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ESTATE OF MARY VAN RIPER,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-3024-16T4
Plaintiff/Appellant,	On Appeal From: Superior Court of New Jersey Tax Court Docket No.: 008198-2016
v.	Civil Action
NEW JERSEY DIVISION OF TAXATION	Sat Below: Hon. Mark Cimino, J.T.C.
Defendant/Respondent.	

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

The New Jersey State Bar Association (NJSBA) accepts the Statement of Facts and Procedural History as presented by the parties in their respective briefs.

PRELIMINARY STATEMENT

The Tax Court decision in this matter creates new law that upends long-standing principles of New Jersey inheritance tax law that both New Jersey practitioners and residents have relied upon in creating estate plans. Never before in New Jersey's inheritance tax jurisprudence has a court permitted the imposition of inheritance tax on the basis of the decedent's mere possession of an interest at death, in the absence of prior ownership and retained control by the decedent. It is critical that this concept be clarified for the future so that individuals can properly plan for the distribution of their wealth without uncertain consequences, and so that attorneys can confidently and properly advise them.

This matter focuses on the taxability of a transfer by Walter and Mary Van Riper, husband and wife, of their jointly-owned home to an irrevocable trust. Walter Van Riper passed away and Mary Van Riper continued to enjoy a life estate in the home. Upon her death, the Tax Court held that Mary Van Riper made a transfer subject to

New Jersey inheritance tax. The value of the transfer, according to the Tax Court's opinion, was 100 percent of the value of the residence. Under previous interpretations of the inheritance tax law, a tax would be imposed only on that portion of the transfer made by a decedent, not assets transferred by others, even if the decedent held a transient interest in the property at the time of death. The Tax Court opinion in this matter, however, alters that long-standing interpretation by imposing inheritance tax on the full value of the home, even though that is not what Mary Van Riper transferred.

As such, the Tax Court decision would impose a new and burdensome tax on transactions and planning techniques. This threatens to becloud the law, to the detriment of taxpayers and their advisors.

The NJSBA urges the Appellate Division to reverse the Tax Court decision and instead affirm the well-established, long-standing principles of New Jersey inheritance tax law outlined herein.

LEGAL ARGUMENT

I. THE NEW JERSEY INHERITANCE TAX APPLIES WHEN A DECEDENT HAS MADE A TRANSFER AND HAS RETAINED A LIFE ESTATE; IT DOES NOT APPLY IN THE ABSENCE OF A TRANSFER.

A. N.J.S.A. 54:34-1(c) imposes inheritance tax on transfers made in contemplation of death or intended to take effect at or after death.

1. The "transfer" requirement.

N.J.S.A. 54:34-1 provides in pertinent part:

> Except as provided in section 54:34-4 of this Title, a tax shall be and is hereby imposed … upon the transfer of property, real or personal, of the value of $500.00 or over, or of any interest therein or income therefrom, in trust or otherwise, to or for the use of any transferee, distributee or beneficiary in the following cases: ….
>
> c. Where real or tangible personal property within this State of a resident of this State … is transferred by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.

N.J.S.A. 54:34-1.

The requirement of a "transfer" is an independent *sine qua non* of the statute, separate from the "contemplation of death" requirement. Tax is imposed "upon the transfer of property…". N.J.S.A. 54:34-1. The Tax Court's opinion in this case recognizes the separate requirement of a transfer. For example, the court notes that to bring an *inter vivos* transaction within the reach of the statute, "the grantor or settlor must transfer some property, or interest therein…" Estate of Van Riper v. Director, Corrected

Slip Opinion at 12, quoting from In re Estate of Lingle, 72 N.J. 87, 94-95 (1976). The court also says that "taxability in this state under the 'at or after death' provision has required that the settlor retain in himself some realistic interest, power or control or some other 'string' during his lifetime..." Id. at 12-13, quoting from In re Estate of Lichtenstein, 52 N.J. 553, 578 (1968). One cannot, of course, "retain" an interest in something he or she did not previously own and transfer.

2. The "contemplation of death" requirement.

Courts in inheritance tax cases often focus on the "contemplation of death" requirement to the exclusion of the transfer requisite. However, the requirement that an action be "in contemplation of death" or "intended to take effect in possession or enjoyment at or after such death" is independent and separate from the transfer requirement.

N.J.S.A. 54:34-1 begins with the statement that a tax is imposed upon the transfer of property valued over $500 in certain circumstances. It then sets forth six circumstances permitting the taxation of assets passing to a survivor, including an action that is taken "in contemplation of death" or that is "intended to take effect in possession or enjoyment at or after such death." N.J.S.A. 54:34-1. Thus, prior ownership of an asset, coupled with its transfer, is a threshold requirement in determining taxation,

separate and distinct from whether the transfer was done in contemplation of death.

In most cases, the existence of a transfer is free from doubt and the issue is whether the decedent's action was calculated to become effective at or after death. See, e.g., Swain v. Neeld, 28 N.J. 60, 67-68 (1958); Estate of Berg v. Director, 17 N.J. Tax 256 (Tax 1998). That is not the case in this matter, though, where the question of whether the prerequisite transfer has occurred is a critical question that must be analyzed before turning to when the action was to be effective.

B. Mary Van Riper transferred only a 50 percent interest in the property to the trust.

1. The interest transferred.

Prior to the creation of the trust in 2007, Walter and Mary Van Riper owned their home as tenants by the entirety. Mary was not the sole owner. Plaintiff's (Appellant's) Statement of Material Facts, ¶ 2 and Exhibit B. Therefore, she alone could not transfer ownership to the trust.

Under the common law view, tenants by the entirety in real estate each own the entire property. They do not hold moieties because "being considered in law as one person, they cannot, during the coverture take separate estates…" King v. Greene, 30 N.J. 395, 400 (1959). Under that historical approach, Walter would be seen as owning 100 percent of the property and Mary would also be viewed

as owning 100 percent. See, e.g., Mueller v. Mueller, 95 N.J. Super. 244 (App. Div. 1967). That analysis could lead one to the nonsensical conclusion that Walter transferred 100 percent of the home to the trust, while Mary also transferred 100 percent of the same home to the trust.

New Jersey's Legislature and courts have not adhered to this legal fiction, though, when it would produce unjust or anomalous results. For example, when married taxpayers who own entireties of real estate elect to file separate New Jersey income tax returns, each is not entitled to deduct 100 percent of the property taxes paid. Rather than allowing a double deduction, N.J.S.A. 54A:3A-17d provides that each is entitled to deduct only one-half of the taxes paid.

In a similar manner, N.J.S.A. 3B:6-4 provides that upon the simultaneous death of spouses owning tenants by the entirety property, "the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived."

By way of further example, upon the death of one tenant by the entirety, the survivor may disclaim the interest passing by survivorship. N.J.S.A. 46:2E-14; see also 26 C.F.R. 25.2518-2(c)(4)(i)(for federal gift tax purposes, surviving tenant by the entirety may disclaim interest passing by survivorship, and "such interest is deemed to be a one-half interest in the property.")

The Appellate Division decision in N.T.B. v. D.D.B., 442 N.J. Super. 205 (App. Div. 2015), is illustrative of this concept. There, the issue was whether a husband was guilty of criminal mischief when he broke down a door and destroyed audio speakers within the couple's jointly owned home. The trial judge held that the husband could not be found guilty of that offense. According to the trial court's ruling, the ownership of the home as tenants by the entirety compelled the conclusion that the husband owned the entire residence and its contents. Therefore, he had not destroyed "the property of another." The Appellate Division disagreed and reversed. The panel wrote that notwithstanding the traditional common law concept of the entirety, "[e]ach tenant by the entirety is a tenant in common with the other during the joint lives of the spouses." Id. at 219 (citations omitted). According to the court, "[e]ach co-tenant 'has a separate and distinct freehold title,' and each holds his or her 'title and interest independently of the others.' [citations omitted] Thus, it is clear that plaintiff and defendant each held a separate and distinct interest in the home." Id.

Even under the traditional notion that tenants by the entirety each own the entire property, that circumstance ended when Walter and Mary Van Riper conveyed title to the trustee. A conveyance by both spouses to a third party severs a tenancy by the entirety. Nappe v. Nappe, 20 N.J. 337, 349 (1956).

When Walter and Mary Van Riper created and funded the trust, Mary conveyed only what she owned: a 50 percent undivided interest in the home held as tenant by the entirety with her husband. She could not and did not transfer the entire home to the trust. In fact, she could not have made such a conveyance without Walter's participation. See Celentano, 13 N.J. Practice §5.17 (2002) ("An estate by the entirety may be destroyed or terminated by the joint acts of husband and wife, but not by the act of any one of them").

2. Terms of the Trust.

The Van Riper Residence Trust Agreement (the "Trust Agreement") directed the trustee to hold the residence and any other assets transferred to the trust and use them for the benefit of Walter and/or Mary during their lifetimes. Trust Agreement, Articles Fourth, Fifth and Sixth, at pp. 2-4; Estate's Statement of Material Facts, ¶ 1 and Exhibit A; Van Riper, supra, Corrected Slip Opinion at 2-3. Upon the death of either Walter or Mary, the trust did not terminate. Rather, the trust remained in existence for the benefit of the surviving spouse. Upon the death of the surviving spouse, the Trust Agreement directed the trust assets to a niece. Importantly, neither the first spouse to die nor the surviving spouse was given the power to modify the terms of the trust at any time. [1]

[1] For example, the Trust did not give either spouse a power to modify the trust disposition through a testamentary power of appointment.

Therefore, no additional transfer was made when Walter died in 2008. The trust continued for Mary's benefit. However, she had no power to receive the assets outright, to remove the niece as a beneficiary, or otherwise affect the distribution.

When Mary died in 2013, her life estate ended, but no additional transfer took place. The trust assets passed to the niece under the terms of the trust that became irrevocable in 2007.

C. The Tax Court incorrectly held that 100 percent of the property, not 50 percent, was subject to inheritance tax on Mary Van Riper's death.

Against that backdrop, the Tax Court held that the full value of the residence was subject to transfer inheritance tax, rejecting the estate's argument that only half of the home was transferred by Mary. The Court explained its decision in the following words:

> With the creation of the trust, there were three interests. The remainder interest which the niece received at or after the death of both husband and wife, the life interest of husband and the life interest of wife. Husband passed in 2007 and his interest extinguished. Wife passed in 2013 and her interest extinguished. Thus, per the express terms of the trust, the niece did not take the property until after the death of husband and at the death of wife. Thus the transfer to the niece is fully taxable under the at or after death provision of N.J.S.A. 54:34-1(c).
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> Van Riper, supra, Corrected Slip Opinion at 24 (emphasis in original).[2]

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[2] In three additional sentences, the Court addressed the application of N.J.S.A. 54:34-1.1. The NJSBA concedes that section is not applicable.

The Tax Court accurately identified the two life estates and the remainder interest created by the terms of the trust. However, it overlooked the other key element of the statute: the transfer requirement. Admittedly, Mary Van Riper was enjoying the benefit of the entire trust at the time of her death. But that is not all the statute requires. It requires the decedent to have *transferred* property **and** *retained* the use of that property for life. As explained above, Mary could not and did not transfer the entire residence to the trust; she transferred only her 50 percent undivided interest.

It is true, as argued by the Division in its Tax Court Brief, that ""[a]s a result of Walter Van Riper's death, decedent became the sole beneficiary of the Trust and, thus, the sole individual entitled to reside in the property pursuant to the Trust instrument." Brief of Division of Taxation, p. 14. But the statute requires more than mere entitlement to the use of property. The Division's argument, like the Tax Court's opinion, completely ignores the transfer requirement.

Walter transferred his 50 percent undivided interest to the trust, and Mary enjoyed the use of that portion during the remainder of her life. As to that portion, however, Mary was a mere beneficiary, not the transferor. The mere enjoyment of

property does not trigger the application of the inheritance tax. There must be a transfer coupled with the retention of enjoyment.

For the foregoing reasons, the NJSBA submits that the Tax Court improperly construed and applied N.J.S.A. 54:34-1(c) when it held that the value of the entire residence was subject to tax at Mary Van Riper's death.

II. THE DECISION OF THE TAX COURT IN THIS CASE RAISES ISSUES OF PUBLIC IMPORTANCE.

A. The Tax Court's decision departs from prior case law.

The Tax Court decision creates new law that could be problematic to both New Jersey practitioners and residents engaging in estate planning. As noted above, never before in New Jersey's inheritance tax jurisprudence has a court permitted the imposition of inheritance tax on the basis of the decedent's mere possession of an interest at death, in the absence of prior ownership and retained control by the decedent.

As argued in Point I of this brief, the inheritance tax statute and the cases interpreting it require both a *transfer* of property **and** the *retention* of an interest by the transferor. For example, in Estate of Berg, supra, 17 N.J. Tax 256, the court applied N.J.S.A. 54:34-1(c) to tax a residence and bank accounts upon decedent's death. However, in that case, decedent owned the residence and the bank accounts alone and outright, and transferred them in a manner that triggered taxation. In In re Lambert, 63 N.J. 448 (1973), the Supreme Court affirmed the taxation of life insurance policies purchased in connection with annuities. In that case, it was the decedent alone who purchased the policies with her own funds. That purchase constituted a *transfer*, without which taxation would not have been permitted.

The case of Darr v. Kervick, 31 N.J. 476 (1960), is instructive as well. In that case, a husband and wife created reciprocal trusts. The husband transferred 51 shares of stock of a closely held corporation to an irrevocable trust. The income from that trust was payable to his wife for her lifetime. Simultaneously, the wife transferred her 49 shares of the same corporation's stock to a trust providing for the payment of income to her husband for life. The husband died within three months after the transfers.

The issue in the case was the taxability, upon the wife's death, of the stock transferred to the trust created by her, which paid income to her husband for life. The Division of Taxation successfully argued that the trust was subject to tax upon her death under the reciprocal trust doctrine. However, the court did not hold that the trust created by the husband, of which his wife was the beneficiary, was taxable.[3] The court held that "…under the circumstances of this case, an imposition of a transfer inheritance tax on the Corpus of the trust created by decedent is proper." Id. at 483 (emphasis added).

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[3] A portion of the husband's trust terminated when one of the couple's daughters died before reaching age 35. Under the terms of his trust, those assets passed to his wife outright. She transferred those assets to the husband's trust, of which she was the beneficiary. The estate stipulated that those assets were subject to tax on her death because, as to those assets, she made a transfer and retained a life estate.

It is also notable that the trust created by the husband in Darr was subject to inheritance tax on his death. According to the court, "[t]he transfer of the Corpus of the trust created by him was taxed by the State as a transfer made in contemplation of death and this tax was sustained in the Prerogative Court. [citation omitted]." Id. at 481. The trust created by the husband was not again subject to tax on his wife's death, even though she was receiving the income from those assets at the time of her death. Thus, even in the reciprocal trust situation, the Supreme Court did not disregard the transfer requirement. The assets that the wife transferred were subject to tax in her estate; the assets transferred by the husband were not subject to tax in her estate, even though she was the income beneficiary at the time of her death.

As such the Tax Court's decision in this case is at odds with the Supreme Court's holding in Darr. Under the logic applied by the Tax Court, both of the trusts in Darr would be taxed at the wife's death, even though she only owned and transferred 49 shares of stock to one of the trusts. Under Darr, only the transferor should be subject to tax, yet the Tax Court opinion here requires that the beneficiary be taxed as well, without any explanation as to the reasoning.

In light of this, the NJSBA submits that the Tax Court's analysis of the husband's transfer and its taxability to his niece

in Section V of the opinion is deficient and should be reversed. It is critical for estate planning attorneys that it be clarified for future precedent and so that individuals can properly plan for the distribution of their wealth without uncertain consequences.

In sum, the NJSBA questions the taxation of interest in the home of *Mr.* Walter Van Riper (*transferor)* which was placed in trust for the benefit of *Mrs.* Mary Van Riper (beneficiary). The estate of Mr. Van Riper is not a party to this litigation, is not before the court, and the court did not address the underlying merits of the taxation of *his* interest in the home. The court seemingly jumps to the conclusion that because Mrs. Van Riper was a beneficiary of the trust, her husband's interest would be subject to taxation upon her demise.

The confusion on this issue even finds its way into the brief of the Respondent. On page 14, first full paragraph, counsel suggests that Mary Van Riper's interest as *beneficiary* is what leads to taxation. Moreover, the paragraph misstates a critical fact. It asserts that Mary Van Riper (a Class A beneficiary) is sole beneficiary. That is incorrect. Mary Van Riper was the "life" or "income" beneficiary and the niece (a Class D beneficiary) was "remainder" beneficiary. While the NJSBA agrees that Walter Van Riper's New Jersey Transfer Inheritance tax return is irrelevant to the taxation of Mary Van Riper's estate, it is nonetheless important to the analysis because it would have been the

appropriate point of taxation of his 50 percent interest in the home.

B. The Tax Court's holding would result in the taxation of many transfers that have never before been subject to inheritance tax.

The use of trusts is, and has been, prevalent in estate planning for a long time. Some trusts are created for tax purposes; however, many trusts are created for non-tax reasons. The New Jersey inheritance tax law has been designed to impose a tax upon the transfer of assets at death or in contemplation of death. It is that "*transfer*" that results in the taxation which would be the subject of any tax inquiry.

It is very common for a testator to create a trust for the benefit of his or her surviving spouse, with a remainder interest to a younger generation. When a remainder beneficiary is a Class C or Class D beneficiary for inheritance tax purposes, the Tax Court's decision in this case would produce unexpected and unprecedented results.

Suppose, for example, that H creates a trust in his will for the benefit of his wife, W, during her lifetime. As long as she lives, she is entitled to the income from the trust. Upon her death, the trust assets pass to B, H's brother (a class D beneficiary to W and Class C to H). Under previous law, the termination of the trust would not trigger the imposition of

inheritance tax on W's estate. This is because she never owned the property placed in the trust and, thus, she has made no transfer.

The Tax Court's ruling, though, changes that. It would impose a tax on W's estate in the example above. Even though she did not make a transfer, W held a life estate in the trust at the time of her death. Under the Tax Court's analysis, that would be sufficient to trigger the imposition of a tax.

In this case, Mary Van Riper was clearly the transferor of her 50 percent interest in the home and that should be subject to transfer inheritance taxation, as noted. However, the undisputed facts provide that Walter Van Riper, her husband, was also a transferor of half of the home. There is no basis for taxation of his share of the home in Mary Van Riper's estate. The court even acknowledges that there were three interests in the trust, his one-half life estate, her one half-life estate and the remainder.

C. The imposition of the inheritance tax in a manner that exceeds the statutory authority to impose tax will harm taxpayers and their advisors.

If left undisturbed, the troubling language contained in the Tax Court decision and its requisite holding that the estate of Mary Van Riper would be obligated to pay tax on Walter Van Riper's portion of the home will create substantial uncertainty for planners, clients, and other professional advisers. Advisers need to have certainty when planning for the creation of a trust.

Otherwise, unnecessary litigation will result from questions about the circumstances under which a beneficiary would be subject to tax. This litigation would not only be between the taxpayer and taxing authority, but also among beneficiaries concerning their obligation for the tax or between beneficiaries and their advisers concerning the manner that the transaction was structured and the advice given concerning the creation of the trust.

Left alone, this aspect of the Van Riper decision will make it very difficult for the estate planning community to recommend the use of trusts due to the potential for uncertain tax burden. Not only will this affect the tax advice to be given in the future, but it could also affect wills and trusts that have been previously set up but have not yet become executory (because they have not passed yet.) Existing New Jersey taxpayers may have trusts created under their wills which may need to be addressed immediately if the Tax Court decision is allowed to remain. Some taxpayers may even pass away without having the opportunity to correct this ambiguity. This cannot be what the Tax Court, or this Appellate Division, intends.

For the foregoing reasons, the NJSBA urges the Appellate Division to reverse the Tax Court decision and provide clarification about the inheritance tax consequences for property transferred to a trust.

CONCLUSION

For the reasons expressed above, the New Jersey State Bar Association urges the Appellate Division to reverse the Tax Court decision and affirm the long-standing principle that the transfer inheritance tax law imposes tax only on transfers made by a decedent, not assets transferred by others, even if the decedent held a transient interest in the property at the time of death.

Respectfully submitted,

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