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Decedents Estates And Trusts—Charitable Bequests and the Doctrine of Cy Pres

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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).

charitable disposition in the event the contingency was not met. The requisite general intent lacking, *cy pres* could not be applied and the fund reverted to the testator's heirs.[26]

The decision seems contrary to the policy of liberal construction of charitable bequests. Such gifts have been construed to permit *cy pres* application even where the testator had provided a substitutional gift to private persons in event of the lapse or failure of the gift for any reason.[27] And where a charitable gift has been made on a *condition* which could not be fulfilled, *cy pres* has been utilized to save the gift, the condition being construed as not requiring that the gift fail when it becomes impractical or impossible to carry out.[28]

The Court decided closely analogous cases in the prior term and came to a different result. The question there was whether bequests to hospitals in Great Britain, which had been nationalized by the government subsequent to the testator's death, could still pass to the hospitals. It was held that they could. Applying liberal rules of construction, the Court held that the hospitals receiving the gifts and those to which they had been bequeathed were identical, notwithstanding the intervening change in ownership. The question of *cy pres* application was avoided since the gifts had never vested in possession of the hospitals before nationalization. The issue, construction of testator's intent, was the same, however, since in each case the testator had died several years before nationalization was contemplated.[29]

Here also, it cannot be rationally stated that the medical college had ceased to exist because of the transfer of ownership and operation to the State University. Furthermore, even though the contingent nature of the vesting of the original bequest may indicate an absence of a general intent to benefit medicine as such, it seems purely speculative to suggest that the testator meant that the gift, once having vested, should continue only until ownership of the school was changed. The result of the decision is to exalt the "dead hand" (with no certainty of what its owner would have wished) and to discourage reorganization of public charities and their absorption by government in a society whose expectations of governmental responsibility are constantly changing.

A return to a policy of more liberal construction by the courts would be in

26. In re Syracuse University, 3 N.Y.2d 665, 171 N.Y.S.2d 545 (1958), *reversing* In re Heffron, 2 A.D.2d 466, 156 N.Y.S.2d 779 (4th Dep't 1956).

27. Sherman v. Richmond Hose Co., 230 N.Y. 462, 130 N.E. 613 (1921).

28. In re Gary, 161 Misc. 351, 292 N.Y.Supp. 785 (Surr.Ct. 1935), *aff'd*, 248 App.Div. 373, 288 N.Y.Supp. 382 (1st Dep't 1936), *aff'd* 272 N.Y. 635, 5 N.E.2d 368 (1936).

29. 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). Judge Van Voorhis, author of the opinion in the instant case, dissented to each of those cases on reasoning substantially as in the instant opinion.

keeping with the underlying theory of *cy pres.* However, the instant decision raises basic considerations which should lead to a *legislative* reevaluation of the policies involved. Not merely testementary freedom is here involved; the public reliance upon the continuity of public trusts is also pertinent. Pennsylvania has recognized this by abolishing, by statute, the requirement for a general intent, charitable gifts in that jurisdiction passing *cy pres* wherever necessary unless the testator has *expressly* provided otherwise by a gift over or remainder clause.[30] In a time of social change, such a provision recommends itself as a fair compromise between private rights and the public interest and a preferable alternative to the uncertainties inherent in the rule applying in New York.[31]

Will Construction

In *In re Gautier's Will,*[32] the term "surviving" was used in a devise where the first legatee took a life estate, the remainder to a determinable class or in the alternative to a "surviving" class. In this situation the slight presumption is that "surviving" means surviving the previous estate.[33] Rules of construction, however, need not be resorted to, when from a reading of the will in its entirety, the testator's intention is clear.[34] The Appellate Division,[35] seeking the intention of the testator, referred to a later paragraph where the testator had declared, "I have not made any provision" for Charles Gautier, a nephew. If "surviving" meant surviving the life beneficiary, part of the estate could pass by intestacy, and in that manner Charles Gautier's estate could realize an intestate share. On this basis the Appellate Division affirmed the Surrogate Court and found that the testator's intention was that the term "surviving" meant surviving the testator himself. Such a decision avoids any partial intestacy and provides for an earlier, rather than later vesting of estates.

The Court of Appeals reversed the Appellate Division and held that the term "surviving" meant surviving the previous beneficiary. When the testator referred to survival of himself he used the words "survive me," indicating that the term "surviving" refers to something different, and this supports the slight presumption that in such a clause "survival" refers to the termination of the previous estate. The fact that Charles Gautier has a possibility of an intestate share, although not contemplated by the testator, is mere happenstance and not an indication of the meaning of the word "surviving".

30. PA. ESTATES ACT OF 1947, 20 P.S. §301.10 (1947).
31. The requirement of general intent has been subjected to criticism. *See, e.g.,* 2A BOGERT, TRUSTS AND TRUSTEES, §436 (1935); Note *A Revaluation of Cy Pres,* 49 Yale L.J. 303, 317-323 (1939).
32. 4 N.Y.2d 502, 169 N.Y.S.2d 4 (1957).
33. Fowler v. Ingersoll, 127 N.Y. 473 (1891); 2 JARMAN ON WILLS 759 (5th ed. 1893); RESTATEMENT, PROPERTY §251 (1940).
34. In re Pubis, 220 N.Y. 196, 202, 115 N.E. 516, 518 (1917).
35. In re Gautier's Will, 3 A.D.2d 750, 160 N.Y.S.2d 238 (2d Dep't 1957) and 3 A.D.2d 752, 161 N.Y.S.2d 574 (2d Dep't 1957).