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Decedent Estates—Wrongful Death Actions

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If a transfer has been made which will benefit others upon the death of the transferor, it is taxable.[26] This principle has been applied in cases involving commercial and private pension plan annuities.[27]

In a recent case, decedent, a member of the New York City employee's retirement system, made an irrevocable election of an "option" which reduced his retirement benefits and gave his wife an annuity for life in the event that she survived him. A unanimous court held the value of the annuity to be taxable to decedent's estate.[28]

The instant situation was analogized to commercial annuities, the court finding that in effect decedent had purchased a joint and survivorship annuity *i. e.* a transfer to take effect in possession or enjoyment on his death.

It was held that the value of the gift to the widow is to be determined by formulae pursuant to Tax Law § 249-v.[29]

A claim, upheld by the Surrogate,[30] that Article XVI, Section 5 of the New York Constitution[31] forbids estate taxation of "pensions" was rejected on the ground that the Constitution refers to income taxes only.

Wrongful Death Actions

a. *Distribution:* Section 29 of the Workmen's Compensation Law provides that if an employee be injured under circumstances entitling him to compensation through the wrongful act of another, not in the same employ, he or in the case of death, his *dependents,* may accept workmen's compensation and commence an action against the third party wrongdoer. If the judgment recovered is greater than the compensation payable, the compensation carrier is entitled to reimbursement therefrom. If the recovery is less than the compensation payable the claimant is entitled to deficiency payments from the employer or the insurance carrier.

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26. *Spiegel's Estate v. Commissioner,* 335 U. S. 701 (1949); *Commissioner v. Church's Estate,* 335 U. S. 632 (1949); *Helvering v. Hallock,* 309 U. S. 106 (1939).

27. *Mearkle's Estate v. Commissioner,* 129 F. 2d 386 (3d Cir. 1942); *Commissioner v. Clise,* 122 F. 2d 998 (9th Cir.), *cert. denied,* 315 U. S. 821 (1941); *Commissioner v. Wilder's Estate,* 118 F. 2d 281 (5th Cir.), *cert. denied,* 314 U. S. 634 (1941).

28. In re *Endemann's Estate,* 307 N. Y. 100, 120 N. E. 2d 514 (1954).

29. The Appellate Division had made an independent computation based on the "actual value" of the gift. This was determined by the decrease in the "initial reserve" fund in the pension records for decedent's own benefits, due to his electing the annuity option. 282 App. Div. 768, 122 N. Y. S. 2d 682 (2d Dep't 1953).

30. 201 Misc. 1077, 106 N. Y. S. 2d 849 (Surr. Ct. 1951).

31. § 5 "All salaries, wages and other compensation, *except pensions,* paid to officers and employees of the state and its subdivisions and agencies shall be subject to taxation". [Emphasis added].

Section 133 of the Decedent Estate Law provides for distribution of the proceeds of a wrongful death action as follows: "The damages recovered in an action . . . are exclusively for the benefit of the decedent's husband or wife, and next of kin . . . and when they are collected, they must be distributed by the plaintiff, or representative, to any or all of such husband or wife and *next of kin,* in proportion to the *pecuniary injuries suffered* . . ." [Emphasis added.]

In *Gross v. Abraham,*[32] plaintiff's husband was injured by the negligence of the defendant, not his employer, and consequently died. Plaintiff brought an action for wrongful death and recovered $10,500 in damages. An application was made pursuant to Section 133, and the damages were apportioned 85% to the plaintiff and 15% to the decedent's son, an adult who was gainfully employed. He testified that his mother and father lived with him rent free, that his father did certain jobs around the house and as a result of the loss of his services he suffered pecuniary damages to the extent of $10.00 per week. The insurance carrier contends that unless a child, minor or adult, is financially dependent on the continued life of the parent he cannot share in the proceeds recovered in an action for wrongful death. Consequently the amount awarded to the son should be repaid to the plaintiff and the deficiency correspondingly reduced, since the son is not a dependent within the meaning of the Workmen's Compensation Law.

The court held that the only major requirements of Section 133 are, first, that the person claiming a share of the proceeds be a member of the class of next of kin as defined by law and, second, that they demonstrate a pecuniary loss or injury so that it may be determined what proportion of the proceeds should be awarded them. The court said that there is nothing in Section 133 which requires that the next of kin be dependent on the decedent as a condition to his sharing in the damages for wrongful death and therefore the proceeds were properly apportioned.[33]

b. *Notice of claim against municipalities:* The Decedent Estate Law Section 130, provides that an administrator may maintain an action for the wrongful death of his intestate provided it is commenced within two years from the date of death. This action can only be brought by the legal representative, not by the surviving spouse or next of kin.[34] Where an action is

32. 306 N. Y. 525, 119 N. E. 2d 370 (1954).

33. See *Tilley v. Hudson River R. R. Co.,* 24 N. Y. 471, 474 (1862); *McIntyre v. New York Central R. R. Co.,* 37 N. Y. 287, 295-296 (1867).

34. *Siso v. Kleiner,* 185 Misc. 154, 56 N. Y. S. 2d 219 (Sup. Ct. 1945).

commenced prior to the granting of letters of administration it is void and not rendered valid by subsequent appointment.[35]

In a recent case[36] plaintiff, one of decedent's next of kin, filed a notice of claim for wrongful death against the City of Mt. Vernon within the ninety day time limit provided by General Municipal Law Section 50-e. At that time plaintiff had not been appointed administratrix of the estate. Subsequently, and within the ninety day period, she was so appointed. The city moved to dismiss the complaint on the ground that it failed to state a cause of action. Plaintiff moved to amend the notice of claim so as to include herself as administratrix.[37] The trial court in its discretion granted plaintiff's motion. The Appellate Division in reversing the trial court relied on *Crapo v. City of Syracuse*,[38] and held that as the plaintiff had not been appointed administratrix at the time of the filing of the notice of claim it was a complete nullity.[39]

The Court of Appeals held that under the existing law an amendment is allowed but remanded the case to the Appellate Division to ascertain whether the trial court abused its discretion, a point which they had not passed on. The court based its decision on the fact that Section 50-e does not require that an executor or administrator be appointed before a notice of claim be filed and since there is no statutory prohibition, the next of kin themselves should be permitted to file a notice, even though a suit on the claim could not be brought until an administrator had been appointed.[40] In addition they stated that the primary purpose of Section 50-e is to give municipalities prompt notice of claims so that investigations may be made.[41] Here that purpose has been fulfilled.

The court distinguished the *Crapo* case, which held that the cause of action for wrongful death does not accrue until the appointment of an administrator. This case arose many years ago under a charter provision which required that notice of intention to commence a wrongful death action and the time and place of the accident had to be filed within six months after the accrual of the cause action and commencement of the suit had to be within

35. *Smith v. New York Central R. R. Co.*, 183 App. Div. 478, 171 N.Y. Supp. 64 (2nd Dep't 1918).

36. *Winbush v. City of Mount Vernon et al.*, 306 N.Y. 327, 118 N.E. 2d 459 (1954).

37. See GENERAL MUNICIPAL LAW § 50-e (6).

38. 183 N. Y. 395, 76 N. E. 465 (1906).

39. 282 App. Div. 749, 123 N.Y.S. 2d 301 (2d Dep't 1953).

40. DECEDENT ESTATE LAW § 130.

41. See *Charlemagne v. City of New York*, 277 App. Div. 689, 102 N.Y.S. 2d 661 (1st Dep't 1951), aff'd, 302 N. Y. 871, 100 N. E. 2d 52 (1951).

one year after accrual. The executor was not appointed until sixteen months had elapsed but he filed his notice of intention within two months and commenced the action within five months of his appointment. His claim was also filed within the two year limit afforded by Decedent Estate Law Section 130.

The court in the instant case said:

> The Syracuse statute required the filing of a claim within six months 'after the cause of action shall have *accrued*' whereas our section 50-e requires filing within 'ninety days after the *claim arises*'. In the *Crapo* case, the claim which the statute demanded had to contain not only a statement of the facts of the accident, but notice also of intention to bring a suit, and it was held that, since only an administratrix could bring the suit, only an administratrix could give notice of intention to sue, and so the time for filing the claim did not start to run until the administratrix was appointed. The present claim, however, was preliminary to suit under section 130 of the Decedent Estate Law, as to which it has been specifically held that the time runs from death, and we have, also, section 50-e itself, which requires filing of the claim within ninety days 'after the claim arises'. The *Crapo* decision is no authority against our holding here . . . . [Emphasis added.]

It is the opinion of this writer that the holding of the instant case will be strictly confined to its facts and will not be applicable to the filing of wrongful death claims in general.

VII. Domestic Relations

Separation Agreements

The Court of Appeals this term has, in two cases,[1] ruled that a wife is entitled to the full amount stated in a separation agreement for the support of herself and her children where the amount stated is unitary and unallocated between herself and the children and, through no fault of hers, she is no longer supporting the children.

The fundamental rule of contracts that a court, as a matter of law, will look only to the agreement to find intent in an unambiguous contract,[2] has always been applied to separation agreements.[3] Courts have refused to apportion the total amount allocated for the support of the wife and the children where the

1. *Nichols v. Nichols*, 306 N.Y. 490, 119 N.E. 2d 351 (1953); *Rehill v. Rehill*, 306 N.Y. 126, 116 N.E. 2d 281 (1953).

2. *Brainard v. New York Cent. R. Co.*, 242 N. Y. 125, 133 N.E. 152 (1926).

3. *Galusha v. Galusha*, 116 N.Y. 635, 22 N.E. 1114 (1889); *Goldman v. Goldman*, 282 N.Y. 296, 26 N.E. 2d 265 (1940).