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## Honorary Trust in Pennsylvania

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## HONORARY TRUST IN PENNSYLVANIA

The honorary trust lacks a definite beneficiary, and therefore has long presented a problem of some difficulty. When the purposes of a trust are charitable, lack of a definite beneficiary is an objection of small merit compared with the fact that the public generally is being benefitted. When, however, the purposes are purely private ones, there being no public policy demanding that such trusts be upheld, the courts have been much less solicitous for their survival. The primary objection to such trusts is the absence of a person who may sue to enforce them. Bogert, in his work on trusts, has summed up the objections of the courts in these words:

"The trust has for centuries been developed with the fundamental conception that there must be a competent ascertainable cestui to compel its enforcement in the case of private trusts. The proposal for honorary trusts is an attempt to alter one of the basic ideas of the trust. Such an alteration would mar the trust as an institution and confuse courts and lawyers as to its characteristics."<sup>1</sup>

The attempt by a testator to create a trust for the purpose of feeding his dogs,<sup>2</sup> to keep his grave in repair,<sup>3</sup> or to have masses said for him,<sup>4</sup> would have no effect, other than to create a resulting trust for the settlor's heirs and next of kin in the property attempted to be settled in the honorary trust, if the argument of Bogert and those courts which subscribe to his theory is followed without qualification. Here, they say, is a perfect example of a trust which should not be permitted to exist since there is nobody who may enforce it. But, as other authorities have pointed out, this is not a particularly appealing objection. Bogert, in extending his argument against this type of trust says:

"If a donor desires to employ the trust to accomplish his purpose, he should accept the fixed limitations of the trust institution and mould his gift to meet those limitations. If he does not wish to accept those limitations, he should bring about the desired end by using a power, a defeasible interest, a condition, or in some other way."<sup>5</sup>

In an attempt to support these trusts Scott says:

"The testator could have accomplished the desired result by giving a power to appoint for the desired purpose; he could have accom-

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<sup>1</sup>Bogert, *Trusts and Trustees*, Sec. 166.

<sup>2</sup>In *Re Dean*, 41 Ch. Div. 552; *Willett v. Willett*, 197 Ky. 663, 247 S.W. 739.

<sup>3</sup>*Angus v. Noble*, 73 Conn. 56; 46 A. 278.

<sup>4</sup>*Festorazzi v. St. Joseph's Catholic Church of Mobile*, 104 Ala. 327, 18 So. 314.

<sup>5</sup>Note 1, *supra*.

plished nearly the same result by making a bequest conditional upon the fulfillment of the desired purpose. There seems to be no reason, therefore, why attempted trusts for these purposes should be regarded as against public policy . . . One is always inclined to doubt the soundness of an argument that a disposition is against public policy when the same result accomplished in a different way is not against public policy. If they fail, it is because of a purely technical rule which defeats the intention of the testator."<sup>6</sup>

The chief argument of the champions of the trust is based upon their conception of the obligation of the trustee as an optional one. They point out that the trustee cannot be compelled to carry out the terms of the trust since there is no one to demand that of him. But, they say, why can not the trustee carry out the trust if he is willing to do so? As Dean Ames has said:

"The only objection that has ever been urged against such a gift is that the court cannot compel A (the trustee) to act if he is unwilling. Is it not a monstrous nonsequitur to say that therefore the court will not permit him to act when he is willing?"<sup>7</sup>

No policy of the law will be violated by thus allowing the intention of the testator to be given effect. No one will be affected by this recognition of a moral obligation by the trustee, except possibly the heirs, or next of kin of the donor, and their objection cannot be based upon any defect in the trust itself, but rather upon their desire that the money revert to themselves. A motive of this sort should not recommend them to any special consideration: viewed as merely an honorary or imperfect obligation, the objection of lack of a proper party to enforce the trust seems to be a groundless complaint. If the duty is no more than an optional one, there can never be any question of enforcement. Should the trustee choose to exercise his privilege not to carry out the trust, there can arise no question of enforcement since there is no beneficiary to suffer by or complain of the trustee's decision. In such a case the property reverts to the heirs and next of kin of the donor or testator. If the trustee decides to perform the trust as directed, there is again no question of enforcement, since the trust is being carried out as desired by the settlor. It is in this latter situation that the question comes before the courts. When the trustee attempts to carry out the terms of the trust, the heirs or next of kin complain to a court of equity, asserting that he holds for them on a resulting trust. In some jurisdictions there is presented the anomalous spectacle of a court of equity suspending the performance of an honorary trust because there is no competent cestui to compel

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<sup>6</sup>Scott, *Control of Property by the Dead*, 65 U. of Pa. Law Review 527, at 540.

<sup>7</sup>Ames, *The Failure of the Tilden Trust*, 5 Harvard Law Review 389.

its performance. Thus when the trust needs no enforcement the courts declare it invalid because it cannot be enforced.

The Restatement of the Law of Trusts has adopted an attitude toward these trusts which would receive perhaps the approval of the authorities on each side of this controversy. Section 124 states:

"Where the owner of property transfers it upon an intended trust for a specific non-charitable purpose, and there is no definite or definitely ascertainable beneficiary designated, no trust is created; but the transferee has power to apply the property to the designated purpose, unless he is authorized by the terms of the intended trust so to apply the property beyond the period of the rule against perpetuities, or the purpose is capricious."

In comment (c) of the same section it is said:

"Since an intended trust for a specific non-charitable purpose is not enforceable because there is no beneficiary to enforce it, it is not a trust, as the term is used in the Restatement of this Subject. Where the transferee has power to apply the property for such a purpose, the intended trust is sometimes called an 'honorary trust'. Since, however, the transferee has only a power and not a duty to apply the property, and since in the Restatement of this Subject the term 'trust' connotes the existence of duties which will be enforced in the courts, it is more accurate to state that the trustee has a power than it is to state that he holds upon trust, whether honorary or otherwise."

Here a middle ground is taken which should satisfy the authorities on both sides of the question. Though the words used are words of trust the Restatement asserts that the resulting legal relation cannot be termed a trust, (since they concede that there can be no such thing as a trust without a cestui), but performance of the prescribed acts by the "trustee" should be approved by the courts, on the ground that the "trustee" is vested with a power to dispose of the property in the way stipulated, and may do so if he wishes.

Whatever the differences of opinion among the authorities, the Pennsylvania law, on at least some phases of the subject, is now settled. The situations most frequently considered involve attempts to create a trust for the erection of a monument or upkeep of a grave, or for the saying of masses for the soul of the trustor or others. A very early case in which this question arose was *Bainbridges' Appeal*.<sup>8</sup> There the testator directed that his estate be converted into cash and after performing certain other duties the executor was to use the residue in the

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<sup>8</sup>97 Pa. 483.

erection of a monument at the testator's grave. The executor elected to perform this duty, and the court refused to interfere with him even though the heirs of the deceased claimed that only a "reasonable" amount of the residue of the estate should be expended in the erection of the monument. Here the doctrine or honorary trusts seems to receive definite recognition, though not by that name.

In the *Bainbridges* case the money was to be used immediately in fulfilling the obligation and therefore there was no need to discuss the rule regarding the duration of the trust. From the time of *In Re Dean*<sup>9</sup> it has been settled that such trusts as these cannot last beyond the period of a life and lives and twenty-one years thereafter. In that case and in subsequent cases dealing with this question of duration, it has been held by the courts that trusts of this type which may extend beyond the above period are in violation of the rule against perpetuities. This is not entirely accurate. The rule against perpetuities is directed against the remote vesting of future contingent interests only, and has no reference to the duration of estates.<sup>10</sup> The rule as set out in the *Dean* case is applied to the duration of the interest and therefore the rule against perpetuities is not properly applicable. But it has been argued, with some force, that the reason for the rule applies to honorary trusts and therefore the courts are correct in speaking of the rule against perpetuities in connection with them, though they may not be technically accurate.<sup>11</sup> The contention is that the rule applying to these trusts is at least an analogous rule. When such a settlement is made the beneficial interest does not vest in a cestui since there is none, and it does not vest in the trustee, since that is contrary to the intention of the donor, and therefore the beneficial interest must vest in the heirs subject to the honorary trust.<sup>12</sup> If then, this beneficial interest vests in the heirs by means of a resulting trust they have a vested interest subject to the performance of the honorary trust. Their vested interest is therefore of a diminished marketability. The reason for the rule against perpetuities is that future contingent estates have an unfavorable effect upon the marketability of present interests. A glance at the honorary trust situation shows that the resulting use in the heirs is diminished in marketability because of the overhanging power of the trustee to carry out the trust. Therefore this "outstanding power may be as objectionable to the

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<sup>9</sup>Note 2, supra. In that case the bequest was "for the term of fifty years, commencing from my death, if any of the said horses and hounds shall so long live." It is interesting to note that, though the animals concerned were hardly likely to live longer than twenty-one years after the death of the trustees, the bequest is not drawn so as to certainly come to an end within a life or lives in being and twenty-one years thereafter. Thus the court lays down the rule for duration in one breath, and in the next seems to disregard it, holding the bequest valid though it is conceivable that one or more of the horses and dogs might live beyond this period.

<sup>10</sup>Johnson's Estate, 185 Pa. 179.

<sup>11</sup>Smith, Honorary Trusts and the Rule Against Perpetuities, 30 Columbia Law Review 60

<sup>12</sup>Bogert, Trusts and Trustees, Sec. 165.

rule as a springing use of an executory devise."<sup>13</sup> The duration rule applied to these trusts is not, then, a purely arbitrary limitation imposed upon them, but is based upon reason and logic.

The Pennsylvania legislature early realized that a common form of such trust, namely, the trust for the maintenance or erection of monuments and tombstones, might often be invalidated because in violation of the duration rule. Therefore there was enacted in 1891 the following statute:

"No disposition of property hereafter made for the maintenance or care of any cemetery, churchyard or other place for the burial of the dead, or of any portion thereof, or grave therein, or monuments or other erections on or about the same, shall fail by reason of such disposition having been made in perpetuity, but said disposition shall be held to be made for charitable use."<sup>14</sup>

As *Bainbridges' Appeal*<sup>15</sup> indicates, this statute was not needed to validate such trusts. Its only purpose was to remove a possible objection to these trusts on the ground that they might endure for too long a period. In one of the first cases decided under the statute of 1891, the court, in discussing a bequest for the purpose of erecting a monumental memorial to the testator, said:

" . . . Testator was disposing of his own property. This is a right assured to him by law, and restrained only by those enactments and principles of public policy which, for the good order and welfare of society, have been established by the legislature or the courts. Gifts for the erection of monuments and construction of vaults or tombs in cemetery lots, and inclosing the same, and providing for their future care and adornment, together with other similar mortuary gifts, have ever been recognized, and the wishes of the donor or testator carried out by the courts. And to remove all doubts upon the subject, the legislature, by the Act of May 26, 1891, P. L. 119, expressly declared . . . ."<sup>16</sup>

A more certain indication that the Pennsylvania courts recognize these trusts as valid apart from the statute could not be desired.

It is interesting to note that though the Act of 1891 was meant to prevent the destruction of these trusts because of too long a duration, the courts still reserve to themselves the right to invalidate them for perpetuity if the occasion demands. Thus in *Palethorp's Estate*,<sup>17</sup> the testator left a sum the income from

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<sup>13</sup>Note 11, *supra*.

<sup>14</sup>1891, May 26, P.L. 119, Sec. 1.

<sup>15</sup>Note 8, *supra*.

<sup>16</sup>Smith's Estate, 181 Pa. 109.

which was to be used for the care and maintenance of the family lot, and the renewal of stones, etc., when necessary, and "for the support and maintenance of some proper person to be from time to time selected and employed by my trustees to attend to the care and oversight of said lot and show people where it is." The court objected to the latter part of the gift on the ground that it would create a "perpetual barker." It was held that this was not one of the purposes contemplated by the act of 1891 and that therefore the gift, as to this provision, was void as creating a perpetuity. Two conclusions may be drawn from this case. First, the act is not mandatory but merely gives the courts the right to uphold trusts of this nature even though they may continue beyond a life and lives and twenty-one years thereafter, if the bequest is otherwise satisfactory to the court. Second, the court infers that it would have recognized the invalidated part of the gift had it not provided for a perpetuity not within the immunity created by the act of 1891. Is it not reasonable to suppose, from this, that the Pennsylvania courts will recognize "honorary" obligations to be performed within the proper period, even though they are not validated by the act of 1891?

It is to be noted that the act of 1891 declares at its end that "said disposition shall be held to be made for charitable use." There was no necessity that the legislature add this provision to the statute. They might have declared that these dispositions were to be valid though to extend in perpetuity, and no more. But they added that the disposition was to be held to be made for a charitable use. Naturally the question arises as to whether it is a charitable use within the meaning of Section 6 of the act of June 7, 1917, P.L. 403, requiring that a will containing a gift to charity be made at least thirty days before the death of the testator. Several early decisions in the lower courts held that Section 6 of the above act did apply,<sup>18</sup> and that therefore such bequests would be void unless the will was made at least thirty days before the death of the testator. In 1930 the Superior Court expressed a contrary opinion. A case came before the court in which a bequest for these purposes was involved.<sup>19</sup> The court decided that the trust was not within the familiar definition of a charitable use as "anything that tends to promote the well doing and well-being of social man where neither law nor public policy forbids." They argued that the act of 1891 was not meant to declare these trusts as charitable for any other purpose than to preserve them from destruction as perpetuities. In support of their argument they point to the enacting clause preceding the statute which clause is in the words, "Legalizing Dispositions in Perpetuity for the Care of Burial Places." Considering this the court says:

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<sup>17</sup>249 Pa. 389.

<sup>18</sup>Boyd's Estate, 5 D. & C. 359; Eby's Estate, 30 D.R. 338.

<sup>19</sup>Estate of Anna M. Deaner, 98 Pa. Superior Ct. 360.

"The reference to charitable use at the end of the statute is limited by the general enacting clause preceding and merely declares the character of the immunity from the effect of the perpetuity doctrine, which it was intended to confer on private trusts theretofore considered perpetuities."

In support for their argument the court pointed to *Palethorp's Estate*,<sup>20</sup> in which the court suggested a reduction of the fund for caring for the burial lots from \$150,000 to \$10,000, the remainder to be diverted to the next of kin. This could not have been done had the trust been charitable for all purposes. Rather, it would have been necessary to award the residue for administration *cy pres*. This decision has definitely removed such bequests from the operation of Section 6 of the Act of 1917, P.L. 403. As the court observed the reason for that law does not apply in cases of bequests for the maintenance of burial lots. The law was meant "to make it reasonably certain that the thing done was the free will act of the donor, and was not the result of undue solicitation on the part of interested persons."<sup>21</sup> When the settlement is for the purpose of maintaining the burial lot of the testator or his family, it is obviously free from "undue solicitation."

In regard to trusts for the saying of masses the courts of Pennsylvania early committed themselves to the view that such trusts might be upheld as religious trusts. The earliest case reported on the subject,<sup>22</sup> concerned a will in which the testator expressed himself as follows, "I also give and bequeath the sum of \$1000, which my executors shall pay to the pastor at Newry, Blair Co., for masses for the repose of my soul, and for the repose of the souls of my relatives and the repose of the souls of the faithful of my parish." It was held that this was a religious or charitable trust for the purpose specified, the duty to carry out the same resting on the pastor of the church at the time of the testator's death. In keeping with this decision it was decided in *Rhymer's Appeal*,<sup>23</sup> that a residuary bequest for the purpose of saying masses for the soul of the testator was a religious use and therefore void under the act of 1855,<sup>24</sup> because executed within thirty days of the testator's death.<sup>25</sup> It would follow from these cases that a trust for the saying of masses is immune from the duration rule, since it is a charitable or religious use within the meaning of the act of 1855, which provides that such trusts shall not be void because of being limited in perpetuity.<sup>26</sup>

<sup>20</sup>Note 17, *supra*.

<sup>21</sup>*Kessler's Estate*, 221 Pa. 314, 321.

<sup>22</sup>*Appeal of Seibert and Bradley, Executors*, 18 W. N. C. 276.

<sup>23</sup>93 Pa. 142.

<sup>24</sup>1855, P.L. 328, reenacted in Sec. 6 of the Act of June 7, 1917, P.L. 403.

<sup>25</sup>See also *O'Donnell's Estate*, 209 Pa. 63.

<sup>26</sup>1855, April 26, P.L. 328, Sec. 10; 1895, May 23, P.L. 114, Section 1.

There has been no case in Pennsylvania comparable to the celebrated case of *In Re Dean*,<sup>27</sup> which decided that a trust for the purpose of caring for certain old pets of the testator should be upheld so long as it was not in violation of the duration rule. So far as is known this case has been followed in the United States only once. In the single reported case,<sup>28</sup> there was a bequest for the support of a favorite dog of the testatrix which the court upheld as a trust for a humanitarian purpose under a statute. The one case in Pennsylvania involving a trust for the upkeep of a specified animal leaves the reader with no opinion as to the Pennsylvania view on this subject. In that case<sup>29</sup> it was held that a bequest for the purpose of keeping certain burial lots in order, paying any debts and funeral expenses of the deceased, and in caring for an old horse "Bob," creates a trust for those purposes. However, the statements in the cases concerning the care of burial lots, would not be in opposition to a prophecy that such trust dispositions will be upheld in Pennsylvania, as and when the question arises. Nowhere have the Pennsylvania courts shown that distinct aversion to the trust without a cestui which distinguishes the criticism of the opponents of the "honorary trust" doctrine. Rather, it might be said, they have shown a definitely sympathetic attitude. Thus in *Dulle's Estate*,<sup>30</sup> the court said relative to a trust before them,

"The fundamental law of Pennsylvania in regard to property . . . is that the owner may do as he pleases with it provided that the disposition be not to unlawful purposes, and what he may do himself he may do by agent while living, or by executor after death."

With this statement before us we may justly be surprised if the Pennsylvania courts fail to follow the doctrine of *In Re Dean*.<sup>31</sup>

The reader is cautioned that the above discussion applies only to trusts created for a specific purpose. Where the purpose designated by the testator is an indefinite one it is generally agreed that the trust cannot be upheld.<sup>32</sup>

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<sup>27</sup>Note 2, *supra*.

<sup>28</sup>*Willett v. Willett*, Note 2, *supra*.

<sup>29</sup>*Wrenshall's Estate*, 72 Pa. Superior Ct. 258.

<sup>30</sup>218 Pa. 162.

<sup>31</sup>Note 2, *supra*.

<sup>32</sup>*Morice v. Bishop of U. of Durham*, 10 Ves. 521; *Scott, Control of Property by the Dead*, 65 Pa. Law Review 527, at 538-39; *Bogert, Trusts and Trustees*, Sec. 166.