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FLORIDA'S CHARITABLE "MORTMAIN"* ACT

G. STANLEY JOSLIN**

Florida in 1933 turned to a legislative restriction on testamentary gifts to charities for the first time. Believing that unrestricted "death bed" charitable devises and bequests often resulted in unjust treatment of the heirs or spouse of the testator, the legislature provided that devises or bequests to charitable or religious institutions or purposes shall be invalid unless executed at least six months prior to the death of the testator, if the testator dies leaving certain heirs or a spouse surviving.¹ The intent is obvious;² but the advisability of such legislative restriction on the testamentary power is contested by many.³ It does not seem that such a restriction during a reasonable time before death, to protect natural objects of the testator's bounty, is improper; but rather, it is a just and needed shield to ward off certain influences which may be concentrated during this "death's-door" period.⁴

HISTORICAL NOTE

Although Florida is the only state to make an initial enactment of this testamentary restriction in the 20th Century (to date), many other jurisdictions have had similar laws for many years. New York has had such a gen-

* The name of "Mortmain Acts" was given these legislative enactments from a very early date. The Mortmain Act, 1736, 9 Geo. II, c. 36, is sometimes called the parent mortmain act. It provided that all gifts and conveyances for charitable uses must be by deed executed before two witnesses, delivered twelve months before death, and enrolled within six months after its execution. At the time when mortmain as a term became associated with these religious and charitable associations, other types of associations were almost nonexistent. Later, as business corporations were formed, the term mortmain became associated with them also. Here we are considering mortmain in its original association with charitable and religious institutions. See *Taylor v. Payne*, 154 Fla. 359, 364, 17 So.2d 615, 618 (1944). "Our statute is not a mortmain act."

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1. FLA. STAT. § 731.19 (1951). "If a testator dies leaving issue of his body or an adopted child, or the lineal descendants of either, or a spouse, and if the will of such testator devises or bequeaths the estate of such testator, or any part thereof, to a benevolent, charitable, literary, scientific, religious or missionary institution, corporation, association or purpose, or to this state, or to any other state or country, or to a county, city or town in this or any other state or country, or to a person in trust for any such purpose or beneficiary, whether or not such trust appears on the face of the instrument making such devise or bequest, such will as to such devise or bequest shall be invalid unless it was duly executed at least six months prior to the death of the testator." The Act is constitutional. *Taylor v. Payne*, 154 Fla. 359, 364, 17 So.2d 615, 618 (1944).

2. *Taylor v. Payne*, 154 Fla. 359, 364, 17 So.2d 615, 618 (1944). "It is to protect the widow and children from improvident gifts made to their neglect by the testator; the design . . . being obviously to prevent testators who may be laboring under the apprehension of impending death from disposing of their estates to the exclusion of those who are, or should be, the natural objects of the testator's bounty."

3. *Id.* at 364, 17 So.2d at 618, ("Whether the legislative philosophy behind such enactment is sound may be debatable").

4. Joslin, *Legal Restrictions On Gifts To Charities*, 21 TENN. L. REV. 761 (1951).

eral restrictive act since 1848, Pennsylvania since 1855, Mississippi since 1857, California since 1874; and Georgia, Idaho, Iowa, Maryland, Montana, Ohio and the District of Columbia all have had such restrictive legislation for over sixty years. These acts have been amended frequently, indicating that the legislators have reviewed the problem and reaffirmed the need for this legislation restricting dispositions to charities. The litigation under these acts has been voluminous, especially in New York and California, and so it can be assumed that their survival is not a matter of default or oversight. A careful analysis of the reasons for this restriction would seem to give credence to a view that jurisdictions without it have not given the matter careful consideration. England and the Canadian Provinces of Ontario, Saskatchewan and Manitoba also have restrictive statutes.⁵ Although the acts of these various jurisdictions have many variations and have shifted emphases during their long history, the basic thesis has persisted—the restricting and controlling, to some extent, of the right and power of disposition to religious and charitable institutions or purposes.⁶

Most of the jurisdictions enacting a restriction on the dispositive process, when religious or charitable uses were the beneficiaries, have retained and strengthened their scope; yet, some have adopted such legislation and repealed it later, leaving no restriction in this area. This phase of the history of such legislation gives little evidence of a careful consideration of its merit when abandoned but does in some instances show traces of strong lobbies or cataclysmic social and political changes during which whole areas of legislation were lost in the turmoil of the new eras.⁷

A collation of these acts shows that, in England and Canada, the emphasis of the restriction is on *inter vivos* gifts made a short time before death, while in the United States the testamentary restriction is emphasized unanimously.⁸ Florida, then, followed this pattern by its testamentary restriction. The time before death designated as the restricted period usually varies from thirty days to one year, with the thirty day

5. HALSBURY'S LAWS OF ENG., ¶ 190; REV. STAT. OF ONT. c. 241, § 6; REV. STAT. OF SASK. c. 120, § 8; STAT. OF MAN. c. 48, p. 122.

6. Joslin, *Mortmain in Canada and the United States: A Comparative Study*, 29 CAN. B. REV. 621 (1950). There seems to have been a definite shift from a design to prevent charitable and religious institutions from amassing tremendous estates in perpetuity, to one of protection of the testator's family. Is it possible that charitable foundations in this country may some day amass such vast areas of land and wealth as to again cause a shift of emphasis? England found herself in this situation at one time. See *Attorney General v. Day*, 1 Ves. Sr. 218, 223 (1748).

7. Michigan adopted a restrictive act in 1855 and repealed it in 1867. Laws of Mich. 1853-5, Act No. 145, §§ 24, 26; Wisconsin's restrictive provision of 1891 was repealed in 1893. Wis. Laws 1891, c. 359, p. 464; Missouri, from 1865 to 1879, MO. CONST. Art. I, § 13 (1865); Delaware in 1787, Del. Laws, 1700-97, Vol. II ¶ 3, p. 800; Massachusetts before it became a state but not after. Prov. Laws 1754, § 3, p. 779.

8. See note 5 *supra*: CAL. PROB. CODE § 41 (1949); D. C. CODE ANN. § 19-202 (1951); FLA. STAT. § 731.19 (1951); GA. CODE ANN. § 113-107 (Supp. 1951); IDAHO CODE ANN. § 14-325 (1947); IOWA CODE, § 1848 (1950); MISS. CODE ANN. § 671 (1942); MONT. REV. CODES ANN. § 91-142 (1947); N. Y. DEC. EST. LAW § 17; OHIO CODE ANN. § 10504-5 (1938); PA. STAT. ANN. tit. 20, § 180.7 (Supp. 1952).

restriction most prevalent. Florida's six month restriction is not unusual by comparison.⁹

PROBLEMS ARISING UNDER THE FLORIDA TYPE ACT.

Although very few problems under the Florida Act have been contested in the Florida Supreme Court, litigation in other states on similar statutes has been considerable. It is probable, then, that as time goes on, more problems will be raised in Florida and this area of precedent will be of great help in resolving them. It is obvious that the effect of the testamentary restriction may be avoided by an inter vivos gift a short time before death. Thus, one who is expected to die within the restricted period may be prevailed upon to make a present instead of a testamentary gift. The statute does not cover this situation and such a procedure is given the sanction of the courts.¹⁰ Whether the scope of the restriction should be extended to this inter vivos area is a matter for the legislator, and not our concern here.

EVASION OF THE STATUTE BY THE "MORAL TRUST"

The effectiveness of the time restriction on testamentary gifts to religious and charitable institutions has been circumvented shamefully by the device illustrated in the case of *Schultz's Appeal*.¹¹ The testator, while very ill, sent for a scrivener and directed him to draw a will devising his estate to certain institutions. The scrivener informed him that in all probability he would not live the statutory period required for such devises and that it would be ineffective. However, he counselled that a devise could be made to an individual whom the testator was satisfied would carry out his wishes after death, and that he (the scrivener) would inform him of those wishes. The will was executed as suggested. The testator died seven days later. The court held the devise was not an improper evasion of the statute and the devise was effective even though the individual agreed that he would apply the property to the institution as the testator had wished. The court stated, "If the statute is practically repealed by this construction it is evident that it must be for the legislature . . ."¹² Similar evasive problems have been litigated in several jurisdictions with similar results and such represents the present weight of judicial opinion.¹³ It seems, however, that a court of today would rightly be less concerned with the technicalities and view the whole process, holding it to be within the statutory proscription and therefore ineffective.¹⁴

9. See state citations, *ibid*.

10. See *President of Bowdoin College v. Merritt*, 75 Fed. 480 (N. D. Cal. 1896); *Schultz's Appeal*, 80 Pa. 396 (1876).

11. 80 Pa. 396 (1876).

12. *Id.* at 407. The author has taken slight liberty in citing the facts to keep from introducing an element not necessary here.

13. *Buckley's Estate*, 270 Pa. 101, 113 Atl. 68 (1921); *Purcell Estate*, 167 Cal. 176, 138 Pac. 704 (1914); *Flood v. Ryan*, 220 Pa. 450, 69 Atl. 908 (1908).

14. "The decisions are wrong in principle, in that they make valid admitted attempts to evade the public policy . . . expressed in her statutes . . ." *Buckley's*

The key to this type of evasive stratagem is the absolute gift to the individual with only a moral obligation on his part to carry out the testator's wishes. Any devise or bequest to an individual with a mutual understanding, express or implied, that the property will be given to religious or charitable institutions, creates a trust in equity which is voidable under the statute; and parol testimony is admissible to show that such devises or bequests, absolute on their face, are in fact in trust.¹⁵ The Florida statute emphasizes this matter by providing, "If a testator . . . devises or bequeaths . . . to a person in trust for any such purpose or beneficiary, whether such trust appears on the face of the instrument making such devise or bequest or not, . . ."¹⁶ This provision of the Florida law seems to indicate a strong legislative disapproval of these evasive devices and may logically be a statutory basis for refusing to give merit to the "moral trust" theory of the earlier cases.

EVASION BY OBLIATING THE INCENTIVE TO RAISE THE
PROTECTION OF THE STATUTE

The Florida Act provides that certain devises or bequests "shall be invalid" if the testator dies "leaving issue of his body, or an adopted child, or the lineal descendants of either, or a spouse."¹⁷ It is well established that the "shall be invalid" provision makes such restricted devises or bequests voidable but not void.¹⁸ The protection is extended only to a certain named class, and only those in that class may assert it. If these testamentary provisions are not avoided by affirmative action on the part of members of the designated class, they are effective. The religious or charitable object will take although it could have been prevented from taking had members of the class elected to avoid these provisions.¹⁹ Basically then, the statute permits any testamentary gifts to religious or charitable objects if members of the protected class do not object. To evade the restrictive effect of the statute, the testator has in many cases attempted to take away the reason for raising an objection to the charitable devise. This usually resolves itself into some device which, if given its express effect, would result in no benefit to the members of the class even if they did assert the statutory restriction.²⁰

Suppose, for example, that a father is near death and, at this time,

Estate, 270 Pa. 101, 104; 113 Atl. 68, 69 (1921), see also *id.* at 70. See *Flood v. Ryan*, 220 Pa. 450, 460; 69 Atl. 908, 911 (1908) (dissenting opinion).

15. *Leopold Schmucker's Estate*, 61 Mo. 592 (1876); *Kenricks v. Cole*, 61 Mo. 572 (1876). *Clippenger's Estate*, 75 Cal. App.2d 426, 171 P.2d 567 (1946). See *Flood v. Ryan*, 220 Pa. 450, 69 Atl. 908 (1908); *Schultz's Appeal*, 80 Pa. 396, 405 (1876).

16. FLA. STAT. § 731.19 (1951).

17. *Ibid.*

18. *Taylor v. Payne*, 154 Fla. 359, 17 So.2d 615 (1944); *Monahan v. O'Byrne*, 147 Ga. 633, 95 S.E. 210 (1918); *Karolusson v. Poonessa*, 207 Iowa 127, 222 N.W. 431 (1929).

19. *Bunn Estate*, 33 Cal.2d 897, 206 P.2d 635 (1949); *Taylor v. Payne*, 154 Fla. 359, 17 So.2d 615 (1944).

20. *E.g.*, *Davis Estate*, 74 Cal. App.2d 357, 168 P.2d 789 (1946); *Layton Estate*,

is inclined to be a charitable benefactor rather than provide for his son. (The merit of the Act is not in issue here.) Upon being advised that in all probability he will not live the six months as provided by the Florida Act, and that his son may elect to avoid any charitable devise or bequest, he may be led to provide in his will that if his son avoids the charitable bequest such avoided portion shall then go to some person or object not in the protected class. Should the father die within six months, there would be no incentive for his son to avoid the disposition to charity as he would receive no benefit from such avoidance. This would allow the charity to take as the scheme intended. A more vicious scheme may be the use of the *in terrorem* provision by which the son could get none of the avoided charitable disposition and would forfeit all devises and bequests to him because of raising the statutory protection. These schemes have been frequently used in other jurisdictions and too frequently permitted, thus defeating the restrictive effect of the statute.²¹

It seems that such circumvention should not be permitted. Although a testator may disinherit his children if he desires, he should not be permitted to disinherit them by an evasive scheme so that charities may take. To permit this is to permit the evils which the statute is intended to remedy, *viz.*, a direct conflict between the influence asserted by religious and charitable objects, as against the obligation and concern for those under the natural bounty of the testator. In this conflict during the last few months of life, the concern for the children is too often overcome by charitable impulses.

The Florida Act provides that devises and bequests to religious or charitable objects are voidable unless duly executed at least six months prior to death of the testator.²² If the testator attempts to provide in his will for schemes whereby he removes all reason for raising the protection of the statute, the whole scheme is actually to make a bequest or devise to charity. This logical interpretation should result in the direct charitable disposition and its indirect disinheriting clause being avoided. As a result, those whom the statute was meant to protect would have an incentive and interest in asserting their statutory right. The California court has held, under its restrictive statute, that a provision in the will, "In the event that for any reason set forth in Section 41, 42 and 43 of the Probate Code²³ . . . my executors or executor are unable to distribute any portion of my estate upon my death . . . I direct that in such event said portion of my estate shall be distributed, and I give, devise and bequeath

217 Cal. 451, 19 P.2d 793 (1933); *Thomas v. Ohio State University*, 70 Ohio St. 92, 70 N.E. 896 (1904); *Trustees of Ohio State University v. Folsom*, 56 Ohio St. 701, 47 N.E. 581 (1895).

21. See note 19 *supra*. See *Kirkbride v. Hickok*, 64 Ohio St. 473, 98 N.E.2d 815 (1951), for a good result but questionable reasoning.

22. FLA. STAT. § 731.19 (1951).

23. CAL. PROB. CODE §§ 41, 42, 43 (1949), restricts religious and charitable devises and bequests if made within thirty days of death.

the same, to . . ." persons not in the class protected by the statute, will be given effect.²⁴ Here is the clearest example of evasion where the testator states in his will that if his children avoid the charitable devise or bequest the avoided portion shall not go to them. Could there be a more apparent or more flagrant effacement of the legislators' intent? The Florida Court, when presented with this problem, will in all probability take a more courageous stand.²⁵

PROBLEMS RAISED BY CODICILS OR RE-EXECUTION OF WILLS

Under the Florida-type statute restricting the period of time before death when effective testamentary gifts to charities must be made, a problem arises when a will devising or bequeathing to charities is executed before the restricted period, but a *new will* executed within the restricted time makes substantially the same gifts to the identical charities. Suppose for example, a Florida testator had executed his will five years before, giving Blackacre to X Charity and the balance of his estate to his children, A and B. Then within six months of death, he executed a new will giving Blackacre to X Charity and the balance of his estate to A. The only change by the new will is to disinherit B. It is clear that the later will would be voidable in its charitable disposition if the charities named were different institutions or objects. But if the *second will* makes a lesser or an identical gift to the same charitable objects, it does not seem that permitting the charity to take would be contrary to the purport of the statute, as the intent of the testator is evidenced by an execution at a time deemed proper under the statute. The charitable gifts in both wills should be considered separately from the other provisions and it seems, by a doctrine of "dependent relative revocation" or intent of the testator, the revocation should not apply to the first will's charitable disposition and it should be effective under the statute. However, it has been held that a codicil, executed within the restricted period and having a declaration of revocation, does not by the doctrine of "dependent relative revocation" reinstate bequests made to charities in a former codicil executed before the restricted period.²⁶ Further, it has been held, where a legacy for a charitable use is void because the *will* was executed within the restricted time, the fact that such legacy is identical with a prior will made before such period does not

24. Davis Estate, 74 Cal. App. 357, 168 P.2d 789 (1946).

25. Although the procedures used to restrain the class from invoking their rights under the statute are usually contained in the will itself, the testator may, during his life, attempt to make arrangements with members of the class so that they will not or cannot invoke the statute. A written promise by members of the class that they will apply property that comes to them because of the avoidance of a charitable gift, to certain charities, is a trust unenforceable under the statute. Watson Estate, 177 Misc. 308, 30 N.Y.S.2d 577 (Surr. Ct. 1941). The right to assert the statutory restriction may be waived after testator's death. Taylor v. Payne, 154 Fla. 359, 17 So.2d 615 (1944). But agreements not to assert the statute, made before death of the testator, are not waivers of the right, nor does it estop those of the class from raising it. Watson Estate, *supra*.

26. Ely v. Megie, 219 N. Y. 112, 113 N.E. 800 (1916).

make that part of the former will effective. The Act does not permit the court to seek a former will.²⁷

A different result is reached when a *codicil*, executed within the restricted period, to a will executed in proper time, makes the same provision for charities that was made by the will. Although the codicil revokes all prior wills, the bequest to charity stands as made and executed at the date of the will, and the charitable gift is not voidable. This results notwithstanding a statute providing that the execution of a codicil has the effect of republishing the will as modified.²⁸

A gift to a religious or charitable use, created by a will executed in proper time, will not be defeated by a *later codicil* which simply diminishes the amount of the gift, although the later instrument is executed within the restricted period. The operative effect of the gift is the date of the will, but the amount of the gift is determined by the codicil.²⁹ A codicil executed within the restricted period increasing bequests to persons, which thereby decreased a residuary gift to charities provided by a will executed in proper time, was held to leave such gift effective as decreased.³⁰ The second will, if in fact a will, may not be called a codicil so that the gifts to charities relate back to the earlier will.³¹ But a will may be so called when in legal effect it is a codicil.³² Under the Act restricting the time for execution of testamentary gifts to charities, the codicil does not make the will speak from the date of the codicil, but the charity takes by force of the will as diminished by the codicil.³³

It will be seen that the execution of a codicil within the restricted period, making an identical or lesser bequest to charities than was provided in the will, is held to pass the bequest under the will. Although no case is found directly in point, the inference is that an increase in the bequest would totally revoke the prior bequest, and the entire gift to charity would fail under the restriction of the statute. Here again it could be contended that the intent of the testator in increasing the charitable gift was contingent upon the gift being effective. On policy and the basic intent of the statute to prevent charitable gifts only during the designated period before death, it seems the prior bequest not frowned upon by the statute should be effective, but only to its content, and the increase in the codicil or later will should be voidable.

A more troublesome problem may arise where the will or codicil executed within the controlled period revokes one specific bequest or

27. *Hartman's Estate*, 320 Pa. 321, 182 Atl. 234 (1936); *Hoffner's Estate*, 161 Pa. 331, 29 Atl. 33 (1894).

28. *McCauley's Estate*, 138 Cal. 432, 71 Pac. 512 (1903).

29. *Bingaman's Estate*, 281 Pa. 497, 127 Atl. 73 (1924).

30. *McDoles' Estate*, 215 Cal. 328, 10 P.2d 75 (1932).

31. *Hartman's Estate*, 320 Pa. 321, 182 Atl. 234 (1936).

32. See note 29 *supra*.

33. *Morrow's Estate*, 204 Pa. 484, 54 Atl. 342 (1903); *Carl's Appeal*, 106 Pa. 635 (1884).

devise to charity and substitutes another of no greater value. The cases above cited infer that there would be a complete revocation of the prior devise or bequest, with the new gift falling under the restriction of the statute. It may be argued that if the property of the earlier specific devise or bequest is in existence there would be no conflict with the intent of the statute as the execution of the gift of certain value was evidenced at a time not frowned on by the statute. The later devise or bequest simply changed the form of property from which the same or a lesser value will accrue to the charity. If, on the other hand, the earlier specific devise or bequest has ceased to exist, a later provision for different property of the same or lesser value would be a new gift to which the restriction should apply.

A further problem arises where a residuary bequest to charities, made before the restricted time, is increased by transactions either testamentary or inter vivos, but within the restricted period. It is obvious that a residuary bequest may be indirectly, but greatly, implemented by testamentary changes in the will or change in the form of assets during life. Where half the estate is bequeathed to a son and the residue to charities a revocation of the bequest to the son shifts the entire estate to the charity. Should this be permitted during the restricted period? It has been held that a change in investment within the restricted period which in effect increases the charitable devise or bequest is not contrary to the statute.³⁴ It seems the same result should follow where the testamentary gift to charity is indirectly increased by changes in the will, even if within the restricted time. The intent to give has been evidenced by an execution at a time distance from death considered proper. However, if the machinations of those to be benefited could be shown to have influenced the revocation of other bequests within the restrictive period so that the charities residuary interest would be increased, such should be held within the purport of the statute and the increase avoided. Under proof of this nature, it seems the increase is actually executed within the restricted period. If it could be shown that the primary intent of the testator was not to revoke a bequest but to benefit the charity, it is a testamentary disposition at that time and so voidable under the statute.

CONCLUSION

Although Florida was the last to enact a statute limiting the right to devise or bequeath to religious and charitable objects, many of our jurisdictions have had similar restrictions for many years. Very few problems arising under this Act have been presented to the Florida courts to date, but it is probable that many will be presented in the future. Although there is a wealth of judicial decisions on these problems in other states, most precedent to be found indicates a tendentious pattern in which the intent of the legislation is permitted to be circumvented with impunity.

34. *Manners v. Philadelphia Library Co.*, 93 Pa. 165 (1880).

A court which looks to the basic intent of the legislation (to prevent the "near death" devise or bequest to charities to the unwarranted detriment of the natural objects of the testator's care and affection) will refuse to sanction these devious practices which utterly nullify this intent.³⁵

35. A few nominable matters: An antenuptial agreement waiving all claims to the property of the other was held a waiver of the right under the statute to avoid the charitable bequest. *Beers' Will*, 85 App. Div. 132, 83 N.Y. Supp. 67 (3d Dep't 1903). A cancellation of a note, due from a charity, by a will executed within the restricted period was held to be voidable under the statute. *Wiley v. Church*, 45 Pa. D. & C. 296 (C.P. 1942). Members of the class have no right to challenge a testamentary gift to charity until the death of the donor. *Watson Estate*, 177 Misc. 308, 30 N.Y.S.2d 577 (Surr. Ct. 1941). A spouse divorced from bed and board was held a spouse within the Act and may avoid the charitable gift. *Moseley's Will*, 138 Misc. 847, 247 N.Y. Supp. 520 (Surr. Ct. 1931). A wife separated from her husband at his death was also held entitled to raise the statutory restriction. *Watkins' Estate*, 118 Misc. 645, 194 N.Y. Supp. 342 (Surr. Ct. 1922). The Florida statute provides, "If a testator dies leaving issue of his body". Would this include an illegitimate child? See *Hastings v. Rathbone*, 194 Iowa 177, 188 N.W. 960 (1922). Where the charity is unsuccessful in litigating these matters, it is not entitled to an allowance for expenses and fees. *Kirkbride v. Hickok*, 155 Ohio St. 165, 98 N.E.2d 4 (1951).