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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 EPTL¹⁰⁰ 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 issue¹⁰³ 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

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].

¹⁰¹ 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).

¹⁰² 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 (3d 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).

¹⁰³ 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 Its Application to Testamentary Substitutes*, 20 N.Y.L.F. 1 (1974).

¹⁰⁴ For a discussion of the standing requirements under the statute, see ROHAN, *supra* note 103, ¶ 5-3.3[4].

¹⁰⁵ 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."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.¹⁰⁷

In *re Estate of Eckart*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 *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.¹⁰⁹ The surrogate ruled that the \$50 bequests did not evince an intent on the part of Julia 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.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 *In re Estate of Cairo*.¹¹¹ In *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.¹¹²

of an undue proportion [of an estate] to charity by will, when certain near relations have, in the opinion of the legislature, a better claim." *Trustees of Amherst College v. Ritch*, 151 N.Y. 282, 334, 45 N.E. 876, 891 (1897). *Accord*, *Hollis v. Drew Theological Seminary*, 95 N.Y. 166 (1884).

¹⁰⁶ *In re Franklin Nat'l Bank*, 4 Misc. 2d 410, 411, 147 N.Y.S.2d 572, 574 (Sup. Ct. Queens County 1955).

¹⁰⁷ EPTL § 5-3.3(a)(2) restricts the right to share in the estate to those who actually contest the charitable bequest and further provides that no contestant's share may exceed the amount to which he would have been entitled had all eligible persons contested.

One commentator has stated that "[t]he public policy underlying EPTL § 5-3.3 cannot be considered a very strong one." ROHAN, *supra* note 103, ¶ 5-3.3[8]. Presumably, since the statute contains no formal requirements for waiver, a waiver or release of the right to contest can occur from the mere failure to assert one's rights. *Id.* In contrast, recognizing that protection of a surviving spouse is a vitally important purpose of the law of wills and estates, the legislature added very stringent waiver requirements to the right of election provisions. Such a waiver must be in writing, subscribed, and acknowledged. *See* EPTL § 5-1.1(f).

¹⁰⁸ 48 App. Div. 2d 61, 368 N.Y.S.2d 28 (2d Dep't 1975), *aff'g mem.*, 72 Misc. 2d 934, 339 N.Y.S.2d 860 (Sur. Ct. Queens County 1973).

¹⁰⁹ 72 Misc. 2d at 937, 339 N.Y.S.2d at 864.

¹¹⁰ *Id.*

¹¹¹ 35 App. Div. 2d 76, 312 N.Y.S.2d 925 (2d Dep't 1970), *aff'd mem.*, 29 N.Y.2d 527, 272 N.E.2d 574, 324 N.Y.S.2d 81 (1971).

¹¹² 35 App. Div. 2d at 77, 312 N.Y.S.2d at 927 (emphasis omitted).

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 disinheritance 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 Norcross*¹¹⁷ 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 disinheritance 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 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).

¹¹⁴ 35 App. Div. 2d at 78, 312 N.Y.S.2d at 927-28.

¹¹⁵ One commentator considered *Cairo*, "as a practical matter, to have emasculated EPTL 5-3.3 . . ." Tarbox, *Decedent's Estates, 1973 Survey of New York Law*, 25 SYRACUSE L. REV. 253, 263 (1973). Justice Christ approved of this view in his concurring opinion in *Eckart*, 48 App. Div. 2d at 66, 368 N.Y.S.2d at 32 (Christ J., concurring).

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).

¹¹⁷ 67 Misc. 2d 932, 325 N.Y.S.2d 477 (Sur. Ct. N.Y. County 1971), *aff'd mem.*, 39 App. Div. 2d 874, 334 N.Y.S.2d 600 (1st Dep't 1972), *discussed in* 17B MCKINNEY'S EPTL § 5-3.3, commentary at 117 (Supp. 1975).

¹¹⁸ 67 Misc. 2d at 937-38, 325 N.Y.S.2d at 482.

¹¹⁹ 71 Misc. 2d 74, 335 N.Y.S.2d 666 (Sur. Ct. N.Y. County 1972).

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.*

¹²¹ See *In re Estate of Rothko*, 71 Misc. 2d 74, 335 N.Y.S.2d 666 (Sur. Ct. N.Y. County 1972); *In re Estate of Norcross*, 67 Misc. 2d 932, 325 N.Y.S.2d 477 (Sur. Ct. N.Y. County 1971).

tary dispositions."¹²² 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;¹²³ 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,¹²⁴ 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*,¹²⁵ 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."¹²⁶ 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 issue entirely, and thus disallowed the contest.¹²⁷

Under this analysis, *Cairo* and *Eckart* are indistinguishable.¹²⁸

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).

¹²⁵ 172 N.Y.L.J. 54, Sept. 16, 1974, at 20, col. 7 (Sur. Ct. Bronx County).

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*.¹²⁹ 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."¹³⁰ 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.¹³¹ Since the legislature has determined that in this situation testamentary intent should not control,¹³² 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,¹³³ 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.¹³⁴ In

children's notices of election to contest the gift to charity should have been declared invalid.
Id.

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 1972) (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), *aff'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*.

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

¹³¹ See note 103 *supra*.

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 993, 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 . . ." ¹³⁵ 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. ¹³⁶ 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

Ins. Law § 671(4): Use of an interrogatory to determine qualification under no-fault's threshold "serious injury" test.

New York's enactment of the Comprehensive Automobile Insurance Reparations Act, ¹³⁷ popularly known as the no-fault insur-

Estate of Fitzgerald, 72 Misc. 2d 472, 339 N.Y.S.2d 333 (Sur. Ct. N.Y. County 1972), provided that should there be a 5-3.3 contest to the bequest made therein to the Archdiocese of New York, the gift should pass personally to the Archbishop of New York without limitation or restriction on its use. The court held that "a clause providing for an alternative disposition . . . may deprive a parent or issue . . . of any status to contest under EPTL 5-3.3." *Id.* at 475, 339 N.Y.S.2d at 337. One proposal to close this loophole advocates ignoring the alternative provisions of the will for the purpose of allowing those persons who would otherwise participate in the distribution of the excess to contest the will. See COMMISSION ON ESTATES, *supra* note 100, at 228.

For a discussion of the possibility that, in addition to the gift-over loophole, the policy of the statute may also be circumvented by an inter vivos gift, in trust or otherwise, for charitable purposes, see 17B MCKINNEY'S EPTL § 5-3.3, commentary at 782 (1967). The various types of inter vivos dispositions that may be employed are outlined in Fisch, *Restrictions on Charitable Giving*, 10 N.Y.L.F. 307, 331 (1964).

¹³⁵ EPTL § 5-3.3(a)(1).

¹³⁶ Surrogate Midonick, in *In re Estate of Rothko*, 71 Misc. 2d 74, 335 N.Y.S.2d 666 (Sur. Ct. N.Y. County 1972), proposed that the surrogate have the power to impose temporary and reasonable support obligations on all solvent estates until young dependents reach the age of majority or are able to provide for themselves. In the alternative, he suggested that the legislature could enact a formula to impose a trust on an estate until the children come of age. *Id.* at 78-79, 335 N.Y.S.2d at 670-71.

¹³⁷ Ch. 13, § 1, [1973] N.Y. Laws 56 (codified at N.Y. INS. LAW §§ 670-77 (McKinney Supp. 1975)).