

*Opinion*  
*no. 1147*

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

TAX DIVISION

JOSEPH H. GUSTON  
SUPERIOR COURT OF THE  
DISTRICT OF COLUMBIA  
TAX DIVISION

JUL 13 1977

BETTY E. SMITH,

and

THE NATIONAL BANK OF WASHINGTON,

Petitioners

v.

DISTRICT OF COLUMBIA,

Respondent

**FILED**

Tax Docket No. 2393

MEMORANDUM OPINION

This matter comes before the Court under Rule 10 of the Tax Division Rules on a fully stipulated record for determination of the legal issues involved. The parties have agreed that the controversy can be resolved by the Court without the necessity of a trial. We have considered the memoranda of law filed by both parties, their arguments presented at the hearing held on May 10, 1977, and the proposed findings of fact and conclusions of law which were submitted by each party subsequent to the hearing. This Memorandum Opinion shall constitute our findings of fact and conclusions of law.

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The facts which have been stipulated or otherwise presented are relatively simple and can briefly be stated as follows. Petitioner Betty E. Smith was the sole beneficiary under a revocable trust agreement dated October 17, 1969, entered into between Florence E. Cook, as grantor, and petitioner The National Bank of Washington, as trustee. Petitioner The National Bank of Washington (hereinafter referred to as petitioner trustee or trustee) is a national banking association organized and existing under the laws of the United States. The grantor, Florence E. Cook (hereinafter referred to as decedent or grantor), died on November 4, 1974. She left a last will and testament dated October 17, 1969, which was filed with the Superior Court of the District of Columbia, Probate Division, on November 14, 1974. Due, apparently, to the nature of the property owned by decedent at the time of her death, probate of the will was never sought.

The National Bank of Washington, however, as trustee under decedent's inter vivos trust and residuary beneficiary under the will, filed a District of Columbia inheritance tax return. In this return the trustee calculated the inheritance tax which was due as being \$12,692.62, based upon a total gross estate of \$129,143.61. The District of Columbia, on the other hand, calculated the inheritance tax due on said estate to be \$14,296.20, together with interest in the amount of \$428.88. The amount in controversy is therefore \$2,032.46. The notice of taxes due was dated August 29, 1975, and the tax was paid by petitioner The National Bank of Washington on February 3, 1976.

The following policies of insurance were all payable to The National Bank of Washington as trustee under the revocable trust agreement with the decedent:

Metropolitan Life Insurance Policy No. 140-176-480	\$ 668.25
Metropolitan Life Insurance Policy No. 5-818-336-M	869.40
Metropolitan Life Insurance Policy No. 140-622-230	668.25
Metropolitan Life Insurance Policy No. 135-846-255	752.45
The Union Labor Life Insurance Co. No. G-1895	1,500.00

The decedent, on the date the revocable trust was established, transferred to the trustee approximately \$52,300 located in several savings accounts. These assets, including any additional assets later transferred, were called the "Trust Estate" in the trust agreement and were to be used primarily for the benefit of the grantor, Florence Cook, during her lifetime as evidenced by paragraph FIRST of the trust which provided:

The Trustee shall invest and reinvest the Trust Estate, collect the income therefrom and pay from the net income or principal all bills and expenses for the Grantor's health, welfare, maintenance and support, or apply the same for her use and benefit during her lifetime, in monthly or quarterly installments. The trustee shall pay to the Grantor so much of the principal as the Grantor may direct by instruments in writing, signed by the Grantor and delivered by the Grantor to the Trustee during the lifetime of the Grantor (even to the extent of all). In absence of such direction, the Trustee may pay to or apply for the benefit of the Grantor such part of the principal thereof (even to the extent of all) as the Trustee, in its discretion, may deem necessary or advisable to provide for the Grantor's health, welfare, maintenance and support.

Paragraph FOURTH of the trust agreement further provided that, upon the death of the grantor, the trust would terminate and the assets and property, including any accrued, accumulated or undistributed income, would be distributed to Mrs. Betty G. Smith, the grantor's niece and petitioner here.

Under subparagraph "O" of paragraph SIXTH of the trust agreement, petitioner trustee was given the following power, exercisable in its absolute discretion:

To pay over to the Executor of the Will of the Grantor or to the Administrator of her estate any share of estate, inheritance, succession, or other taxes which such representative may certify to the Trustee as being due because of the inclusion in the taxable estate of such Grantor of the value of any asset forming part of this Trust, with no requirement for the Trustee to verify any such amount so claimed, the certification by the personal representative to be sufficient;

Article I of the last will and testament of the decedent, executed the same day as the trust agreement, provided in part:

I direct my Executor hereinafter named to pay all of my just debts and funeral expenses as soon after my decease as may be found convenient. I direct that \* \* \* my place of burial shall have a suitable marker and gravestone. \* \* \* Considering the foregoing, my said Executor is authorized, empowered, and directed to incur such bills and expenses for my funeral and interment as, in his discretion, are proper, without regard to any limitations imposed by law or rule of court in force in my legal domicile at the time of my demise.

Funeral expenses in the amount of \$3,663.63 and a cemetery marker costing \$786.80 were paid for by the trustee in connection with the funeral and burial of the decedent. These amounts were claimed as deductions on the District of Columbia inheritance tax return. In Article II of her will the decedent provided:

I hereby grant my Executor the authority to sell to the Trustee of my Revocable Trust Agreement dated the 17th day of October, 1969, such assets of my estate as my Executor may determine as proper or desirable, in his sole discretion, provided that such power to sell to the said Trustee shall be exercised only for the purpose of providing the Executor of my estate with sufficient funds in cash to pay the debts, taxes and other expenses levied against my estate.

The decedent named her attorney, William R. Kearney, Esquire, to be the executor of her will. If for some reason he were unable to serve, she named The National Bank of Washington as alternate executor. Under Article IV of her will, the decedent bequeathed the rest and residue of her property to the petitioner as trustee under the revocable trust agreement. The decedent had in Article III bequeathed all of her personal property to petitioner Smith.

The difference in the tax as calculated by petitioner The National Bank of Washington when it filed the inheritance tax return and the amount determined by the District of Columbia resulted from two adjustments made by the District of Columbia. First, the District disallowed the deductions claimed by petitioner trustee for the amounts paid by it for funeral expenses and for a cemetery marker totalling \$4,450.43. Secondly, the District of Columbia included in the estate for inheritance tax purposes the proceeds of the life insurance policies listed above, in the aggregate amount of \$4,445.35.

Petitioners, in support of their contention that the amounts paid for funeral expenses and the cemetery marker were proper deductions taken by petitioner trustee in the inheritance tax return, argue that §6(a) of the District of Columbia Rules and Regulations pertaining

to inheritance and estate taxes (hereinafter referred to as D. C. Regulations or Regulations) permits such deductions.<sup>1/</sup>

That Regulation specifically provides:

There may be allowed as deductions [from the valuation of gross estate] such amounts for funeral expenses as are actually expended, but not exceeding \$1,000 unless an expenditure in excess of \$1,000 is directed in the will of the decedent. No deductions shall be allowed for a monument or memorial, unless expenditure for such is directed in the will of the decedent.

Since Article I of the last will and testament of the decedent specifically authorized payments for a "suitable marker and gravestone" without regard to any limitations imposed by law, petitioners contend that the limitation in §6(a) of the Regulations is inapplicable and a deduction for the full amount expended for these purposes should be allowed. They further argue that at least a deduction in the amount of \$1,000, as specifically authorized by §6(a), should be permitted.

The District of Columbia, on the other hand, cites §6(f) of the D. C. Regulations pertaining to inheritance and estate taxes in support of its disallowance of the claimed deductions for funeral expenses and the purchase of a cemetery marker. Paragraph (f) of §6 provides:

Funeral, administration and other expenses and debts of the decedent are not proper deductions from the value of jointly held real estate or personal property passing by right of survivorship or from any other property received by a beneficiary (such as a U.S. Civil Service Retirement Fund) which may not be attached for debts of the decedent. Exceptions to this rule are encumbrances on District real estate and taxes on District real estate computed to the date of decedent's death, and liens on personal property having a taxable situs in the District. <sup>2/</sup> [Emphasis supplied.]

<sup>1/</sup> 16 D.C.R.R. §405.1 (September 8, 1970). The parties in their arguments and briefs referred to the Regulation as §6(a) rather than as 16 D.C.R.R. §405.1. In order to be consistent, we will do the same in this opinion. These Regulations were adopted pursuant to D.C. Code 1973, §47-161.

<sup>2/</sup> 16 D.C.R.R. §405.6.

The District argues that §6(f) precludes the deductions for funeral expenses and grave marker in the inheritance return filed by the petitioner trustee because the assets of the trust were not subject to attachment for the payment of these liabilities. The trust assets, the District concedes, were attachable to the extent of the estate, inheritance, succession or other taxes, due as a result of the inclusion of any asset of the trust in the taxable estate of the decedent, pursuant to paragraph SIXTH, subparagraph "O" of the trust agreement, supra.

After considering the arguments presented by both sides, we find that the assets which made up the trust estate in the revocable trust agreement executed by decedent on October 17, 1969, were not subject to attachment for the debts of the decedent, namely, the funeral expenses and the cemetery marker, within the meaning of §6(f) of the Regulations. Therefore, under §6(f), notwithstanding §6(a), the expenditures for funeral expenses and the purchase of a cemetery marker were not proper deductions from these non-attachable assets by petitioner trustee in the inheritance tax return. Although the trust estate was presumably includible in the taxable estate of the decedent for federal estate tax purposes,<sup>3/</sup> it was not part of the probate property subject to administration under the laws of the District of Columbia. D.C. Code 1973, §18-501 et seq. and §20-301 et seq.

It seems clear that the inter vivos transfer of these trust assets, considering the language of both the trust and the will, was not a testamentary disposition, and thus

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<sup>3/</sup> Since the trust was revocable, formed with the purpose in mind to benefit the grantor during her lifetime, and the grantor could invade the principal of the trust to any extent for her own benefit, the trust property would have been includible in the grantor's taxable estate under Int. Rev. Code §2038.

not subject to probate. It is also equally clear that the life insurance policies did not constitute a part of the probate estate of the decedent. See 46 C.J.S. Insurance §1157 (1946). This may have been a major factor in the executor's decision not to seek probate of decedent's will in this case. Since the trust property did not pass under the will of the decedent, but rather passed immediately upon her death to the beneficiary under paragraph FOURTH of the trust agreement, supra, we find that it could not be attachable for the claims for which deductions are sought in this case. Nor were the proceeds of the insurance policies subject to attachment by the creditors of the decedent. D.C. Code 1973, §35-716.

This Court is fully cognizant of the general rule, which has been followed in this jurisdiction, that where a person creates a trust for his own benefit and support, or a discretionary trust, his creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit. RESTATEMENT (SECOND) OF TRUSTS §156 (1959). See American Security & Trust Co. v. Utley, 127 U.S. App. D.C. 235, 236, 382 F. 2d 451 (1967). We do not dispute the rule that one may not create a trust for his own benefit and place the income beyond the reach of his creditors. See Liberty National Bank v. Hicks, 84 U.S. App. D.C. 198, 201, 173 F. 2d 631 (1948). However, it is also true that the creditors of the settlor cannot compel him to exercise a power of revocation so that they might reach his property. RESTATEMENT (SECOND) OF TRUSTS §331, Comment o (1959). The acceptance of these general principles, however, does not require this

Court to hold that in this case creditors could attach the trust property for the purposes for which the deductions were taken, funeral expenses and costs of the cemetery marker which were incurred after death. Nor do we believe that §6(f) of the Regulations would require us to rule that the deductions were proper in this case. See Hankin v. District of Columbia, 310 A. 2d 56, 58 (D.C. App. 1973).

We disagree with petitioners' assertion that the terms of the trust and will, when read together as a common estate plan, imposed a duty on the trustee to pay for the funeral expenses and the cemetery marker, and that if such duty were neglected, the assets of the trust would be attachable for those purposes. The will in Article I clearly provided that the burden of paying the debts and funeral expenses of the decedent fell upon the executor, not upon the petitioner trustee. The decedent specifically granted to her executor in Article II of her will, supra, the authority in his sole discretion to sell to the trustee of her revocable trust assets of her estate for the purpose of providing the executor with sufficient funds to pay the debts, taxes and other expenses of her estate. The decedent could easily have provided either in her will or in the trust agreement that the assets of the revocable trust could, without equivocation, be used for the benefit of her estate and thus be subject, prior to distribution to the beneficiary, to all claims against her estate. Since she did not, and in fact, as we stated, clearly evidenced an intention that the executor use the assets passing under her will for the expenses and debts of ~~the~~ estate, and if these were insufficient to sell any of these assets to the

trustee in order to obtain the necessary cash, we cannot attribute to her an intention to use the trust estate for these purposes. This Court must read the language of the trust and will strictly, and cannot speculate as to what the unspoken intentions of the decedent might have been when she executed the trust and will. We find that the language of the will is clear and unambiguous as to her intentions in this respect.

In the trust, the decedent did provide that the trust estate might be used to pay certain taxes after her death. In subparagraph "O" of paragraph SIXTH of the trust, she authorized the trustee to pay to the executor the estate, inheritance, succession or other taxes which were due as a result of any asset of the trust being included in her taxable estate. Under paragraph SIXTH of the trust the trustee was not under any obligation to pay such taxes, however. Rather, the trustee could exercise such power in its sole and absolute discretion, if and when it deemed it advisable to do so. Absent a clear intention exhibited by the decedent to require the trust property to be subject to the general claims and debts of the estate, we cannot find that those assets were attachable for the payment of funeral expenses and a cemetery marker. We do not believe the fact that there was no probate of decedent's will is significant. That it may have been the trustee rather than the executor in this case who assumed the responsibility of administering the estate, collected all the assets, accounted for the expenses and debts, and then distributed the remainder, does not render the trust property thereby attachable for the debts of the decedent within the meaning of §6(f), in order to obtain the deductions sought here.

The nature of the trust property passing to the beneficiary, and its legal significance for purposes of the questions raised here, is similar to joint property. Upon the death of one joint owner, the property held in joint tenancy does not pass by way of the decedent's will but rather the surviving joint tenant becomes sole owner of the property by his right of survivorship. See Hankin v. District of Columbia, 310 A. 2d 56, 58 (D.C. App. 1973).<sup>4/</sup>

In the same manner, the property which made up the trust estate of the decedent here did not pass under her will to the beneficiary, petitioner Smith, but rather passed by way of the trust. As a result, this property could not be attachable for the items which petitioner trustee sought to deduct.

In so holding, we have not disregarded the principle that, for purposes of the inheritance tax, the recipient of property is taxed solely on the distributive share which he actually receives, after the deduction of expenses properly chargeable to the estate. See Hankin, 310 A. 2d at 58. We have considered the cases cited by petitioners in support of their argument that to deny the claimed deductions would result in the calculation of the inheritance tax payable by one or both of the petitioners on an amount part of which was never actually received by the beneficiary. District of Columbia v. Payne, 126 U.S. App. D.C. 47, 374 F. 2d 261 (1966); Hyman v. District of Columbia, 101 U.S. App.

<sup>4/</sup> In Hankin, the surviving joint tenant sought to deduct on her inheritance tax return expenses of her husband's (the other tenant) last illness and funeral, District of Columbia and federal income taxes, and a large contribution made to a university fund. The court, rejecting a challenge to the validity of §6(f) of the Regulations, held that the deductions could not be taken since the decedent's former interest in the jointly owned property was not attachable for the items the appellant sought to deduct. The court concluded that the payment of these debts was either voluntary or due to a personal obligation on her part. 310 A. 2d at 59.

D.C. 179, 247 F. 2d 585 (1957). It is true that the court in each of these cases stated that Congress must have intended that the inheritance tax in the District of Columbia was to be computed on the value of what the beneficiary actually receives. See District of Columbia v. Payne, 126 U.S. App. D.C. at 50. However, in each of those cases no issue was raised as to whether the property on which the tax was based was attachable for purposes of the claims against the estate. In Payne, the executor expended funds for the costs of the funeral and a grave marker in excess of the \$1,000 permitted by §6(a) of the Regulations. The District claimed that under that section the amount in excess of \$1,000 could not be deducted and no deduction could be taken for the costs relating to the cemetery marker. Observing that the probate court had allowed the deductions in full as a proper charge against the estate, and that the amount received by the residuary beneficiary was reduced by the allowance of the deductions, the court held that it was error to require the beneficiary to pay an inheritance tax on an amount which she never actually received. 126 U.S. App. D.C. at 50. In Hyman, the court held that the inheritance tax on the transfer of realty must be computed on the net value of the realty which was arrived at by reducing the market value of the property by an encumbrance on the property in the form of a debt owed to the devisee. 101 U.S. App. D.C. at 181. The circumstances in Hyman and Payne are clearly distinguishable from the case before us.<sup>5/</sup>

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<sup>5/</sup> In fact, the court in Hyman stated that its holding was limited to the language of the will involved and the facts and circumstances there existing.

Assuming for the moment that the will had been probated, had the executor paid the expenses of the funeral and the cost of the cemetery marker out of the assets passing under the will, or if the executor had sold any of such assets to obtain sufficient funds to meet these debts as directed in Article II of the will, we would have little difficulty in approving the deduction. In such circumstances, we believe that the deductions would clearly have been allowable under the authority of §§6(a) and 6(f) of the Regulations. We would assume that the decedent contemplated when she wrote her will that there would be sufficient property in her estate, in the nature of cash or other personal property, to cover the expenses of her funeral and burial.<sup>6/</sup> She had in fact anticipated the possibility that there might be insufficient cash on hand at her death, in which case she provided that property owned by her at the time of her death could be sold to the trustee to obtain the necessary cash. The fact that the will was never probated and the trustee was "acting" administrator and that there may have been insufficient funds on hand to cover the cost of the decedent's funeral and related expenses, necessitating the payment of these expenses out of the assets of the trust, is not determinative of whether the deductions may be taken where the trust estate was not attachable for these purposes. See Hankin v. District of Columbia, supra. The decedent

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<sup>6/</sup> In Article III of her will, the decedent bequeathed all her personal effects, jewelry, clothing and furniture to petitioner Smith, if then living, and through the residuary clause all the remainder of her property to the trustee, The National Bank of Washington.

could have anticipated and made provisions for such a situation, but did not do so. In light of our discussion, we conclude that, based upon §6(f) of the Regulations, the trustee may not be permitted to take the claimed deductions on the inheritance tax return.

The second question presented here relates to whether the proceeds of the insurance policies taken out by decedent and which were payable to petitioner trustee were includible in the estate of decedent for purposes of the inheritance tax. The District of Columbia argues that the life insurance proceeds which were payable to the petitioner trustee were subject to District of Columbia inheritance tax pursuant to D.C. Code 1973, §47-1601(a)<sup>7/</sup> and §5(a)(2) of the Regulations pertaining to inheritance and estate taxes. Section 5(a) of the Regulations provides:

The following transfers of the proceeds of insurance on the life of the decedent and of annuity contract benefits are taxable under Article I:

\* \* \*

(2) Where taken out to provide for the payment of taxes (including estate and inheritance taxes) or other charges against the estate, or to be used for the benefit of the estate of the insured. 8/

\* \* \*

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7/ Section 47-1601(a) provides in pertinent part for the imposition of an inheritance tax on the following property:

All real property and tangible and intangible personal property \* \* \* transferred from any person who may die seized or possessed thereof, either by will or by law \* \* \* and all such property, or interest therein, transferred by deed \* \* \* made or intended to take effect in possession or enjoyment after the death of the decedent \* \* \* shall be subject to the tax \* \* \*.

8/ 16 D.C.R.R. §404.1(b). None of the other paragraphs of this Regulation are pertinent, unless we conclude that all of them, taken together, provide the only situations in which transfers of life insurance proceeds are taxable under §47-1601(a). However, we do not decide that issue.

The District of Columbia argues that the life insurance proceeds here are taxable under §5(a)(2) because the policies were "taken out" to be used for the benefit of the estate of the insured since the trust agreement authorized the trustee to use those proceeds for the payment of taxes. It further argues that the insurance proceeds come within the broad reach of D.C. Code §47-1601(a).

Petitioners, on the other hand, argue that, since §5(a) of the Regulations does not provide that insurance proceeds payable to a named beneficiary are taxable, they are therefore not taxable. They claim that these policies were not taken out for the payment of taxes or to be used for the benefit of the estate within the meaning of that section. Moreover, they contend that it has been the long-standing policy of the Department of Finance and Revenue of the District of Columbia not to tax such proceeds. In support of this argument, petitioners cite the instructions for Schedule D for the District of Columbia inheritance tax return which state:

Life insurance policies payable to a surviving beneficiary specifically named therein are not taxable. <sup>9/</sup>

Although §47-1601(a) by its language appears to include within its coverage a very broad range of transfers of property occurring upon the death of an individual, we are persuaded that the practice of the District of Columbia in the past has been to exclude proceeds of insurance policies for purposes of calculating the inheritance tax where the policies are payable to a surviving beneficiary specifically named therein. The contemporaneous

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<sup>9/</sup> Instructions for Form FF-19, District of Columbia Inheritance Tax Return 3 (Revised August, 1972).

interpretation of a statute by the persons or agency assigned to oversee it commands great respect, and we should accept that interpretation absent a clear indication that it is incorrect. See Lenkin v. District of Columbia, 149 U.S. App. D.C. 129, 141, 461 F. 2d 1215 (1972). We have not been shown any authority to persuade us that the interpretation of §47-1601(a) by the Department of Finance and Revenue, in the area of life insurance proceeds, as evidenced by the instructions referred to above, is incorrect. At least where the named beneficiary of the policies is not obligated, pursuant to the terms of a will or trust, to use the proceeds for the benefit of the estate, we believe the insurance proceeds would not be includible in the estate of the decedent for purposes of District of Columbia inheritance tax. Here, the policies were all payable to a named beneficiary surviving the decedent, the petitioner The National Bank of Washington ultimately for the benefit of petitioner Smith, and the trustee was not obligated to use the proceeds for the benefit of the estate.

Contrary to the suggestion of the District, there is no evidence that the insurance policies were "taken out to provide for the payment of taxes \* \* \* or other charges against the estate." Nor is there any evidence that they were "taken out" to be used for the benefit of the estate, or were so used by the trustee. The trustee was authorized in subparagraph "O" of paragraph SIXTH of the trust agreement, supra, to pay to the executor the share of the estate, inheritance, succession or other

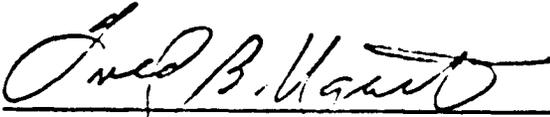
taxes due as a result of the inclusion in the taxable estate of the value of any asset forming part of the trust estate. This clause of the trust does not state that the insurance policies were taken out to provide for the payment of taxes or to be used for the benefit of the estate. Nor is there any other clause in either the trust or the will which provides, or which could be construed by this Court to provide, that the insurance would be so used. Assuming for the moment that the insurance proceeds were includible in the decedent's estate for federal estate tax purposes, the trustee was under no obligation to use those proceeds, or any other asset in the trust, to pay the estate tax attributable to the inclusion of the proceeds of the insurance. Rather, paragraph SIXTH of the trust gave the trustee complete discretionary authority to use the trust property for the payment of the taxes. Without a clear indication on the part of the decedent that the insurance was purchased for the purpose of the payment of taxes, or to benefit her estate in some other fashion, we cannot conclude that §5(a)(2) is applicable. Therefore, we conclude that the proceeds of the policies were not taxable under either §5(a)(2) of the Regulations or under D.C. Code §47-1601(a).

Accordingly, this Court makes the following trial findings:

1. That petitioners are not entitled to a deduction for funeral expenses and the cost of a cemetery marker in the amount of \$4,450.43; and

2. That the proceeds of the insurance policies are not includible in the decedent's estate for purposes of District of Columbia inheritance taxes.

Petitioners are to submit an Order to the Court by July 27, 1977.

  
FRED B. UGAST  
Judge

Dated: July 13, 1977

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