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## THY WILL BE DONE: THE STATUS OF CHARITABLE BEQUESTS IN CALIFORNIA

The effect, wisdom and validity of the California mortmain statute<sup>1</sup> can best be evaluated when considered in light of general testamentary power and traditional restrictions on the right of charities to hold land. Both of these considerations, as affected by the changing social, political and economic order, comprise the background for limitations on the testator's power to bequeath to charities. Similar mortmain acts are now found in eleven American jurisdictions,<sup>2</sup> and only recently were repealed in England.<sup>3</sup>

The Common Law preference for free alienation of land received a significant impetus with passage of the Statute of Wills.<sup>4</sup> The extent to which the testator should be allowed freedom of alienation thus became somewhat more than an academic question. The arguments in favor of full testamentary freedom have been summarized as follows: there is a natural right to dispose of property as one chooses; there would be less incentive to work and accumulate if there were no freedom of testamentary disposition; members of a testator's family should not be protected against disinheritance, as they may be undeserving; the elderly may be in a better position to secure attention if their families are not guaranteed bequests; and further restrictions on personal freedom should be avoided.<sup>5</sup> The merit of these contentions has been refuted by legislatures which have imposed some restrictions<sup>6</sup> on the testator's power of disposition. The question herein considered is whether or not legislation restricting testamentary power, favoring the right of heirs to take and placing restrictions on the right of charities to inherit, is still justifiable.

### *The History of Mortmain*

An important factor which must be considered with respect to the present restrictions on charitable bequests is the legal status of charities. Traditionally, charities have been favored by the law. They are not bound by the rule against perpetuities,<sup>7</sup> nor the rule against accumulations;<sup>8</sup> many qualify for tax exempt

<sup>1</sup> CAL. PROB. CODE §§ 41-43. "Mortmain" is used here only as a term of convenience; it has no ramifications as to the policy of the statute. See note 37 *infra* and accompanying text.

<sup>2</sup> See, CAL. PROB. CODE §§ 41-43; D.C. CODE ANN. § 19-202 (1961); FLA. STAT. § 731.19 (1965); GA. CODE ANN., § 113-107 (1935); IDAHO CODE ANN. 14-326 (1948); IOWA CODE § 633.266 (1964); MISS. CODE ANN. § 671 (1942); MONT. REV. CODES ANN. § 91-142 (1947); N.Y. DECED. EST. § 17 (McKinney, 1949); OHIO REV. CODE ANN. § 2107.06 (Page, 1954); PA. STAT. tit. 20, 180.7 (1936).

<sup>3</sup> Charities Act, 1960, 8 & 9 Eliz. 2, c. 58.

<sup>4</sup> SIMES, FUTURE INTERESTS 11 (1966).

<sup>5</sup> Haskell, *Power of Disinheritance: Proposal for Reform*, 52 GEO. L.J. 499, 501 (1963).

<sup>6</sup> For a discussion of the statutory protection for the spouse in marital property, see Phipps, *Marital Property Interests*, 27 ROCKY MT. L. REV. 180 (1955).

<sup>7</sup> E.g., CAL. CONST. art. XX, § 9, *Collier v. Lindley*, 203 Cal. 641, 648, 266 Pac. 526, 528 (1928); *Estate of Sutro*, 155 Cal. 727, 734, 102 Pac. 920, 922 (1909); *People v. Cogswell*, 113 Cal. 129, 137-39, 45 Pac. 270, 271 (1896).

<sup>8</sup> E.g., *Estate of McKenzie*, 227 Cal. App. 2d 167, 172, 38 Cal. Rptr. 496, 500 (1964); *Collins v. Lyon, Inc.*, 181 Va. 230, 24 S.E.2d 572 (1943).

status,<sup>9</sup> and courts will attempt to put gifts to charities in force.<sup>10</sup> In addition, the English chancery courts openly favored charities,<sup>11</sup> as did Parliament.<sup>12</sup> The logical reasons for this favoritism were the natural predilection for an agency dedicated to the doing of good works, and an appreciation for the corresponding reduction of claims on the public purse.<sup>13</sup>

However, the protection of charitable interests was not uniformly advocated. There were two powerful forces in feudal England, the Crown and the nobility, that disliked seeing real property pass into the control of charities. Since charitable corporations do not die, the lord of the fee was prevented from collecting his customary feudal dues on succession and thus feudal revenues were in danger of extinction.<sup>14</sup> Extensive landholdings came under the control of the church as dying testators attempted to gain spiritual salvation at the expense of their waiting heirs.<sup>15</sup> The increasing percentage of land owned by the ecclesiastical corporations prompted the mortmain statutes, which were the "effort of the civil power to curb the influence of the spiritual power, and check a dangerous tendency to enrich corporations of a religious or eleemosynary character."<sup>16</sup>

One of the first legislative enactments against charitable alienations in England was the Magna Charta,<sup>17</sup> which prohibited gifts of land to religious houses and voided any attempts to so convey by allowing the lord of the fee to reenter. This was followed by a history of legislation closing loopholes found by lawyers attempting to avoid the effect of the statute.<sup>18</sup> The early history of English mortmain was culminated during the reign of Henry VIII, who effectively curbed the mounting wealth and power of the ecclesiastical corporations by confiscating

<sup>9</sup> INT. REV. CODE of 1954, § 170 (income tax), § 2055 (estate tax), § 2522 (gift tax).

<sup>10</sup> See *Estate of Thomasson*, 245 A.C.A. 844, 852, 54 Cal. Rptr. 229, 233 (1966); SIMES, *The Dead Hand Achieves Immortality: Gifts to Charity*, in PUBLIC POLICY AND THE DEAD HAND 110 (1955).

<sup>11</sup> E.g., *Sonley v. Clockmaker's Co.*, 1 Bro. C.C. 81, 28 Eng. Rep. 998 (1780).

<sup>12</sup> E.g., *Erection of Hospitals Act*, 1597, 39 Eliz. 1, c. 5, § 1 (allowed the establishment of charitable corporations for hospitals, churches, poorhouses and houses of correction); *Construction of Churches Act*, 1803, 43 Geo. 3, c. 108 (allowed gifts of land to churches); *Greenwich Hospital Act*, 1829, 10 Geo. 4, c. 25 (allowed trustees of Greenwich Hospital to hold land without a Crown license); *School Sites Act*, 1844, 7 & 8 Vict. c. 37 (allowed deeds of land without valuable consideration to establish schools for the poor).

<sup>13</sup> *Bristowe, Legal Restrictions on Gifts to Charity*, 7 L.Q. REV. 262, 266 (1891).

<sup>14</sup> *Joslin, "Mortmain" in Canada and the United States: A Comparative Study*, 29 CAN. B. REV. 621 (1951).

<sup>15</sup> PROFFAT, *THE CURIOSITIES AND LAW OF WILLS* 131 (1876).

<sup>16</sup> *Id.* at 132.

<sup>17</sup> 9 Hen. 3, c. 36 (1225), reenacted as, 25 Edw. 1, c. 36 (1297).

<sup>18</sup> See, e.g., *A Statute of Mortmain*, 1279, 7 Edw. 1, st. 2 (allowed entry by the lord of the fee on alienation of any lands in mortmain); *Statute de Donis Conditionalibus*, 1285, 13 Edw. 1, c. 32 (circumscribed the right of the church to use common recovery); *Statute of Quia Emptores*, 1290, 18 Edw. 1, c. 1 (provided that no sales of lands or tenements into mortmain would be permitted); *Mortmain Act*, 1391, 15 Rich. 2, c. 5 (practice of converting lands lying near churches for grave purposes by papal bulls without Crown license was prohibited); *Assurances to Charitable Uses Act*, 1531, 23 Hen. 8, c. 10 (prohibited all assurances and trusts of land to the use of parish churches, guilds, and fraternities if over twenty years duration).

their holdings.<sup>19</sup> Elizabeth I ameliorated the restraints on charitable gifts because the prohibition of religious charities had significantly reduced the amount of non-state support available for worthy causes, and it was thought wise to encourage private charitable activities.<sup>20</sup> Encouraged by this policy, testators could and did make large provisions for non-superstitious charities.<sup>21</sup> As large acreages continued to pass into the control of the so-called "dead hands"<sup>22</sup> of charity, it became obvious that the reasons for initially passing the mortmain act were not being met.<sup>23</sup> In order to retard the shift of land ownership to charitable corporations, further legislation was passed in 1736, precluding the gift or conveyance of any lands, tenements or hereditaments, or monies to be expended in the purchase of such "to or upon any person or persons, bodies politic or corporate, or otherwise in trust or for the benefit of any charitable use whatsoever"<sup>24</sup> Subsequently, the English statute was reenacted by the Mortmain and Charitable Uses Act of 1888<sup>25</sup> prohibiting the conveyance of real property to or for the use of a charity unless a license in mortmain was received from the Crown.<sup>26</sup> This act otherwise continued the main provisions of the Georgian Mortmain statute.<sup>27</sup> At the adoption of the 1888 act, three reasons were given in favor of restricting charitable bequests, namely, to prevent disinheritance, to prevent death bed charity, and to prevent tie ups of land.<sup>28</sup> It is evident, however, that these reasons did not justify the statute. The Common Law had no particular concern with

<sup>19</sup> Monastery Confiscation Act, 1535, 27 Hen. 8, c. 28 (confiscated church possessions for the King, his heirs and assigns); Dissolution of Monasteries and Abbies Act, 1539, 31 Hen. 8, c. 13 (extended confiscation policy and insured that such properties would go to the King); St. John of Jerusalem Act, 1540, 32 Hen. 8, c. 24 (confiscated Church hospital in Palestine).

<sup>20</sup> 35 Eliz. 1, c. 7, § 27 (1593) (allowed any person, for a twenty year period, to convey land in fee simple to houses of correction and abiding houses); Erection of Hospitals Act, 1597, 39 Eliz. 1, c. 5, § 1 (allowed the establishment of charitable corporations for hospitals, churches, poorhouses and houses of correction).

<sup>21</sup> 9 Geo. 2, c. 36 (1736) (preamble).

<sup>22</sup> The derivation of the term has been explained in various ways. One explanation was that the land no longer yielded services to the feudal lord, such as wardships, reliefs, etc., and that the lands were thus like "dead hands" to the lord because they gave him no service. COKE, LITTLETON 2, b. (Coventry ed. 1830). Blackstone attributed the term's derivation to the fact that the clergy were regarded as dead men by the law, so the land held by them was in effect held by dead hands. 1 BLACKSTONE, COMMENTARIES 479 (10th ed. 1787).

<sup>23</sup> LOVELASS, WILLS 257 (12th ed. 1839).

<sup>24</sup> 9 Geo. 2, c. 36. An exception was allowed in the case of gifts made by deed, indented, sealed and delivered in the presence of two witnesses at least one year before the death of the donor.

<sup>25</sup> 51 & 52 Vict. c. 42 (amended by 55 & 56 Vict. c. 11 (1892)).

<sup>26</sup> Alienation of land in mortmain was allowable when a license in mortmain was received by the charity from the Crown. The key statutes governing the licensing prior to 1888 were: Ordinatio de Libertatibus perquirendis, 1299, 27 Edw. 1, stat. 2; A Statute of Amortising Lands, 1306, 34 Edw. 1, stat. 3; Encouragement of Charitable Gifts Act, 1696, 7 & 8 Will. 3, c. 37.

<sup>27</sup> 9 Geo. 2, c. 36 (1736).

<sup>28</sup> Brnstowe, *supra* note 13, at 268.

preventing disinheritance,<sup>29</sup> nor did it prevent disposition of personality to charity.<sup>30</sup> Death bed charity was not necessarily less worthy than other charity,<sup>31</sup> and the benefit accruing to the public from a charitable gift was greater than that accruing from the same property in private ownership.<sup>32</sup> The history of mortmain is long, and the reasons given to justify the policy have varied at different periods in history. The modern statutes must be viewed against this historical background since they continue the pattern of discrimination against the charities' right to inherit.

The purpose of the statutes is the protection of the testator's family against disinheritance. The American statutes usually have three common provisions—percentage restrictions,<sup>33</sup> a protected class<sup>34</sup> and a time period within which gifts are controlled.<sup>35</sup> The first two of these show the shift in purpose from protection of the Crown and nobility to protection of the interests of the heirs. Percentage restrictions on the amount of the charitable gift allow *both* the heirs and the charity to share in the estate of the testator. Furthermore, limiting the effect of the statute to a protected class allows the charity to take except when members of such a class survive. The time periods are based on the theory that the will may be less rational when the testator makes it with fear of impending death; he may not reasonably consider the objects of his natural bounty.<sup>36</sup> These statutes are not "mortmain" in the strict sense of the term in that they are not hostile to the charity's power to take,<sup>37</sup> but they are an additional limitation on testamentary power. They are intended to "protect private rights, or more accurately stated, private expectancies"<sup>38</sup> on the part of the testator's family. The policy behind the legislation affecting testamentary capacity was influenced by the

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<sup>29</sup> The abolishment of the "Custom of London" in 1724 ended the only protection for the spouse (except for dowry and curtesy) and children—the doctrine of reasonable parts. For a discussion of the history of disinheritance, see Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139 (1936). See *In re Kaufman*, 117 Cal. 288, 49 Pac. 192 (1897) for a case expressing the contemporary California position.

<sup>30</sup> It may be surmised that by 1888 in England a substantial part of the nation's wealth was in personality, rather than real property. See THE WORLD ALMANAC 102 (Chicago World, 1888).

<sup>31</sup> Bristowe, *supra* note 13, at 269.

<sup>32</sup> SIMES, *The Dead Hand Achieves Immortality: Gifts to Charity*, in PUBLIC POLICY AND THE DEAD HAND 116 (1955). In addition, feudal tenures had been abolished. The only feudal incident remaining by this time was escheat. Obviously, the object of mortmain could no longer be to secure feudal tenures.

<sup>33</sup> E.g., CAL. PROB. CODE § 41; N.Y. DECED. EST. § 17 (McKinney, 1949).

<sup>34</sup> E.g., CAL. PROB. CODE §§ 41 & 43; N.Y. DECED. EST. § 17 (McKinney, 1949).

<sup>35</sup> *Ibid.* For an excellent discussion of the current American statutes, see Fisch, *Restrictions on Charitable Giving*, 10 N.Y.L.F. 307 (1964).

<sup>36</sup> "The reason for the time periods is that a testamentary gift given in a will made a considerable time prior to the testator's death, at a time when he is not motivated by a death bed fear of hell and the need of purchasing heavenly bliss, is not as likely to be improvident as a charitable gift influenced by the fear of death, purgatory and the impending judgment." 1 PAGE, WILLS § 3.16, at 108 (2d ed. 1952).

<sup>37</sup> E.g., Estate of Dwyer, 159 Cal. 680, 687, 115 Pac. 242, 245 (1911); Estate of Guitierrez, 220 Cal. App. 2d 6, 33 Cal. Rptr. 593 (1963). See *In re Webster's Estate*, 178 Misc. 342, 33 N.Y.S.2d 862 (1942).

<sup>38</sup> 1 PAGE, *op. cit. supra* note 36, § 3.15, at 105.

opinion that a man near death is not as able to rationally make a choice between his family, who are the objects of his natural bounty, and charity, as he may be in less extreme times.<sup>39</sup> All of the modern statutes seem to be predicated on this opinion.<sup>40</sup>

### *The California Legislation Restricting Charitable Bequests*

The present California statute, Probate Code sections 41-43, voiding gifts to charity unless the will was executed prior to thirty days before death, originated in 1874.<sup>41</sup> Permissible gifts are limited to one-third of the estate if the testator leaves heirs within the protected class, even though the will may have been executed prior to the insulating time period. Both specific and residuary bequests

<sup>39</sup> *Id.* § 3.16, at 108.

<sup>40</sup> Fisch, *supra* note 35.

<sup>41</sup> ACTS, AMENDATORY OF THE CODE, ch. 304, p. 275 (1874), reenacted by CAL. STATS. 1931, c. 281, p. 589, §§ 41-43, without substantial change. See note 50 *infra*, for text of § 41 as then enacted. The present code sections are as follows:

§ 41. No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, by a testator who leaves a spouse, brother, sister, nephew, niece, descendant or ancestor surviving him, who, under the will, or the laws of succession, would otherwise have taken the property as bequeathed or devised, unless the will was duly executed at least 30 days before death, such devises and legacies shall be valid, but they may not collectively exceed one-third of the testator's estate as against his spouse, brother, sister, nephew, niece, descendant or ancestor, who would otherwise, as aforesaid, have taken the excess over one-third, and if they do, a pro rata deduction from such devises and legacies shall be made so as to reduce the aggregate thereof to one-third of the estate. All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies, otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected.

Nothing herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity or in trust for a charitable use, in any person who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relative, unless and then only to the extent that such relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will.

§ 42: Bequests and devises to or for the use or benefit of the State, or any municipality, county or political subdivision within the State, or any institution belonging to the State, or belonging to any municipality, county or political subdivision within the State, or to any educational institution which is exempt from taxation under section 1a of Article XIII or section 10 of Article IX of the Constitution of this State and statutes enacted thereunder, or for the use or benefit of any such educational institution, or made by a testator leaving no spouse, brother, sister, nephew, niece, descendant or ancestor surviving by whom the property so bequeathed or devised would have been taken if said property had not been so bequeathed or devised, are excepted from the restrictions of this article.

§ 43: Nothing in this article contained shall apply to bequests or devises made by will executed at least six months prior to the death of a testator who leaves no spouse, child, grandchild or parent, or when all of such heirs, by a writing executed at least six months prior to his death, shall have waived the restriction.

are under the purview of the statute.<sup>42</sup> In general, specific bequests will be effectuated before provision is made for residuary bequests,<sup>43</sup> and when both are present in the will, only the excess above the specific bequest to the maximum permissible one-third of the estate will pass to the residuary legatee.<sup>44</sup> The statute does not limit gifts to individuals for charitable purposes, but only gifts to charitable corporations, societies, or gifts in trust for charitable uses.<sup>45</sup> It does not void gifts but only requires that they be reduced to legal limits.<sup>46</sup> It applies to foreign wills of testators who have either real<sup>47</sup> or personal property<sup>48</sup> in the state.

The present statute is the same as the provision enacted in 1874 with the exception of two amendments subsequently prompted by cases. In *Estate of Garthwaite*,<sup>49</sup> testatrix died without legal heirs and with a will executed within the prohibited period. The court ruled that under the statute as it then stood<sup>50</sup> the gift was void, and so escheated to the state. This obviously unjust result was remedied by the elimination of the general term "legal heirs" and the substitution of a limited protected class of heirs,<sup>51</sup> and by the further provision that, in the absence of a member of the protected class, the estate would pass as provided by the will.<sup>52</sup> This amendment has relaxed limits on charitable bequests by narrowing the class of persons who could challenge.<sup>53</sup>

The case commonly credited with inducing the legislature to add the last paragraph to section 41 is *Estate of Broad*.<sup>54</sup> There, testator executed a will within thirty days of death. He devised his estate to charity with a residuary clause in favor of twelve legatees, none of whom were relatives, and ignored his nieces and nephews. The court construed the statutes to mean that if the testator were survived by *any heirs* within the protected class, then the bequest to charity would fail. Justice [now Chief Justice] Traynor's dissent attacked the decision stating that the bequest to charity should fail only if there were surviving heirs

<sup>42</sup> *Estate of Hamilton*, 181 Cal. 758, 186 Pac. 587 (1919).

<sup>43</sup> *Id.* at 762, 186 Pac. at 588.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Id.* at 772, 186 Pac. at 592; *accord*, *Estate of Stenman*, 35 Cal. App. 2d 95, 94 P.2d 821 (1939).

<sup>46</sup> *Estate of Hamilton*, *supra* note 42.

<sup>47</sup> *Estate of Dwyer*, 159 Cal. 680, 115 Pac. 242 (1911).

<sup>48</sup> *Estate of Layton*, 217 Cal. 451, 19 P.2d 793 (1933); *Estate of Sloane*, 171 Cal. 248, 152 Pac. 540 (1915).

<sup>49</sup> 131 Cal. App. 321, 21 P.2d 465 (1933).

<sup>50</sup> "No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will executed at least thirty days before the death of the testator. If so made at least thirty days before death, such devises and legacies shall be valid, but they may not collectively exceed one-third of the estate of a testator who has legal heirs, and if they do, a pro rata deduction from such devises and legacies shall be made so as to reduce the aggregate thereof to one-third of the estate. All dispositions of property made contrary hereto shall be void, and go to the residuary legatees or devisees or heirs, according to law." Cal. Stats. 1931, c. 281, p. 589, §. 41.

<sup>51</sup> CAL. PROB. CODE § 41.

<sup>52</sup> See *Estate of Mautner*, 38 Cal. App. 2d 521, 101 P.2d 520 (1940) in which an estate passed to charity under a similar fact situation.

<sup>53</sup> *Estate of Davison*, 96 Cal. App. 2d 263, 215 P.2d 504 (1950).

<sup>54</sup> 20 Cal. 2d 612, 128 P.2d 1 (1942).

of the protected class who could take under the will as residuary legatees or by the laws of succession as heirs at law. This opinion was apparently shared by the legislature, which then amended the statute to preclude a member of the protected class from taking unless he could take under the will or by intestate succession.<sup>55</sup>

### *Construction of the Statute*

In general, the courts have been forced to regard the California statute as a limitation on "the right of the testator to dispose of his property in accordance with his own inclinations and desires."<sup>56</sup> As such, the statute is strictly construed against those who are challenging the gift to charity.<sup>57</sup> Although collateral heirs outside of the protected class may have rights in the estates of intestates under other sections of the Probate Code, the courts have held that only those who have rights under sections 41-43 will be allowed to challenge bequests to charity.<sup>58</sup>

The right to challenge a will under Probate Code sections 41-43 is not the same as a general right to contest.<sup>59</sup> The basis of the general right has been held to be an illegal deprivation of a property right which attaches to the heir on the death of the ancestor,<sup>60</sup> and which can be prosecuted by a later dying heir's personal representative.<sup>61</sup> In contrast to this, the right of an heir to challenge a charitable bequest is not a property right until he asserts it,<sup>62</sup> but is merely a privilege given him by statute. The right to object to a charitable bequest is personal, and the benefits which flow therefrom are personal and extend only to those of the enumerated classes who have filed objections.<sup>63</sup> Indications are that the courts will refuse to allow heirs from outside the protected class to gain benefits from a challenge by a protected heir.<sup>64</sup> The right to challenge does not pass to the representative of a decedent heir as part of his estate,<sup>65</sup> although once the heir has asserted the right, his administrator has been permitted to continue with the suit.<sup>66</sup>

<sup>55</sup> CAL. PROB. CODE § 41.

<sup>56</sup> *In re Plaster's Will*, 266 App. Div. 439, 43 N.Y.S.2d 1, 3 (1943), construed the New York statute, and was quoted with approval in *Estate of Bunn*, 33 Cal. 2d 897, 900, 206 P.2d 635, 637 (1949).

<sup>57</sup> *Estate of Bunn*, *supra* note 56, at 900, 206 P.2d at 637; *Estate of Davison*, 96 Cal. App. 2d 263, 215 P.2d 504 (1950).

<sup>58</sup> *Estate of Jephcott*, 115 Cal. App. 2d 277, 251 P.2d 1001 (1953); *Estate of Randall*, 86 Cal. App. 2d 422, 194 P.2d 709 (1948). In addition, the courts have expressly stated that amendments to one section of the article enlarging the class of people who may challenge would not also amend other sections. See *Estate of Mealy*, 91 Cal. App. 2d 371, 204 P.2d 971 (1949); *Estate of Cottrill*, 65 Cal. App. 2d 222, 150 P.2d 214 (1944).

<sup>59</sup> *Estate of Hughes*, 202 Cal. App. 2d 12, 20 Cal. Rptr. 475 (1962).

<sup>60</sup> *Estate of Baker*, 170 Cal. 578, 586, 150 Pac. 989, 992 (1915).

<sup>61</sup> *Id.* at 587, 150 Pac. at 993.

<sup>62</sup> *Estate of Sanderson*, 58 Cal. 2d 522, 25 Cal. Rptr. 69, 375 P.2d 37 (1962); *Estate of Adams*, 164 Cal. App. 2d 698, 709, 331 P.2d 149, 156 (1958).

<sup>63</sup> *Estate of Guitierrez*, 220 Cal. App. 2d 6, 33 Cal. Rptr. 593 (1963).

<sup>64</sup> *Ibid.*

<sup>65</sup> *Estate of Bunn*, 33 Cal. 2d 897, 206 P.2d 635 (1949).

<sup>66</sup> *Estate of Sanderson*, 58 Cal. 2d 522, 375 P.2d 37 (1962); *Estate of Guitierrez*, 220 Cal. App. 2d 6, 33 Cal. Rptr. 593 (1963).

Community property law has had its own impact on court interpretation of the statute. Children from a former marriage of a predeceased spouse have no standing to void the bequest even though community property from the first marriage comprises part of the estate of the testator, and although they have rights to intestate shares under other sections of the Probate Code.<sup>67</sup> An even more complicated situation is presented when heirs of a later dying spouse challenge an estate which is comprised of community property. Since, under Probate Code section 228, one-half of the estate falling into intestacy would return to the family of the predeceased spouse, the challenging heirs of testator can only take one-half of the amount over the permissible one-third to charity, with the other half going under the will to the charity.<sup>68</sup>

The statute has presented many other problems for the court to consider. When, for example, there are successive estates, and the non-charity life tenant has a power to invade the corpus, it is difficult to calculate the value of the charity's remainder interest. In such cases, the life tenant has been allowed to surrender his tenancy and purchase an annuity, thus facilitating the determination of the relative values.<sup>69</sup> Further, courts will allow members of the protected class to challenge and void the gift on appeal from a decree of distribution,<sup>70</sup> provided, however, that the decree has not become final.<sup>71</sup> The bequest cannot be challenged after a final decree of partial distribution has been entered, even though it may be readily apparent that the one-third limit has been exceeded.<sup>72</sup> Codicils to the will added during the prohibited period have been held not to invalidate the charitable bequest on challenge if they do not enlarge the amount given to the charity or change the terms of the bequest.<sup>73</sup> The California courts have held that the estate to which the one-third limitation applies is the gross estate less administration costs, federal estate taxes and proved debts.<sup>74</sup> This value is ascertained as of the date of distribution,<sup>75</sup> and the base estate is not just that within the jurisdiction of the court, but the total estate wherever located.<sup>76</sup>

As might be expected of any law that limits testamentary power, many methods have been used to avoid the effect of the mortmain statutes. The emphasis on strict construction has led to the conclusion that such statutes are only applicable to dispositions that are strictly testamentary.<sup>77</sup> It has been hypothesized

<sup>67</sup> Estate of Jephcott, 115 Cal. App. 2d 277, 251 P.2d 1001 (1953).

<sup>68</sup> Estate of Randall, 86 Cal. App. 2d 422, 194 P.2d 709 (1948).

<sup>69</sup> Estate of Nicely, 235 Cal. App. 2d 174, 44 Cal. Rptr. 804 (1965). But cf. Estate of Hughes, 202 Cal. App. 2d 12, 20 Cal. Rptr. 475 (1962); Estate of Gorchakoff, 108 Cal. App. 2d 44, 238 P.2d 121 (1951); Estate of Campbell, 175 Cal. 345, 165 Pac. 931 (1917).

<sup>70</sup> Estate of Moran, 122 Cal. App. 2d 167, 264 P.2d 598 (1953).

<sup>71</sup> Estate of Adams, 164 Cal. App. 2d 698, 331 P.2d 149 (1958).

<sup>72</sup> Estate of Lungg, 71 Cal. App. 2d 403, 162 P.2d 707 (1945).

<sup>73</sup> E.g., Estate of McDole, 215 Cal. 328, 10 P.2d 75 (1932); Estate of McCauley, 138 Cal. 432, 71 Pac. 512 (1903); Estate of Herbert, 131 Cal. App. 2d 666, 281 P.2d 57 (1955); Estate of Pence, 117 Cal. App. 323, 4 P.2d 202 (1931).

<sup>74</sup> Estate of Dwyer, 159 Cal. 680, 115 Pac. 242 (1911); Estate of Moore, 219 Cal. App. 2d 737, 33 Cal. Rptr. 427 (1963).

<sup>75</sup> Estate of Campbell, 175 Cal. 345, 165 Pac. 931 (1917).

<sup>76</sup> Estate of Dwyer, 159 Cal. 680, 115 Pac. 242 (1911).

<sup>77</sup> President of Bowdoin College v. Merritt, 75 Fed. 490 (N.D. Cal. 1896); Ruther-

that the same methods used to avoid the widow's share can be used to avoid the mortmain statutes.<sup>78</sup> This would indicate that joint tenancy with a charity,<sup>79</sup> the charity as beneficiary of a life insurance policy,<sup>80</sup> and a joint bank account arrangement with a charity<sup>81</sup> could all be used. Another method of circumvention would be to have the testator create an inter vivos charitable trust reserving to himself a power of revocation and a life interest.<sup>82</sup> One authority has commented that even if such trusts are executed a short time before death and include amounts above the maximum permissible amount, they will be allowed.<sup>83</sup> Death bed deeds have been held to operate outside the statute,<sup>84</sup> thereby affording another alternative to the dying donor.

The testator can even avoid the effect of the statute within the four corners of the will. Courts have allowed gifts to a person with a request in the will to use the gift for charitable purposes.<sup>85</sup> Although this does not create a legally enforceable trust, the testator can choose someone who would feel an obligation to use the bequest as requested.<sup>86</sup> California courts, by their construction of the mortmain statute, have allowed a simple method of circumvention. Since heirs cannot challenge the bequest unless (and to the extent that) they can take either under the will or by intestate succession, the possibility of a challenge can easily be precluded by inserting clauses providing for alternative takers outside the protected class in the event that the gift to charity fails.<sup>87</sup> Such clauses for the benefit of third parties will prevent any of the estate from falling into intestacy, and so will prevent the heirs from taking by the laws of succession. If the relatives cannot take, they will not be permitted to challenge and the will stands as written.<sup>88</sup>

Thus, it can be concluded that the status of charitable bequests in California is dependent upon the interplay of three factors: the amount of the bequest, the presence or absence of residuary or substitutional clauses for the benefit of third parties, and the existence or non-existence of heirs within the protected class. The cases also indicate that whenever possible the courts will attempt to effectuate charitable bequests.

ford v. Ott, 37 Cal. App. 47, 51, 173 Pac. 490, 491 (1918); 1 PAGE, *op. cit. supra* note 36, § 3.20, at 121.

<sup>78</sup> 1 PAGE, *op. cit. supra* note 36, § 3.20, at 119.

<sup>79</sup> *E.g.*, Hart v. Hart, 194 Misc. 162, 81 N.Y.S.2d 764 (1948).

<sup>80</sup> *E.g.*, Mitchell v. Mitchell, 290 N.Y. 779, 50 N.E.2d 106 (1943).

<sup>81</sup> *E.g.*, Ibey v. Ibey, 93 N.H. 434, 43 A.2d 157 (1949).

<sup>82</sup> Wells Fargo Bank v. Superior Court, 32 Cal. 2d 1, 8, 193 P.2d 721, 725 (1948).

<sup>83</sup> 1 SCORR, TRUSTS, § 57.5, at 473-74 (2d ed. 1956).

<sup>84</sup> President of Bowdoin College v. Merritt, 75 Fed. 480 (N.D. Cal. 1896).

<sup>85</sup> Estate of Sanderson, 58 Cal. 2d 522, 25 Cal. Rptr. 569, 375 P.2d 37 (1962); Estate of Purcell, 167 Cal. 176, 179, 138 Pac. 704 (1914) (dictum).

<sup>86</sup> *Ibid.*

<sup>87</sup> Estate of Randall, 86 Cal. App. 2d 422, 194 P.2d 709 (1948); Estate of Davis, 74 Cal. App. 2d 357, 168 P.2d 789 (1946). It should be noted that it is unsafe to use an individual as residuary legatee, as his death prior to that of the testator will cause his gift to lapse and fall into intestacy. It is perhaps best to use a California non-profit educational institution as residuary legatee, as this will guarantee that the charity will get the whole gift. See CAL. PROB. CODE § 42.

<sup>88</sup> Estate of Hames, 76 Cal. App. 2d 673, 173 P.2d 693 (1946); Estate of Davis, 74 Cal. App. 2d 357, 168 P.2d 789 (1946).

*Efficacy of the Statute and Desirability of Reform*

A discussion of the efficacy of the California mortmain statute must cover three topics: the intent of the legislature in enacting the code provisions, whether the courts have effectuated this intent in practice, and the resulting effect of the statute. This discussion must necessarily precede any consideration of alternatives to the present statute.

The legislative intent behind the California statute was to protect the heirs of the testator, rather than to prevent charities from holding an excessive amount of property.<sup>89</sup> It was surmised that during the last period of the testator's life he would become less conscious of those with whom he had natural ties of love and affection, and more concerned with remembrance after death and eternal salvation.<sup>90</sup> In actual practice, however, the courts have not effectuated this intent. In their determination of violations, they have favored the charities at the expense of the heirs. One explanation of the attitude of the courts may be that, even though strict construction of the statute could lead to the prevention of all excessive gifts to charity during a certain period of the testator's life, such preclusion was beyond the contemplation of the legislature.<sup>91</sup>

The actual effect of the statute resulting from the court's interpretation is an unfortunate one. It has been summarized by Professor Richard R. B. Powell:

Some of these statutes have become substantially dead letters for all astute drafters of wills. Thus in California, the statute can be invoked only by designated relatives who would otherwise have taken the property. Skilled draftsmen of wills couple the excessive gift to charity with a gift over of any part thereof found to be invalid to some person *not* one of the designated relatives, and the statute becomes of no effect. Even in this state, however, the statute catches some wills, and such a pitfall for the unskilled is of doubtful social value.<sup>92</sup>

One of the most telling arguments against the continuation of the statute in its present form is the injustice which has resulted from the pattern of circumvention allowed by the California courts. By the use of residuary or substitutional clauses, devices known to all professional drafters of wills, the effect of the statute can be completely avoided. However, the testator who writes out his own holographic will without the benefit of legal advice is penalized. His testamentary bequest may well be futile if members of the protected class survive him.

An additional problem raised by the current statute is the amount of power it gives to a fairly wide group of heirs. The scope of the protected class in the statute is no longer realistic. It must be remembered that any voiding of bequests that is done under the statute contravenes the intent of the testator. This negation of testamentary purpose is directly contrary to the approach in most will cases. Therefore, it would seem reasonable that this group be strictly curtailed. Although family ties have decreased as mobility has increased, the statute has

<sup>89</sup> Estate of Adams, 164 Cal. App. 2d 698, 33 P.2d 149 (1958); Estate of Davison, 96 Cal. App. 2d 263, 215 P.2d 504 (1950); *accord*, *In re Webster's Estate*, 178 Misc. 342, 33 N.Y.S.2d 862 (1942). The California statute and the New York statute construed in the *Webster* case are very similar.

<sup>90</sup> Estate of Lennon, 152 Cal. 327, 329, 92 Pac. 870, 871 (1907) (dictum); Estate of Graham, 63 Cal. App. 41, 48, 218 Pac. 84, 87 (1923).

<sup>91</sup> *President of Bowdoin College v. Merritt*, 75 Fed. 480 (N.D. Cal. 1896).

<sup>92</sup> 6 POWELL, REAL PROPERTY 502-04 (1965).

not been modified to meet this trend. A much more realistic protected class would be one limited solely to spouses and dependent children. The testator has an obligation to support them in life, and it is logical that this responsibility should not be escaped by death.

The effect of the California statute remains the same as the effect of the mortmain statute proposed in medieval England—the prevention of inheritance by charities. Charity was singled out for this prohibition, rather than other strangers, because it was feared that the non-profit nature of charitable organizations would induce gifts at the last of a testator's life,<sup>93</sup> while the possibility that testators might will their property to non-charitable strangers was not deemed worthy of legislative preclusion.<sup>94</sup> However, it is unlikely that people place quite the credence on being able to buy their way into heaven in the 1960's as they might have a century ago. This lessening of credulity removes one of the major reasons behind the statute.

Since it is apparent that the purpose of the statute has not been effectuated in that the heirs have only a superficial protection, and that the statute now serves largely as a trap for the unwary, the question is directed to three alternatives: Should the law be tightened to preclude evasions, should the restrictions on charitable bequests be dispensed with altogether, or should the law be modified to accomplish a more limited purpose.

Some authorities have shown a preference for the first alternative.<sup>95</sup> It has been stated by some writers that if the interest of the heirs is worth protecting, the only way it can be done is by more or less reenacting the old English idea of mortmain by declaring the excessive or untimely gifts void.<sup>96</sup> A model statute has been proposed which attempts to balance the interests of the heirs and the charities' right to take under the will, and prevents the evasions common under the California statute.<sup>97</sup> Some opinion has been expressed to the effect that all gifts to charity, whether testamentary or inter vivos, within a certain time period of the testator's death should be voidable.<sup>98</sup> The problem with this approach is that it continues the prohibition against charities, and does nothing to realistically delineate the heirs who have an interest worth protecting in the testator's estate.

On the other hand, elimination of the restrictions altogether might, in an occasional case, leave dependents of the testator unprovided for. The relative infrequency of this occurrence should not preclude it from legislative consideration as severe hardship may otherwise result. The doctrines of undue influence, fraud and lack of testamentary capacity may be inadequate to protect the family against arbitrary disinheritance.

The most desirable alternative would be the enactment of family maintenance legislation.<sup>99</sup> This type of legislation requires provision to be made for the support

<sup>93</sup> Estate of Graham, 63 Cal. App. 41, 48, 218 Pac. 84, 87 (1923).

<sup>94</sup> Decker v. American Univ., 236 Ia. 895, 20 N.W.2d 466 (1945).

<sup>95</sup> ATKINSON, LAW OF WILLS 138 (2d ed. 1953); Joslin, *Legal Restrictions on Gifts to Charities*, 21 TENN. L. REV. 761 (1951).

<sup>96</sup> ATKINSON, *op. cit. supra* note 95, at 138.

<sup>97</sup> See Joslin, *Legal Restrictions on Gifts to Charities*, 21 TENN. L. REV. 761, 769 (1951) (which poses a list of suggestions for mortmain laws).

<sup>98</sup> *Id.* at 765.

<sup>99</sup> A discussion of family maintenance legislation is very ably presented in Lauffer,