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# Probate: Application of Oregon Alien Inheritance Statute Held Unconstitutional as Intrusion into File doForeign Affairs

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# PROBATE: APPLICATION OF OREGON ALIEN INHERITANCE STATUTE HELD UNCONSTITUTIONAL AS INTRUSION INTO FIELD OF FOREIGN AFFAIRS

*Zschernig v. Miller*, 389 U.S. 429 (1968)

Decedent, a resident of Oregon, died intestate leaving an estate comprised of both real and personal property. Her next of kin, aliens residing in East Germany, sued for a determination of heirship in their favor. This action was contested by the Oregon Land Board, which requested that the property be escheated to the state pursuant to an Oregon statute.[1] The statute required escheat unless there existed a reciprocal right of United States citizens to receive property situated in a foreign country on the same terms as a citizen of the foreign country; unless United States citizens had the right to receive money payments from foreign estates within the United States or its territories; and unless proof was offered that the foreign heir could inherit without confiscation by the foreign government. The plaintiffs contended that two German treaties[2] provided for reciprocal rights of inheritance but in any event the Oregon statute was unconstitutional. The trial court, ignoring the constitutional issue found as a matter of fact that the statutory reciprocity requirements had not been met and ruled that the estate must escheat. The Supreme Court of Oregon[3] affirmed and dismissed the argument that the Oregon statute was unconstitutional on its face. On appeal the United States Supreme Court HELD, that the Oregon statute was unconstitutional in its application. The requirement by the court of proof of the actual existence of reciprocity was held to be an intrusion by the state into the field of foreign affairs, exclusively reserved by the Constitution to the federal government.

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1. ORE. REV. STAT. §111.070 (1965), which provides: "(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case: (a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen; (b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and (c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries. (2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section. (3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property."

2. Treaty with Germany of Friendship, Commerce, and Consular Rights, Dec. 8, 1923, 44 Stat. 2132, 2135 (1925); Treaty with the Federal Republic of Germany of Friendship, Commerce, and Navigation, Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593 (1956).

3. Zschernig v. Miller, 243 Ore. 567, 412 P.2d 781 (1966).

With the outbreak of World War II, states began passing statutes placing conditions upon inheritance by aliens living in unfriendly countries. Today, these are commonly referred to as "Iron Curtain Statutes." Generally they fall into two categories, benefit or use statutes[4] and reciprocity statutes.[5]

Benefit or use statutes are found mostly in the eastern states. These statutes do not allow nonresident inheritance where it appears that the alien heir might not have the full use and benefit of the property due to government confiscation. Any property withheld is paid into the court or other appropriate state agency. The alien heir can later petition the court and if he can show that he would then benefit from a distribution, the court will pay over the property. Massachusetts holds the property upon interest and pays over such interest as well.[6]

Since World War II, benefit or use statutes have predominantly affected heirs living in Iron Curtain countries.[7] The courts in their determination of whether an heir will have the full benefit and use of his inheritance have relied heavily upon Treasury, State, and Justice Department circulars.[8] These circulars have set guidelines for determining which countries have confiscatory policies toward the property of its residents.

The constitutionality of a benefit or use statute was questioned in *Ioannou v. New York*.[9] The Supreme Court, in a per curiam decision, dismissed the appeal for want of a substantial question. Justices Black and Douglas, however, in a dissenting opinion,[10] felt that the power of conducting international affairs was in the hands of the federal government and that the descent and distribution of property in one nation to citizens of another nation was clearly a proper subject of international relations.

The second category of alien inheritance statutes is reciprocity statutes, prevalent in the western states. These limit the rights of nonresident aliens to inherit from American decedents to those who can show that there is a reciprocal right for United States citizens to inherit property in the country where the alien resides. If the alien fails in this burden, the property will be held by the court.

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4. *See, e.g.*, N.Y. SURR. CT. PROC. §2218 (McKinney 1967) (this has been the prototype for other benefit or use statutes); CONN. GEN. STAT. ANN. §45-278 (1960); MD. CODE ANN. art. 93, §161 (1957); MICH. STAT. ANN. §27.3178 (306a) (Supp. 1968); N.J. STAT. ANN. §3A:25-10 (1953); R. I. GEN. LAWS ANN. §33-13-13 (1956). *See also* MASS. GEN. LAWS ANN. ch. 206, §27A (Supp. 1967); PA. STAT. tit. 20, §1156 (Supp. 1967); WIS. STAT. §318.03 (2) (1958).

5. *See, e.g.*, CAL. PROB. CODE §259 (Deering 1956); IOWA CODE ANN. §567.8 (Supp. 1966); MONT. REV. CODE ANN. §91.520 (Supp. 1963); NEV. REV. STAT. §134.230 (1967); N.C. GEN. STAT. §§64-3 to -5 (1965).

6. MASS. GEN. LAWS ANN. ch. 206, §27A (Supp. 1967).

7. Petition of Mazurowski, 331 Mass. 33, 116 N.E. 2d 854 (1954); *In re* Url's Estate, 7 N.J. Super. 455, 71 A.2d 665 (Somerset County Ct.), *appeal dismissed*, 5 N.J. 507, 76 A.2d 249 (N.J. 1950); *In re* Best's Estate, 200 Misc. 332, 107 N.Y.S.2d 224 (Sur. Ct. 1951); Matter of Geffen, 199 Misc. 756, 104 N.Y.S.2d 490 (Sur. Ct. 1951).

8. Matter of Baier, 305 N.Y. 143, 111 N.E.2d 424 (1953); Treasury Circular 655, 31 C.F.R. §211.3 (a) (1959).

9. 371 U.S. 30 (1962).

10. *Id.* at 30-31.

The leading case dealing with a reciprocity statute is *Clark v. Allen*,[11] which held that a California alien inheritance statute was constitutional. The Court held that rights of inheritance are to be determined by local law.[12] However, those rights may be affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements.[13] Then the state policy must give way.[14] The Court concluded that there was no prevailing federal policy on the subject and that the California statute would have only some incidental or indirect effect in foreign countries. Since *Clark*, however, other state courts have made minute inquiries into whether reciprocal rights exist.[15] They have been concerned with more than the mere existence of reciprocal statutory provisions.

In the instant case there were three different grounds presented by the members of the Court upon which to base the decision. First, the *application* of the Oregon statute was unconstitutional. Second, the Oregon statute, on its face, was unconstitutional, and third, the Oregon statute was constitutional but the 1923 German Friendship Treaty[16] vitiated its application.

Speaking for the Court, Justice Douglas refrained from ruling the statute unconstitutional on its face. Instead, he alluded to the prior ruling in *Clark*[17] that a general reciprocity probate statute did not, on its face, intrude on the federal domain. He concluded that the Oregon statute had been unconstitutionally applied. He observed that the Oregon courts were inquiring into such matters as the credibility of foreign diplomats and the actual administration of foreign law.[18] The Court held that such inquiries had a direct impact upon foreign relations and as such were an intrusion into the federal domain. *Clark* was distinguished on the grounds that the California statute involved required merely a routine reading of foreign laws as opposed to proof of reciprocity.

Justices Stewart and Brennan, however, believed that all three requirements of the Oregon statute were unconstitutional on their face. They felt that these requirements by their very nature required the state courts to make the kind of inquiries that the majority opinion classified as an unconstitutional infringement into foreign affairs. They wanted the court to follow a strict interpretation of the constitutional provisions that grant the federal government supremacy in matters of foreign relations.

Justice Harlan, relying on *Ashwander v. Tennessee Valley Authority*,[19] felt that where a case may be disposed of on either of two grounds, one constitutional and one statutory, it should be decided on the latter. Accord-

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

12. Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942); Lyeth v. Hoey, 305 U.S. 188, 193 (1938).

13. *See* Kolovrat v. Oregon, 366 U.S. 187, 190 (1961); Hauenstein v. Lynham, 100 U.S. 483, 488 (1879).

14. Hines v. Davidowitz, 312 U.S. 52, 55 (1941).

15. Cases cited *supra* note 7.

16. Treaty with Germany of Friendship, Commerce, and Consular Rights *supra* note 2.

17. Clark v. Allen, 371 U.S. 30 (1962).

18. State Land Bd. v. Kolovrat, 220 Ore. 448, 461-62, 349 P.2d 255, 262 (1961).

19. 297 U.S. 288 (1936).

ing to Harlan, the decision in the present case should have rested on a reinterpretation of the 1923 German Friendship Treaty.[20] The property in question would then pass pursuant to the treaty provisions and would not involve any question of constitutionality of the Oregon statute.

The principal case dealt solely with the particular Oregon reciprocity statute. However, there are indications in the opinion that would make it equally applicable to benefit or use statutes. The Court cited several cases[21] that construed both reciprocity and benefit or use statutes, inferring that they could both be unconstitutional in application.

The instant case is of particular significance to Florida probate judges. With the great influx of Cuban refugees into the state in recent years, it is only a matter of time before some of these Cubans begin leaving property to their relatives in Communist Cuba. Florida's statute[22] is clearly of the benefit or use type. The county judge may withhold funds from alien nonresidents when he determines that the alien "would not have the benefit or use of control of property due him and that special circumstances make it desirable that delivery to him be deferred. . . ." The attorney general of Florida, however, issued an opinion[23] in 1962 that reaffirmed the general proposition that alien nonresidents may inherit in the same manner as residents. He also expressed the opinion that this right extended to aliens living in an "unfriendly country." Subsequent to this opinion, however, at least one Florida judge[24] has indicated that where there is no applicable treaty the county judge in the exercise of his discretion may withhold distributions to aliens residing in Communist countries. Since the United States Supreme Court refused to promulgate a clear standard as to how far the states may go in this area, it is hard to predict how this decision will affect the discretionary powers of the Florida probate judge. The Florida statute does not set any criteria for the judge's decision, but leaves it solely to his discretion. It would be possible to argue that the exercise of such discretion is not a fact determination by him and, therefore, not a thrust into international relations. However, if the judge bases his decision to withhold distributions on a factual determination of the governmental system of the alien's country, he will be in danger of reversal.

The majority of the United States Supreme Court agreed that even in the absence of an enunciated national policy in the area, the power of states to affect foreign relations is strictly limited. The Court failed, however, to establish any meaningful standard by which the lower courts can determine what constitutes an infringement. It has been left to future decisions to

20. Treaty with Germany of Friendship, Commerce, and Consular Rights *supra* note 2.

21. 389 U.S. 429, 437 (1968).

22. FLA. STAT. §731.28 (1967) reads in part: "When the county judge determines that any alien legatee, devisee, heir, beneficiary or distributee not residing within the territorial limits of the United States or any territory or possession thereof would not have the benefit or use or control of property due him and that special circumstances make it desirable that delivery to him be deferred, the county judge may order that such property be converted into available funds and paid into the state treasury. . . ."

23. [1961-1962] FLA. ATT'Y GEN. BIENNIAL REP. 525, 527.

24. Brooker, *Alien Heirs Residing Behind the Iron Curtain*, 38 FLA. B.J. 20, 23 (1964).

define the limits of the state's powers in this area. The uncertainty created by this decision is increased due to the Court's failure to affirm or overrule *Clark v. Allen*. Instead, the Court contented itself to straddle the fence by distinguishing *Clark* on its facts. As a practical matter, however, these two cases are indistinguishable. It would appear that any state may pass an Iron Curtain statute, but not an effective one. They may pass statutes that require a routine reading of foreign laws, but they may not inquire into the functioning of foreign laws.

The Court's conclusion would have been more logical had it followed the reasoning of Justices Stewart and Brennan or that of Justice Harlan. Justices Stewart and Brennan pointed out in their concurring opinion that the Oregon legislature framed its reciprocity law in such a way as to force the Oregon courts to affect foreign relations. They indicated that any realistic attempt to apply the state's three criteria would force the Oregon courts to do more than routinely construe foreign laws. Such application would, of necessity, trespass upon the exclusive powers of the federal government to deal in foreign relations as provided for in the Constitution. If such reasoning had been followed *Clark* would have been overruled. Thus, states would be required to follow the intent of the testator and distribute the funds in accordance with the will. Even if the probate judge knew the alien beneficiary would not receive the funds he would have no authority to withhold them. An alternative would be federal legislation encompassing all alien inheritance within the United States and creating a uniform alien inheritance law within the United States and its territories.

Justice Harlan noted in his concurring opinion that, if the majority view is followed, a state may legitimately require reciprocity but it may not take measures to assure that reciprocity exists in practice. Such an approach is unreasonable. In addition, he pointed out that the Solicitor General of the United States had informed the Court that reciprocity statutes had little effect on the foreign relations and policies of this country. The apprehension that such an application will cause a deterioration in international relations is unsubstantiated. It does not constitute the kind of changed conditions that call for a reexamination of *Clark v. Allen*. Therefore, according to Justice Harlan, *Clark* should be affirmed and the Oregon statute held constitutional on its face as well as in its application. As a result, states could continue to regulate descent and distribution to aliens.

The majority should have followed one of these two approaches thereby providing a clear standard for the states to follow.

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