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Conditional Inheritance in New York

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NOTES

CONDITIONAL INHERITANCE IN NEW YORK

Attempts by testators to influence, after their death, the lives of their beneficiaries are by no means new to the law.[1] These attempts often take the form of restrictions on the enjoyment of property disposed of by will. It is the object of this article to particularize the efficacy of such attempts when they take the form of conditions precedent and subsequent to the vesting of the property.

Before proceeding, however, it is appropriate to distinguish among terms used in this area of the law. If the entire will is to be effective only if a specified event does or does not occur, the will is a conditional will.[2] If, on the other hand, the enjoyment of a particular inheritance depends upon the performance or non-performance of some act, that particular legacy or devise is subject to a condition. If the performance so specified must occur before the estate can vest, the condition is precedent; unless it be performed, the gift fails. If the performance does not necessarily precede the vesting of the estate, but may accompany or follow it, the condition is subsequent; if breached, the estate will be divested.[3] Closely related to estates on

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[1] Conditions in wills were known to the law of ancient Rome. Pound, *Legacies On Impossible Or Illegal Conditions Precedent,* 3 ILL. L. REV. 1, 5 (1908); Browder, *Conditions And Limitations In Restraint Of Marriage,* 39 MICH. L. REV. 1288 (1941); Note, 10 N.Y.U. INTRA. L. REV. 154 (1955). Holdsworth records the interesting will of Robert Goche who, in 1556, devised property to his son, who was to study law and become a "Sergeaunte of the Coiff," on condition that ". . . he never take penny or any manner of rewarde for his councell, but to give the same to all men without taking anny things . . . and if he do otherwise thenne I wille that he shall have no more of my manors and landes before to him geven, but only the mannour of Horkestowe, and that all the rest ymmediatlie after suche taking of monney for his counsell shall revert to my sonne Robert." 7 HOLDSWORTH, A HISTORY OF ENGLISH LAW 372 (2d ed. 1937).

[2] See, *e.g.,* Matter of Poonarian, 234 N.Y. 329, 137 N.E. 606 (1922), where a will was to be effective if the testator died on a trip from New York to Constantinople. Because the testator died after he returned to New York, it was held that the condition to the will's effectiveness had not been met, and the will was denied probate. However, if an occasion of possible danger, such as a forthcoming journey, merely supplies the inducement for making a will at that time, the will is given effect even though the testator dies at a time different from that contemplated. Eaton v. Brown, 193 U.S. 411 (1904).

[3] Matter of Dettmer, 177 Misc. 349, 30 N.Y.S.2d 571 (Surr. Ct. 1941); Martin v. Ballou, 13 Barb. 119, 133 (Gen. T. 4th Dist. 1852) (dictum); *cf.* Underhill v. Saratoga & W. R.R., 20 Barb. 455, 459 (Gen. T. 4th Dist. 1855) (dictum); II DAVIDS, NEW YORK LAW OF WILLS § 878 (1924).

condition subsequent are estates on limitation. The enjoyment of the latter is intended to cease when a certain event occurs, without regard to whether or not the event constitutes a breach of a condition.[4]

The purpose of construing a will is to ascertain and effectuate the intent of the testator.[5] Therefore, courts will not limit themselves to an examination of a particular phrase in a will in order to determine what the testator intended. To effectuate properly the testator's intent, the courts will look at the whole instrument.[6] Furthermore, no particular words are necessary to create a condition if the intent to do so may be fairly gleaned from the will.[7] However, the law favors the vesting of estates.[8] Therefore, precatory words, indicating that something is merely the wish or desire of the testator, will not be construed as creating a condition or obligation.[9] Similarly, where language is ambiguous as to the testator's intent, the law favors a construction that no condition was intended.[10] Moreover, because the law favors early vesting, courts will construe a condition as subsequent, rather than precedent, wherever possible.[11]

Enforceability of Conditions

Generally, conditions will be enforced if they are legal and definite in their requirements.[12] However, a condition subsequent to a legacy

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[4] See Matter of Horton, 160 Misc. 64, 289 N.Y. Supp. 618 (Surr. Ct. 1936); 6 AMERICAN LAW OF PROPERTY 692 (Casner ed. 1952); ATKINSON, WILLS 405 (2d ed. 1953); Note, 10 N.Y.U. INTRA. L. REV. 154, 155 (1955).

[5] Matter of Krooss, 302 N.Y. 424, 429, 99 N.E.2d 222, 225 (1951) (dictum); Matter of Rooker, 248 N.Y. 361, 364, 162 N.E. 283, 284 (1928) (dictum). *But see* ATKINSON, WILLS 816-17 (2d ed. 1953); POWELL, FUTURE INTERESTS 200 (2d ed. 1937).

[6] See, *e.g.*, Cunningham v. Parker, 146 N.Y. 29, 40 N.E. 635 (1895) (where words "on condition" were construed as impressing a charge on the estate); Matter of Gaffers, 254 App. Div. 448, 5 N.Y.S.2d 671 (3d Dep't 1938) (where "upon condition" was construed as importing a covenant). See also ATKINSON, WILLS 811 (2d ed. 1953).

[7] Matter of Mahlstedt, 140 Misc. 245, 251, 250 N.Y. Supp. 628, 639 (Surr. Ct. 1931) (dictum); *cf.* Matter of Gaffers, *supra* note 6 at 453, 5 N.Y.S.2d at 678 (dictum); Underhill v. Saratoga & W. R.R., *supra* note 3 at 459 (dictum); Martin v. Ballou, *supra* note 3 at 133 (dictum).

[8] Matter of Krooss, *supra* note 5 at 427, 99 N.E.2d at 224 (dictum); Matter of Watson, 262 N.Y. 284, 300, 186 N.E. 787, 791 (1933) (dictum); II DAVIDS, NEW YORK LAW OF WILLS § 951 (1924).

[9] Post v. Moore, 181 N.Y. 15, 73 N.E. 482 (1905); Matter of Johnston, 277 App. Div. 239, 99 N.Y.S.2d 219 (3d Dep't 1950), *aff'd*, 302 N.Y. 782, 98 N.E.2d 895 (1951) (alternate holding).

[10] See, *e.g.*, Tillman v. Ogren, 227 N.Y. 495, 125 N.E. 821 (1920); Matter of Gaffers, *supra* note 6; *In re* Allen's Estate, 45 N.Y.S.2d 699 (Surr. Ct. 1943). See also ATKINSON, WILLS 402 (2d ed. 1953).

[11] See, *e.g.*, *In re* Allen's Estate, *supra* note 10; Matter of Enders, 171 Misc. 283, 13 N.Y.S.2d 766 (Surr. Ct. 1939); Matter of Lesser, 158 Misc. 895, 287 N.Y. Supp. 209 (Surr. Ct. 1936); *In re* Scott's Will, 204 N.Y. Supp. 478, 491 (Surr. Ct. 1924) (dictum); ATKINSON, WILLS 404 (2d ed. 1953).

[12] See, *e.g.*, *In re* Dehncke's Will, 116 N.Y.S.2d 871 (Surr. Ct. 1952) (In

of personal property, which has no gift over to an alternate beneficiary in event of breach of the condition, is unenforceable.[13] It is regarded as a nullity on the tenuous assumption that it was designed to place the beneficiary *in terrorem* of the threatened, but ineffective, divestment.[14] For purposes of the *in terrorem* rule,[15] a general gift of the residue of the estate is not regarded as a gift over to an alternate beneficiary.[16] However, if the will expressly provides that in event of a breach of the condition subsequent the legacy is to fall into the residue of the estate, which is expressly bequeathed, there is a sufficient gift over to render the condition enforceable.[17] Furthermore, legacies of personalty "inseparably attached" to realty devised in the will are subject to conditions subsequent to the same extent as the realty; that is, otherwise valid conditions subsequent on such legacies are effective even though unaccompanied by a gift over.[18]

Conditions which involve illegality are universally condemned. To determine illegality, the applicable test is: if the result of enforcement of a condition would induce conduct detrimental to the public interest, the condition is illegal.[19] Somewhat more complex is the effect of illegality on a condition. If the illegal provision is a condition subsequent, the condition is disregarded and the gift is absolute.[20]

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this construction proceeding, one condition divesting a husband of property devised to him by his wife if he should "disapate" [*sic*], was held invalid as being too indefinite to be capable of enforcement. However, the court held that the husband took only a fee simple conditional because another condition, divesting the husband if he remarried, was lawful.); *In re* Jackson's Will, 20 N.Y. Supp. 380 (Surr. Ct. 1892). ". . . [L]egacies and devisees . . . [are] acts of bounty merely. The testator . . . [is] free to withhold them altogether, or to subject them to conditions, whether sensible or futile. The gift is to be taken as it is made or not at all. . . ." Oliver v. Wells, 254 N.Y. 451, 459, 173 N.E. 676, 679 (1930).

[13] Matter of Johnston, 277 App. Div. 239, 99 N.Y.S.2d 219 (3d Dep't 1950), *aff'd*, 302 N.Y. 782, 98 N.E.2d 895 (1951) (alternate holding); Matter of Arrowsmith, 162 App. Div. 623, 147 N.Y. Supp. 1016 (1st Dep't 1914), *aff'd*, 213 N.Y. 704, 108 N.E. 1089 (1915); Matter of Vandevort, 62 Hun 612, 17 N.Y. Supp. 316 (Gen. T. 5th Dep't 1892) (alternate holding).

[14] 6 AMERICAN LAW OF PROPERTY 592 (Casner ed. 1952). "The condition where there is no devise over, is said to be *in terrorem* merely, a convenient phrase adapted by the judges to stand in the place of a reason for refusing to give effect to a valid condition." Hogan v. Curtin, 88 N.Y. *162, *171 (1882).

[15] Basically, the *in terrorem* rule is not applicable to realty. Hogan v. Curtin, *supra* note 14; Mooney v. Mooney, 115 N.Y.S.2d 167 (Sup. Ct. 1952).

[16] See Matter of Enders, 171 Misc. 283, 13 N.Y.S.2d 766 (Surr. Ct. 1939); Matter of Bailey, 141 Misc. 748, 253 N.Y. Supp. 275 (Surr. Ct. 1931).

[17] *In re* Von Grimm's Will, 133 N.Y.S.2d 926 (Surr. Ct. 1954); Matter of Kirkholder, 86 Misc. 692, 149 N.Y. Supp. 87 (Surr. Ct. 1914), *aff'd*, 171 App. Div. 153, 157 N.Y. Supp. 37 (4th Dep't 1916).

[18] *In re* Parson's Will, 115 N.Y.S.2d 460 (Surr. Ct. 1952).

[19] Browder, *Illegal Conditions And Limitations: Miscellaneous Provisions*, 1 OKLA. L. REV. 237, 238 (1948); 9 MIAMI L.Q. 493 (1955).

[20] Matter of Haight, 51 App. Div. 310, 316, 64 N.Y. Supp. 1029, 1033 (2d Dep't 1900) (dictum); see, *e.g.*, Matter of Filkins, 203 Misc. 454, 120 N.Y.S.2d 124 (Surr. Ct. 1952); Matter of Dettmer, 176 Misc. 512, 27 N.Y.S.2d 609

If, however, the provision is construed as a limitation on an estate, since no element of forfeiture is considered involved, the authorities agree that it is enforceable regardless of its inducement to act contrary to the public good.[21] Thus, a devise to a son *"if* he should remain unmarried" is absolute, because the condition is unenforceable. On the other hand, a devise *"so long as* he remains unmarried" is subject to divestment in the event of marriage. This distinction has been characterized as a mere "quibble" [22] and the result, however logical, has been severely criticized [23] as it allows a testator to effectuate an unlawful purpose merely by a careful selection of words. A condition precedent involving *malum prohibitum* is disregarded with respect to personalty and the legacy is considered unconditional.[24] Although it is usually accepted that where the condition involves *malum in se,* or is attached to realty, both the condition and the bequest are void, the law is not settled in this area.[25] These rules which would accord different treatment to conditions on realty and conditions on personalty have also been subject to great criticism.[26]

Particular Illegal Conditions

The vast majority of conditions found to be illegal involve interference with the formation or maintenance of family relationships, or involve attempts to prevent interference with the distribution of the estate.[27] Restraints on marriage, inducements to divorce, and attempts to separate parents from their children fall into the first category. Provisions for forfeiture if the beneficiary contests the will are considered in the second.

(Surr. Ct.), *aff'd,* 262 App. Div. 1032, 30 N.Y.S.2d 333 (2d Dep't 1941), *aff'd,* 289 N.Y. 597, 43 N.E.2d 830 (1942).

[21] See Irwin v. Irwin, 179 App. Div. 871, 876, 167 N.Y. Supp. 76, 79 (2d Dep't 1917); 6 AMERICAN LAW OF PROPERTY § 27.14 (Casner ed. 1952); ATKINSON, WILLS 406 (2d ed. 1953); Browder, *Illegal Conditions And Limitations: Effect Of Illegality,* 47 MICH. L. REV. 759, 773 (1949); Note, 10 N.Y.U. INTRA. L. REV. 154, 155 (1955).

[22] ATKINSON, WILLS 406 (2d ed. 1953).

[23] See 6 AMERICAN LAW OF PROPERTY § 27.14 (Casner ed. 1952); ATKINSON, WILLS 406 (2d ed. 1953); Browder, *supra* note 21, at 773.

[24] See Matter of Liberman, 279 N.Y. 458, 18 N.E.2d 658 (1939); Matter of Haight, *supra* note 20 at 310, 64 N.Y. Supp. at 1029; *In re* Blind's Will, 138 N.Y.S.2d 210 (Surr. Ct. 1954); ATKINSON, WILLS 414 (2d ed. 1953).

[25] See, *e.g.,* Matter of Liberman, *supra* note 24 at 468, 18 N.E.2d at 662; Matter of Haight, 51 App. Div. 310, 316, 64 N.Y. Supp. 1029, 1033-34 (2d Dep't 1900). See also ATKINSON, WILLS 414 (2d ed. 1953). However, it should be noted that a condition involving *malum in se* has never arisen in New York. Furthermore, "the tendency of the courts has been to ignore distinctions between 'legacies out of personal estate' and legacies or devises of interests in real property. . . . The beneficiary takes under the will as if no conditions had been annexed to the gift to him or as if he had complied with the void condition." Matter of Liberman, *supra* note 24 at 468-69, 18 N.E.2d at 662.

[26] ATKINSON, WILLS 407 (2d ed. 1953); Browder, *Illegal Conditions And Limitations: Effect Of Illegality,* 47 MICH. L. REV. 759, 763 (1949).

[27] See Browder, *supra* note 26, at 759.

Judge Lehman has succinctly outlined the New York law on marriage provisions as follows:

> A condition calculated to induce a beneficiary to marry, even to marry in a manner desired by the testator, is not against public policy. A condition calculated to induce a beneficiary to live in celibacy or adultery is against public policy. "Conditions in general restraint of marriage were regarded at common law as contrary to public policy, and, therefore, void." The rule still prevails in New York. . . . Conditions in partial restraint of marriage, which merely impose reasonable restrictions upon marriage, are not against public policy.[28]

Conditions which operate to restrain a beneficiary from marrying a certain person,[29] or outside a particular religion,[30] or during minority,[31] are regarded as reasonable, partial restraints, and therefore enforceable. Such restraints are, however, construed very strictly against forfeiture.[32] This is illustrated by the recent New York decision in *Matter of Rosenthal*.[33] There the testator apparently desired to dissuade his beneficiaries from marrying Gentiles. His will contained conditions both precedent and subsequent to prevent legatees, devisees and donees of powers of appointment from taking under the will or exercising powers under the will if they married outside the Jewish religion. Testator's grandson exercised his power of appointment, over the corpus of a trust established under the will, in favor of his daughter, who intended to marry a Gentile. In the construction proceeding brought by the daughter, the dissenting opinion declared that the testator's obvious intent should control. Nevertheless, the majority, by a very narrow construction, held that the great-granddaughter would take unconditionally as the will's sanctions were not explicitly directed against appointees.

Conditions prescribing forfeiture in the event of marriage are upheld where directed against a second marriage of the testator's

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[28] Matter of Liberman, *supra* note 24 at 464, 18 N.E.2d at 660.

[29] See, *e.g.*, Matter of Seaman, 218 N.Y. 77, 112 N.E. 576 (1916).

[30] Matter of Liberman, 279 N.Y. 458, 464, 18 N.E.2d 658, 660 (1939) (dictum); *cf.* Matter of Rosenthal, 283 App. Div. 316, 127 N.Y.S.2d 778 (1st Dep't), *aff'd mem.*, 307 N.Y. 715, 121 N.E.2d 539 (1954); Matter of Solomon, 156 Misc. 445, 281 N.Y. Supp. 827 (Surr. Ct. 1935). In addition, conditions that require a person to be raised in a particular religion are valid. Matter of Kempf, 252 App. Div. 28, 297 N.Y. Supp. 307 (4th Dep't 1937), *aff'd mem.*, 278 N.Y. 613, 16 N.E.2d 123 (1938); Matter of Lesser, 158 Misc. 895, 287 N.Y. Supp. 209 (Surr. Ct. 1936). However, in one old case, a Virginia court held invalid a condition subjecting a legacy to forfeiture if the legatee should leave a certain religious sect. This sect forbade marriage outside the religion under pain of expulsion. Because there were only five or six marriageable men whom the legatee might marry, the condition was an unreasonable restraint on marriage and was void. Maddox v. Maddox, 52 Va. (11 Gratt.) *804 (1854).

[31] Hogan v. Curtin, 88 N.Y. *162 (1882).

[32] See, *e.g.*, Matter of Rosenthal, *supra* note 30; Matter of Solomon, *supra* note 30.

[33] 283 App. Div. 316, 127 N.Y.S.2d 778 (1st Dep't), *aff'd mem.*, 307 N.Y. 715, 121 N.E.2d 539 (1954).

widow or widower.[34] Another exception to the rule proscribing such forfeitures is sometimes made where the testator's intent was simply to provide support until marriage.[35] Here, however, the beneficiary must be a female relative whose support will devolve upon her spouse in the event of marriage or remarriage. Thus, such a provision is valid if intended for support of a daughter[36] or daughter-in-law,[37] but not for a friend[38] or a son.[39] In addition, a condition that a legacy is to be effective only if the legatee is unmarried at the time of testator's death is valid.[40] Here the condition cannot act as a restraint on future conduct because the status is fixed as of the time the will and its condition become effective.

Analogous to the state's discouragement of restraints on marriage is its condemnation of conditions which tend to disrupt existing marriages. Thus, a legacy purportedly effective only if the legatee obtains a divorce or separation is absolute and vests immediately because the condition is legally a nullity.[41] In the exceptional case it may be upheld where it was intended as a support provision.[42] Of course, a legacy for a son, to be effective only if he obtained a divorce, is absolute and the condition void because the separated status would require less, not more money, for living expenses;[43] it could not have

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[34] Matter of Byrnes, 260 N.Y. 465, 184 N.E. 56 (1933) (by implication); *In re* Dehncke's Will, 116 N.Y.S.2d 871 (Surr. Ct. 1952); Mooney v. Mooney, 115 N.Y.S.2d 167 (Sup. Ct. 1952); Note, 10 N.Y.U. INTRA. L. REV. 154, 155 (1955).

[35] See ATKINSON, WILLS 406 (2d ed. 1953); RESTATEMENT, PROPERTY § 424 (1944); Browder, *Conditions And Limitations In Restraint Of Marriage,* 39 MICH. L. REV. 1288, 1328 (1941).

[36] *Cf.* Matter of Horton, 160 Misc. 64, 289 N.Y. Supp. 618 (Surr. Ct. 1936).

[37] Irwin v. Irwin, 179 App. Div. 871, 167 N.Y. Supp. 76 (2d Dep't 1917).

[38] Matter of Dettmer, 176 Misc. 512, 27 N.Y.S.2d 609 (Surr. Ct.), *aff'd,* 262 App. Div. 1032, 30 N.Y.S.2d 333 (2d Dep't 1941), *aff'd mem.,* 289 N.Y. 597, 43 N.E.2d 830 (1942).

[39] *Cf.* Matter of Haight, 51 App. Div. 310, 316, 64 N.Y. Supp. 1029, 1033 (2d Dep't 1900) (dictum).

[40] Robinson v. Martin, 200 N.Y. 159, 93 N.E. 488 (1910); RESTATEMENT, PROPERTY § 424 (1944).

[41] Matter of Haight, *supra* note 39; *In re* Blind's Will, 138 N.Y.S.2d 210 (Surr. Ct. 1954). Somewhat illustrative of the attitude of some courts regarding conditions generally, and in particular those posing any threat to family stability, is the decision in Holmes v. Connecticut Trust & Safe Deposit Co., 92 Conn. 507, 103 Atl. 640 (1918). There the court held invalid a testamentary condition requiring the husbands of the alternate beneficiaries to abstain from the use of tobacco and alcohol on the ground that it was clearly opposed to public policy as it tended to be "provocative of marital discord." 103 Atl. at 642.

[42] *Accord,* Matter of Hughes, 225 App. Div. 29, 232 N.Y. Supp. 84 (4th Dep't 1928), *aff'd mem.,* 251 N.Y. 529, 168 N.E. 415 (1929); Whiton v. Snyder, 54 Hun 552, 555, 8 N.Y. Supp. 119, 120 (Gen. T. 3d Dep't 1889) (dictum).

[43] Matter of Haight, *supra* note 39 at 316, 64 N.Y. Supp. at 1033. In one case, a testatrix bequeathed her son the income from a trust for life. On his death the principal was to be paid to his widow and their issue if she and they were other than his present wife and her issue (who under no circumstances were to inherit). The court held that, regardless of what the testatrix's actual intent was, the condition was valid; there was no tendency to induce divorce

been intended as a support measure. However, if the legatee is already separated, a condition subjecting a legacy to divestment if the separation ends is enforceable;[44] it does not induce a future act since the separated status already exists. Such conditions are justifiable only where they were intended as provisions for support; in other instances they should not be recognized as they tend to perpetuate the disruption.

Conditions which tend to interfere with normal parent-child relationships are also illegal as against public policy. Thus, provisions for forfeiture if a child comes into the custody of his father "by legal means or without the written consent" of a trustee,[45] or if children have social intercourse with their mother or her relatives,[46] have been held invalid and unenforceable.

Generally, conditions providing for forfeiture if the beneficiary contests the will in whole or in part, are enforceable.[47] These are considered to be consistent with public policy in that they discourage vexatious and frivolous litigation, family quarrels, wasting of the estate and the defaming of the testator's reputation in protracted litigation over his will.[48] Notwithstanding this general policy, the condition will not be allowed to work a forfeiture if the contest is consistent with the public good. For example, if one provision of the will is attacked on the ground that it violates the rule against perpetuities, the contestant will not forfeit his share of the estate under another provision of the will.[49] Such a contest is consistent

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because the provision for the son remained constant and would not be affected by any change in his marital relations. Matter of Rothchild, 271 App. Div. 582, 66 N.Y.S.2d 573 (1st Dep't 1946), *aff'd mem.*, 298 N.Y. 538, 80 N.E.2d 670 (1948).

[44] Matter of Hughes, *supra* note 42; Wright v. Mayer, 47 App. Div. 604, 62 N.Y. Supp. 610 (1st Dep't 1900) (concurring opinion); Cooper v. Remsen, 5 Johns. Ch. 459 (N.Y. 1821) (*semble*); *accord, In re* Jacobs' Estate, 112 N.Y.S.2d 281 (Surr. Ct. 1952). *Contra,* Whiton v. Snyder, *supra* note 42. In the *Jacobs* case, a legatee was to inherit if she was divorced at the time of the testatrix's death. The legatee obtained a divorce shortly after the testatrix died. The court held that the condition was valid because it did not purport to induce divorce, and that the bequest was ineffective because the condition was not met.

[45] Matter of Forte, 49 Misc. 327, 267 N.Y. Supp. 603 (Surr. Ct. 1933); *accord,* Matter of Carples, 140 Misc. 459, 250 N.Y. Supp. 680 (Surr. Ct. 1931).

[46] Matter of Ranney, 161 Misc. 626, 292 N.Y. Supp. 476 (Surr. Ct. 1936) (alternate holding).

[47] See Matter of Kirkholder, 86 Misc. 692, 149 N.Y. Supp. 87 (Surr. Ct. 1914), *aff'd,* 171 App. Div. 153, 157 N.Y. Supp. 37 (4th Dep't 1916); *cf. In re* Von Grimm's Will, 133 N.Y.S.2d 926 (Surr. Ct. 1954). Proceedings to construe a will do not fall under the interdict of a "no contest" clause. Matter of Mattes, 205 Misc. 1098, 130 N.Y.S.2d 270 (Surr. Ct. 1954); Matter of Von Deilen, 154 Misc. 877, 278 N.Y. Supp. 689 (Surr. Ct. 1935).

[48] 6 AMERICAN LAW OF PROPERTY 613 (Casner ed. 1952).

[49] N.Y. DECED. EST. LAW § 125; Matter of Rosenstein, 152 Misc. 777, 274 N.Y. Supp. 126 (Surr. Ct. 1934); see RESTATEMENT, PROPERTY § 429(2) (1944); 6 AMERICAN LAW OF PROPERTY 635 (Casner ed. 1952).

with public policy of the state which forbids perpetuities.[50] Furthermore, a contest brought on behalf of a minor is consistent with the public policy which favors the zealous protection of the rights of infants.[51] Similarly, a condition which requires beneficiaries to ratify, on demand, all of the acts in connection with the administration of an estate is inconsistent with the public policy which requires strict accounting of fiducial acts, and is, therefore, void.[52]

Performance of Conditions

After the enforceability of the condition has been ascertained, problems may arise in determining whether or not its requirements have been satisfactorily met. With regard to conditions subsequent, the burden of proof is on the party in whom the estate will vest if the condition is not performed.[53] Here, substantial performance of the condition is sufficient compliance to prevent divestment.[54] In addition, if performance is impossible, under certain conditions there will be no forfeiture.[55]

With conditions precedent the burden of proof is on the party in whom the estate will vest if the condition is performed.[56] Usually, literal performance is required, but if there is no gift over to an alternate beneficiary, substantial compliance with the terms of the condition is acceptable.[57] If performance is impossible, under certain conditions it may be waived.[58] Moreover, if there is no performance because there has been a rejection of a tender of performance, the tender will be considered as sufficient compliance with the will.[59] In *Matter of Feinson,*[60] decided in 1950, a testator bequeathed stock to legatees on the condition precedent that they agree in writing, in a form to be

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[50] N.Y. PERS. PROP. LAW § 11; N.Y. REAL PROP. LAW § 42.

[51] N.Y. DECED. EST. LAW § 126; Matter of Andrus, 156 Misc. 268, 281 N.Y. Supp. 831 (Surr. Ct. 1935) (alternate holding); *accord,* Matter of Vandevort, 62 Hun 612, 17 N.Y. Supp. 316 (Gen. T. 5th Dep't 1892).

[52] Matter of Andrus, *supra* note 51; *cf.* Matter of Smyth, 246 App. Div. 820, 284 N.Y. Supp. 470 (2d Dep't 1936) (per curiam); N.Y. DECED. EST. LAW § 125.

[53] See Hogeboom v. Hall, 24 Wend. 146 (Sup. Ct. 1840). "He who may lose by a breach of the condition, must be plainly put in the wrong." *Id.* at 150. See ATKINSON, WILLS 411 (2d ed. 1953).

[54] ATKINSON, WILLS 411 (2d ed. 1953).

[55] Livingston v. Gordon, 84 N.Y. 136 (1881); *cf.* Matter of Ranney, 161 Misc. 626, 630, 292 N.Y. Supp. 476, 480-81 (Surr. Ct. 1936).

[56] ATKINSON, WILLS 410 (2d ed. 1953); *accord,* Hogeboom v. Hall, *supra* note 53 at 150 (dictum).

[57] See Matter of Feinson, 200 Misc. 858, 104 N.Y.S.2d 303 (Surr. Ct. 1950); II DAVIDS, NEW YORK LAW OF WILLS § 883 (1924).

[58] Livingston v. Gordon, *supra* note 55; *cf.* Matter of Feinson, *supra* note 57. *Contra,* Martin v. Ballou, 13 Barb. 119, 132 (Gen. T. 4th Dist. 1852) (dictum).

[59] Matter of Trybom, 277 N.Y. 106, 13 N.E.2d 596 (1938); *accord,* Livingston v. Gordon, *supra* note 55.

[60] 200 Misc. 858, 104 N.Y.S.2d 303 (Surr. Ct. 1950).

specified by the executor, to vote for the testator's widow as a director of a corporation. Before the executor had specified the form of the agreement, one legatee died. Although the legatee had not yet agreed in writing, he had given the executor his oral assent to be bound. The court ruled that the legacy should be paid to the estate of the legatee because the condition had been substantially performed and this performance would effectuate the will of the testator. It should be noted that in this case there was never any laxity on the legatee's part. The same result could have been reached by treating the condition as one which was at all times impossible of complete performance.

Conclusion

The divergence in treatment of realty and personalty is a relic of the practice, hundreds of years ago, of administering legacies and devises in different courts.[61] The *in terrorem* anomaly developed as a result of that same dichotomy of jurisdiction. Certainly there is neither purpose nor justification for their existence today. Although there has been some tendency in recent years toward eliminating them,[62] progress must necessarily be slow in eradicating usages so long established in the law.

SITUS OF INTANGIBLE PROPERTY IN CONFLICT OF LAWS

It is an apparent anomaly to discuss the situs of intangible property. Can there be any "'proprietary right, which is not the object of corporeal substance'"? [1] Intangibles, having no physical existence, occupy no space and therefore can have no *actual* location. In conflict of laws problems, however, situs of property often must be

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[61] See Browder, *Conditions And Limitations In Restraint Of Marriage*, 39 MICH. L. REV. 1288, 1290-91 (1941).

[62] Matter of Liberman, 279 N.Y. 458, 468-69, 18 N.E.2d 658, 662 (1939) (dictum); see, *e.g.*, *In re* Blind's Will, 138 N.Y.S.2d 210 (Surr. Ct. 1954). In the *Blind* case, a daughter was to inherit the remainder of property only if she became a widow or divorced from her then husband, otherwise she was to get only the income from the property. The court held the condition void as against public policy as tending to induce divorce. The court further ruled that the daughter was to get the property, both real and personal, in fee simple absolute. This, of course, is a departure from the rule that where an illegal condition is attached to realty, both conditions and devise are void. See note 25 *supra*.

[1] Millar v. Taylor, 4 Burr. 2303, 2362, 98 Eng. Rep. 201, 233 (K.B. 1769); see 13 ILL. L. REV. 708, 711-12 (1919).