within twenty (20) days of date hereof.

Exceptions are granted the defendants.

ESTATE OF HARRY D. HARVIE, DECEASED, C.P. Franklin County Branch

Orphans' Court Division - Trust - Will - Tax Clause - Declaratory Judgment Act - Appointment of Guardian Ad Litem

1. A guardian ad litem to represent the interest of minors is not necessary where their interests are identical to interests of children who have reached majority and have joined in the action.

2. Sections 3702 and 3704 of the Probate Code creates a presumption that a testator intends that proration of taxes should be made in accordance to its terms unless the testator's will provides otherwise.

3. A direction in testators will that " all estate and inheritance taxes shall be paid by my executors out of my estate" clearly supercedes tax instructions in a prior trust agreement.

Charles H. Davison, Esq., Counsel for Petitioners

Daniel W. Long, Esq., Counsel for Trustee

OPINION AND ORDER

KELLER, J., May 12, 1983:

On July 31, 1975, Harry D. Harvie entered into a trust agreement with Valley Bank and Trust Company as trustee, which provided for the payment of the net income of the trust to Mr. Harvie during his lifetime, and upon his death to his wife, Mildred B. Harvie, and upon her death the trust assets would be divided into separate equal trusts for the benefit of the children of Mr. Harvie for their lives with remainder to their respective children. The trust agreement provided inter alia:

> PARAGRAPH SIX. If any estate, inheritance, succession or other death taxes are assessed against or measured by the assets of this trust upon the death of the Settlor, this trust shall bear its proportionate part thereof unless the will of

> such Settlor so dying shall provide otherwise and shall bear such additional part thereof as Settlor's will may provide. If at the death of the Settlor, there shall be a tax on the said trust estate divisible into a tax on a life estate, followed by a tax on a remainder, the said Trustee may, in its discretion, pay the entire tax from the principal of the trust estate before the tax on the remainder would ordinarily become due and payable.

Harry D. Harvie executed his Last Will and Testament on June 26, 1980, and appointed his wife, Mildred B. Harvie, his two daughters, Joan Harvie Vander Sluis and Carolyn Harvie Thompson, and Valley Bank and Trust Company of Chambersburg his executors and trustees. He gave one-half of his estate to his wife to be held in trust by his executors/trustee for her benefit for life with discretion in the trustee to invade the principal and with remainder over to the two daughters in equal shares. Out of the remaining one-half of the estate, he made specific bequests equal to $65,000 and bequeathed the remainder to his two daughters in equal shares. Paragraph Frist of his Will provided:

> "I direct that all my just debts and funeral expenses be paid as soon as practicable after my death. I direct that all estate and inheritance taxes shall be paid by my executors out of my estate."

Mr. Harvie died on June 10, 1981, and his said Last Will and Testament was probated on June 19, 1981. Letters testamentary were issued to Joan Harvie Vander Sluis, Carolyn Harvie Thompson and Valley Bank and Trust Company; Mrs. Harvie having renounced her right to serve by renunciation duly filed. The value of the assets held in the trust as of the date of the decedent's death was $165,294.71. The decedent's gross estate for Federal Estate Tax purposes, including the trust asets, was $890,407.42. The Federal Estate Tax payable on the same was $74,251.45. A proportionate part of the total Federal Estate Tax allocable to the trust assets would be $29,463.86. The Pennsylvania Inheritance Tax payable on the decedent's net estate was $21,593.14. The proportionate share of the Pennsylvania Inheritance Tax allocable to the trust assets would be $9,917.68.

The total United States Estate Tax and Pennsylvania Inheritance Tax has been paid out of assets of the estate by the executors. Due to the value of the jointly owned property, insurance on the decedent's life, and the assets in the trust estate the executors held according to the Federal Estate Tax Return a probate estate of $233,846.79, and according to the Pennsylvania Inheritance Tax Report $235,753.71. After the deduction of

debts and expenses, United States Estate Tax and Pennsylvania Inheritance Tax, the amount remaining for distribution from the probate estate was either $106,882.45 using the figures from the Federal Estate Tax Return, or $106,989.37 using the Pennsylvania Inheritance Tax Report. If one-half of the amount available for distribution from the probate estate is distributed to the trust in favor of Mrs. Harvie, the remaining one-half will not be sufficient to pay in full the specific bequest of $65,000.00, and there will be no residue for distribution to the daughters of the decedent. However, if the trust would contribute the $39,381.54 which represents the proportionate part of the United States Estate Tax and Pennsylvania Inheritance Tax allocated to the trust assets in the calculation of the two taxes, there would be sufficient funds in the probate estate to pay in full the specific bequests and make funds available as a residue for distribution to the decedent's two daughters.

Joan Harvie Vander Sluis and Carolyn Harvie Thompson perceiving an uncertainty to exist as to the proration of the United States Estate Tax and Pennsylvania Inheritance Tax in the estate of Harry D. Harvie, deceased, between the assets of the estate and the assets held in the trust, filed their petition for a declaratory judgment to determine whether any, and, if so how or what proportion of the said taxes due and paid in the estate of the decedent shall be paid by the trustee under the Trust Agreement of July 13, 1975. Mildred B. Harvie, widow, two adult grandchildren and the Valley Bank and Trust Company as trustee and co-executor joined in the prayer of the petition. Briefs were submitted and arguments heard on April 14, 1983. The matter is now ripe for disposition.

To avoid having the Court sua sponte raise any issue as to the propriety of the declaratory judgment proceeding, its institution by petition and without having a guardian appointed to represent the interests of minor grandchildren, and unborn grandchildren, counsel for the petitioner has included within his brief discussion on these three issues. We find the discussion most helpful and are fully persuaded that:

1. Under the provisions of the Declaratory Judgments Act of 1976, P.L. 856, No. 142, 42 Pa. C.S.A. 7531, et seq., it was proper to proceed to seek a resolution of the issues raised under that Act, and particularly in the light of the legislative mandate:

> "General rule. - This subchapter is declared to be remedial. Its purpose is to settle and to afford relief from uncertainty

and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered." (42 Pa. C.S.A. 7541 (a))

2. Proceedings under the Declaratory Judgments Act in the Orphans' Court Division shall be initiated by petition rather than by filing a complaint. (Section 761 P.E.F. Code, 20 Pa. C.S.A. 761)

3. It was not legally necessary to have a guardian ad litem or trustee ad litem appointed to represent the interest of minor grandchildren and unborn grandchildren because their interests are identical to the interests of the two suviving children of the decedent, and the two adult grandchildren of the decedent who have joined in the prayer of the petition.

The sole issue raised by this proceeding is whether the Federal Estate Tax and Pennsylvania Inheritance Tax paid initially by the executors of the decedent's estate out of the probate estate shall be apportioned between the estate and the decedent's inter vivos trust so that the turstees will be required to reimburse the executors out of trust assets that portion of the death taxes which were generated by such trust assets held by the trustees on the date of decedent's death.

The petitioners rely upon Section 718(b) (c) of the Inheritance and Estate Tax Act of 1961, 72 P.S. 2485-718 (Pennsylvania Inheritance Tax Act No. 255 of 1982 is not applicable in the case at bar), and Sections 3702, 3703(a) and 3704(a) of the P.E.F. Code, 20 Pa. C.S.A. 3702, 3703(a), 3704(a) which deal with the apportionment of the Federal Estate Taxes.

Section 718 of the Inheritance and Estate Tax Act of 1961 provides inter alia:

> (b) Transfer for Limited Period. In the absence of a contrary intent appearing in the will or other instrument of transfer, the inheritance tax imposed by this act, in the case of a transfer of any estate income or interest for a term of years, for life, or for other limited period, shall be paid out of the principal of the property by which the estate, income or interest is supported. Such payment shall be made by the personal representative and, if not so paid, shall be made by the trustee, if any, and, if not so paid, shall be made by the transferee of such principal.
>
> (c) Other Transfers. In the absence of a contrary intent appearing in the will or other instrument of transfer and except as provided in subsections (a) and (b) of this section,

> the ultimate liability for inheritance tax imposed by this act shall be upon each transferee.
>
> (The petitioners also rely upon Section 2514(15) of the P.E.F. Code, 20 Pa. C.S.A. 2514(15) which is substantially simlar to subsection (b) of Section 718, supra.)

The sections of the P.E.F. Code relied upon by the petitioners provide inter alia:

> 3702. Equitable apportionment.
>
> Estate tax, except as provided in section 3703(a) of this code (relating to powers of testator or settlor), shall be apportioned equitably, as near as may be in accordance with the principles hereinafter stated, among all persons interested in property includible in gross estate, whether residents or non-residents of the Commonwealth, and they shall pay the amounts apportioned against them.
>
> 3704 Method of apportionment
>
> (a) Basis of apportionment. -- Apportionment of the estate tax, except as provided in section 3703 of this code (relating to general rules), shall be made among the persons interested in property includible in gross estate in the proportion that the value of the interest of each such persons bears to the value of the net estate before exemption. The values used in determining the amount of tax liability shall be used for this purpose.

The petitioners contend that a fair interpretation of the language of paragraph 6 of the trust agreement, and paragraph first of the decedent's will either creates an ambiguity or in the alternative that there is a presumption to pay a proportionate share of the death taxes properly allocated to the assets of the trust. They also urge the Court to conclude that it would be inconceivable that the testator intended the diminishment of his specific bequests to grandchildren, and elimination of his residuary bequest to his two daughters, which would be the necessary result of payment of all of the death taxes from the residue of the probate estate. To the contrary the trustee contends that the application of rules of construction to ascertain the testamentary intent of the testator is unnecessary because the decedent in his Last Will and Testament clearly and unequivocally directed "*all* estate and inheritances taxes shall be paid by my executors out of my estate." (italics ours) In response to the petitioners' argument concerning the elimination of the

daughter's residuary bequests, trustee suggests that they are hardly left destitute or ignored by their deceased father, for they will receive upon the death of their mother one-half of the probate estate and also all of the income from the trust fund.

In *Stadtfeld Estate,* 359 Pa. 147 (1948), Judge Joseph Stadtfeld had during his life entered into a separation agreement with his wife which assured her of a certain monthly income for life unless he or his executor should create a trust fund for her of $75,000.00. When he died the executors created the trust fund and secured an agreement from the trustee to refund any portion of the Federal Estate Tax which the court might find to be due. Judge Stadtfeld's will provided inter alia: "I direct that all inheritance, estate, succession or similar duties or taxes which shall become payable in respect to any property or interest passing under my will or any codicil which I may hereafter execute, shall be paid out of the principal of my estate, without diminution of any devises, bequests or legacies." (Page 152) The issue of whether the Federal Estate Tax should be paid out of the residue of the probate estate or from the assets of the trust was litigated, and the Supreme Court concluded that the estate tax would be prorated and the trust would have to bear its proportionate share. The court stated, "It would seem too clear for discussion that this provision is wholly silent with regard to estate taxes on property not passing under the will and therefore is not broad enough to cover property which, though not so passing, is subject to the Federal Estate Tax because of its constituting part of the decedent's gross estate." The Supreme Court also observed, "... the provisions of the Proration Act automatically apply and the process of apportionment comes immediately into operation since the proration prescribed by the Act is mandatory unless the testator 'otherwise directs in his will.' ... the Act creates a presumpion that a testator intends that proration should be made in accordance with its terms unless his will contains a specific provision, clearly expressed, inconsistent with such presumpion, and, to accomplish that result, his language must not be of doubtful import: *Harvey Estate,* 350 Pa. 53, 56, 57, 38 A. 2d 262, 263." (Pages 151, 152)

In *Hoffman Estate,* 399 Pa. 96 (1960), the Supreme Court of Pennsylvania was called upon to construe the testamentary language: "First: I direct that all my just debts, funeral expenses and any and all inheritance taxes be first paid out of my estate." The issue to be resolved was whether this language required an apportionment of the federal estate tax among the beneficiaries of the decedent's largess including the recipient of a specific bequest of stock in a closely-held family corporation. The

Supreme Court held, "Nothing within the four corners of this will indicate any intent that the testatrix intended that the federal estate tax, entirely different in meaning or scope from an inheritance tax, should not be prorated." (Page 101)

In *In Re: Estate of Harry S. Fleishman,* Deceased, 479 Pa. 569, 388 A. 2d 1077 (1978), the decedent's will provided inter alia: "Fourteenth: I direct my executors, hereinafter named, to pay out of the principal of my residuary estate, passing under Article Fifteenth hereof, all estate, inheritance, transfer and succession taxes, imposed upon or payable with respect to any property or interest in property which may be included as part of my estate for the purposes of said tax, at such time and in such manner as my executors in their sole discretion shall determine . . . it being my particular intention that the bequest to my wife under Article Fifth hereof and the bequest and devise for the benefit of my wife under Article Thirteenth hereof shall be free of all such taxes." (Page 573) The Supreme Court concluded that all taxes should be paid from the residuary estate, and further observed:

> While the law presumes that testators most likely want transferees of bequests to bear attendant inheritance tax burdens, testators are free to allocate the burden otherwise. (Page 575)
>
> Testator directed that the residuary estate bear the burden of 'all' taxes 'imposed upon' 'any property or interest in property which may be included as part of (his) estate' for purpose of taxation, which included the property Mildred's appointment transferred. (Page 576)
>
> That the burden of additional inheritance tax falls upon testator's relatives while 'collateral heirs' enjoy the transferred property free of taxes, does not alter testator's express intention that his residuary estate bear the tax burden. In clear, absolute, and definite terms, testator directed the source of payment of 'all taxes' on 'any property' 'which may be included as part of (his) estate' and 'no part thereof should be collected from or prorated among any persons receiving or in possession of, or receiving the benefit of, the property or interest in property tax' his intent must prevail. (Page 577)

In our judgment paragraph 6 of the inter vivos trust established by Harry D. Harvie on July 31, 1975 specifically provided that the assets of the trust should bear a proportionate part of any estate, inheritance, succession or other death taxes unless: (1) the will should provide otherwise, and (2) should bear such additional part thereof as settlor's will may provide. We construe the carefully drafted language to mean that Mr. Harvie intended:

> 1. In the absence of any provision to the contrary in his will, the trust should pay its proportionate share of all death taxes.
>
> 2. The will could eliminate entirely or reduce the amount of the death taxes to be apportioned to the trust assets.
>
> 3. The will could impose upon the assets of the trust the responsibility for more than its proportionate share of such death taxes.

When Mr. Harvie executed his Last Will and Testament almost five years later, and provided in paragraph First "I direct that *all estate and inheritance taxes* shall be paid by my executors out of my estate," he was clearly exercising the option he had reserved to himself in paragraph 6 of the trust agreement to "provide otherwise." (italics ours)

We conclude that testator clearly and unequivocally directed that all death taxes should be paid out of his estate. We therefore find no reason to apply Rules to Construction seeking to ascertain his intent.

DECREE

NOW, this 12th day of May, 1983 it is ORDERED AND ADJUDGED THAT:

1. The language of the Last Will and Testament and July 31, 1973 Inter Vivos Trust Agreement of Harry D. Harvie is clear and unequivocal.

2. Paragraph First of the Last Will and Testament of Harry D. Harvie dated June 26, 1981 imposed upon his executors the duty of paying all estate and inheritance taxes out of his estate.

3. No proportion of the estate and inheritance taxes due and paid by the executors of Harry D. Harvie, deceased, from probate assets of his estate shall be charged to or paid from assets of the trust.

4. The petitioners' prayer for apportionment of death taxes in the estate of Harry D. Harvie is denied and the petition dismissed.

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