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Decedents Estates And Trusts—Wills—Power of Appointment

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COURT OF APPEALS, 1957 TERM

change in the testamentary intention or volition and the elements of fraud or mistake are lacking. This relaxation of the rule against incorporation by reference will not lead to the evils the rule seeks to prevent, since the court in each instance will evaluate the substance of any amendments.

Wills—Power of Appointment

In many will cases involving the exercise of a power of appointment the property over which the person has a power may be in one state while the will in question was drawn in another. The construction of a will insofar as it involves exercise or non-exercise of a power of appointment when the donor of the power is domiciled in New York, and the situs of the property involved is New York, is governed by the law of New York.¹⁷

A governing statute in New York concerning the construction of a will states:

Power to bequeath executed by general provisions in will. Personal property embraced in a power to bequeath, passes by a will or testament purporting to pass all the personal property of the testator; unless the intent, that the will or testament shall not operate as an execution of the power, appears therein either expressly or by necessary implication.¹⁸

The Court of Appeals in the case of *In re Deane's Will*¹⁹ had to determine the law to be applied to and the construction to be placed on a general devise of personal property under a will drawn in Texas. The testatrix had been given a power of appointment over a trust fund amounting to some \$800,000 by her former husband. The testatrix in a general bequest left all her personal property to her grandson. Since the donor of the trust was a resident of New York and created the trust in New York, the Court applied the law of New York in construing the will. The required intent (under section 18 of the Personal Property Law) not to exercise the power of appointment did not appear in her bequest of personal property under the will. Outside evidence as to statements made during the drafting of the will clearly indicated that the testatrix did not wish to exercise the power of appointment. However, the Court decided that under the express terms of section 18, outside evidence is of no effect unless the requisite intention not to exercise the power is found in the will.

The Court of Appeals in strictly adhering to the language of the statute also reaffirmed *In re Smith*²⁰ stating: that "direct statements of intention" are

17. *In re Philbrick*, 209 N.Y. 585, 103 N.E. 315 (1913); adopting the rule of Massachusetts in *Sewall v. Wilmer*, 132 Mass. 131 (1882).

18. N. Y. PERS. PROP. LAW §18.

19. 4 N.Y.2d 326, 175 N.Y.S.2d 21 (1958).

20. 254 N.Y. 283, 172 N.E. 499 (1930).

not admissible in the interpretation of wills unless the subject or object of the gift is unclear from the instrument itself.

Charitable Bequests and the Doctrine of *Cy Pres*

The doctrine of *cy pres* permits application of charitable gifts by the courts in a manner similar to but not directly in accordance with the specific intent of the testator, where the specific instructions of the testator have become impossible, impractical, or illegal to perform.²¹ Although the theories and policies which have supported the doctrine have varied with historical shifts in philosophical and political emphasis, one underlying purpose still vital has been the preservation of gifts for the benefit of society where that can be done without impinging upon testamentary freedom.²²

Before the *cy pres* doctrine may be applied, however, the courts must find that the testator had a general charitable intent to benefit a larger class (than the immediate beneficiary), in which the substituted object or mode is included, rather than a mere specific intent to benefit the stated object in the particular manner.²³ A testator's intent is gleaned primarily from the will itself.²⁴ As a practical matter, however, the courts will construe the testator's intent liberally where it is possible to do so so as to preserve a charitable gift.²⁵

The Court of Appeals adopted a restrictive construction, however, during this term. Testator provided in his will for a \$10,000 endowment fund for the College of Medicine of Syracuse University. The trust fund was applied in the manner specified for twenty-six years. The question in this case was whether the endowment could be transferred to the state when the Medical College was sold to the State University and operated thereafter as a state institution. The Appellate Division, finding, in view of all the circumstances, a general intent on the part of the testator to aid medical education generally through the facilities of the College, allowed the transfer under *cy pres*. The Court of Appeals, however, inferred an express disavowal of a general charitable intent by the testator from the fact that the vesting of the original gift was contingent on the College's attaining certain accreditation within one year without any provision in the will for a substitutional

21. *Cy pres* applied only to charitable trusts by the common law, but now extends to absolute charitable gifts in New York. N. Y. PERS. PROP. LAW §12. N. Y. REAL PROP. LAW §113. See also *Sherman v. Richmond Hose Co.*, 230 N.Y. 462, 130 N.E. 613 (1921); *In re Potter*, 307 N.Y. 504, 121 N.E.2d 522 (1954); 2 RESTATEMENT, TRUSTS §399 (1935).

22. For a discussion of the developing rationalia of the doctrine, see Fisch, *The Cy Pres Doctrine and Changing Philosophies*, 51 Mich. L. Rev. 375 (1953).

23. *Saltsman v. Greene*, 256 N.Y. 636, 177 N.E. 172 (1931), *affirming* 136 Misc. 497, 243 N.Y. Supp. 576 (Sup.Ct. 1930). 4 SCOTT, TRUSTS §399 (2d ed. 1956). N. Y. PERS. PROP. LAW §12(2). N. Y. REAL PROP. LAW §113(2).

24. *In re Watson*, 262 N.Y. 284, 186 N.E. 787 (1933).

25. *In re Potter*, 307 N.Y. 504, 517, 121 N.E.2d 522, 528 (1954).