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Estate Administration--Apportionment--Amount of Claim Based on Antenuptial Contract and Includible in the Gross Tax Estate Held Subject to Apportionment (Estate of Samuel Lipshie, 145 N.Y.L.J. 15, col. 5 (Surr. Ct. 1961))

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if the decision is not an "untainted determination," [31] the court may refuse the waiver and grant a severance instead.

Thus the practitioner who could, prior to this decision, under the *Scott v. McCaffrey* [32] rule, waive a jury after severance had been denied, and thus in reality effect a severance, has lost a procedural device valuable in separating his client from the others. It may well be, after this case, that the practioner will find his client tied to the other defendants with bonds that cannot be broken.

ESTATE ADMINISTRATION — APPORTIONMENT — AMOUNT OF CLAIM BASED ON ANTENUPTIAL CONTRACT AND INCLUDIBLE IN THE GROSS TAX ESTATE HELD SUBJECT TO APPORTIONMENT.— In a proceeding to settle their account, the executors of the decedent's estate sought to have the widow pay her apportioned share of the estate taxes under Section 124 of the New York Decedent Estate Law. Decedent and his widow had entered into an antenupital agreement under the terms of which each mutually waived his rights in the other's estate, including his right of election. [1] As additional consideration for the contract, the decedent agreed that if the widow survived him she would be entitled to the remaining annuity payments due under an agreement between the decedent and his employer. The widow contended that she was a contract creditor of the estate and that, as such, no tax could be apportioned against these annuity payments since they were nontestamentary assets although they were included in the gross taxable estate. The Court, applying federal estate tax concepts of consideration, *held* that this antenuptial agreement was not a contract which created a legal obligation exempt from apportionment under section 124, but was in reality a gift taking effect at death against which there must be apportionment. *Estate of Samuel Lipshie,* 145 N.Y.L.J. 15, col. 5 (Surr. Ct. 1961).

Section 124 of the Decedent Estate Law provides for equitable apportionment of the estate taxes due among all "the persons interested in the gross tax estate . . . to whom such property is or may

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[31] People v. Diaz, *supra* note 28 at 93, 198 N.Y.S.2d at 40. The Court does not spell out the meaning of this phrase.

[32] 12 Misc. 2d 671, 172 N.Y.S.2d 954 (Sup. Ct. 1958).

[1] N.Y. DECED. EST. LAW § 18. This section provides that when a decedent dies testate, the surviving spouse is entitled to elect his or her share of the estate as in intestacy subject to certain limitations. There is also included a provision allowing a waiver of the right of election.

be transferred or to whom any benefit therein accrues" [2] unless a contrary intent is expressed by the testator in the will or in a nontestamentary instrument. The taxes are to be apportioned "among the persons benefited in the proportion that the value of the property or interest received by [them] bears to the total value of the property and interest received by all persons benefited. . . ." [3]

Most courts have interpreted section 124 to mean that all of the property which taxing authorities have included in the gross tax estate is subject to apportionment.[4] This interpretation is significant because inter vivos trusts,[5] Totten trusts [6] and other inter vivos transactions which are part of the gross tax estate are made subject to apportionment.[7] A few courts have implied that this general interpretation of section 124 is too broad and have exempted a contract creditor from apportionment although the property received

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[2] N.Y. DECED. EST. LAW § 124(1).

[3] N.Y. DECED. EST. LAW § 124(3)(i). A deduction or exemption which was allowed to the estate by the taxing authorities because of some special characteristic of the person or organization receiving the benefit, *e.g.*, the marital deduction or the charitable deduction, is to be allowed to that person or organization exclusively, for purposes of section 124. INT. REV. CODE OF 1954 §§ 2055-56. The following example will help to clarify the application of this section of the statute. Assume all deductions, exemptions and allowable expenses have been taken out of the gross estate, leaving an adjusted gross estate of $120,000, and assume the allowable marital deduction to be $60,000. If $70,000 were received by the spouse, the amount subject to apportionment would be computed in the following manner:

Adjusted Gross Estate	$120,000	§ 124 Benefit Received	$ 70,000
Allowable Marital Deductions	60,000	Marital Deduction	60,000
Gross Taxable Estate	$ 60,000	Amount Subject to Apportionment	$ 10,000

Since the amount of the benefit received by the wife which is subject to apportionment is $10,000 and the gross taxable estate is $60,000, the wife must pay 1/6 or 16 2/3% of the taxes charged against the estate. See, *e.g.*, In the Matter of the Accounting of Smithers, 15 Misc. 2d 701, 181 N.Y.S.2d 702, *modified*, 17 Misc. 2d 979, 188 N.Y.S.2d 917 (Surr. Ct. 1959); In the Matter of the Estate of Peters, 204 Misc. 333, 88 N.Y.S.2d 142, 147 (Surr. Ct.) *aff'd mem.*, 275 App. Div. 950, 89 N.Y.S.2d 651 (2d Dep't 1949).

[4] In the Matter of the Accounting of Townsend, 200 Misc. 740, 170 N.Y.S.2d 210 (Surr. Ct. 1951); In the Matter of the Estate of Kaufman, 170 Misc. 436, 10 N.Y.S.2d 616 (Surr. Ct. 1939). "The court is bound by the actual fact of inclusion or exclusion of the property by the taxing authorities." *Id.* at 445, 10 N.Y.S.2d at 626.

[5] In the Matter of the Estate of Corlies, 174 Misc. 459, 21 N.Y.S.2d 243 (Surr. Ct. 1940). The court, in discussing a clause in the will which specifically directed executors to pay the estate taxes without apportionment, said: "This provision . . . discloses no intent on the part of testatrix to relieve the *inter vivos* trust from bearing its proportionate share of taxes pursuant to the provisions of section 124. . . ." *Id.* at 461, 21 N.Y.S.2d at 244.

[6] In the Matter of the Accounting of Townsend, *supra* note 4.

[7] In the Matter of the Estate of Leonard, 16 Misc. 2d 465, 184 N.Y.S.2d 552 (Surr. Ct.) *aff'd*, 9 App. Div. 2d 1, 189 N.Y.S.2d 422 (3d Dep't 1959); In the Matter of the Accounting of Smithers, *supra* note 3.

was includible in the gross tax estate.[8] This rationale has been applied in cases where there was a separation agreement under which the decedent was legally obligated to make a property settlement for his wife.[9]

The leading case which followed this reasoning was *Matter of Brokaw*.[10] There, the decedent established a trust for his spouse pursuant to a separation agreement, which trust was held to be part of the decedent's taxable estate.[11] The Court of Appeals affirmed per curiam the lower court's determination which denied the executor's right to apportion estate taxes against the widow. A strong dissent was registered by Judge Desmond in which he said:

> [C]ompliance with that statute [section 124] requires a spreading of these taxes against the beneficial interests, including the trust estate. That the trust was established to discharge an obligation is immaterial. . . . Apportionment against the benefited person follows as a direct and necessary consequence of the inclusion of the transferred property in the gross tax estate, and payment of the tax.[12]

The view of the dissenting opinion, although it seems logical, has not been adopted by the courts in subsequent cases involving separation agreements.[13]

In one case, *In re Patterson's Will*,[14] the Surrogate's Court, faced with an antenuptial agreement, the proceeds of which were included in the gross tax estate, adopted the same reasoning as the cases involving separation agreements. The court determined that since the wife had an enforceable claim against the estate, the property she received was not subject to apportionment.[15]

In none of these cases did the court concern itself with what constitutes good and valuable consideration for a contract claim under the federal estate tax law. In finding that the wife had an enforceable claim against the estate, the courts relied on the common-

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[8] In the Matter of the Estate of Oppenheimer, 166 Misc. 522, 2 N.Y.S.2d 786 (Surr. Ct. 1938). See In the Matter of the Estate of Porter, 12 Misc. 2d 180, 176 N.Y.S.2d 366 (Surr. Ct. 1958), and cases cited therein.

[9] In the Matter of the Accounting of Cordier, 1 Misc. 2d 887, 145 N.Y.S.2d 855 (Surr. Ct. 1955); In the Matter of the Will of Brokaw, 180 Misc. 490, 41 N.Y.S.2d 57 (Surr. Ct. 1943), *aff'd*, 293 N.Y. 555, 59 N.E.2d 243 (1944) (per curiam).

[10] See note 9 *supra*.

[11] Helvering v. United States Trust Co., 111 F.2d 576 (2d Cir. 1940). This is the case which held the trust includible in the gross taxable estate.

[12] In the Matter of the Will of Brokaw, 293 N.Y. 555, 561, 59 N.E.2d 243, 246 (1944) (dissenting opinion).

[13] In the Matter of the Estate of Porter, 12 Misc. 2d 180, 176 N.Y.S.2d 366 (Surr. Ct. 1958); In the Matter of the Accounting of McKeon, 4 Misc. 2d 931, 124 N.Y.S.2d 590 (Surr. Ct. 1953).

[14] 73 N.Y.S.2d 433 (Surr. Ct. 1947).

[15] *Id.* at 436-37.

law concept of consideration[16] under which a promise to marry is good consideration.[17] However, the estate tax law provides that in order that a contract claim may be deducted from the gross tax estate it must be based on consideration in "money or money's worth."[18] Common-law consideration is not necessarily consideration in "money or money's worth."[19] The Internal Revenue Code specifically declares that the relinquishment of marital rights does not constitute adequate consideration.[20]

The Court in the instant case, relying on estate tax concepts of consideration, determined that since this agreement was not entered into for consideration in "money or money's worth" with the resulting inclusion of the value of the annuity in the gross taxable estate, the annuity was in reality a gift and not a legal obligation which would exempt the person receiving it from apportionment. The Court cited with approval *Matter of Galewitz*,[21] where the decedent's son had a valid option to buy stock from the estate of his father, but the option price was below the value placed on the stock by tax authorities. The difference was included in the gross tax estate. The court said:

> [W]hile the option is valid in contract law its status tax-wise is not that of a bona fide sale contract, but of a transfer, part-sale, and part-gift. As to the part-gift the tax is imposed, and, therefore, apportioned to the part-donee.[22]

The Court in the principal case also discussed *Matter of Ryle*,[23] in which the court there viewed section 124 as a procedural device, and determined that once the property is included in the gross tax estate and subject to estate tax, the terms of section 124 automatically apply.

The Court also discussed and distinguished the earlier New York cases.[24] The area of distinction is that in the earlier cases

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[16] See In the Matter of the Will of Brokaw, *supra* note 9; In Re Patterson's Will, 73 N.Y.S.2d 433 (Surr. Ct. 1947).

[17] De Cicco v. Schweizer, 221 N.Y. 431, 117 N.E. 807 (1917). In Prewit v. Wilson, 103 U.S. 22 (1880), an antenuptial conveyance of property for the consideration of marriage was held to supersede the rights of creditors if there was no knowledge of the intent to defraud the creditors on the part of the party receiving the conveyance.

[18] INT. REV. CODE OF 1954 § 2053(c).

[19] See Treas. Reg. § 25.2512-8 (1958).

[20] INT. REV. CODE OF 1954 § 2043. See In the Matter of the Estate of Seitz, 262 N.Y. 32, 186 N.E. 193 (1933).

[21] 3 App. Div. 2d 280, 160 N.Y.S.2d 564 (1st Dep't 1957), *aff'd mem.*, 5 N.Y.2d 721, 152 N.E.2d 666, 177 N.Y.S.2d 708 (1958).

[22] In the Matter of the Estate of Galewitz, 3 App. Div. 2d 280, 293-94, 160 N.Y.S.2d 564, 579 (1st Dep't 1957).

[23] 170 Misc. 450, 10 N.Y.S.2d 597 (Surr. Ct. 1939).

[24] See notes 9 and 14 *supra*, and the cases cited therein. "After close scrutiny . . . this court is of the opinion that the cases involving separation

the spouses' claims could not be diminished by taxes, *i.e.*, the decedent intended the spouse to have the whole amount of the contractual benefits without diminution. Relying on the provision in section 124, allowing the decedent to provide for a different scheme of apportionment than that called for in the statute, these earlier cases inferred that the decedent had expressed an intent to exempt the proceeds thereof from apportionment. These cases reasoned that, if pursuant to an antenuptial or separation agreement, the husband provided that his wife should receive a definite sum, then it was clear that the intent of the husband now deceased was to give his wife the entire amount without deduction for any apportionment of estate taxes.[25] However, the Court in the instant case refused to infer that the decedent husband desired to exempt the spouse's interest from diminution. The Court assumed that the decedent contemplated the impact of taxes. It might be argued that since the intent of the decedent was unexpressed in the earlier cases as well as here, there is no distinction.

The distinction of the case of *In re Patterson's Will*,[26] the only case distinguished which involved an antenuptial agreement, appears even more tenuous. In that case, the spouse had an antenuptial agreement whereby the decedent agreed to leave his wife a life interest in certain property if she survived him. Similarly, in the principal case, the spouse had an antenuptial agreement whereby she would receive a life interest in property if she survived the decedent. It is submitted that the spouse's interest in the principal case is the same as the spouse's interest in the *Patterson* case.

Most of the cases which this Court distinguished involved the proceeds from separation agreements, which, although part of the gross tax estate, were held free from apportionment.[27] Here there may be a valid ground for distinction because in the estate tax area proceeds of a separation agreement are not now includible in the gross tax estate,[28] whereas proceeds of an antenuptial agreement are.[29] However, this distinction is untenable in this context because in the earlier cases cited by the Court the tax authorities

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agreements and Matter of Patterson . . . must be distinguished." Estate of Samuel Lipshie, 145 N.Y.L.J. 15, col. 5 (Surr. Ct. 1961).

[25] This holding is contrary to the majority of the cases which hold that decedent must express his intent not to follow the apportionment statute in a will or non-testamentary instrument. See In the Matter of Estate of Duryea, 277 N.Y. 310, 14 N.E.2d 369 (1938); In the Matter of the Estate of Ryan, 178 Misc. 1007, 36 N.Y.S.2d 1008 (Surr. Ct. 1942), *aff'd mem.*, 265 App. Div. 1051, 41 N.Y.S.2d 196 (1st Dep't 1943). *But see* In the Matter of the Estate of Martin, 176 Misc. 805, 29 N.Y.S.2d 159 (Surr. Ct. 1941).

[26] 73 N.Y.S.2d 433 (Surr. Ct. 1947).

[27] See, *e.g.*, In the Matter of the Estate of Porter, 12 Misc. 2d 180, 176 N.Y.S.2d 366 (Surr. Ct. 1958), and cases cited therein.

[28] Harris v. Commissioner, 340 U.S. 106 (1950); 1946-2 *Cum. Bull.* 166.

[29] INT. REV. CODE OF 1954 § 2043.

at that time *did* include the proceeds of the separation agreement in the gross tax estate.[30] Since this distinction is invalid, these earlier cases involving separation agreements must also rely on the above distinction that the spouse's interest was not intended to be diminished by taxes.

As to the procedure for paying the estate taxes apportioned against the widow in the instant case,[31] the Court provided that the company which was to pay the annuity should deduct a percentage of the monthly annuity payment, as it becomes due, for taxes. Since there was no separate trust established with which to pay the annuity, the question arises as to who would meet this liability if the company should become insolvent. Would the widow have to pay the full amount of the liability although she didn't receive the full amount of the payments?

The purpose of section 124 was to relieve the residuary estate from the burden of paying the entire estate tax by spreading the tax liability over all the property included in the gross tax estate.[32] This purpose was frustrated by those cases which, following the reasoning of *Matter of Brokaw*,[33] exempted from apportionment property included in the gross tax estate which was subject to contract claims. The Court here seems to be taking a large step forward in giving to the statute the construction it was originally intended to have, *i.e.*, if the property is includible in the gross tax estate, it is automatically subject to its apportioned share of the taxes.

FEDERAL JURISDICTION — LABOR LAW — FEDERAL COURTS AUTHORIZED TO ENJOIN STRIKES IN VIOLATION OF COLLECTIVE BARGAINING AGREEMENTS DESPITE SECTION 4 OF NORRIS-LAGUARDIA ACT.— Appellant labor union set up picket lines in an attempt to organize non-union office employees of appellees, six interstate motor carriers. In separate actions by the latter to enjoin the union's picketing as a violation of the no-strike clause of separate collective bargaining agreements, the United States Court of Appeals, Tenth Circuit, *held* that despite the prohibition of the Norris-LaGuardia Act against the issuance of injunctions in labor disputes, the federal courts under Section 301 of the Labor Management Relations Act (Taft-Hartley Act) have jurisdiction to enjoin strikes which are in

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[30] In the Matter of the Estate of Porter, *supra* note 27.

[31] Since the executor had already paid the tax, the widow was to pay her apportioned share to the estate.

[32] 2 Butler, NEW YORK SURROGATE LAW AND PRACTICE § 1847 (1941).

[33] 180 Misc. 491, 41 N.Y.S.2d 57 (Surr. Ct. 1943), *aff'd*, 293 N.Y. 555, 59 N.E.2d 243 (1944) (per curiam).