NORTH CAROLINA LAW REVIEW

Volume 54 | Number 3 Article 6

2-1-1976

Constitutional Law -- Mortmain Statutes -- A Blow to an Old and Ailing Statute

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ing with this phrase,[73] the courts seem impressed that they are weighing the factors to determine the need for prior notice and hearing.[74] If public participation is allowed in another proceeding, due process standards may be satisfied. If not, the factors weighed attempt to illuminate the significance of the administrative action.[75] Although there will be disagreements over the delineation of appropriate factors and the determination of their relative influence, the purpose of section 553 is more likley to be realized by "substantial effect" analysis than by the legislative-interpretative distinction applied in *Eastern Kentucky*.

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Constitutional Law—Mortmain Statutes—A Blow to an Old and Ailing Statute

Mortmain statutes,[1] which restrict[2] charitable bequests in wills[3] executed within a specified period[4] before the testator's death, were incorporated from the Georgian Statute of Mortmain[5] into the constitu-

73. "Substantial impact," like "interpretative rule," could be analyzed in terms of its meaning rather than its underlying purpose of ferreting out the need for notice and hearing prior to the rule's promulgation.

74. *See* cases cited notes 35-41 *supra*.

75. *See* text accompanying note 36 *supra*. While the coordination of these considerations is complex, each illuminates a factor of importance. A complex and pervasive rule indicates a greater likelihood of agency error that might be discovered through public participation. Drastic changes, retroactivity, and difficulty in compliance with the rule all indicate that there are persons with a direct interest in the rule. That there are those injured is probably indicative of the rule's importance.

1. *E.g.*, PA. STAT. ANN. tit. 20, § 2507(1) (Spec. Pamphlet 1975) states, in relevant part: "Any bequest or devise for religious or charitable purposes included in a will or codicil executed within 30 days of the death of the testator shall be invalid to the extent that someone who would benefit by its invalidity objects: Provided, That the Commonwealth shall not have the right so to object . . . ."

2. Some statutes only limit the bequest, *e.g.*, IDAHO CODE § 15-2-615 (Supp. 1972) allows an unlimited bequest to charity provided the first $100,000 of the testator's estate goes to his lineal descendants.

3. Pennsylvania, for example, invalidates certain *inter vivos* transfers to charitable organizations made within thirty days of death. Joslin, *Legal Restrictions on Gifts to Charities*, 21 TENN. L. REV. 761, 764 & n.19 (1951).

4. The prohibited period ranges from thirty days to one year before death. 1 W. BOWE & D. PARKER, PAGE ON WILLS § 3.16 (1960).

5. Also called the Charitable Uses Act. For a discussion of the history see W. ROLLISON, WILLS §§ 168-70 (1970); *Restrictions on Charitable Testamentary Gifts*, 5 REAL PROPERTY, PROBATE & TRUST J. 290, 291 (1970) [hereinafter cited as *Restrictions*].

tion[6] and statutes of eleven American jurisdictions.[7] These statutes withstood challenges[8] to their validity until 1972 when a district court in *In re Small*[9] found the District of Columbia statute to be a denial of freedom of religion.[10] In 1974 the Pennsylvania Supreme Court, in *In re Estate of Cavill*,[11] became the first state supreme court to declare a mortmain statute unconstitutional as violative of the equal protection clause of the fourteenth amendment.[12]

Twenty-four days before her death,[13] Leona Cavill executed a will containing a charitable bequest.[14] The orphan's court[15] held the bequest effective and concluded that section 7(1) of the Wills Act,[16] which would have invalidated the bequest, violated the due process, privileges and immunities, and equal protection clauses of the fourteenth amendment to the United States Constitution.[17] The Pennsylvania Supreme Court affirmed,[18] but invalidated the mortmain statute solely on equal protection grounds. The dissent[19] supported the validity of

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6. MISS. CONST. art. 14, § 270.

7. CAL. PROB. CODE §§ 40-43 (West 1956); D.C. CODE ANN. § 18-302 (1973); FLA. STAT. ANN. § 731.19 (1964); GA. CODE ANN. § 113-107 (1935); IDAHO CODE § 15-2-615 (Supp. 1972); IOWA CODE ANN. § 633.266 (1964); MISS. CODE ANN. § 91-5-31 (1972); MONT. REV. CODES ANN. § 91-142 (1947); N.Y. EST., POWERS & TRUSTS § 5-3.3 (McKinney 1967); OHIO REV. CODE ANN. § 2107.06 (Page 1954); and PA. STAT. ANN. tit. 20, § 2507(1) (Spec. Pamphlet 1975).

8. Taylor v. Payne, 154 Fla. 359, 17 So. 2d 615, *appeal dismissed*, 323 U.S. 666 (1944); Decker v. American Univ., 236 Iowa 895, 20 N.W.2d 466 (1945); *In re* Kruger's Will, 23 App. Div. 2d 664, 257 N.Y.S.2d 232 (1965); Patton v. Patton, 39 Ohio St. 590 (1883).

9. Administration No. 2507-70 (D.D.C., Feb. 7, 1972).

10. *Id.* at 3.

11. — Pa. —, 329 A.2d 503 (1974).

12. U.S. CONST. amend. XIV, § 1. The "holding is likewise mandated by the prohibition of special laws in the Pennsylvania Constitution. Pa. Const. art. III, § 32, P.S." 329 A.2d at 505 n.7.

13. The prohibited period in Pennsylvania is thirty days before death. See note 1 *supra*.

14. The residue of decedent's estate was to be divided among The American Heart Association, The American Cancer Society Incorporated, The American Foundation for the Blind, Boys Town of Boys Town, Nebraska and Zem Zem Hospital for Crippled Children of Erie, Pa. 329 A.2d at 504 n.2.

15. Cavill Estate (Pa. O.C. 1973), *discussed in*, 56 ERIE COUNTY LEGAL J. 44 (1974).

16. Act of April 14, 1947, § 7(1) [1947] Pa. Laws 89. The court also invalidated the amended version of the mortmain statute. "[T]estatrix died while the 1947 Act was in effect . . . . Since section 7(1) and section 2507(1) are identical in effect, [the court's] analysis of section 7(1) is equally applicable to section 2507(1)." 329 A.2d at 504 n.1.

17. U.S. CONST. amend. XIV.

18. 329 A.2d 503.

19. *Id.* at 506.

the statute[20] against both equal protection and due process attacks.

Traditional equal protection analysis recognizes the right of a state to erect necessary statutory classifications,[21] within certain limitations. The state must prove a "compelling state interest"[22] if the personal right contravened by the classification is "fundamental,"[23] such as the right to vote,[24] travel,[25] procreate,[26] work,[27] or the freedom of religion[28] or association.[29] This rigid "strict scrutiny test"[30] also adheres if the classification is "suspect,"[31] such as one based on race,[32] national origin,[33] or alienage.[34] But if neither fundamental rights nor suspect classifications are involved, the constitutionality of the statutory classification must be evaluated under the "rational basis test."[35] The laxity[36] of that test is indicated by the famous formulation in *United States v. Carolene Products Co.*:[37]

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis.[38]

The rational basis test has been applied to the regulation of com-

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20. The dissent would limit invalidation to the 1947 version "[b]ecause the language of the two provisions is not identical . . . ." *Id.* at 506 n.1.

21. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

22. Boraas v. Village of Belle Terre, 476 F.2d 806, 813 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974).

23. *Id.*

24. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966).

25. Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969).

26. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

27. Truax v. Raich, 239 U.S. 33, 41 (1915).

28. Sherbert v. Verner, 374 U.S. 398, 406 (1963).

29. Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

30. The test is "'strict' in theory and fatal in fact." Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

31. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1101 (1969).

32. Loving v. Virginia, 388 U.S. 1, 11 (1967).

33. Oyama v. California, 332 U.S. 633, 644-46 (1948).

34. Graham v. Richardson, 403 U.S. 365, 372 (1971).

35. Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee*, 62 GEO. L.J. 1071, 1073 (1974).

36. From 1937 to 1972, only one law was invalidated using the rational basis test. See Morey v. Doud, 354 U.S. 457 (1957); Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807, 811 (1973).

37. 304 U.S. 144 (1938).

38. *Id.* at 152.

mercial activity,[39] social benefits,[40] and taxation.[41] The United States Supreme Court has even applied the rational basis test in the area of decedents' estates. In *Labine v. Vincent*[42] the Supreme Court upheld the Louisiana intestate succession law which excluded illegitimate children from inheriting equally with legitimate children of an intestate natural father.[43]

Prior equal protection challenges to the constitutionality of mortmain statutes have traditionally invoked the rational basis test. In *Taylor v. Payne*[44] the Florida Supreme Court determined that that state's mortmain statute did not deny the testator equal protection because the state had the right to control the "testamentary alienation of property."[45] The court found the purpose of the statute to be legitimate: "to protect the widow and children from improvident gifts made to their neglect by the testator."[46] A year later, in *Decker v. American University*,[47] the Iowa Supreme Court found that state's mortmain statute constitutional because it was "enacted to correct the evil of making bequests for charitable purposes to the detriment of those who should be the object of the testator's bounty."[48]

In the face of these decisions, the court in *Cavill* relied upon an unsophisticated version of the rational basis test[49] and found the mortmain statute irrationally under-inclusive as well as over-inclusive.[50] The majority characterized the classification as a specious, temporal one that gave effect to or voided a testator's bequest according to the accident of the lapse of time[51] between the execution of a will and the death of the

39. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).
40. Jefferson v. Hackney, 406 U.S. 535, 549-51 (1972).
41. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 509 (1937).
42. 401 U.S. 532 (1971).
43. *Id.* at 538-39.
44. 154 Fla. 359, 17 So. 2d 615, *appeal dismissed*, 323 U.S. 666 (1944).
45. *Id.* at 362-63, 17 So. 2d at 617.
46. *Id.* at 364, 17 So. 2d at 618.
47. 236 Iowa 895, 20 N.W.2d 466 (1945).
48. *Id.* at 902, 20 N.W.2d at 469.
49. 329 A.2d at 506. There is no possibility of applying the strict scrutiny test as there is no fundamental right or suspect classification involved in *Cavill*. There has been scholarly opinion to the effect that there is an emerging standard of review, a "newer equal protection" being applied by the Court under the guise of the rational basis test. The Court appears to be employing an intermediate standard of review in some cases when the strict scrutiny test is unavailable and when the minimal scrutiny of the rational basis test is ineffectual, *supra* note 35. *E.g.*, Gunther, *supra* note 30. But the Supreme Court has never actually said that an intermediate standard exists, so it cannot be relied upon.
50. 329 A.2d at 506; *see* Tussman & tenBroek, *supra* note 21, at 347-53.
51. 329 A.2d at 505-06.

testator.[52] In reaching this conclusion, the court rejected the State's argument that the classification was rationally related to the legislative purpose of proscribing undue influence by charitable or religious organizations to the detriment of dependent heirs.[53]

The dissent in *Cavill* argued that the rational basis test does not require a "statute drawn with mathematical precision"[54] as long as that classification has a rational basis to a permissible state interest. However, if the state interest is protection of heirs who rely upon the testator for support and who are the natural objects of his bounty, a classification scheme that allows distant, even unknown legal heirs to challenge a charitable bequest is only questionably related.[55] If the state interest is, on the other hand, protection of the testator from undue influence by charitable or religious organizations, the rights of those charities become the focus; theoretically, this is not a question of denial of equal protection but a violation of due process, and the standard of review changes dramatically.[56]

By finding the classification arbitrary, the court in *Cavill* avoids hypothesizing a statutory purpose and ruling on its permissibility. In contrast, the focus in *Taylor v. Payne* and *Decker v. American University* was the permissibility of the objective, a focus that assumed the noncapriciousness of the classification.

Mortmain statutes were originally enacted in England to prevent ecclesiastical control of land in which the feudal overlords had an interest. The statutes appeared in two forms:[57] the true "mortmain" statutes[58] based on Magna Carta provisions that prohibited the holding of real estate by charities;[59] and the statutes now commonly called "mortmain" based upon the Georgian Statute of Mortmain,[60] which

52. *Id.* at 505.

53. *Id.* at 506.

54. *Id.* at 509, based on the criteria set out in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

55. 329 A.2d at 506. In *Cavill*, the complaining heirs are nieces and nephews of the decedent.

56. This alternative legislative purpose is postulated in *In re* Gredler's Estate, 361 Pa. 384, 389, 65 A.2d 404, 407 (1949). "[A] discussion of whether an irrebuttable presumption rationally relates to a legislative end is confusing and unnecessary." Note, *Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From Rodriguez to LaFleur*, 62 GEO. L.J. 1173, 1198 (1974).

57. *Restrictions*, *supra* note 5, at 290.

58. *Id.* The term "mortmain" should not technically be applied to statutes which restrict the donor from making charitable bequests. See *In re* Estate of Dwyer, 159 Cal. 680, 115 P. 242 (1911); A. SCOTT, 5 TRUSTS § 589(3)(c), at 3885 (1967).

59. *Restrictions*, *supra* note 5, at 290.

60. The Georgian Statute of Mortmain is also known as the Charitable Uses Act. W. ROLLISON, *supra* note 5, § 168.

restricted the power to devise property to charity. The two forms focused on the rights of different parties; the former limited the rights of the donee-charity and the latter restricted the donor-testator. The statutes were also designed to benefit different parties. The Magna Carta provisions empowered only overlords or the crown to set aside the transfer, whereas the Georgian Statute of Mortmain gave descendants of the testator that right.[61]

The Pennsylvania Supreme Court in *Cavill*[62] focused its equal protection analysis on the donor-testator.[63] This choice of focus helps distinguish the case from *Labine v. Vincent*[64] which the dissent considered crucial.[65] The statute reviewed in *Cavill* is historically related to the Georgian Statute of Mortmain:[66] both the English and the Pennsylvania statutes center on the rights of the donor and the benefit to the legal heirs.

The intestate succession statute in *Labine*, however, is functionally similar to the older mortmain statute based on provisions in the Magna Carta. The Magna Carta mortmain statute permitted the crown or an overlord to prevent a charity from receiving a bequest; the property bequeathed redounded to the state upon exercise of this power.[67] The Louisiana intestate law was intended to further a social organization that relies upon the nuclear family and to establish an orderly intestate succession system that would duplicate the probable property distribution of the decedent.[68] The rights of the potential donee, the illegitimate in *Labine*, are subjugated to the state's interest in a particular social fabric, as the charities' rights bowed to the interests of the crown under the Magna Carta provisions. In contrast, the rights of the donor-testator under a mortmain statute should bow only to the testator's obligation to his dependent heirs, as under the Georgian Statute of Mortmain.

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61. *Restrictions, supra* note 5, at 296.

62. 329 A.2d 503.

63. There is obviously some confusion by the court on this point. The court "conclude[s] that section 7(1) denies the charitable beneficiaries equal protection of the laws." *Id.* at 505 (footnote omitted). Yet the analysis clearly evaluates the classification of testators.

64. 401 U.S. 532 (1971).

65. 329 A.2d at 508.

66. Remick, *Restrictions on Gifts for Religious or Charitable Uses*, 51 DICK. L. REV. 201, 202 (1947).

67. The Pennsylvania statute limits invalidation of the bequest "to the extent that someone who would benefit by its invalidity objects: Provided, That the Commonwealth shall not have the right so to object . . . ." PA. STAT. ANN. tit. 20, § 2507(1) (Spec. Pamphlet 1975).

68. 401 U.S. 532, 538 (1971).

Applying the rational basis test to each statute, the Louisiana intestate succession law must rationally relate to the state interest in a particular social fabric, whereas the classification of donors under the Pennsylvania mortmain statute must effectuate the protection of dependent heirs. The classification in *Labine* is neither over-inclusive nor under-inclusive in relation to the state's interest in its social structure while the classification in *Cavill* is susceptible to both challenges. A further distinguishing factor is that a mortmain statute subverts the stated intention of the decedent, while the intestate succession law at least purports to honor it.

There are numerous grounds on which a mortmain statute can be attacked. The Pennsylvania Supreme Court invalidated that state's statute on equal protection grounds,[69] although the orphan's court had suggested equal protection, due process, and privileges and immunities violations. In *In re Small*[70] the United States District Court for the District of Columbia utilized the first amendment freedom of religion to invalidate the District of Columbia mortmain statute, a ground peculiarly available to challenge that jurisdiction's statute.[71] There was also a hint of equal protection "strict scrutiny" analysis when the court in *In re Small* stated that "at least [religious institutions] should be in these circumstances in an equal position [with other beneficiaries]. I can see no compelling Government necessity or otherwise for the Government to interfere . . . ."[72]

A stronger weapon than equal protection to be raised against the mortmain statute might be procedural due process. The dissent in *Cavill* discussed it[73] and a District of Columbia probate court relied upon it in *Doyle v. Key*.[74] The court in *Doyle* traced the denial of due process:

> [t]hat a will procured by undue influence is invalid . . . requires no citation of authority. That the statute in question creates an irrebuttable presumption of undue influence is also clear. . . . Thus, if 18 D.C. Code 302 is valid, the legacies here involved are void without regard to the factual absence of any kind of undue influence.[75]

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69. *See* note 12 *supra*.
70. Administration No. 2507-70 (D.D.C., Feb. 7, 1972).
71. The D.C. mortmain statute is unique in that it restricts only bequests to religious organizations. D.C. CODE ANN. § 18-302 (1973).
72. Administration No. 2507-70 at 4.
73. 329 A.2d at 510-11.
74. Administration No. 2188-72 (Super. Ct. D.C., P. Div., Feb. 13, 1975).
75. *Id.* at 6.

Despite the linguistic maneuvers of the dissent in *Cavill*,[76] the practical effect of a legislative "prohibition" restricting charitable bequests is not distinguishable from an irrebuttable presumption of undue influence: both restrict charities from taking bequests. Admittedly, the presumption may be rebutted by "obtaining the consent of all other interested parties"[77] or by "proving the existence of a prior will"[78] with substantially the same gift. But the first solution allows a necessarily interested party, the potential beneficiary, to be a judge in his own cause and denies the charity a right to an impartial hearing on the presumption. The second solution is only available when there is an extant prior will.

Application of the irrebuttable presumption doctrine has been criticized by commentators as an *ad hoc* analysis utilized to circumvent the often harsh standards of equal protection review.[79] The objection has been that the challenge is actually a complaint of differing treatment of persons "similarly situated with respect to the underlying purposes of the rule."[80] A challenge to a mortmain statute need not be vulnerable to that objection. The challenge is that the classification is a deprivation of due process; the classification is tantamount to an irrebuttable presumption of undue influence and unprincipled activity by the charitable beneficiary. The purpose of the summary classification is not to provide for governmental efficiency[81] nor to maintain a social order[82] but to relieve individual heirs from the burden of establishing culpable activity or corrupt intent on the part of charitable beneficiaries.[83] The classification fails as a denial of due process not justified by the statutory purpose of circumventing due process of law. Furthermore, in a challenge to the validity of a mortmain statute, employment of the irrebuttable presumption doctrine would permit success without reliance upon a judicial conclusion of capricious classification.

76. "This distinction between a conclusive presumption and a flat prohibition is not one without a difference when the constitutional implications of a state's legislative action are at stake." 329 A.2d at 510 (footnote omitted).

77. *Id.*

78. *Id.*

79. *E.g.*, Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975).

80. *Id.* at 465 n.78.

81. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

82. Labine v. Vincent, 401 U.S. 532 (1971).

83. In order to submit the issue of undue influence to a jury, four elements must be proven: (1) that the testator was susceptible to influence; (2) that there was opportunity to influence; (3) that the influencer was disposed to influence the testator unduly; and (4) that the coveted bequest actually resulted. Note, *Testamentary Undue Influence in Iowa*, 18 DRAKE L. REV. 255, 258 (1969).

Mortmain statutes have been whittled away at by state legislatures,[84] evaded by estate planners,[85] and criticized by scholars and practicing lawyers.[86] Finally they have been invalidated by the courts. The combination of *In re Small, In re Estate of Cavill,* and *Doyle v. Key* represents a frontal attack on the mortmain statute as an anachronistic feudal holdover. Other courts confronted with challenges to mortmain statutes should consider whether a state's role in policing the distribution of a decedent's estate ought to extend beyond guaranteeing dependent heirs continued support. Invalidation of a mortmain statute does not deny those heirs a right to complain of undue influence by an offending charitable organization. Rather, the intervention of the courts leaves that remedy healthy while, hopefully, tolling the demise of the mortmain statute.

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Constitutional Law—Southeastern Promotions, Ltd. v. Conrad: A Contemporary Concept of the Public Forum

In *Southeastern Promotions, Ltd. v. Conrad*[1] the United States Supreme Court held that municipal auditoriums in Chattanooga, Tennessee "were public forums designed for and dedicated to expressive activities."[2] The Court looked in part to the traditional public forum cases (those involving streets and parks)[3] for the relevant criteria for its

84. *E.g.*, "By recent amendment the Idaho mortmain statute now permits an unlimited bequest to charity even within the proscribed thirty-day period, provided the first $100,000 goes to the lineal descendants of the testator." 1 W. BOWE & D. PARKER, *supra* note 4, § 3.16, at 1973-74 Supp. 15 (footnote omitted); *see also Restrictions, supra* note 5, at 297.

85. Various "avoidance techniques" are catalogued in Fisch, *Restrictions on Charitable Giving,* 10 N.Y.L.F. 307, 325-31 (1964). These include substitutional and conditional dispositions, *in terroram* and no-contest clauses, dependent relative revocation, contracts to bequeath and *inter vivos* dispositions.

86. *Id.*; Hollinger, *Decedents' Estates & Trusts Laws, Annual Survey of Pennsylvania Legal Developments,* 45 PA. B. ASS'N Q. 221, 229 (1974); Remick, *supra* note 66; and *Restrictions, supra* note 5, at 298-99.

1. 420 U.S. 546 (1975).

2. *Id.* at 555.

3. Cameron v. Johnson, 390 U.S. 611 (1968); Poulos v. New Hampshire, 345 U.S. 395 (1953); Kovacs v. Cooper, 336 U.S. 77 (1949); Cox v. New Hampshire, 312 U.S. 569 (1941); Schneider v. State, 308 U.S. 147 (1939); Hague v. C.I.O., 307 U.S. 496