Testate and Intestate Succession to Domestic Property by Alien Beneficiaries

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In the United States today, every attorney who includes estate planning in his practice, whether he be located in an urban or rural area, is confronted with the possibility of being approached by a client who wishes some of his property to pass to residents of, or institutions in a foreign country.1 Thus, it is important for attorneys to familiarize themselves with the obstacles which have been placed in the way of the testate or intestate transfer of personal property located in the United States to persons or institutions in foreign countries.

In 1939, as a result of the Hitler regime's assertion of power in Germany and subsequent acts of aggression in Europe, there began a movement among the states to restrict, by statute and court decision,2 the disposition of assets

1 Because of its immigrant population there are millions of United States citizens today who have relatives and close friends in foreign countries, or who have charitable feelings towards the country in which they were born or from which their ancestors migrated.

2 A number of writers have claimed that certain states have incorporated restrictions similar to the "benefit" restrictions, infra, by court decision and not by statutory authority. In 15 BUFFALO L. REV. 105 (1965), Pennsylvania, Mississippi, Nebraska and Vermont are listed as such states, although no cases are cited to support this contention. In Bader, Brown & Grzybowski, Soviet Inheritance Cases in American Courts on the Soviet Property Regime, 1966 DUKE L.J. 98, Pennsylvania, Michigan, Missouri and Vermont were listed as states adopting the rule by local court rules but no statutes or cases were cited. Maine was listed as a state adopting the rule by court decision and the case of Berman v. Frendol, 154 Me. 337, 148 A.2d 93 (1959) was cited. However, the writer did not get this impression upon reading that case. In Chaitkin, The Rights of Residents of Russia and Its Satellites to Share in Estates of American Descendants, 25 S. CAL. L. REV. 297 (1952), Pennsylvania is said to be the only state adopting the rule by court decision or local court rule, that has reported cases showing this view. A few illustrative cases are listed. Then Massachusetts, Michigan, Missouri, Nebraska and Vermont are stated to observe this practice. California is also stated to have denied distribution where benefit was doubtful (Howaldt v. Superior Court, 18 Cal. 2d 114, 114 P.2d 333 (1941)).

It should be pointed out that in some cases, this type of contention is now outdated. Pennsylvania, infra note 16, Michigan, infra note 18 and Massachusetts, infra note 11, now have statutes. Caution should be taken regarding the other jurisdictions since reported cases from which authority for this contention may be obtained, do not appear to be available. In Chaitkin, supra, Tennessee is said to reject this rule, without prior statutory authority. However, Hamilton Nat'l Bank v. Touriansky, 197 Tenn. 245, 271 S.W.2d 1 (1954) which supposedly indicates this would, to the writer, indicate rather that Tennessee under the proper circumstances would follow the rule without a statute. Illinois, in In re Estate Of Miller, 35 Ill. App. 2d 349, 182 N.E.2d 913 (1962), refused to follow the rule and withhold distribution without statutory authority.
located in the United States to foreign residents by will or intestate succession. The unsettled conditions following World War II and the advent of the "Cold War" provided the impetus for enactment of restrictive statutes which expectedly received the name of "Iron Curtain Statutes." These statutes may be classified either as "benefit" or "reciprocity" statutes. The former has found the greater acceptance and has been enacted by a number of eastern states.

The primary object of this legislation was to promote the basic object and obligation of Courts of decedent devolution to use their utmost endeavors to effectuate the express or implied wishes of a decedent respecting the disposal of his assets on death. Only subordinate to this purpose, was the effort to prevent the diversion of assets here located to foreign governments whose conceptions of the properties were totally at variance with those which form the basis of the national existence of this country.

The second type of statute has been enacted by several western states. "Reciprocity" legislation existed in a few states long before Hitler came to power, but its number and use grew in response to the chaotic conditions in Europe since the late 1930's. Its objective was to prevent residents of foreign countries from sharing in estates located in the United States, unless that foreign country granted United States citizens reciprocal rights.

Such legislation has frequently resulted in frustrating the express or implied intent of a decedent and it has proven to be a trap for the unwary draftsman. This comment will attempt to analyze the substance and effects of the statutes. It will discuss problem areas in litigation and suggest possible areas of change and improvement. The discussions herein will be largely based on the decisions of New York and California, because these states have numerous cases dealing with their respective types of statutes while most other jurisdictions, with the possible exception of Montana and New Jersey, have only a few scattered cases which are not always clear.

3 First Nat'l Bank of Cincinnati v. Fishman, 7 Ohio Misc. 130, 217 N.E.2d 60 (1966). It should be pointed out that although this phrase is basically used to describe only one of the two categories of statutes herein discussed, the writer will consider both categories to be included with the phrase "Iron Curtain Statutes" since generally, the two categories are discussed together and both are basically directed presently against the "Iron Curtain" countries.

4 It must be noted that one statute may fit into both categories at the same time. E.g., ORE. REV. STAT. § 111.070(1)(c) (Supp. 1957).

5 Included in this category are New York, New Jersey, Massachusetts, Rhode Island, Connecticut, Maryland, Florida, Pennsylvania, Ohio, Michigan, Wisconsin and Oregon.


7 Included in this category are California, Montana, Nevada, Oregon, Iowa and North Carolina.
“BENEFIT” STATUTES

By 1939, Hitler’s activities in Europe had aroused great public sentiment in the United States. However, the federal government had not yet acted to restrict the flow of assets from this country to foreign countries under the control of Hitler’s “Wehrmacht.” It was at this time that the Executive Committee of the Surrogates’ Association of the State of New York proposed legislation to amend the Surrogates’ Court Act. The express purpose of this statute was to “authorize the deposit of money or property by the Surrogates’ Court in cases where the transmission or payment to a . . . resident in a foreign country might be circumvented by confiscation in whole or in part.”8 The New York legislature adopted the proposed amendment, which read as follows:

Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld, the decree may direct that such money or other property be paid into the surrogates’ court for the benefit of such legatee, distributee, beneficiary of a trust or such person or persons who may thereafter appear to be entitled thereto. Such money or other property so paid into court shall be paid out only by the special order of the surrogate or pursuant to the judgment of a court of competent jurisdiction.9

Similar legislation presently exists in New Jersey,10 Massachusetts,11 Rhode Island,12 Connecticut,13 Maryland,14 Florida,15 Pennsylvania,16 Ohio,17 Michigan,18 Wisconsin,19 and Oregon.20 The legislation authorizes the withholding of property which would otherwise be distributed in a foreign country unless it appears that the person or institution having the right to the property will in fact receive its benefits, use, and control. The

8 12 BUFFALO L. REV. 630, 631 (1963) quoting: Comment, N.Y. ANN. CIV. PRAC. ACTS 398 (14 Nichols-Cahill); Chaitkin, supra note 6, at 300.
9 N.Y. SURR. CT. ACT § 269a(1) (1939).
15 FLA. STAT. ANN. § 731.28 (1960).
17 OHIO REV. CODE ANN. § 2113.81 (Baldwin 1964).
18 MICH. STAT. ANN. § 27.3178 (306a) (1962).
19 WIS. STAT. ANN. § 318.06(8) (b) (1958).
property is held by the court or other authorized public body until such time as the person having a right to it will receive its "benefit."21 These statutes place the burden of proving that the "benefit" will be received upon the distributee claiming the property.22

Since the end of World War II, the thrust of such legislation has been aimed at the countries behind the "Iron Curtain." The courts have used many different criteria in determining whether the legatee, distributee or beneficiary will receive the "benefit" of the property in question, but the result had until recently, almost always been the same. The cases had held, generally, that the person or institution behind the "Iron Curtain" would not receive the full benefit of the property and therefore payment was to be withheld.

The criteria used by the courts in determining whether to invoke a "benefit" statute include: (1) the "proscribed list,"23 a regulation of the United States Treasury Department;24 (2) judicial notice of particular facts;25 (3) abundance of, or lack of proof that the distributee will receive the "benefit";26 (4) letters received from departments of the federal government, such as the Department of State, expressing its opinion on whether a


23 Jones, supra note 21, at 240.


26 Brizgys v. County Treasurer of Union County, 84 N.J. Super. 485, 202 A.2d 709 (1964); In re Reid's Will, 23 App. Div. 2d 171, 259 N.Y.S.2d 217 (1965); In re Saniuk's Estate, supra note 22; In re Kina's Estate, 49 Misc. 2d 598, 268 N.Y.S.2d 131 (Surr. Ct. 1966); In re Well's Estate, 204 Misc. 975, 126 N.Y.S.2d 441 (Surr. Ct. 1953); In re Bold's Estate, 173 Misc. 545, 18 N.Y.S.2d 291 (Surr. Ct. 1940); In re Estate of Birkner, supra note 24.
distributee will receive the property in the particular country;\(^2\) the exchange rate from dollars into the foreign countries' own currency since the exchange rate may, in and of itself, be used to confiscate the money to be distributed;\(^3\) and (6) the principle of stare decisis, relying on past decisions which have decided whether or not a person in a particular country will receive the "benefit."\(^4\) Of these criteria, the "proscribed list" is most often used. In many cases this alone may be the basis of a decision.\(^5\) Judicial notice has also occasionally been used alone\(^6\) but it is usually used, as are the remaining criteria, in conjunction with the Treasury Regulation or some other criterion.\(^7\) Because of the many disparate factors and the inconsistency of their application, the case law in this area is in a state of confusion and uncertainty. It will be pointed out later that this lack of clarity in the cases is possibly responsible for much of the criticism of the "benefit" type of legislation.

The Treasury Department periodically publishes a list of countries to which checks or warrants drawn against funds of the government of the United States cannot be transmitted because "postal, transportation, or banking facilities in general or local conditions in [these countries] . . . are such that there is not a reasonable assurance that a payee in those areas will

\(^2\) In re Url's Estate, supra note 24.

\(^3\) In re Greenberg's Will, 24 App. Div. 2d 435, 260 N.Y.S.2d 818 (1965); In re Shef-sick's Estate, 50 Misc. 2d 293, 270 N.Y.S.2d 34 (Surr. Ct. 1966); In re Szabados' Will, 40 Misc. 2d 1072, 244 N.Y.S.2d 575 (Surr. Ct. 1963); In re Tybus' Estate, 28 Misc. 2d 278, 217 N.Y.S.2d 913 (Surr. Ct. 1961); Petition of Mazurowski, supra note 21; In re Estate of Birkner, supra note 24; In re Url's Estate, supra note 24; In re Estate of Petroff, supra note 24; In re Kina's Estate, supra note 26.

\(^4\) A fine example of the use of stare decisis is a series of cases involving distributees residing in Poland. The series began with In re Tybus' Estate, supra note 28. In this case, the court made its own investigation by actually going to Poland. It was a very unusual case and in the next year the courts in In re Swiderski's Estate, 29 Misc. 2d 480, 217 N.Y.S.2d 918 (Surr. Ct. 1961) and in In re Groncky's Estate, 230 N.Y.S.2d 181 (Surr. Ct. 1962), in very short opinions, ordered payment to distributees in Poland on the basis of the Tybus decision. Numerous other similar decisions may be found.

It must be pointed out that the court, in In re Kina's Estate, supra note 26, recently criticized reliance on any previous case and, specifically referring to the cases following Tybus, held that stare decisis is not applicable to cases that are litigated entirely on a question of fact. The court here determined that the facts did not satisfactorily show that the distributees would receive the benefit of the estate.

\(^5\) In re Braier, supra note 21; In re Siegler's Will, supra note 24; In re Offinger's Estate, supra note 24; In re Best's Estate, supra note 24; In re Markewitsh, supra note 21.

\(^6\) In re Miller's Estate, supra note 25; In re Landau's Estate, supra note 25; In re Volencki, supra note 22; In re Belemecich's Estate, supra note 25.

\(^7\) In re Estate of Petroff, supra note 24; In re Saniuk's Estate, supra note 22; In re Well's Estate, supra note 26; In re Getream's Estate, supra note 24; In re Kina's Estate, supra note 26; Petition of Mazurowski, supra note 21; In re Aras' Estate, supra note 24; In re Estate of Birkner, supra note 24; In re Url's Estate, supra note 24.
actually receive checks or warrants . . . and be able to negotiate the same for value. The present regulation lists the following countries and areas: Albania, Communist Controlled China, Cuba, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, North Korea, North Viet-Nam, the Union of Soviet Socialist Republics, the Russian Zone of Occupation of Germany, and the Russian Sector of Occupation of Berlin, Germany.

Some of the earlier decisions held that the "Treasury Regulation" was a statement of federal policy on the question of distribution of funds. However, the more recent decisions recognize that this regulation is not a statement of policy and is not intended to be controlling on the states in their distribution of estates within their control. Nevertheless, most courts rely heavily on the regulation, reasoning that the federal government is better informed about the situation in these foreign lands and that, if there is reason to doubt the proper receipt and use of checks or warrants drawn against the United States, there should be no less reason to doubt the proper receipt of private funds to be distributed by the courts. Certainly, some of this reliance may also be attributed to the general mistrust of Communist Governments.

Most of the writers and at least one court, in the past, have noted that there may be an almost irrebuttable presumption created against the existence of "benefit" in a particular country by the use of the Treasury Regulation. "Where regulations of the United States Treasury Department prohibit the transmission of funds of the United States to foreign countries, the burden of proving benefit may be virtually insurmountable." The creation of such an irrebuttable presumption, it is said, is emphasized in cases where the court takes judicial notice of certain facts which by themselves indicate that the distributee will not get the "benefit."

It should be noted that the courts do not take judicial notice that the distributee will not receive the benefit, use, or control of the property to be distributed, but rather, certain facts and circumstances which may very well indicate that benefit of the property will not be received. For example, the

36 In re Saniuk's Estate, supra note 22; Berman, supra note 6; see 12 BUFFALO L. REV. 630, 631 (1963).
37 In re Braler, supra note 21; In re Markewitsh, supra note 21; see Berman, supra note 6.
39 Jones, supra note 21, at 239.
courts notice that, "there can be no doubt that [a particular country] is a self-proclaimed Communist state."\textsuperscript{40} "The court will [also] take judicial notice that the countries mentioned in the Treasury Regulation are behind the so-called Iron Curtain . . . . Common knowledge tells us that private ownership of property has been abolished in the Soviet Union, and its satellite nations . . . .\textsuperscript{41}

Many of the courts which use judicial notice recognize that:

\textsuperscript{40} In re Belemecich's Estate, \textit{supra} note 25, at 509, 192 A.2d at 741.

\textsuperscript{41} First Nat'l Bank of Cincinnati v. Fishman, \textit{supra} note 3, at 141, 217 N.E.2d at 67. \textit{See also} cases cited in note 25, \textit{supra}.

\textsuperscript{42} In re Volencki, \textit{supra} note 22, at 353, 114 A.2d at 27.

\textsuperscript{43} In re Greenberg's Will, \textit{supra} note 28; In re Siegler's Will, \textit{supra} note 24; In re Kina's Estate, \textit{supra} note 26; In re Torsky's Will, 36 Misc. 2d 101, 232 N.Y.S.2d 183 (Surr. Ct. 1962); In re Wells' Estate, \textit{supra} note 26; In re Bold's Estate, \textit{supra} note 26; Brizgys v. County Treasurer of Union County, \textit{supra} note 26; Petition of Mazurowski, \textit{supra} note 21; First Nat'l Bank of Cincinnati v. Fishman, \textit{supra} note 3.

It must be noted that some courts still rely heavily on the Treasury Regulation even where there is considerable evidence to the contrary. \textit{See e.g.}, State Land Board v. Pekarek, 234 Ore. 74, 378 P.2d 734 (1963).
Many writers feel that it is not "objective justice," but merely a prejudice against all Communist countries, which is responsible for the presumption that the governments behind the "Iron Curtain" will confiscate money and other property inherited from or bequeathed by residents of the United States. With regard to the possibility of confiscation by an "Iron Curtain" country, a few well-known authorities on foreign law have agreed with Harold J. Berman, Professor of Law at Harvard University, who stated:

The evidence of such a likelihood is so slight, and the language of many judges so tinged with emotion, that it is difficult to resist the suspicion that in these particular cases many of our courts have departed from their usual standards of objective justice.

This suspicion is reinforced by experiences that do not appear in the published reports. The writer was in a Philadelphia court during the trial of a case involving a Soviet claim to funds in an estate when the judge turned to the spectators and said . . . "If you want to say that I'm prejudiced, you can, because when it comes to Communism I'm a bigoted anti-Communist." Another judge said, in such a case, "I am not going to send money to Russia where it can go into making bullets which may one day be used against my son." Another judge, asked if he would consent to hearing argument on the law, replied, "No, I won't send any money to Russia." 44

However, it appears that while the emotionalism pointed out by Professor Berman does exist, it is not as prevalent as might be indicated by the above quote. In the reported cases, such emotional and prejudicial statements do not often appear. When such statements do appear, they are generally to emphasize the importance of facts and circumstances of which the court is taking judicial notice. 45

What is required to overcome the presumption, created by placing the burden of proof on the claimant and the already existing evidence against the existence of "benefit," is not clear. The distributee must prove that there is nothing in the laws of the country in which he resides that prevents him from having the benefit, use, or control of the property to be distributed. He must also show that, in fact, he will be allowed to receive the benefit, use, and control of the property. However, it has been said that "the problem of proving such a factual likelihood—or absence thereof—is a staggering one." 46 "The proofs, it appears, cannot be merely persuasive, but must be

44 Berman, supra note 6, at 257.

45 For example, in In re Belemecich's Estate in which Yugoslavian heirs were attempting to obtain distribution of their inheritance from an estate probated in Pennsylvania, the court judicially noticed certain facts and circumstances, similar to those discussed above, which, without contradictory evidence, led to the conclusion that the heir would not receive the full benefit, use and control of their shares of the estate. After reaching this conclusion the court showed its feelings by saying "It could be that the greedy, gluttonous grasp of the government collector in Yugoslavia does not clutch as rapaciously as his brother confiscator in Russia . . ." 411 Pa. 506, 511, 192 A.2d 740, 742 (1963).

46 Berman, supra note 6, at 263.
conclusive of the question. The quality of the proofs must, it would follow, be exceptional. Expert testimony should be introduced.\footnote{Jones, supra note 21, at 239.}

Expert testimony might include: (1) testimony of banking officials versed in the mechanics of international transactions and familiar with the practices of the banks in foreign countries and the extent of control over them by the governments of those countries; (2) statements and certificates of government officials;\footnote{However, due to the general mistrust and fear of Communist countries, officials of the United States carry much more weight than officials of "Iron Curtain" countries.} and (3) testimony of possibly the most persuasive of all experts, attorneys trained in the laws and legal practices of the particular "Iron Curtain" countries, especially when they themselves have practiced law in those countries. Such witnesses and other evidence may be very difficult to find and may add great expense to the litigation. However, it has been proven in very recent years that if strong evidence of the above nature can be introduced, the courts will allow distribution, and the presumption that does exist can be overcome.\footnote{This is not to say that weighty evidence of "benefit" will always result in distribution. Anytime there is an issue of fact, courts will treat the same evidence differently and different decisions will be reached. In the type of litigation discussed herein, different results upon similar evidence of "benefit" will occur, many times, because a particular court may be more prejudiced than others and for this reason, or for numerous others, may give greater weight to the Treasury Regulation and facts judicially noticed than is called for. See, In re Shefsick's Estate, supra note 28; In re Greenberg's Will, supra note 28; State v. Pekarek, supra note 43.}

The case of In re Haab,\footnote{31 Misc. 2d 878, 219 N.Y.S.2d 1003 (Surr. Ct. 1961).} decided in 1961, involved an Estonian national who came to the United States under a travel visa and while here, claimed her portion of an estate the distribution of which had previously been withheld. She personally testified that she would receive the benefit of the funds in question if payment were made to her. The court, with little discussion, ordered payment.

In In re Szabados' Will,\footnote{Supra note 28.} a resident and national of Hungary, in 1963, claimed a bequest. Evidence was submitted, showing that funds could be transmitted to Hungary through banking channels in excess of the official exchange rate and that the beneficiary could come to the United States to collect the funds if he were given advance payment sufficient to pay for his trip to this country. The court found that the evidence satisfactorily indicated that the beneficiary would receive the benefit of the moneys due him. However, it must be noted that, as in the Haab case, the beneficiary had to come to the United States on the partial payment made to him for this purpose, in order to receive the balance.
In re Saniuk's Estate, another 1963 case, involved several distributees of an estate, first probated in 1940, who claimed their shares as residents and nationals of Russia. When distribution had first been withheld, they were residents of Poland. After placing upon the claimant the burden of proof that the Russian nationals would receive the benefit, use, and control of the property, the court stated that:

In Matter of Braier . . . the Court of Appeals approved of reliance upon United States Treasury Regulations and policy in arriving at a determination that an alien legatee would not have the benefit or use or control of money on deposit. The respondent in this proceeding apparently in reliance upon this decision has raised no issue as to the documentary evidence submitted by the petitioners. In the Braier case the Court of Appeals held the Treasury Department's conclusions to be directly relevant to the Surrogate's determination under Section 269 (now § 269-a) of the Surrogate's Court Act. However, I find nothing in the opinion to indicate that the Court held this to be the exclusive consideration. . . .

It seems apparent that the Surrogate should, and in fact must, consider other equally relevant factors in reaching his determination.

The burden placed upon the distributees by the Legislature should not be extended to create an irrebuttable presumption.

The evidence submitted in the Saniuk case included: (1) a letter from an official of the American Express Company stating that remittances to the Soviet Union had been readily made through the Bank of Foreign Trade in Moscow and that the company has always received proof of payment without difficulty; (2) a letter from the American Embassy in Moscow stating that it is their understanding that Soviet heirs may receive and dispose of an inheritance from abroad; and (3) a letter from the distributees themselves, to the same effect. The court, on the basis of such evidence, ordered payment of the funds.

The Saniuk opinion would certainly seem to indicate that the existing presumption is not irrebuttable. It appears that the type of evidence presented in Saniuk is relatively simple and inexpensive to obtain. In addition, once such letters have been presented in one case, they may serve as precedent for future cases. Expert testimony should be considered in any of these cases, but, as would appear from Saniuk, it may not be as absolutely essential as some have felt.

Although contradictory judicial decisions would not appear to be likely if one believes that there is an irrebuttable or almost irrebuttable presumption against the existence of "benefit," it has happened that cases relatively close

52 Supra note 22.
53 In re Saniuk's Estate supra note 22, at 438, 243 N.Y.S.2d at 48-49.
54 Id. at 438, 243 N.Y.S.2d at 49.
55 Id. at 439, 243 N.Y.S.2d at 49.
in time have reached opposite conclusions as to the existence of "benefit" in a given country. Perhaps the best example of this occurred in New York. In 1963, in the case of In re Reidl's Estate\(^6\) the surrogate court held that the evidence presented to it on a new method of distribution, payment to residents of Czechoslovakia by Tuzex Certificates, did not convince it that benefit of the funds in question would be received if distributed. In 1965, the high court of New York reversed the lower court.\(^5\) The court held that "when the surrogate should use his discretion to apply the section depends on the proof before him."\(^6\) After discussing the proof, the high court ordered payment of the funds by the use of this new method.\(^5\)

Then in 1966, in In re Shefsick's Estate,\(^6\) the surrogate court again heard evidence on the Tuzex Certificates. From the evidence, the court concluded "that through the use of the Tuzex program a beneficiary of an American estate receives twice the official rate of exchange."\(^6\) However, the court was not satisfied with this, and discussed the fact that twice the official rate of exchange was still much lower than the "market place rate of exchange."\(^6\) Most cases appear to disregard the market place rate of exchange. Professor Berman, in carefully analyzing rate of exchange as a test for the existence of "benefit," is highly critical of considering the rate of exchange of currency of countries behind the "Iron Curtain" in the market place in the free world, due to the fact that many of these countries make

\(^{58}\) Id. at 172, 259 N.Y.S.2d at 218.
\(^{59}\) "The proof here shows a plan called the Tuzex Program which was put into effect in 1958. It was shown that there is an organization in Czechoslovakia called the Tuzex Foreign Trade Organization. It maintains stores in Czechoslovakia and also has purchasing agents here and possibly in other countries. It publishes a catalogue of merchandise it has for sale with fixed prices. The articles may be obtained either in the stores or by order to be fulfilled by the purchasing agent in the foreign country. Purchases are paid for in certificates issued by the organization. Upon delivery of the merchandise, a receipt is obtained from the consignee. The recipient of a certificate may either use it himself or transfer it. The proof was that such certificates have been widely used and there is no record that any such certificates, or the merchandise represented by it, has been confiscated, either directly, through the imposition of taxes, manipulation of exchange rates, or otherwise." In re Reidl's Will, supra note 57, at 172, 259 N.Y.S.2d at 218. This program was the basis of other decisions which allowed distribution to citizens of Czechoslovakia, infra. Evidence of the system and its past success should certainly be the spearhead used by an attorney for a distributee in Czechoslovakia. However, reliance should not be placed entirely on the program, infra. See, In re Estate of Petroff, supra note 24, for a program in Bulgaria, known as Corecom, which is very similar to the Tuzex program.

\(^{60}\) 50 Misc. 2d 293, 270 N.Y.S.2d 34 (Surr. Ct. 1966).
\(^{61}\) Id. at 295, 270 N.Y.S.2d at 36.
\(^{62}\) The court here took judicial notice of the market place rate of exchange, thus putting before itself additional evidence not normally considered by other courts.
it illegal to take their currency into or out of the country. Czechoslovakia is one such country. Thus, the rate of exchange found in the United States is a black market rate of exchange and as such is an unfair indicator. This argument was discussed in Shefsick but was disregarded as being irrelevant as it was in In re Greenberg's Will, another case denying distribution on the basis of the black market rate of exchange. Since the court was not convinced that the distributees would receive the benefit of the estate, distribution was withheld. The opinion distinguished the Reidl decision since in that case the market place rate of exchange was not brought up.

Shortly after Shefsick, the surrogate court probated another estate in which heirs in Czechoslovakia again had an interest. In In re Karman's Estate, the court observed that:

Various and conflicting reports have heretofore been made to this court concerning the probability of certain foreign nationals receiving the full benefit of legacies or distributive shares sent from estates in this country.

Diverse opinions have been written in various jurisdictions along these lines. The court then concluded from the evidence, that the Tuzex system of distributing the estate would be likely to give the benefit of the estate to the distributees. The court pointed out that its conclusions as to fact were the same as those reached in the Reidl case in the appellate court. The court did not discuss the decision in Shefsick, nor did the issue of the market place rate of exchange appear.

Recent decisions allowing distribution to countries behind the "Iron Curtain" on the basis of the facts presented are not limited to New York. One of the most recent New Jersey cases is In re Estate of Birkner. The court, in quoting an earlier New Jersey decision, noted:

It is the obligation of our courts, under this statute... to make sure that funds left to an individual or institution behind the Iron Curtain can safely be transmitted to the beneficiary. There must be convincing proof that the distributive shares will reach their proper destination. We may not turn away from the common knowledge of obstacles which stand in the way of that desired achievement.

64 Supra note 28.
67 Supra note 24.
68 In re Estate of Birkner, supra note 24, at 95, 216 A.2d at 261: The case quoted from Brizgys v. County Treasurer of Union County, supra note 26, at 498, 202 A.2d at 709.
The court went on to state that when distribution is to be made to a country listed on the Treasury Regulation, "extreme caution" should be used.

The proofs submitted by the distributee in *Birkner* included: (1) evidence from the Manager of the International Banking Department of the New Jersey Bank and Trust Company, that banking channels were open to Czechoslovakia; (2) testimony of a Czechoslovakian official to the effect that there were no taxes on property inherited by Czechoslovakian citizens from foreign countries and that such inheritances could be taken in Czechoslovakian money at twice the official exchange rate, in Tuzex Certificates, or both; and (3) a letter from a beneficiary of an American estate already distributed to him, stating that he had received the money and its full benefit, use and control. The court, in ordering distribution, observed that "each case must stand or fall on the proofs adduced . . . ."70

One of the best informed critics of "Iron Curtain" legislation, Professor Berman, does not appear to suggest that it is possible to remove the normal prejudices against the "Iron Curtain" countries. He admits that a "probate court has every reason to inquire whether the [beneficiary] is permitted under Soviet law, and is likely in fact, to receive the money and to have the use of it."71 But Professor Berman goes on to say:

"Neither the statutory authority nor the inherent jurisdiction of the court to protect the distributee and to prevent frustration of the testator's wishes justifies the creation of such an irrebuttable presumption. While it may be proper to impose upon the claimant the burden of proving that there is nothing in Soviet law that prevents the Soviet Heir from having the benefit, use and control of funds in American estates, once he has satisfied this burden, the court should impose the burden of proving a factual likelihood of illegal confiscation of diversion of the funds by Soviet Government officials upon the party alleging such a factual likelihood."72

There is a great deal of validity in this suggestion, and the prejudicial weight still given in some cases to the Treasury Regulation and facts judicially noticed would be greatly limited by this change.

Professor Berman has further stated:

[S]o far as [he] . . . has been able to determine from judicial opinions from conversations with lawyers who have appeared on both sides of this issue, and from conversations with Soviet citizens, there is not a single known instance of con-

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70 *Id.* at 99, 216 A.2d at 264.
71 Berman, *supra* note 63, at 263.
72 *Id.* at 263-64.
73 *Supra* note 49.
fiscation by the Soviet Government, or diversion by its officials, of funds in an estate sent to a Soviet citizen from a foreign country.\textsuperscript{74} If this be true, such conversations, judicial opinions, and letters should be used more often in court as evidence of "benefit." Such evidence is available and, as demonstrated in the Saniuk and Reidl cases, a little ingenuity can certainly produce more. An attorney hoping to win an estate for foreign heirs or legatees must become aware of the problems of proof facing him and also of the fact that the problems may not be as insurmountable as some writers in the field have indicated.

Occasionally, the effect of a treaty between the United States and a country behind the "Iron Curtain" becomes important in obtaining distribution of an estate probated in a "benefit" state. Consider the existence of a treaty in which two countries agree to allow free transfer of property between countries by will or inheritance.\textsuperscript{75} Since a treaty is supreme to any state law,\textsuperscript{76} no state could prevent such a transfer of rights to the property. Such a treaty had been thought not to prevent the application of a "benefit" type of statute since such legislation does not prevent the transfer of rights to the property but only prevents its distribution temporarily.

It is true . . . that a treaty between this country and a foreign power becomes the supreme law of the land and any local statute must yield if there is a conflict between the two. . . . And whatever may be said as to [such a treaty's] application to substantive rights it certainly was not binding as to merely procedural matters. The decree of the Surrogate has not deprived the . . . legatees of their property, and only as a matter of procedure it has been set aside for their benefit and account until such a time as reasonable assurance be given that they will receive it.\textsuperscript{77}

However, it now appears that this view has been overruled by the Supreme Court of the United States, and now a treaty of the above nature will preclude application of the "benefit" statutes.\textsuperscript{78} Thus, in addition to factual

\textsuperscript{74} Berman, supra note 63, at 263.

\textsuperscript{75} Care must be taken when determining that a treaty allows free transfer between the countries. Similar treaties may be interpreted differently. For example, in Clark \textit{v. Allen}, 331 U.S. 503 (1947), a treaty was interpreted as only an agreement on free transfer of property from one country to another, if the person transferring the property from the former was a national of the latter. This interpretation will, in many cases, mean that the decision cannot be rested on the treaty. On the other hand, in Kolovrat \textit{v. Oregon}, 366 U.S. 187 (1961), the United States Supreme Court held that the interpretation of the treaty in Clark \textit{v. Allen} was not controlling on the interpretation of other treaties and the court preceded to hold that the treaty before it was an agreement between countries to allow free transfer of property between their residents whether or not they were nationals of the country in which the potential recipient resided.

\textsuperscript{76} Kolovrat \textit{v. Oregon}, supra note 75; Clark \textit{v. Allen}, supra note 75.

\textsuperscript{77} In re Siegler's Will, supra note 24, at 438-39, 132 N.Y.S.2d at 394. Petition of Mazurowski, supra note 21; See also, In re Belemeccich's Estate, supra note 25.

proof as to "benefit" distribution of an estate may be obtained under a treaty, if one exists.

It appears that the "benefit" type of statute has not been seriously questioned in litigation along constitutional lines, other than upon the question of supremacy of a treaty. An attempt was made to test the constitutionality of New York's statute, by an appeal to the Supreme Court of the United States after the New York courts withheld distribution of an estate to a resident of England who had been made a gift of the interest by a Czecho-slovakian beneficiary of the estate. The appeal was denied for lack of a federal question. Justices Black and Douglas dissented, apparently agreeing with the appellant's contention that the New York regulations might "impair the effective exercise of the Nation's foreign policy."70 This is the attitude that some writers have taken in the past.80

Another consideration regarding the "benefit" statutes is the date at which the court's inquiry should be directed. This may be an extremely important point, although the courts rarely seem concerned with it. In "benefit" states, the essential date for inquiry is the date upon which distribution is to be ordered. If "benefit" is not found to be present on that date, distribution will be withheld until a future time, when the question is again raised and "benefit" is shown to exist. It is important to note, then, that should a treaty be enacted or expire either between the death of the decedent and the time of probate, or between death and application for distribution, it must be taken into account. The same consideration is true of changes in facts and circumstances in the foreign country during this interim period. Such changes will have a decided impact on whether distribution will be ordered.

"RECIPROCITY" STATUTES

The minority of states presently having "Iron Curtain Statutes" have the type known as "reciprocity" statutes. California's statute in this area is representative. The pertinent sections81 read as follows:

The right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and

81 There is a preceding portion of the first section which is deleted. It is almost exactly the same as the portion shown but it pertains to real, rather than personal property. Since there are numerous other considerations to be taken into account in considering real property in this context, it has been deleted from the scope of this paper.
conditions as residents and citizens of the respective countries of which such aliens are residents.\textsuperscript{82}

The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights.\ldots \textsuperscript{83}

If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property the property shall be disposed of as escheated property.\textsuperscript{84}

Other states having this form of enactment include Oregon,\textsuperscript{85} Montana,\textsuperscript{86} Nevada,\textsuperscript{87} Iowa,\textsuperscript{88} and North Carolina.\textsuperscript{89}

"Reciprocity" statutes, in theory, bear distinct differences from the "benefit" statutes of the New York type. One obvious distinction is that the "benefit" statute does not affect a distributee's right to the money or other personal property, but only determines the time at which such a distributee will in fact be allowed to receive it. On the other hand, the "reciprocity" statutes determine whether a distributee has any right to the property. If the distributee is a resident of a country which does not offer United States citizens equal inheritance rights with its own citizens, then residents of that foreign country are not given inheritance rights in "reciprocity" states and therefore the intended beneficiary receives no right in the estate in question.

The method of investigating the foreign law should, theoretically, be different in "benefit" and "reciprocity" states. In the "benefit" states, the courts look to the inheritance rights of the foreign distributee, as far as law and practice, to determine whether the distributee is granted rights sufficient to allow him to receive the benefit, use and control of an inheritance. The "reciprocity" statute, however, tests not the rights of the foreign distributee, but rather the rights of an American distributee to determine whether the latter is afforded the same rights as the foreign citizen is given by his own country, whatever those rights may be.\textsuperscript{90}

"Reciprocity" statutes, like the "benefit" statutes, place the burden of

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\item \textsuperscript{82} CAL. PROB. CODE, § 259 (1947).
\item \textsuperscript{83} CAL. PROB. CODE, § 259.1 (1947).
\item \textsuperscript{84} CAL. PROB. CODE, § 259.2 (1947).
\item \textsuperscript{85} ORE. REV. STAT. tit. 12, § 111.070 (1957).
\item \textsuperscript{86} MONT. REV. CODE § 91.520 (1947).
\item \textsuperscript{87} NEV. REV. STAT. § 134.230 (1957).
\item \textsuperscript{88} IOWA CODE § 567.8 (1958).
\item \textsuperscript{89} N.C. GEN. STAT. §§ 64-3 to -5 (1965).
\item \textsuperscript{90} It should be noted that, although "reciprocity" does not require that one country give the citizens of the other, rights equal with those given to its own citizens by the latter, there is a requirement that the former give some minimum substantive rights. See, In re Estate of Larkin, 52 Cal. Rptr. 441, 416 P.2d 473 (1966).
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proof on the person or persons claiming the existence of reciprocity. However, the existence of "reciprocity" has been treated more as a question of fact than has the existence of "benefit." This is due: (1) to the fact that the court cannot readily take judicial notice of facts indicating the non-existence of reciprocity; and (2) the absence of any applicable federal regulation or rule. Thus, there is generally no already existing evidence, and "reciprocity" is therefore easier to prove than "benefit."

It has never been claimed that there is a strong, almost irrebuttable presumption against the existence of "reciprocity." However, it has been claimed that courts in "reciprocity" states place too much emphasis on factors involved in determining whether one will receive the benefit of the property. Such factors are immaterial to whether or not "reciprocity" exists. The cases most often cited in connection with this objection are Estate of Nersisian and Estate of Gogabashvele, two California decisions. In Nersisian the court, in quoting the lower court opinion, made the following statement on the question of the sufficiency of the evidence submitted to show "reciprocity": "You might have the law on it but as a matter of fact how are you going to prove that any distribution to be made here to a Russian subject under Russia would be distributed to him and not taken by the Russian Government?"

Four years later, in Gogabashvele, the court, in finding that no reciprocity existed between the United States and Russia, used an analysis of the Soviet form of government as determinative of the question. In short, the court found that United States citizens have been allowed to inherit estates in the Soviet Union, not as a matter of right but rather, as a matter of privilege. The court held that "where such a taking [by United States citizens] is merely a matter of sufferance there is no 'reciprocal right' within the meaning of the code section."

The analysis of the Russian form of government and its comparison to our own would appear to be immaterial if in fact United States citizens are allowed to inherit Russian estates. The fact that Russia can, at any time, prevent such past practice would appear irrelevant. The Gogabashvele

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91 Again, this is not to say that reciprocity will always be found by a court upon the introduction of weighty evidence of its existence. But see, In re Estate of Chichernea, 57 Cal. Rptr. 135, 424 P.2d 687 (1967); In re Estate of Larkin, supra note 90; In re Estate of Miller, 104 Cal. App. 2d 1, 230 P.2d 667 (1951); In re Estate of Blak, 65 Cal. App. 2d 232, 150 P.2d 567 (1944); In re Estate of Hasova, 143 Mont. 74, 387 P.2d 305 (1963); In re Estate of Ginn, 136 Mont. 338, 347 P.2d 467 (1959); In re Estate of Spoya, 129 Mont. 83, 282 P.2d 452 (1955); In re Estate of Gaspar's, 128 Mont. 52, 269 P.2d 667 (1954).

92 Id.


opinion, in addition, discusses the Treasury Regulation which would also seem irrelevant to the existence of "reciprocity."

However, two very recent California decisions appear to have removed this objectionable practice. In In re Estate of Larkin,97 two cases were consolidated. The beneficiaries resided in and were nationals of the Soviet Union. "In both cases the trial court received extensive evidence . . . concerning the written law and actual practice of the Soviet Union in matters of inheritance involving citizens of the United States."98 The uncontradicted evidence established that United States citizens are allowed to share in Soviet estates "upon the same terms and conditions as do Soviet citizens"99 and that United States citizens do receive and will continue to receive "economically significant interests in Soviet estates."100

The court recognized that California's "reciprocity" statute "imparts a requirement that the inheritance rights recognized in the foreign country meet some minimal standard of economic substantiality and that it be shown that such rights are regularly recognized in practice."101 Nevertheless, it held that:

Nothing in the language or history of the statute suggested that the Legislature, in restricting the freedom of our citizens to dispose of their property, sought to impose upon the whole world the system of property ownership and descent which prevails in California.102

It was noted that the statute "seeks equality of treatment for our citizens rather than identity of substantive law or governmental structure."103 Such an interpretation expectedly led the court to criticize the manner in which the Gogabashvele majority employed the statute. Moreover, they disagreed with that court's acceptance of the general operation of the Soviet Government and its actions towards the free world as evidence of the lack of reciprocity. The Larkin decision clearly stresses that "such evidence does not truly relate to the issues before us,"104 and that such evidence should not concern the court.

More recently, the Supreme Court of California reiterated this position in the case of In re Estate of Chichernea,105 in which the heirs of the decedent were residents of Rumania. The court, relying heavily on the reasoning set

97 Supra note 90.
98 In re Estate of Larkin, 52 Cal. Rptr. 441, 443, 416 P.2d 473, 475 (1966).
99 Id.
100 Id.
101 Id.
102 Id.
103 Id.
104 Id. at 455, 416 P.2d at 487.
105 Supra note 91.
forth in Larkin, held that "the failure of a nation to ground its system of inheritance on the philosophy of 'natural rights' does not prejudice the existence of reciprocity required by Probate Code section 259."

It has long been recognized that "reciprocity" statutes are subject to the operation of a treaty in which the United States agrees with another country to allow free transfer of property between the countries by will or inheritance. A "reciprocity" statute, by depriving a foreign resident of all right to an estate, would certainly be a contravention of such a treaty. Thus, as in "benefit" states, a treaty may (as limited below), by itself, be sufficient to obtain an inheritance for a foreign resident.

Because of the nature of the "reciprocity" statutes, courts, whose decisions are governed thereby, must aim their inquiry at the date of decedent's death, rather than at the time of probate as is the case with "benefit" statutes. If reciprocity does not exist at the time of decedent's death, the subsequent passage of a treaty or change of circumstances in the foreign country will be of no significance as it is in "benefit" states. The beneficiary must have an interest as of the date of decedent's death, or he never will have an interest.

The "reciprocity" statute has, as has the "benefit" statute, been criticised as an infringement upon the federal government's exclusive right to make and control foreign policy. However, this contention would appear to have been well settled in the case of Clark v. Allen. The Supreme Court of the United States, in 1947, held that:

Rights of succession to property are determined by local law . . . . Those rights may be affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements . . . . Then the state policy must give way . . . . But here there is no treaty governing the rights of succession to personal property. Nor has California entered the forbidden domain of negotiating with a foreign country . . . or making a compact with it contrary to the prohibition of Article I, Section 10, of the Constitution. What California has done will have incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line.

CONCLUSION

During a time when a country is invaded by a foreign power, or when a country, for any reason, is in a chaotic state, and its banking and postal

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106 In re Estate of Chichernea, supra note 91, at 695, 57 Cal. Rptr. at 143.
107 supra note 75.
109 supra note 80.
110 supra note 75.
111 supra note 75, at 517.
channels are disrupted, it is certainly beneficial to all persons involved to have the distribution of funds to such an area withheld temporarily. Indeed, states have the duty to insure that decedent's wishes are complied with. Yet, a disposition of property to such areas would surely frustrate such intent. Thus, it is clear that the states have a valid interest and purpose in placing some restriction on the distribution of funds of estates located in the United States, to residents or institutions in foreign countries during such times.

Of the two types of legislation presently used to accomplish this task, the "benefit" type, it is submitted, is perhaps the better. "Benefit" statutes theoretically accomplish this purpose since they withhold funds only until the beneficiary can receive and use them. "Reciprocity" statutes, though valid on other grounds, do not satisfy this need since under such statutes the withholding of funds is permanent.\(^1\)

While the value of the restrictions, if used properly, is clear, the use of a "benefit" statute in a prejudicial manner in order to discriminate against certain countries would be contrary to its theoretical purpose and would, the writer feels, be a direct interference with the federal government's exclusive authority over foreign affairs.

Some recent New York and New Jersey decisions would seem to indicate that the courts are tending to restrict the operation and effect of "benefit" statutes so that the distribution of property will be withheld only when exceptional conditions exist such as those which prevailed in Europe during the 1940's. Perhaps, to insure that these statutes will only be used in such situations, Professor Berman's suggestion of placing the burden of proof of the factual likelihood of a failure of "benefit" upon the state\(^2\) should be incorporated into these statutes. "Reciprocity" could be added as an additional requirement, as is the case in Oregon\(^3\) but the "benefit" requirement is needed.

Perhaps the best way in which to have such restrictions would be the enactment of a federal statute similar to the "benefit" statute now used in several states. This would eliminate the possibility that restrictions or their application would encroach upon the forbidden area of foreign affairs. It would also help to eliminate the inconsistencies which now characterize the case law. The federal courts would then be able to develop definitive rules of evidence for this area. The possibility of antagonizing the "Iron Curtain" countries by such

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\(^1\) Reciprocity was found to exist between the United States and Germany and also between the United States and the Netherlands during World War II. Thus, "benefits" provisions should be present to give courts express authority to temporarily withhold payment. See, In re Estate of Miller, supra note 91; In re Estate of Blak, supra note 91.

\(^2\) Berman, supra note 63, at 263-64.

restrictions is an additional reason for federal control. Perhaps an effective alternative to federal intervention might be the creation of a commission to draft uniform legislation governing the disposition of domestic property to persons residing in foreign countries.

As a practical matter, however, attorneys must be aware of this area of the law as it exists today. This is true, whether in a state having such legislation or not, since the estate may be probated in whole or in part in a state which does.

California appears to have settled its position as a "reciprocity" state. It merely requires a reasonable showing that United States citizens are given reciprocal rights with the citizens of the foreign country in question, and nothing more. California seems to have accomplished a removal of prejudice and irrelevant considerations from its decisions in the past few years. By treating the existence of "benefit" more as a question of fact, New York in recent years has also made great strides towards removing the grounds for objection to the "benefit" type of legislation.

The objections to the highly prejudicial atmosphere found in the courts and to an almost irrebuttable presumption in the "benefit" states may have had a great deal of validity a decade ago. Such criticism may still have validity in some jurisdictions.\(^\text{115}\) It has been recently said that:

The problem of distributions of Pennsylvania estates to Iron Curtain legatees and devisees is a largely unsettled area of the law. Not only is the validity of existing state Iron Curtain acts being challenged, but the entire subject is fraught with political implications and predilections, clouded by the questionable dicta of outmoded cases, and confused by an absence of definitive rules of evidence.\(^\text{116}\)

It must always be kept in mind that even under the most favorable conditions presently existing in New York and California there is still a problem of proving "benefit" and "reciprocity" respectively. In addition, prejudice may be found in any particular case thereby making a favorable decision very difficult. Therefore, consideration should always be given to available means of avoiding such restrictions and the necessity of the problematic litigation which accompanies them. But in considering such a move, one should recognize that "benefit" states have distributed estates, upon finding the presence of "benefit," to "Iron Curtain" countries including Russia,\(^\text{117}\) Bulgaria,\(^\text{118}\)

\(^{115}\) The writer has been unable to find recently reported cases from many of the jurisdictions having the restrictions herein discussed. Therefore it is very difficult to say whether the jurisdictions not specifically mentioned, have followed the lead of New York, New Jersey, California and Montana in this respect.

\(^{116}\) Jones, supra note 21, at 227.

\(^{117}\) In re Saniuk's Estate, supra note 22.

\(^{118}\) In re Estate of Petroff, supra note 24.
Hungary, Estonia, Czechoslovakia, Yugoslavia, and Poland. "Reciprocity" states have found "reciprocity" to exist with countries including Russia, Rumania, Czechoslovakia, and Yugoslavia.

Since the "benefit" and "reciprocity" legislation only exist in the probate courts of the states in which they are enacted, their restriction may be avoided by avoiding probate. There appear to be no such restrictions by the states or the federal government, save in time of war or other military confrontation, on the inter vivos disposition of property to countries behind the "Iron Curtain." Therefore, the advantages and disadvantages of avoiding probate should be weighed against the disadvantages of the litigation discussed earlier in order to determine the best possible method for achieving a client's wishes regarding inclusion of a foreign resident as a beneficiary of the client's estate.

If probate is either desirable or unavoidable, there is yet another way to avoid the operation of the "benefit" type of restriction insofar as it might withhold estate funds indefinitely. One may provide for a gift over to another if the funds cannot be distributed immediately or within a stated period of time. This method might be employed to avoid the restrictive effects of "reciprocity" statutes. However, the result of such an action is unknown.

Stuart Weisler


121 In re Karman's Estate, supra note 66; In re Reidl's Will, supra note 26; In re Estate of Birkner, supra note 24.

122 In re Estate of Primorac, 51 Misc. 2d 166, 272 N.Y.S.2d 457 (Surr. Ct. 1966); In re Offinger's Estate supra note 24; In re Aras' Estate, supra note 24.

123 In re Tybus' Estate, supra note 28.

124 In re Estate of Larkin, supra note 90; In re Estate of Yarovikoff, 52 Cal. Rptr. 459, 416 P.2d 491 (1966).

125 In re Estate of Chichernea, supra note 91; In re Estate of Gaspar, supra note 91.

126 In re Estate of Hosova, supra note 91.

127 In re Estate of Genn, supra note 91; In re Estate of Spoya, supra note 91.


129 In re Van Dam's Estate, 43 N.Y.S.2d 184 (Surr. Ct. 1943).