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Decedents Estates And Trusts—Will Construction

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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 testamentary 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 Reevaluation 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).

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It is the writer's opinion that the word "provision" does not relate to an intestate share, but merely to an express bequest of the will itself. There is, therefore, no conclusive proof that the testator did not contemplate, or in fact desire that Charles Gautier retain the possibility of an intestate share. As the Court points out, at least he evinced no intention that he was to be excluded as next of kin. A court may not rewrite a will to avoid intestacy.³⁶ This appears to be especially true where such a rewriting was not clearly desired by the testator.

Escheat of Decedent Veteran's Estate

Under a federal escheat statute,³⁷ federal pension benefits paid to an incompetent beneficiary who dies intestate with no surviving distributees, are to escheat to the United States if, under the laws of the state wherein the beneficiary last resided, they would escheat to the state.

In *In re Hammond's Estate*,³⁸ both the state and federal governments sought control of the federal pension funds which comprised the estate of an incompetent veteran, who died intestate with no surviving distributees.

The state contended that there was no escheat of these unclaimed estate funds to the state, that under the present New York laws the state does not assert absolute title to such funds but takes possession and holds them in a custodial capacity for the benefit of unknown living distributees who may forever come forward and claim them.³⁹ Since, technically, the term escheat means that title to such property must pass to the state absolutely,⁴⁰ with all rights present in unknown surviving distributees cut off forever,⁴¹ there is no longer any escheat under New York laws and therefore the federal escheat statute does not apply to the estate funds in question to determine their disposition.

In unanimously rejecting the state's argument, the Court of Appeals stated that the term "escheat" in the federal statute must not be given such a narrow interpretation as to defeat the manifest purpose of the statute, which is to secure for the United States the use and benefit of funds originally paid to federal beneficiaries which would otherwise become the property of the state.

Since, under both the federal escheat statute⁴² and present New York laws,

36. *In re Englis' Will*, 2 N.Y.2d 395, 161 N.Y.S.2d 39 (1957).

37. Act of July 3, 1930, ch. 849, 450(3), 49 STAT. 993. (Now 71 STAT. 136 (1957), 38 U.S.C. 3502(d), Supp. V 1958).

38. 3 N.Y.2d 567, 170 N.Y.S.2d 505 (1958).

39. N. Y. Surr. Ct. Act §272.

40. *Johnson v. Spicer*, 107 N.Y. 185, 80 N.Y.S.2d 125 (1887); *Crowner v. Cowdrey*, 139 N.Y. 471, 68 N.Y.S.2d 493 (1893).

41. N. Y. ABANDONED PROPERTY LAW §§201, 203.

42. See Opinion of the Solicitor of the Veterans Administration, 1946.