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Testamentary Gifts to Charity in Florida

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equal authority prerequisite is troublesome. In the *Roberts* case the Florida Supreme Court stated:[29]

> "[T]he community of interest which must exist to remove the case from the operation of the guest statute 'must be such that the passenger is entitled to be heard in the control and management of the vehicle — such as practically to amount to joint or common possession thereof.' "

This statement obviously does not contemplate joint physical control of the vehicle, but rather the right to govern the conduct of one another and to exercise an equal voice in the control and management of the automobile.[30] A car pool is a joint control and management arrangement; the driver acts for others as well as for himself.[31] The reciprocal agreement for transportation to a particular destination should satisfy the "equal authority" requirement. Consequently the Florida Supreme Court should have little difficulty in classifying a car pool arrangement as a joint enterprise.

Conclusion

The Florida Supreme Court's position that the guest statute is inapplicable when the transportation is for the mutual benefit of the driver and the occupant, its tendency to construe the guest statute in favor of the passenger, and the likelihood that it will label car pools as joint enterprises indicate that the Court will side with the weight of authority in finding the guest statute inapplicable to car pool arrangements. If so, a car pool member will be required to show only ordinary negligence on the driver's part in order to recover damages in an action for personal injury.

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TESTAMENTARY GIFTS TO CHARITY IN FLORIDA

A recent Florida Supreme Court case, *In re Blankenship's Estate*,[1] has focused attention on section 731.19 of Florida Statutes 1959, which limits testamentary gifts to charity. This note will review the Florida law on this subject and will evaluate the effectiveness of the statute.

Under the English common law a testamentary gift to charity

29. *Id.* at 625; *accord,* Bessett v. Hackett, 66 So. 2d 694 (Fla. 1953).
30. Downes v. Norrell, 261 Ala. 430, 74 So. 2d 593 (1954).
31. Crescent Motor Co. v. Stone, 211 Ala. 516, 101 So. 49 (1924).

1. 122 So. 2d 466 (Fla. 1960).

was valid even though it was made shortly before death or comprised a large part of the estate.[2] Today most states follow this view, but statutes in eleven jurisdictions restrict testamentary gifts to charity by invalidating them if the will was executed within a specified period before the testator's death,[3] or by limiting their amount to a specified fraction of the testator's estate,[4] or both.[5] The common purpose of such provisions is to protect the testator's family from improvident disposition of the estate;[6] the "time" statutes have the additional purpose of protecting the testator from undue influence when he fears impending death.[7] Most of these statutes permit invalidation of a gift only if a protected relative survives the testator.[8]

DEVELOPMENT OF THE FLORIDA LAW

In 1933 the Florida legislature enacted a statute[9] invalidating testamentary gifts to charity by a testator who dies within six months after execution of the will and is survived by specified relatives. The Florida Supreme Court has decided three cases construing this statute.

The first of these cases was *Taylor v. Payne*,[10] in which the testa-

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2. See Annot., 154 A.L.R. 682 (1945).

3. D.C. CODE ANN. §19-202 (1951) (1 calendar month); FLA. STAT. §731.19 (1959) (6 months); OHIO REV. CODE ANN. §2107.06 (Page 1953) (1 year); PA. STAT. ANN. tit. 20, §180.7 (1950) (30 days).

4. IOWA CODE ANN. §633.3 (1950) (¼ of estate after payment of debts); N.Y. DECED. EST. LAW §17 (½ of estate after payment of debts).

5. CAL. PROB. CODE §41 (30 days, 1/3 of estate); GA. CODE ANN. §113-107 (1959) (90 days, 1/3 of estate but no restriction on excess over $200,000); IDAHO CODE ANN. §14-326 (1947) (30 days, 1/3 of estate); MISS. CODE ANN. §671 (1956) (90 days, 1/3 of estate); MONT. REV. CODES ANN. §91-142 (1947) (30 days, 1/3 of estate).

6. *In re* Dwyer's Estate, 159 Cal. 680, 115 Pac. 242 (1911); Taylor v. Payne, 154 Fla. 359, 17 So. 2d 615, *appeal dismissed*, 323 U.S. 666 (1944), 154 A.L.R. 677 (1945).

7. Taylor v. Payne, *supra* note 6; Paxson's Estate, 221 Pa. 98, 70 Atl. 280 (1908); ATKINSON, WILLS 136 (2d ed. 1953).

8. ATKINSON, WILLS 137 (2d ed. 1953).

9. Fla. Laws 1933, ch. 16103, §20, at 548, now FLA. STAT. §731.19 (1959). Florida is the only state that has passed such a statute in the 20th century. For a historical review of the adoption of similar statutes in other states see Joslin, *Florida's Charitable "Mortmain" Act*, 7 U. MIAMI L.Q. 488 (1953). Joslin states that the statutes limiting testamentary gifts to charity are mortmain acts. For an articulate expression of the contrary view, accepted by most writers, that these statutes are not true mortmain acts, see Bodfish, *The Destructive Effect of the 1937 Amendment of Section 42 of the Probate Code of California upon the Limitations Regarding Testamentary Dispositions to Charity*, 26 CALIF. L. REV. 309 (1938). The Florida Supreme Court has said that what is now FLA. STAT. §731.19 (1959) is not a mortmain act. Taylor v. Payne, *supra* note 6.

10. 154 Fla. 359, 17 So. 2d 615, *appeal dismissed*, 323 U.S. 666 (1944).

tor's will gave a life estate in certain property to his wife and the remainder to a church. The testator died within six months after execution of the will, and his wife qualified as executrix but died before the estate was administered. When the administratrix c.t.a., d.b.n., relying on the statute, refused to distribute proceeds to the church its trustees brought an action to recover them. The circuit court upheld the dismissal by the county judge of the trustees' petition, and the Florida Supreme Court affirmed the judgment.

The Court, while questioning the philosophy behind the statute, upheld its constitutionality. The purpose of the statute was said to be:[11]

> "[T]o protect the widow and children from improvident gifts made to their neglect by the testator; the design of the statute 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."

The Court said that the statute should be construed so as to protect fully the persons specified by it, but that as much effect as possible should be given to the cardinal rule that the intent of the testator must govern unless it is violative of some rule of law. On this basis the bequest was held to be voidable at the election of the members of the protected class. Since the trustees had initiated the action and the statute on its face made their interest invalid, they had the burden of proof to show waiver of protection.

The second case to come before the Court was *In re Pratt's Estate*.[12] Pratt's will, which was executed three days before his death, made five charities beneficiaries under a residuary clause. Another will making the same bequests was validly executed more than six months before his death but was revoked by the later will. The wife and children of the testator had the charitable bequests invalidated. In upholding this result the Florida Court held that the doctrine of dependent relative revocation was not available to revive the earlier will. The Court reiterated its statement in *Taylor v. Payne* in regard to the purpose of the statute and its proper construction, adding:[13]

> "Thus the statute is to be neither strictly nor narrowly construed. But its plain language, from which we cannot deviate, is broad enough to encompass many cases where a testator, by no means *in extremis* or even contemplating death, makes a

11. 154 Fla. at 364, 17 So. 2d at 618.
12. 88 So. 2d 499 (Fla. 1956).
13. *Id.* at 501.

charitable bequest and dies shortly thereafter. The statutory coverage is much more comprehensive than its apparent purpose would warrant, but the restriction of its scope is a problem for the legislature."

The *Pratt* decision apparently led to a revision of the statute in 1957. The amended statute provided, *inter alia,* that if the testator made substantially the same bequest in a will duly executed "immediately next prior to such last will and more than six months before his death,"[14] the statutory prohibition would not apply.

The next development was the 1960 case of *In re Blankenship's Estate.*[15] The testatrix had willed most of her estate, valued at nearly $16,000, to two charities, while her sole heir at law, a married daughter, was left $10.00. Four wills containing essentially the same charitable bequests had been made; two were executed more than six months before the testatrix's death, and two were executed during that period. The daughter's petition to avoid the bequests was denied by the county judge's court, and the Second District Court of Appeal affirmed the decision.[16] The court said that *Pratt* was not authority in this case because the amendment "obviously purports to mitigate the severity of the then existing statute."[17] The court of appeal stated that to accept a literal interpretation of the statute rather than to be guided by the intent of the legislature would result in an unreasonable conclusion. If Mrs. Blankenship had made only one will in the six-month period the bequests would be valid. To invalidate the bequests would have the illogical effect of nullifying them because they were expressed twice during the six months preceding her death.

The Florida Supreme Court granted certiorari and quashed the judgment. The Court stated that the opinion of the Second District Court of Appeal in *Blankenship* conflicted with the rule set out in *Pratt* that the statute is to be neither strictly nor narrowly construed, but that its plain language should be followed. Although the 1957 amendment was intended to mitigate the severity of the statute, the legislature spelled out the allowable extent of mitigation by requiring that the next prior will must not have been executed within six months of the testator's death. Since this condition was not met, the bequest was invalidated.

In reaching this result the Court stated that the possibility of apparently illogical results in some cases did not warrant deviation

14. FLA. STAT. §731.19 (1959).
15. 122 So. 2d 466 (Fla. 1960).
16. 114 So. 2d 519 (2d D.C.A. Fla. 1959).
17. *Id.* at 521.

from the plain language of the statute. "The legislature is not bound to follow reason or logic in such statutes."[18]

SUMMARY OF THE FLORIDA LAW

A reading of section 731.19 of Florida Statutes 1959 and a consideration of the Florida cases indicate that testamentary gifts to charity may be invalidated when *all* of the following elements exist:

(1) A relative specified by the statute, who would receive any interest in the donated property if the gift failed, survives the testator and elects to avoid the charitable gift.

(2) The will makes a gift to a charity other than an institution of higher learning.

(3) The will was executed by the testator within six months of the time of his death.

(4) There is no next to last will, executed more than six months before the testator's death, that contains substantially the same gift.

When a will is executed more than six months before death, a codicil made during the six-month period will not invalidate a substantially similar bequest or devise made in the will.[19] If more than one codicil is made during the six-month period, the gift will probably be effective, although this point is not expressly mentioned in the statute.

Only those persons within the class specified by the statute may contest the gift,[20] and the gift is valid if none survive.[21] The protected relatives may waive their statutory protection or ratify the bequest.[22] Although the gift is valid until the surviving relatives avoid it, the charity cannot force a distribution without carrying the burden of proof to show waiver or ratification.[23]

Statutes limiting testamentary gifts to charity have frequently been evaded in other states.[24] Although the Florida Court has not decided a case involving evasive devices permitted in other jurisdictions, testamentary gifts to charity can probably be evaded in Florida. Perhaps an inter vivos transfer of property is the safest way to avoid

18. 122 So. 2d at 469.

19. FLA. STAT. §731.19 (1959).

20. Taylor v. Payne, 154 Fla. 359, 17 So. 2d 615, *appeal dismissed,* 323 U.S. 666 (1944), 154 A.L.R. 677 (1945); *In re* Lohbiller's Estate, 113 So. 2d 248 (3d D.C.A. Fla. 1959) (waiver made by spouse after testatrix's death).

21. *In re* Juen's Will, 5 Fla. Supp. 90 (County Judge's Ct. 1954).

22. Cases cited note 20 *supra.*

23. Taylor v. Payne, *supra* note 20.

24. MACDONALD, FRAUD ON THE WIDOW'S SHARE 34 (1960).

application of the statute.[25] Additionally, the statute may be bypassed by a specific provision for a gift over to a non-relative in the event the bequest to charity fails.[26] An *in terrorem* clause, providing that any person contesting the will is barred from taking under it, might be utilized to prevent avoidance of the gift by a relative.[27] Two other evasive devices, probably more susceptible to being set aside by the courts, are a contract to make a will[28] and a testamentary gift with a precatory request that the legatee apply the bequest to a specified charitable purpose.[29] Neither of these devices should be prohibited by the statute, since a valid contract to make a will is not a testamentary disposition and a precatory expression does not create a trust.

An Evaluation of the Effectiveness of Section 731.19

As previously stated, the dual purpose of statutes that limit testamentary gifts to charity made shortly before the testator's death is protection of the testator from undue influence[30] and protection of his family from improvident disposition of the estate.[31] The effectiveness of section 731.19 in achieving these goals is questionable.

The fact that a testator has been unduly influenced in making his will is an acknowledged ground for its invalidation.[32] Is the extraction of death-bed gifts by charities so widespread a practice as to justify invalidation of *all* gifts to charity within the six-month period? No sociological data have been advanced to prove that statutory protection is needed.[33]

25. President of Bowdoin College v. Merritt, 75 Fed. 480 (C.C.N.D. Cal. 1896).

26. *In re* Haines' Estate, 76 Cal. App. 2d 673, 173 P.2d 693 (1946). An example is given in Joslin, *supra* note 9, at 491-92. See Fla. Stat. §731.19, which provides that the gift may be avoided by relatives "who would receive any interest in the devise or bequest so avoided."

27. Joslin, *supra* note 9, at 492.

28. Miller v. Carr, 137 Fla. 114, 188 So. 103 (1939); see Fla. Stat. §731.051 (1959).

29. Flood v. Ryan, 220 Pa. 450, 69 Atl. 908 (1908). For a discussion of this evasive device, under the name "moral trust," see Joslin, *supra* note 9, at 490-91.

30. See note 7 *supra*. The first statute to limit testamentary gifts to charity, Statute of Mortmain, 1736, 9 Geo. 2, c. 36, cites improvident testamentary trusts for charity by dying persons to the detriment of their heirs as a factor increasing the "publick Mischief" [*sic*] of rendering lands inalienable. It seems clear, however, that the primary purpose of the statute was to promote the alienability of land, not to protect lawful heirs.

31. Cases cited note 6 *supra*.

32. One writer has pointed out the similarity between the policy behind legislation limiting charitable gifts and the policy invalidating wills because of undue influence. Simes, Public Policy and the Dead Hand 112 (1955).

33. It has been suggested that undue influence over dying persons occurs too infrequently to be of consequence. Remick & Hutton, *Restrictions on Gifts for Religious or Charitable Uses*, 51 Dick. L. Rev. 201, 209 (1947).

It is usually said that statutes limiting charitable gifts are not intended to discriminate against charities,[34] but it is clear that these statutes can result in arbitrary restrictions. If the purpose of the statute is to restrict undue accumulation of wealth by charities,[35] the statute is ineffective, because most charities receive much more money by inter vivos gift than by bequest.[36]

The Florida Court has indicated that the dominant policy of this statute is protection of the family.[37] This raises the question whether this protection is limited to the situation in which the testator is unduly influenced or whether it includes situations in which the testator intentionally leaves his family destitute. It seems that the desirable policy would be to have the testator, not the taxpayers, provide for the basic needs of his family. This statute affords little protection to the family against being left destitute, because it operates only when the particular method of disinheritance is by charitable gift; and even then evasive devices allow the statute to be emasculated. When the statute is applied to invalidate a charitable gift its arbitrary operation can result in too little[38] or too much[39] protection for the family.

If family protection is really the problem, a more flexible and effective approach is clearly needed. A more detailed statute may have some validity,[40] but a system that vests discretion in the trial court to provide for the family seems preferable to a rigid, inflexible statutory scheme that seeks to set out one solution for all cases. In England

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34. See MACDONALD, FRAUD ON THE WIDOW'S SHARE 34 (1960); Annot., 154 A.L.R. 682 (1945).

35. "Restrictions on gifts to charity rest upon policies reflecting attitudes opposing undue influence and undue accumulations by charities, as well as a desire to protect the estate owner's family." Scoles, *Conflict of Laws in Estate Planning*, 9 U. FLA. L. REV. 398, 422 (1956).

36. See ANDREWS, PHILANTHROPIC GIVING 72 (1950); BORNET, CALIFORNIA SOCIAL WELFARE 16 (1956). An estimate of sources of philanthropic gifts in the U. S. in 1960 indicates that about 79% came from living donors and 7% from bequests. See AMERICAN ASS'N OF FUND-RAISING COUNSEL, INC., GIVING USA 8 (1961).

37. See text at note 11 *supra*.

38. Suppose, *e.g.*, that the testator is the father of five young children. From an estate of $150,000 he decides to leave $140,000 to his closest friend, a non-relative, and $10,000 to charity. Under §731.19 the wife and children could have only the $10,000 gift set aside, which would not be sufficient to maintain the family.

39. This would occur when the testator has made adequate provision for his family. Suppose, *e.g.*, that the testator is married and childless. From an estate of $80,000 he decides to leave $70,000 to his wife and $10,000 to charity. Under §731.19 the wife can set aside the charitable gift, although the will makes adequate provision for her.

40. See the detailed statutory scheme proposed in Joslin, *Legal Restrictions on Gifts to Charities*, 21 TENN. L. REV. 761 (1951).

a system has been adopted that vests this discretion in the trial court, and it has been suggested that it could be used to advantage in this country as well.[41] In essence, the English method allows relatives within the protected class to apply for a court order granting maintenance out of the decedent's estate.[42] The object is to make such reasonable provision for the family as the particular circumstances require.

Even the more flexible English approach presents problems. One is that it is subject to inter vivos evasion; any new statute adopted in Florida should preclude this possibility. Moreover, since family protection in the United States is now achieved by a number of unrelated statutory provisions,[43] any new statute should largely replace or operate harmoniously with these statutes.

CONCLUSION

In deciding *In re Blankenship's Estate* the Florida Supreme Court applied a literal interpretation to section 731.19. The result was illogical and probably one not contemplated by the legislature, although it was clearly correct under the wording of the statute. Even if this minor defect were corrected,[44] serious questions would remain as to the purpose and effectiveness of such a statute.

If the purpose of section 731.19 is to protect the family from hardship resulting from disinheritance by the decedent, a more effective scheme is needed. The rigid operation of the statute gives too little relief in some cases and too much in others. A system that vests in the trial court discretion to provide for the needs of the family out of the estate of the decedent, such as has been adopted in England, could serve the purpose adequately. In the absence of a fundamental reconsideration of the problem by the legislature, repeal of the existing statute would be preferable to a patchwork revision.

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41. MACDONALD, FRAUD ON THE WIDOW'S SHARE 290 (1960).

42. For a concise resume of the English legislation see MACDONALD, *op. cit. supra* note 41, at 290-94. For expanded treatment of the subject by the English writers see BAILEY, WILLS 85-89 (5th ed. 1957); 1 JARMAN, WILLS 73-116 (8th ed. 1951); J. G. SMITH, INTESTACY AND FAMILY PROVISION 97-98 (1952).

43. MACDONALD, *op. cit. supra* note 41, at 21-36, discusses dower, homestead, family allowances, lapse statutes, and statutory protection of children.

44. Senate Bill No. 751, amending §731.19 to avoid the result reached in *Blankenship*, was before the 1961 Florida Legislature but was not passed. The bill omitted the reference to the "immediately next prior will" and provided that the gift could be avoided unless the testator made a substantially similar gift "by a will duly executed more than six months prior to his death and by each subsequent will duly executed prior to such last will . . . ."