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Taxation--Exemption from Transfer Tax--Necessity of Indefeasibly Vested Interest (Matter of Brower, 304 N.Y. 661 (1952))

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TAXATION—EXEMPTION FROM TRANSFER TAX—NECESSITY OF INDEFEASIBLY VESTED INTEREST.—Testator provided that all his property go to his widow for life with power to use such part of the principal as might be "necessary for her support." Upon her death, the remainder was to go to his two children and four grandchildren. Plaintiff-widow contends that this power to invade enlarges her life estate to one in fee, and gives her the "indefeasibly vested" interest in the estate which will entitle her to the transfer tax exemption allotted by the New York law.[1] The Court of Appeals disallowed the exemption. *Held:* A power to invade the principal as necessary for support does not enlarge a life estate into one in fee so as to make it "indefeasibly vested" within the meaning of the statute. *Matter of Brower,* 304 N. Y. 661, 107 N. E. 2d 589 (1952).

When the inheritance, transfer, and estate tax laws of New York were originally enacted, it was the intention of the legislature to accord special consideration in the way of tax exemption to those beneficiaries who constituted the immediate family of the decedent.[2] Prior to the 1946 amendment[3] to the New York Tax Law, in order to be entitled to this exemption, the amount of the estate transferred to certain enumerated beneficiaries had to be capable of reasonable ascertainment on the basis of "known data."[4] The value of an expectant estate which was contingent only on survivorship[5] or remarriage[6] could thus be satisfactorily determined. Similarly, where the life tenant had a power to invade the corpus, and such power was limited to some ascertainable standard, such as the support of the life tenant, the values of the life and remainder interests might be accurately estimated.[7] This was done by reference to the economic habits of the life tenant and his life expectancy.[8] However, if the

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[1] "Any tax on the amount of the net estate not in excess of one hundred fifty thousand dollars . . . shall not be payable with respect to (a) The amount of the net estate transferred to and indefeasibly vested in a husband or wife, not exceeding twenty thousand dollars. . . ." N. Y. TAX LAW § 249-q(a).

[2] *See* Matter of Stubblefield, 191 Misc. 823, 827-28, 79 N. Y. S. 2d 630, 633 (Surr. Ct. 1948); Matter of Walsh, 189 Misc. 350, 351, 71 N. Y. S. 2d 778, 779-80 (Surr. Ct. 1947).

[3] Laws of N. Y. 1946, c. 380.

[4] Matter of Cregan, 275 N. Y. 337, 9 N. E. 2d 953 (1937); Matter of Campanari, 188 Misc. 666, 68 N. Y. S. 2d 253 (Surr. Ct. 1947); *see* Matter of Mancuso, 170 Misc. 298, 300, 10 N. Y. S. 2d 459, 461 (Surr. Ct. 1939) (N. Y. law prior to 1946 was patterned after the federal statute).

[5] Matter of Cregan, *supra* note 4; *see* Matter of Weinberger, 194 Misc. 294, 296, 85 N. Y. S. 2d 11, 13 (Surr. Ct. 1948); Matter of Stroh, 171 Misc. 681, 682, 13 N. Y. S. 2d 560, 562 (Surr. Ct. 1939).

[6] Matter of Keenan, 302 N. Y. 417, 99 N. E. 2d 219 (1951) (reference may be had to recognized remarriage tables).

[7] Ithaca Trust Co. v. United States, 279 U. S. 151 (1929); Matter of Birdsall, 176 Misc. 619, 28 N. Y. S. 2d 23 (Surr. Ct. 1941).

[8] *See* Matter of Dowling, 191 Misc. 818, 820, 79 N. Y. S. 2d 557, 558 (Surr. Ct. 1948); Matter of Birdsall, *supra* note 7, at 624, 28 N. Y. S. 2d at 27.

amount of the estate was not readily ascertainable, no exemption was allowed.[9] This indefinite criterion of "reasonable certainty" resulted in a volume of litigation disproportionate to the amount of tax involved.[10]

In an effort to remedy the confusion and to evolve a more definite rule, the present statute was amended in 1946 to provide for exemptions in computing the estate tax on transfers to a widow, husband, or children, only if their interests became *indefeasibly vested.* Consequently, an estate which is transferred subject to any limitation or contingency whatsoever is not indefeasibly vested,[11] and therefore is subject to tax.[12]

A question arises as to whether the right of the life tenant to invade the corpus enlarges his interest from a life estate to one in fee so as to make such interest "indefeasibly vested" within the meaning of the statute. Two recent Surrogate's Court cases have dealt with the problem, one involving a life estate coupled with an unrestricted power to invade the corpus, the other a life estate with a power to invade the principal at the sole discretion of the beneficiary. In the first case, an indefeasible interest was held to exist,[13] whereas in the second it was held insufficiently vested to grant the exemption.[14]

In the instant case, the decedent's widow was given the power to invade the corpus "as necessary for her support." Even though willing to admit that this was an unrestricted power, the Tax Commission denied that this was an indefeasibly vested interest under the statute. The Court of Appeals accepted this view, and held that

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[9] Matter of Weinberger, *supra* note 5; Matter of Stroh, *supra* note 5; Matter of Bonner, 157 Misc. 810, 285 N. Y. Supp. 283 (Surr. Ct. 1936); Matter of Chollet, 148 Misc. 782, 266 N. Y. Supp. 415 (Surr. Ct. 1933).

[10] The tax is only 1%; therefore, an exemption can never exceed $200 to the husband or wife, and $50 to other specified beneficiaries.

[11] Matter of Benson, 275 App. Div. 226, 89 N. Y. S. 2d 589 (4th Dep't 1949); Matter of Van Cott, 194 Misc. 984, 89 N. Y. S. 2d 425 (Surr. Ct. 1949) (both cases involved estates subject to divestment upon remarriage); Matter of Whiteman, 114 N. Y. S. 2d 633 (Surr. Ct. 1952); Matter of Leonard, 199 Misc. 138, 100 N. Y. S. 2d 105 (Surr. Ct. 1950), *appeal dismissed,* 278 App. Div. 668, 103 N. Y. S. 2d 136 (2d Dep't 1951) (remainders were contingent upon survivorship); Matter of Dowling, *supra* note 8; Matter of Faber, 191 Misc. 828, 80 N. Y. S. 2d 380 (Surr. Ct. 1948) (trustees' power of invasion of principal made remainders defeasible). *But cf.* Matter of Walsh, 189 Misc. 350, 71 N. Y. S. 2d 778 (Surr. Ct. 1947) (power to invade corpus does not prevent the remainder from becoming indefeasibly vested).

[12] See N. Y. TAX LAW § 249-q(c) (Supp. 1952). "For the purposes of paragraphs a and b of this section a transfer shall be deemed indefeasibly vested in the transferee if (1) the death of the transferee will cause a termination or failure of the interest transferred to him only it if [sic] occurs within a period not exceeding six months after the decedent's death . . . and (2) such termination or failure does not in fact, occur."

[13] Matter of Wilken, 197 Misc. 724, 97 N. Y. S. 2d 716 (Surr. Ct. 1948).

[14] Matter of Ingraham, 197 Misc. 402, 95 N. Y. S. 2d 183 (Surr. Ct. 1950); *cf.* Matter of Britt, 272 App. Div. 426, 71 N. Y. S. 2d 405 (3d Dep't 1947); Matter of Sonnenburg, 133 Misc. 42, 231 N. Y. Supp. 191 (Surr. Ct. 1928).

a power to invade the corpus as "necessary for support" does *not* enlarge an interest from a life estate to one in fee.[15] The interest of the widow was therefore not "indefeasibly vested," and the exemption afforded by the Tax Law was inapplicable.

The holding in the present case appears to be limited to a life estate with a power of invasion as necessary for support. Since the question was not considered, it may still be argued that a life estate coupled with a power of invasion containing no such phrase is indefeasibly vested within the meaning of the tax statute.[16] It may well be, however, that the phrase "as necessary for support" was immaterial to the decision, and that the Court of Appeals based its holding on the theory that the testamentary disposition of a life estate, in and of itself, is sufficient to warrant a disallowance of the tax exemption.

It would appear from judicial interpretation of this statute that nothing less than the equivalent of a fee interest would be entitled to tax exemption. An attempted application of so strict a standard to each individual member of the family, however, seems inconsonant with the original intention of the legislature.[17]

TORTS—IMPUTATION OF COMMUNISM NOT SLANDER PER SE.—Defendant, in the presence of third parties, called plaintiff a communist.[1] Plaintiff commenced this slander action, without alleging special damages. Defendant's motion to dismiss was granted. *Held:* An imputation of communism is not slander per se.[2] The court then reasoned that, in view of the cold war, it is better ". . . to allow free

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[15] See Matter of Close, 281 App. Div. 147, 118 N. Y. S. 2d 284 (3d Dep't 1952).

[16] It is therefore unnecessary to conclude either that *Matter of Wilken, supra* note 13, is overruled, or that *Matter of Ingraham, supra* note 14, is approved.

[17] *See* Matter of Weinberger, 194 Misc. 294, 297, 85 N. Y. S. 2d 11, 14 (Surr. Ct. 1948) (each transferee must qualify separately for the exemption, not as a group); Matter of Stubblefield, 191 Misc. 823, 827-28, 79 N. Y. S. 2d 630, 633 (Surr. Ct. 1948); Matter of Walsh, 189 Misc. 350, 351, 71 N. Y. S. 2d 778, 779-80 (Surr. Ct. 1947).

[1] The other defamatory statements were: "The whole neighborhood knows that you and your husband (meaning Mary Keefe and David Keefe) are communists." "Some investigator came to my house recently and I gave him the whole story about your being communists."

[2] The court recognized the established rule that an imputation of communism, when written, would be libel per se, but adhered to the ancient distinction between libel and slander, citing with approval Ostrowe v. Lee, 256 N. Y. 36, 175 N. E. 505 (1931).