SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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ACCOUNTING BY: JAMES P. SHEA

as the EXECUTOR

of the ESTATE OF MARGARET HARMSE,
a/k/a MARGARET C. HARMSE
a/k/a M.C. HARMSE
Deceased
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MEMORANDUM OF LAW IN SUPPORT OF OBJECTIONS

File No.: 619 P 2001

HON. LEE HOLTZMAN
Judge Assigned

PRELIMINARY STATEMENT

This memorandum of law is submitted in support of the objections of Peter Gallagher and Mary Gallagher to the accounting by James P. Shea, as the Executor of the Estate of Margaret Harmse (a/k/a Margaret C. Harmse, a/k/a M.C. Harmse). As explained more fully below, the tax exoneration clause in decedent's will is sufficient to relieve the decedent's non-testamentary gifts to the objectants from payment of any estate taxes that would otherwise be apportioned against objectants pursuant to EPTL §2-1.8(d). Furthermore, because the decedent clearly expressed her intention that the gifts to objectants should be free of any estate tax burden, the court should deny the executor's request, pursuant to EPTL §2-1.8(e), to recover from objectants all estate tax that has been paid, as well as any estate tax that may in the future be due.

STATEMENT OF FACTS

On May 7, 1996, Margaret Harmse executed a quitclaim deed for property known as 3285 Perry Avenue, Bronx, New York, in favor of objectants, Peter Gallagher and Mary Gallagher. In the same document, Peter and Mary Gallagher granted to Margaret Harmse a life estate in the premises conveyed. Margaret Harmse also held a number of certificates of deposit in her own name, in trust

for Mary Gallagher.

Margaret Harmse died on July 7, 2001. The first paragraph of the decedent's Last Will and Testament, dated October 14, 1993, directed payment of debts and funeral expenses as soon as practicable after the decedent's death. In the second paragraph, the decedent devised all the rest, residue and remainder of her property, real and personal, owned at the time of her death, to her sister, Anna Harmse. The second paragraph further provided that, in the event that Anna Harmse should predecease the decedent, the residuary estate should be divided equally among six charitable institutions (American Red Cross in Greater New York; the Salvation Army; the New York Association for the Blind; Shriners Hospital for Crippled Children; Federation of Protestant Welfare Agencies, Inc.; and Church of the Holy Nativity). Since Anna Harmse predeceased her sister, the six charities named in the will now share in the decedent's entire residuary estate.

Paragraph "Fifth" of the will provides: "All estate, inheritance, transfer, legacy, succession and other death taxes of any nature, payable by reason of my death shall be paid out of my residuary estate." The Executor now asks the Court to construe paragraph "Fifth" to require equitable apportionment of estate taxes against objectants. The Executor further seeks to recover from objectants the entire amount of estate taxes already paid ($128,255.70), as well as any additional estate taxes that may be due on the value of the non-testamentary assets they have received, pursuant to EPTL §2-1.8(e), on the ground that a charitable deduction is available for the entire residuary estate.

ARGUMENT

I. ESTATE TAXES SHOULD NOT BE EQUITABLY APPORTIONED AGAINST OBJECTANTS BECAUSE THE TAX EXONERATION CLAUSE IN THE DECEDENT'S WILL RELIEVES THE DECEDENT'S NON-TESTAMENTARY

GIFTS TO THE OBJECTANTS FROM ANY ESTATE TAX OBLIGATIONS

N. Y. Estates, Powers & Trusts Law, §2-1.8(a) provides:

> Whenever it appears in any appropriate action or proceeding that a fiduciary has paid or may be required ro pay an estate or other death tax, under the law of this state or of any other jurisdiction, with respect to any property required to be included in the gross tax estate of a decedent under the provisions of any such law (hereinafter called "the tax"), the amount of the tax, except in a case where a testator otherwise directs in his will . . . shall be equitably apportioned among the persons interested in the gross tax estate . . . to whom such property is disposed of or to whom any benefit accrues . . . in accordance with the rules of apportionment herein set forth, and the persons benefitted shall contribute the amounts apportioned against them."

EPTL §2-1.8(d) provides, in relevant part, that "any direction as to apportionment or non-apportionment of the tax, whether contained in a will or a non-testamentary instrument, relates only to the property passing thereunder, unless such will or instrument provides otherwise."

Paragraph "Fifth" of the decedent's will provides: "All estate, inheritance, transfer, legacy, succession and other death taxes of any nature, payable by reason of my death shall be paid out of my residuary estate." This is an "otherwise direction" under §2-1.8(a). New York courts have consistently construed identical or substantially identical tax exoneration clauses to apply to both testamentary and non-testamentary property. In re Estate of Bruce, 131 A.D.2d 670, 516 N.Y.S.2d 748 (2d Dep't 1987) ("all estate taxes payable by reason of my death shall be chargeable against and payable out of my residuary estate without contribution by anyone"); In re Myers' Will, 7 Misc.2d 664, 160 N.Y.S.2d 496 (Surr. Ct. Westchester Co. 1957) ("all inheritance, estate and transfer taxes, or death penalties, both State and Federal, which may be imposed on all property passing by reason of my death, as well as upon all other property included in my taxable estate in any jurisdiction shall

be paid from my residuary estate"); In re Estate of Coulter, 11 Misc. 2d 851, 173 N.Y.S.2d 425 (Surr. Ct. N.Y. Co. 1957), aff'd, 4 A.D.2d 1019, 169 N.Y.S.2d 418, appeal denied, 5 A.D.2d 814, 170 N.Y.S.2d 981 (1st Dep't 1958), and appeal denied, 4 N.Y.2d 676 (1958) ("I direct that all . . . taxes payable by reason of my death shall be paid from the residue of my estate"); see also In re McGee's Will, 73 N.Y.S.2d 190 (Surr. Ct. Westchester Co. 1947) ("all inheritance taxes, estate taxes and other similar taxes, both State and Federal, shall be paid out of my residuary estate"). Therefore, the taxes paid upon the real property and the proceeds of the certificates of deposit are a proper charge on the residuary estate and may not be apportioned against those assets. See In re Estate of Haliday, 184 Misc. 668, 53 N.Y.S.2d 934 (Surr. Ct. N.Y. Co. 1944) (where tax exoneration clause was broad enough to include non-testamentary assets, taxes paid on proceeds of savings accounts standing in trust for decedent's grandson were a proper charge on residuary estate).

II. EPTL §2-1.8(e) DOES NOT PROVIDE ANY JUSTIFICATION FOR DEPARTING FROM THE REQUIREMENT THAT, WHERE THE WILL CONTAINS A TAX EXONERATION CLAUSE SUCH AS THE ONE IN THIS CASE, THE EXECUTOR MUST DEDUCT THE ESTATE TAXES ON ALL PRERESIDUARY DISPOSITIONS (INCLUDING NON-TESTAMENTARY DISPOSITIONS) "OFF THE TOP" OF THE RESIDUARY ESTATE

It is well-settled that, because a general tax exoneration clause exonerates all preresiduary dispositions from the burden of estate taxes, the executor must compute the estate tax on the preresiduary dispositions and deduct that sum "off the top" of the residuary, thus reducing the residuary estate. In re Estate of Olson, 77 Misc.2d 515, 519, 353 N.Y.S.2d 347, 351 (Surr. Ct. Kings Co. 1974); In re Estate of Miller, 76 Misc.2d 1092, 1094, 353 N.Y.S.2d 379, 382 (Surr. Ct. N.Y. Co. 1974); In re Estate of Walsh, 34 Misc.2d 388, 390, 228 N.Y.S.2d 75, 77 (Surr. Ct. N.Y. Co. 1962); In re Will of Heit, 26 Misc.2d 774, 776, 206 N.Y.S.2d 59, 61 (Surr. Ct. N.Y. Co. 1960); In

re Estate of Mayers, 189 Misc. 700, 710, 73 N.Y.S.2d 715, 724 (Surr. Ct. N.Y. Co. 1947), aff'd, 274 A.D. 918, 84 N.Y.S.2d 895 (1st Dep't 1948), aff'd, 299 N.Y. 388, 87 N.E.2d 422 (1949). This rule applies even though it reduces the beneficial share of each fractional intra-residuary beneficiary, including the share of a charity. In re Estate of Olson, 77 Misc.2d at 519, 353 N.Y.S.2d at 352; In re Estate of Miller, 76 Misc.2d 1092, 1094, 353 N.Y.S.2d 379, 382 (Surr. Ct. N.Y. Co. 1974) (conceding that, if all estate taxes, including those on both non-testamentary and testamentary assets that were not subject to apportionment, were paid out of residuary before division into six equal parts, share for charitable trust would be reduced); In re Estate of Coulter, 11 Misc.2d at 851, 173 Misc.2d at 425 (conceding that tax clause substantially identical to the one involved in this case imposed upon charities who were residuary beneficiaries "a tax burden that otherwise would not be theirs"); see also In re Estate of Walsh, 34 Misc.2d at 390, 228 N.Y.S.2d at 77; In re Will of Heit, 26 Misc.2d at 776, 206 N.Y.S.2d at 61; In re Estate of Mayers, 189 Misc. at 710, 73 N.Y.S.2d at 724. The rule has been applied where, as here, all residuary legatees were charities. See In re James' Estate, 180 Misc. 441, 40 N.Y.S.2d 4 (Surr. Ct. N.Y. Co. 1943), aff'd, 267 A.D. 761, 45 N.Y.S.2d 938 (1943), appeal denied, 267 A.D. 820, 47 N.Y.S.2d 101 (1st Dep't 1944). This does not mean, however, that estate taxes are apportioned against the fractional charitable shares; rather, the charitable shares are simply reduced in amount. In re Estate of Olson, 77 Misc.2d at 519, 353 N.Y.S.2d at 352.

EPTL §2-1.8(e) provides:

> In all cases in which any property required to be included in the gross tax estate does not come into the possession of the fiduciary, he is authorized to, and shall recover from the persons benefitted or from any person in possession of such property the ratable amounts of the tax and any interest payable by the persons benefitted. The surrogate

> may direct the payment thereof to the fiduciary and may charge such payments against the interests of the persons benefitted in any assets in the possession of the fiduciary or any other person. If the fiduciary cannot recover the amount of the tax and interest apportioned against a person benefitted, such amount may be charged in such manner as the surrogate determines.

The first sentence of this section is not applicable since, as explained in Point I, *supra*, the tax allocation clause in the will prohibits apportionment against the non-testamentary assets transferred to the objectants. Therefore, the only portion of this section that might support recovery of the estate taxes from the objectants is the last sentence. However, in the face of the decedent's clear direction that the non-testamentary assets should not be subject to any tax burden, the Court may not charge the estate taxes against those assets simply because they cannot be recovered from any other non-charitable beneficiary (whether testamentary or non-testamentary). Section 2-1.8(e) should not be interpreted to render nugatory any other part of §2-1.8 — including subsections (a) and (d), which together authorize a testator to exonerate assets from the burden of tax apportionment. See In re Estate of Masten, 154 A.D.2d 676, 546 N.Y.S.2d 880 (2d Dep't 1989) (rejecting church's argument that §2-1.8(e) supersedes §2-1.8(b) and therefore church was not required to pay estate taxes on value of life estate transferred to it by testator's sister (the recipient of the original devise) as a charitable gift).

The Executor's request for apportionment under §2-1.8(e) is premised on his assertion that "a proper deduction is available for the entire testamentary residuary estate." Thus, the Executor appears to also be relying on §2-1.8(c), which states, in relevant part: "Unless otherwise provided in the will . . . (2) Any exemption or deduction allowed under the law imposing the tax by reason of . . . the charitable purpose of the gift shall inure to the benefit of the . . . charitable gift . . . ."

However, as explained above, deduction of the taxes attributable to the non-testamentary dispositions to the objectants does not deprive the charities of the benefit of the charitable deduction; instead, it simply reduces the amount of the fractional shares of the residuary that are payable to the charities. While a reduction in the amount of the charitable gifts is unfortunate, the alternative—imposing the taxes on the same assets that the decedent clearly and explicitly relieved of that burden—contravenes the testator's intent and is therefore an unacceptable solution.

CONCLUSION

For all the foregoing reasons, objectants respectfully request that this Court (1) construe Paragraph Fifth of the Last Will and Testament of Margaret Harmse to prohibit apportionment of estate taxes against the interests of any and all non-testamentary beneficiaries, including Mary Gallagher and Peter Gallagher; and (2) deny Petitioner's request for a decree, pursuant to EPTL §2-1.8(e), directing recovery from Mary Gallagher and Peter Gallagher of estate taxes already paid in the amount of $128,255.70, and payment of any additional estate taxes that may be due on the value of the non-testamentary assets they have received.

Dated: Bronx, New York
October __, 2003

Yours, etc.

Cecile C. Weich, Esq.

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