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Decedent Estates—Testamentary Capacity

Harry T. Dixon

part which may be construed as making Section 524-a referable to the procedure prescribed in Section 751, the provision for cure is inapplicable.[119] And the court further pointed out (2) that under Section 524-a, the express relation to the correction of errors in a case is confined to those instances where appeal is perfected by service of notice of appeal, whereas Section 751 expressly provides for effectuation of appeal by filing and service of an affidavit of errors.

VI. Decedent Estates

Testamentary Capacity

At common law, communications made by a patient to his physician for the purpose of receiving medical aid, even though made in the strictest confidence, were not privileged.[1] Consequently in 1828 the Legislature enacted what is now Section 352 of the Civil Practice Act, which created a privilege between physician and patient. This section provides, "a person duly authorized to practice physic or surgery, or dentistry, or a registered professional or licensed practical nurse, shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity . . ."

Courts construed this statute so as to preclude a physician from testifying even as to knowledge gained from observation of his patient's appearance during the period of attendance.[2] However a doctor could testify concerning the condition of a person where he did not attend him professionally.[3]

Judge Earl in *Renihan v. Dennin*,[4] commented on this construction and said "It is probably true that the statute, as we feel obligated to construe it, will work considerable mischief. In testamentary cases, where the contest relates to the competency of the testator it will exclude evidence of physicians, which is generally the most important and decisive . . . But the remedy is with the Legislature and not with the courts." Judge Earl later

119. See *People v. Cornell*, 186 Misc. 825, 59 N. Y. S. 2d 835 (Delaware County Ct. 1946).

1. *Dutchess of Kingston's Case*, 20 How. St. Tr. 613 (1776); *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564, 569 (1879).
2. *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185 (1876); *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281 (1880); *Renihan v. Dennin*, 103 N. Y. 573, 9 N. E. 320 (1886).
3. *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564 (1879).
4. 103 N. Y. 573, 580, 9 N. E. 320, 322 (1886).

advanced the view that the privilege should not prohibit a physician from testifying at least as to those observations which a lay person might testify to.[5]

To obviate these difficulties the Legislature in 1891 enacted what is now Section 354 of the Civil Practice Act which provides for a complete waiver by the patient and partial waiver by the patient's representatives where he is deceased.[6] Where the representative[7] of the decedent waives the privilege the statute provides that the "physician or surgeon may . . . disclose any information as to the mental or physical condition of a patient who is deceased which he acquired in attending such patient professionally, *except confidential communications and such facts as would tend to disgrace the memory of the patient.*" [Emphasis added.]

This was the state of the law when the case of In re *Coddington's Will,*[8] reached the Court of Appeals. Here the testamentary capacity of the testatrix was in dispute. An objection was interposed when the physician of testatrix was asked about her mental condition. This put in issue the meaning of "confidential communications" as expressed in Section 354. The court relied on In re *Cashman's Will,*[9] and held that the Legislature intended to adopt the suggestion of Judge Earl in the *Eddington,*[10] *Grattan*[11] and *Renihan*[12] cases, viz., that physicians be permitted to testify in such cases of limited waiver only to what they could have noticed as laymen.[13]

Since the physician is the one person who can best tell the condition of the patient it would seem that the construction of the court restricts the scope of the statute unnecessarily and renders it practically worthless. In addition it seems unlikely that the Legislature intended to put a more stringent restriction on the testimony of a physician than that of a layman, yet this is its

5. *Edington v. Aetna Life Ins. Co.,* 77 N. Y. 564, 571 (1879).

6. *Mulligan v. Sinski,* 156 App. Div. 35, 38, 140 N. Y. Supp. 835, 838 (2d Dep't 1913), *aff'd,* 214 N. Y. 678, 108 N. E. 1101 (1915). "The power of a personal representative . . . is not as broad as that of the patient himself."

7. C. P. A. § 354, allows waiver on trial ". . . if the validity of the last will and testament of such deceased patient is in question, by the executor or executors named in said will, or the surviving husband, widow or any heir at law or any of the next of kin, of such deceased, or any other party in interest."

8. 307 N. Y. 181, 120 N. E. 2d 777 (1954).

9. 159 Misc. 881, 289 N. Y. Supp. 328 (Surr. Ct. 1936), aff'd, without opinion 250 App. Div. 871, 297 N. Y. Supp. 150, (2d Dep't 1937), *aff'd without opinion,* 280 N. Y. 681, 21 N. E. 2d 193 (1939).

10. *Edington v. Mutual Life Ins. Co.,* 67 N. Y. 185 (1876).

11. *Grattan v. Metropolitan Life Ins. Co.,* 80 N. Y. 281 (1880).

12. *Renilan v. Dennin,* 103 N. Y. 573, 9 N. E. 320 (1886).

13. *But cf. Holcomb v. Harris,* 166 N. Y. 257, 59 N. E. 820 (1901); *Murry v. Physical Culture Hotel,* 258 App. Div. 334, 17 N. Y. S. 2d 862 (4th Dep't 1939); *Matter of Cleveland's Will,* 273 App. Div. 623, 78 N. Y. S. 2d 897 (3rd Dep't 1948).

effect, i. e., not only is he restricted to matters which a layman could observe but in addition he may not give any testimony which would tend to disgrace the memory of the patient.[14]

Estate Tax

a. *Effect of taxes on elective share:* A widow electing to take against the will of her deceased husband is granted her share of the estate as in intestacy, "but shall in no event be entitled to take more than one half of the net estate of the decedent *after* the deduction of . . . *any* estate tax."[15] [Emphasis added.]

If the testator makes no provision for the payment of estate taxes, the burden of the tax is apportioned among the beneficiaries and "any exemption or deduction allowed under the law imposing the tax by reason of the relation of any person to the decedent . . . shall inure to the benefit of the person bearing such relationship."[16] Thus, to the extent of the state and federal marital deductions,[17] a widow is to be unaffected by taxes on the estate.

The conflict with the election statute which, literally read, imposes a tax burden on an electing widow by requiring deduction of taxes on the estate as a whole before calculating the maximum elective share, was recently resolved by allowing the apportionment statute to control.[18] As the widow's share added nothing to the total tax burden, the maximum limitation was calculated *before* deducting any estate taxes.[19]

The court held that the statutes must be read together, and since the purpose of each is to increase the share of a surviving spouse,[20] they must be so interpreted. Therefore "any estate tax" refers to the tax allocable to the widow's share.[21]

The dissent insists that only the Legislature can make "before taxes" mean "after taxes."

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14. See dissent of Judge Van Voorhis in instant case.
15. DECEDENT ESTATE LAW § 18(1)(a).
16. DECEDENT ESTATE LAW § 124(3).
17. TAX LAW § 249-s (4) (a); INT. REV. CODE § 812(e).
18. In re *Wolf's Estate,* 307 N. Y. 280, 121 N. E. 2d 224 (1954); noted in Appellate Division stage, 3 BFLO. L. REV. 328 (1954).
19. This also has the effect of reducing the total tax burden on the estate.
20. See *Matter of Byrne's Will,* 260 N. Y. 465, 472, 184 N. E. 56, 58 (1933) (relative to section 18); COMBINED REPORTS OF COMMISSION TO INVESTIGATE DEFECTS IN THE LAW OF ESTATES, 1928-1933, 338 (Reprint ed.) (relative to section 124).
21. Where the apportionment statute is not applicable, (as where the testator provides that taxes be paid from the residuary estate), the maximum limitation is calculated *after* the deduction of taxes. In re *Ryan's Will,* 280 App. Div. 410, 114 N. Y. S. 2d 1 (1st Dep't 1952). (Cited with approval in the instant case.)