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ESTATES, POWERS AND TRUSTS LAW

EPTL § 5-3.3: Right of parents and/or issue to challenge excessive gifts to charity is reaffirmed.

Section 5-3.3 of the EPTL[100] is one of several legislative exceptions to the general rule that whenever possible a will should be construed in accordance with the intent of the testator.[101] The statute provides that when a decedent has directed that more than one-half of his estate be used for charitable purposes,[102] any parent or issue[103] who as a distributee or residual legatee would receive a pecuniary benefit from successful litigation may contest the gift.[104] Although testamentary bequests to nonprofit institutions are not contrary to the public policy of the State,[105] the statute reflects the

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[100] EPTL § 5-3.3 provides in pertinent part:
A person may make a testamentary disposition of his entire estate to any person for
a benevolent, charitable, educational, literary, scientific, religious or missionary
purpose, provided that if any such disposition is contested by the testator's surviving
issue or parents, it shall be valid only to the extent of one-half of such testator's
estate, wherever situated, after the payment of debts, subject to the following:
1) An issue or parent may not contest a disposition as invalid unless he will
receive a pecuniary benefit from a successful contest as a beneficiary under the will
or as a distributee.

For a brief survey of the history of this provision in New York, see TEMPORARY STATE
COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES,
FOURTH REPORT 215-23 (1965) [hereinafter cited
as COMMISSION ON ESTATES].

The first, safest and most urgent rule of testamentary construction is the one
that says that whenever possible the testament is to be construed in accord with the
actual intent of the testator including his presumed intent to dispose of his whole
estate by will.

In re Estate of Dammann, 12 N.Y.2d 500, 504, 191 N.E.2d 452, 453, 240 N.Y.S.2d 968, 970
(1963).

For examples of the types of nonprofit institutions whose receipt of charitable
bequests was held to be controlled by earlier codifications of the present EPTL § 5-3.3, see
Unger v. Loewy, 236 N.Y. 73, 140 N.E. 201 (1923) (Cornell University, Johns Hopkins
University, Leland Stanford, Jr., University), In re Will of Yadach, 5 App. Div. 2d 355, 172
N.Y.S.2d 340 (5d Dep't 1958) (bequest to pastors of various churches for celebration of
masses for testator and his wife), In re Rowland's Will, 225 App. Div. 118, 232 N.Y.S. 127
(2d Dep't 1928) (Young Men's Christian Association), and In re Estate of Watkins, 118 Misc. 645,
194 N.Y.S. 342 (Sur. Ct. Orange County 1922) (Odd Fellows' Lodge).

A surviving spouse is not included in the excessive gifts to charity provision because
he is thought to be sufficiently protected by the right of election provided in EPTL § 5-1.1.
See Commission on Estates, supra note 100, at 227-28. First enacted in 1929 as Decedent
Estate Law § 18, ch. 229, § 4, [1929] N.Y. Laws 500, EPTL § 5-1.1 protects the surviving
spouse from total disinheritance by granting him a personal right of election to take a share
of the decedent's estate. See In re Byrnes, 260 N.Y. 465, 184 N.E. 56 (1933); In re Estate of
Dunham, 63 Misc. 2d 1029, 314 N.Y.S.2d 29 (Sur. Ct. Greene County 1970); In re Estate of
Topazio, 175 Misc. 132, 22 N.Y.S.2d 847 (Sur. Ct. Kings County 1940). For an extensive
analysis of the 5-1.1 right of election, see 9A P. ROHAN, NEW YORK CIVIL PRACTICE
§ 5-1.1 (1975) [hereinafter cited as ROHAN]; Arenson, Surviving Spouse's Right of Election and

For a discussion of the standing requirements under the statute, see ROHAN, supra
note 103, ¶ 5-3.3[4].

Public policy encourages the support of charitable, benevolent, scientific, religious,
and educational institutions. EPTL § 5-3.3, like its predecessors, merely prevents "the giving
legislative concern with protecting "the natural objects of the testator's bounty from improvident gifts to their neglect."\textsuperscript{106} Thus, parents or issue who choose to contest the gift will thereby obtain that portion of the charitable bequest in excess of one-half of the estate which would otherwise pass to them under the will or in intestacy.\textsuperscript{107}

In \textit{In re Estate of Eckart}\textsuperscript{108} represents the latest judicial attempt to reconcile the purpose of the statute with the rule that a testator's expressed intent should prevail. In \textit{Eckart}, the decedent bequeathed $50 to each of her two children and the balance of her estate to the Watch Tower Bible and Tract Society of Pennsylvania. The Appellate Division, Second Department, affirmed without opinion Surrogate Laurino's decision that the children should be permitted to contest the charitable bequest.\textsuperscript{109} The surrogate ruled that the $50 bequests did not evince an intent on the part of Julie Eckart to disinherit her children should any part of her estate fall into intestacy, and therefore the children were not barred from sharing in the part of the estate that would lapse into intestacy as a result of the contest.\textsuperscript{110}

The court's concern with determining the testator's intent before permitting the children to contest the will under section 5-3.3 is a result of the holding of \textit{In re Estate of Cairo}.\textsuperscript{111} In \textit{Cairo}, the testatrix bequeathed more than half of her estate to charity. Her will further provided that "for good and sufficient reason" no bequests were being made to her grandson or daughters-in-law.\textsuperscript{112}
The court held that section 5-3.3 did not give the grandson standing to contest the will in light of the testatrix’s clear intent that he not benefit from the estate113 and the dominant scheme of the instrument that the entire estate go to charity.114 In effect, this ruling meant that the mere addition of express words of disinheri-
tance in a will is sufficient to override the legislative policy permitting parents or issue to contest charitable bequests.115

Courts have since struggled to interpret the Cairo decision in such a way as to preserve the right to contest excessive charitable bequests.116 For example, the will in In re Estate of Norcross117 contained language stating that no provision had been made therein for the testator’s children since they had already been provided for through inter vivos trusts. The surrogate determined that since “[a]n intent to deprive these distributees of property which might pass to them through intestacy is not evident in the will . . .” the children could contest the charitable bequest.118 A similar result was reached in In re Estate of Rothko,119 where the decedent’s will explicitly provided that his children should only inherit in the event of their mother’s death.120

In an attempt to distinguish Cairo, courts121 have interpreted the decision as requiring that the words of disinheri-
tance in the will “unambiguously extend to intestate property as well as testamen-

113 Id. at 78, 312 N.Y.S.2d at 927. The rationale employed in Cairo was subsequently described as the “crystal clear intent” test. See In re Estate of Eckart, 48 App. Div. 2d 61, 63, 368 N.Y.S.2d 28, 29 (2d Dep’t 1975) (Christ J., concurring); In re Estate of Norcross, 67 Misc. 2d 992, 997, 325 N.Y.S.2d 477, 482 (Sur. Ct. N.Y. County 1971), aff’d mem., 39 App. Div. 2d 874, 334 N.Y.S.2d 600 (1st Dep’t 1972).
116 In light of the doctrine of stare decisis, the result reached in Cairo can be avoided “only if a distinction can be drawn between the language of the will considered in Cairo and the language of the will” actually at issue. In re Estate of Norcross, 67 Misc. 2d 932, 937, 325 N.Y.S.2d 477, 482 (Sur. Ct. N.Y. County 1971), aff’d mem., 39 App. Div. 2d 874, 334 N.Y.S.2d 600 (1st Dep’t 1972).
118 67 Misc. 2d at 937-38, 325 N.Y.S.2d at 482.
120 In Rothko, the surrogate found that “[t]here exists no basis for a conclusion that this decedent ever intended to disinherit his issue in every event, as . . . in the Cairo decision.” Id. at 76, 335 N.Y.S.2d at 669 (emphasis added). Accordingly, the testator’s children were permitted to contest the charitable bequest. Id.
Yet, in *Cairo,* the words of disinheritance that were held to bar the grandson's contest of the charitable gift referred merely to the fact that no testamentary bequests were being made in his favor; the issue of intestate succession was not mentioned in the will at all. It is therefore submitted that *Cairo* does not require the presence of specific words of disinheritance as to both testamentary and intestate dispositions in order to sustain a finding that a 5-3.3 contest is precluded. While *Cairo* indicated that the testatrix's intent as to "her entire estate" was to disinherit the family members involved, the decision did not further define "entire estate" as necessarily encompassing both types of dispositions. Accordingly, *Cairo* appears to disallow any contest simply if an intent to disinherit is clearly ascertainable from the language of the will. Such an interpretation of *Cairo* formed the basis of the court's opinion in *In re Estate of Newkirk,* where the surrogate ruled that a $100 bequest from an estate worth approximately $75,000 "must be deemed to be so de minimis as to establish [testatrix's] strong intent to effectually disinherit petitioner." In *Newkirk,* as in *Cairo,* the court considered the language of the will with regard to bequests alone, from that inferred an intent to disinherit the entire estate, and thus disallowed the contest.

Under this analysis, *Cairo* and *Eckart* are indistinguishable.

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122 Brief for Petitioners-Respondents for argument to the Court of Appeals at 5, *In re Estate of Eckart.*

An example of testamentary language that was held to bar a daughter's right to take her intestate share of her mother's estate under EPTL § 4-1.1 was found in the will considered in *In re Estate of Beu,* 70 Misc. 2d 396, 333 N.Y.S.2d 858 (Sur. Ct. Rockland County 1972), aff'd mem., 44 App. Div. 2d 774, 354 N.Y.S.2d 600 (2d Dep't 1974). The will stated:

> I give and bequeath unto my daughter... the sum of five dollars, and it is my will that this provision be in lieu and bar of every right and interest in and to my estate... since... she has been disobedient and ungrateful and has failed to return the affection and trust that I have bestowed upon her.

70 Misc. 2d at 397, 333 N.Y.S.2d at 858-59.

123 See text accompanying note 112 supra.

124 35 App. Div. 2d at 77, 312 N.Y.S.2d at 927 (emphasis in original).


126 Id., col. 8.

127 The Newkirk will contained seven specific bequests, the smallest of which was the petitioner's $100. The remainder of the $75,000 estate was bequeathed to two Roman Catholic institutions for the purpose of having masses said for the decedent and other family members. In addition to inferring from the nominal bequest an intent to disinherit the grandson, the court placed great emphasis on the testatrix's motives in making the charitable bequest. Since arranging for such masses was a practice in keeping with the testatrix's religious faith, the surrogate determined that the bequests must be deemed a constitutionally protected exercise of religious freedom not to be lightly infringed upon after death. *Id.*

128 Justices Latham and Shapiro, dissenting in *Eckart,* recognized that the nominal legacies in the will "tend to support the testatrix's intent to disinherit..." 48 App. Div. 2d at 67-68, 368 N.Y.S.2d at 33 (Latham & Shapiro, JJ., dissenting). Regarding the factual situation in *Eckart* as almost identical to that in *Cairo,* the dissenters concluded that the
The disinheriting language in *Eckart*, like that in *Cairo*, which was treated as an effective bar to a 5-3.3 contest, referred only to testamentary bequests. If in *Cairo* one could justifiably infer that the testatrix did not intend that the petitioner share in any part of the estate, the same conclusion could be reached in *Eckart*. As Justice Christ noted in his lengthy concurring opinion in *Eckart*, "[t]he error in *Cairo* is the search for the testatrix's intention when the statute is designed to make that intention immaterial." An analogy can be drawn to EPTL section 5-1.1, which protects a disinherited spouse by granting him the right to elect against his spouse's will notwithstanding any expressed intent of the deceased to leave him nothing. Since the legislature has determined that in this situation testamentary intent should not control, no words of disinheritance can defeat this right of election. Similarly, courts should not permit section 5-3.3, specifically drafted to protect disinherited parents or issue, to be overridden by the mere insertion of a carefully drafted disinheritance provision.

At the same time it should be recognized that the statute has several other loopholes that may defeat the legislative purpose which prompted its enactment. As Justice Christ noted, a testator may include in the will a gift-over provision directing that in the event of a successful contest the estate pass to a third party. In interpreting testamentary intent, courts have looked to expressions of love and affection in the will as negating an intent to disinherit. Compare *In re* Estate of Norcross, 67 Misc. 2d 932, 325 N.Y.S.2d 477 (Sur. Ct. N.Y. County 1971) (expression of affection toward children and reference to gifts previously given to them) and *In re* Estate of Rothko, 71 Misc. 2d 74, 335 N.Y.S.2d 666 (Sur. Ct. N.Y. County 1971) (attitude of testator toward children similar to that in *Norcross*) with *In re* Estate of Beu, 70 Misc. 2d 396, 333 N.Y.S.2d 858 (Sur. Ct. Rockland County 1972), off'd mem., 44 App. Div. 2d 774, 354 N.Y.S.2d 600 (2d Dep't 1974) ($5 bequest because of disobedience and ungratefulness of daughter).

The wills in *Eckart* and *Cairo*, however, contain no clear-cut expressions of either affection or hostility, but merely state that the testatrix had "good and sufficient" reason for acting as she did. *In re* Estate of Eckart, 72 Misc. 2d 934, 938, 339 N.Y.S.2d 860, 862 (Sur. Ct. Queens County 1973); *In re* Estate of Cairo, 35 App. Div. 2d 76, 77, 312 N.Y.S.2d 925, 927 (2d Dep't 1970). It therefore seems unwarranted to infer that the language in the Eckart will, or for that matter the language involved in *Cairo*, is "tantamount to a showing of an estrangement between the testatrix and her two children." Brief for the Attorney General for argument to the Court of Appeals at 3, *In re* Estate of Eckart.

129 In interpreting testamentary intent, courts have looked to expressions of love and affection in the will as negating an intent to disinherit. Compare *In re* Estate of Norcross, 67 Misc. 2d 932, 325 N.Y.S.2d 477 (Sur. Ct. N.Y. County 1971) (expression of affection toward children and reference to gifts previously given to them) and *In re* Estate of Rothko, 71 Misc. 2d 74, 335 N.Y.S.2d 666 (Sur. Ct. N.Y. County 1971) (attitude of testator toward children similar to that in *Norcross*) with *In re* Estate of Beu, 70 Misc. 2d 396, 333 N.Y.S.2d 858 (Sur. Ct. Rockland County 1972), off'd mem., 44 App. Div. 2d 774, 354 N.Y.S.2d 600 (2d Dep't 1974) ($5 bequest because of disobedience and ungratefulness of daughter).

130 48 App. Div. 2d at 64, 368 N.Y.S.2d at 30 (Christ, J., concurring).

131 48 App. Div. 2d at 64, 368 N.Y.S.2d at 30 (Christ, J., concurring).

132 As noted by the Court of Appeals in *In re* Estate of Clark, 21 N.Y.2d 478, 484, 236 N.E.2d 152, 155, 288 N.Y.S.2d 995, 997 (1968), "[u]nlike the expressions of intent which constitute testamentary dispositions, the right of election... is statutory in nature and exists wholly outside of, and in direct contravention to, the provisions of a will."

133 See *Commission on Estates*, supra note 100, at 207, which reflects the view that EPTL § 5-3.3 operates to render the decedent's expressed intent immaterial, at least with respect to half of his estate.

134 48 App. Div. 2d at 67, 368 N.Y.S.2d at 33 (Christ, J., concurring). The will in *In re*
the presence of such a clause, there can be no contest of the charitable gift since the parent or issue will necessarily fail to satisfy the statutory requirement that "he . . . receive a pecuniary benefit from a successful contest . . . ." Moreover, section 5-3.3 in no way restricts a testator's ability to bequeath half of his estate to charity and half to a total stranger, thus leaving penniless those dependents whom the law requires he support during his lifetime. Concededly, the overruling of the unfortunate holding in Cairo would not remedy all of these problems. It would be a first step, however, toward preventing the circumvention of the clear legislative policy underlying section 5-3.3.

Editor's Note. As The Survey goes to print, Eckart has been reversed on appeal, 175 N.Y.L.J. 91, May 11, 1976, at 4, col. 1 (Ct. App.). Although the Court of Appeals did reject the Cairo rationale, it considered itself compelled to reaffirm the Cairo result. The Court declared that "it is the statute itself . . . which disrupts the stated legislative purpose. . . . [and] [i]f there is to be a constructive change it should come from the Legislature." Id., col. 4.

Insurance Law


New York's enactment of the Comprehensive Automobile Insurance Reparations Act, popularly known as the no-fault insur-