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Some Preliminary Effects of the U.S.-P.R.C. Detente on American Law

by *Dorothy K. Chin**

I. INTRODUCTION

The 1970's saw the beginning of friendly communication between the United States and the People's Republic of China (P.R.C.). Starting with "ping pong" diplomacy, more official routes of contact were developed, leading to President Nixon's trip to the P.R.C. and the issuance of the Shanghai Communique¹ in February 1972. The Shanghai Communique pledged each government to non-intervention and peaceful co-existence and was considered the first step towards normalization of relations between the two countries. With the establishment in 1973 of official "liaison offices," P.R.C.-U.S. diplomatic relations became institutionalized. Formal diplomatic relations at the ambassadorial level are expected in the near future, despite complicated problems related to the Republic of China (Taiwan).

The turnabout in relations between the P.R.C. and the U.S. represented by these events and the rapidity of the change have been much publicized for their effect on the nations of the international community. Each nation had to assess how the new P.R.C.-U.S. detente would affect its relations with both countries.

Of less glamorous and less noticed effect, but nonetheless of highly personal significance, has been the impact of the detente on Chinese-Americans, especially those who were born or had lived in the P.R.C. or who have relatives in the P.R.C. For twenty years Chinese-Americans could maintain only infrequent and circuitous contact with relatives in the P.R.C., for fear of government reprisals on both sides of the Pacific. Hostile international relations between the two countries, exacerbated by the Korean War and the con-

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1. Shanghai Communique, February 27, 1972, United States - People's Republic of China, 66 DEPT STATE BULL. 435, 11 INT'L LEGAL MAT'LS 571 (1972).

tinuing political and military support of Taiwan by Washington, frustrated hopes of Chinese-Americans for returning to the P.R.C. for a visit or longer stay or seeing their relatives on American soil.

The progression of events leading to the establishment of relations between Peking and Washington at a level just below formal recognition and the outwardly warm appearances of both sides stunned the Chinese-American community. In the short space of less than three years, the P.R.C., once a source of communist evil, became a friend of the U.S. After an initial suspicion implanted by twenty years experience, Chinese-Americans took advantage of the detente and visited their relatives in the P.R.C., sent money and generally established regular communication.

This study deals with aspects of P.R.C.-U.S. relations in the wake of the detente, focusing on legal questions involving Chinese-Americans and their P.R.C. relatives. The twenty-year hiatus, in which contact between Chinese-Americans and their P.R.C. relatives was minimal, will be explored for its effects on the legal problems that Chinese-Americans face in their relations with the P.R.C. or its residents. Whether and to what extent the detente has changed legal requirements imposed during the period of unfriendly relations between the two countries will be examined.

The first section of this paper studies the problem of succession to American estate property by P.R.C. residents. Although the usual case involves an elderly Chinese-American dying intestate in the U.S. and leaving distributees in the P.R.C., with the relaxed conditions brought about by the detente, many Chinese-Americans are thinking about bequests to P.R.C. relatives. A thorough probe of the legal issues involved is presented. The second part of this paper describes the immigration process from the P.R.C. to the U.S. and related legal problems. The detente opened the gates of the P.R.C. for immigrants coming to the U.S. The third part is a brief look at the Social Security and Veterans Administration regulations regarding payment to beneficiaries within the P.R.C. This issue is important because some Chinese-Americans seek to retire to the P.R.C. and be supported by these benefits. Also there may be beneficiaries in the P.R.C. entitled to payments. The effect of the recent events on these payments will be discussed. The conclusion sums up the obstacles yet remaining from the era before the detente and makes projections for the future in light of the basis created by the improved conditions.

II. SUCCESSION TO ESTATE PROPERTY

A. *Introduction*

Since the World War II period, the eligibility of nonresident alien beneficiaries to inherit property has been a confused and complex legal problem in the United States. In the application of nonresident alien beneficiary statutes, there arises a basic conflict between the jurisdiction of the federal government over foreign affairs and the states' power to regulate their

domiciliaries' estates. Unclear guidelines have produced uncertainty and much litigation. Against this backdrop, an analysis of the right of beneficiaries in the P.R.C. to inherit will be attempted.

Cases involving beneficiaries residing in the People's Republic of China are few.² That there has been so little Chinese experience in this area is not surprising. The explanation for this is part demographic, part cultural and part statutory. Due to restrictive immigration laws,³ such as national origins provisions,⁴ the number of Chinese-Americans who would be of sufficiently advanced years to die in the United States is quite small. Furthermore, many of these elderly come from rural areas of China and do not believe in writing wills. In all the cases studied, both reported and unreported, decedents died intestate. Elderly Chinese prefer to avoid the legal process in disposing of worldly goods. No will is written and the estate is generally passed on through a joint bank account with a relative or friend. Because of the immigration restrictions, the elderly Chinese-American most usually involved is a man who is unmarried. He thus has no wife or issue to care for after his death.

At the same time, all transactions with the P.R.C. or any national thereof, including transfers of estate funds to P.R.C. beneficiaries, were prohibited by the Foreign Assets Control Regulations (F.A.C.) of the Treasury Department.⁵ A subsequent general license was issued in 1971 allowing transactions prospectively; but any P.R.C. assets "blocked" by the regulations from December 17, 1950 to May 7, 1971 remain subject to the prohibition.⁶

Mention is made at this time of the continued listing of the P.R.C. on 31 C.F.R. § 211.1,⁷ which prohibits delivery of checks drawn against funds of the United States to payees in the P.R.C. Although this Treasury Circular affects only checks drawn against federal funds, state probate courts sometimes have given the Circular great weight in deciding whether estate funds should be sent to certain countries. The effect of the Circular on estate payments to the P.R.C. is examined below.⁸ Despite these barriers, there are indications that a detailed analysis of this area at this time could prove to be of great use in the near future. One reason is the growing Chinese immigration rate. Significant

2. A review was made of the reporters of New York and California, the states with the largest Chinese-American populations. There are only two reported cases in New York, *In re Estate of Yee Yoke Ban*, 200 Misc. 499, 107 N.Y.S.2d 221 (Sur. Ct. 1951); *In re Estate of Wong Hoen*, 199 Misc. 1119, 107 N.Y.S.2d 407 (Sur. Ct. 1951), since enactment in 1939 of the legislation controlling foreign heirs. N.Y. SUR. CT. ACT § 269-a, now N.Y. SUR. CT. PROC. ACT § 2218 (McKinney Supp. 1977-78). The author has located two unreported cases, which will be discussed at length below.

3. 8 U.S.C. §§ 1151-1153 (1970 & Supp. 1978).

4. *Id.* § 1151.

5. 31 C.F.R. § 500.210 (1977).

6. 31 C.F.R. § 500.546 (1977).

7. Treasury Department Circular 655. This regulation will be referred to herein as the Treasury Circular to distinguish it from the Foreign Assets Control (F.A.C.) regulations.

8. § II, D, 2.

changes in the immigration law⁹ in 1965 have increased the number of Chinese immigrating to the U.S. from 4,057 in 1965, to 13,736 in 1966, to 18,823 in 1976.¹⁰ As Chinese-Americans become a larger minority, the likelihood of estate situations arising will increase.

As the F.A.C. prohibition on financial transactions has been prospectively lifted,¹¹ funds from estates can now be sent to P.R.C. beneficiaries, subject to state inheritance laws. However, accounts accruing prior to May 7, 1971 are still blocked. The removal of this federal restriction, the easing of tensions between the P.R.C. and the U.S. memorialized in the Shanghai Communique and the increase in number of Chinese-Americans, may encourage the disposition of gifts to P.R.C. relatives.

On the receiving end, the P.R.C. stands to gain in a very concrete sense by encouraging dispositions to its citizens. The P.R.C. seems to be eager for foreign exchange to boost its economy. This policy has been emphasized by the post-Mao regime. If it is eager enough, it may help to answer difficult questions of proof of foreign law and identity of beneficiaries, required by alien beneficiary statutes. The P.R.C. may also help to facilitate the transfer of funds between the two countries.

A desire to receive American dollars has already influenced some countries to accommodate themselves to American state court decisions. For instance, the Soviet Union modified its inheritance law with the effect that its citizens could receive inheritances from American decedents.¹² Doubts exhibited by state courts that a beneficiary would receive use of funds has, in part, led to the creation of state enterprises in Czechoslovakia, the Soviet Union, and Bulgaria which allow the recipient of foreign currency to buy consumer goods at a favorable rate of exchange.¹³ Also, in response to American inquiries, the Soviet Injurcollegiua, an association of attorneys, aids in the proof of Soviet law and the transfer of funds.¹⁴

9. Pub. L. No. 89-236, §§ 8, 24, 79 Stat. 911 (1965) (codified at 8 U.S.C. § 1151 (1970)).

10. U.S. Immigration & Naturalization Service, Dep't of Justice, 1976 Annual Report 89, Table 14 (1976); U.S. Immigration & Naturalization Service, Dep't of Justice, 1974 Annual Report 59, Table 14 (1974).

11. See 31 C.F.R. § 500.546 (1977).

12. In re Alexandroff's Estate, 30 Misc. 123, 61 N.Y.S.2d 866 (Sur. Ct. 1945).

13. See, e.g., A. Lubimsky, Chairman of Vneshposyltorg (U.S.S.R.), Instruction on settlement of accounts with Soviet citizens receiving inheritances from abroad in foreign currency (Jan. 5, 1966) (copy available in the *Boston College International and Comparative Law Journal* offices). The New York courts have been accepting of these state enterprises in fulfilling the requirements of use, benefit and control discussed below. In re Reidl's Will, 23 A.D.2d 172, 259 N.Y.S.2d 218 (1965) (Czechoslovakia); In re Estate of Petroff, 49 Misc.2d 235, 267 N.Y.S.2d 10 (Sur. Ct. 1966) (Bulgaria).

14. See American Embassy in Moscow, Report: Deaths and Estates: Transmission of Estates to the U.S.S.R. (Aug. 23, 1972) (copy available in the *Boston College International and Comparative Law Journal* offices).

Whether the P.R.C. will follow these examples of accommodation will depend greatly on how much it wants foreign currency and how much estate property it thinks will be bequeathed to its beneficiaries. The opportunity is now available to the P.R.C. to encourage dispositions.

The Shanghai Communique, the recent changes in the immigration law, and the authorization of certain financial transactions with the P.R.C. may have laid the groundwork for a situation where succession problems will receive close scrutiny from both the U.S. and the P.R.C. This section of the paper will examine the current situation generally in regard to nonresident aliens and specifically in regard to P.R.C. beneficiaries of New York and California decedents. New York and California were selected because of the likelihood of P.R.C. beneficiaries, given the large Chinese-American population in these two states. Finally, various resolutions of the problems will be analyzed.

B. History

The origins of restrictions on aliens to own property stem from the early common law, although restrictions were placed upon ownership of realty only.¹⁵ Fear of subversion and national defense seemed to be the justifications for these limitations.¹⁶ These common law disabilities are gradually being removed in the United States.¹⁷

As World War II approached, many state governments became concerned about their liberal inheritance laws. One concern was that, while aliens living in foreign countries could receive distributions from the United States, many countries were not allowing distribution of their estates to American citizens.¹⁸ There was also a fear that proceeds of American estates would be confiscated by aggressive states abroad and used to finance wars against the U.S.¹⁹ As a result, two types of statutes restricting inheritance were passed, retention and reciprocity statutes. These laws apply to both realty and personalty, in contrast to the common law disability on realty only.

Retention statutes, also known as "benefit statutes" or "custodial statutes," have been passed by several Eastern states.²⁰ New York's statute²¹

15. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 372 (G. Sharswood ed. 1875).

16. Calvin's Case, 7 Co. Rep. 1a, 18b, 17 Eng. Rep. 377, 399 (1606); 2. W. BLACKSTONE, COMMENTARIES 249 (3d ed. 1768).

17. E.g., UNIFORM PROBATE CODE § 2-112.

18. 1941 Cal. Stats., c. 895, § 2, at 2474.

19. See J. RITCHIE, N.H. ALFORD & R.W. EFFLAND, DECEDENTS' ESTATES AND TRUSTS 112 (1977) [hereinafter cited as RITCHIE *et al.*].

20. E.g., MASS. GEN. LAWS ANN., ch. 206, §§ 27A-27B (West 1958 & Supp. 1977); N.J. STAT. ANN. § 3A: 25-10 (West Supp. 1975).

21. N.Y. SUR. CT. ACT § 269-a now N.Y. SUR. CT. PRO. ACT § 2218 (McKinney Supp. 1977-78).

was the prototype. Discretion was given to the court to determine whether the foreign beneficiary would receive benefit, use or control of the legacy. If there was any doubt that he would, the funds were sequestered until more favorable conditions developed. The purpose of this type of statute was not only to deprive enemy states of funds to finance wars but also to retain the legacy for the beneficiary until he could receive full benefits. It was thought that this retention would effectuate the testator's intent.

In the Western United States, reciprocity statutes have been passed. They are not concerned, as retention ones are, with sequestering funds for the ultimate use by the alien beneficiary. The purpose of reciprocity statutes is to secure from foreign governments some guarantee of inheritance rights for American citizens. Reciprocity statutes were the result of the concern that estates of Americans could be passed to an alien heir abroad while an American might not be able to receive a counterpart right to inherit estate property from an alien decedent.²² The typical reciprocity statute²³ makes the right of inheritance of a nonresident alien contingent upon the grant by the domestic laws of the alien's nation of a like right to a citizen of the United States. If no such grant can be demonstrated, the property passes to the next eligible heir. If there is no eligible heir, the property escheats to the state.²⁴

Retention and reciprocity statutes, originally enacted in response to World War II conditions, were kept alive and in use by the cold war. These statutes were used to prevent dispositions to citizens and residents of the Communist-controlled countries, the governments of which were considered hostile to the U.S. These statutes provided an opportunity for state courts to examine and often to criticize foreign governments, especially Communist ones. The potential for unconstitutional intrusion by the states into foreign affairs became evident. As the cold war intensified, examination and criticism of foreign governments and political systems by state courts became pronounced. Constitutional questions arose as to whether state alien inheritance statutes would be applied by the courts without unconstitutionally interfering with the conduct of United States foreign policy.

C. *Constitutional Limitations*

In 1947, the former California reciprocity statute was challenged in *Clark v. Allen*²⁵ on the grounds that it was an interference with the exclusive jurisdiction of the federal government over foreign affairs. The Supreme Court of the

22. RITCHIE *et al.*, *supra* note 22, at 112.

23. *E.g.*, NEB. REV. STAT. § 4-107 (1974).

24. California's reciprocity statute, CAL. PROB. CODE § 259 (West 1959), *repealed by* 1974 Cal. Stats., c. 425, § 1, at 1025, was declared unconstitutional by the California Court of Appeal in *In re Kraemer's Estate*, 276 Cal. App.2d 715, 81 Cal. Rptr. 287 (1969).

25. 331 U.S. 503 (1947).

United States upheld the constitutionality of the law, stating that, in the absence of a treaty between the U.S. and a foreign country specifically covering succession, the reciprocity statute was not an intrusion of the state into foreign affairs.²⁶ It was argued that the purpose of the statute, to seek favorable inheritance provisions in foreign countries for American heirs, was more properly an international issue best settled by the federal government. The Court dismissed this argument, stating that the contention that the statute constituted an interference in international relations was “farfetched.”²⁷ Justice Douglas, writing for the majority, stated that the statute had “some incidental or indirect effect in foreign countries”²⁸ which was permissible and did not constitute an incursion into foreign affairs.

Twenty-one years later, the Court appeared to change its attitude in *Zschernig v. Miller*²⁹ where the constitutionality of an alien inheritance statute was challenged successfully. *Zschernig* involved an Oregon Statute³⁰ with both a reciprocity provision and a benefit use and control requirement. The Supreme Court found the political climate had overly influenced state courts in their approach to alien beneficiaries:

As we read the decisions that followed in the wake of *Clark v. Allen*, we find that they radiate some of the attitudes of the “cold war”³¹

Justice Douglas, for the majority, felt that the application of alien inheritance statutes intruded into foreign affairs because of their scrutiny of foreign governments:

At the time *Clark v. Allen* was decided, the case seemed to involve no more than a routine reading of foreign laws. It now appears that in this reciprocity area under inheritance statutes, the probate courts of various States have launched inquiries into the type of governments that obtain in particular foreign nations — whether aliens under their law have enforceable rights, whether the so-called “rights” are merely dispensations turning upon the whim or caprice of the government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation.³²

Though clearly reflecting a changed attitude, the Court refused to overrule *Clark*. It relied on the history and operation of the Oregon statute to hold that,

26. *Id.* at 517.

27. *Id.*

28. *Id.*

29. 389 U.S. 429 (1968).

30. OR. REV. STAT. § 111.070 (1969), *repealed by* 1969 Or. Laws, c.595, § 305.

31. 389 U.S. at 435.

32. *Id.* at 433.

as applied, the statute was "an intrusion by the State into the field of foreign affairs. . . ." ³³ The Court distinguished *Clark* as being concerned "with the words of a statute on its face, not the manner of its application." ³⁴ At the time of *Clark*, said Justice Douglas, the Court was unaware of the potential for interference in foreign affairs. ³⁵ The majority stated, however, that it would have decided recent California cases along *Zschernig* criteria. ³⁶

As *Clark* was not overruled, the Supreme Court left available to the states the power to enact statutes concerning alien inheritance. It is the application of such statutes which would continue to be subject to examination as to whether an unconstitutional involvement with foreign relations was present. This criterion suggests that the validity of these statutes must be made on a case-by-case basis. The probate courts would seem to be charged with deciding at some point whether their "routine reading" of foreign laws was drifting towards interference with international relations. The Supreme Court, however, provided little in the way of guidance as to how that decision would be made.

The concurring opinion of Justices Stewart and Brennan sought to clarify the issue by wiping the slate clean. The Justices considered alien inheritance statutes to be unconstitutional on their face as necessarily involving a "prohibited voyage into a domain of exclusively federal competence." ³⁷ They felt that any realistic attempt to apply the criteria of the statute would involve evaluations, express or implied, of the administration of foreign law, the credibility of foreign diplomatic statements and the policies of foreign governments. In view of this change in judicial philosophy since *Clark*, the shifting of priorities of the U.S. in international relations, and the uncertainty created by the Court's decisions in *Zschernig*, these concurring opinions may indeed foretell future Supreme Court doctrine on the issue.

D. *The New York Experience*

1. Constitutional Questions

In *In re Leikind* ³⁸ the Court of Appeals of New York upheld the constitutionality of the New York retention statute:

[I]f the courts of this State, in applying the "benefit or use or control" requirements, simply determine, without animadversions,

33. *Id.* at 432.

34. *Id.* at 433.

35. *Id.*

36. *Id.*

37. *Id.* at 442.

38. 22 N.Y.2d 346, 239 N.E.2d 550, 292 N.Y.S.2d 681 (1968), *appeal dismissed* 394 U.S. 148 (1970).

whether or not a foreign country, by statute or otherwise, prevents its residents from actually sharing the estates of New York decedents, the statute would not be constitutional under the explicit rationale of the *Zschernig* case.³⁹

The New York court stated that there was no showing by the *Leikind* claimant that "the lower courts in this case have currently engaged in the conduct criticized"⁴⁰ in *Zschernig* as interfering with foreign relations. The court limited itself to an examination of the statute as it applied to this particular case. In so doing, it evidenced a narrower application of the rationale underlying *Zschernig* than the Supreme Court may have intended. *Zschernig* made no mention of the Oregon Court's examination of one case, but rather emphasized the prior application of the law in general.⁴¹ The New York court seemed to be aware in a footnote of this difference (which it nonetheless did not apply): "certain of the examples cited by the Supreme Court in the *Zschernig* case as prohibited conduct purportedly occurred in New York courts. . . ."⁴²

In addition the *Leikind* decision distinguished *Zschernig* on the basis of the broader intrusion of the Oregon statute. That law provided for reciprocity, while the New York statute did not. This distinction, said the New York court, might be of "critical importance" in upholding New York's statute.⁴³

A new subdivision was added to the New York statute effective June 22, 1968⁴⁴ which tied estate distribution to the practice of the United States in transmitting federal funds. The new section was designed to reconcile the statute to the *Zschernig* decision and avoid state interference with federal foreign policy. With the addition of subdivision 1, the statute read as follows:

1. (a) Where it shall appear that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, the court shall direct that the money or property to which such alien would otherwise be entitled shall be paid into court for the benefit of said alien or the person or persons who thereafter may appear to be entitled thereto. The money or property so paid into court shall be paid out only upon order of the surrogate or pursuant to the order or judgment of a court of competent jurisdiction.

(b) Any assignment of a fund which is required to be deposited

39. *Id.* at 352, 239 N.E.2d at 553, 292 N.Y.S.2d at 685.

40. *Id.*

41. 389 U.S. at 440-41.

42. 22 N.Y.2d at 352 n.3, 239 N.E.2d at 553 n.3, 292 N.Y.S.2d at 686 n.3.

43. *Id.* at 351, 239 N.E.2d at 553, 292 N.Y.S.2d at 685.

44. 1968 N.Y. Laws, c. 998, § 1.

pursuant to the provisions of paragraph one (a) of this section shall not be effective to confer upon the assignee any greater right to the delivery of the fund than the assignor would otherwise enjoy.

2. Where it shall appear that a beneficiary would not have the benefit or use or control of the money or other property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person or persons who may thereafter appear entitled thereto. The money or property so paid into court shall be paid out only upon order of the court or pursuant to the order or judgment of a court of competent jurisdiction.

3. In any such proceeding where it is uncertain that an alien beneficiary or fiduciary not residing within the United States, the District of Columbia, the Commonwealth or Puerto Rico or a territory or possession of the United States would have the benefit or use or control of the money or property due him the burden of proving that the alien beneficiary will receive the benefit or use or control of the money or property due him shall be upon him or the person claiming from, through or under him.⁴⁵

The constitutionality of subdivision 1 was challenged in *Bjarsch v. DiFalco*.⁴⁶ The United States District Court considered the deprivation period in subdivision 1 cases to be minimal and therefore not an unconstitutional denial of due process.⁴⁷ The court also stated that, given the absence of cases interpreting subdivision 1, it could not be said that, as applied, there was a denial of due process.⁴⁸

In addressing an argument based on the Equal Protection Clause, the decision noted that the Treasury list⁴⁹ was always considered relevant in determining benefit, use and control, that the classification created by subdivision 1 was related to the legitimate purpose of the statute and that it was not arbitrary or unreasonable.⁵⁰ Subdivision 1 was found to create a rebuttable presumption, not an absolute prohibition.⁵¹ The majority upheld the constitutionality of all of Section 2218 both on its face and also, limiting examination to post-*Zschernig* cases, in its application.⁵² The impact of this ruling as it relates to P.R.C. beneficiaries will be discussed below.⁵³ Unless the Supreme Court

45. N.Y. SURR. CT. PROC. ACT § 2218 (McKinney Supp. 1977-78). A subdivision 4 was added by 1977 N.Y. Laws, c.496, § 2.

46. 314 F. Supp. 127 (S.D.N.Y. 1970).

47. *Id.* at 135-36.

48. *Id.* at 136.

49. *See* note 7 *supra*.

50. 314 F. Supp. at 136.

51. *Id.*

52. *Id.* at 133.

53. § D, 2.

decides to speak on the constitutionality of all or part of Section 2218, it is constitutional according to both state and federal courts.

2. Application to P.R.C. Beneficiaries

There were only two reported cases covering beneficiaries residing in the P.R.C. under the New York statute. Both were decided in 1951; both make reference to the Treasury Department Circular, the effect of which has since been incorporated into the New York statute.

The decedent in *In re Estate of Yee Yoke Ban*⁵⁴ died intestate, with distributees resident in the P.R.C. The Consul General of the Republic of China, relying upon the most-favored nation clause of the Treaty between the Republic of China and the U.S.,⁵⁵ requested delivery to him of the distributive shares for remittance to the beneficiaries. The Public Administrator petitioned against the Consul General, asking that payment be made into the City Treasury pursuant to the then Surrogate's Court Act Section 269.⁵⁶

The court decided that the Treaty did not prevent Section 269 from operating to place the funds into the City Treasury.⁵⁷ The provision invoked read:

A consular officer of either High Contracting Party may in behalf of his nonresident countrymen receipt for their distributive shares derived from estates in process of probate . . . provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees, and provided further that he furnish to the authority or agency making distribution through him reasonable evidence of such remission.⁵⁸

The court stated that no evidence had been presented concerning the possibility of transmitting funds to mainland China and that unlicensed payments to nationals of China had been prohibited by Executive Order No. 9193.⁵⁹ Upon this basis and taking judicial notice that mainland China was controlled by a Communist government which was not recognized by the U.S. government, the court decided it would be impossible for the Consul to transmit the funds to the distributees on the mainland.

54. 200 Misc. 499, 107 N.Y.S.2d 221 (Sur. Ct. 1951).

55. Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, United States-Republic of China, art. II, para. 3, 63 Stat. 1299, T.I.A.S. No. 1871, 25 U.N.T.S. 69.

56. The Surrogate's Court Act § 269 was identical to the present Act, N.Y. SUR. CT. PRO. ACT § 2218 (McKinney Supp. 1977-1978), minus subdivisions 1 and 4. See note 45 *supra* and accompanying text.

57. 200 Misc. at 501, 107 N.Y.S.2d at 223.

58. *Id.* at 500, 107 N.Y.S.2d at 222.

59. *Id.* at 501, 107 N.Y.S.2d at 223.

By the time of this decision, the P.R.C. had been added to Treasury Department Circular 655⁶⁰ determining that:

postal, transportation, or banking facilities in general or local conditions in . . . the People's Republic of China . . . are such that there is not a reasonable assurance that a payee in those areas will actually receive checks or warrants drawn against funds of the United States, or agencies or instrumentalities thereof, and be able to negotiate the same for full value.⁶¹

The court did not refer to the listing of the P.R.C. on the Treasury Circular.

A short time thereafter, the same fact situation arose in a neighboring county.⁶² Decedent Wong Hoen died intestate, leaving distributees in the P.R.C. The Consul General of the Republic of China again invoked the provisions of the treaty between the U.S. and the Republic of China to assert that he was entitled to payment.

The Surrogate in this case cited the listing of the P.R.C. on the Treasury Circular and then stated that there was no proof presented to him that the Consul General would "be able to transmit the funds to the [distributee] or that he will be able to negotiate them for full value."⁶³ It seems the Surrogate used the standard of the Treasury Circular in determining the benefit, use or control requirements of Section 269. As in the *Yee Yoke Ban* case, the Surrogate here took judicial notice of the situation on the mainland of China and ordered that the funds be deposited in the City Treasury.⁶⁴

Both of these cases illustrate the reliance of the New York Surrogates' Courts on the Treasury Circular in applying the alien inheritance statute. Though the *Yee Yoke Ban* court did not refer to the Treasury Circular in deciding against the claim, it did state that the listing of Russian "bloc" nations would prevent estate payment in those countries. The *Wong Hoen* court, however, specifically cited the Treasury Circular listing of the P.R.C.

The reliance by probate courts upon the Treasury Circular to influence estate distribution under state inheritance law could be characterized as excessive and has indeed met criticism. As Professor Berman points out,⁶⁵ in spite of State Department disclaimers that federal law does not restrict distribution of estates to Communist heirs, some New York probate court decisions have relied upon the Treasury regulation as controlling evidence of the factual situation in the alien's country.

60. Communist-controlled China was added on April 17, 1951 under Treasury Department Circular No. 655, Supplement No. 8. 16 Fed. Reg. 3479 (1951). The instant case was decided on July 3, 1951.

61. 31 C.F.R. § 211.1(a) (1977).

62. *In re Estate of Wong Hoen*, 199 Misc. 1119, 107 N.Y.S.2d 407 (Sur. Ct. 1951).

63. *Id.* at 1120, 107 N.Y.S.2d at 409.

64. *Id.*

65. Berman, *Soviet Heirs in American Courts*, 62 COLUM. L. REV. 257, 265 (1962).

The writer has located a more recent unreported estate situation involving P.R.C. beneficiaries.⁶⁶ William Hong, a citizen of the U.S. died intestate in New York County in 1967. He left a net estate, after claims and taxes had been adjusted, of approximately \$18,500. His distributees under New York intestacy law were a sister and a niece, both residing in the P.R.C., and nieces and nephews in Hong Kong and the U.S.

Under New York law⁶⁷ the distributees must be given notice of the intestate accounting proceedings. The only address that the relatives of the decedent knew for the P.R.C. beneficiaries was "Mainland China." Notice of the accounting proceedings was subsequently mailed to the beneficiaries with their addresses stated only as "Mainland China." The notices were returned with a stamped notation that the addresses were incomplete. Thereafter, service by publication was permitted.⁶⁸ The P.R.C. distributees were duly served citations of the accounting proceeding of their relative by publication of notice in the *New York Law Journal* and the *East Side News*.

After the statutory time allowed for them to appear had elapsed⁶⁹ and they did not appear, the accounting was settled without them. It was determined that the P.R.C. sister and the P.R.C. niece each had a distributive share of approximately \$6,200.

The Surrogate's Decree Settling Account⁷⁰ was filed in November 1971 after outstanding claims had been adjusted. The distributive shares of each of the Hong Kong and American beneficiaries were paid to them. As for the P.R.C. sister and niece, the Administrator was ordered to "pay and distribute . . . [t]o the Finance Administrator of the City of New York the sum of . . . [distributive share] for the benefit of [name of sister or niece], a resident of mainland China, representing her share in the Estate herein. . . ."⁷¹ Efforts to ascertain the precise justifications for such action were unfruitful.

The exact determination for the ordering of the deposit of the legacies to these P.R.C. residents is relevant since financial transactions with the P.R.C. are now authorized. If the basis of the deposit was that transmissions of gifts to P.R.C. beneficiaries were prohibited by the F.A.C., then, since the May 7, 1971 lifting of the prohibition, permitting funds accruing after that date to be transmitted, the Surrogate should order the funds sent. If the basis of the order was that the beneficiaries resided in a country listed on the Treasury Circular, or it was felt that they would not have benefit, use or control of their gift, then, despite the subsequent authorization of transactions, these determinations obstruct the present sending of estate funds to the P.R.C.

66. In re Estate of William Hong, No. 1564/1967 (Sur. Ct. N.Y., Nov. 29, 1971).

67. N.Y. SUR. CT. PROC. ACT § 2210 (McKinney Supp. 1977-78).

68. See N.Y. SUR. CT. PROC. ACT § 307 (McKinney Supp. 1977-78).

69. See N.Y. SUR. CT. PROC. ACT § 2215 (McKinney Supp. 1977-78).

70. In re Estate of William Hong, *supra* note 66.

71. *Id.* at 5.

The above discussion suggests the feasibility of a two-part test to decide whether a beneficiary will have sufficient benefit, use or control of American estate funds. The first test is whether the funds would ever reach the intended beneficiary. The second test is whether the beneficiary will be able to enjoy the funds once they are transmitted to him. How the second test is to be implemented is an open question given the previous impossibility of getting funds to the P.R.C. Court standards of a P.R.C. beneficiary's benefit, use or control of estate property accruing after May 7, 1971 therefore await clarification.

A variation on the *Hong* theme is the *In re Estate of Tom Ai Yuen* proceedings.⁷² Decedent Yuen died intestate in New York in 1962. He was a national of China who came to the U.S. in 1930 and obtained permanent residency in this country. The amount of his net estate (after claims and taxes) was almost \$7,000.

Decedent was allegedly survived by two distributees.⁷³ One was his widow who had left China in 1955 for Hong Kong. She remained in Hong Kong until 1968, at which time she went to Canada to reside. The other alleged surviving distributee was a son who was born in China, leaving in 1954 for Hong Kong. In 1959 he went to Canada and became a Canadian citizen in 1965. Two other sons were asserted to have predeceased the decedent, leaving no issue.

The Surrogate's court, apparently dubious of the claims of the widow and son, ordered a kinship hearing to determine the distributees of the decedent.⁷⁴ The alleged widow offered as proof of her identification her Hong Kong Identity Card. Offered as evidence were (1) a photograph of the decedent with the alleged son and the son's cousin; the photograph allegedly taken in New York in 1959; (2) two memoranda of checks allegedly sent by decedent to his wife; (3) photograph of decedent's grave, allegedly taken by the son; (4) a letter from a bank dated before decedent's death showing pedigree information; and (5) a letter from an attorney, with photos of the decedent and his wife attached, together with an unexecuted petition of decedent to classify the wife for immigration admission into the U.S.⁷⁵ In addition, testimony was offered sufficient to convince the referee that the claimants were the decedent's wife and son.

As for the other two sons, the referee stated the evidence indicated that they were born of his marriage to his wife, though the referee was not convinced that the evidence was of sufficient probative force to establish the facts of their deaths.⁷⁶ He recommended that their distributive shares be placed with the

72. No. 3185/1962 (Sur. Ct. N.Y., Feb. 25, 1966).

73. *In re Tom Ai Yeun*, No. 3185/62 (Sur. Ct. N.Y., June 14, 1965) (report of referee).

74. *Id.* at 2.

75. *Id.* at 3.

76. *Id.* at 5.

Treasurer of the City of New York, subject to the further order of the court, "pursuant to Section 269A of the Surrogate's Court Act."⁷⁷ Section 269A of the Surrogate's Court Act was, at the time of the referee's decision, Section 2218 without subdivision 1 or 4 of the present Surrogate's Court Procedure Act.⁷⁸

The Surrogate accepted the kinship findings of the referee's report. His decree settling the administrator's account determined and ordered:

And it appearing that the distributees are nationals of China and having failed to obtain a license permitting the transfer of their respective distributive shares to them pursuant to Sec. 500;201 of the Foreign Assets Control Regulations of the United States of America, it is

ORDERED, ADJUDGED and DECREED, that the decedent left him surviving his widow, WONG LIN TAI, and a son, TOM WING LING, nationals of China, and that the shares of the said WONG LIN TAI and TOM WING LING, as well as the shares of WIN LIP and TOM WING YET, two of decedent's other sons, be deposited with THE DIRECTOR OF FINANCE of THE CITY OF NEW YORK, subject to the further order of this Court.⁷⁹

It is to be noted that the court states that the reason for depositing the distributive shares with the Director of Finance is that the distributees appear to be nationals of China and are therefore ineligible under federal law from obtaining a license transferring their distributive shares to them.⁸⁰ This line of reasoning follows closely that of the *Yee Yoke Ban* case in which the Surrogate was concerned with the actual transmittal of funds and in which the Surrogate also cited the licensing prohibition.⁸¹

The instant case may be said to employ the first test of our devised two-test analysis of payment of estate benefits to P.R.C. recipients which would deny immediate payment where the actual transmittal of funds to the beneficiaries is impossible.

Application was made to the Federal Reserve Bank of New York for a license.⁸² A letter from the Federal Reserve Bank⁸³ requested a residence ques-

77. *Id.*

78. See note 45 *supra* and accompanying text.

79. In re Tom Ai Yuen, *supra* note 73, at 2-3.

80. *Id.* at 2.

81. See note 59 *supra* and accompanying text.

82. Letter from Gitta R. Yaker, Esq., to Director of Foreign Assets Control, U.S. Treasury Dep't (Sept. 18, 1973) (copy available in the *Boston College International and Comparative Law Journal* offices).

83. Letter from Stanley L. Sommerfeld, Acting Director, Office of Foreign Assets Control, to Gitta R. Yaker, Esq. (Oct. 3, 1973) (copy available in the *Boston College International and Comparative Law Journal* offices).

tionnaire⁸⁴ be submitted. The questionnaire was duly submitted and a license granted.⁸⁵

The widow and son of decedent Yuen established to the satisfaction of the Secretary of the Treasury that, because of their new residence in Canada and the ties that they had to their new country, they should not be considered nationals of China.⁸⁶ The definition of "national" as used by the F.A.C. to grant or deny licenses seems to be a measure of the applicant's intent to establish at least a permanent residence, if not citizenship, in a country to which payment is permitted.

The license was presented to the Surrogate along with a recommendation by the distributees' attorney that the shares of the two allegedly surviving sons be paid to the widow and surviving son since approximately 30 years had passed without evidence that the two sons were alive. The Surrogate accepted this recommendation and ordered the funds withdrawn to the widow and son.⁸⁷

As a practical matter only larger estates are worth pursuing by P.R.C. beneficiaries. William Hong's net distributive estate was worth over \$18,500. The Yuen net proceeds came to almost \$7,000. Smaller estates will be depleted by expenses.

With the federal prohibition lifted against the transmittal of funds to the P.R.C., the question now becomes what are the criteria by which the New York courts will decide whether the P.R.C. beneficiary will be able to receive his funds. As of 1968, the Treasury Circular was incorporated into the New York alien inheritance statute as subdivision 1.⁸⁸ *Bjarch v. DiFalco*,⁸⁹ which upheld the constitutionality of subdivision 1, interpreted it as instituting a rebuttable presumption of non-benefit rather than an absolute prohibition of distribution.⁹⁰ Deposit of the funds with court was, however, a necessary first step.⁹¹

Application of subdivision 1 has proved to be problematic. *In re Estate of Becher*⁹² was decided after a decision was made to impanel a three-judge court in *Bjarch* but before the three-judge court handed down its decision. The case

84. *Id.* at 1-2. The residence questionnaire probes the bonds of the applicant with his country of intended permanent residence. His intent to reside in the new country is measured by whether he seeks citizenship of that country, any by his ties within the country to family, property and means of livelihood. Intent to return to the P.R.C. and possible remaining influences of the P.R.C. are examined. A copy of the questionnaire is available in the *Boston College International and Comparative Law Journal* offices.

85. U.S. Treasury Dep't, Office of Foreign Assets Control, License No. B 89113 (Aug. 2, 1974) (copy available in the *Boston College International and Comparative Law Journal* offices).

86. *Id.*

87. Conversation with Gitta R. Yaker, Esq., in New York City (Feb. 1975).

88. See note 45 *supra* and accompanying text.

89. 314 F. Supp. 127 (S.D.N.Y. 1970).

90. *Id.* at 136.

91. *Id.* at 137.

92. 61 Misc.2d 46, 304 N.Y.S.2d 628 (Sur. Ct. 1969).

involved an East German beneficiary to whom subdivision 1 would apply since East Germany is still on the Treasury Circular. The *Becher* court held that the standard to be applied under subdivision 1 is the same standard as that in subdivision 2: that is, whether the beneficiary would have the benefit, use or control of the funds.⁹³ Although the *Bjarch* case upheld the distinction created by subdivision 1, the exact effect of *Bjarch* on *Becher* seems unclear as to the proof required under subdivision 1 for payment.

Furthermore, after *Bjarch* was decided, the Surrogate in *In re Litos*⁹⁴ refused to follow the procedure enunciated by *Bjarch* of first depositing funds in the court for Albanian distributees subject to subdivision 1. The Surrogate felt that the heirs had established that they would have the benefit, use and control of the gift and deposit would be useless.⁹⁵

Since the P.R.C. is still on the Treasury Circular, if a case involving a P.R.C. beneficiary should arise, there may be a constitutional question as to due process and equal protection of different classes of aliens, as well as varying procedural interpretations. Removal of the P.R.C. from the Treasury list, would not automatically enable P.R.C. distributees to receive or benefit from full value of their shares in an estate. They must still prove that they will have use, benefit and control.⁹⁶

According to subdivision 3 of §2218, the burden shifts to the alien to prove use, benefit or control only after some uncertainty has been raised. Uncertainty could be mere residence in a communist country.⁹⁷ The first element of meeting this burden is establishing that private ownership of property is permitted to citizens of the alien's country. In *In re Estate of Padworski*⁹⁸ the court accepted testimony that the Civil Code and the Constitution of the U.S.S.R. permitted citizens of the Soviet Union to own property "to satisfy their material and cultural requirements."⁹⁹

A second element is a showing by the alien that he has a right to inherit property without governmental restriction in his country. In the *Padworski* case, testimony also was provided that Soviet citizens were able to receive funds from estates without limitation as to amount.¹⁰⁰

In one of the early cases that reversed previous decisions and allowed payment to Soviet distributees, *In re Alexandroff's Estate*,¹⁰¹ the Surrogate accepted

93. *Id.* at 47, 304 N.Y.S.2d at 629.

94. N.Y.L.J., Dec. 14, 1970, at 18, col. 7 (Sur. Ct., Dec. 1970).

95. *Id.*

96. *In re Estate of Draganoff*, 46 Misc.2d 167, 259 N.Y.S.2d 20 (Sur. Ct. 1965).

97. Di Falco, *Foreign Law in the New York Surrogate's Court: A View from the Bench*, 6 Cornell Int'l L.J. 45, 47 (1972); see also *In re Estate of Draganoff*, *supra* note 96.

98. 53 Misc.2d 1043, 281 N.Y.S.2d 276 (Sur. Ct. 1967).

99. *Id.* at 1045, 281 N.Y.S.2d 278.

100. *Id.*

101. 30 Misc. 123, 61 N.Y.S.2d 866 (Sur. Ct. 1945).

presentation of formal certificates of the Soviet Ambassador to the U.S. These certificates stated that the legatees and distributees of estates, in contrast to the former situation, had the benefit, use and control of the money or other property due them. The Surrogate also noted that the new inheritance law of the Soviet Union effective in 1945 broadened the class of heirs and legatees and the kind of personal property which might be inherited.¹⁰² These two conditions convinced the Surrogate that the aliens would be able to inherit and own property, including inherited property sent from abroad.

The case in *In re Estate of Henseling*¹⁰³ involved East German beneficiaries (German Democratic Republic citizens). Expert testimony was offered by a former judge residing in East Berlin who was an international lawyer, and by a member of the City Council of Dresden, Germany, who was also Chairman of the Department of Finances of the City of Dresden. The testimony established, by citation to applicable statutes, that inheritance was permitted and that there was no "reasonable possibility that the estate will be confiscated by the D.D.R. [German Democratic Republic] on any number of theoretical legal grounds."¹⁰⁴ One of the expert witnesses testified that to his knowledge there have been no governmental confiscation of property coming from abroad and permission to receive foreign inheritances was routinely granted.¹⁰⁵

In recognition of the fact that one form of confiscation by the foreign government is the levying of high taxes, courts have considered this a factor in determining whether to allow transfer of estate funds. The *Padworski* Surrogate favorably cited the fact that in 1943 the Soviet Union abolished inheritance taxes.¹⁰⁶ The decisions of *In re Estate of Henseling*,¹⁰⁷ and of *In re Estate of Kina*¹⁰⁸ involving Polish distributees, both noted the lack of inheritance tax in the two countries and both permitted transmittal of funds.

Another major consideration of the courts in deciding whether the beneficiary would have benefit, use or control is the exchange rate. If the internal exchange rate within the alien's home country were at an appreciable lower rate of exchange than in the United States, this would indicate a confiscation in part and prevent any attempt to prove benefit, use or control.¹⁰⁹ Where the distribution of estate funds would be made through American dollar account stores, such as the *Vnesposyltorg* in the Soviet Union and the *Tuzex* Foreign Trade Corporation in Czechoslovakia, the Surrogate has al-

102. *Id.* at 124, 61 N.Y.S.2d at 867.

103. 70 Misc.2d 610, 334 N.Y.S.2d 553 (Sur. Ct. 1972).

104. *Id.* at 611, 334 N.Y.S.2d at 554.

105. *Id.*

106. 53 Misc.2d at 1045, 281 N.Y.S.2d at 278.

107. 70 Misc.2d at 612, 334 N.Y.S.2d at 555.

108. 29 A.D.2d 563, 286 N.Y.S.2d 773 (1967).

109. *In re Estate of Greenberg*, 24 A.D.2d 435, 260 N.Y.S.2d 818 (1965).

lowed payment, considering it to be "reasonably probable" that the legatees would have benefit, use or control of their legacies.¹¹⁰

There are indications that the courts will apply the foregoing factors in a flexible manner. The Surrogate in *In re Estate of Becher*¹¹¹ recognized that the statutory requirement of full, use or benefit must be made in the context of a different system than that of the U.S. Despite an acknowledgment that the beneficiary would be required to exchange his American dollars at a fixed official rate and that he probably could not re-convert them back into dollars, the Surrogate dismissed this limitation on the use of the funds as inconsequential.¹¹² The Surrogate drew attention to the differing economic and political systems of East Germany and the U.S. and stated that benefit, use or control could not be identical in the two countries. "To require identical possibility of use of the money in East Germany as in this country would in effect mean that under the guise of safeguarding to petitioner the benefit, use and control of the money, he would be denied such benefit, use or control completely."¹¹³ Similarly, the *Padworski* Surrogate also allowed for the differences when he recognized that Soviet citizens could own property according to their material and cultural requirements.¹¹⁴

Applying these criteria of use, benefit and control in a hypothetical situation to determine whether P.R.C. beneficiaries may receive their estate funds, the first element to be proven is whether the P.R.C. allows ownership of property, particularly ownership due to inheritance. On a theoretical level our attention is drawn to the newly promulgated Constitution,¹¹⁵ where no mention is made of the citizen's right to inherit property. The original Constitution of 1954 permitted citizens to inherit property although the 1975 Constitution also omitted inheritance rights.¹¹⁶ This omission may indicate that individual inheritance is no longer permitted in the P.R.C.

Failing a finding of Constitutional protection of individual property rights, we look now to the statutes of the P.R.C. to see if there is a statutory protection. The only pertinent statute that has been promulgated by the Peking regime has been the Marriage Law.¹¹⁷ Chapter III, Article 12 of the Marriage Law insures the right of the husband and wife to inherit each other's property.¹¹⁸ Chapter IV, Article 14 protects the right of parents and children

110. *In re Estate of Paroth*, 72 Misc.2d 499, 340 N.Y.S.2d 433 (Sur. Ct. 1971); *In re Estate of Reidl*, 23 A.D.2d 171, 259 N.Y.S.2d 217 (1965).

111. 61 Misc.2d 46, 304 N.Y.S.2d 628 (Sur. Ct. 1969).

112. *Id.* at 48-49, 304 N.Y.S.2d at 630.

113. *Id.* at 48, 304 N.Y.S.2d at 630.

114. 53 Misc.2d at 1045, 281 N.Y.S.2d at 278.

115. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, reprinted in 21 PEKING REV. 5 (1978).

116. See CONSTITUTION OF THE PEOPLES REPUBLIC OF CHINA (1954); CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (1975).

117. Law of May 1, 1950, THE MARRIAGE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1973).

118. *Id.*, ch. 3, art. 12.

to inherit one another's property.¹¹⁹ If the Marriage Law is not superseded by a possible reading of the Constitution which would not permit ownership of property by P.R.C. citizens, it can be said that the law in the P.R.C. guarantees the right of inheritance to wives, husbands and children of each other's property which is other than the means of production. Beneficiaries other than spouses, parents or children, would not be protected.

The possibility still exists that testimony by qualified witnesses could be introduced to establish that from their personal knowledge inheritance of property is permitted in the P.R.C., including inheritance from abroad. The credibility of such witnesses would nevertheless be subject to question. Expert witnesses are usually subject to rigorous examination and cross-examination and there is no prohibition on the introduction of the testimony of a second qualified expert witness whose testimony may directly contradict that of the first witness.¹²⁰

Testimony of a P.R.C. official, offered in court to prove that inheritance is a right in the P.R.C. and that there is no government confiscation of foreign inheritance, would be of dubious weight. Since there appears to be no private practice of law in the P.R.C., any attorneys produced would be subject to the criticism of governmental ties. Finding a suitable expert witness from the P.R.C. would appear to be an insurmountable obstacle. The possibility exists, however, that qualified expert testimony of an individual not a citizen of the P.R.C. could be obtained. Passing on the sufficiency of the qualifications would be a task for the judge.¹²¹

119. *Id.*, ch. 4, art. 14.

120. In the *Henseling* case, *supra* note 108, the testimony of a former judge who was an international lawyer and the testimony of a member of the City Council of Dresden were accepted to prove that there was no legal basis for government confiscation of inheritance from abroad, nor any practice of it. That such testimony can fail to persuade was demonstrated in the case of *In re Estate of Draganoff*, 46 Misc.2d 167, 259 N.Y.S.2d 20 (Sur. Ct. 1965). A Bulgarian attorney specializing in civil family and inheritance law who was a member of a lawyer's office specializing in work with foreign countries offered testimony to prove that a Bulgarian citizen would receive full benefit, use and control of a foreign inheritance. The court felt that the Bulgarian attorney was not a free and independent attorney but a member of a lawyers' collective and as such, subject to restrictive pressures imposed by a communist government. The court decided that he could not objectively analyze his government's fiscal policies. The court viewed this testimony with extreme skepticism, all the more since there was no other proof offered to substantiate the testimony. The witnesses in the *Henseling* case apparently were considered detached enough from their government to be believed, and their testimony seemed in accord with other evidence.

121. *Carrols Equities Corp. v. Villanve*, 57 A.D.2d 1044, 395 N.Y.S.2d 800 (1977). Another approach to the problem of proof of the P.R.C. law was followed by the Hong Kong government when it had to establish the P.R.C. law of intestate succession. According to a Hong Kong law, whenever any native of China dies intestate leaving property within the jurisdiction of the Hong Kong court, and proof of the law of the P.R.C. is necessary to determine distribution, a written statement of law of the P.R.C. by a P.R.C. official which is certified by a British consular officer in China is allowed in evidence by the Hong Kong court. The response from the P.R.C. officer has been to establish the legal rights of the specific parties involved rather than to provide information as to the general legal requirements which would cover all situations. This was sufficient

We can conclude that unless the right to inherit private property is protected, either by statute or by custom as testified to by detached and qualified expert witnesses, transmittal of estate funds would not be permitted. Evidence on the issue of any inheritance tax levied on foreign estates in the P.R.C. is ascertainable by statutory analysis and through witnesses testifying from their personal knowledge. The credibility of a particular witness, especially if he were a government official from the P.R.C., would be subject to the discretion of the Surrogate. Evidence of a non-confiscatory rate of exchange could be ascertained objectively by comparing the internal rate of exchange from American dollars to P.R.C. yuan to the rate outside the P.R.C. As to the fundamental question of full benefit, use and control of funds in the P.R.C., any analysis would have to adopt the modern contextual approach which would take into account the P.R.C.'s differing political system, which restricts the ownership of private means of production. Differences in economic and political systems between communist countries and the U.S. were recognized in the *Becher* case,¹²² and hinted at the *Padworski* case.¹²³ Such a liberal approach could be extended to estate inheritance to P.R.C. residents.

A less hostile attitude towards communist governments which currently allows transmittal of funds was expressed by Surrogate Di Falco of New York County. He made the observation that the motivation for Section 2218 is dissipating: "Today with the thaw in the cold war, the need to withhold funds has been sharply reduced."¹²⁴ The Surrogate was referring to the European communist countries, but the same may be said of U.S.-P.R.C. relations.

The right of P.R.C. citizens to own property received through inheritance appears doubtful under present evidence, though the P.R.C. could prove to be as flexible as the Soviet Union was, by modifying its laws to broaden the range of inheritable property and permissible heirs,¹²⁵ abolishing inheritance tax¹²⁶ if any, and if the rate of exchange is found to be unfavorable, providing means to insure a higher value for the foreign currency.¹²⁷ Under such circumstances, a court could find justification in accepting testimony from a witness attesting to benefit, use and control. Such was the case in *Alexandroff*,¹²⁸ where the court observed changes made in the Soviet in-

for the Hong Kong courts, but probably would not be accepted by an American probate court. The probate courts, in New York at least, seem concerned with a right of inheritance granted to all citizens of a particular foreign country and not with the rights of particular parties in a particular case. Unless the P.R.C. will provide proof of its actual law which regulates all cases of inheritance, New York Surrogates will probably not permit transmittal of funds.

122. See note 111 *supra* and accompanying text.

123. See note 98 *supra* and accompanying text.

124. DiFalco, *Foreign Law in the New York Surrogate's Court: A View from the Bench*, 6 Cornell Int'l L.J. 45, 48 (1972).

125. See notes 101 & 102 *supra* and accompanying text.

126. See note 106 *supra* and accompanying text.

127. See note 111 *supra* and accompanying text.

128. Note 101 *supra*.

heritance law which allowed less restrictive inheritance. It seems then that the skepticism of the court as to the veracity of statements by the government or its representatives can be overcome with sufficient objective substantiation, such as statutory provisions. In the final analysis, it is up to the P.R.C. to determine the extent to which its system can be adapted to accommodate American standards of proof.

Beyond the basic proof of benefit, use or control of a foreign beneficiary, there lie evidentiary and procedural problems which could be determinative of the case. Basic to the claimant's case is his proof of identity. In the *Yuen* case, the referee permitted secondary evidence to establish the claimants' identities.¹²⁹ Secondly, claimants who must put forth their case while still abroad have faced some doubting Surrogates. Again, in *Yuen*, the claimants' burden was eased by their personal presentation of their case.

A third problem is the availability of accurate records. Since Chinese governments until recently have not kept accurate records, documents of vital statistics may have to be reconstructed. In *In re Estate of Borok*¹³⁰ the court rejected reconstructed documents of vital statistics. It noted that the documents' authenticity were doubtful since "the government certifying the records also has a financial interest in accomplishing the transmittal of funds to its nationals."¹³¹ If the P.R.C. decides to reconstruct documents to bolster the claims of its residents, there may be serious question of their veracity by the Surrogate's Court.

Location of beneficiaries is sometimes a formidable problem. If the P.R.C. and the U.S. continue to have further relations, organized help could be utilized to locate family members.¹³² Other special procedures devised in the case of nonresident beneficiaries include arranging for proper representation. For a nonresident alien to be represented in the American courts, he must sign a power of attorney authorizing a party to act on his behalf in the American courts. Furthermore, depositions taken abroad require a certain format.¹³³ Certification of official records must be accomplished or the record is inadmissible as evidence.¹³⁴

It may also be advantageous to establish a recognized method of distribution of estate funds. Transfers of funds may be made through normal banking channels.¹³⁵ Transmittal through the American Express Company has been

129. See note 72 *supra* and accompanying text.

130. 49 Misc.2d 870, 268 N.Y.S.2d 669 (Sur. Ct. 1966).

131. *Id.* at 873, 268 N.Y.S.2d at 670.

132. Service of citation was made to a Polish distributee through the Polish Consulate in Washington in the *Padworski* case. See note 99 *supra* and accompanying text.

133. N.Y. CIV. PRAC. LAW § R.3113 (McKinney 1970 & Supp. 1977-78).

134. *Id.*, § R.4542 (McKinney Supp. 1977-78).

135. 31 C.F.R. § 500.524(e) (1977).

recognized in New York.¹³⁶ In the case of the P.R.C., transmittal would have to be made to the Bank of China.¹³⁷ If the two countries wish, the procedure for the transfer of inheritance may be established in a special inter-governmental agreement. This was done by the U.S. and the U.S.S.R. in Article 10 of the Consular Convention between the Government of the Union of Soviet Socialist Republics and the Government of the United States of America.¹³⁸ It allows any American agency, firm or person intending to realize a transfer of inheritance funds to call upon a consular officer to effect the transmission of the money or property.¹³⁹

E. *The California Decision*

By not following the New York example in amending its alien inheritance provision, California seems to have adopted the position of Justices Stewart and Brennan in their concurring opinions¹⁴⁰ who felt that such statutes could not but interfere in foreign relations.

In the *Eng* case,¹⁴¹ the only reported California case involving P.R.C. citizen distributees, the District Court of Appeal, after determining that a treaty with the Republic of China settling inheritance questions had no effect on P.R.C. distributees, discussed the difficulty of proving foreign law. The court declined to take judicial notice of foreign law and felt that documents of unquestioned authority should also be consulted, especially in the investigation of a country such as the P.R.C. The court also stated that proof of reciprocity may involve more than formal law and may require oral testimony as to the foreign system's practical working.¹⁴² The *Eng* case, in its application, may very well have been considered unconstitutional under *Zschernig*. The California legislature decided to avoid these possible interferences with the federal government's jurisdiction by repealing the statute.¹⁴³

F. *Conclusion*

The confusing and conflicting area of alien succession to estate property ultimately may have to be resolved by the Supreme Court. If the concurring opinions of Justices Stewart and Brennan one day are given full effect, alien

136. In re Estate of Saniuk, 40 Misc.2d 437, 243 N.Y.S.2d 47 (Sur. Ct. 1963).

137. See, e.g., Application for Transfer of Funds from The Chase Manhattan Bank, N.A. to Bank of China (copy available in the *Boston College International and Comparative Law Journal* offices).

138. Consular Convention, June 1, 1964, United States-Union of Soviet Socialist Republics, art. 10, 19 U.S.T. 5018, T.I.A.S. No. 6503.

139. *Id.*

140. See note 37 *supra* and accompanying text.

141. In re Eng's Estate, 228 Cal. App.2d 160, 39 Cal. Rptr. 254 (1964), cert. denied 381 U.S. 902 (1965).

142. *Id.* at 168, 39 Cal. Rptr. at 259.

143. CAL. PROB. CODE § 259 (West 1956), repealed by 1974 Cal. Stats., c.425, § 1, at 1025.

inheritance statutes may be struck down *in toto* as unconstitutional. There may be a likelihood of this happening considering the trend from *Clark* to *Zschernig* in limiting aspects of state alien inheritance statutes.

A treaty between the United States government and a foreign country, which regulates matters of inheritance, would be most desirable as it would prevail over any conflicting provisions of state law.¹⁴⁴ Ultimately it will be up to the P.R.C. to decide if it wants to accommodate its system in the hope of receiving substantial foreign currency.

III. IMMIGRATION

A. Introduction

The United States modified its immigration law in 1965.¹⁴⁵ The national origin provisions were abolished and a new system was established which allowed less restrictive entry for Chinese. As indicated above,¹⁴⁶ the year after the new law was put into effect, the immigration of Chinese more than tripled from the previous year. Unfortunately, we can only estimate how many of these Chinese came from the P.R.C., since the Immigration and Naturalization Service considers the P.R.C. and Taiwan as one unit and does not publish separate figures for each area.

As for the P.R.C. policy of allowing its citizens to emigrate to the U.S., I was told by an immigration attorney¹⁴⁷ that, before the easing of relations in 1971-72 between the two countries, the obstacle for the would-be immigrant was one imposed by the P.R.C. The U.S. usually admitted immigrants from the P.R.C. as refugees. Since the detente, an increased number of P.R.C. citizens have been allowed to join their families in the U.S., although complete freedom to emigrate is lacking. If one looks at the figures of immigrants admitted from the P.R.C. and Taiwan,¹⁴⁸ it may be observed that from 1969 to 1971 they remain within a range of 500 but that in 1972-76 there is an increase of over 3,000 from the 1971 figure. This increase may have been the result of the detente and would then represent immigrants from the P.R.C.

The overwhelming majority of immigrants from China falls into two groups set up by the 1965 amendment. Chinese immigrants usually receive visas on the basis of relationship to a U.S. citizen or permanent resident. The first group is called "immediate relatives" (such as spouses, children and parents) of United States citizens. Members of this group are not subject to any numerical ceiling. The second group is subject to a system of preference

144. *Kolovrat v. Oregon*, 366 U.S. 187 (1961).

145. Pub. L. No. 89-236, §§ 8, 24, 79 Stat. 911 (1965) (codified at 8 U.S.C. § 1151 (1970)).

146. See note 10 *supra* and accompanying text.

147. Conversations with Thomas Lee, Esq., in New York City (Feb. 1975).

148. See note 10 *supra*.

classifications set up for natives of the Eastern hemisphere. This second group is subject to a per-country (in this case the P.R.C. and Taiwan together) ceiling of 20,000 per year. The preference classifications under which P.R.C. immigrants arrive in the United States are:

1st preference: unmarried sons and daughters of U.S. citizens (if under 21, they would be exempt from the ceiling as "immediate relatives");

2d preference: spouses and unmarried sons and daughters of lawful permanent resident aliens;

3d preference: members of the professions or those gifted in the arts or sciences;

4th preference: married sons and daughters of U.S. citizens;

5th preference: brothers and sisters of U.S. citizens.¹⁴⁹

A spouse or child of a preference immigrant is entitled to the same status and priority date as the spouse or parent who is the specific beneficiary of the preference.

The discussion that follows will outline the procedure involved in admitting a P.R.C. immigrant. First, a brief organizational structure of the agencies enforcing the immigration laws will be presented. Second, the P.R.C. practice and policy of allowing its citizens to emigrate to the U.S. will be examined. Finally, some difficulties peculiar to Chinese aliens will be discussed.

B. *U.S. Agencies Involved in Immigration*¹⁵⁰

If an American citizen or permanent resident desires to have an "immediate relative" or a relative permitted by one of the preference classifications immigrate to the United States, he must file a visa petition with the Immigration and Naturalization Service. The Immigration and Naturalization Service is headed by a commissioner who is the principal Justice Department official charged with enforcing the immigration laws.

Necessary supporting documentation must also be submitted to the Immigration Service consisting of proof of citizenship or lawful entry and proof of relationship. Where original documents are not available, secondary evidence including affidavits are allowed.

If the Immigration Service approves the petition, it certifies to the American consulate indicated by the petitioner on the form that the beneficiary possesses the requisite family relationship of either an immediate relative or a preference relative. The American consulate in Hong Kong handles the visas for P.R.C. beneficiaries. This is convenient for most of the

149. 8 U.S.C. § 1153 (Supp. 1978).

150. See generally C. GORDON & H.N. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* (1978); E.J. HARPER & R.F. CHASE, *IMMIGRATION LAWS OF THE UNITED STATES* (3d ed. 1975).

beneficiaries who originate largely from the Canton area which is a short distance from Hong Kong.

The consul will then issue the visa to the certified alien upon his arrival in Hong Kong. Final judgment as to the issuance or refusal of a visa rests with the consul, but in practice if an approved petition is sent, the visa issuance will follow.

A petition for an alien relative is filed with the district director of the Immigration Service for the district of the petitioner's residence. If the district director does not approve the petition, appeal may be made to the Board of Immigration Appeals.¹⁵¹ The Board of Immigration Appeals is a quasi-judicial tribunal created by regulations of the Attorney General.¹⁵² It consists of five members. The Board has appellate jurisdiction only as granted to it in the regulations. The Board does not supervise the Immigration Service; its decisions, however, are binding on the entire Service. Appeal to the Board involves an adversary process with oral argument available in most instances as a matter of right. The Board determines its appeals solely on the basis of the administrative record of the Service, but has the power to make its own fact findings.

Under the regulations of the Attorney General, a Board decision can be certified to the Attorney General for review at the request of the Commissioner of Immigration or of the Chairman of the Board or a majority of the Board or the Attorney General himself.¹⁵³ This is rarely done, and so the Board's decision can be considered a final administrative action.

If the petitioner wishes to appeal an adverse decision rendered by the Board denying his petition for an alien relative, he cannot go to the Attorney General but must seek judicial review by filing in the United States District Court.¹⁵⁴ Statistically, very few Board decisions are reversed on appeal in the courts.¹⁵⁵

C. P.R.C. Policy and Practice

After the petition for an alien relative has been certified to the American Consulate in Hong Kong, the P.R.C. beneficiary must apply for an exit visa from his government.¹⁵⁶ Only after the petition has been granted will the

151. 8 C.F.R. § 3.1(b)(5) (1977).

152. 8 C.F.R. pt. 3 (1977).

153. 8 C.F.R. § 3.1(h) (1977).

154. *See* Cheng Fan Kwok v. Immigration & Naturalization Service, 392 U.S. 206, 210 (1968); *Lai Haw Wong v. Immigration & Naturalization Service*, 474 F.2d 739, 742 (9th Cir. 1973).

155. *See* note 147 *supra* and notes 157 & 158 *infra*.

156. If a request for an exit visa is made by either the sponsor or the beneficiary to other P.R.C. government offices, such as the United Nations delegation, the liaison office in Washington, D.C., or the Foreign Office in Peking, all such requests are referred back to the local Public Security Bureau. It seems as if the other government agencies are abdicating responsibility for issuing exit visas to the local Public Security Bureau. Those seeking shortcuts are told to go through channels.

P.R.C. consider issuing an exit visa.

According to immigration attorneys, the response from the P.R.C. government was originally very irregular in issuing exit visas, but since 1977 has been much more lenient in letting those leave the country if they desire to go.¹⁵⁷ The parents of Chinese-Americans will be allowed to leave first; then the younger members of the family, such as the brothers and sisters of the petitioner, may go.

One of the immigration attorneys I spoke with felt that it was P.R.C. policy to allow certain of its citizens to leave.¹⁵⁸ The large majority of beneficiaries are Cantonese from the Toi Shan area and have been considered hard to discipline to the regime's ideology. By allowing these people to leave the country, the P.R.C. may feel it is relieving itself of reactionaries. I was told¹⁵⁹ that, in general, group pressure on those desiring to leave was negligible, in part because so many P.R.C. citizens from the Canton area desired to leave. There apparently has been no harassment, either official or unofficial of those planning to leave the P.R.C. The encouraging of reunification of families in the U.S. is also an expression of the recent P.R.C. policy of seeking the support of overseas Chinese for the P.R.C. regime. To aid in the process, the P.R.C. has now issued passports to those relations certified by the American Consulate, thereby facilitating their travel to the U.S.

The procedural process in applying for an exit visa depends upon whether the applicant resides in the rural area or in one of the large cities. In the rural area, it seems that processes are done on a personal basis. Application for an exit visa is made to the Public Security Bureau for the local district. In most cases the section will act on it directly. In some instances, however, the section office will instruct the beneficiary to bring it up to the country level. The lower the level of decision, the more likely that independent action will be taken.

If the beneficiary is a resident of a large city, such as Canton or Shanghai, he must make application through three levels: the neighborhood branch office of the Public Security Bureau, then the branch office of the Public Security Bureau, and finally the municipal Public Security Bureau. Generally speaking, applications from a large city take one to one and a half years. In the rural areas, the time generally is shorter, although even here approval may take up to two years.¹⁶⁰

At the local Public Security Bureau, the beneficiary must fill out an application form and state why he or she wants to go to the United States. At this time the beneficiary must also submit a copy of the approval letter granting the ap-

157. Conversation with Norman Lau Kee, Esq., in New York City (Feb. 1975).

158. Conversation with Benjamin Gim, Esq., in New York City (Feb. 1975).

159. *Id.*

160. See note 156 *supra*.

plicant a relative immigrant visa petition.¹⁶¹ When more than one relative is eligible, the approval letter does not list the names of those eligible but only the name of the principal beneficiary, usually the head of the family. In these cases the Public Security Bureau would send the letter back asking for further information. At this point the attorney handling the matter for the petitioner would provide affidavits identifying those others eligible for the visa and stating their relationship to the sponsor and principal beneficiary. The approval letter included in the appendix actually is valid for two people, the named beneficiary and his child.

The American consulate in Hong Kong has helped to expedite the procedure involving beneficiaries not named on the approval letter. It developed a new letter, form HNK-13,¹⁶² which listed all of the approved beneficiaries. The covering letter from the American Consul to the petitioner explains the purpose of the new letter.¹⁶³ The new form HNK-13 greatly helped to alleviate the paperwork involved in identifying the unnamed beneficiaries. An immigration attorney informed me that the Consulate provided no further assistance to prospective immigrants from the P.R.C.¹⁶⁴

Once the exit permit has been issued to the beneficiary, he or she is free to leave the P.R.C. legally and travel to Hong Kong where a relative immigrant visa will be granted.

D. *Problems Peculiar to P.R.C. Immigrants*

Chinese immigration cases present problems of identity. Often there are no birth, marriage, divorce or adoption records because of Chinese custom. The identity of a Chinese relative of an American citizen or permanent resident must then be established by other means.

American Consulate General form HNK-6¹⁶⁵ provides information about the requirements for secondary evidence of identity in Chinese cases. This form is used to process aliens who possess a Hong Kong identity card and are presented here merely as examples of secondary evidence acceptable to establish identity and relationship in Chinese cases.

For P.R.C. beneficiaries, documentation of a long family relationship to an

161. U.S. Dep't of Justice, Immigration & Naturalization Service, Notice of Approval of Relative Immigrant Visa Petition, Form I-171 (rev. Dec. 1, 1972) (copy available in the *Boston College International and Comparative Law Journal* offices).

162. Consul General of the U.S.A., Hong Kong, B.C.C. Form HNK-13 (Nov. 14, 1975) (copy available in the *Boston College International and Comparative Law Journal* offices).

163. *Id.*

164. *See* note 157 *supra*; Conversation with Thomas Lee, Esq., in New York City (Feb. 1975).

165. American Consulate General, Hong Kong, Secondary Evidence of Identity, Form HNK-6 (July 1, 1962) (copy available in the *Boston College International and Comparative Law Journal* office of Identity, Form HNK-6 (July 1, 1962) (copy available in the *Boston College International and Comparative Law Journal* offices).

American sponsor is especially difficult. From 1950 until 1971, remittance of private funds to the P.R.C. were prohibited. Thus, proof of a family relationship can therefore not be established in this way as provided for in form HNK-6, "Identifying material from Local Sources, item 6. The prohibition on sending funds would also eliminate naming the P.R.C. relative as the beneficiary of any funds due the sponsor. Affected in this way would be "Identifying Material from the United States" items 2 through 6, all of which confer some property right upon the P.R.C. relative by his American sponsor.

Because of the previous hostility between the P.R.C. and the U.S., correspondence between relatives living in the two countries was often eschewed. The existence, therefore, of correspondence such as suggested by item 5 (local sources material) is unlikely.

As for local source material item 1, aside from the political danger formerly associated with possession of a photo of one's self with an American, most Chinese in the P.R.C. would not ordinarily possess a camera as it is considered a luxury, especially in the rural areas.

Allowable in Chinese cases to establish relationship to the sponsor are meaningful affidavits of people who have personal knowledge of the relationship. Where derivative citizenship is claimed by a child of a United States citizen, a blood test is usually required to exclude spurious cases.

Those sponsors who were admitted into the U.S. as refugees and who then seek to have members of their family immigrate will have their immigration history statements carefully scrutinized for any inconsistencies. Often there will be discrepancies because in seeking to enter the U.S. as a refugee, the Chinese would not report the existence of family in the P.R.C. for fear of being denied entry into the U.S. This was a widespread practice. Any inconsistency must be overcome with strong proof.

Fortunately for the Chinese family, the Immigration Service in New York City realizes the problems that Chinese face and has adopted more flexible standards of proof of kinship. Immigration attorneys informed me that if a case is routed by the Immigration Service for processing by a station other than New York, the standard of proof becomes much more rigid.¹⁶⁶ The application will be denied on weaker grounds if decided outside of New York because of the lack of background in Chinese cases.

We now turn our attention to three Chinese cases decided recently by the Board of Immigration Appeals which affect P.R.C. beneficiaries. The decision rendered by the Board in *Matter of Kwok*¹⁶⁷ involved an adoption in mainland China in 1936. The Immigration Service argued that an adoption must be accomplished by a juridical act before it can be recognized as valid for

166. See note 157 *supra*.

167. 14 I. & N. Dec. 118 (B.I.A. 1972).

immigration purposes; the Board rejected this contention. The Board looked to the Chinese Civil Code of the Republic of China in effect in mainland China at the time of the adoption and stated that the Civil Code did not require the permission or approval of a court of other governmental agency for an adoption to be valid. The Board re-asserted the long-standing rule that the validity of an adoption is governed by the law of the place where the adoption was created.

In *Matter of Yee*,¹⁶⁸ the lawful permanent resident alien petitioner applied for preference status for the beneficiary as his adopted son. An initial approval was later revoked and the petitioner appealed to the Board. The beneficiary was adopted in 1955 in the P.R.C. by the sponsor. A document entitled "Deed on Giving Own Son Away to Other Persons for Adoption" was signed by the natural parents and the adoption registered with The People's Committee, North District of Canton. The revocation of the petition was based on the prior unrelated case of *Matter of Yee*¹⁶⁹ which held that (1) Article 13 of the Marriage Law of the People's Republic of China related only to foster children and not to adopted children and that therefore the P.R.C. had no adoption law, and (2) that even if it did relate to adopted children, it did not outline a procedure for effecting adoptions.

The Board overruled the first *Yee* case upon information supplied by a subsequent opinion from the Library of Congress.¹⁷⁰ The new opinion concludes that the Chinese characters in Article 13 translate as "adopted children" rather than "foster children." The information provided by the opinion asserted that courts of the People's Republic of China have recognized the existence of adoptive relationships and the procedure for effecting adoptions has been adequately spelled out in court decisions and other legal writings. The basis of the Library of Congress opinion was newly acquired P.R.C. court decisions and legal writings. The existence of adoption in the P.R.C., as established by P.R.C. statute, court decision and legal writings was therefore accepted by the Board.

P.R.C. law has also been accepted in a case involving an illegitimate son. In *Lau v. Kiley*¹⁷¹ petitioner was a lawful permanent resident applying for preference status for his out-of-wedlock-son in the P.R.C. born in 1952. In order to qualify as a "son" for preference purposes, according to section 101(b)(1) of the Immigration and Naturalization Act,¹⁷² the son must be the legitimate child of the petitioner, or a child legitimated under the law of the

168. 14 I. & N. Dec. 125 (B.I.A. 1972).

169. 13 I. & N. Dec. 620 (B.I.A. 1972).

170. *Matter of Yee*, *supra* note 168, at 127-28.

171. 563 F.2d 543 (2d Cir. 1977).

172. 8 U.S.C. § 1101(b)(1) (1970 & Supp. 1978).

child's residence or domicile, or under the law of the father's residence or domicile under certain conditions. The burden of proof of establishing existence of the required relationship is upon the petitioner.

The petitioner contended that under Article 15 of the Marriage Law of the People's Republic of China¹⁷³ children born out of wedlock have the same rights as those born in lawful wedlock and that illegitimate children have the same legal status as legitimate children. The Board of Immigration Appeals rejected this contention,¹⁷⁴ asserting that under the provisions of Article 15, paternity must be "legally established." The pertinent provision of Article 15 states:

Children born out of wedlock shall enjoy the same rights as children born in lawful wedlock. No person shall be allowed to harm or to discriminate against them.

Where the paternity of a child born out of wedlock is legally established by the mother of the child or by other witnesses or by other material evidence, the identified father must bear the whole or part of the cost of maintenance and education of the child until the age of 18.

With the consent of the mother, the natural father may have the custody of the child.

With regard to the maintenance of a child born out of wedlock, in case its mother marries, the provisions of Article 22 shall apply.¹⁷⁵

The Board maintained that paternity of a child born out of wedlock must be legally established for otherwise the provision regarding the father's obligation to contribute to the child to father only upon consent of the mother would be superfluous. The petitioner contended that under the law of the P.R.C. all children are "legitimate." He argued that where proof of paternity is furnished by the mother, other witnesses, or by material evidence, then the natural father may be required to pay for the support and education of the child, but this is not a proceeding to establish paternity.

Lau commenced an action in the United States District Court for the Southern District of New York. As stated by the Court of Appeals for the Second Circuit:

Lau contended that under the law of the People's Republic of China all children . . . are "legitimate," while the Board maintained that some form of paternity proceeding is required to determine the legitimacy of a child born out of wedlock.

The District Court, while holding that the Board erred in concluding that a paternity suit is required to determine legitimacy, re-

173. Law of May 1, 1950, *supra* note 117, art. 15.

174. *In re Lau*, No. A20-122-881 (B.I.A. June, 1974).

175. *See* note 173 *supra*.

jected Lau's argument that all children born in the People's Republic of China are legitimate. Concluding that "the terms 'legitimate child' and 'illegitimate child' are meaningless in the context of the Chinese legal system," 410 F. Supp. 221, 224 (S.D.N.Y. 1976) . . .¹⁷⁶

the District Court held that:

if Lau could meet the standard of proof required by the INS and prove, to the satisfaction of the INS, that he is Kim Koke's natural father and that they treated each other as father and son, "then there is no valid reason why the desired preference should be denied," 410 F. Supp. at 225.¹⁷⁷

The Board then appealed to the Court of Appeals. The Court of Appeals affirmed the decision below:

We have examined Article 15 of the Marriage Law of the People's Republic of China, and we are convinced that all children born in the PRC are legitimate at birth, in the only sense of the "legitimate" that is meaningful in the Chinese context.¹⁷⁸

The only question to be remanded to the Board was the sufficiency of proof offered by Chin Lau that Kim Koke Lau was his natural son.

Both the adoption and legitimation cases required construction of P.R.C. statutes. In the second *Yee* case, the Board overruled an earlier holding upon a new opinion submitted by the Library of Congress. In the *Lau* case, the second circuit recognized the adoption valid under the laws of the P.R.C., the place of adoption, as valid for immigration purposes. In both instances, understanding of a different legal and political system was expressed by the deciding authorities.

E. Conclusion

Although both barriers to entry to the U.S. and to departure from the P.R.C. have been greatly lowered, allowing unprecedented immigration from the P.R.C. to the U.S., some still exist which could be alleviated. The P.R.C.-Canadian exchanges of notes of October 24, 1973¹⁷⁹ provide some insights into the P.R.C.-U.S. situation.

These two series of exchanges of notes regulated matters of dual citizenship, gave assurances that each government would not interfere with citizens of one country applying to join members of their families in the other country and set up a procedure for the granting of visas to those seeking reunion with

176. 563 F.2d at 547.

177. *Id.*

178. *Id.* at 548.

179. Exchange of Notes on Consular Matters, Oct. 24, 1973, Canada-People's Republic of China (copy available in the *Boston College International and Comparative Law Journal* offices).

members of their families living in Canada. Under this procedure a Canadian official accredited to the Canadian Embassy in Hong Kong would visit the P.R.C. to complete Canadian procedures for visas. The Chinese agreed to offer "all the assistance" that such official would require for this duty.

In the implementation of this procedure, the Chinese were sensitive to anything they felt was discriminatory toward them. For instance, they were initially slighted by Canada's provision of medical forms which the Chinese were to complete. Gradually, however, the Chinese accepted this as a standard Canadian procedure.

Canada has similar reunification of families arrangements with Eastern European countries.¹⁸⁰ However, the exchanges of notes with the P.R.C. was a unique arrangement for the P.R.C. How the arrangement will develop is yet to be seen.

Whether the P.R.C. will desire to conclude similar agreements with other countries may turn on the successful operation of the Canadian-P.R.C. arrangement and the attitude of the Peking regime towards allowing its citizens to leave the country. Although the impetus for the Ottawa-Peking agreement came from the Canadian side, its conclusion was made possible by evolution in P.R.C. thinking in regard to dual nationality.

Several observations may be made concerning American-P.R.C. immigration in light of the Canadian-P.R.C. understanding. First, it is to be noted that the basic agreement was encompassed in an exchange of notes "constituting an understanding on consular matters." The problem of dual nationals and reunification of families was considered of great weight and was dealt with at the same time as other consular affairs. If the United States and the P.R.C. ever do make a similar agreement, formal diplomatic recognition may first be required to testify to the commitment of the two sides in dealing with one another.

Second, the Canadian-P.R.C. exchanges of notes attempted to resolve problems of dual nationals renouncing citizenship of one of the countries. Since the P.R.C. does not seem to have an updated official view on dual nationals, a similar regulation between the United States and the P.R.C. may avoid potential problems for Chinese-Americans visiting the P.R.C. Third, the major problem in Chinese immigration cases is documentation of relationship. If the P.R.C. understands a reunification of families arrangement with the U.S. to include the actual assistance in documentation of the relationship between sponsor and beneficiary, such as governmental certification of identity and relationship, the P.R.C. would be greatly facilitating the immigration process.

The P.R.C. could also expedite the immigration process by clarifying its

180. Address by Maurice Copithorne, Esq., Harvard Law School (Apr. 30, 1975).

legal positions under examination by the Board of Immigration Appeals. This could be effectuated by providing decisions and legal writings from its courts and scholars. An opinion such as decided in the *Lau* case involving an out-of-wedlock child could very well have been more easily resolved if the P.R.C. government in one way or another had provided substantiating information to prove the petitioner's position.

Thus the question becomes how much the Peking regime itself deems it "desirable" either directly or indirectly to encourage emigration to the U.S. The encouragement given to emigration to Canada may be an indication of its new attitude. The possibility exists, of course, that Peking, on the other hand, may decide that one such arrangement is enough and refuse any others.

On another level, Peking may take a different approach. Discrimination against Chinese immigrants is notorious in American history. Given the sensitivity that the P.R.C. displayed in regard to any overtones of discrimination in the implementation of the Canadian-P.R.C. agreement, Peking may have decided that it and its citizenry have been discriminated against long enough and that it will now seek an equal position with other nations. The P.R.C. may feel that some of its laws such as its legitimation statute deserve recognition of validity and equality with other foreign laws. This might result in providing proof in identity cases and information about its laws.

A further obstacle to providing information about its laws is the P.R.C.'s desire to avoid subjecting her laws to the scrutiny of foreigners. Except for a period involving the Soviet Union, this seems to be a P.R.C. policy.

The P.R.C. and Taiwan have not reached their immigration allotment of 20,000 per year (excluding non-quota immediate relatives).¹⁸¹ There is still room for further immigration. Whether the trend will continue in regard to immigrants from the P.R.C. depends on the multiplicity of factors mentioned above and on the overall political climate existing between it and the U.S.

IV. SOCIAL SECURITY AND VETERANS ADMINISTRATION BENEFITS

A. Introduction

After President Nixon's trip to the P.R.C. in early 1972 which resulted in friendly, though cautious, relations between the P.R.C. and the U.S., some Chinese-Americans in the United States, especially those who had been brought up in China and later came to the United States, thought of returning to the P.R.C. to live out their retirement years. They calculated that if they could receive their Social Security benefits, they would live a very comfortable life in the P.R.C. The question arose of whether or under what conditions they could receive their benefits while in the P.R.C.

181. See note 10 *supra*.

There also may be currently in the P.R.C. claimants entitled to Social Security benefits either in their own right or as survivor-beneficiaries. In numerical terms, both Americans wishing to emigrate to the P.R.C. and possible Social Security claimants living in the P.R.C. are probably very few. Furthermore, Americans of Chinese descent have felt, after returning to the P.R.C. to visit relatives, that adjustment to the new P.R.C. life and ideology may be very hard for them. Certainly the P.R.C. has not encouraged Americans of Chinese descent to settle in the P.R.C., considering them an unwanted disturbing influence. In spite of the small numbers affected, in the interests of a thorough as possible analysis of the effects of the detente upon Chinese-Americans and their P.R.C. relations, an examination follows of the existing status of Social Security and, relatedly, Veterans Administration payments to the P.R.C. These payments do represent foreign exchange which the P.R.C. may deem important to receive.

B. *Social Security*

Payment of federal funds to the P.R.C. is prohibited under Treasury Department Circular 655.¹⁸² If and when that restriction is lifted, various Social Security regulations would come into operation.

A recipient who is a United States citizen, is entitled to all of his back checks.¹⁸³ If the United States citizen leaves the P.R.C. while the Treasury restriction is in effect, he or she may receive all of his back checks due while he was in the P.R.C.

For alien recipients, the procedure is more complex. The United States and various foreign countries have concluded Treaties of Friendship, Commerce, and Navigation which confer Social Security benefits upon citizens of the foreign countries and have thus waived the Social Security requirements for those citizens.¹⁸⁴ These countries are: the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, and Nicaragua. The treaty with the Netherlands waives requirements as to survivor benefits only.

Without a "treaty obligation" exception, an alien who has left the United States for more than six months at a time cannot receive benefits unless he was eligible for monthly benefits for December 1956¹⁸⁵ or is now in active military service of the United States.¹⁸⁶ The alien may also receive his benefits if the worker on whose Social Security record the alien claims his benefits either:

1) had railroad work which was treated as covered employment under the U.S. Social Security system;¹⁸⁷ or

182. 31 C.F.R. § 211(a) (1978).

183. 20 C.F.R. § 404.503 (1978).

184. 20 C.F.R. § 404.463(b) (1978).

185. 20 C.F.R. § 404.460 (1978).

186. 20 C.F.R. § 404.460(b)(3) (1978).

187. 20 C.F.R. § 404.460(b)(5) (1978).

2) died while in the U.S. military service or as a result of a service-connected disability and his release from military service was under conditions other than dishonorable;¹⁸⁸ or

3) lived in the U.S. for at least 10 years; or earned at least 40 quarters of coverage under the U.S. Social Security system.¹⁸⁹

Exception 3 applies only if the beneficiary is a citizen of a country having a social security system allowing payment to American citizens abroad; or the country does not have a social insurance system of general application and the country was not under Treasury Department suspension any time within five years prior to January 1968.¹⁹⁰

For example, both Poland and Czechoslovakia have social insurance systems that would pay citizens of the United States who qualify for benefits while outside of the foreign country. Taiwan does not have a social insurance system and was not on the Treasury Department restriction. Citizens of Poland, Czechoslovakia and Taiwan who have been outside the United States more than six months may receive Social Security benefits if the worker had resided in the United States for ten years or earned 40 quarters of coverage; or if the claimant was entitled in December 1956 to benefits, is in the Armed Forces of the United States, had railroad credits which may be used as Social Security credits or claims through someone who died as a result of service in the Armed Forces of the United States.

Rumania, Hungary and the Soviet Union appear to have social insurance systems that would not pay Americans outside the country. Citizens of these countries who have been outside the United States more than six months may receive benefits only if they were entitled in December 1956, or are in the Armed Forces of the United States, or if the worker on whose record the alien claims benefits had railroad credits which may be used as Social Security credits, or died as a result of service in the Armed Forces.

In order for the Social Security Administration to determine the existence of living beneficiaries, the Administration must interview them. Since the Soviet Union will not let the Social Security Administration conduct interviews, it is virtually impossible for survivor benefits to accrue to Soviet citizens. There is also a further restriction because the Soviet Union does not have a social insurance system that would pay Americans outside the country. In practice, only those who would receive payment in the Soviet Union are U.S. citizens.

If and when the P.R.C. is removed from the Treasury Circular, aliens seeking to claim future benefits will be subject to the above conditions. If the P.R.C. did not wish its citizens to receive their benefits, or wished to keep foreign examination of its system to a minimum, the P.R.C. could refuse to

188. 20 C.F.R. § 404.460(b)(4)(i) & (ii) (1978).

189. 20 C.F.R. § 404.460(b)(2) (1978).

190. 20 C.F.R. § 404.460(b)(2)(ii) (1978).

furnish information about its social insurance system or refuse to allow interviews with potential survivor beneficiaries.

As to payment of earned benefits payable to aliens in the P.R.C., the following apply:

After June 30, 1968, no benefits will accrue to an alien residing in the P.R.C.¹⁹¹ Payment of benefits accrued before June 30, 1968 will be limited to the last 12 months of entitlement.¹⁹² With the amounts of back payment of Social Security benefits so limited, depletion of Treasury reserves should not be a consideration in removing the P.R.C. from the Treasury list.

C. *Veterans Administration*

Related to the payment of Social Security benefits to recipients residing within the P.R.C. is the payment of Veterans Administration benefits to the same group.

Since the P.R.C. is currently a "listed" country, Treasury checks may not be delivered to recipients within the P.R.C. However, benefit checks to persons residing in a "listed" country may be forwarded at the request of the recipient in care of a U.S. Foreign Service post in an "unlisted" country. The request must specify the post to which the checks are to be forwarded and that the claimant will take delivery in person.¹⁹³ Requests for evidence to support awards cannot be addressed to a claimant at an address in a "listed" country, so a change of address to a Foreign Service post in an "unlisted" country is also necessary for evidentiary purposes.¹⁹⁴ The claimant is entitled to all retroactive benefits after a country has been removed from the Treasury list or after he requests that checks be sent to him in care of a U.S. Foreign Service post in an "unlisted" country.

The procedure for recipients of Veterans Administration benefits outside the U.S. is much simpler than that for recipients of Social Security benefits and VA payments are fully retroactive. The simplicity of procedure and full entitlement of benefits assist probably only a few Chinese currently in the P.R.C. and Chinese-Americans thinking of emigrating to the P.R.C.

D. *Conclusion*

In light of the current atmosphere of increased communication between the P.R.C. and the U.S., removal of the P.R.C. from the Treasury list may be a likely event in the near future. While the numbers of valid recipients of Social Security and Veterans Administration benefits may not be substantial, once

191. 20 C.F.R. § 404.460(c)(1) (1978).

192. 20 C.F.R. § 404.460(c)(2) (1978).

193. VA Regulations 1653 (C)(2) (1967).

194. VA Regulations 1653 (C)(1) (1967).

the P.R.C. becomes "unlisted" these claims would need to be adjusted and an on-going procedure established to process claims.

The process for alien claimants of Social Security benefits is complicated and may involve what the P.R.C. would consider foreign interference in its affairs. A Treaty of Friendship, Commerce and Navigation may solve these problems but whether there will be enough intimacy between the two countries to negotiate such a treaty remains to be seen. The P.R.C. may conclude, as the Soviet Union seems to have done, that the amount of foreign exchange involved is not worth having its system and citizenry evaluated by a foreign country.

For those Chinese-Americans who would retain their American citizenship if they emigrated to the P.R.C., the situation is much brighter for receiving Social Security payments once the P.R.C. becomes unlisted. But whether these potential emigres would be or feel welcome once the restriction is lifted is unknown.

V. CONCLUSION

This paper has attempted to explore three important aspects of relations between Chinese-Americans and their P.R.C. relatives and the effect the detente has had upon these three aspects. It would appear that detente has created an atmosphere in which both sides have become more trusting of one another. As for significant changes in the legal problems analyzed in this paper, more commitment by both sides is necessary.

The simple solution to the problems discussed in the paper would be a treaty regulating inheritance problems and establishing Social Security benefit rights. Even lacking formal diplomatic recognition, such a treaty could be signed. It is doubtful, however, that under present conditions a treaty such as this would be negotiated without further friendly relations.

Another avenue would call for the P.R.C. to make accommodations if it wanted to receive foreign currency. Such accommodations include making its system of social insurance available for scrutiny by the Social Security Administration and possibly changing it to suit Social Security standards; and making some of its citizens available for interviews by Social Security. In lieu of a treaty, this would be the only method by which its residents could receive benefits.

If Peking was serious about encouraging receipt of foreign currency, it would have to "open up" its legal system to foreign investigation. Proof of Chinese law is necessary in New York courts to transmit estate funds. The P.R.C. has maintained the policy of "delaying" or "postponing" the enactment of laws, to allow its revolutionary society to experiment as to what laws will prove necessary and desirable. The current leadership of the P.R.C. has given indications that a more formal legal system soon may be established; whether this will occur remains to be seen.

Our analysis of the immigration situation suggests that there may be another motive besides economics for the P.R.C. to accommodate itself to the inquiries of foreign governments. This is national pride and a desire to end discriminatory practices towards the Chinese. The Chinese may be desirous of establishing that their system is equal, if not better, to any of that in the West and demand that P.R.C. legal determinations be recognized. As a proclaimed inspiration to Third World countries, the P.R.C. may want to press for non-discriminatory practices all the more. On the other hand, the P.R.C. has always prided itself in creating a system different from that of the West and has considered it far superior to any in the West. The P.R.C. may want to maintain this special position and not seek approval of it from the Western countries. But since the P.R.C. has been admitted to the United Nations and is an active member of the world community, instead of the outcast it had been previously, the P.R.C. can be expected to play the game according to the rules to maintain its position in the international sphere.

The interests of the P.R.C. in accommodating its system to certain American standards have been noted. If we look at the ability of the P.R.C. to make accommodations when it is to be advantageous to do so, we find it surprisingly flexible. The establishment of liaison offices were an innovative way to set up diplomatic communication while keeping intact the U.S. commitments to the Taiwan government. These offices are embassies in function. The Peking regime deemed the offices more important than an insistence on withdrawal of the R.O.C. embassy from Washington, although the P.R.C. has been and is still adamantly opposed to a "two-China" policy. Peking's capacity to accommodate in this case seems almost an ideological compromise and shows the lengths it will go to if it desires the results.

As for the U.S., the foremost barrier remaining to better Washington-Peking relations in this context is the continued listing of the P.R.C. on the Treasury Circular. Listing on the circular is due in large part to political considerations. When the P.R.C. becomes unlisted, a basis will be established on the American side for increased transactions between the two countries and for friendlier relations.

The effects of detente on Chinese-Americans and their P.R.C. relatives has been extremely significant; yet it remains to be seen whether that commitment will be sustained and increased so that the fullest rights and benefits possible can be achieved.