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Property—Trusts and Future Interests—Judicial Correction of Invalid Trust Provisios

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In a recent case,⁷³ a will before the Court of Appeals for construction provided for a trust for the lives of the sister and cousin of the testatrix, the corpus to go to her nephew on the termination of the trust, but in the event the nephew predeceased the sister and the cousin the corpus was to go to charity. The nephew outlived the cousin but predeceased the sister. The court, bolstering its opinion with the rules mentioned above, construed the will literally holding that the nephew's interest vested indefeasibly on his surviving the cousin. The remainder passed to his estate, therefore, and the gift to the charity was defeated.

Judge Van Voorhis, the sole dissenter, maintained that the intent of the testatrix that the nephew survive the termination of the trust in order to take was manifest, and that in view of this intent the rules of construction should not be applied.

Judicial Correction of Invalid Trust Provisions

It is the established rule in this state that invalid portions of a will may be excised by the court so that the remaining provisions may be preserved and the intent of the testator carried out as far as possible.⁷⁴ The proper application of this rule was the issue before the Court of Appeals in *In re Fischer's Will*.⁷⁵

In this case the testator had provided for the creation of a trust, the income to be paid to his wife for her life and upon her death the principal to become a part of his residuary estate. A further provision set up a trust of the residuary estate, which was to be charged with an annuity to be paid to the testator's mother for her life, the balance to be held until his grandson became twenty-one, or if he should die before reaching that age until the grandnephew of the testator should die or reach twenty-one. On the termination of the trust the corpus was to be distributed to residuary legatees named in the will. The Surrogate ruled that the trust set up for the widow violated the rule against perpetuities since the corpus might not be alienable until the testator's wife, grandson and grandnephew had died. In order to effectuate the intent of the testator as far as possible, the Surrogate preserved the trust for the widow by deleting the third measuring life insofar as it applied to the corpus of the widow's trust. He further determined that (since the remainder interests of the residuary legatees were contingent and, therefore, not subject to acceleration⁷⁶) the residue of the corpus of the widow's trust

73. *In re Campbell's Will*, 307 N. Y. 29, 119 N. E. 2d 577 (1954).

74. *Kalish v. Kalish*, 166 N. Y. 368, 59 N. E. 917 (1901).

75. 307 N. Y. 149, 120 N. E. 2d 688 (1954).

76. *Matter of Durand*, 250 N. Y. 45, 164 N. E. 737 (1928).

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should pass as intestate property upon the termination of the two measuring lives.

The Appellate Division modified the decision of the Surrogate, ruling that since the will made no provision for the payment of the income during the lives of the grandson and grandnephew, and since the income could not be accumulated (some of the residuary legatees being adults),⁷⁷ both of the latter measuring lives should be excised and the corpus of the widow's trust should pass to the residuary legatees at her death.

The Court of Appeals reversed and reinstated the decision of the Surrogate. Finding that the testator had provided for a delay in the distribution of the corpus of the widow's trust until his grandson had reached twenty-one to assure an adequate principal in the residuary trust to pay the annuity, the court ruled that the trust was, therefore, an active one. The fact that the secondary purpose of accumulating the excess income was illegal could not destroy the validity of a trust having this valid primary objective. The court further agreed with the determination of the Surrogate that the gifts to the residuary legatees could not be accelerated inasmuch as they were based on survivorship and, therefore, contingent.⁷⁸ The finding that the corpus of the widow's trust passed as intestate property necessarily followed.

Charitable Trusts

It is an established principle that where a testator has apparently sought to leave money for a charitable purpose, a liberal construction is to be given to the terms of the will in order to uphold it and validate the bequest.⁷⁹

In the case of *In re Potter's Will*,⁸⁰ testator established a trust for the benefit of the "education of the children of the poor" and "for the education of the children of the poor who shall be educated in the academy in the village of Huntington."⁸¹ The academy was closed in 1858 and the building was torn down.

The question before the court was whether the testator had a general charitable intent to educate the children of the poor, or whether he had a specific charitable intent which failed when the

77. See PERSONAL PROPERTY LAW § 16, REAL PROPERTY LAW § 61.

78. See *Matter of Crane*, 164 N. Y. 71, 58 N. E. 47 (1901).

79. Cf. *In Re Pattberg's Will*, 282 App. Div. 770, 123 N. Y. S. 2d 564 (2d Dep't 1953), *aff'd*, 306 N. Y. 835, 118 N. E. 2d 903 (1954); *Matter of Neher's Will*, 279 N. Y. 370, 18 N. E. 2d 625 (1939).

80. 307 N. Y. 504, 121 N. E. 2d 522 (1954); See *Williams v. Williams*, 8 N. Y. 525 (1853) where the same trust provision was before the court.

81. 281 App. Div. 981, 120 N. Y. S. 2d 636 (2d Dep't 1953).