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CHARITIES-STATUTORY RESTRICTIONS ON TESTAMENTARY DISPOSITIONS TO CHARITY-INTERPRETATION OF CALIFORNIA STATUTE

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CHARITIES—STATUTORY RESTRICTIONS ON TESTAMENTARY DISPOSITIONS TO CHARITY—INTERPRETATION OF CALIFORNIA STATUTE—Testatrix, domiciled in California, devised her residuary estate to the Eastern Star Lodge, expressly disinheriting her heirs. A further clause provided, "Any portion of my estate which shall be held to have been disposed of in violation of section 41 of the Probate Code shall be distributed to my friend, Eleanor Mott." Section 41 provides [1] that charitable gifts made by a testator, survived by certain designated relatives, including nephews and nieces, "who, under the will, or the laws of succession, would otherwise have taken the property so bequeathed or devised," would be invalid unless executed at least thirty days prior to the testator's death, and that property bequeathed contrary to these provisions should go to the relatives of the statutory class, "if and to the extent that they would otherwise have taken said property as aforesaid but for such devises and legacies" and that "otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected." [2] A final clause, an amendment of 1943, directs that nothing in the statute should be so construed as to vest the

[1] For the text of the provision see Cal. Prob. Code Ann. (Deering, 1944) § 41.
[2] Cal. Stats. (1937) c. 480.

property in anyone not a relative, "or in any such relative, unless and then only to the extent that such relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of other effective disposition in the will." [8] Within thirty days of the execution of the will testatrix died, leaving as heirs a half-brother and nephews and nieces. The lower court found the charitable gift invalid and awarded the residue to the substitutional legatee., *Held*, on appeal, that the gift to charity was valid. The heirs were precluded from taking under the will, being named neither as substitutional nor residuary legatees; nor could they take under the laws of succession, since intestacy was effectively prevented by the inclusion of a substitutional legatee. However, this legatee, being a non-relative, was expressly prohibited from taking by the statute. *Haines' Estate*, (Cal. 1946) 173 P. (2d) 693.

It has been repeatedly declared that the purpose of statutes, under certain circumstances restricting a testator's power to make charitable bequests, is not one of discriminating against charities but rather of protecting the heirs named therein, from his hasty and improvident acts of generosity.[4] The earlier trend was to hold such a gift void *per se* [5] or permit anyone benefiting from its invalidity to object,[6] but generally today the gift may be avoided only by a member of the statutory class.[7] An immediate problem arises as to the disposition of the voided bequest. Two statutes provide that it shall go "to the residuary legatee or devisee, next of kin, or heirs, according to law," [8] which is the general rule in regard to

[3] Cal. Stats. (1943) c. 305.

[4] Hollis v. Drew Theological Seminary, 95 N.Y. 166 (1884); In re Dwyer's Estate, 159 Cal. 680, 115 P. 242 (1911); Taylor v. Payne, 154 Fla. 359, 17 S. (2d) 615 (1944). For general discussions of the statutes see ZOLLMAN, AMERICAN LAW OF CHARITIES, §§ 493-516 (1924) and 3 SCOTT, TRUSTS, §§ 362-363.6 (1939). For the texts of the statutes see 2 BOGERT, TRUSTS AND TRUSTEES, § 326 (1935).

[5] In re Garthwaite's Estate, 131 Cal. App. 321, 21 P. (2d) 465 (1933), interpreting an earlier statute than that applicable to the instant case.

[6] Harris v. Am. Bible Soc., 2 Abb. Dec. 316, 4 Abb. Prac. (N.S.) 421 (1867), and Robb v. Washington and Jefferson College, 185 N.Y. 485, 78 N.E. 359 (1906), both modified by statute, see note 7, infra.

[7] By decision: Taylor v. Payne, 154 Fla. 359, 17 S. (2d) 615 (1944); Karolusson v. Paonessa, 207 Iowa 127, 222 N.W. 431 (1928); Monahan v. O'Byrne, 147 Ga. 633, 95 S.E. 210 (1918); Thomas v. Ohio State University, 70 Ohio St. 92, 70 N.E. 896 (1904), where the gift is declared void, but provisions of the will may be ratified by the protected heir, and collaterals, not included in the statute, who would have taken by a provision for alternative disposition, the heirs failing to ratify were precluded from objecting. By legislation: N.Y. Laws (1929) c. 229, § 3, N.Y. Decedent Estate Law (McKinney, 1939) § 17; for application of the amendment see Plaster's Estate, 179 Misc. 80, 37 N.Y.S. (2d) 498 (1942); and In re Hills, 264 N.Y. 349, 191 N.E. 12 (1934). Cal. Stats. (1937) c. 480; for a comparison with In re Garthwaite's Estate, 131 Cal. App. 321, 21 P. (2d) 465 (1933), see In re Mautner's Estate, 38 Cal. App. (2d) 521, 101 P. (2d) 520 (1940), and remarks on these two decisions in In re Broad's Estate, 20 Cal. (2d) 612 at 617, 128 P. (2d) 1 (1942). On the subject of waiver of the protection of the statute see 154 A.L.R. 677 at 682 (1945).

[8] Idaho Code (1932) § 14-326; 20 Pa. Ann. Stat. (Purdon, 1930) § 195.

void legacies.[9] However, it has been held that the property of a specific charitable bequest was not intended as part of the residuary legacy and consequently passed by intestacy.[10] Nevertheless, the weight of authority supports the former contention and, absent statute, both substitutional and residuary clauses are effectuated.[11] Hence the possibility of an anomolous situation where the party permitted to invalidate may not benefit and conversely.[12] Also, the substitutional bequest may have been made in furtherance of a secret trust, evading the statutory provisions, and such a bequest has been upheld despite the legatee's avowed intention to comply with the testator's desires.[13] By favoring residuary and substitutional legatees it is questionable whether these statutes actually afford the heir any protection. Although most jurisdictions now prohibit non-relatives from invoking the statutes, California has the only legislation denying them any benefit from an avoidance of the gift by the heirs. It is ironical that this very restriction appearing to protect the heir in conjunction with the prevention of intestacy by a non-effective substitutional disposition, renders the charitable gift valid and thus completely nullifies the statute. One recoils from such construction although as a logical application of the statutory language it is undoubtedly sound.[14] The statute has been subject to constant revision.[15] A redrafting in 1937 [16] omitted a former provision for disposition of voided bequests to the

[9] In re Logasa's Estate, 163 Misc. 628, 297 N.Y.S. 730 (1937).

[10] Huidekoper v. Perry, 14 Ohio C.C. 68, 7 Ohio C.D. 326 (1895); Davis v. Davis, 62 Ohio St. 411, 57 N.E. 317 (1900).

[11] Flood v. Ryan, 220 Pa. 450, 69 A. 908 (1908). Watson's Estate, 177 Misc. 308 at 318, 30 N.Y.S. (2d) 577 (1941), "The statute does not make an alternative gift to the one invoking the statute. When invoked by anyone entitled to do so it puts a limit upon the charitable gift. That done, the will must be looked at to see the consequence of the limitation. If the will contains an alternative method of disposing of the excess, the will of course will operate thereon. If no such provision is in the will, then the property passes in intestacy. . . ."

[12] As in In re Logasa's Estate, 163 Misc. 628, 297 N.Y.S. 730 (1937), where a sister, the residuary legatee, took in preference to the father who as next of kin had previously contested the gift. Under the New York statute a sister is not permitted to avoid.

[13] Flood v. Ryan, 220 Pa. 450, 69 A. 908 (1908), involving residuary bequests to two charities and further "provided however, in case of my death within thirty days from the date hereof [after the expiration of this time the gifts would have been valid] I give, devise and bequeath all my said residuary estate unto Most Rev. P. J. Ryan, archbishop of Philadelphia, absolutely." Over the objection of a sister, sole heir at law, and testimony of the archbishop that his "personal conscience would be to give it to some charity," the court held the bequest to the archbishop valid.

[14] That such was the construction anticipated in California see 17 So. CAL. L. REV. 27 (1943). The present provisions had been construed once before with a result similar to the instant case, Estate of Davis, 74 Cal. App. (2d) 357, 168 P. (2d) 789 (1946), hearing denied by the California Supreme Court.

[15] For the legislative history of section 41 and related provisions 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 CAL. L. REV. 309 (1937).

[16] Cal. Stats. (1937) c. 480.

residuary legatee or devisee, next of kin, or heirs.[17] In 1942, starting from the premise that charitable gifts, relatives surviving, were invalid at their election, the court held that such omission indicated a legislative intent to protect the heirs and awarded them the property of such bequest in preference to non-relative residuary legatees.[18] Does the 1942 amendment by necessary implication repudiate this holding? It supports the decision in preferring heirs over non-relative legatees; it permits the testator to prefer a particular heir by effectuating a substitutional or residuary clause in his favor; and it seems arguable that a substitutional gift to a non-relative, expressly prohibited from taking, is not such an "other effective disposition" as to prevent intestacy and preclude the heir from taking under the laws of succession. This construction may do violence to plain statutory language but at least it renders it meaningful. Actually, the policy behind these so-called mortmain statutes seems questionable. It is doubtful whether they accomplish their declared purpose; and between a non-relative legatee forced upon the testator and the charity actually preferred by him, it would seem the latter has the better claim. The major premise, that the heirs should be preferred to the charity, is of doubtful validity. Except in the case of particular relatives who are permitted to take an intestate share against the will, and who are further protected by an avoidance of illusory inter vivos transfers,[19] an obvious method of evading the statutes here under consideration,[20] surely there is no strong policy against disherison of an heir. A statute such as that of California which permits contest by collaterals of the third degree seems hardly justifiable and perhaps accounts for its qualifications and the construction adopted in the instant case.

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[17] Cal. Prob. Code Ann. (Deering, 1944) § 41, as enacted in 1931.

[18] In re Broad's Estate, 20 Cal. (2d) 612, 128 P. (2d) 1 (1942), and Fleishmen's Estate, 62 Cal. App. (2d) 588, 145 P. (2d) 86 (1944).

[19] Newman v. Dore, 275 N.Y. 371, 9 N.E. (2d) 966 (1937); Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E. (2d) 381 (1944).

[20] President of Bowdoin College v. Merritt, (C.C. Cal. 1896) 75 F. 480; City Bank Farmers' Trust Co. v. Charity Organization Society, 238 App. Div. 720, 265 N.Y.S. 267 (1933).