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Expert Analysis

Mortmain Statutes and Restrictions On Testamentary Gifts to Charities

During the feudal days of the 13th century, the first Statutes of Mortmain were enacted by King Edward I of England.[1] These statutes aimed to preserve England's revenues by preventing land from passing into the possession of the church. Possession of property by a corporation such as the church was known as "mortmain" or literally "dead hand." Under the feudal system, taxes were generated when the ownership of land passed by inheritance. If an estate was owned by a religious corporation (that never died), these taxes were never paid. The Statutes of Mortmain were meant to re-establish the prohibition against donating land to the church for the purposes of avoiding these taxes.[2]

Hundreds of years later, many American jurisdictions enacted their own mortmain statutes sharing the traditional concern that excessive property ownership by religious organizations took property out of commerce.[3] Even *Matter of Rothko*,[4] the quintessential Surrogate's Court decision concerning fiduciary self-dealing, had its beginnings with a New York mortmain statute. In his will, Mark Rothko effectively disinherited his children in favor of charitable bequests. The New York mortmain statute in effect at the time, Estate Powers and Trusts Law (EPTL) 5-3.3, allowed Rothko's daughter to elect against the estate for her share of a 50 percent interest in the estate.[5] This election gave the daughter standing to seek removal of the executors because of their self-dealing, and led to the important precedent set by the Court of Appeals.[6]

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The laudatory protection of family members may make mortmain statutes seem attractive. However, evolving public policy ideals emphasize the right of individuals to dispose of their own property as they wish.

Today, the Surrogate's Courts of New York place an unparalleled emphasis upon testamentary freedom and what the testator intended. This article will look at the historic reasons for mortmain, and the reasons why the legal system has embraced free will over regulation.

Brief History

Mortmain in England had its roots in the Magna Carta in 1215 which made certain prohibitions against the alienation of land.[7] The Statutes of Mortmain, enacted in 1279 and 1290, were meant to strengthen the prohibition against donating land to the church for purposes of avoiding the feudal system and related taxes. There was also concern that some clerics may suggest to those on their deathbeds that unless a portion of their estate was given to the church, a penitent would not receive their proverbial eternal reward. Some church leaders and others sought to

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curb this possible abuse. The early mortmain statutes sought to strike a proper balance between the power of the church, family protections and customs, and the aristocracy.[8]

Charitable giving was increasingly favored in the following years, and the early mortmain statutes were eventually weakened and repealed. However, there remained a concern that testators would make deathbed charitable bequests to the church. As a result, the English Parliament enacted the Modern Law of Mortmain in 1736 which explicitly prohibited testamentary bequests of land to charities and nullified inter vivos transfers of land to charities when made within 12 months of the donor's death.[9] A prohibited transfer reverted to the donor's heirs. Under the earlier restrictions, an improper devise to charity was not void but merely voidable. By contrast, the Mortmain Act rendered such devises void absolutely.[10]

England mortmain statutes were eventually repealed beginning in the early 1900s. By the 1950s, Parliament viewed mortmain statutes as no longer needed or well suited for protecting testamentary freedom.

Statutes in New York

Many American jurisdictions enacted their own mortmain statutes ostensibly to protect testators and their families from overreaching religious groups as well as other charitable groups, but also because of the traditional concern that excessive property ownership by religious organizations and charities in general took property out of commerce.

Many American judges and legislators thought the English example worthy of emulation. As discussed in *Stephenson v. Short*,[11] prominent judges urged American legislators to follow the English Parliament's example "by enacting legislation to prevent the 'imposition upon pious and feeble minds in their last moments' and to restrain charitable impulses when they threaten 'the natural claims of blood and parental duty to children.'"[12]

New York had some version of a mortmain statute since 1860. Prior to the Bennett Commission and the enactment of the current EPTL, Decedent's Estate Law 17 allowed the surviving spouse and children of a decedent to contest any will (or elect against it) if more than half of the net estate was gifted to charity.

New York had some version of a mortmain statute since 1860. Prior to the Bennett Commission and the enactment of the current EPTL, Decedent's Estate Law 17 allowed the surviving spouse and children of a decedent to contest any will (or elect against it) if more than half of the net estate was gifted to charity. EPTL 5-3.3 continued this prohibition and allowed surviving issue and parents as permissible contestants. The surviving spouse was eliminated under the EPTL because his or her rights were adequately protected by the right of election now codified in EPTL 5-1.1.

Yet, despite the statutory prohibitions, a testator could avoid application of the statute by making inter vivos charitable gifts, whether in trust or outright, or by providing in his or her will that if the parents or issue contested, the gift should instead be paid to a third person. The third person could not be a charity,[13] but this alternative drastically reduced potential contestants' power to contest.

In the 1970s, several cases evidenced a shift in public policy and ideology on this issue. In *Matter of Cairo*,[14] a grandson of the deceased attempted to use EPTL 5-3.3 to contest a disposition in the will to certain charities. Pursuant to the terms of the will, the testator gave her cooperative apartment and other items to her sister, and the residue of her estate to three named charities. The will expressly stated that she made no bequest to her grandson and other family members "for good and sufficient reason."

The Queens County Surrogate's Court ruled that the grandson was entitled to share in the estate pursuant to EPTL 5-3.3. The Second Department reversed focusing on the "first rule of testamentary construction [which] is that a will be interpreted to reflect the testator's actual intent." The Second Department found that the testator's clearly expressed intent was to benefit charity and her sister, and that she wanted no part of her estate to go to her grandson. The Court of Appeals affirmed without opinion.

Subsequent cases viewed *Cairo* as mandating that in each case the

court look to the testator's intent in determining whether EPTL 5-3.3 provides a remedy for a disinherited family member. See e.g., *Estate of Newkirk*, 86 Misc.2d 930, 931 (Surr. Ct. Bronx Co. 1974) ("This concept of the supremacy of the testator's intent permeate[d] the other recent cases considering the statute at issue.")

The Court of Appeals further explained its reasoning in a later case *Matter of Estate of Eckart*.[15] In *Eckart*, the court found that a will provision that made "no further testamentary provision" for a family member clearly evidenced a testamentary intent by the testator to disinherit that family member and did not grant the individual rights under EPTL 5-3.3.

In *Eckart*, the Court of Appeals noted the criticism of the Cairo decision because of the testator's ability to nullify a statute which was designed to protect his issue from being disinherited by excessive gifts to charity. The Court of Appeals reasoned that the statute itself (and not the Cairo decision) allowed a testator to avoid its protections by simply creating a gift over to an individual not qualified to contest the gift. The Court of Appeals noted that any constructive change should come from the Legislature and not the court.[16]

EPTL 5-3.3 was repealed in 1981.

Testamentary Intent

The laudatory protection of family members may make mortmain statutes seem attractive. However, evolving public policy ideals emphasize the right of individuals to dispose of their own property as they wish.

The Third Restatement of Property: Wills and Other Donative Transfers highlights that the "'law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property.'" Similarly, the Uniform Probate Code provides that one of its underlying purposes and policies is to discover and make effective the intent of a decedent in distribution of his property.

The mortmain statutes may have been repealed because they were unworkable and easily circumvented. It is more likely that the ability to cleverly draft around the statute evidenced a changing public policy toward free will. A testator could and should do what he or she intended regardless of the restrictions imposed by the mortmain statutes. As stated by the Court of Appeals, "a testator's expressed intent is the only construction guide we need."[17]

Conclusion

There were certainly valid purposes for the enactment of mortmain statutes in the United States including the protection of the testator from undue influence and the protection of the testator's family. However, the statutes restricted the power of testators to dispose of their property as they wished. Evolving ideas of free will and testamentary freedom led to their repeal. In modern day Surrogate's Courts, it is the intent of the testator that governs.[18]

1. https://legacy.fordham.edu/halsall/source/ed1-mortmain.asp

2. Id.

3. Elizabeth R. Carter, "Tipping the Scales In Favor of Charitable Bequests: A Critique," 34 Pace L. Rev. 983, 1013 (2014). Available at: http://digitalcommons.pace.edu/plr/vol34/iss3/1

4. 43 NY2d 305 (1977).

5. 71 Misc.2d 74 (Surr Ct New York Co. 1972).

6. 43 NY2d 305 (1977).

7. See Carter, supra note 3; see also Jeffrey G. Sherman, "Can Religious Influence Ever Be 'Undue' Influence?" 73 Brook. L. Rev. 579, 587-620 (2008). Available at http://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1326&context=blr

8. See Carter, supra note 3, at 1007-1009.

9. Id. at 1011-1012.

10. Sherman, supra note 7 at 596-597.

11. 92 NY 433 (1883).

12. Id. at 440; see also Sherman, supra note 7, at 598.

13. *Durkee v. Smith*, 171 AD 72 (3d Dept. 1916), aff'd, 219 NY 604 (1916).

14. 35 AD2d 76 (2d Dept. 1970).

15. 39 NY2d 493, 498 (1976).

16. Id. at 502.

17. *Matter of Dammann*, 12 NY2d 500, 506 (1963); see also *Matter of Cairo*, 35 AD2d 76 (2d Dept. 1970).

18. A law school research paper by Andrea Bonilla, a recent graduate of St. John's University School of Law, was the basis for this article.