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Inheritance and Succession - Enforcement of California Non-Resident Alien Inheritance Statute - Exclusive Federal Power over the Regulation of Foreign Affairs

Tom Allison

RECENT CASES

INHERITANCE AND SUCCESSION—ENFORCEMENT OF CALIFORNIA NON-RESIDENT ALIEN INHERITANCE STATUTE—EXCLUSIVE FEDERAL POWER OVER THE REGULATION OF FOREIGN AFFAIRS

Claimant, a citizen and resident of East Germany, was the sole heir of the deceased, a California resident and naturalized citizen of the United States. California, under the reciprocity[1] and escheat[2] provisions of its Probate Code, contended that claimant could not claim the right of intestate succession and therefore the decedent's real and personal property must escheat to the State. Claimant countered with the argument that section 259 of the Probate Code conflicted with provisions in the United States' 1923 treaty with Germany[3] and constituted an invasion by California into an area of foreign affairs, exclusively a federal field.

The fact that the United States and Germany had executed a treaty in 1923 would have been dispositive of the issue in this case except for the fact that the reciprocal rights secured by the treaty involved realty but not personalty. In as much as the decedent's estate consisted of both real and personal property it was necessary for the court to determine the validity of the reciprocity statute without use of an express federal supremacy concept.

The California Court of Appeal, Second District, affirming the Superior Court's decision, held that section 259 of the Probate Code was an intrusion by the State into the field of foreign affairs. Therefore, the petitioner, as sole heir, was entitled to full distribution of the decedent's estate with California notwithstanding the fact that she was a non-resident alien. *In re Estate of Kraemer*, 81 Cal. Rptr. 287 (1969).

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1. CAL. PROB. CODE § 259 (West 1956): "The right of aliens not residing within the United States . . . to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States . . . to take personal property . . . is dependent . . . upon the existence of a reciprocal right . . . ."

2. CAL. PROB. CODE § 259.2 (West 1956): "If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property."

3. Treaty with Germany Dec. 8, 1923, art. IV, 44 Stat. 2132 (1925).

Under the common law an alien could inherit personalty but not realty.[4] This disability upon aliens has been altered by state statutes.[5] The basic premise is that a state has the power and right to regulate property distribution by testamentary or intestate succession within its jurisdiction.[6] If there is conflict between a state statute and federal legislation or treaty, then the state statute becomes invalid.[7] Thus, a most common method of attack by the non-resident alien has been the argument that such statutes constitute intrusion into foreign affairs by the state.[8]

The United States Supreme Court has stated:

> Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.[9]

This statement indicates that any action which affects an alien may involve delicate foreign relations problems. However, in a memorandum for the United States as amicus curiae in *Zschernig v. Miller*[10] the State Department informed the Court that state alien inheritance laws have had little effect on the foreign relations of this country.[11] One writer has stated that there is little direct evidence regarding this question.[12]

The so-called reciprocity statutes that have been enacted by some states[13] provide that a non-resident alien, who is entitled to receive property within the borders of the subject state, must meet the burden of proving that a citizen of the United States would be able to take property upon the same terms and conditions as could residents of the particular foreign country under consideration.[14] Under an analysis of the instant case the non-resident alien claimant has no burden at all, because the only evidence allowed is a reading by the court of the foreign law relating to reciprocity.[15] Therefore, statutes placing the burden upon the claimant to show that reciprocity does exist are meaningless unless it can be surmised that state courts will be permitted to carry their investigation slightly beyond a reading of the foreign law. If this is not the

4. 1 W. BLACKSTONE, COMMENTARIES 372; 2 J. KENT, COMMENTARIES 61-63.
5. 13 VILL. L. REV. 672, 674 (1968).
6. Clark v. Allen, 331 U.S. 503 (1947); Irving Trust Co. v. Day, 314 U.S. 556 (1942); United States v. Fox, 94 U.S. 315 (1876).
7. U.S. CONST. art. VI; *In re* Estate of Arbulich, 41 Cal. 2d 86, 257 P.2d 433 (1953), *cert. denied*, 346 U.S. 897 (1953).
8. Zschernig v. Miller, 389 U.S. 429 (1968).
9. Hines v. Davidowitz, 312 U.S. 52, 64 (1951).
10. Zschernig v. Miller, 389 U.S. 429 (1968).
11. *Id.* at 434.
12. 21 VAND. L. REV. 502, 511 (1968).
13. *E.g.*, CAL. PROB. CODE § 259 (West 1956); IOWA CODE ANN. 567.8 (Supp. 1970); MONT. REV. CODES ANN. § 91-520 (1964); NEV. REV. STAT. §§ 134.230-250 (1957); N.C. GEN. STAT. § 64-3 to -5 (1965).
14. *Id.*

case then that section of a statute placing the burden upon the claimant to prove the existence of reciprocity should have been declared unconstitutional on its face.

Clark v. Allen[16] established that a general reciprocity clause in a state statute did not, on its face, intrude federal domain and therefore such a statute was presumed constitutional. It should be pointed out that the Supreme Court was not concerned with the manner of application of the subject statute. It was stated that the reciprocity statute in question had only incidental or indirect effect in foreign countries and that many state statutes did this.[17] Considerable doubt on the present vitality of the *Clark* holding was cast in *Zschernig v. Miller*,[18] where the court held that a reciprocity and benefit statute[19] was an invalid intrusion by the state into the field of foreign affairs as applied by the court notwithstanding that the statute did not conflict with express federal policy.[20] In deciding *Zschernig* the court refused to re-examine its decision in *Clark*, holding that the state reciprocity statute was not invalid on its face but was invalid as applied.[21] Of course, this leaves some uncertainty as to under what circumstances a state statute does affect foreign relations in this area. Justices Stewart and Brennan, in concurring, opinioned that the statute was invalid on its face as contrary to the Federal Constitution and along with Justice Harlan advocated overturning *Clark*.[22]

The California court in the instant case followed the directions set down by the *Zschernig* holding. The reciprocity statute[23] in the *Zschernig* case was in essence a replica of section 259 of the California Probate Code. Therefore, both provisons allegedly have vitality and are valid on their face. The difficulty arises when the probate court attempts to ascertain whether reciprocity does in fact exist in the subject foreign country. According to the holdings in *Clark v. Allen, Zschernig v. Miller* and the instant case the reciprocity or benefit type statute becomes invalid when the state court's inquiry goes beyond the mere reading of the relevant foreign law.[24]

Several previous decisions pertaining to the issue indicate that state courts have ventured beyond a mere reading of the foreign country's statute. Legatees who were residents and citizens of

15. Zschernig v. Miller, 389 U.S. 429, 433 (1968).
16. Clark v. Allen, 331 U.S. 503 (1947).
17. *Id.* at 517.
18. Zschernig v. Miller, 389 U.S. 429 (1968).
19. ORE. REV. STAT. § 111.070 (Supp. 1957) (repealed by 1969 c. 59 § 305).
20. Zschernig v. Miller, 389 U.S. 429, 440-41 (1968).
21. *Id.* at 432.
22. *Id.* at 441-42.
23. ORE. REV. STAT. § 111.070 (Supp. 1957) (repealed by 1969 c. 59 § 305).
24. Zschernig v. Miller, 389 U.S. 429, 432-33 (1968).

Czechoslovakia failed to establish their right to take under an Oregon reciprocity statute notwithstanding the offering of a certificate from that country's Ambassador declaring that United States heirs in Czechoslovakia did receive by succession without discrimination. The court's rationale in deciding against the claimants was that little credence could be given to statements of Czechoslovakian officials because of their interest in acquiring funds for their government. Judicial notice was taken regarding the fact that communists were not known for their veracity.[25]

Soviet Union beneficiaries have, on some occasions, been unable to establish the existence of reciprocity necessary to satisfy the California statute. In one case the court examined the Russian governmental structure, constitution, court system and its general legal theory and held that no reciprocal rights existed.[26]

Illustrative of the fact that existing political climate can influence a state court's determination as to whether a non-resident alien can qualify as a beneficiary is a decision just five years after the aforementioned case. A Russian citizen was allowed to receive property by testamentary disposition from a California decedent. The court stated that despite its reactions to Soviet Union policies, resolution of foreign policy questions must rest with the Federal Government. The court was concerned that section 259 of the California Probate Code might be declared unconstitutional if the state inquired too deeply into Russian policy. It is interesting to note that the court did receive testimony from an expert and from documents tending to show that United States citizens who were beneficiaries of estates in the Soviet Union suffered no discrimination.[27] This in itself was an inquiry by the court beyond a mere reading of the foreign law.

In a surprising turnabout, the Supreme Court of California while hearing an estate claimant who was a citizen of Rumania, determined, after reading the Rumanian law on succession, that reciprocity did not exist. The court ventured beyond a reading of the law and examined the actual practice in Rumania regarding matters of inheritance involving United States citizens and determined that the claimants met their burden of showing that economically significant reciprocity did exist. The trial court heard authorities on Rumanian law testify and examined articles and case histories in ascertaining the reciprocity question. The authority was asked, "Do you know of any situation under the law of Rumania where a Rumanian citizen might inherit property but under the same circumstances the courts of Rumania would not permit a citizen of the

25. State v. Pekarek, 234 Ore. 74, 378 P.2d 734, 738 (1963).
26. *In re* Gogabashvele's Estate, 195 Cal. App. 2d 503, 16 Cal. Rptr. 77, 81 (1961).
27. *In re* Estate of Larkin, 52 Cal. Rptr. 441, 416 P.2d 473 (1966).

United States to inherit the same property?" The authority answered, "No *I* don't. Rumanian tribunals, as a matter of fact, cannot make any discrimination in this respect. . . ."[28] The question arises, what if the authority had answered in the affirmative to the question of whether discrimination against United States citizens existed?

The underlying motive behind a benefit or reciprocity type of statute appears to be an attempt to encourage foreign nations to grant inheritance rights to United States citizens.[29] Just prior to World War II the fear of confiscatory policies by Nazi Germany led a New York court to refuse to distribute property to a German-Jewish beneficiary of an American estate.[30] This type of political consideration continued to influence state courts during the Cold War. Statements by judges, and others, expressed some state court attitudes:

> . . . .sending American money to a person within the borders of an Iron Curtain country is like sending a basket of feed to Little Red Ridinghood in care of her 'grandmother'.[31]
>
> It is conceded that there is no right to inherit land, since it is a primary principle of their [Soviet] form of government that real property is owned by the State.[32]
>
> If this money were turned over to the Russian authorities, it would be used to kill our boys and innocent people in Southeast Asia . . . .[33]
>
> Now, as then, it is recognized as elementary that to permit goods and dollars to flow into the countries controlled by the aggressor is against our national interest.[34]
>
> The court found Russia had no separation of powers, too much control in the hands of the Communist Party, no independent judiciary, confused legislation, unpublished statutes . . . the court also noted Stalin's crimes, the Beria trial, the doctrine of crime by analogy . . . .[35]
>
> I'm a bigoted anti-Communist.[36]

Illustrative of a state statute reflecting international tensions is California's during the 1940's. Prior to 1945 the burden was upon the non-resident alien claimant to establish that reciprocity did exist.[37] This was amended in 1945 (reflecting amiable American and

28. *In re* Estate of Chichernea, 57 Cal. Rptr. 135, 140, 424 P.2d 687, 692 (1967).
29. Clostermann v. Schmidt, 215 Ore. 55, 332 P.2d 1036, 1042 (1958).
30. *In re* Weidberg's Estate, 172 Misc. 524, 15 N.Y.S.2d 252 (Sur. Ct. 1939).
31. *In re* Belemecich's Estate, 411 Pa. 506, 511, 192 A.2d 740, 742 (1963).
32. *In re* Bold's Estate, 173 Misc. 545, 18 N.Y.S.2d 291, 295 (Sur. Ct. 1940).
33. N.Y. Times, May 15, 1954, at 25, col. 7.
34. Chaitkin, *The Rights of Residents of Russia and Its Satellites to Share in Estates of American Decedents*, 25 S. CAL. L. REV. 297 (1952).
35. 55 CAL. L. REV. 592, 594 n. 10 (1967).
36. Berman, *Soviet Heirs in American Courts*, 62 COLUM. L. REV. 257 (1962).
37. Ch. 895, § 1, [1941] Cal. Stats. 2473.

Russian relations) to a presumption in favor of reciprocity[38] and in 1947 (when Cold War tensions mounted) a reversion back to the burden resting with the claimant.[39]

It is not clear from the opinion in the case under discussion whether the reciprocity requirement of section 259 of the California Probate Code in and of itself constitutes an intrusion into the field of foreign affairs, or whether said section when read against the United States' 1923 Treaty with Germany makes the reciprocity requirement invalid. In addition, the case fails to enumerate just what action by probate courts in administering reciprocity clauses constitute inquiry into foreign affairs. The decision appears to rest on an historical basis in that the opinion discusses how some state courts have, in the past, interjected their own bias when confronted with the reciprocity issue rather than holding to just a reading of the relevant foreign law. The *Kraemer* court relied heavily on the United States Supreme Court's holding in *Zschernig* but Justice Douglas also failed to offer a clear definition of where the boundary line between exclusive federal domain and legitimate state inquiry should be drawn.

TOM ALLISON

WITNESSES—COMPETENCY—WAIVER OF PRIVILEGE OF COMMUNICATION TO OR INFORMATION ACQUIRED BY PHYSICIAN—Appellee suffered severe back injuries as a result of an automobile accident due to the alleged negligence of the appellant. In the personal injury action that followed, appellee introduced testimony by several expert witnesses to prove that his injuries and damages were a result of the automobile accident. The appellant called Dr. George Holiday, the chiropractor who had treated appellee prior to the accident, to testify. The appellee objected to this testimony, asserting that it violated the statutorily protected confidential communication between physician and patient, and that at no time had there been a waiver of this privilege.[1] The lower court excluded the testimony of Dr. Holiday concluding that there had been no waiver of the physician-patient privilege since Dr. Holiday's treatment of the patient was not interrelated with that of the other doctors who had testified. Reversing the lower court's decision the Supreme Court of Indiana *held* that if a patient by way of complaint, counterclaim, or affirmative defense, places in issue his physical or mental condition, then he automatically waives the privilege granted by the statute as to *all* matters causally or historically related

38. Ch. 1160, § 1, [1945] Cal. Stats. 2208.
39. Ch. 1042, § 1, [1947] Cal. Stats. 2443.
1. The statute containing the physician-patient privilege is IND. ANN. STAT. § 2-1714 (1937).