

1959

In the Matter of the Estate of Alexis B. Malan : Brief of Appellant

Utah Supreme Court

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In the
Supreme Court of the State of Utah
L E D
JUL 28 1959

Clk, Supreme Court, Utah

In the Matter of the Estate of
ALEXIS B. MALAN,

Deceased.

} Case No.
9076

BRIEF OF APPELLANT,
UTAH STATE TAX COMMISSION

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In the
Supreme Court of the State of Utah

In the Matter of the Estate of ALEXIS B. MALAN, <i>Deceased.</i>	}	Case No. 9076
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BRIEF OF APPELLANT,
UTAH STATE TAX COMMISSION

STATEMENT OF FACTS

This case is an appeal by the State Tax Commission of the State of Utah from a decision of the Second Judicial District Court determining the inheritance tax in the Estate of Alexis B. Malan to be the sum of \$702.40.

There is no dispute concerning the facts of this case, the same having been stipulated in the lower court (R. 5).

Alexis B. Malan died on December 18, 1957 in Ogden, Utah. Prior to the time of his death, he executed three deeds to his wife, Elfreda A. Malan. The deeds were dated

February 2, 1956, February 6, 1956 and February 6, 1956, respectively; all were delivered to the grantor's son, Fred W. Malan, and were recorded after the death of the grantor.

Inasmuch as the three conveyances were made within three years prior to the death of Mr. Malan, the property covered thereby was included in the gross estate of the decedent for the purpose of determining the amount of inheritance tax owing to the state of Utah. However, when the inheritance tax return was filed with the State Tax Commission, the estate claimed an exclusion of \$12,583.33 which represents one-third of the value of the property conveyed by deed to Elfreda A. Malan. This exclusion was denied by the State Tax Commission, and the Commission's decision was reversed by the District Court.

The sole question on appeal is whether the widow can claim a one-third exclusion for statutory dower on property which passes to her by deed, but which is included in the gross estate of the husband for the purpose of determining inheritance tax.

It is agreed that \$702.42 is the correct amount of the tax in the event the widow properly claimed the exclusion; and that \$629.16 is the additional tax owing in the event the widow erroneously claimed the aforesaid exclusion. Respondent does not contend that the deeds were not made in contemplation of death, nor is there any dispute as to the value of the property.

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT ERRED IN DETERMINING THE INHERITANCE TAX TO BE THE SUM OF \$702.42.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DETERMINING THE INHERITANCE TAX TO BE THE SUM OF \$702.42.

Section 59-12-3, Utah Code Annotated, 1953, is the section of our Inheritance Tax Law which defines what is to be included in a decedent's gross estate for the purpose of determining the inheritance tax. A careful reading of this section indicates that there are two broad categories of property subject to the tax. These are:

- (1) Property which passes by testamentary disposition or by the law of inheritance or succession, and
- (2) Certain inter-vivos transfers by deed or gift made in contemplation of death or intended to take effect in possession or enjoyment after death.

In connection with the second category, Section 59-12-4, Utah Code Annotated, 1953, provides:

“Any transfer of a material part of any such property in the nature of a final disposition or distribution thereof made by a decedent within three

years prior to his death, except a bona fide sale for a fair consideration in money or money's worth, shall be presumed to have been made in contemplation of death, for the purposes of this chapter."

The question as to whether a widow's dower interest is includable in the gross estate of the husband first came before the Utah Supreme Court in the case of *In Re Bullen's Estate*, 47 Ut. 96, 151 Pac. 53. In that case it was established that where a widow takes the one-third interest of her husband's real estate pursuant to the provisions of the statutory dower statute, she takes in her own right and not as an heir of her husband. Thus, it was established by the *Bullen* case that the one-third interest could not be included in the gross estate of the husband for the purpose of calculating the amount of the inheritance tax.

Shortly after the *Bullen* case, the case of *In Re Osgood's Estate*, 52 Ut. 188, 173 Pac. 152, came before the Court. In the *Osgood* case the widow had inherited property under the terms of her husband's will. She was attempting to claim a one-third deduction on the real estate, relying on the prior *Bullen* case. However, in this case, the Court held that where a widow elects to take what is provided for her in her husband's will she must be regarded the same as any other devisee, and the one-third interest which would otherwise go to her under the statutory dower statute is then treated as a part of the estate and is subject to the inheritance tax.

The rule expounded in the *Osgood* case was later reaffirmed in another will case *In Re Kohn's Estate*, 56 Ut.

17, 189 Pac. 409, where the sole issue was whether the widow took under the will or under the statute.

The most recent case, and the one which the Tax Commission believes to be indistinguishable from the instant case and controlling is *In Re Kjar's Estate*, 62 Ut. 427, 220 Pac. 501. In that case the decedent, shortly prior to his death, conveyed all his real estate by deed to his wife and other members of his family. In determining the inheritance tax, the administrator attempted to deduct from the gross estate one-third of the value of the real estate. The state objected to this deduction, which became the sole point to be decided on appeal. After referring to the prior cases, the Court held, at Page 430 of the Utah Report that:

“Under the Inheritance Tax Law, conveyance by deed stands upon the same footing as conveyance by will.”

The Court went on to point out that the language of the Inheritance Tax Law (59-12-3, Utah Code Annotated, 1953) providing for a tax on “property * * * which shall pass * * * by deed * * * made in contemplation of the death of the grantor” is plain and unambiguous. It was, therefore, held that the entire property was includable in the gross estate, and that any deduction or exclusion would be improper.

The decision in the *Kjar* case had stood as a precedent for approximately 36 years, and said decision is based upon sound reasoning. Had the decedent in the instant case left a will giving all his property to his wife, the widow would not be attempting to claim an exclusion; yet, there is no

sound reason why said decedent should be permitted to do the same thing by deed and yet not come within the provisions of the inheritance tax.

The widow also appears to be taking quite an inconsistent position. On the one hand she is acknowledging the gift and claiming through it to get the entire amount of the property (otherwise under the laws of succession the widow would only be entitled to one-third or one-half of the husband's property, depending upon the number of children); yet for inheritance tax purposes she is refusing to recognize the gift and attempting to take by dower. A party should not be permitted to claim both under and against the same deed; to insist on its efficacy to confer a benefit and repudiate a burden with which it is qualified (Am. Jur. Estoppel, Sec. 21).

The previously cited Utah cases make it clear that the only time an exclusion for dower is permitted is when the widow actually takes the property by way of dower. This she has not done in the instant case.

CONCLUSION

It is respectfully submitted that the decision of the lower court be reversed.

Respectfully submitted,

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