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Decedent's Estates—Construction of Wills

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construed so as to sustain the gift wherever possible.[21] Since the intention of the grantor constitutes the controlling element in any construction problem,[22] the courts must first determine that intent and then ascertain whether it can be carried out.

Three cases recently before the Court of Appeals[23] presented substantially the same problem of interpretation regarding such charitable bequests. These cases involved bequests to foreign hospitals that had been nationalized after the death of the testator but before fulfillment of the gifts. In each case, the Court held (6-1) that such nationalization did not divest the gift.

Since the intent of the testator, to aid the sick poor of the district served by the hospital, was clearly ascertainable from the will, it was only necessary for the Court to determine whether such purpose was effectively defeated by nationalization. Examination of the applicable nationalizing acts[24] disclosed provisions for a corporate Board of Directors to operate each hospital with the power to accept endowments and administer them in accordance with their terms as far as practicable. In view of such provisions, the fact that the nationalizing acts vested technical title in a government minister was deemed immaterial. Likewise, the fact that the bequests would benefit the nationalizing governments, by ultimately reducing the cost of operating the hospitals, was deemed incidental to, and not destructive of, testator's purpose to aid the sick poor.

Thus, the liberal view taken by the Court in these cases presents a clear manifestation of the established policy of favoring charitable bequests.[25] On the basis of the facts involved, there appears to be little danger of frustration of the testator's purpose; hence, there has been no undue extension of the policy of liberality.

Construction Of Wills

In the matter of interpretation of wills, the Court of Appeals appeared to progress from liberal to strict as the term progressed.

21. In re Robinson's Will, 203 N.Y. 380, 96 N.E. 925 (1911); In re Cunningham's Will, 206 N.Y. 601, 100 N.E. 437 (1912); Where a general charitable purpose is clear, but the exact terms of the gift cannot be carried out, the gift may nonetheless be sustained by invocation of the *cy pres* doctrine. N.Y. REAL PROPERTY LAW §113; N.Y. PERSONAL PROPERTY LAW §12; In re Lyon, 280 N.Y. 391, 21 N.E.2d 365 (1939).

22. In re Hayes' Will, 263 N.Y. 219, 188 N.E. 716 (1934).

23. In re Ablett's Will, 3 N.Y.2d 261, 165 N.Y.S.2d 63 (1957); In re Perkin's Will, 3 N.Y.2d 281, 165 N.Y.S.2d 77 (1957); In re Bishop's Will, 3 N.Y.2d 294, 165 N.Y.S.2d 86 (1957).

24. NATIONAL HEALTH SERVICE ACT, 1946, 9&10 GEO. 6, c.81; NATIONAL HEALTH SERVICE ACT, 1947, 10&11 GEO. 6, c. 27 (Scotland).

25. See note 21 *supra*.

In the case of *In re Fabbri's Will*,[26] the disputed clause read:

> Sixth: Upon the death of Edith, either before or after me, the principal of the trust fund created for her benefit shall be distributed to and among such issue of Teresa Clark, daughter of Edith, as I may designate in writing.[27]

The testator died without making further designation with respect to the remainder interest.

Since an overly literal reading of the last sentence of the clause would in effect disinherit the claimants, the Court held this to be contrary to the dominant purpose of the plan of distribution which it gleaned from the will itself and circumstances surrounding the making of it. Furthermore, it would be contrary to the presumption against intestacy, an inference of common experience that a person undertaking to make a will intends, unless clearly indicated otherwise, to dispose of his entire estate.[28] Thus the Court construed the language to mean a class gift to the children of Teresa Clark with a reservation of a right to prefer certain of the children over others, and in the absence of such apportionment, the residue to be divided equally.[29]

Three of the Court thought differently. Said Judge Desmond for the minority, "Judicial reluctance to adjudge partial intestacy can have no effect here, any more than our wish that the testator had made a later written designation so as to leave a plan of distribution more symmetrical and to our minds more fair."[30]

These latter remarks proved to foreshadow two cases decided later in which the respective claimants attempted to apply an argument of symmetry. New York has long recognized the bequest by implication,[31] the most common example of which is the gift to "B for life, and if B dies without issue, then to C."[32] B's surviving issus may take by implication. A more elaborate gift by implication is

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26. 2 N.Y.2d 236, 159 N.Y.S.2d 184 (1957).
27. *Id.* at 238, 159 N.Y.S.2d at 186.
28. The presumption against intestacy is particularly strong in respect to the disposition of a residuary estate. In re Hayes' Will, 263 N.Y. 219, 188 N.E. 716 (1934); Snyder v. Snyder, 182 App. Div. 65, 169 N.Y. Supp. 396 (2d Dep't 1918); In re McGowan's Will, 134 Misc. 409, 235 N.Y. Supp. 484 (Surr. Ct. 1929), *aff'd*, 228 App. Div. 779, 239 N.Y. Supp. 688 (2d Dep't 1930), *aff'd mem.*, 254 N.Y. 513, 173 N.E. 844 (1930).
29. The Court, in the past, has been reluctant to find a class gift where the language would lend itself to being interpreted as an individual gift. Moffet v. Elmendorf, 152 N.Y. 475, 46 N.E. 845 (1897); *cf.* In re Bartlett's Will, 224 App. Div. 136, 80 N.Y.S.2d 375 (3d Dep't 1948).
30. 2 N.Y.2d at 245, 159 N.Y.S.2d at 192.
31. Masterson v. Townshend, 123 N.Y. 458, 25 N.E. 928 (1890).
32. RESTATEMENT, PROPERTY §272 (1940); In re Latz's Estate, 95 N.Y.S.2d 584 (Surr. Ct. 1950).

found in *In re Selner's Estate*,[33] where the gift was made to the testator's wife for life, unless she predecease him, in which event the gift was to go to testator's children. The. wife survived the testator and it was held that the sons received the remainder after her life estate by implication.

It is clear, of course, that all such gifts are primarily dependent upon the intent of the testator and it may be noted that presumption against intestacy will be found utilized broadly whenever the gift is allowed even though such rules are often held to be of little value generally in interpreting wills.[34]

In both *In re Englis' Will*,[35] and *In re Slater's Will*,[36] life estates in trust income were left to the respective widows of the testators, with remainders to the tstators' children or their issue, but if the children should predecease the widows, in each case the gift was to go to the claimants.

In the *Englis*[37] case, the income from the trust was to go to the surviving child should either die without issue *after* the death of the widow. No provision was made for the contingency that actually happened, that is, both children dying without issue after the widow. The Court found the contingent gift to the claimants only incidental to the plan of the will, and the result of the intention exhausted rather than inadvertent omission. "That is answer enough," said Judge Desmond for a unanimous Court, " . . . to the argument of the respondents in this case that the presumption against intestacy is so strong that we should conjure up a legacy by implication."[38]

In the *Slater*[39] case, the children were originally to share the corpus of the trust after the death of the widow, but a codocil was appended to the will eight years after its making giving the daughter only a life estate in the income of the trust and in that instrument the contingent remainder to the claimants to take effect on the death of the testator's wife was, for reasons not apparent in the opinion, repeated. No provision was made for the contingency which actually happened, the daughter dying without issue after the widow. While it seems anomalous that the testator should be concerned over keeping the property out of intestacy in the one instance so as to repeat the contingent gift and, out of less than mere inadvertence, deprive the claimants of the property in the second

33. 261 App. Div. 618, 26 N.Y.S.2d 783 (2d Dep't 1941), *aff'd*, 287 N.Y. 664, 39 N.E. 2d 287 (1941). See also, West v. Murphy, 197 N.C. 488, 149 S.E. 731 (1929); Renaker v. Tanner, 260 Ky. 281, 83 S.W.2d 54 (1935).
34. In re Hayes' Will, 263 N.Y. 219, 222, 188 N.E. 716, 717 (1934); Kern v. Kern, 293 Ill. 238, 127 N.E. 396 (1920).
35. 2 N.Y.2d 395, 161 N.Y.S. 2d 39 (1957).
36. 3 N.Y.2d 109, 164 N.Y.S2d 393 (1957).
37. *Supra*, note 35.
38. *Id.* at 404, 161 N.Y.S.2d at 45.
39. *Supra*, note 36.

contingency, the Court rested its decision directly on the *Englis* case, and held for intestacy.

It is interesting to note that the air of certainty added to the *Fabbri* decision by the presumption against intestacy was entirely dispelled in the later cases. This suggests that the facts of each case must be *a priori* sympathetic to the claimant before the rule has any efficacy.

Date Of Commutation Of Annuity

Testatrix had during her lifetime created an inter vivos trust. She held a life interest in the profits—with her children designated as the primary beneficiaries. In lieu of a right retained in the trust agreement the settlor created an annuity in her will for her husband to be paid out of the said trust. The annuity being a lien on the trust, the beneficiaries contested the validity of the said annuity and requested that if found valid it be commuted. The validity was established in a previous decision as was the right to have it commuted.[40] However, this was not until fifteen years after the settlor's death. The Court in *In re Ferris' Trust*[41] was faced with the question as to the date the annuity should be computed. Should the annuitant be paid his said annuity for the years up to the date of the decision of the Court to direct the commutation and at this date award the computed value, or should the date of the settlor's death be the date of the computed value? The first alternative means a larger settlement for the annuitant because the mortality tables set a later age as the life expectancy as one becomes older.

The majority of the Court were of the opinion that the date of the settlor's death should represent the computed value. Unless otherwise provided, an annunity runs from the date of the death of the testator with the first payment due at the end of the first twelve-month period.[42] The Court reasoned that the commutation being a substitute for the annuity it should, if possible, be computed from the same date. To alleviate some of the difference between the amount he will receive and the amount he would have received if the later date were used, the Court authorized the maximum interest on the computed value for the years of litigation.

The dissent's opinion was that the annuitant should receive his annuity for the years up to the time the Court decides the commutation should take place and at this time direct the computed value. Their reasoning stems from the idea that

40. Application of Harris, 276 App. Div. 990, 96 N.Y.S.2d 88 (1st Dep't 1950), *aff'd*, 302 N.Y. 752, 98 N.E.2d 884 (1951).
41. 3 N.Y.2d 70, 163 N.Y.S.2d 953 (1957).
42. Kearney v. Cruikshank, 117 N.Y. 95, 22 N.E. 580 (1889).