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RESTRICTIONS ON GIFTS FOR RELIGIOUS OR CHARITABLE USES

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Collaborating With

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Since April 26, 1855¹ gifts for religious or charitable uses, whether by Deed or Will, have been subject to certain statutory restrictions. The reason for these dates back prior to the Middle Ages.

"Charities had their origin in the great command, to love thy neighbor as thyself. But when the Emperor Constantine permitted his subjects to bequeath their property to the church, it was soon abused; so much so, that afterwards, when it became too common to give land to religious uses, consistently with the free circulation of property, the supreme authority of every nation in Europe, where Christianity prevailed, found it necessary to limit such devises by statutes of mortmain.

"In France, by the ancient constitutions of that Kingdom, churches, communities, chapters, colleges, convents, &c., were not permitted to acquire or hold immovable property. Dumoulin sur, 1st art., 51 De la Cou., Paris. This incapacity after a long time was relaxed, and they were allowed to hold, by license of the King.

"In Spain, the communities mentioned before could neither acquire nor hold property, unless by authority of the sovereign; but in England, corporations had the capacity to

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¹See Act of April 26, 1855, P. L. 332, paragraph 11.

take property by the common law. Co. Litt., 99. They were rendered incapable of purchasing without the King's license by a succession of statutes from Magna Charta, 9 Henry III. to 9 Geo. II.

"They are known as the Statutes of Mortmain; that is, as it was the privilege of anyone, before such statute restrained it, to leave his property of every kind by testament to whom he pleased, and for such purposes, charitable or otherwise, as he chose; and the will was, in every particular, administered according to the testator's intentions, sometimes by the courts of common law, and at others by a court in chancery, as may be seen from the cases in Duke and other writers upon charities."²

Our own Acts of Assembly stem from the Act of 9 Geo. 2, c. 36, properly known as the Charitable Uses Act, passed by Parliament in 1735.³

That Act by its terms excluded "any estate, real or personal, lying or being within that part of Great Britain called Scotland", and its provisions "were never in England supposed to have been made to extend to her colonies and were never in force in those in America which became independent states, except by legislative adoption."⁴ Hence provisions similar to those of that Act were never in effect in Pennsylvania until, in 1855, a statute was passed⁵ reading as follows:

"No estate, real or personal, shall hereafter be bequeathed, devised, or conveyed to any body politic, or to any person, in trust for religious or charitable uses except the same be done by deed or will, attested by two credible, and at the time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor; and all dispositions of property contrary hereto, shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law; *Provided*, That any disposition of property within said period, *bona fide* made for a valuable consideration, shall not be hereby avoided."

²From the opinion of Mr. Justice Wayne in *Perrin vs. Carey*, 65 U. S. (16 L. Ed.) 701, 24 How. 465, a case which arose in 1861 in Ohio under a bill in equity to set aside devises and bequests under the Will of Charles McMicken to the City of Cincinnati in trust for the foundation and maintenance of two colleges.

³As observed in 2 Chitty, page 34, this Act was commonly but erroneously termed the "Mortmain Act" and was wholly repealed except as to Section 5 by the later Mortmain and Charitable Uses Act of 1888. It provided, inter alia, that a gift should be invalid:

"in trust or for the benefit of any charitable uses whatsoever, unless such gift - - - be and be made by deed indented, sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor."

As noted in *Jarman on Wills*, (5th Edition by Bigelow) page 232: "Never, indeed, was the spirit of any legislative enactment more vigorously and zealously seconded by the judicature, than" this statute.

⁴10 American Jurisprudence page 615, and *Perrin vs. Carey*, supra.

⁵Act of April 26, 1855, P. L. 332, Section 11.

Scarcely had the ink become dry on this piece of legislation, when in 1857 the matter came before our Supreme Court for its decision. There⁶ it appeared that one Thomas Smith had on April 10, 1856 made his Will by which he bequeathed and devised certain property in trust for "the uses and purposes of Friends Boarding School at Westtown, etc.", and died twenty days later, or in other words less than one calendar month after the making of his Will. The real point involved in that case was whether or not the gift was a devise for a charitable use, and in passing upon this point Mr. Chief Justice Lewis, after quoting the Act of 1855, went on to say:

"In the spirit of the statute of 9 Geo. 2d, ch. 36 and to prevent many of the mischiefs remedied by that statute, the Act of 26th April, 1855, was passed. There may be some difference of opinion on the question of policy involved in its enactment; but there can be no doubt that it is our duty to carry out its provisions in good faith."

It is the "difference of opinion on the question of policy involved" in such an enactment that has impelled a consideration of the subject by the writer.

Under certain of the decisions⁷ following the passage of this Act

"it was held that if the attesting witness be interested as legatee or devisee under the will, or is to derive a pecuniary benefit or advantage from any part of it, or if interested at the time of attestation in a religious or charitable institution named as beneficiary, he is not disinterested within the meaning of the statute. Under the authority of this case, and those which followed and broadened its scope, all gifts to charitable uses were held invalid if the subscribing witness had such an interest under any of the provisions of the will as to disqualify him from attesting the execution of the entire testamentary writing. All gifts to charities fell if the subscribing witness was disqualified from attesting the execution of the will."⁸

The situation thus created was very quickly corrected by the Legislature which⁹ interpolated the provision that:

"a disinterested witness being a witness not interested in such religious or charitable use, this act not being intended to apply to a witness interested in some other devise, bequest, or gift in the same instrument."

Despite the apparent clearness of this provision, within less than four years the matter had reached our Supreme Court¹⁰ where Mr. Justice Elkins said:

"It would be difficult to conceive of a clearer and more direct expression of legislative intention. Hereafter the inter-

⁶In *Price v. Maxwell*, 28 Pa. 23.

⁷See particularly *Kessler's Est.*, 221 Pa. 314 (1908).

⁸See *Palethorp's Est.*, 249 Pa. 411, 413 et seq.

⁹By the Act of June 7, 1911, P. L. 702.

¹⁰*Palethorp's Est.*, 249 Pa. 411, 414 (1915).

est which disqualifies an attesting witness to a will in cases of this character, is an interest in the religious or charitable use. An interest in a devise, or bequest, or gift in the same instrument, does not disqualify an attesting witness because the legislature has so declared, and it is a subject clearly within the domain of legislative power. This means that when the execution of a will has been attested by two credible witnesses, all devises, bequests and gifts, except those in which the attesting witness has an interest, are to be held valid under the Act of 1911."

So the matter stood until the Commission appointed on October 4, 1915¹¹ "to codify and revise the laws of decedents' estates" filed with the Legislature their recommendation that Section 6 of the new Wills Act¹² should provide:

"No estate, real or personal, shall be bequeathed or devised to any body politic, or to any person in trust, for religious or charitable uses, except the same be done by will attested by two credible, and, at the time, disinterested witnesses, at least thirty days before the decease of the testator; and all dispositions of property contrary hereto shall be void, and go to the residuary legatee or devisee, heirs or next of kin, according to law. A disinterested witness, within the meaning of this section, is a witness not interested in such religious or charitable use, this section not being intended to apply to a witness interested in some other devise or bequest in the same instrument."

The Commissioners comment in their report¹³ that:

"Much might perhaps be said in favor of the abolition of the prohibition of bequests and devises for charitable and religious uses made within any definite period of time before the death of the testator. The Commissioners have concluded to make no recommendation on this subject to the Legislature. They have, however, substituted for the period of one calendar month, that of thirty days, for the reason that the calendar months of the year do not contain the same number of days, and the provision should be uniform."

Strangely enough, however, it was not this apprehension on the part of the Commissioners as to a possible desire to abolish the definite period of time fixed by the Act, but rather on the contrary the necessity for two credible witnesses that excited the interest of the Legislature in the possibility of amending the Act on this point. Such procedure was proposed in the Session of 1935 and met with but little opposition.

The result was the passage of the Act of July 2, 1935, P. L. 573, which deleted from the statute all reference to witnesses. There still remained the pro-

¹¹By the Act of April 23, 1915, P. L. 177.

¹²That of June 7, 1917, P. L. 403.

¹³Page 62.

vision for the lapse of a certain length of time. "Thirty days" seems a simple enough sort of an expression, but the reported decisions indicated such uncertainty, real or assumed, in the litigation that arose on the subject that the Legislature¹⁴ inserted a clause providing: "which period shall be so computed as to exclude the first and include the last day thereof." Since the date of this Act the matter has been governed by the provision providing as follows:

"No estate, real or personal, shall be bequeathed or devised to any body politic, or to any person in trust for religious or charitable uses, except the same be done by will at least thirty days before the decease of the testator, which period shall be so computed as to exclude the first and to include the last day thereof; and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, heirs or next of kin, according to law."

In the Wills Act of 1947¹⁵ there is a provision¹⁶ that:

"Any bequest or devise for religious or charitable purposes included in a will or codicil executed within thirty days of the death of the testator shall be invalid unless all who would benefit by its invalidity agree that it shall be valid. The thirty-day period shall be so computed as to include the day on which the will or codicil is written and to exclude the day of death. Unless the testator directs otherwise, if such a will or codicil shall revoke or supersede a prior will, or codicil executed at least thirty days before the testator's death, and not theretofore revoked or superseded and the original of which can be produced in legible condition, and if each instrument shall contain an identical gift for substantially the same religious or charitable use, the gift in the later will or codicil shall be valid; or if each instrument shall give for substantially the same religious or charitable purpose a cash legacy or a share of the residuary estate or a share of the same asset, payable immediately or subject to identical prior estates and conditions, the later gift shall be valid to the extent to which it shall not exceed the prior gift.

and in adverting to the time limitation, the stringent provisions of which are somewhat ameliorated to the extent above set forth, the Commissioners in their report said (page 10):

"This subsection takes care of the situation where a testator has been charitably inclined and then changes his will in some respect within thirty days of death. The present un-

¹⁴By Act No. 71 of May 16, 1939, P. L. 141. The Act relating to gifts for religious or charitable uses by a deed inter vivos remained in effect until the Act of May 16, 1939, P. L. 141 (No. 70).

¹⁵Approved by the Governor April 24, 1947, No. 38.

¹⁶Under Section 4 relating to under what circumstances wills shall be modified.

The final clause of the Act to a large extent embodies the rule of law illustrated by the opinion of the court in *Bingaman's Est.*, 281 Pa. 497.

fortunate situation is illustrated by *Hartman's Est.*, 320 Pa. 321. The rule of Section 6 of the Wills Act of 1917 is considered sound, and it is believed the proposed subsection in avoiding certain inequitable situations does not weaken the effectiveness of the rule forbidding last minute 'charitable' and 'religious' influences. When the devise or bequest for religious or charitable purposes remains the same in the earlier and later will there should be no difficulty in applying the proviso—the later charitable gift will be good."

Up to the time of this writing, this is the last word by the Legislature on the subject.

The Wills Act of 1947 in the provision quoted greatly improves the law relative to charitable dispositions and these provisions will, it is hoped, more effectually carry out the intention of testators, which has always been considered as the pole-star to guide the courts.

In *Hartman's Estate*¹⁷ the drastic effort of the 30-day requirement was illustrated, now happily changed by the new Act. Likewise the softening rules adopted in *Bingaman's Estate*¹⁸ were properly extended, so it may be generally concluded that these provisions constitute an advance in the law of Wills.

However, the question occurs as to the propriety of the 30-day clause in its retention in view of the elimination of the clause requiring attesting witnesses, construed in *Paxson's Estate*¹⁹ as subscribing witnesses, by the provisions of the amending Act of 1935²⁰ and carried over into the Act of 1947.

Under the present state of the law and in view of the ruling in *Schultz's Appeal*²¹ and affirmed in the later cases of *Flood vs. Ryan*²² and *Bickley's Estate*²³ and other methods of affording means of by-passing the 30-day requirement, a reasonable doubt arises whether this time requirement has not lost its potency as well as any sound reasons for its continuation in the law.

To refresh the memory of the gentle reader, it was decided in *Schultz's Appeal*²⁴ about 21 years after the passage of the Act of April 26, 1855 that the 30-day provision could be by-passed under the following statement of facts. Schultz, the testator, being very ill sent for a scrivener to write his will and the same was drawn and executed September 6, 1872, the testator dying September 13, 1872. He had expressed a desire to leave the bulk of his estate to religious charities but the scrivener advised that the will would be inoperative as to such

¹⁷320 Pa. 321 (1936), 182 A. 234.

¹⁸281 Pa. 497 (1924), 127 A. 73.

¹⁹221 Pa. 98 (1908), 70 A. 280.

²⁰Act of July 2, 1935, P. L. 573.

²¹80 Pa. 396 (1876).

²²220 Pa. 450 (1908), 69 A. 908.

²³270 Pa. 101 (1921), 113 A. 68.

²⁴Note 21, *supra*.

bequests if the testator died within the 30 days as he actually did. A suggestion was made that he could dispose of his estate by will unconditionally to someone and if the latter would see fit he could apply the estate to the purposes the testator had wanted. After this scheme was thoroughly explained the testator concluded to make a bishop of his church as the residuary legatee absolutely. The bishop did not know of this arrangement, had no part in it, and learned the facts after the testator's death. Whereupon he signified his intention to carry out the testator's wishes, although he was advised that under the terms of the will the residuary estate was his absolutely. The balance of the estate for distribution amounted to something over ten thousand dollars and the auditor awarded the fund to the bishop holding the gift absolute unimpressed with any trust and that the bishop was not bound by any assurances given testator that he could be trusted to carry out his wishes, not having been a party in any way to such arrangement. The Orphans' Court overruled the exceptions to the auditor's report and entered a decree which later was assigned for error to the Supreme Court. In affirming the decree and dismissing the appeal, Sharswood, J. thus concluded:

"It is urged, however, that this whole plan is nothing but a contrivance to evade the statute. No doubt such was the intention of the testator. It is said that it is a fraud upon the law and that the bequest ought therefore to be declared void. But that overlooks the fact that the absolute property in the subject of this bequest has vested in the legatee, and that he is entirely innocent of any complicity in the fraud of the testator. If the statute is practically repealed by this construction it is evident that it must be for the legislature to devise and apply a remedy, not the judiciary, whose province is not *jus dare* but *jus dicere*."

This reasoning, characterized by one writer as "legalistic casuistry"²⁵ was followed in *Flood vs. Ryan*²⁶ and in *Bickley's Estate*,²⁷ not however without strong dissenting opinions in both, in the former by Mestrezat, J., and in the latter by Simpson, J. Justice Simpson delivered an extremely caustic criticism of the reasoning of *Schultz's Appeal* and the cases following, outlining his dissertation into five points, all of which are compelling and pertinent. This opinion is prefaced with the following statement: "If the question involved was an open one with us, or if it was of modern determination, we would reverse the decree in the present case for the following reasons."

Despite the animadversions made the principle of these cases has survived and remains as law to this day, thus affording opportunities for evasion perpetrated by the testator as in the cases cited upon innocent persons who are im-

²⁵Execution of Wills, 47 Dick. L. R. 83 (1943), Hutton.

²⁶See note 22 supra.

²⁷See note 23 supra.

pelled by a high sense of duty in carrying out the testator's wishes despite the stringent terms of the statute. In *Flood vs. Ryan*²⁸ the Archbishop testified that although he was advised by counsel that the gift to him was an absolute and unconditional one, yet he was impelled to carry out the testator's wishes being bound in the realm of conscience. On this particular aspect Mestrezat, J., in his dissenting opinion said:

"The question here, however, is not between a cestui que trust and the trustee, nor does it involve the right of a cestui que trust to enforce the provisions of a trust against a trustee. The question is whether the devise to Archbishop Ryan was in fact to him individually or to him as trustee for the church and charity primarily given the property in the will, and therefore made to him individually to evade the Act of April 26, 1855, P. L. 328. . . . The will, therefore, read in the light of these facts, shows conclusively that the residue of the testator's property was devised to the Archbishop with the intention, and the devisee so understands that it shall be held and used for the church and charity named in his will. . . . The will itself shows the intention of the testator to give the residue of his property to the church and charity named in his will. The Archbishop, the devisee, admits that he holds the property for such uses. Under his admission Archbishop Ryan would commit a fraud if he applied the property to his own use and withheld it from the church and charity. His integrity and high character are a positive assurance that he will not betray the trust reposed in him. The church and charity, therefore, get the property, as intended by the testator, in plain violation of the laws of Pennsylvania."²⁹

As subscribing witnesses have been eliminated in the matter of charitable gifts by will, there are no safeguards against an evasion of the requirement by ante-dating a will, either in collusion with the scrivener or where a will is holographic, and therefore the exclusive work of the testator. In these several methods of evasion the situation can be presented in the form of this question.

Why put an honest scrivener to such subterfuges as in *Schultz's Appeal*, *Flood vs. Ryan*, and *Bickley's Estate*, or tempt a dishonest scrivener to travel in even more devious paths?

The purpose of the 30-day provision was to preclude deathbed dispositions wherein it might be obvious that unscrupulous persons or those with an overweening zeal for the particular cause might impose their wills upon the testator rather than the free and voluntary expression of the testator himself.

This aspect of so-called "deathbed wills" was very recently before the Supreme Court³⁰ where the will of a man who died about twenty-four hours

²⁸See note 22 supra.

²⁹Cf. *Honorary Trusts in Pennsylvania*, 42 Dick. L. R. 161 (1938).

³⁰*Klingner vs. Dugacki*, 356 Pa. 143 (1947), 51 A. 2d. 627.

after his will was executed was set aside *inter alia* on the ground that the decedent did not possess testamentary capacity as found by the jury and the court below, and Mr. Justice Allen M. Stearne, who wrote the opinion for the court, called attention to the fact that:

"As early as 1612 Coke said: 'Few men pinched with the messengers of death have a disposing memory': 10 Rep. Pref. XIV."

Thus the matter stands, though the considered opinion of many learned jurists, some of which have been referred to hereinbefore, has differed materially on the wisdom of retaining either the credible witness clause, which has been eliminated, or the thirty-day clause which has been retained, or both.³¹

To the writer there seems to be some doubt as to whether or not the situation as it existed at the time of Constantine and later during the reign of George II, and in this Commonwealth in 1855, has not materially changed.

In England, in the early part of the Eighteenth Century, and back prior thereto at least to the time of Magna Carta when one referred to a charitable use but one institution was meant—The Church, and in such case not, as today any one of scores of denominations, but that having its sole source of authority in Rome.

Today, on the other hand, there is scarcely a limit to those institutions, conceived by the mind of man in its most unselfish manifestations, which are conducive to the alleviation of mortal ills and misfortunes, the relief of the poor and needy, the healing of the sick and distressed, as well as those incident solely to religion or education. But a negligible few of the gifts for such purposes can be imputed to overweening influence on a mind clouded by approaching death and bent on a belated ransom.

Where such is the purpose that impelled the gift and such the condition of the testator, our law has adequate relief in the decisions relating to testamentary capacity, undue influence and confidential relationship.

Every active practitioner within the Commonwealth has experienced cases where a splendid charitable gift by one of unquestioned lucidity and completely free from any influence has been thwarted by an unexpected death within thirty days. In many more they have shuddered at the thought of what might have been had the testator not survived this purely arbitrary period of time.

In 1855 railroads were in their infancy. Airplanes and automobiles were undreamt of. Life was leisurely and death normally the result of illness or old age. Times have changed. Should the law change with them?

³¹See *McLean vs. Wade*, 41 Pa. 266, 269 (1861); *Gray's Est.*, 147 Pa. 67, 76 (1892); *Paxson's Est.*, 221 Pa. 98, 107, 111 (1908). For a digest on the laws of this and other states relation to the subject see the Supplement to the Law of Wills published with the Second Edition of Thompson on Wills, Sections 595-647.

Charities are, or at least should be, favorites of the law, at least up to a certain point.³² The law protects a surviving spouse as against a will which provides unduly in his or her opinion for a charitable use. No such protection is given to the decedent's children and perhaps this would be a wise matter for the Legislature to consider.³³

There should certainly be no encouragement given to "undue influence."

The evil which is attempted to be remedied by the Statute being obvious, in the opinion of the writer such could be prevented better and with less injury to the reasoned desires of a testator by the inclusion of the credible witness clause or some modification thereof, rather than the persistence of the thirty day clause.

If the thirty day clause is repealed the principle of *Schultz's Appeal*, et al, passes out. If instead of this provision the credible witness requirement is restored, the fear of imposition upon the testator is safeguarded, it is believed, sufficiently. If the trend of the law and economic events is followed, the thirty day clause in the present law might be repealed as was the credible witness requirement in 1935, thus leaving the testator unhampered by either requirement.
April 30, 1947.

³²Note the fact that under the Federal Estate Tax Act most gifts for charity are exempt from tax.

³³For law of other states relative to limitation of amount based on the proportion of the estate particularly applying where testator leaves lineal descendants as in Idaho, or spouse, child, grandchildren or parent as in Iowa, or spouse, child or parent as in New York, see Atkinson, *Law of Wills* (Hornbook Series 1937) page 108 et seq.