IN THE COURT OF APPEALS OF IOWA

No. 0-116 / 88-1375

HAROLD MARVIN BARLOW, ROSE MARY BARLOW and ROSE MARY BARLOW as Executor of the Estate of WILLIAM E. BARLOW,

Appellees,

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vs.

MARILYN FEIEREISEN BRUBAKER,

Defendant,

and
ARLENE FEIEREISEN KACHER,

Appellant,

and
HENRY LEE FEIEREISEN,

Defendant.

Appeal from the Iowa District Court for Linn County, Paul J. Kilburg, Judge.

Kacher appeals a district court declaratory judgment ruling determining that Kacher and her two codefendants were liable for a portion of federal estate tax due on the estate of William Barlow. **AFFIRMED IN PART, AND REVERSED IN PART.**

Eugene J. Kopecky of Ackley, Kopecky & Kingery, Cedar Rapids, for appellant.

William H. Roemerman of Crawford, Sullivan, Read, Roemerman & Brady, Cedar Rapids, for appellee.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ., but decided en banc.

SCHLEGEL, J. 20

This appeal arises out of a declaratory judgment holding all three defendants liable for a share of federal estate taxes due on the estate of William Barlow. Defendant Kacher appeals this ruling.

William Barlow died testate on July 20, 1978. Barlow's wife, Florence, died on December 20, 1977. Florence had three children by a prior marriage. These children are the defendants herein.

On January 27, 1978, William transferred several parcels of real estate to the defendants subject to a life estate.

William Barlow's will provided that all taxes payable by reason of his death with respect to property passing under this will shall be paid out of the estate. The will also provided for no bequests or devise to any of the defendants. However, since William's transfer of the real estate occurred within three years of his death, the property was eventually listed in the probate inventory. Kacher disputes in this appeal the listing of this property in the probate inventory.

In 1982, the estate's tax return was audited by the I.R.S. Eventually, the I.R.S. requested payment of additional federal estate tax, interest, and penalty by reason of the inclusion of the transferred property for federal estate tax purposes.

On June 29, 1987, the executor filed this petition for declaratory judgment seeking a determination as to the obligations of the parties to pay the federal estate taxes and penalties regarding the transferred property.

Following a hearing, the court determined that the defendants were responsible for the portion of the federal estate taxes attributable to the transferred real estate. The court concluded that since the transferred property did not pass through the will, the estate was not required to pay the federal estate taxes pursuant to section 633.449. The court then prorated the federal estate taxes between the parties. Kacher has filed this appeal.

Kacher contends the real estate transfer to the defendants by Barlow prior to his death was not properly included in the taxable estate. If the real estate was properly included in the taxable estate, Kacher contends the taxes should not be assessed pursuant to Iowa Code section 633.449. In addition, she claims the taxes should not be allowed under the doctrines of estoppel and latches, and because the statute of limitations has run on this cause of action. Finally, Kacher contends the interest and penalty should not be assessed to her due to the substantial delay caused by the executor.

Our scope of review in this declaratory judgment action is de novo. The essential character of a cause of action and the relief it seeks, as shown by the complaint, determine whether an action is at law or equity. <u>Moseback</u>

v. Blythe, 282 N.W.2d 755, 758 (Iowa App. 1979). The record shows that the case was tried in equity. In addition, the construction of a will, an equitable matter, is at issue. Matter of Estate of Sheets, 331 N.W.2d 127, 128 (Iowa 1983). We give weight to the trial court's findings, but we are not bound by them. Id.

Kacher contends the real estate in question should not have been included in the probate inventory, thereby subjecting it to the payment of federal estate taxes. The transfer of the real estate took place within three years of the death of the decedent. Transfers made within three years of death, except for bona fide sales for money or money's worth, are to be included in the estate for federal estate tax purposes. I.R.C. § 2035 (1982). Money or money's worth must have been given for the real estate in order to keep it out of the probate estate. Kacher argues that the consideration, or money's worth, was the satisfaction of a prior moral obligation to the children. The trial court held, and we agree, that this was insufficient consideration to constitute "money's worth." This court has repeatedly held that past or moral consideration is not sufficient to support an executory contract. Youngberg v. Holstrom, 108 N.W.2d 498, 502 (Iowa 1961). The alleged contract was no longer executory at the time of death, however the consideration given was both past and moral. We hold that this is insufficient consideration. In addition, there was insufficient evidence put forth to even establish that such an obligation existed. The trial court properly included the real estate in the probate estate.

The next issue to be decided is whether the decedent expressly provided for the payment of taxes from sources other than the property of the estate. Iowa Code section 633.449 states: All federal estate taxes shall be paid from the property of the estate, unless the will of the decedent, or other trust instrument, provides expressly to the contrary. The will stated:

> I further direct that all my estate, inheritance, transfer, legacy, succession and other taxes and duties of any nature payable by reason of my death which may be assessed or imposed upon or with respect to property passing under this will shall be paid out of the estate as an expense of administration and no part of said taxes shall be apportioned or prorated to any legatee or devisee of this will.

The federal estate tax is a tax to the "estate." Therefore, generally federal estate tax will be payable by the estate, not the beneficiary or transferee. The will does not expressly provide for anyone but the estate to pay the tax. We find no basis to assess the tax to the transferees. We reverse the trial court's ruling holding the defendants liable for federal estate taxes and require that those taxes be paid out of the estate.

By reason of the above holding the remaining issues raised by Kacher are no longer relevant.

AFFIRMED IN PART AND REVERSED IN PART.

Oxberger, C.J., concurs; Sackett and Hayden, J.J., specially concur; Habhab and Donielson, J.J., dissent.

SACKETT, J. (specially concurring)

I totally agree with the majority that all federal estate taxes should have been paid by decedent's estate. I write specially to clarify my position.

The Iowa Probate Code provides that all federal and state estate taxes shall be payable from the property of the decedent's estate without apportionment. Section 633.449 reads:

> Payment of federal estate taxes. All federal and state estate taxes (as distinguished from state inheritance taxes) owing by the estate of a decedent shall be paid from the property of the estate, unless the will of the decedent or other trust instrument provides expressly to the contrary.

Passage of section 633.449 removed any doubt as to whether federal estate tax, in absence of the direction of the will to the contrary, must be paid from the residue as the first source available. Bergren v. Estate of Mason, 163 N.W.2d 374, 378 (Iowa 1968).

Federal estate tax in the absence of a direction of the will to the contrary must be paid from the residue as the first available source and not be apportioned. Bergren, 163 N.W.2d at 378. Federal estate taxes attributable to nonprobate property are payable out of the probate estate. Matter of Estate of Sheets, 331 N.W.2d 127, 128 (Iowa 1983).

The dissent admits the decedent's will contains no express direction to the contrary, but seeks to infer a direction that the transferees pay the tax by what is claimed to be an absence of direction. An express provision is more than a mere absence of direction. However, unlike the dissent, I find, after a careful reading of decedent's will, that the will directs payment of all estate taxes, not just those attributable to property passing under the will. I look particularly to the following language:

> I further direct that all of my estate . . . and other taxes and duties of any nature payable by reason of my death which may be assessed or imposed upon or with respect to, property passing under this will shall be paid out of the estate as an expense of administration. (emphasis added).

The federal estate tax in question is clearly by reason of his death.

The next question is, is it assessed or imposed upon or with respect to property passing under the will. It is both assessed and imposed upon property passing under his will. The decedent's will provided taxes assessed by reason of his death should be imposed upon property passing under his will. This opinion is further bolstered by the fact that no property is specifically devised, but rather the beneficiaries are given the residue (that which is left when the debts, taxes and expenses are paid), thereby distinguishing this case from *Sheets*, 351 N.W.2d at 129, where the court found it clear the testator had intended his widow's share not be reduced by federal estate tax and apportioned tax to a transferee.

Hayden, J., joins this special concurrence.

HABHAB, J. (dissenting)

I agree with the majority that the real estate in question should be included in the probate inventory. However, I disagree with that part of the majority's opinion which requires the estate to pay the federal estate taxes due on the property transferred by the decedent prior to his death.

The majority relies upon section 633.449 in reaching its decision. That section provides, in pertinent part:

> All federal and state estate taxes . . . owing by the estate of the decedent shall be paid from the property of the estate, unless the will of the decedent, or other trust instrument, provides expressly to the contrary.

The majority then turns to the will to determine whether the decedent expressly provided that the federal estate tax should be paid from sources other than property of the estate. The only provision in the decedent's will which touches on the subject is the following:

> I further direct that all of my estate, inheritance, transfer, legacy, succession and other taxes and duties of any nature payable by reason of my death which may be assessed or imposed upon or with respect to property passing under this will shall be paid out of the estate as an expense of administration and no part of said taxes shall be apportioned or prorated to any legatee or devisee of this will.

The majority then concludes that since the decedent did not expressly provide that the federal estate tax be paid from a source other than property of the estate, that it should be paid by the estate. By dissenting I disagree, for I believe that the intent of the testator was to relieve his estate, except as to those legatees and devisees of his will, from the payment of the federal estate tax.

It strikes me that the question in controversy is better resolved by attempting to determine the intent of the testator insofar as payment of federal estate taxes is concerned. When I couple the decedent's reason for transferring the property to the defendants in the first instance with the aforesaid provision of his will, I conclude that he did not intend the estate to pay the federal estate taxes.

I would hold that where a will specifically provides the circumstances under which estate and inheritance taxes are to be paid from the estate, unless those circumstances exist, then those taxes are not to be paid from the estate. Thus here, since the decedent expressly denoted that estate taxes were not to be apportioned or prorated as to legatees or devisees of his will, only individuals within those respective categories were exempt from apportionment or proration.

I believe that the Latin phrase "expressio unius est exclusio alterius" applies here. (The expression of one thing is the exclusion of another.) Under this maxim, when one thing is specified in a will the intention to exclude all others from its operation may be inferred. I would hold that the expressions by the testator in his will is sufficient to meet the "expressly to the contrary" provisions of section 633.449.

I would affirm the trial court.

Donielson, J., joins this dissent.