IN THE SUPREME COURT OF THE STATE OF OREGON

GAIL RASMUSSEN
and BETHANNE DARBY,

Petitioners,

v.

ELLEN ROSENBLUM,
Attorney General,
State of Oregon,

Respondent.

(SC S061470)

En Banc

On petition to review ballot title filed July 5, 2013; considered and under advisement August 23, 2013.

Aruna A. Masih, Bennett, Hartman, Morris & Kaplan LLP, Portland, filed the petition and reply for petitioners.

Rolf C. Moan, Assistant Attorney General, Salem, filed the answering memorandum for respondent. With him on the answering memorandum were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

WALTERS, J.

The ballot title is referred to the Attorney General for modification.

1   WALTERS, J.

2   Pursuant to ORS 250.085(2), petitioners seek review of the ballot title for

3   Initiative Petition 12 (2014). Because we conclude that the ballot title does not

4   substantially comply with ORS 250.035(2), we refer it to the Attorney General for

5   modification.

6   The proposed measure provides, in part, that "[a]ll family giving is exempt

7   from taxation." It defines "family giving" to include giving by voluntary act or by

8   operation of law from one family member to another family member or trust. Current

9   Oregon law does not impose a tax on gifts during a person's lifetime; it does impose a tax

10   on property that is transferred as a result of a person's death. *See* ORS 118.010 and

11   118.160 (imposing state tax on transfers of property on death). However, that tax applies

12   only to estates valued at more than $1 million. ORS 118.160(1)(c). Consequently,

13   estates valued at less than $1 million would not be affected by Initiative Petition 12

14   (2014). The proposed measure would exempt estates valued at $1 million or more from

15   existing estate or inheritance taxes if such estates are transferred from one family member

16   to another family member or trust.

17   The Attorney General certified the following ballot title:

18   **"Exempts from state, local taxation 'family giving' (defined) of**
19   **any 'property' (defined), including by inheritance**

20   **"Result of 'Yes' Vote:** 'Yes' vote exempts 'family giving' (defined)
21   of 'property' (defined) -- including inheritance received from a 'family
22   member' (defined) -- from state or local taxation; reduces state revenue.

23   **"Result of 'No' Vote:** 'No' vote retains law taxing certain estates
24   and making those to whom estate property passes -- even if related to

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1 decedent -- liable for unpaid estate tax.

2 **"Summary:** Current law imposes one-time tax on estate of person
3 who dies when value of estate -- as determined by federal law -- is $1
4 million or more; if estate does not pay tax, those to whom estate property
5 passes are liable; does not otherwise tax property received as gifts or
6 inheritance. Measure precludes state, local tax on property -- defined as
7 including any legal or equitable interest in anything of value -- given from
8 one 'family member' (defined) to another family member; includes property
9 passed by will, inheritance, or other operation of law; exempts all 'family
10 giving' (defined) from taxation. Measure does not prohibit or restrict
11 ordinary property taxes imposed based on ownership of an interest in
12 property. Measure reduces state revenues; provides no replacement. Other
13 provisions."

14 Petitioners first object to the caption. A certified ballot title must contain a

15 "caption of not more than 15 words that reasonably identifies the subject matter of the * *

16 * measure." ORS 250.035(2)(a). Petitioners contend that the caption does not

17 "reasonably identif[y] the subject matter" of the measure, because it does not explain its

18 effect on current law. In particular, petitioners argue that the caption must make clear

19 "the significant policy choice at the heart of the proposed measure's effect"; that is, the

20 choice to exempt "family giving" from any estate or inheritance tax on estates of $1

21 million or more. For that proposition, petitioners cite this court's decisions discussing a

22 similar measure -- *Rasmussen v. Kroger*, 351 Or 358, 266 P3d 87 (2012) (*Rasmussen I*),

23 and *Rasmussen v. Kroger*, 351 Or 542, 270 P3d 250 (2012) (*Rasmussen II*) -- and ask that

24 we require the Attorney General to certify for this measure the same ballot title that the

25 Attorney General certified for that similar measure.

26 The similar measure to which petitioners refer is Initiative Petition 18

27 (2012). That measure would have enacted "a prohibition on the imposition of any state

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1   or local estate tax, inheritance tax, tax on property transferred in connection with a

2   person's death, or tax on the transfer of property between 'family members' as the

3   proposed measure define[d] that term." *Rasmussen I*, 351 Or at 360. The caption that the

4   Attorney General initially certified stated:

5   "Prohibits estate and inheritance taxes, and any tax on property
6   transfers between 'family members' (defined)"

7   *Id.*

8   The court described the parties' positions as to that caption as follows:

9   "According to petitioners, the certified caption erroneously suggests to
10   voters that the measure would prohibit taxes that presently apply to all
11   estates, when, in fact, the present statutory scheme taxes only estates with a
12   gross value of $1 million or more. The Attorney General responds that the
13   caption accurately informs voters that the measure would prohibit the
14   imposition of any estate or inheritance tax as well as tax on property
15   transfers between certain family members without suggesting that all voters
16   currently are subject to such taxes."

17   *Id.* at 361-62. After observing that it had twice considered similar arguments, the court

18   referred the ballot title to the Attorney General for modification. The court explained that

19   "prohibiting the imposition of current tax measures would represent a
20   significant policy choice that goes to the heart of the proposed measure's
21   effect -- *i.e*., the choice to no longer impose estate and inheritance taxes on
22   estates valued at $1 million or more. Because that effect is part of the
23   subject matter of the proposed measure, it must be acknowledged in the
24   ballot title's caption -- if it is possible to do so within the word limit -- in
25   order to inform voters of the scope of the proposed change."

26   *Id.* at 364.

27   Petitioners urge the same result in this case and ask us to require the

28   Attorney General to certify for Initiative Petition 12 (2014) the caption that the Attorney

29   General certified, after court referral, for Initiative Petition 18 (2012):

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1   "Nullifies existing inheritance tax on estates of $1 million, prohibits
2   taxing family property transfers."

3   The Attorney General recognizes the relevance of this court's reasoning in

4 *Rasmussen I*, but argues that the measure at issue here is more complicated than was the

5 measure proposed in Initiative Petition 18 (2012) and asserts that it would be difficult to

6 more fully describe the effect of this measure on existing law in 15 words or less. The

7 Attorney General also argues that the caption that petitioners propose, if used for this

8 measure, would be inaccurate and thereby misleading.

9   We agree that the caption that the Attorney General certified for Initiative

10 Petition 18 (2012) does not accurately describe the subject matter of Initiative Petition 12

11 (2014). For instance, unlike Initiative Petition 18 (2012), the measure at issue here does

12 not affect the taxation of all estates; it affects only the taxation of estates that pass to

13 family members or trusts. Therefore, the measure does not "nullify" inheritance taxes

14 generally, and a caption that so stated would be inaccurate. However, the fact that the

15 caption that the Attorney General certified in response to this court's decision in

16 *Rasmussen I* does not precisely fit the measure now at issue does not mean that we should

17 ignore the logic of the court's decision in that case. The court's conclusion in *Rasmussen*

18 *I* -- that the caption should reflect the measure's policy choice to no longer impose an

19 inheritance tax on estates valued at $1 million or more -- is applicable, at least in part,

20 here.

21   The proposed measure would exempt many estates valued at $1 million or

22 more from inheritance and estate taxes. Many people bequeath their property to family

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1   members by will, and Oregon law provides that the property of those who die without

2   wills passes to surviving family members by operation of law. *See* ORS 112.015 to

3   112.055 (law of intestate succession). Furthermore, although designing a caption that

4   accurately reflects that policy choice is undeniably a daunting task, we do not think that it

5   is insurmountable. Without requiring the Attorney General to use any one of the

6   following suggested captions, we advance them for her consideration:

7   Exempts property transfers within families (primarily inherited estates over
8          $1 million) from state taxes;

9   Exempts property transfers within families from state taxes, primarily
10   inherited estates over $1 million;

11   Exempts transfers within families from tax on inherited estates over $1
12   million, other state taxes.

13   Petitioners also object to the certified "yes" vote result statement on the

14   basis that it fails to provide the voter with sufficient substantive information to

15   understand the policy choice proposed by the measure's operative terms. We agree. ORS

16   250.035(2)(b) requires that the ballot measure include a "simple and understandable

17   statement of not more than 25 words that describes the result if the state measure is

18   approved." Like the caption, the "yes" vote result statement also must inform voters that

19   the primary effect of the measure will be to make transfers within families exempt from

20   existing inheritance and estate taxes on estates of more than $1 million.

21   The caption and the "yes" vote result statement do not substantially comply

22   with ORS 250.035(2)(a) and (b) in the respect that we have identified. The ballot title is

1   referred to the Attorney General for modification.[1]

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[1]   We reject without discussion petitioner's other challenges to the ballot title.