

1966

In the Matter of the Estate of William Paxman, Deceased : Brief of Respondent and Cross- Appellant Vivian T. Paxman, Executrix

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF
THE ESTATE OF
WILLIAM PAXMAN, Deceased

} Case No.
10565

BRIEF OF RESPONDENT AND
CROSS-APPELLANT
VIVIAN T. PAXMAN, EXECUTRIX

UNIVERSITY

SEP 11

LAW

APPEAL FROM ORDER OF FIFTH DISTRICT
COURT OF UTAH IN AND FOR JUAB COUNTY

Honorable C. Nelson Day, Judge

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William Paxman, Deceased

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BRIEF OF RESPONDENT AND CROSS-APPELLANT VIVIAN T. PAXMAN, EXECUTRIX

STATEMENT OF NATURE OF CASE

The appeal in this case is from an order of the District Court approving inheritance tax return and fixing amount of inheritance tax. The Tax Commission appealed from that part of the order interpreting the will of the decedent and fixing the amount of inheritance tax. The respondent executrix then cross-appealed from that part of the order fixing inheritance tax in the amount of \$869.16 instead of \$521.49 as claimed by the executrix in her return.

RELIEF SOUGHT BY RESPONDENT AND CROSS-APPELLANT

The respondent and cross-appellant contends that the court's findings and order on interpretation of the will of deceased and deductions to be allowed were correct and should be approved, but contends that the court erred in its interpretation of Section 59-12-2 Utah Code 1953 relating to rate of tax and that the amount of tax

as set forth in the executrix's inheritance tax return, towit \$521.49, is correct instead of \$869.16 as fixed by the court.

STATEMENT OF FACTS

Appellant's Brief sets forth in full the Last Will and Testament of William Paxman, deceased, also the "Acceptance of Testamentary Provisions" filed by the widow (executrix), and the sections of the Utah Code involved in the appeal and cross-appeal. Repetition herein is deemed to be unnecessary. Appellant failed to state however that the executrix's inheritance tax return was submitted to the Tax Commission prior to the filing of her petition for approval of same by the court and that the Commission, through its auditor, disallowed the widow's claim of deduction for her statutory interest in real estate. This action was set forth in paragraph 9 of her petition to the court. (R 13-15)

ARGUMENT

As a preliminary to its argument on interpretation of the decedent's will, the Tax Commission on pages 5 and 6 of its brief appears to complain of the fact that the District Court took primary jurisdiction of the case and acted upon the executrix's Petition for Order Approving Inheritance Tax Return and Fixing Inheritance Tax "without giving the Commission the preliminary right to make an initial determination of the appropriateness of such a return on the basis of its experience and expertise in this area." The point was urged by counsel for the Commission before the trial court and argument made that the executrix had failed to exhaust

her administrative remedies. This was answered by reference to Section 59-12-35 of the Inheritance Tax Act which specifically provides that:

“The district court having either principal or ancillary jurisdiction of the settlement of the estate of a decedent shall have jurisdiction to hear and determine all questions in relation to said tax that may arise affecting any devise, legacy or inheritance, or any grant or gift, or any transfer of title by right of survivorship, under this chapter, subject to right of appeal as in other cases, and the State Tax Commission shall represent the interests of the state in any such proceedings.”

Since the petition filed by the executrix (R. 13-15) recites in paragraph 9 that the Inheritance Tax Return had been submitted to the Tax Commission and approved by it except for the item herein in dispute, it was obviously proper for the court to take jurisdiction of the matter without calling for further consideration by the Commission. And it ought not to be assumed that the District Court's experience and expertise in the area of interpretation of wills and statutes is inferior to that of the Tax Commission. In any event the section above quoted gives the court and not the Tax Commission original jurisdiction and duty to hear and determine the questions here involved. The suggestion made by counsel that the executrix had failed to exhaust her administrative remedies before presenting her petition to the court for an order approving the inheritance tax return and fixing the amount of tax is without merit. The Inheritance Tax Act is entirely unlike the Sales Tax Act (Chapter 15 of Title 59) and Use Tax Act (Chapter 16, Title

59), each of which provide that the Tax Commission shall conduct hearings and make determinations and that its decisions shall be final unless an appeal is taken to the Supreme Court within thirty days.

In Section 59-12-35 supra, the Legislature has fixed the role of the Tax Commission with reference to inheritance taxes as that of partisan advocate for the state and not judge. In this case the zeal and tenacity of the Commission in contending for a strained and unreasonable interpretation of the testator's will and applicable statutory provisions relating thereto shows that it is not shirking its duty as such advocate and that it is sparing no effort to collect for the state the highest possible rate and amount of inheritance tax.

ANSWER TO APPELLANT'S POINTS 1 AND II

Section 74-4-3 Utah Code 1953 expressly gives to a surviving wife a one-third interest in real property possessed by the husband at any time during the marriage to which the wife has made no relinquishment of her rights, and further provides that such one-third interest shall be set apart as her property in fee simple, if she survives him. Section 74-4-4 provides that if the husband shall make any provision by will for the widow, such provision shall be deemed to be in lieu of the distributive share secured by Section 74-4-3 unless it shall appear from the will that the decedent designed the testamentary provisions to be additional to such distributive share, in which case the widow shall be presumed to have accepted both such testamentary provisions and such distributive share.

In this case the widow has not at any time made any relinquishment of her statutory right under Section 74-4-3. On the contrary, she filed a written acceptance of the provisions of the will (R.4) and therein expressly claimed her one-third interest in real estate under that section and also claimed her right to receive all other property left by decedent, pursuant to the provisions of the will.

Respondent submits that a fair reading of the will indubitably shows that it was the intention of the testator to give to his wife all of *his* property and without any intention to require her to renounce or relinquish the right given her by statute to one-third of real estate possessed by him during the marriage. This was submitted to the trial court in a request for a special finding by the court upon the following question:

“Does it appear from the language of the will of William Paxman that he intended to devise and bequeath all of his property to his wife, in case she survived him, without any requirement that she renounce or relinquish whatever right or interest was given her by law in real estate acquired by him during the marriage?”

The Court's affirmative finding upon that question is shown in the paragraph numbered 1 of the order appealed from herein, as set forth on page 3 of Appellant's Brief, to wit:

“1. That the testator, William Paxman, intended to and did provide by his will that his wife, if she survived him, have all of his estate, and without requiring her to relinquish her statutory right to one-third of the real estate, and that such intention appears from the will of the deceased.”

Respondent submits that no other answer to the above question can reasonably be given. The will is simple, concise and unambiguous. It unmistakably shows a desire on the part of the testator to give his wife all of his property without any desire to have her forego her statutory right in real estate, or to compel her to pay additional inheritance tax by renunciation of her right in such real estate. Counsel for the Commission argues that the provision in the will reciting that the omission to provide for testator's children is intentional and not occasioned by accident or mistake is "irrelevant." Surely such argument will not be persuasive. The declaration in the will that the omission to provide for his children was intentional adds to proof, if additional proof is necessary, that it was the clear and deliberate desire of testator to give to his wife all property of which he had power to devise or bequeath, and without compelling her to choose between the will and her statutory right. In that connection we should consider what would have been the effect of the alternative choices.

(a) If the widow had chosen to take under the will, would there have been any effect other than to compel payment of additional inheritance and estate tax? Would the testator have intended that?

(b) If the widow had elected to renounce the will and take her statutory one-third of real estate, where would the balance of property go? To children who were expressly cut off by the will? Or to the widow and children? And with additional tax burden? Did the testator intend such a result?

It appears to be the opinion of the Tax Commission that the only way for a testator to provide for his surviving wife to get both her statutory right and the benefit of a will is for the will to provide in express words that the provisions for the wife in the will are in addition to the right given her by Section 74-4-3 Utah Code Annotated. Yet counsel for the Commission admits on page 9 and again on page 18 of his brief that such a construction of the statute "may create a situation where two wives, equally loved and cared for by their husbands might receive through his will the same amount of property, with one getting a substantial tax break over the other simply because one husband had better legal advice than the other, and inserted in his will a statement to the effect that its provisions were in addition to the statutory share under Section 74-4-3." Respondent submits that in interpreting wills or other documents the courts look to the substance of things and do not arbitrarily require a particular word or phrase to be used, where the intention of the signer is plainly discernible from the language used.

In this case the trial court in its original Memorandum Decision dated October 21, 1965 (R. 19a) and in its Findings of Fact and Conclusions of Law and Order Approving Inheritance Tax Return and Fixing Inheritance Tax (R. 16-17) and in its final order amending the original order (R. 29-30) and in the accompanying Findings of Fact and Conclusions of Law (R. 25-28) in each instance specifically found:

"That the testator, William Paxman, intended to and did provide by his will that his wife, if she

survived him, have all of his estate, and without requiring her to relinquish her statutory right to one-third of the real estate, and that such intention appears from the will of the deceased."

The court thereupon rightly concluded that the surviving wife had the right to claim and receive under the provisions of Section 74-4-3 one-third of real estate described in the inheritance tax return, without renouncing the will of deceased, and also had the right to receive all other property left by deceased without relinquishing her right under the statute to claim one-third of real estate referred to.

In its zeal to recover additional taxes the Tax Commission argues that it has been its practice and policy to deny the right of a widow to take both under the will and under the statute unless the husband *clearly and unequivocally states in his will that its provisions for the widow are additional to her distributive share under the statute.* (Emphasis added) It then argues that this practice and policy should be recognized by the court and given effect in interpreting the provisions of Section 74-4-3 and 74-4-4. Respondent submits that this is reading into a plain and unambiguous statute a meaning never intended by the Legislature and that the court will be abdicating its responsibility if it allows such a practice of an administrative agency to control or influence its decision herein. The statute does not say that the husband must state in his will that its provisions are "in addition to the distributive share provided by Section 74-4-3." It does not say that it must "clearly and unambiguously" or "specifically and unequivocally" appear from the will that its

provisions for the wife are in addition to her statutory right. What Section 74-4-4 does say is simply:

"If the husband shall make any provision by the will for the widow, such provision shall be deemed to be in lieu of the distributive share secured by the next preceding section, unless it shall appear from the will that the decedent designed the testamentary provision to be additional to such distributive share, in which case the widow shall be presumed to have accepted both such testamentary provisions and such distributive share."

Can any judicial tribunal say that there is any call for reference to administrative practice of the tax collecting agency in interpreting a concise and unambiguous will such as that herein involved in which the testator declares:

"I hereby devise and bequeath unto my beloved wife Vivian T. Paxman, all my property and estate, both real and personal, of whatsoever nature or wheresoever situated, to have and to hold the same absolutely.

I hereby nominate and appoint my beloved wife, Vivian T. Paxman, the executrix of this my last will and testament, and direct that she serve as such executrix without bond.

I hereby declare that my omission to provide herein for my children is intentional and not occasioned by any accident or mistake, and it is my desire and will that my children now living and also any of my children which may be born hereafter shall not share in my estate."

Will the court justify the Tax Commission in contending that there is not shown in this will a clear and unambig-

uous and unequivocal intention on the part of the testator to give all property which he had power to devise or bequeath to his wife if she survived him — and without any requirement that she renounce that which the statute gave her as an absolute right in lieu of dower in case she survived him?

Counsel for the Commission cites in support of its contention herein the cases of *In Re Osgood's Estate* 52 Utah 185, 173 Pac. 152 and *In Re Kohn's Estate*, 56 Utah 17, 187 Pac. 409. The Osgood case is clearly not in point. In it the will of the testator expressly provided that:

“This provision for my wife shall be in lieu of and not in addition to her statutory interest in my estate granted by Section 2826 Compiled laws of Utah 1907”

In the Kohn Estate case the appeal was after decree of final distribution and the court expressly found that the decree was entered pursuant to petition of the executrix “in accordance with the will of the deceased” and that the executrix (widow) intended to and did waive her right to take under the statute and petitioned for distribution in accordance with the will and that decree of distribution was granted accordingly. The court saying:

“It was the duty of the executrix under the law to see to it that the estate was distributed in accordance with the will. The presumption is that she administered ‘the estate in accordance with the provisions of the will’ *Hamilton v. Hamilton*, 148 Iowa, 127, 126 N.W. 776. When we thus compare the provisions of the will with the decree of distribution, we find them to be in perfect harmony, and the conclusion is therefore forced upon us

that the widow not only intended to and did waive her right to take under the statute, but elected to and did take under her husband's will. Unless we disregard all rules of construction and all presumptions herein referred to such conclusions seems inevitable."

That clearly distinguishes the Kohn case from the case at bar. Here the widow timely filed her declaration that she claimed both under the statute and under the will, and that she accepted the provisions of the will without renouncing or relinquishing her right in real estate given by Sec. 74-4-3 of the Code.

The holding of this court in *In Re Bullen's Estate*, 47 Utah 96, 151 Pac. 533, should be considered in this connection:

What the wife receives under section 2826 — one-third in fee simple of all the legal and equitable estate in real property possessed by the husband during the coverture and not relinquished by her — she receives, not as an heir of her husband, but in her own right, something which belongs to her absolutely, and of which she could not have been deprived by will or by any other voluntary act of her husband without her consent. Under that section, she is not an heir within the meaning of our intestate or succession statutes.

The court in that case quotes approvingly from the Nebraska case of *Estate of Strahan* 93 Neb. 828, 142 N.W. 678, the following:

"It has been held by the great weight of authority that dower is not immune because it is dower, but because it, like the right to the homestead and to the distributive share of the widow of the estate of her deceased husband, belonged to her inchoate-

ly during his life, and vested fully in her at his death. The widow's share of the estate of her deceased husband, by the present inheritance law, is given to her in lieu of dower, and it follows that the interest of the appellant in her deceased husband's estate, both real and personal, comes within the test of immunity. Under the present statute the wife takes her interest in the estate of her deceased husband by operation of law. She cannot be deprived of that interest by his will. It is something which belongs to her absolutely and independently of any right of inheritance or succession. Strictly speaking, the widow's share should be considered as immune, rather than exempt, from an inheritance tax. It is free, rather than freed, from such tax. It is not excepted from the taxable class, because it never was in such class.

The rule declared in the Bullen case has been repeatedly followed by this court. In *re Green's Estate*, 78 Utah 139, 142, 1 Pac. 2d 968; In *re Reynolds' Estate* 90 Utah 415, 62 Pac. 2d 270; In *re Malan's Estate*, 10 Utah 2d. 22, 347 Pac. 857, and *Cardon v. Harper et al* 106 Utah 560 151 Pac. 2d 99.

ARGUMENT ON RESPONDENT'S CROSS APPEAL

The rate of tax to be assessed against the taxable portion of a decedent's estate is to be determined from Section 59-12-2 Utah Code 1953 which is set forth at length on pages 22 and 23 of Appellant's Brief. The controversy between the Commission and the executrix is as to the meaning to be given to the words in the third paragraph "but on the excess of \$40,000.00 the rate shall be as herein provided." The executrix contends that the words "as herein provided" connote "as in this section

provided" rather than "as in this paragraph provided." Certainly the words should be read and construed in connection with the whole section. When so construed it is evident that the Legislature intended a three per cent rate on the *first taxable bracket above the exemption*. If not so construed then the Legislature gave a lower rate of tax on the first bracket above exemptions to collateral heirs or strangers to the blood than it did to a surviving wife and children.

How can this be? Merely by noting that there is an exemption of \$10,000.00 in favor of heirs and beneficiaries other than the spouse and children, *and that the tax on the first bracket above the exemption is at the rate of three per cent*. The Tax Commission contends that in case of property passing to the spouse or children the tax on the first bracket of taxable estate is five per cent. Can it be thought that the lawmakers intended such a whittling down of the exemption? Or that they would intend a *higher rate* of tax after exemptions on property passing to a widow or children?

The executrix submits that they did not, and that the consistent and reasonable view to take is that the Legislature meant that the rate of tax on the portion of an estate passing to a wife or children should be according to the same graduated brackets set up in the statute, namely three per cent on the first \$25,000 above exemption, then five per cent on the amount in excess of \$25,000 above the exemption up to \$75,000.

If this construction is not adopted then the paragraph relating to the five per cent rate presents a defin-

itely contradictory problem in arithmetic and is impossible of any certainty of interpretation.

“Five per cent of the amount by which the estate exceeds \$25,000 but does not exceed \$75,000 except where property not exceeding in value the sum of \$40,000 goes to the husband, wife or children. . . . then in such case the exemptions shall be the amount so going not to exceed \$40,000, but on the excess of \$40,000 the rate shall be as herein provided;”

That paragraph should not be construed as a statute standing alone. Rather it should be read with the entire section and with the reasonable view that the Legislature would not be more generous to collateral relatives or strangers to the blood than to the widow or children of a decedent.

In this connection it may be asked what will be the result in case the court rules with the Commission and holds that the clause “but on the excess of \$40,000 the rate shall be as herein provided” refers specifically to the *five per cent rate* mentioned in paragraph 3 and not to the *graduated rates* set forth in the whole section? Will the Commission then be faced with the dilemma of allowing the million-dollar estate to claim that the five per cent rate applies to all of the excess over \$40,000 passing to a spouse or children? It is a sword that may cut both ways, and before the court rules that “*as herein provided*” means “*as herein in this paragraph provided*,” it doubtlessly will consider carefully the whole section and the object and intent of the legislators and will assume that they intended to make fully effective the exemption

granted to a surviving spouse and children and did not intend to whittle down that exemption or require them to pay 66-2/3 per cent more tax on the first bracket of taxable estate than is required of collateral heirs or strangers.

Counsel for the Tax Commission relies upon the case of *In re Walton's Estate* 115 Utah 160, 203 Pac. 2d 393. That case is not in point. It did not involve an estate in excess of \$40,000 going to a wife, husband or children. It involved an estate of the stipulated value of \$27,000, and the questions at issue as stated by Chief Justice Pratt on page 394 of 203 Pacific Reporter were these:

1. Does the term "children" include grandchildren;
2. Is the life interest of the surviving son equivalent to a transfer to a surviving child, thus exempt; and
3. What is the exemption which should be allowed under the section.

That which is said in the opinion (or in the concurring opinion of Mr. Justice Wolfe) relative to the rate of tax at five per cent on estates in excess of the \$40,000 exemption is clearly *obiter dicta* and is not binding in this case where the issue is directly raised. It should be noted from Mr. Justice Wolfe's concurring opinion that he said: "In this case, it is not necessary to determine what the rate would be if such property were in excess of \$40,000 because the whole estate is only \$27,000." Furthermore in the main opinion Chief Justice Pratt commented on the fact that if the contention of the Tax

Commission on one question argued were upheld it would put the direct heirs of a decedent *in a disadvantageous position compared with collateral heirs*. That is the situation here if the Commission's contention is sustained. It will mean that a *higher rate of tax* is imposed upon a surviving wife on the *first portion of the estate above the exemption* than would be imposed upon the first portion of taxable estate going to a collateral heir or a stranger to the blood.

On behalf of the executrix it is submitted that the Legislature never intended such result, and that the words in the act "but on the excess of \$40,000 the rate shall be *as herein provided*" should be read in connection with the whole section and construed accordingly, rather than as if paragraph three stood alone.

It is obvious from the language above quoted from Chief Justice Pratt in the Walton case that the Supreme Court would not favor a construction which would put a surviving wife or children of a decedent "in a disadvantageous position compared with collateral heirs." It is also obvious that if paragraph three of the Sec. 59-12-2 is read in connection with paragraph two — and with the realization that the Legislature would not intend to put a surviving spouse or children in a disadvantageous position compared to collateral heirs or strangers to the blood then the contention asserted by the executrix herein is correct and should be sustained.

The court will also note that it has repeatedly said that inheritance taxes are not property taxes but taxes

upon the right to inherit, and that such taxes are strictly construed against the taxing power.

In re Brown's Estate 54 Ut. 73, 179 P. 652

Larson v. MacMiller 56 Ut. 84, 189 P. 579

In re Green's Estate 78 Ut. 139, 142; 1 Pac. 2d 968

If that rule of strict construction against the taxing power is applied in construing Section 59-12-2, with its use of the words "as herein provided" then clearly the contention of the executrix herein should prevail.

CONCLUSION

In conclusion respondent submits:

1. The will of William Paxman is unambiguous and shows an unmistakable intent on the part of the testator to devise and bequeath all of his property to his wife if she survived him, and without any intent to require her to relinquish the right given her by Section 74-4-3 to one-third of real estate owned by him during the marriage.

2. Sections 74-4-3 and 74-4-4 are clear, certain and unambiguous and reference to administrative policies or Tax Commission practices is wholly uncalled for and irrelevant.

3. Testator's surviving wife did not at any time waive or relinquish her statutory right in real estate and did clearly and unequivocally claim such right and also her right to benefit of her husband's will.

4. Section 59-12-2 is unclear, confusing and incon-

sistent unless the construction contended for by respondent is adopted, but if such construction is adopted it is logical, reasonable and definitely consistent with the spirit and intent of the Legislature in granting a special exemption in favor of a surviving husband or wife or children of a decedent.

Respondent and cross appellant therefore submits that the order of the court approving the inheritance tax return should be approved and affirmed excepting in the matter of rate and amount of tax and as to that it should be so modified as to approve the rate and amount of tax set forth in the executrix's return.

Respectfully submitted,

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