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The Ohio Mortmain Statute—As Amended

Richard W. Schwartz

The recent amendment to the Ohio mortmain statute has liberalized the harsh terms of the former law. After tracing the history of mortmain statutes, the author briefly compares the provisions of both the original and the amended Ohio law with similar statutes in other jurisdictions. Mr. Schwartz concludes that in several areas the amendment has cured many previously-existing inequities but cautions the reader that some restrictions still remain. He expresses the hope that the amendment is a forerunner of the complete abolition of the mortmain statute.

In those jurisdictions where the legislatures have adopted mortmain statutes, the statutes seem to have taken one of the following four forms: (1) to limit the amount that can be devised or bequeathed to charities; (2) to render such dispositions invalid if drawn into the testator's will within a prescribed period of time before his death; (3) to impose both of these restrictions; or (4) to render such dispositions partially invalid if drawn into the testator's will within a prescribed period of time before his death.

Until this past legislative session, Ohio followed the second view expressed above. However, under the recent amendment to the Ohio mortmain statute which became effective on October

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1 Eleven jurisdictions have enacted mortmain statutes. These jurisdictions include District of Columbia, California, Florida, Georgia, Idaho, Iowa, Mississippi, Montana, New York, Ohio, and Pennsylvania.

2 Iowa and New York.


4 California, Georgia, Idaho, and Mississippi.

5 Ohio and Montana.

6 114 Ohio Laws 320, 346 (1932). The previous mortmain statute read as follows: If a testator dies leaving issue, or an adopted child, or the lineal descendants of either, and the will of such testator gives, devises, or bequeaths such testator's estate, or any part thereof, to a benevolent, religious, educational, or charitable purpose, or to any state or country, or to a county, municipal corporation, or other corporation, or to an association in any state or country, or to persons, municipal corporations, corporations or associations in trust for such purposes, whether such trust appears on the face of the instrument making such gift, devise, or bequest or not, such will as to such gift, devise, or bequest, shall be invalid unless it was executed at least one year prior to the death of the testator. Ibid.
6, 1965, Ohio has joined Montana in category four by imposing restrictions on the amount that can be devised or bequeathed to charity within a prescribed period of time before testator's death.

This important change in the Ohio statute, the first significant one in over 113 years, makes it appropriate to discuss some of the implications and changes which arise under the recent amendment.

I. HISTORY OF MORTMAIN STATUTES

Statutes restricting testamentary gifts, while customarily termed mortmain acts in America, have no significant identification with the English statutes of mortmain. The earliest mention of mortmain was in the forty-third clause of Henry III's Second Charter (1217), which sought to prevent gifts to religious corporations on the grounds that they were fraudulent and intended to deny the lord his apparent right to his feudal obligations. In addition, conveyances of property to charitable and religious corporations endowed with perpetuity interfered with free alienation of land and prevented escheats to the crown.

Although the Wills Act of 1837 repealed the existing prohibition against corporations taking by devise, its effectiveness was diluted by the Statute of Mortmain and Charitable Uses. This latter statute prohibited a gift or conveyance of real or personal property "to or upon any person or body corporate or politic, in trust for the benefit of any charitable uses whatever, except by deed properly executed within twelve months before the death of the donor."

Although the influence of the English laws aimed at free alienation may have given rise to similar legislation in the colonies, the English statutes themselves were never in force on this side of the Atlantic. The state law which came closest to the English statutes was the early Mississippi Constitution which unequivocally pro-

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7 Ohio Rev. Code § 2107.06.
8 The author of this article has previously written on this subject. See Note, The Mortmain Statute — A Need for Reform, 13 W. Res. L. Rev. 576 (1962).
9 Taswell-Langmead, English Constitutional History 101-02 (10th ed. 1946).
11 7 Will. 4 & 1 Vict. c. 26.
12 1736, 9 George II, c. 36.
13 Hollison, Wills 306-07 (1939).
hibited all devises and bequests for charitable purposes. If these laws were ever considered to exist in Ohio before 1806, it could only have been by resolution of the territorial governors and judges.

The reason for restricting gifts by will for charitable purposes in the United States was in part the fear that free alienation of lands would be curtailed, but was mainly to protect certain classes of the testator's relatives from being excluded from his will by improvident gifts made to charitable institutions while under the apprehension of impending death.

The actual purpose of the Ohio statute is still subject to some doubt. However, a full analysis of the Ohio law to date leaves little doubt that the effect of the statute is not primarily to protect the heirs of the testator, but to declare void as against public policy gifts within the purview of the previous statute and now the present amended act.

II. THE OHIO MORTMAIN ACT

The Ohio mortmain statute had its origin in 1874 when the legislature amended the Wills Act of 1852. This original amendment of 1874 has survived without substantial change until the present time when the legislature deemed it time to liberalize our statute.

The new statute, as reproduced from the Enrolled Bill, provides:

Sec. 2107.06 (A) If a testator dies leaving issue and devises or bequeaths his estate, or any part thereof, in trust or otherwise to any municipal corporation, county, state, country, or subdivision thereof, for any purpose whatsoever, or to any person, association, or corporation for the use or benefit of one or more benevolent, religious, educational, or charitable purposes, such devises and bequests shall be valid in their entirety only if the testator's will was executed more than six months prior to the death of the testator. If such will was executed within six months of the testator's death, such devises and bequests shall be valid to the extent they do not in the aggregate exceed twenty-five per cent of the value of the

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15 Prior to 1940, the Mississippi Constitution, art. 14, §§ 269-70, prohibited unequivocally all devises and bequests for charitable purposes.


17 In re Lennon's Estate, 152 Cal. 327, 92 Pac. 870 (1907); Taylor v. Payne, 154 Fla. 359, 17 So. 2d 615 (1944); In the Matter of Franklin Nat'l Bank, 4 Misc. 2d 410, 147 N.Y.S.2d 572 (Sup. Ct. 1955); Ruple v. Hiram College, 35 Ohio App. 8, 171 N.E. 417 (1928).

18 See Note, supra note 8, at 578.

19 50 Ohio Laws 297 (1852), as amended, 72 Ohio Laws 3 (1875).
testator's net probate estate, and in the event the aggregate of the
devises and bequests exceeds twenty-five per cent thereof, such
devises and bequests shall be abated proportionately so that the
aggregate thereof equals twenty-five per cent of the value of the
testator's net probate estate.

(B) The execution of a codicil to the testator's will within
six months of his death shall not affect the validity of any such
devises and bequests made by will or codicil executed more than
six months prior to his death, except as the same are revoked or
modified by the codicil. If a codicil executed within such period
increases the aggregate of such devises and bequests to more than
twenty-five per cent of the value of the testator's net probate es-
tate, such increase by codicil is invalidated to the extent that such
increases, plus the aggregate contained in the will and not re-
voked by the codicil, exceeds twenty-five per cent of the value of
the testator's net probate estate; and the amount of the codicil's in-
crease of each such devise and bequest in the will and each such
device and bequest contained in the codicil which was not con-
tained in the will shall be abated proportionately.

(C) The portion of any such devises and bequests which is
invalid under this section shall be distributed per stirpes among
such testator's issue unless expressly otherwise provided in the will
or codicil.

(D) As used in this section, "the value of the testator's net
probate estate" means the probate inventory value of all the tes-
tator's assets which are subject to the jurisdiction of the probate
court, less all debts and costs and expenses of administration, but
prior to the payment of any estate or inheritance taxes, and "is-
sue" means a child or children, including an adopted child or
adopted children, and their lineal descendants.

Under the amendment, four factors must be present before the
Ohio mortmain statute can operate: (1) the decedent must die
testate; (2) within six months of making his will; (3) survived by
issue, be they natural or adopted children or their lineal descendants;
and (4) have left gifts outright or in trust to charities the aggregate
of which is more than twenty-five per cent of the net probate es-
tate. Where all of these conditions exist, devises or bequests to
charities, either outright or in trust for charitable uses, are inval-
dated to the extent they exceed twenty-five per cent of the net pro-
bate estate; that in excess of twenty-five per cent passes per stirpes
among the testator's issue unless otherwise provided in the testator's
will. This result is different from that under the former statute
where the charitable gift, if a specific or general devise or bequest,
lapsed and passed into the residuary clause of the testator's will.21

20 Ohio Rev. Code § 2107.06.
21 Davis v. Hutchings, 15 Ohio C.C.R. 174 (1897), rev'd on other grounds sub
nom., Davis v. Davis, 62 Ohio St. 411, 57 N.E. 317 (1900)
Where there was no residuary clause, or the gift itself consisted of the entire residuary clause of the will, the gift passed as intestate property to the heirs at law pursuant to Ohio Revised Code section 2105.06. Where the gift represented merely a portion of the residue it was divided up among the remaining residuary beneficiaries.

III. THE PRESENT AND PREVIOUS OHIO MORTMAIN STATUTES COMPARED TO THE STATUTES IN OTHER JURISDICTIONS

A. Changes as to Time

The previous Ohio statute provided that charitable gifts were "invalid" if the testator died within a year of making his will, and was survived by one of the parties enumerated in the statute. The severest criticism of this old law was the one-year time limitation.

Under the amended law testamentary gifts to charity made in a will executed more than six months from death are valid in their entirety. While such amendment reduces the time period from one year to six months during which an absolute presumption of undue influence is deemed to exist, the statute still remains harsh in comparison with states that provide limitations of ninety days, thirty days, or no limitation whatsoever.

B. Change as to Amount

The previous Ohio statute, like those of the District of Columbia, Florida, and Pennsylvania, placed no restriction on the amount which could be given to charitable institutions in wills made prior to the time limitation. The statute merely stated that all gifts to

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22 Davis v. Davis, supra note 21, held that where the residuary clause was limited to the "balance" of the testator's estate, that it was limited in nature, and gifts which were invalid by operation of the mortmain act, passed as intestate property to the heirs of testator.


25 114 Ohio Laws 320, 346 (1932).

26 OHIO REV. CODE § 2107.06.

27 GA. CODE ANN. § 113-107 (1959); MISS. CODE ANN. § 671 (1942), (ninety days).

28 D.C. CODE ANN. § 19-202 (1961); CAL. PROB. CODE § 41; IDAHO CODE ANN. § 14-326 (Amended 1965); MONT. REV. CODES ANN. § 91-142 (1947); PA. STAT. ANN. tit. 20 § 180.7 (1950) (thirty days).

29 IOWA CODE ANN. § 633.266 (revised 1963); NEW YORK DECED. EST. LAW § 17 (no time limitation).

charity, regardless of amount, were invalid if contained in a will executed within a year of the testator's death.\textsuperscript{31}

The amendment\textsuperscript{32} provides that a testator may give by will at least twenty-five per cent of his net probate estate to charity regardless of when his will is executed. The amended statute is similar to the provision of the Montana Code dealing with limitations on testamentary gifts to charity\textsuperscript{33}

C. Effect of Gift to Charity Made in Codicil

Under the previous statute there was a dearth of cases dealing with the effect of a codicil upon charitable gifts made in a will. However, there is no question that such charitable gifts in a codicil were controlled by the previous Ohio mortmain statute. As stated in \textit{Newman v. Newman}:\textsuperscript{34}

section 2107.01 provides that in Chapters 2101 to 2131, inclusive, of the Code, the word 'will' includes codicils. As a consequence, a codicil is subject to the restrictions of Section 2107.06, invalidating charitable bequests made by a will executed within a year of the testator's death.\textsuperscript{35}

In the case of \textit{Ruple v Hiram College},\textsuperscript{36} the testator in his will provided, in part, for a $10,000 bequest to an individual, and the residue of his estate to be divided between two charities. By a codicil executed within one year of his death, the $10,000 bequest was revoked. It was argued that the $10,000 bequest should pass as intestate property since it would otherwise go to the charities who were residual beneficiaries under the will. The court in finding that the Ohio mortmain statute did not apply, stated: "Not only does the spirit of the section referred to fail to condemn the codicil, but the letter of the statute likewise fails so to do."\textsuperscript{37}

The latest case, under the prior statute, decided by Dean Fletcher Andrews,\textsuperscript{38} involved a situation where a testator executed a codicil within a year of his death wherein he specifically revoked an item in his will which left certain bequests to individuals and charities,

\begin{itemize}
  \item \textsuperscript{31} 114 Ohio Laws 320, 346, (1932)
  \item \textsuperscript{32} \textit{OHIO REV. CODE} § 2107.06(B).
  \item \textsuperscript{33} \textit{MONT. REV. CODES ANN.} § 91-142 (1947) (thirty day limitation and one third maximum).
  \item \textsuperscript{34} 199 N.E.2d 904 (Ohio P. Ct. 1964)
  \item \textsuperscript{35} \textit{Id.} at 907-08.
  \item \textsuperscript{36} 35 Ohio App. 8, 171 N.E. 417 (1928)
  \item \textsuperscript{37} \textit{Id.} at 13, 171 N.E. at 418.
  \item \textsuperscript{38} \textit{Newman v. Newman}, 199 N.E.2d 904 (Ohio P. Ct. 1964)
\end{itemize}
and substituted a new provision in his codicil leaving a lesser amount to different individuals, and more to the same charities. In holding that the Ohio mortmain statute applied and that the gifts to charities were void, Dean Andrews stated:

I hold that the charitable bequests in Mr. Newman's will were unconditionally revoked by the codicil, and that the charitable bequests in the codicil are invalid by reason of section 2107.06, Revised Code.80

If there was any confusion arising from the decisions of the courts regarding the effect of the statute on codicils, the legislature in the amended statute sought to put an end to it by specifically providing for codicils executed within the statutory limitation period. Section 2107.06, as amended, provides that a codicil executed within six months of the decedent's death will have no effect upon charitable gifts made in a will or codicil executed more than six months from the decedent's death unless the codicil revokes or modifies those gifts. Charitable gifts made in a codicil are invalid only insofar as they, together with those made in the will or other codicils, exceed twenty-five per cent of the net distributable estate of the testator.40 If either additional or new charitable gifts in a codicil cause the twenty-five per cent limit to be exceeded, then the gifts in the codicil abate proportionately.41

Thus, had the Newman case42 been decided under the amended statute, the charitable gifts as provided in the codicil would have been valid up to twenty-five per cent of the net probate estate.

D. Change in Protected Parties

Under the previous statute,43 charitable gifts which were invalid under the Ohio mortmain statute could have inured to the benefit of strangers, such as residuary beneficiaries, even though the object of the statute was to protect the testator's issue. As the court said in the Ruple case,44 "it is apparent therefore that, while this section may incidentally inure to the benefit of others, the object of the statute is to protect the testator's direct issue."

80 Id. at 911.
40 Ohio Rev. Code § 2107.06.
41 Ibid.
42 199 N.E.2d 904 (Ohio P. Ct. 1964).
43 114 Ohio Laws 320, 346 (1932).
44 Ruple v. Hiram College, 35 Ohio App. 8, 171 N.E. 417 (1928).
45 Id. at 12, 171 N.E. at 418.
The present amendment, however, specifically provides that "the portion of any such devises and bequests which is invalid under this section shall be distributed per stirpes among such testator's issue unless expressly otherwise provided in the will or codicil." Thus, in no event could an individual, including a residuary beneficiary, other than issue of the testator, benefit from the invalidity of charitable gifts unless the testator stated in his will that in the event of the applicability of the Ohio mortmain statute the invalid gifts should pass to others than his issue.

### E. Changes in the Area of Void and Voidable Gifts

In determining whether a testamentary gift is void or voidable under a particular mortmain act, one writer has concluded that under those statutes which enumerate parties who must survive the testator, the gifts are voidable, while under those that do not, the gifts are void. While such a conclusion seems logical and practical, a reading of the Pennsylvania statute which does not enumerate parties who must survive the testator, and a study of the case law in Ohio, where the statute does enumerate parties, leads one to the conclusion that such a categorical generalization is fallacious. If the testamentary gift to charity is void, then it automatically fails at the death of the testator. However, if the gift is merely voidable, then it fails only if one of the parties protected under the statute objects; if no such objection is made, the statute is deemed waived, and the charitable bequest is valid.

Of the eleven jurisdictions which have mortmain statutes, Ohio’s previous statute appears to be the only one under which both the "void" and "voidable" positions found acceptance. This confusing situation resulted from the lower courts’ propensity to hold gifts voidable in contravention of the Ohio Supreme Court’s rulings that such gifts are void. All of the other jurisdictions have apparently resolved their problems either by statutory amendment or unequivocal judicial interpretation.

### F Void-Voidable Confusion in the Ohio Act

When the Ohio mortmain act was passed in 1874 as an amendment to the Wills Act of 1852, it was specifically provided

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46 Ohio Rev. Code § 2107.06.

47 Ibid.

48 Note, 50 Colum. L. Rev. 94 (1950).


50 50 Ohio Laws 297 (1852), as amended, 72 Ohio Laws 3 (1875).
that charitable gifts made within the prohibited time period were "invalid and void." When this act was printed in 1874 as section 5915, Revised Statutes, it was entitled "any bequest or devise to charitable purpose, if any issue of testator living, void, unless made one year before his death." However, it is interesting to note that when the body of the statute was printed the words "and void" for some reason disappeared so that it provided only that charitable gifts within one year of the testator's death were "invalid." It cannot be discovered where or why those words were omitted; it is mere conjecture that they were so omitted either because of redundancy, or because of the desire to change the meaning of the section. Semantically, there is no difference between the word "invalid" and the word "void." Subsequent sections of the Ohio General Code, and section 2107.06 of the Ohio Revised Code, prior to amendment, state only that the gifts are "invalid."

(1) Supreme Court Decisions Construing Gifts Under the Previous Statute as Void.—Certainly it is questionable whether the omission of the word "void" from the statute prior to amendment has caused the apparent disagreement among the Ohio courts as to whether a gift was void or voidable. In Patton v. Patton, the Ohio Supreme Court in 1883, held that the charitable bequests under the mortmain statute made within a year of the death of the testator "became absolutely void immediately at and after the death of the testator." Some difficulty was subsequently caused in the cases of The Trustees of Ohio State University v. Folsom, an 1897 decision, and Thomas v. The Trustees of Ohio State University, which was decided in 1904. Both of these cases dealt with the construction of a will left by the same testator who died within a year of executing his will and codicil. In his will the testator made a devise to Ohio State University, but provided that if for any reason the gift should fail, it would then pass to the children of his brothers. In his subsequent codicil, the testator gave his daughter the power to appoint the devise to the University if it became void under the mortmain statute, thereby cutting off the gift to the children of his brothers. At the death of the testator within a year of

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51 72 Ohio Laws 3 (1875).
52 114 Ohio Laws 320, 346 (1928) [Ohio Gen. Code §§ 10504, 10504-5.]
53 39 Ohio St. 590 (1883)
55 56 Ohio St. 701, 47 N.E. 581 (1897).
56 70 Ohio St. 92, 70 N.E. 896 (1904).
making his will and codicil, his daughter exercised her power of appointment. The supreme court held that the power to appoint did not fall within the purview of the statute, and the devise went to the university. The discussion by the court of the power to waive the statute caused confusion in later cases.

The cases of Davis v Davis,\(^57\) decided in 1900, and in Theobald v Fugman,\(^58\) decided in 1901, both held that gifts made within the statutory period were void. The case of Barrett v Delmore,\(^59\) in 1944, did not consider the "void" versus "voidable" issue but dealt solely with the issue of whether a designated heir was within the classes specified by the statute as surviving the testator.

If there was any doubt created as to whether charitable gifts were void or voidable under the previous Ohio statute, the supreme court in 1951 in Kirkbride v. Hickok,\(^60\) seemed to have answered it.\(^61\) In Kirkbride, the testator had died within a year of making his will. The will placed his entire estate in trust for twenty years, with provision for the payment of income during such period to his children and certain other persons. At the end of twenty years, the trust was to terminate and be divided among some twenty charities. An "in terrorem" clause in the will provided that the children would forfeit all their interests if they contested the provisions of the will. This put the controversy of "void" versus "voidable" squarely in issue. If the gifts were voidable, then action by the children would involve the "in terrorem" clause,\(^62\) while inaction would constitute a waiver of the statute's provisions.\(^63\) On the other hand if the gift were void, then action by the children would not invoke the "in terrorem" clause, because the gift would fail automatically at the death of the testator.\(^64\) The court in holding that the gifts were void, stated:

The language of this section is clear and unambiguous. Invalid

\(^{57}\) 62 Ohio St. 411, 57 N.E. 317 (1900)
\(^{58}\) 64 Ohio St. 473, 60 N.E. 606 (1901)
\(^{59}\) 143 Ohio St. 203, 54 N.E.2d 789 (1944).
\(^{60}\) 155 Ohio St. 293, 98 N.E.2d 815 (1951)
\(^{61}\) For criticism of this case as going beyond the statutory purposes, see Note, 65 HARV. L. REV. 1074 (1952)
\(^{62}\) The result here would be that the other beneficiaries would receive the entire income for twenty years and the children would have a vested remainder.
\(^{63}\) The result here would be the same as the provisions of the will, that is, the children and other beneficiaries would receive the income for twenty years, and the charities receive a vested remainder in the principal.
\(^{64}\) The result here, as determined by the court in the Kirkbride case, was that the children and other beneficiaries received the income for twenty years, and the children had a vested remainder.
means void, or without validity, and it seems obvious that if children of the blood take under the will just as it provides, and have done nothing themselves to bring about the invalidity of the bequests to the charities, they can not be said to have waived the provisions of the statute.

The court went on to distinguish the *Thomas* case and the *Folsom* case on the ground that the naked power to appoint is not covered by the statute.\(^6\)

**2. Lower Court Cases Construing Gifts Under the Previous Statute as Vorable.**—The conflict in the Ohio position as to the “void versus voidable” question arises from two probate court decisions.\(^6\) The first of these two probate court decisions, *Deeds v. Deeds*,\(^6\) decided in Montgomery County in 1950, involved a devise by codicil to Denison University which failed because the codicil was executed within a year of the date of testatrix’s death. The testatrix’s husband was the residuary beneficiary under her will, and her son was the substitute residuary beneficiary if her husband failed to survive the testatrix. After testatrix’s death, her son signed a waiver relinquishing and disclaiming his rights under the statute to the property devised to the charity. In a will construction action filed by the husband as executor, the court held that the gift was voidable rather than void. Accordingly, the court said the son, who was a protected party under the statute, had by his waiver effectuated the gift to the University. The case was never appealed.

The second case, *Ireland v. Cleveland Trust Company*,\(^6\) decided in 1958 by Judge Walter Kinder of the Probate Court of Cuyahoga County, involved a devise of over a $1,500,000 to charity. Testatrix was survived by her son, the sole heir at law and residuary legatee under her will, who was willing to waive the benefits of the statute if a waiver was legally possible. The court, “distinguishing” the *Kirkbride* case without elaboration, held that the law of Ohio permitted and authorized a waiver, and therefore

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\(^6\) Subsequent to the *Kirkbride* case, the court of appeals of Mahoning County, Ohio, decided the case of Roenick v. Dollar Sav. & Trust Co., 179 N.E.2d 379 (Ohio Ct. App. 1960). In that case the testator, within the year of his death, drafted a will leaving the residue to his grandson on the condition that he pay sums of money to certain charities. The court upheld the gift of the residue to the grandson, but without citation of authority, held that the condition was invalid as coming within “the plain, and unambiguous, terms” of the mortmain act.


\(^6\) 94 N.E.2d 232 (Ohio P. Ct. 1950).

\(^6\) 157 N.E.2d 396 (Ohio P. Ct. 1958).
the gift to charity was valid. This case, as the Deeds case, was never appealed, and thus both appear to have been friendly lawsuits, aimed perhaps at saving taxes. Both of these cases are contrary to the law as interpreted by the supreme court, for the Ohio statute prior to amendment and the weight of case law interpreting it are clear in holding that testamentary gifts made in prohibition of the statute are void as against public policy.

(3) Result Under the Amendment.—It was hoped that the amended statute would correct the inequity of declaring a gift void if made within the statutory time period, and thereby permit persons who would benefit from the invalidity of the mortmain statute to waive its provisions and permit the charities to benefit if the heirs so desired. The original bill as presented to the legislature contained the following provision.

Any such issue who would receive any of the testator's estate by reason of the provisions of the preceding sentence may renounce such distributive share by filing in the Probate Court having jurisdiction of the administration of such testator's estate, within three months of the approval by the Court of the inventory of the testator's assets, a written renunciation of such distributive share. On a motion filed before the expiration of such three months and for good cause shown, the Court may allow further time for the filing of the renunciation. Each such renunciation shall restore such devises and bequests effective as of the date of death to the extent of the value of the distributive share being renounced. If such renunciations are filed by all such issue, such devises and bequests shall be valid in their entirety.

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69 See Millard v. Humphrey, 8 F. Supp. 784 (W.D. Wash. 1934), aff'd, 79 F.2d 107 (2d Cir. 1935); Estate of William A. Carney, 9 T.C. 1047 (1947); Estate of Dudley S. Blossom, 45 B.T.A. 691 (1941). Internal Revenue Code of 1954 § 2055(a) provides:

In General — For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, or power, if the disclaimer is made before the date prescribed for the filing of the return)

(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes.

Thus, if a waiver of a charitable bequest is valid, there is a substantial savings in estate tax, for the amount of the charitable bequest can be deducted from the estate before computing the estate tax.

70 The theory that such testamentary gifts are void as against public policy is succinctly set forth in Kirkbride v. Hickok, 155 Ohio St. 293, 300, 98 N.E.2d 815, 819, (1951), as follows: "In none of those cases has the statute been treated otherwise than as a limitation on the power of the testator to make charitable bequests, where the testator dies within a year after making his will, and all hold that property so devised or bequeathed does not under such circumstances pass to charitable institutions."

However, the Ohio House of Representatives by amendment struck this provision from the bill for the reason that to permit a waiver of the statute would subject the issue of the testator to a great deal of pressure from the charities and other issue who desired to waive the statute.

As a result of the failure to include this provision in the present statute, there is clearly no right to waive the effect of the statute. The gifts within the prohibited time period are void ab initio in the same manner as they were under the Ohio Supreme Court's interpretation of the old statute.

IV DOCTRINES PERMITTING AVOIDANCE OF THE HARSH EFFECTS OF MORTMAIN ACTS

A number of doctrines which reduce the hardship of the mortmain statutes have been incorporated into statutes or adopted by judicial decision. One of these is the doctrine of dependent relative revocation. Another is the doctrine of independent legal significance.72

A. Doctrine of Dependent Relative Revocation

The doctrine of dependent relative revocation operates where the testator has executed a will prior to the statutory time limitation set forth in a particular mortmain act leaving gifts to charity, and later, during the statutory time period, executes a new will or codicil which either expressly or impliedly revokes or modifies the prior will, and which names the same or similar charity and gives the same or different amounts of money to those charities. As previously discussed, the gifts made to charities within the prohibited time periods are void or voidable if left to charity, and the requisites of the particular statutes have been met. However, the doctrine of dependent relative revocation operates to validate the charitable gifts in the prior will on the ground that it was the testator's intention that the revocation of the gift in the prior will be conditioned upon the validity of the subsequent will or gifts.73 Further, if the gifts are invalid under the second will, the condition has not been met, and thus the gifts under the prior will are still

72 Further statutory aids to charities are provided in the Florida and Georgia statutes. FLA. STAT. ANN. § 731.19 (1964), requires that those persons named within it must file notice within eight months after the death of the testator in order to invoke its protection. GA. CODE ANN. § 113-107 (1959), provides that when the estate exceeds $200,000 the restrictions shall not apply to the excess.

in effect. This is succinctly stated by the court in *In re Kaufman's Estate*: 74

Under the doctrine of dependent relative revocation, an earlier will, revoked only to give effect to a later one on the supposition that the later one will become effective, remains in effect to the extent that the later proves ineffective. The doctrine is designed to carry out the probable intention of the testator when there is no reason to suppose that he intended to revoke his earlier will if the later will became inoperative.

The various courts which apply the doctrine of dependent relative revocation to such situations have adopted different standards. Thus, some courts 75 refuse to apply the doctrine where there is an express clause of revocation, stating that such a clause is controlling. Others 76 will apply the doctrine even when the revocation clause has been inserted, stating that the intention of the testator is paramount to the words used in his will. Further, where the second will contains no express clause of revocation, but the clauses of the second will are inconsistent with those of the first, the courts are split in decision. Some of the courts have held that the second will does not revoke the first, since it is truly the inconsistency between the gifts in the two instruments which affords any grounds for claiming revocation, and since the gifts in the second will are not operative, the first instrument is not affected by the second. Other courts hold that the testator intends to revoke the first instrument, as is indicated by the inconsistent gifts in the second instrument, and effect must be given to this intention even though the gifts which are made by the second instrument cannot take effect. 77

The application of the doctrine can best be illustrated by several cases. In *In re Kaufman's Estate* 78 the testator, upon moving from New York to California, drafted a new will revoking all his former wills. This new will named the same charitable beneficiaries as did his former will and provided for identical cash bequests. The only substantial change was the naming of a new executor. The testator died within thirty days of the execution of this new will.

74 25 Cal. 2d 854, 858-59, 155 P.2d 831, 833 (1945)


Under California law, testamentary gifts to charity are invalid if the will providing for them was executed within thirty days of the testator's death. The California court, applying the doctrine of dependent relative revocation, sustained the gifts to charity under the prior will stating:

When a testator repeats the same dispositive plan in a new will, revocation of the old one by the new is deemed inseparably related to and dependent upon the legal effectiveness of the new.\(^{79}\)

In the case of *Linkins v. Protestant Episcopal Cathedral Foundation*,\(^{80}\) the testator executed a second will revoking his first will, but provided in the residuary clause of the second for distribution to the same charities as in the residuary clause of the first. The testator died within one month of executing his second will, making such charitable bequests void under the District of Columbia Code. The court of appeals, citing the *Kaufman* case with approval, applied the doctrine of dependent relative revocation to uphold the gifts and stated:

The doctrine of dependent relative revocation is basically an application of the rule that a testator’s intention governs; it is not a doctrine defeating that intent.\(^{81}\)

The same result was reached by an Iowa court in *Blackford v. Anderson*,\(^{82}\) holding that the doctrine of dependent relative revocation was applicable so as to give effect to the thrice declared intent of the testator.

Several states have, by statute, incorporated into their mortmain acts the doctrine of dependent relative revocation in order to avoid the effects of the mortmain provisions. Thus, in 1957, as a result of *In re Estate of Pratt*,\(^{83}\) in which a Florida court refused to apply the doctrine in a case similar to the *Kaufman* and *Linkins* decisions where a subsequent will revoked all prior wills of the testator, the Florida Legislature amended section 731.19 of its statutes to provide that charitable gifts are not voided if the

\[^{79}\text{Id. at 860, 155 P.2d at 834.}\]
\[^{80}\text{187 F.2d 357 (D.C. Cir. 1950).}\]
\[^{81}\text{Id. at 360.}\]
\[^{82}\text{226 Iowa 1138, 286 N.W. 735 (1939).}\]
\[^{83}\text{88 So. 2d 499 (Fla. 1956).}\]
trust for the same person or beneficiary as was made in such last will.\textsuperscript{84}

Another comprehensive incorporation of the doctrine into a mortmain statute was accomplished by Pennsylvania in section 180.7 of its statutes. This section provides in part:

Unless the testator directs otherwise, if such a will or codicil shall revoke or supersede a prior will or codicil executed at least thirty days before the testator's death, and not theretofore revoked or superseded and the original of which can be produced in legible condition, and if each instrument shall contain an identical gift for substantially the same religious or charitable purpose, the gift in the later will or codicil shall be valid; or if each instrument shall give for substantially the same religious or charitable purpose a cash legacy or a share of the residuary estate or a share of the same asset, payable immediately or subject to identical prior estates and conditions, the later gift shall be valid to the extent to which it shall not exceed the prior gift.\textsuperscript{85}

Following the amendment of the Pennsylvania statute, \textit{McGuigan Estate}\textsuperscript{86} was decided. There, the testator died five days after executing a new will which specifically revoked all prior wills. This new will left all the residue absolutely to a charity, while a former will executed more than thirty days prior to decedent's death had left all the residue in trust for the same charity. The court in upholding the charitable gift stated:

Prior to the Act of 1947 the law of Pennsylvania was clearly settled that the residuary gift contained in testatrix's last will of 1955 was void [because of testatrix's death within 30 days]. The reason for the law prior to 1947 was clear: The basic purpose of the 30 day requirement was and is to prevent a testator during his last illness from being importuned or otherwise influenced, by hope of reward or fear of punishment in the hereafter, to leave his estate in whole or in part to charity or to church. Since it would often be difficult to prove whether a man was in his last illness, or whether he had been importuned, or was unduly influenced by charity or church, or was influenced while in extremis by a sudden hope of Heaven or fear of Hades, the Legislature wisely established a clear, realistic and inflexible time period — 30 days. However, society came to realize that gifts to charity or church which were made within the last 30 days of a man's life were not always unduly influenced by charity or church and that the law was unfair to testators, charity and church alike for the above mentioned reason, as well as because of the fact that while in good health a testator might die in a motor, railroad or plane accident within 30 days after making his will. The Legislature therefore

\textsuperscript{84} FiA. STAT. ANN. § 731.19 (1964)
\textsuperscript{85} PA. STAT. ANN. tit. 20, § 180.7 (1950).
\textsuperscript{86} 388 Pa. 475, 131 A.2d 124 (1957).
decided that the prior statutory law in re charitable gifts should be modified and liberalized and that gifts to charities which were made within 30 days of death should, at least to a limited extent, be protected and validated where the testator had made a substantially identical charitable gift in a prior extant will.\textsuperscript{87}

Thus, the Pennsylvania Legislature came to recognize some of the inherent problems which resulted from a harsh and antiquated law and corrected them by adopting a modern and liberal approach.

But, while California, District of Columbia, Iowa, Florida, Mississippi, and Pennsylvania, by decision or statute, have adopted to a greater or lesser degree the doctrine of dependent relative revocation to ease the burden of their mortmain acts, the Ohio Supreme Court in the recent case of \textit{Jewish Welfare Federation v. Cleveland Trust Co.},\textsuperscript{88} refused to apply the doctrine. Such a refusal is certainly not inconsistent with the harsh position taken by the Ohio courts in rebuffing any attempt to modify the effects of its mortmain statute.

\section*{B. Doctrine of Independent Legal Significance}

While all apparent attempts to modify the effect of the Ohio mortmain act on testamentary dispositions\textsuperscript{89} have been thwarted by the Ohio courts and Legislature, the Ohio courts have held that inter vivos trusts with charitable beneficiaries are not void if created within a year of a testator’s death.\textsuperscript{90} Because of this approach the implications of Ohio Revised Code section 2107.63, may cause some surprising results.

Formerly, where a testator provided in his will that the residue of his estate “pour over” into a pre-existing inter vivos trust, for such a gift to be valid, the trust had to be incorporated by reference, pursuant to Ohio Revised Code section 2107.05, into the testator’s will.\textsuperscript{91} Any subsequent amendments to the trust also had to be

\textsuperscript{87} \textit{Id.} at 477-79, 131 A.2d at 126-27.
\textsuperscript{91} Bolles \textit{v. Toledo Trust Co.}, 144 Ohio St. 195, 58 N.E.2d 381 (1944).
incorporated into the testator's will by codicil for the property passing from the estate into the trust to go according to the terms of the trust as amended.\textsuperscript{92} Thus, in \textit{Cleveland Trust Co. v. White},\textsuperscript{93} decided prior to Ohio Revised Code section 2107.63, and pursuant to Ohio Revised Code section 2107.05, where the testator created an inter vivos trust within a year of the date of his death with charitable beneficiaries and incorporated the same by reference into his will executed thereafter, the court held that while the property transferred during his life to the trust passed to charity, property which passed into the trust from testator's will did not pass to charity because the same was a testamentary disposition within the prohibition of the mortmain act.

However, with the passage of section 2107.63 in 1963, the Ohio Legislature recognized the doctrine of "independent legal significance," which provides in substance that an inter vivos trust stands independently of a will of a testator, and that once the trust has been referred to in the will, subsequent amendments to the trust do not have to be referred to in the will.\textsuperscript{94} The result of this doctrine is that, without testamentary disposition, the residue of the testator's estate "pours over" into his inter vivos trust as amended.

The doctrine of independent legal significance coupled with the approach of the Ohio courts in upholding inter vivos trusts for the benefit of charities produces an interesting result which can be illustrated as follows: X draws a will in July of 1961 and provides therein that the residue of his estate shall "pour over" into a P inter vivos trust created in June of 1961, X amends his trust in January of 1962 by changing the beneficiaries to charitable institutions without changing his will; if X dies in March of 1962, the gifts to the charities are valid, even if X is survived by issue, adopted children, or lineal descendants thereof, because the amendment of his trust is not a testamentary disposition so as to come within the purview of the old statute as well as the new section 2107.06. In reality what the testator is doing is devising or bequeathing property to charity and accomplishing such during the time period prior to his death.

Whether the Ohio Legislature was aware of this interesting result when it passed Ohio Revised Code section 2107.63 is a matter of conjecture.

\textsuperscript{92} Koeninger v. Toledo Trust Co., 44 Ohio App. 490, 197 N.E. 419 (1934)
\textsuperscript{93} 58 Ohio App. 339, 16 N.E.2d 588 (1937)
\textsuperscript{94} OHIO REV. CODE § 2107.63 (Supp. 1964)
V Conclusion

The amended mortmain statute represents an important step forward in the liberalization and clarification of Ohio's attitude toward testamentary gifts to charity. Four major changes were incorporated into the new law: (1) the time during which an absolute prohibition exists on testamentary gifts to charity has been reduced from one year to six months; (2) charities are permitted to receive up to twenty-five per cent of the testator's net distributable estate under wills executed within the prohibited time period; (3) only issue of the testator, adopted children, or lineal descendants of either are permitted to benefit from the invalidity of the charitable gifts; (4) the effect of charitable gifts made in codicils has been specifically set forth in the new law.

While the foregoing changes in the mortmain law have cured many of the inequities which existed under the prior law, testamentary gifts to charity within the prohibited time period are still void if in excess of twenty-five per cent of the testator's net probate estate. In addition, those persons who would benefit from the invalidity of the gifts have no right to renounce their windfall in favor of the designated charities if they so choose.

It is hoped that the amendment to section 2107.06 of the Ohio Revised Code is but a first step towards a complete abolition of the Ohio mortmain statute which would place charitable beneficiaries on an equal footing with other testamentary recipients.