ALIEN INHERITANCE STATUTES: A NEED FOR INTERNATIONAL UNIFORMITY

> " 'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I chose it to mean-neither more nor less.' "
>
> Carrol, *Through the Looking Glass.*

It is said that death and taxes are inevitable. One might well add probate to these unavoidables. When men die their assets must be collected and their obligations satisfied; the residue of the estate is then distributed. This procedure becomes complicated when the decedent is a United States citizen and his beneficiaries are aliens.

The laws of the United States relating to wills and inheritance have not kept pace with the greatly increased mobility of mankind or the resultant increase in estate settlements involving foreign aspects.

The right of nonresident aliens to inherit real or personal property is regulated by the laws of several states. Within the United States it is basic law "that the administration in each state is separate and complete in itself."[1] Each state "[m]ay determine not only the process by which title may be acquired, retained, or transferred, but also what individuals are to be permitted to enjoy privileges of ownership."[2]

The advent of alien disabilities in the descent and distribution of real property can be traced to common law.[3] National consideration of foreign policy and defense seemed to be the justification assigned to the limitations placed on the aliens right to inherit and hold land.[4]

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1. R. LEFLER, CONFLICT OF LAWS 374 (1959).

2. 1 HYDE, INTERNATIONAL LAW 203 (1922).

3. *See* Sullivan, *Aliens Land Laws: A Re-evaluation*, 36 TEMP. L.Q. 15 (1962), for the history of alien land laws.

4. 2 BLACKSTONE, COMMENTARIES 249; Note, 16 U. CHI. L. REV. 315, 316 (1952). Lord Coke felt that to permit aliens to inherit real property was to create a Trojan horse in time of war. Cardozo, J., in Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185 (1920), citing POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 445.

Currently, the common law disabilities do not remain in their pristine form in any state of the Union although various states have enacted statutes which restrict the nonresident alien's right to inherit and hold property.[5] Such statutes are the by-product "of the increasing importance of personal property, the relaxation of the common law disabilities of aliens in general and the rise of potentially hostile totalitarian governments."[6] As World War II approached, state governments became distressed by the fact that liberalized probate laws allowed aliens living in foreign countries to receive distributions from the United States, although many countries were not allowing distribution of their estates to American citizens.[7] As a result, various states enacted legislation aimed at preventing distribution of estates to countries engaging in such confiscatory practices. This legislation falls into two general categories: (1) Reciprocity statutes,[8] and (2) Benefit-Use statutes.[9]

I. RECIPROCITY STATUTES

In the Western United States several reciprocity statutes have been enacted.[10] The typical reciprocity statute makes the right of a nonresident alien to inherit real or personal property contingent upon the grant by the domestic laws of the alien's nation of a like right to a citizen of the United States. Section 259 of the California Probate Code, for example, provides:

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5. O. GIBSON, ALIENS AND THE LAW, app. B. Tabs, 5-6, at 180-81 (1940).

6. Note, *State Statutes Affecting The Inheritance And Distribution Of Estates To Foreign Heirs*, 1967 U. ILL. L.F. 141.

7. *See* ch. 895, § 2, [1941] CAL. STAT. 2474.

8. ARIZ. REV. STAT. ANN. § 14-212(c) (1956); CAL. PROB. CODE § 259 (West 1959); MONT. REV. CODES ANN. § 91-520 (1964); NEV. REV. STAT. ch. 134.230 (1967); OKLA. STAT. ANN. tit. 60, § 121 (West 1971); TEXAS CIV. STAT. art. 166(a) (Vernon 1969). These statutes prevent heirs from inheriting estates unless their countries of residence grant reciprocal rights to American citizens.

9. CONN. GEN. STAT. § 45-278 (Supp. 1970-71); FLA. STAT. ANN. § 731.28(2) (1965); MD. ANN. CODE art. 93, § 161 (1964); MASS. GEN. LAWS ch. 206 § 27B (Supp. 1968); MICH. STAT. ANN. § 27.3178 (306a) (Supp. 1970); N.J. STAT. ANN. 3A: 25-10 (Supp. 1971-72); N.Y. SUR. CT. PROC. ACT § 2218 (McKinney Supp. 1971); OHIO REV. CODE ANN. § 2213.81 (Page's Supp. 1970); PA. STAT. ANN. tit. 20, § 1156 (Purdon's Supp. 1971); WIS. STAT. ANN. § 318.06(8)(b) (Supp. 1970-71). These statutes prevent the distribution of estates to an alien beneficiary when it appears that the beneficiary will be deprived of the "benefit, use and control" of the estate.

10. *See* note 8 *supra*.

> The right of aliens not residing within the United States or its territories to take real [and 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 real [and personal] property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. . . .
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> 259.1 The burden shall be upon such nonresident aliens to establish the fact or existence of the reciprocal rights set forth in Section 259.
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> 259.2 If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, then property shall be escheated property.

Reciprocity statutes give absolutely no inheritance rights to nonresident aliens who fail to meet the statutory requirements. The estate immediately escheats to the state if it is found that the alien's country shows partiality toward its own citizens.[11]

Reciprocity statutes were first passed in 1941. Unlike the drafters of the "benefit-use" statutes the drafters of the reciprocity statutes were not generally concerned with the protection of the beneficiary's rights. Rather, they had another basic purpose in mind: to secure from foreign governments at least basic inheritance rights for United States citizens.[12]

A primary criticism of the reciprocity statutes concerns the burden-of-proof provisions.[13] In the absence of competent evidence to the contrary, reciprocity is presumed not to exist. The burden of rebutting the presumption is on the alien beneficiary and difficulties of proof, prejudice, expense and the fact that in this area of law judicial precedent is not followed may render the burden insurmountable.[14]

A treaty is pre-emptive of any state legislation regulating the inheritance of property by aliens.[15] Reciprocity statutes cannot

11. CAL. PROB. CODE § 259.2 (West 1959).

12. *See* Clostermann v. Schmidt, 215 Ore. 55, 332 P.2d 1036, 1042 (1958).

13. *See generally* Jones, *Iron Curtain Distributees: A Mounting Problem In Pennsylvania's Orphan's Courts*, 69 DICK. L. REV. 779, 808-12 (1962).

14. Montana has the only statute which is silent on this point, but the burden has been placed on the alien beneficiary by judicial decision. *In re* Gaspar, 128 Mont. 383, 275 (1954).

15. *In re* Estate of Romaris, 191 Cal. 740, 218 P. 421, 423 (1923). The treaty does not abrogate or repeal the state law but suspends its effect for the

be applied to those countries to which the federal government has granted equal inheritance rights. This is due to the fact that a state statute conflicting with a treaty between the United States and a foreign nation must yield to the treaty.[16] In the case of *Kolovrat v. Oregon*[17] the United States Supreme Court held that an 1881 treaty with Serbia (now Yugoslavia), containing a "most favored nation clause"[18] which guaranteed Yugoslav citizens equal inheritance treatment, precluded the application of reciprocity legislation to that country so long as the treaty remained in force.[19] In order for the treaty to pre-empt the state statute it must be directed to reciprocity. Therefore, where a treaty merely gives aliens residing in the United States all the rights of citizens of the United States, such a treaty does not affect the state's reciprocity statute.[20] The treaty must express an overriding federal policy, before the state reciprocity statute will be superceded.[21] Furthermore, state courts have usually placed a strict construction upon treaty provisions. Where a treaty provision violates the right of a state to control the transmission of property, the courts have held that the treay will be construed

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duration of the treaty. *See* Blythe v. Hinckley, 180 U.S. 333, 340; Geofroy v. Riggs, 133 U.S. 258, 266 (1890). Upon expiration of the treaty the state law again controls the inheritance of property by alien beneficiaries. Pierson v. Lawler, 100 Neb. 783, 161 N.W. 419 (1917).

16. Clark v. Allen, 331 U.S. 503, 517 (1947). It has also been held that the benefit type of legislation cannot be used to prevent distribution to heirs in countries to which federal treaties guarantee reciprocal inheritance rights. Consul General of Yugoslavia v. Penn., 385 U.S. 395 (1964).

17. 366 U.S. 187 (1961). The Court held that in spite of the wide discretion left in Yugoslav authorities for the payment of legacies, the "Oregon state policy must give way to supervening U.S.-Yugoslavian arrangements . . . ."

18. The "most favored nation clause" is construed to allow the citizens of one of the contracting parties to the treaty to be treated as if they were citizens of the other contracting party. 1 OPPENHEIM, INTERNATIONAL LAW § 580, n.3 (8th ed. 1955).

19. Treaty with Serbia for facilitating and developing commercial relations, Oct. 2, 1881, 22 Stat. 963. Recent treaties usually give aliens only a qualified right to succeed to property, requiring that the property be disposed of within five years. *See, e.g.*, Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, Oct. 29, 1954, art. IX, para. 2 [1956] 2 U.S.T. 1839, 1850, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation with Japan, April 2, 1953, art. IX, para. 3 [1953] 2 U.S.T. 2063, 2071, T.I.A.S. No. 2863.

20. *In re* Estate of Arbulich, 41 Cal. 2d 86, 257 P.2d 433 (1953).

21. Article IV of the 1923 Treaty with Germany, 44 Stat. 2135, T.S. No. 725, was held to override the state policy in the case of *In re* Estate of Kreamer, 276 Cal. App. 2d 715, 81 Cal. Rptr. 287 (1969).

when possible as not overriding state law.[22]

If evidence is introduced by the alien beneficiary that a treaty exists between his nation and the United States regulating inheritance, "then the determination of the alien's right to inherit becomes a question of law."[23] Therefore, the alien beneficiary must establish reciprocity in one of two ways: (1) either by proof of the existence of relevant treaty provisions; or (2) by introducing evidence as to the law of the foreign nation in question and evidence to the effect that other United States citizens have in fact received bequests from estates probated in that country.[24]

Once an alien's inheritance rights vest under a treaty, the subsequent expiration of that treaty will not divest those rights.[25] This results from the extensive protection which the courts have given to these vested rights.[26] However, a contingent right in property under a treaty which is not perfected before the treaty expires is extinguished.[27]

The United States treaty provisions relating to the inheritance of property by nonresident aliens and the judicial interpretations of these provisions have produced unwarranted misunderstanding. This situation has been caused by two factors: (1) the language used in the treaties; and (2) the attitude of the state courts toward these treaties.

Some of the uncertainty can be traced to the difference in definition of terms existing between civil and common law countries. The 1783 treaty with Sweden[28] is a perfect example. The courts were divided as to the meaning of the words "goods and

22. *See* Moody v. Hagen, 36 N.D. 471, 490, 162 N.W. 704 (1917), *aff'd*, 245 U.S. 633 (1917).

23. Comment, *The Statutory Regulation Of Inheritance By Nonresident Aliens*, 13 VILL. L. REV. 148, 155 (1967).

24. *In re* Estate of Ginn, 136 Mont. 338, 347 P.2d 467 (1969), the court rejected the contention that the alien could not receive any amount in excess of that previously granted without proof of reciprocity for the amount claimed. "Once reciprocity is proven there is no limit to the amount to be received."

25. *See* Goos v. Brocks, 117 Neb. 750, 756, 223 N.W. 13 (1929); Fiott v. The Commonwealth, 53 Va. 564, 577 (1855).

26. *See* The Society for the Propagation of the Gospel v. New Haven, 21 U.S. (8 Wheat.) 464 (1823).

27. Buchanan v. Deshon, 1 Harr. and G. (Md.) 280 (1827) (contingent right of dower and the treaty expired before the husband died).

28. Treaty of Amity and Commerce with Sweden, April 3, 1783, 8 Stat. 64.

effects" in article 6 of the Treaty. The confusion centered on the question of whether or not the Treaty related to real property as well as to personal property. One side contended that "goods and effects" clearly included only personal property and the treaty could not be extended to cover real property.[29] The other side took the meaning of the words as allowing aliens to succeed to real property.[30]

II. ZSCHERNIG V. MILLER

Reciprocity legislation has also been sharply criticized in that it comes too close to involving the states in the conduct of foreign affairs.[31] Such abuses were destined to be challenged. The challenge was presented to the United States Supreme Court in *Zschernig v. Miller*.[32] The Court, per Justice Douglas, held an Oregon inheritance statute with "reciprocity" and "benefit-use" provisions to be unconstitutional.[33] It was the opinion of the Court that the provisions of the Oregon statute, *as applied*, was an invalid intrusion by the state into the field of foreign affairs.[34] The decision restricted state courts to a "routine reading" of foreign laws since state courts have, in the past, interjected their personal bias when dealing with foreign governments. Such conduct was held to have a "persistent and subtle" effect on foreign affairs.[35] The opinion distinguished *Clark v. Allen*[36] by indicating that the *application* of the California reciprocity statute[37] then in question did not, on its face, constitute an intrusion into foreign affairs. The United States Supreme Court, in *Clark*,

29. Johnson v. Olson, 92 Kan. 819, 145 P. 256 (1914); Meier v. Lee, 106 Iowa 303, 76 N.W. 712 (1898).

30. Erickson v. Carlson, 95 Neb. 182, 145 N.E. 352 (1914); Adams v. Akerlund, 168 Ill. 632, 48 N.E. 454 (1897).

31. There has been at least one instance in which a state law governing the capacity of aliens to hold real property caused an international incident. *See* M. KNOVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 157-61 (1946).

32. 389 U.S. 429 (1968).

33. Ch. 591, § 305 [1969] Oregon Laws (repealed 1969).

34. The Court found that Oregon's application of it's alien inheritance statute did affect foreign affairs. The Court held: "It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way." Zschernig v. Miller, 389 U.S. 429, 440 (1968).

35. *Id.* at 441. One of the most blatant examples of unconstitutional activity that the Court cited was *In re* Estate of Gagabashvele, 195 Cal. App. 2d 503, 16 Cal. Rptr. 77 (1961).

36. 331 U.S. 503, 517 (1947).

37. CAL. PROB. CODE § 259 (West 1959).

reasoned that the reciprocity statute in question had only incidental or indirect effect on foreign affairs.[38] In deciding *Zschernig* the Court refused to overrule *Clark*, therefore, "state statutes, as worded, have not been overruled. They have only been overturned as applied—where they have sanctioned an involvement with international relations."[39] From this it appears that the validity of the statute, *as applied*, must be decided on a case-by-case basis. *Zschernig* called for a "routine reading" of foreign laws and so long as state courts comply, their decisions will be constitutional.

Probate courts face the obvious difficulty of attempting to ascertain what constitutes a "routine reading" of foreign laws and determining at what point investigation by a state court becomes an unconstitutional intrusion into the field of foreign affairs. As Mr. Justice Stewart stated in *Zschernig*, the resolution of the constitutional issue may vary from day to day.[40] More definite guidelines are urgently needed as to what federal and state responsibility is in this area. Many post-*Zschernig* decisions have suggested that the states' position be clarified[41] and until the Supreme Court develops guidelines as to what constitutes a "routine reading" of foreign laws, probate courts will be in a state of uncertainty.

Conceding the reciprocity statutes' admirable purposes, it is evident that they have not accomplished their supposed goals. Such statutes have not obtained equal inheritance treatment in foreign countries for United States citizens. One explanation is that few states have adopted reciprocity statutes and their application, even within a given jurisdiction, has not been uniform.[42] Not only have the statutes failed to accomplish their goals but they also unduly restrict an American citizen's freedom of testamentary disposition. The statutes often raise complex legal and factual issues resulting in expensive litigation which may deplete the alien's potential inheritance. Finally, it has become evident

38. 331 U.S. 503, 517 (1947).

39. Note, *Conflict of Laws-Constitutionality of State Statutes Governing Ability of Nonresident Aliens to Receive Property Under American Wills; Zschernig v. Miller*, 21 VAND. L. REV. 502, 513 (1968).

40. Zschernig v. Miller, 389 U.S. 429, 443 (1968).

41. *In re* Estate of Leikind, 22 N.Y.2d 346, 292 N.Y.S.2d 681, 239 N.E.2d 550, 553 (1968); Goldstein v. Cox, 299 F. Supp. 1389, 1394 (S.D.N.Y. 1968); Bjarsch v. Difalco, 314 F. Supp. 127, 137 (S.D.N.Y. 1970).

42. Berman, *Soviet Heirs In American Courts*, 62 COLUM. L. REV. 257, 268-72 (1962).

that the *Zschernig* decision did not establish the clear and definite guidelines necessary to eliminate the problems associated with alien beneficiaries. The post-*Zschernig* application of alien inheritance statutes indicates that some states have managed to justify their enforcement notwithstanding *Zschernig*.

III. IRON CURTAIN STATUTES

Prior to World War II it was necessary for state courts to consider the fact that an alien beneficiary might be deprived of the estate due him because of the political situation in his own country. But the events in Europe during the early 1940's caused a change of attitude toward alien beneficiaries, and this led to the institution of the "benefit-use" statutes. This change was necessary in order to protect the testator's wishes and to prevent the confiscation of the estate by a foreign government.

Eastern states have rejected reciprocity legislation and have promulgated statutes of the benefit, use and control type,[43] commonly known as the "Iron Curtain Statutes." Section 2218-1 of the New York Surrogate Court Procedure Act, the prototype of these statutes, provides:

> Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit, use or control of the money or other property due him, or where payment should be withheld, the decree may direct that such money or other property be paid into the surrogate's 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 judgement of a court of competent jurisdiction.

The most important characteristic of the "benefit-use" legislation is that the alien's right to ownership is formally guaranteed. Ostensibly, the statute's purpose is to afford the alien's inheritance further protection. The distribution of the estate to an alien beneficiary is withheld until it appears that he will have the "benefit, use and control," of the estate.[44] Such a procedure is thought to effectuate the testator's intent. Although the statutes are not primarily retributive measures enacted against Iron

43. *See* note 9 *supra*.

44. N.Y. SUR. PROC. ACT § 2218-2 (McKinney Supp. 1971-72).

Curtain countries,[45] most of the cases arising since World War II have involved them.[46] These statutes, as an allegedly subordinate aim, prevent the confiscation by, and the enrichment of, governments whose political ideas differ from those of the United States.[47] An examination of these statutes leads to the conclusion that this purpose is in fact controlling and the welfare of the alien beneficiary and the testator's intent are not seriously considered.[48]

In the majority of the cases, the burden of proof is placed upon the alien beneficiary to persuade the courts that he will enjoy the full benefit of the estate.[49] Placing such a burden upon the alien appears to frustrate the avowed purpose of the legislation—to protect the interest of the potential alien beneficiary. Withholding distribution of an estate for an indefinite period means that some aliens may never benefit from their inheritance,[50] and this already onerous burden may be increased in several respects: (1) by a local court's bias against certain forms of government; (2) by lack of information regarding foreign law; and (3) by the expense of presenting proof as to the nature of foreign law.

In order to determine whether to distribute an estate to an alien beneficiary the courts are required, by *Zschernig*, to do no more than routinely read foreign laws. Yet, because of the nature of the "benefit-use" statutes this alone is insufficient. Any realistic attempt to apply the criteria of the statute would involve more than a "routine reading" of foreign law. The state courts, in applying the bare words of the statute, would be required to examine the alien's actual ability to use and benefit from the estate once released to him.[51] This would require an evaluation of

45. *In re* Estate of Wells, 204 Misc. 975, 126 N.Y.S.2d 441 (Sur. Ct. 1953).

46. *See, e.g.*, the table of cases printed in 12 BUFFALO L. REV. 630 (1963). Since World War II, there has been only two attempts to apply a benefit statute to a non-communist country. Rhode Island Hosp't Trust Co. v. Hohnson, 81 R.T. 115, 91 A.2d 12 (1953); Lagoe Estate, 7 Pa. Fiduciary Rptr. 257 (Orphan's Ct. 1957).

47. *In re* Estate of Url, 7 N.J. Super. 445, 71 A.2d 605 (P. Div.), *appeal dismissed*, 5 N.J. 507, 76 A.2d 249 (1950).

48. First Nat'l Bank v. Fishman, 7 Ohio Misc. 130, 127 N.E.2d 60 (1966); Blemecich Estate, 441 Pa. 506, 192 A.2d 740 (1963).

49. N.Y. SUR. CT. PROC. ACT § 2218-3 (McKinney Supp. 1971-72).

50. *See* Ioannou v. New York, 371 U.S. 30 (1962).

51. Chaitken, *The Right of Residents of Russia and its Satellites to Share in Estates of American Decedents*, 25 So. CAL. L. REV. 296, 299 (1952).

foreign law, the credibility of diplomatic statements, and the policies of national government.[52] These are clearly an involvement in foreign affairs and international relations which the Constitution entrusts solely to the federal government and is prohibited by the *Zschernig* decision.[53] Therefore, it may be concluded that the nature of the "benefit-use" statutes since *Zschernig* have not changed; only the language of the courts in determining the presence or absence of the criteria effected.[54]

There can be little question that state "benefit-use" statutes governing alien inheritance rights affect foreign relations. The most serious objection to the "Iron Curtain" statutes is that their administration has been a chronic source of embarrassment to the State Department. In applying the statute, courts have not hesitated to brand Iron Curtain countries as enemies and to refuse to recognize consuls as attorney in fact for the potential alien beneficiary.[55] It is hardly surprising that the United States Attorney General has described the statutes as a "recurrent source of diplomatic friction."[56]

IV. TREASURY REGULATION

In other cases, a virtually irrebuttable presumption arises that aliens of certain nations will not have full use, benefit, and control of the estate from a Treasury Department Regulation which states:

> [t]he Secretary of the Treasury hereby determines that postal transportation, or banking facilities in general or local conditions in Albania, Communist-controlled China, Cuba, North Korea, North Viet-Nam, the Russian Sector of Occupation of Berlin, Germany are such that there is not a reasonable assurance that a payee in those areas which actually receive checks or warrants drawn against funds of the United States,

52. Zschernig v. Miller, 389 U.S. 429, 441 (1968) (concurring opinion J. Stewart).

53. There are many decisions involving "benefit-use" statutes where official documents and expert witnesses were considered completely insufficient by the courts. *In re* Estate of Shefsick, 50 Misc. 293, 270 N.Y.S.2d 34 (Sur. Ct. 1966); *In re* Estate of Dragnoff, 40 Misc. 2d 167, 259 N.Y.S.2d (Sur. Ct. 1965); *In re* Estate of Getream, 200 Misc. 543, 107 N.Y.S.2d 224 (Sur. Ct. 1951).

54. Since *Zschernig* the language used by the Surrogate's in their decisions is barren of any reference to the socio-political conditions with the alien's country.

55. Matter of Braunstein, 204 Misc. 975, 126 N.Y.S.2d 441 (Sur. Ct. 1952); *See* Comment, U. CHI. L. REV. 329 (1951).

56. Clark v. Allen, 331 U.S. 503 (1947).

> or agencies or instrumentalities thereof, and be able to negotiate the same for full value.[57]

This regulation prohibits the drawing of government checks in favor of persons residing in specified nations of the Communist bloc, since there is no assurance the named payee will receive full value.[58]

In 1951, the New York Court of Appeals reversed an earlier position allowing distribution of estates to heirs in Iron Curtain countries, citing the Treasury Regulation.[59] From this decision it has become the position of many courts that the regulation is not limited merely to checks drawn on government funds but is the official federal policy controlling distribution of estates under state law.[60] The State Department has never endorsed this application but "has repeatedly stated that distribution of estates to heirs in Communist countries is not restricted by federal law."[61]

The Treasury Regulation has divided the courts as to the weight to be given to the proscribed list. On the one hand, it is felt that the federal government is presumably well informed concerning conditions in the beneficiary's country and the list should be given considerable weight.[62] On the other hand, courts have recognized that the regulation is expressly limited in scope to federal funds and regard the regulation as one of many factors to be considered.[63]

There is a fallacy in relying on the Treasury Regulation as controlling evidence of the factual situation of an alien beneficiary. For placement or removal of a country on or off the list may be in furtherance of political, diplomatic or other objectives

57. 31 C.F.R. 211.2(a) (Supp. 1971). The People's Republic of China was added to the list in 1951. Poland was removed from the list in 1957.

58. *In re* Estate of Best, 200 Misc. 332, 107 N.Y.S.2d 224 (Sur. Ct. 1951); *In re* Estate of Getream, 200 Misc. 543, 107 N.Y.S.2d 224 (Sur. Ct. 1951).

59. *In re* Estate of Alexandroff, 61 N.Y.S.2d 866, 867 (Sur. Ct. 1945).

60. In case after case, the courts, particularly New York's Surrogate's courts, have relied entirely upon this regulation in applying their inheritance statutes. *In re* Estate of Best, 200 Misc. 332, 107 N.Y.S.2d 224 (Sur. Ct. 1951) (U.S.S.R.); *In re* Estate of Braier, 30 N.Y. 148, 111 N.E.2d 424 (1953) (Hungary); *In re* Estate of Wank, 199 Misc. 1119, 197 N.Y.S.2d 407 (Sur. Ct. 1951) (China); *In re* Estate of Geffen, 199 Mis. 756, 104 N.Y.S.2d 490 (Sur. Ct. 1951) (Lithuania).

61. *See* Berman, *supra* note 42, at 265.

62. *See* Wolder's Estate, 28 Pa. D. & C.2d 51, 53 (Orphan's Ct. 1962).

63. *See, e.g., In re* Estate of Shefsick, 50 Misc. 293, 270 N.Y.S.2d 34 (Sur. Ct. 1966); *In re* Estate of Saniuk, 40 Misc. 2d 437, 243 N.Y.S.2d 47 (Sur. Ct. 1963).

of the United States. This became evident when Poland was removed from the list of countries to which Treasury checks could be sent.[64] This resulted not because of a change in local conditions, but because of a change in Polish-American relations, and in particular, the negotiation of a Polish-American commercial agreement.[65] The absurdity of relying on the Treasury Regulation is further demonstrated when property may be effectively bequeathed to a person living in Poland, yet, a person living in the Ukraine, with essentially similar economic, political, and legal systems, may not receive the same property.[66]

One of the major objections to the courts' use of the Treasury Regulation in interpreting the "benefit-use" statutes has been the fact that the regulation does not address itself to inheritance matters. Clearly, the subject matter of the "benefit-use" statutes is beyond the scope of federal law.

V. INTERNATIONAL UNIFORM PROBATE CODE

A. History

By looking at the present statutory schemes dealing with alien inheritance and the confusion in estate administration which they precipitate, it becomes evident that there is an urgent need to coordinate inheritance laws of the United States and other nations.

Bilateral treaties have mitigated the problems of some aliens who inherit property located within those states which perpetuate restrictions on the transmission of property to nonresident aliens.[67] However, such treaty provisions are of no benefit to

64. 22 Fed. Reg. 4134 (1957), *amending* 31 C.F.R. § 211.3(a) (Supp. 1957).

65. Surplus, Agricultural Commodities Agreement with the Polish People's Republic, June 7, 1957 [1957] 8 U.S.T. 799, T.I.A.S. No. 3839. Removal of the prohibition on transmittal of treasury checks and remittances to Polish residents was explained by the State Department as following from "the change in Polish exchange and other administrative regulations . . . of the Polish minister of France, dated Nov. 7, 1965, removing the prohibition on the possession of foreign means of payment by Polish citizens in the country, as well as . . . the introduction of a new exchange rate in regard to remittances from abroad, effective Feb. 11, 1957." 36 DEP'T STATE BULL. 1003-04 (1957).

66. Matter of Moroz, Sur. Ct. Massena, N.Y., Feb. 10, 1961 (Hon. Lott. H. Wells, Surrogate). New York court ordered distribution to legatees in Poland but withheld distribution to heirs in the Soviet Union, when all took equally under the same will, on the grounds that the Polish heirs would have full benefit of the estate bequeathed to them but the Soviet heirs would not.

67. Treaty with Italy, Feb. 2, 1948, art. VIII, § 2, 63 Stat. 2255, 2266

aliens who are not residents of countries which have treaties with the United States. Furthermore, the United States treaty commitments do not directly abrogate state inheritance statutes pertaining to alien beneficiaries.[68] By eliminating such restrictions through an international uniform probate code it would permit a realization of the testator's intent by assuring alien beneficiaries the receipt of property due them under the terms of the will.

The need to coordinate inheritance laws of the various nations through international agreement was recognized at the Hague Conference on Private International Law in 1893.[69] Notwithstanding so early an effort, the administration of alien inheritance laws has remained plagued by a diversity of national laws.[70] Due to the increased mobility of our society and the United States involvement in international trade and industry, the need for uniformity among nations constantly increases.

In the past the United States has not actively participated in the development of international uniform laws.[71] In 1963, however, Congress appropriated funds to send United States delegates to the International Institute for the Unification of Private Law and to the Hague Conference on Private International Law.[72] Since that time the United States has been actively involved in the development of conventions for unifying private international law. United States delegates participated in formulating the Draft International Convention Providing a Uniform Law on the Form of Wills,[73] and in the 1964 and 1968 sessions of the Hague Conference.[74] Future conventions to coordinate international

(1949), T.I.A.S. No. 1965 (3 years); *see* O. GIBSON, *supra* note 5, app. B. tabs. 8(a), at 182-83.

68. *See, e.g.*, Treaty with Argentina, July 27, 1853, art. IX, 10 Stat. 1005, 1009 (1853), T.S. No. 4.

69. *See* Rabel, *The Form of Wills*, 6 VAN. L. REV. 533, 534 (1953).

70. 4 E. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 271 (1958).

71. *See generally* Nadelmann, Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law, 102 U. PA. L. REV. 323 (1954); Potter, *Inhibitions Upon the Treaty-Making Power of the United States*, 28 AM. J. INT'L L. 456 (1934).

72. Congress appropriated $25,000 to send U.S. delegates to the convention. H.R.J. Res. 778 of Dec. 30, 1963, 22 U.S.C. § 269(g) (1964).

73. *Rome Institute Draft International Convention Providing a Uniform Law on the Form of Wills*, 2 INT'L LAW. 251 (1968).

74. *See Report of the United States Delegation to the Eleventh Session*, 8 INT'L LEGAL MATERIALS 785 (1969); Kearney, *Progress Report—International Unification of Private Law*, 23 RECORD OF N.Y.C.B.A. 220 (1968).

succession laws are likely to occur since the 1972 Hague Conference has the topic on its agenda.[75]

There is good cause for the United States and other nations to adopt internationally uniform laws as a method for administering estates of foreign beneficiaries. The same types of legal problems which exist in the United States probate laws, also exist on an international scale. In the United States, the Commissioners on Uniform State Laws have sought in vain to resolve the differences among state probate laws by means of a uniform law.[76] However, politics and personal interests have prevented the development of these uniform acts.[77] Nevertheless, the Uniform Commercial Code has demonstrated the effectiveness of uniform acts as a means of reducing conflict of laws. Basically an international uniform probate code could perform the same functions.

B. Uniform Probate Code

Primarily, the Uniform Code should provide a standard will form to which all nations would agree and which would cover every disposition of property made by a will. This could be accomplished by adopting the proposal of the Draft Convention.[78] By implementing an international will form into the Uniform Code the necessity of searching for applicable law and the examination of formalities prescribed by such law would no longer be necessary. Also, the will would be valid irrespective of the nationality, domicile, or residence of the testator. Secondly, the Uniform Code should establish which courts would have jurisdiction for determining testamentary capacity. By establishing these courts the intent of the testator would more likely to be fulfilled as it would be less difficult to ascertain whether or not the testator had the capacity to make a will.

The Uniform Code should also provide a means whereby it could be determined whether the states' local law or some other nation's law would serve as the basis for determining testamentary capacity. Finally, and perhaps the most important, state law

75. 8 INT'L LEGAL MATERIALS 824 (1969).

76. In 1967 the following Uniform Acts were recommended for adoption by the states: *Ancillary Administration of Estates Act; Model Estates Act; Model Execution of Wills Act*, J. RICHIE, N. ALFORD & R. EFFLAND, CASES AND MATERIALS ON DECEDENT'S ESTATES AND TRUSTS 25 n.91 (3rd ed. 1967).

77. *Cf.* Lee, *Some New Features in the Consular Institutions*, 44 GEO. L.J. 406, 414-15 (1956).

78. *See Rome Institute . . .*, *supra* note 73.

barriers to alien inheritance should be subordinated to the provisions of the Uniform Code. The Uniform Code should either completely invalidate alien disabilities under state statute, or prohibit discriminatory treatment of aliens which are residents of adhering nations.

C. United States Implementation

Once the Uniform Code has been developed it can become federal law by one of two ways: (1) either as a treaty under article II, section 2, of the United States Constitution; or (2) as an executive agreement with the approval of Congress. However, irrespective of whether the Uniform Code is implemented as a treaty or as an executive agreement, the result would be the enactment of federal legislation governing the distribution of estates to alien beneficiaries.

VI. CONCLUSION

It seems apparent that reciprocity and benefit statutes in their present form do not adequately accomplish the purpose for which they were enacted. Not only do they frustrate the testamentary scheme of the decedent but they have caused a tremendous amount of confusion in estate administration. It appears that the interest of the foreign beneficiary and of the testator would be better effectuated by the formation of an International Uniform Probate Code.

The most efficient means of accomplishing the goal of an International Uniform Probate Code is through multilateral conventions. However, little will result from the 1972 Hague Conference toward developing a uniform code since the Conference has given second place on the agenda to problems relating to the administration of decedent's estates.[79] Therefore, in order to develop a uniform code and eliminate the current problems it will be necessary to formulate a multilateral convention for the unification of probate law. It would be necessary for this convention to establish a uniform code that would be recognized by all nations adhering to the Convention. Until an International Uniform Probate Code is developed and adopted, all the future holds for the alien beneficiary is confusion and speculation.

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79. *See* Lee, *supra* note 77.