in each case. The Court therefore found that the testator intended to favor the foundation and that to benefit it he permitted section 124 to apply, with the result that the foundation would receive its share of the residuary estate before any taxes were assessed. During this period, however, the income would be distributed one half to the charitable trust, the other half to the individual trusts. The Court found that one ratio for distribution was intended by the statute (Personal Property Law section 17-b) and also that this would simplify accounting procedures and save expense to beneficiaries.

The need to make a testator's intention unmistakably clear is underlined by this case. The draftsman should specifically state the testator's intention regarding section 124. In the instant case, recipients of individual trusts drew their arguments from the results which would follow if section 124 was applied. They showed that this would reduce the value of the individual trusts and implied that it must have been the intent of the testator to favor individuals over a charitable trust for a foundation. The Court, looking at the will, determined that testator probably favored the foundation and made no mention of section 124 so that it would apply. In any event, if no mention is made, the Court presumes that testator knows about it and wants the section to apply.

W. W. M. Jr.

8. In the Matter of the Will of Shubert, 10 N.Y.2d 461, 473, 180 N.E.2d 410, 416, 225 N.Y.S.2d 13, 21 (1962).

TORTS

CONTRACTOR HELD ACTIVELY NEGLIGENT AS A MATTER OF LAW AND NOT ENTITLED TO INDEMNIFICATION FROM SUB-CONTRACTOR

Defendant Shulman (hereinafter called contractor) entered into a contract with defendant, Board of Education of the City of New York, to renovate certain rooms in a public school in the Bronx. In order to facilitate the work, contractor erected a boom which was suspended over the school play yard from a fourth floor window. To remove rubbish accumulated in the work area, contractor hired Andrew Bedden (hereinafter called sub-contractor). Contractor knew that the usual way of removing debris on this type of job was by use of a boom, that sub-contractor had used booms on other jobs, and that the boom constructed in the school was available for sub-contractor's use. Contractor did not mention safeguards to be used on the job. Reporting to the school, sub-contractor was directed to the fourth floor where the rubbish was located. Shortly thereafter, infant plaintiff, while "spinning his top" in the school play yard during recess, was hit on the head by a falling board. Plaintiff sued contractor and the Board of Education to recover damages for his personal injuries. Contractor commenced a third-party action against sub-contractor for common-law indemnification, but this complaint was dismissed as a matter of law. The jury then returned an award of $120,000 for the plaintiff. The Appellate Division unanimously affirmed the award but reversed, by a divided court, the dismissal of the third-party complaint.[1] On appeal by the sub-contractor to the Court of Appeals *held*, reversed, one judge dissenting. Under the facts and circumstances of this case, the failure of contractor to provide the required safeguards in an area of known inherent danger and his failure to correct the dangerous situation which he created was active negligence. *Colon v. Board of Educ.*, 11 N.Y.2d 446, 184 N.E.2d 294, 230 N.Y.S.2d 697 (1962).

Where the negligence of two or more persons concur to produce a single indivisible injury to a third party, all the wrongdoers are jointly and severally liable for the entire damage. In such a case if a *joint* money judgment is recovered, and one tort-feasor pays more than his *pro rata* share, he may obtain contribution from the other tort-feasors who were joined in the action.[2] Often, however, a wrongdoer will seek indemnity rather than contribution. The reason for this is that in contribution the loss is shared among the several wrongdoers, whereas if indemnity is obtained, a total shifting on the entire economic loss from one wrongdoer to another will be accomplished. Legally, contribution and indemnity are distinguished by the element of equal fault. If the parties are in pari delicto, indemnity will not be available. However, if it can be shown that one party is an active wrongdoer while the other is merely a passive wrongdoer, then a right to indemnity will arise in favor of the latter

1. 14 A.D.2d 842, 220 N.Y.S.2d 875 (1st Dep't 1961).
2. N.Y. Civ. Prac. Act § 211(a).