

STATE OF VERMONT  
CHITTENDEN COUNTY, SS.

PROBATE COURT  
DOCKET NO. 32439

RE: ESTATE OF CLARK HINSDALE, JR.

**ORDER REGARDING ALLOCATION OF CERTAIN EXPENSES AND  
ABATEMENT OF DEvised PROPERTIES**

The above reference matter came before the court for ruling on issues of expense allocation and abatement. Memorandum of law were submitted by Irene C. Hinsdale through her attorneys, Bergeron, Paradis & Fitzpatrick, and by the Clark Hinsdale, III, Mindy Hinsdale, and Michael Hinsdale, through Attorneys Liam L. Murphy and James H. Ouimette.

**Findings of Fact**

Clark Hinsdale, Jr., died testate on May 20, 2008, leaving a substantial estate. Mr. Hinsdale was survived by his spouse, Irene C. Hinsdale, and five children. The adult children from Mr. Hinsdale's first marriage are Clark W. Hinsdale, III, Michael J. Hinsdale, and Melinda L. Hinsdale, the "Adult Children." Mr. Hinsdale has two minor children from his second marriage, Jacob C. Hinsdale, born February 15, 1992, and Laura C. Hinsdale, born July 20, 1993.

After payment of debts and expenses, the Decedent's Will provides for the distribution of articles of personal property to Irene Hinsdale and for the apportionment of Estate taxes. (Last Will and Testament of Clark W. Hinsdale, Jr. ("Will") at Article Fourth.) These payments are not at issue. The residue of the Decedent's Estate is divided between his spouse and Adult Children. Irene Hinsdale is devised the homestead along with a number of income producing properties, "Hinsdale Properties," subject to certain specifically designated debts. (Will, Article Fifth (a)). The Decedent devised the so-called "Farm Property" in trust for the benefit of his adult children, subject to certain specified accounts payable. (Will, Article Fifth (b)). The primary difference between the specific devises appears to be that many of the Wife's properties, as rental properties with many based in Burlington, Vermont, are generating income. Properties specifically devised to the Adult Children, with most of it in Charlotte, Vermont, do not appear to be rental properties, but are described in the testator's will in terms of acreage. Many of these properties are encumbered by mortgages.<sup>1</sup>

In Article Fifth © the Decedent bequeathed all receivables from Hinsdale Properties to

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<sup>1</sup> Neither party suggests that the properties bequeathed to Wife are unencumbered by mortgage accounts.

his wife, and he bequeathed specific other receivables to the Trust for the benefit of his Adult Children. Any receivables arising from the sale of a property by the Decedent prior to his death that would under the terms of his Will have been distributed to his spouse or Adult Children, is bequeathed to the party who would have received the property under the terms of the Will. Any remaining property not otherwise devised is awarded to Irene Hinsdale. ( Will, Article Fifth (d)).

At the time of his death, the Decedent held all of his properties as a sole proprietor, with the exception of a 40% in ownership interest in the Nordic Farm. The debts on his properties were sometimes property specific, but often were not, (i.e., the debt related to the purchase of a property was sometimes secured by a mortgage on a different property or group of other properties.) Debts related to some Farm properties were secured by rental properties in Burlington and vice-versa. The Decedent paid his debts from the income from his various properties and spread his losses and depreciation over all his properties.

The residue of the Estate has been exhausted by general administration expenses of the Estate. These are expenses generated by the administration of the Estate as a whole, such as executor's fees, appraisals, consultants, etc. Each remaining class of specific devisees has also incurred expenses specific to that class alone, e.g. property taxes. Substantial Estate taxes have been paid.

The Adult Children accept responsibility to pay the principal of any debts devised to them, even if some of the debts were secured by properties not devised to them under the terms of the Will. The Adult Children also accept responsibility to re-pay any reduction of principal since the Decedent's death of any debts devised to them, even if the debts were secured by properties not devised to them at death. Finally, the Adult Children agree that the "net probate income" of any specifically devised property is allocable to the devisee of such devised property.

The question before the court is whether the devisees of Hinsdale Farms property must repay Hinsdale Properties for payments made by Hinsdale Properties on behalf of Hinsdale Farms during the administration of the Estate. In making this determination, the court is asked to consider whether mortgage interest payments are general administrative expenses or must be allocated to the properties devised; whether "net losses" of specifically devised properties are general administrative expenses or are costs to be allocated to the specific properties devised; and where the residue of the estate is insufficient to pay the Estate's general administrative expenses, how are such expenses allocated to specific devisees for the purpose of abatement.

### **Discussion**

The executor of an estate is a representative of limited authority, his general duties being to collect the assets of the Estate, pay its debts, and distribute the residue to those entitled. *Baldwin v. Taplin*, 113 Vt. 291, 295 (1943). If money borrowed by the executor from one devisee actually goes to the benefit of the estate, the probate court may authorize its repayment.

*Id.*, at p.296. Unless the decedent directs otherwise, the residue of an estate is used to pay the general expenses of the estate. If the residue is insufficient to pay estate general expenses, the classes of bequests and devises abate to pay such expenses. The classes abate in a certain order, with specific devises and bequests abating only after the rest of the estate has been exhausted.

The Adult Children claim that it is a “basic rule” that unsecured debts must be paid by the executor during the probate period, as part of general administrative expenses. They claim that this rule should also extend to secured debts, such as a mortgage, and that the interest on a mortgage is part of the general administrative expenses. The Adult Children further claim that the properties specifically devised to them which are not generating income but which include mortgage debt, should be viewed as experiencing a “net loss” under the Uniform Principal and Income Act. Irene Hinsdale claims that the interest on the mortgage payment is part of the “debts” assigned to the specific devisees in the will, and as such moves for reimbursement by the Adult Children for amounts she paid towards the mortgages in the Adult Children’s trust.<sup>2</sup>

The Adult Children argue that when real property does not generate income, any mortgage payments made by the executor during the probate period should be allocated such that the devisee is exclusively responsible for the amount paid towards the mortgage’s principal balance only, but that the estate is responsible for the amount paid toward the mortgage’s interest, as a general administrative expense. In other words, the Adult Children argue that for each specific devise of encumbered real property that did not generate income from the time the testator died to the conclusion of probate proceedings, all interest paid on the mortgage should be calculated as part of the executor’s general administrative expenses under 14 V.S.A. § 3304.<sup>3</sup>

If the Adult Children’s argument prevails, the amount in interest paid by the executor on the Adult Children’s non-income generating property would be deducted from the net probate income as calculated pursuant to 14 V.S.A. § 3304(b)(4). In this manner, the Adult Children allege, the interest payments should be allocated between the Adult Children and Irene Hinsdale, rather than charged solely to the Children’s Trust, for the interest and principal payments in full.

#### A. Contrary Provisions in Testator’s Will

The Adult Children’s argument does not comport with the testator’s express intent to assign the debts and accounts payable associated with the specific devises of property. The statute on which the Adult Children rely provides that, absent any “contrary provision” in the

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<sup>2</sup> In the instant matter, it could be argued that the executor’s administration should not have borrowed money from one beneficiary’s specifically devised property to pay the debts associated with the specific devises of another beneficiary. *Baldwin v. Taplin*, 113 Vt. 291, 296 (1943); *see also In re Searles’ Will*, 82 N.Y.S.2d 219, 227 (N.Y. Surr. Ct. 1948) (observing that the legatee of a specifically bequeathed property is has the sole responsibility for satisfying the lien); *In re Purdy’s Will*, 73 N.Y.S.2d 38, 45 (N.Y. Surr. Ct. 1947).

<sup>3</sup> Under Children’s theory, if Wife has also been devised property that does not generate income during the probate period, any mortgage payments made on these properties must also be submitted to the same parsing out of expenses.

testator's will, § 3304 sets the general guidelines by which an executor determines the estate's net probate income. 14 V.S.A. § 3304(a). If the testator has not made contrary provisions, the executor must determine the net probate income of the estate, deduct all "properly payable" general administration expenses, and distribute specifically devised and all other net probate income to the legatees or trustees. 14 V.S.A. § 3304(b)–©.

The Fifth section of testator's will lists specific devises to his Wife and Adult children. Subsection (a) devises, to Wife, "all of the real estate associated with Hinsdale Properties, a sole proprietorship" of a detailed list of properties. Following this list is this paragraph:

It is my direction that the following debts associated with the above-properties be assigned to my wife, IRENE C. HINSDALE, including the accounts payable at Hinsdale Properties: [a list of six accounts held by Yankee Farm Credit, including account numbers, plus three accounts held by Chittenden Bank].

(Will at 4.) The same language is used to bequeath a specific list of properties to the Trust held for the benefit of the Adult Children. Subsection (b) of the Fifth section also provides:

It is my direction that the following debts associated with the above-properties be assigned to the Trust for the benefit of my children, CLARK W. HINSDALE III, MELINDA HINSDALE BICKFORD, and MICHAEL J HINSDALE, including the accounts payable by Hinsdale Farms: [a list of eight accounts held by Yankee Farm Credit, one account held by Chittenden Bank, and various other accounts listed by name].

(Will at 5 – 6.) The testator specifically devised, in both subsections, the "accounts payable" for the listed devised properties, in their entireties. The court's "first and chief object" in interpreting a will "is to ascertain the intention of the testator from the language used." *In re Barslow's Estate*, 128 Vt. 192, 196 (1969). "The court is to place itself in the shoes of the testator, and his language is to be construed and interpreted in the light of the state of facts with which he was surrounded and his relations to the various objects of his bounty." *In re Houghton's Estate*, 118 Vt. 228, 232, 105 A.2d 257 (1954). Construing the intent from the express language used by the testator, the "accounts payable" bequeathed to Irene Hinsdale and the Adult Children include both principal and interest payments.<sup>4</sup>

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<sup>4</sup> Children argue that testator's instructions in the First section, that the executor pay "all [his] legally enforceable debts and funeral expenses, including the expenses of [his] last illness, and expenses of administration . . . as soon as convenient" are evidence of his intent that the mortgage interest fees be part of the general administration expenses. *In re Reynolds Estate*, 94 Vt. 149, 155 (1920) (holding that a "provision in the will directing the payment of all just debts . . . is a mere formality adding nothing of a testamentary character to the instrument"); *In re Beaudry's Estate*, 134 N.Y.S.2d 893, 894 (N.Y. Surr. Ct. 1954) ("A general provision for debt payment is not a direction that a lien or encumbrance on specifically bequeathed personalty shall be discharged by the executors.").

B. The Handling of Encumbered Assets During Probate

The probate administration of the Adult Children's specifically devised properties are more properly analyzed under the law of encumbered assets. This law, modeled after § 3-814 of the Uniform Probate Code, provides that:

If any assets of the estate are encumbered by mortgage, pledge, lien, or other security interest, the executor or administrator may, except as otherwise provided by will, pay the encumbrance or any part thereof, . . . in whole or in part, whether or not the holder of the encumbrance has filed a claim, if it appears to be for the best interest of the estate. Payment of an encumbrance does not increase the share of the distributee entitled to the encumbered assets unless the distributee is entitled to exoneration.

14 V.S.A. § 1214 (emphasis added). This statute prevents a devisee from inequitably enjoying the benefits of prolonging the probate period, wherein he would eventually receive a piece of property worth more than it was at the time of testator's death (or at least, with a decreased debt), and the benefit of paying a proportionally lower interest rate. *See Anderson v. Massachusetts Mut. Life Ins. Co.*, 432 N.Y.S.2d 959, 962 (N.Y. App. Div. 1980) (citing a similar New York statute's application as a method of protecting one beneficiary from being required to contribute more than his share while the other beneficiary receives a "windfall"). This principle existed at common law as well. *See In re Ryan's Estate*, 254 N.Y.S.2d 191, 192 (N.Y. Surr. Ct. 1964) ("[A]nyone receiving the entire title to property, whether by descent, devise or as a surviving tenant by the entirety, should take the property in the condition in which it exists at the date of the death of the person who makes their title complete.").

Because, as discussed, the Adult Children stipulate that they should be held financially accountable for reimbursing the estate for the payments allocated to paying the principal portion of the mortgage, applying their analysis, the Adult Children would still enjoy an inequitably reduced interest payment. Irene Hinsdale, on the other hand, would be required to pay something for nothing, in contributing to an interest payment for a property in which she has no ownership interest. This result is not supported by relevant probate law.

The interest commensurate with a mortgage account is not properly separated out. *See In re Aman's Estate*, 5 N.Y.S.2d 962, 965 (N.Y. Surr. Ct. 1938) ("Owing to the fact that a legacy of an interest-bearing debt most always described the debt specifically as the property of the testator, it is generally found that a legacy of a mortgaged debt carries with it all interest accrued and unpaid at the death of the testator."). The forced bifurcation between principal and interest payments runs contrary to the general understanding of the word "debt." "In most situations, interest is considered to be the cost of the use of the amounts owing a creditor and an incentive to prompt repayment and, thus, an integral part of a continuing debt." *Bruning v. United States*, 376 U.S. 358, 360 (1964) (emphasis added).

With respect to exoneration, at Vermont common law, the devisee of an encumbered

property was entitled to have the estate exonerate the debt from the estate's personal property. *In re Reynolds Estate*, 94 Vt 149, 154 (1920); *but, cf. In re Searles' Will*, 82 N.Y.S. 2d 219, 227 (N.Y. Surr. Ct. 1948) (finding that the legatee of a specifically bequeathed property bears the sole obligation to satisfy the lien "unless the will expressly or by necessary implication directs the contrary"). Even under the *In re Reynolds* rule, however, if the devisee deliberately accepts funds from the estate so that the executor may satisfy a mortgage payment bequeathed to that devisee, this right to exoneration is waived. In the instant case, not only have the Adult Children accepted funds from the estate to make mortgage payments for specifically devised properties, but they stipulate as to receiving these funds from a devisee of entirely different properties in the estate.

Although this issue has not been specifically addressed by the Vermont legislature, sister jurisdictions in Massachusetts, New Jersey, New York, and Pennsylvania, for example, have since reversed this trend to require that a testator expressly convey an intent to exonerate the property of its encumbrance in his will. Mass. Gen. Law ch.191, §23; N.J. State. Ann. Ch 26, §3A:26-1; N.Y. Real Prop. Law §250; Pennsylvania Wills Act of 1947, 20 Purdon Stat. §180.14(12). The court finds this evidence of a doctrinal trend towards requiring express evidence of exoneration sufficiently persuasive in the instant matter. Therefore, because the testator did not expressly, or even impliedly, provide for exoneration of any of the properties devised any of the parties in his will, 14 V.S.A. §1214's encumbrance rule applies.

Furthermore, and most importantly, a beneficiary cannot seek contribution from other legatees of specifically devised property. It is undisputed that no residue exists from which to make the Adult Children's mortgage payments, irrespective of how the payments are allocated in the estate. Instead, the Adult Children look to Irene Hinsdale's income from specifically devised rental properties for contribution. The general rule at a common law is that specific devisees of real property are not "entitled to obtain contribution from a specific devisee of other real property for the purpose of satisfying or discharging the mortgage." 72 A.L.R.2d 383, §§ 1-2; *see also In re Porter*, 72 P. 173,174 (Cal. 1903) ("It is the general rule that the devisee or heir of a mortgaged estate cannot claim exoneration out of specific legacies."); *Dean v. Hart*, No. 428, 1937 WL 2248 at \*1 (Ohio Ct. App. 1937) (observing that refusing to discharge the mortgage on encumbered property devised to one of testator's children using the proceeds from the sale of property devised to other of the testator's children was also in holding with the testator's intent); *In re Hodgkin's Estate*, 221 P. 169, 170 (Or. 1924) (relying on the testator's intent to specifically devise property to a beneficiary as evidence that she did not intend it to be used to pay the mortgage associated with property devised to another beneficiary).

### Allocation of Expenses

There are ongoing expenses of administration that must be allocated among the beneficiaries of this Estate. Irene Hinsdale contends that allocation of abatement should be based upon the two classes of properties - those devised to the Spouse and those devised to the Adult Children, based upon the aggregate net equity value of the properties in each class at death. The

Adult Children believe there is no basis for such aggregation of properties because the Decedent held all his properties as a sole proprietor, with one exception, and paid his debts from the income of his various properties. They believe the fairest method of allocation of abatement is to allocate the abatement based upon the net equity of each property at death.

Debts and other mortgages at the time the testator died were secured by other properties (cross-collateralized). The Adult Children argue that the allocation of the interest proposed by the Irene Hinsdale would assign debts to devisees and not to properties devised and the allocations would be "made up" allocations based upon a variety of assumption of the testator's intent which are not part of the Will. The allegation of this cross-collateralization is not relevant to the analysis. The value of the properties were what they were at the time of testator's death, and the testator's Will unequivocally assigns the debts associated with each set of property to the Adult Children or Irene Hinsdale. The Adult Children are essentially asking the court to assign a different value to the properties during the probate period, and then resume the actual value of the properties after the properties are devised.

Vermont case law has not specifically addressed this question. The Uniform Probate Code provides that "Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will." Uniform Probate Code §3-902. Thus, under the Uniform Code the proportional share due for abatement is calculated per devisee within each class of devise (general, specific, etc.), and not by individual devise. The court in this case would, under this method, calculate proportional share as to each devisee, as all devises in the Will are specific devises. This also appears to be the way that net probate income is distributed under 14 V.S.A. §3304©.

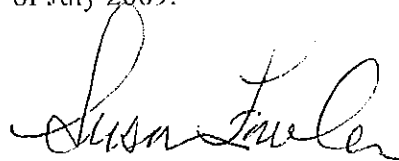
Such an interpretation of the Will appears to conform with the testator's intent. In interpreting a will and settling an estate, the court is required to give effect to the testator's intent. *Destitute of Bennington County v. Henry W. Putnam Mem'l Hosp.*, 125 Vt. 289, 293 (1965). Here, Mr. Hinsdale gave his adult children their specific devises as well as the debts associated with those properties; he knew full well what he was giving them and how it was encumbered. The devises were divided into two sets, one going to the Spouse, and one going to the Adult Children. To calculate abatement by looking at each individual property's proportional share- as opposed to considering the net value of the total property as divided between the two sets of devisees- would contravene the way the testator treated his devises in every other aspect of the will.

### Conclusions and Order

Based upon the foregoing analysis, the court hereby concludes the Adult Children are responsible for interest payments associated with debts assigned to them pursuant to the terms of the Last Will and Testament of Clark W. Hinsdale, Jr. Ongoing general administrative expenses will be abated based upon the aggregate net equity value of the properties in each class

at death using the mortgages assigned to the properties devised to each set of devisees.

Dated at Burlington, Vermont, this 20th day of July 2009.

A handwritten signature in cursive script, appearing to read "Susan L. Fowler". The signature is written in black ink and is positioned above a horizontal line.

Susan L. Fowler, Probate Judge