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Comparative Law--Consular Agent Representing His National as Beneficiary

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A resident of the United States died leaving a will in which his wife was not mentioned. D, the consular agent of the de jure government of Lithuania, filed a written renunciation of the will in behalf of W, a resident of Lithuania. D had no means of communicating with W. P, executor of T's will, sought to expunge the order accepting the renunciation. Held, petition granted. A consular agent is a representative of a foreign government empowered to safeguard the citizens of his country and to assure them of fair treatment according to the laws of the country in which he officiates. However, in the absence of some additional grant of authority a consul is not the personal agent of his national. The consular agent may derive the authority to act as personal agent from treaties which give him the power of attorney, court appointments to represent incompetents or personal authority from his national. In the instant case D failed to prove any requisite authority. In re Klekunas, 56 Ill. App. 2d 70, 205 N.E.2d 497 (1965).

A consular agent is an agent commissioned by a government to represent it in a foreign country to protect and promote its interest and those of its citizens. Oscanyan v. Arms Co., 103 U.S. 261 (1880). Because the consular agent must represent his citizens' interests and because these interests often involve property in the foreign state, the consular agent is of necessity often required to participate in litigation on behalf of a beneficiary's interest in an estate. Lee, Some New Features in the Consular Institution, 44 Geo. L.J. 406, 410 (1956). His legal capacity to represent a national is one of the main issues involved in litigation similar to the principal case. This is due to a variety of statutory provisions among the states. In the United States, real property law is regulated by the state governments. Clarke v. Clarke, 178 U.S. 186, 190 (1900). In addition to

1 A government de jure is one that ought to possess the powers of sovereignty, though at the time it may de deprived of them, whereas a government recognized as the government de facto is one really in possession of powers of sovereignty, although possession be wrongful. O'Connell, International Law 174 (1965). In the principal case, Russia is the de facto government of Lithuania. The United States does not recognize the forced incorporation of Lithuania into the Union of the Soviet Socialist Republic. It continues to recognize the diplomatic and consular officers of the Republic of Lithuania. In Re Alexandravicus, 83 N.J. Super. 303, 199 A.2d 662 (1964).
the many state statutes on this subject, there are other factors which may supersede the statutes.

A consul may derive power to intervene for his national in a decedent's estate from (1) appointment by the court as conservator or guardian of an incompetent national, (2) authorization by a power of attorney conferred by his national, (3) authorization by a power of attorney conferred by treaty, or (4) authorization by virtue of his office as consular agent according to customary international law.

One who acquires power as a conservator or guardian is appointed by the court whenever the beneficiary is unable to manage his own interests. However, the guardian cannot elect to take the intestate share for the incompetent without judicial or legislative authority. Whether the court or the guardian is empowered to make the choice is determined by the statutory provisions of the particular state. 5 PAGE, WILLS, §47.18 (4th ed. 1962). In the principal case, had the consular agent been appointed guardian, the court still would have had jurisdiction of the subject matter because in Illinois the guardian is required to follow the court's orders; he does not exercise his own judgment. In re Reighard's Estate, 401 Ill. 364, 84 N.E.2d 345 (1949). Some states have statutory regulations which preclude appointment of a consular agent as a guardian. An example is West Virginia's statute which provides, "Notwithstanding any other provision of law, no person not a resident of this state . . . shall be appointed or act as executor, administrator, curator, guardian, or committee . . . ." W. Va. Code ch. 44, art. 5, § 3 (Michie 1961). An examination of applicable state statutes is necessary to determine the consul's powers with respect to guardianship.

By procurement of his national's personal authorization, the consul may exercise the national's right of election although it is purely a personal right. 5 PAGE, WILLS, §47.16 (4th ed. 1962). When an Italian citizen entered into an agreement to give her attorney in the United States the right to represent her best interests, the court construed this general power of attorney to include the right to make an election to take her intestate share. In re Celenza's Estate, 308 Pa. 186, 162 Atl. 456 (1932). This power to elect has been allowed a consular agent when expressly given by a person interested in the decedent's estate. In re Skewry's Will, 33 N.Y.S.2d 610 (Sur. Ct. 1942).
Many United States treaties authorize a consul to represent his nationals with respect to a decedent's estate. Boyd, *Consular Functions in Connection with Decedents' Estates*, 47 Iowa L. Rev. 823, 844 (1962). At one time the decedent had to be a fellow citizen of the national; however, many treaties no longer make this a requirement. *In re Houston's Estate*, 145 Misc. 417, 261 N.Y. Supp. 317 (Sur. Ct. 1932). Recent treaties have enabled courts to recognize the consular agent as having the power of attorney in the absence of any duly authorized representatives. *Lachowicz v. Lechowicz*, 181 Md. 478, 30 A.2d 793 (1943).

Treaties giving consular agents representative functions may be construed as restricted or unrestricted. Lee, *Some New Features in the Consular Institution*, supra at 411. The unrestricted treaties give the consular agent the right to represent his national in a situation similar to that in the principal case if the national is otherwise unrepresented. *In re Zalewski's Estate*, 265 App. Div. 878, 38 N.Y.S.2d 37 (Sup. Ct. 1942). Restricted treaties require an interpretation of local law because they give the consul rights only in so far as state laws permit. Lee, *Some New Features in the Consular Institution*, supra at 395. However, the Illinois court in the principal case did not find an applicable treaty under which such authority could be claimed.

Cases have held that merely by virtue of his office a consular agent may represent his national in a decedent's estate. Lee, *Some New Features in the Consular Institution*, supra at 410. The Supreme Court recognized the right of a consular agent to institute a proceeding for his fellow citizens without their personal authorization. *The Bello Corrun*, 19 U.S. 152 (1821). This case dealt with property seized by custom officers of the United States. However, it has been cited as authority for allowing a consul to represent his national in a partition suit concerning an intestate estate in which the national was interested. *Zolezzi v. Tarantola*, 138 N.J. Eq. 579, 49 A.2d 482 (1946). In *Buxhoeveden v. Estonian St. Bank*, 181 Misc. 155, 41 N.Y.S.2d 752 (Sup. Ct. 1943), the court stated that a consul of a duly recognized government is a competent party to defend the property rights of his nation in the courts. The object for which consuls are appointed is to watch over the rights and interests of their subjects, and "in a country where laws govern, and justice is sought for in courts only, it would be a mockery to preclude them from the only avenue through which their course lies to the end of their mission."
Yet under local law in Illinois some source of authority is necessary before the consular agent can exercise the election privilege of his national to avoid a will. In the principal case there was no showing that the beneficiary was incompetent so as to justify appointment of the consul as guardian. Nor could the consular agent communicate with his national; thus he could receive no personal authorization as a power of attorney. There were no treaty provision giving the Lithuanian consul the power to act for his national in electing to avoid a will. The only possible source of authority would have been the inherent powers of a consul under principles of international law. However, the Illinois court in the instant case dismissed this possible source of authority by saying no right of election cases were found in which the consul’s authority was recognized without (1) a treaty or (2) an express power of attorney from his national. Apparently, the Illinois court found inapplicable the principles set forth in *The Bello Corrune*, supra and later cases applying these principles. Moreover, the Illinois court considered the relations between the de facto and the de jure governments and the fact that the consular agent of the de jure government would probably be unable to distribute the beneficiary’s share if he were allowed to recover it. Considerations which distinguish between de facto and de jure governments are said to be political rather than judicial. BRIGGS, *The Law of Nations* 129 (2d ed. 1952). Later cases indicate a tendency to distinguish between acts political in nature and those personal in nature in situations involving de jure and de facto governments. The courts will consider cases of a personal nature but state those involving political questions to be beyond their reach. *In re Alexandravicus*, 83 N.J. Super. 303, 199 A.2d 662 (1964). Whether equitable considerations will override considerations based on principles of international law is in the court’s discretion. The court in the principal case leaned toward equitable considerations.

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**Constitutional Law—Double Jeopardy**

*D* was indicted in New York for murder in the first degree and was thrice tried in the state courts on the same indictment. The jury in the first trial found *D* guilty of second degree murder. Following a reversal, *D* was tried under the same indictment and found guilty