

CHAPTER 4

Trusts and Estates

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§4.1. **Descent and distribution: Illegitimacy.** *Vallin v. Bondesson*¹ decided that an illegitimate intestate decedent's illegitimate brothers and sisters were entitled to inherit ahead of legitimate maternal first cousins.

The legitimate relatives' contention that an illegitimate child may inherit only from its mother or maternal ancestors in an ascending line was rejected, despite the specificity of General Laws, Chapter 190, Section 5.² The Supreme Judicial Court ruled that Sections 5 and 6³ of Chapter 190 had to be construed together and in light of the manifest purpose of the legislation to mitigate the common law disabilities imposed upon illegitimates. Section 5 makes an illegitimate child an "heir" of his mother, and as an heir an illegitimate child can inherit from his illegitimate brothers and sisters *through* his mother within the meaning of Section 6.⁴

The Court recognized that its interpretation "would give greater rights of inheritance to an illegitimate when inheriting from another illegitimate than he would have when inheriting from a legitimate person."⁵ But, it expressed its belief that the contrary construction would pronounce the distinctions between legitimate and illegitimate children; legitimates would be allowed to succeed to the estates of their illegitimate maternal relatives, but the latter could not take from the former. This would conflict with the general objective of the statute to remove the rigors of the common law.

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§4.1. 1 346 Mass. 748, 196 N.E.2d 191 (1964).

² "An illegitimate child shall be heir of his mother and of any maternal ancestor, and the lawful issue of an illegitimate person shall represent such person and take by descent any estate which such person would have taken if living."

³ G.L., c. 190, §6, provides: "If an illegitimate child dies intestate and without issue who may lawfully inherit his estate, such estate shall descend to his mother or, if she is not living, to the persons who would have been entitled thereto by inheritance through his mother if he had been a legitimate child."

⁴ "We are also satisfied that the sole purpose of the last clause, 'if he had been a legitimate child,' is to permit legitimate maternal relatives to inherit where they are nearest to the intestate under the laws of descent." 346 Mass. 748, 753, 196 N.E.2d 191, 194 (1964).

⁵ *Ibid.*

§4.2. Wills: Adopted child as legatee. Under the statutes of the Commonwealth an adopted child inherits from the adopting parent in the same manner as a natural child,¹ and a child adopted by a testator is entitled to a bequest under the designation of the word "child" or its equivalent.² Prior to 1958 a bequest to a "child" of someone other than the testator would not have included the adopted child of that person unless it plainly appeared that the testator had the intent to benefit the adopted child.³ However, a 1958 statute amended the prior law by including an adopted child under the word "child" or its equivalent whether the adopting parent or another person be the donor, in the absence of contrary indications from the terms of the instrument.⁴ The recent statute is expressly made applicable only to "grants . . . or bequests executed after [its] effective date. . . ."

In *Moore v. Cannon*⁵ a testator, who died before 1958, left the residue of his estate in trust for the benefit of his wife and children and provided: "In the event of the death of any of my . . . children prior to the death of my . . . wife, leaving a wife or husband or issue of him or her surviving, and surviving my said wife," the trustee was to pay over the part of the residue which would have gone to such child "to those who would have been entitled to receive such part of my . . . estate had such child died intestate vested with the title thereto." A son of the testator died in the lifetime of the testator's wife leaving a widow and an adopted child surviving him.

The Supreme Judicial Court ruled that the pre-1958 rule of construction of non-inclusion of adopted children was rendered inapplicable. Under the language of the limitation in question the gift over was, in effect, to the statutory heirs of the testator's deceased son, the intended distributees being those persons who would have taken by the intestacy laws had the son died owning the property. The adopted son was a statutory heir.

Previous cases concerned with pre-1958 instruments have taken the position that the terms "issue," "children," and "heirs" would not benefit an adopted child of someone other than the donor.⁶ The

§4.2. 1 G.L., c. 210, §7.

² *Id.* §8.

³ *Ibid.* Before the 1958 amendment, §8 read: "The word 'child,' or its equivalent, in a . . . bequest shall include a child adopted by the . . . testator, unless the contrary plainly appears by the terms of the instrument; but if the . . . testator is not himself the adopting parent, the child by adoption shall not have, under such instrument, the rights of a child born in lawful wedlock to the adopting parent, unless it plainly appears to have been the intention . . . of the testator to include an adopted child."

⁴ *Ibid.* As amended by Acts of 1958, c. 121, §1, §8 now provides: "The word 'child,' or its equivalent, in a . . . bequest shall include an adopted child to the same extent as if born to the adopting parent or parents in lawful wedlock unless the contrary appears from the terms of the instrument."

⁵ 1964 Mass. Adv. Sh. 929, 199 N.E.2d 312.

⁶ See *Old Colony Trust Co. v. Wood*, 321 Mass. 519, 523-524, 74 N.E.2d 141,

present case was thought to be distinguishable in that the specific language of the limitation called for such devolution of the property as would follow if legal title to it had been vested in the deceased son.⁷

If the gift over were to the "estate" of the deceased son, it would seem that in the event that the son died intestate the son's heirs including his adopted child would take as statutory heirs.⁸ The provisions of the will in *Moore* appear to express a similar dispositive scheme except that the testator did not desire to benefit the legatees of his son's will but restricted the possible distributees to those who would be entitled to inherit from the son had he died intestate. That the "statutory heirs" were to take as purchasers under the will rather than through the intestacy of the son should not be critical in view of the specific issue before the Court—whether the pre-1958 rule of construction had been rebutted.

§4.3. **Wills: Construction; meaning of "next of kin."** The frequently litigated question—whether an end limitation in favor of testator's "next of kin" means those who answer that description at the time of the testator's death or those who would have been his next of kin at the time set for distribution had he died then—came before the Supreme Judicial Court again in *First Safe Deposit National Bank of New Bedford v. Westgate*.¹ The testator left the residue of his estate in trust to pay the income to his wife during widowhood. Stated sums of money were to be paid out of principal to his son on marriage and upon attainment of designated ages. Upon the death or remarriage of the testator's wife the income was payable to the son for life. At the death of his son and after the death or remarriage of his widow the trust fund was to be held for the benefit of the son's issue, but

[i]f by reason of death or remarriage or lack of issue living at my son's decease, the foregoing provisions cannot be carried out, I direct my Trustees to pay over the trust estate then remaining, free of all trusts, to my next of kin, according to the laws of descent and distribution in intestate estates in this Commonwealth.²

There were spendthrift provisions affecting both income and principal. The testator's widow and son, who was the only child,

144-145 (1947); *Bundy v. United States Trust Co.*, 257 Mass. 72, 80, 153 N.E. 337, 340 (1926); *Wyeth v. Stone*, 144 Mass. 441, 443-444, 11 N.E. 729, 731-732 (1887).

⁷ Compare § Restatement of Property §305, Comments c, bb (1940).

⁸ If the son died testate, his legatees would take. See *Leary v. Liberty Trust Co.*, 272 Mass. 1, 171 N.E. 828 (1930).

§4.3. 1 346 Mass. 444, 193 N.E.2d 683 (1963).

² Id. at 446, 193 N.E.2d at 685.

survived him. The son survived the widow and died without issue.

The Supreme Judicial Court ruled that the testator's son was his sole "next of kin" within the meaning of the will and held that the corpus of the trust was payable to the executors under the son's will. The rule of construction that a gift over to a testator's next of kin means those who answer that description at the testator's death was held applicable³—the son took a transmissible interest under the designation of "next of kin" in the end limitation.

The decision attributes to the testator an incongruous dispositive scheme. If the testator had bequeathed property in trust to pay the income to his son for life and designated amounts of principal on the son's reaching specified ages with a remainder to the testator's heirs, it would appear to be extremely unlikely that the testator would have meant "heirs" as of the date of his death if his son were his only heir at law.⁴ The testator would not have restricted his son to a life estate and a limited part of the principal if he intended to benefit him further under the identity of "heirs."

The incongruity is not as great in the limitation in the *Westgate* case, because the alternative gift to the son's issue did not make it certain as of the time of the testator's death that the son would acquire the complete interest in the trust.⁵ It nevertheless seems improbable that the donor would have limited the son to a life estate and portions of the principal had he anticipated the son taking the principal as a remainderman. There would not have been any incongruity had "next of kin" been interpreted as having meant those who would have been so identified had the testator died at the time set for the final distribution of the trust fund.

No constructional tendency should arise as a result of the spendthrift provisions. There is precedent for making a spendthrift provision a factor in making the canon for the determination of heirs at testator's death inapplicable when there is a coincidence of the life beneficiary as an heir.⁶ In those cases, however, the restraint on alienation was restricted to the income interest, and it could have been urged that had the testator intended that the "heirs"

³ "We consider that when a bequest is made to one or more for life, and remainder to the testator's heirs, or next of kin, or relations, or such persons as would take his estate by the rules of law if he had died intestate, the bequest is to those who are such heirs or next of kin at the time of his decease, unless there are words indicating a clear intention that it shall go to those who may be his relations or next of kin at the time of the happening of the contingency upon which the estate is to be distributed." *Childs v. Russell*, 11 Metc. 16, 23 (Mass. 1846). See also *New England Trust Co. v. Watson*, 330 Mass. 265, 265-266, 112 N.E.2d 799, 800 (1953); *Tyler v. City Bank Farmers Trust Co.*, 314 Mass. 528, 531, 50 N.E.2d 778, 780 (1943); 3 Restatement of Property §308 (1940); 2 Simes and Smith, *Future Interests* §734 (2d ed. 1956).

⁴ See 3 Restatement of Property §308, Comment *h* (1940).

⁵ *Ibid.*

⁶ *Thompson v. Bray*, 313 Mass. 717, 49 N.E.2d 228 (1943); *Boston Safe Deposit & Trust Co. v. Waite*, 278 Mass. 244, 179 N.E. 624 (1932).

be ascertained at his death, he in large part would have undone what he sought to do by the spendthrift provisions—the remainder interest would have been alienable.⁷ In *Westgate* both income and principal were subject to spendthrift provisions.

A statute enacted during the 1964 SURVEY year changes the rule of construction applied in the *Westgate* case, and if the same limitation appears in an instrument executed after January 1, 1965, the testator will be presumed to have intended to benefit those persons who would have been his next of kin had he died at the time set for distribution of the corpus.⁸

In the *Westgate* case the testator's widow also survived him. Yet, the Court concluded that she was not entitled to take as "next of kin, according to the laws of descent and distribution in intestate estates in this Commonwealth"; that the words "next of kin" are limited to blood relations of the designated ancestor. There is local precedent to support this viewpoint.⁹ On the other hand, there is also a line of cases holding that a gift over to the heirs of a designated person will include the spouse of such person as a statutory heir.¹⁰ It is difficult to see why "next of kin" restricts the class to blood relatives while "heirs" does not.¹¹ The Supreme Judicial Court did not consider it significant that the limitation in question also made specific reference to the Massachusetts statutes of descent and distribution. This makes the reference to the intestacy laws in large part surplusage.

One of the articulated reasons for the canon of construction that a remainder over to the next of kin of the testator means those who are his next of kin at the time of his death is that it would correspond with the desires of the donor who uses such language. The testator usually uses these words, after he has exhausted his specific desires to benefit designated beneficiaries, to express his wish to let the law take its course.¹² If there were intestacy, his widow would be entitled to take under the statutes of descent and distribution.

⁷ See *Boston Safe Deposit & Trust Co. v. Waite*, 278 Mass. 244, 179 N.E. 624 (1932). For a line of cases in which spendthrift provisions were not deemed to be significant factors, see *Perkins v. New England Trust Co.*, 344 Mass. 287, 182 N.E.2d 308 (1962), 1962 Ann. Surv. Mass. Law §2.5; *Bagley v. Kuhn*, 322 Mass. 372, 77 N.E.2d 312 (1948); *Old Colony Trust Co. v. Clarke*, 291 Mass. 17, 195 N.E. 758 (1935); *Rotch v. Rotch*, 173 Mass. 125, 53 N.E. 268 (1899).

⁸ Acts of 1964, c. 307. See §4.7 *infra*.

⁹ See *Bailey v. Smith*, 222 Mass. 600, 602, 111 N.E. 684, 686 (1916); *Haraden v. Larrabee*, 113 Mass. 430, 431 (1873).

¹⁰ *Calder v. Bryant*, 282 Mass. 231, 184 N.E. 440 (1933); *Olney v. Lovering*, 167 Mass. 446, 45 N.E. 766 (1897); *Proctor v. Clark*, 154 Mass. 45, 27 N.E. 673 (1891); *Lincoln v. Perry*, 149 Mass. 368, 21 N.E. 671 (1889); *Lavery v. Egan*, 143 Mass. 389, 9 N.E. 747 (1887).

¹¹ See Casner, *Construction of Gifts to "Heirs" and the Like*, 53 Harv. L. Rev. 207, 218-228 (1939); 3 Restatement of Property §§305, 307 (1940).

¹² *Whall v. Converse*, 146 Mass. 345, 348-349, 15 N.E. 660, 662 (1888).

§4.4. **Trusts: Governmental claims.** In *Town of Randolph v. Roberts*¹ a testatrix left property in trust for the benefit of her niece. If the income was insufficient to support her properly, the trustees were authorized to

. . . use such part of the sum of said trust estate as may be necessary for such purpose, and I give my said trustees the sole power of determining whether or not it is necessary to use a part of the principal sum for such purposes, and [if] it is so determined, what part shall be used and when.²

The trust assets were of small value — a little more than \$5000 and a dwelling valued at \$4000.

The niece had received disability assistance from the welfare department of the town commencing before the testatrix's death. After the trust was constituted the trustee paid \$30 a month to the niece for her support, room and board, thereby reducing the town's obligation from \$206 to \$176 a month. The town attempted to reach and apply the trust corpus for the disability payments made to the niece before and after the death of the testatrix.

The Supreme Judicial Court ruled that the disability payments made before the testatrix's death, the date the trust took effect, could not be recovered from the trust fund; the trust was intended to provide for future support. Nor could the town reach any part of the trust for its payments after the trust was constituted. Since the trust was discretionary, and since the niece had no absolute right to the principal or any part of it, her creditors could not acquire any greater rights than she had. There was no indication that the trustees had exercised their discretion arbitrarily or in bad faith. The Court pointed out that the trust was of a small amount and that the testatrix probably had the desire to supplement public assistance of her niece or to provide for her welfare if the assistance ceased. The town's claim was not given special treatment simply because it was a governmental claim and the Court observed that public policy did not preclude public support to the beneficiary of a private trust.

Under the law of some jurisdictions the interest of a beneficiary of a spendthrift trust or a trust for support may not be insulated from the claims of particular classes of claimants such as dependents of the beneficiary, suppliers of necessities, those who render services or furnish materials to benefit the interest of the beneficiary, and the state or federal governments.³ The Supreme Judicial Court has, however, not seen fit to treat any class of general creditors

§4.4. 1 346 Mass. 578, 195 N.E.2d 72 (1964).

2 Id. at 579, 195 N.E.2d at 73.

3 See 2 Scott, Trusts §§157-157.5 (2d ed. 1956); 1 Restatement of Trusts Second §157 (1959).

differently from any other.⁴ At any rate, it appears that the trust in *Roberts* was discretionary and not a support or a spendthrift trust; and the trustee's refusal to reimburse the town for its assistance payments should not be considered an abuse of its discretion in view of the small value of the trust res and the probable objectives of the testatrix.

§4.5. Trusts: Allocation of capital gains distribution by a regulated investment company. The question, novel for Massachusetts, whether a capital gains distribution by an open-end regulated investment company is to be allocated to income or principal, received a full analysis in the case of *Tait v. Peck*.¹

The investment company issued a dividend of its shares representing a distribution of capital gains resulting from sales of securities in its portfolio of investments. With the trust instrument silent on the matter, the trustee's refusal to assign these shares to the income account was challenged. Although the dividend was payable in cash or stock at the trustee's option, the Supreme Judicial Court ruled that it was properly allocated to principal. The view that a regulated investment company is the functional equivalent of a common trust fund and in effect a conduit for passing realized gains to the trust was adopted. These gains retained their character as principal after distribution to the trust, and it would have made no difference had they been distributed in the form of cash instead of stock.

The so-called Massachusetts rule for the allocation of dividends treats cash dividends, however large and extraordinary, as income and stock dividends as principal.² If the dividend is payable in cash or stock at the trustee's election, it is to be considered a cash dividend whatever the form.³ The rule is somewhat arbitrary and may produce sporadic inequitable results, but its simplicity provides for more convenient and practical trust administration.⁴ Excep-

⁴ See *Burrage v. Bucknam*, 301 Mass. 235, 16 N.E.2d 705 (1938); *Bucknam v. Bucknam*, 294 Mass. 214, 200 N.E. 918, 104 A.L.R. 774 (1936).

§4.5. 1346 Mass. 521, 194 N.E.2d 707 (1963).

² *Third National Bank & Trust Company of Springfield v. Campbell*, 336 Mass. 352, 354-355, 145 N.E.2d 703, 705-706 (1957); *Old Colony Trust Co. v. Shaw*, 261 Mass. 158, 168-169, 158 N.E. 530, 534 (1927); *Minot v. Paine*, 99 Mass. 101, 108 (1868). See 3 Scott, Trusts §§236-236.4 (2d ed. 1956); 1 Restatement of Trusts Second §236 (1959).

³ *Smith v. Cotting*, 231 Mass. 42, 48-49, 120 N.E. 177, 182-183 (1918); 1 Restatement of Trusts Second §236(c) (1959); 3 Scott, Trusts §236.4 (2d ed. 1956).

⁴ *D'Ooge v. Leeds*, 176 Mass. 558, 560-561, 57 N.E. 1025, 1025-1026 (1900); 3 Scott, Trusts §236.3 (2d ed. 1956).

"A trustee needs some plain principle to guide him; and the *cestuis que trust* ought not to be subjected to the expense of going behind the action of the directors, and investigating the concerns of the corporation, especially if it is out of our jurisdiction. A simple rule is, to regard cash dividends, however large, as income, and stock dividends, however made, as capital." *Minot v. Paine*, 99 Mass. 101, 108 (1868).

tions have been engrafted on this rule, however, so that the substance of a corporate distribution prevails over the manner in which it is made. Thus, a distribution by way of liquidation or return of capital is credited to trust corpus although made in the form of a cash dividend.⁵ In like manner, if the substance and intent of the corporate transaction is to make a cash dividend, the distribution is allocable to income although made in the form of stock.⁶ Although one of the major reasons for the formulation of the general rule was to avoid exhaustive investigation by the trustee into the sources of dividends and the intricacies of corporate accounts, the obvious realities of the distribution should prevail over any label placed upon it.

If a trust sells a security held by it, realizing a profit, the gain is credited to principal. So, too, if a trust participates in a common trust fund, a proportionate share of the gains resulting from the sale of the fund's securities is allocable to corpus. The trustee's objectives in investing in a mutual fund are similar to those for participating in a common trust fund—convenience, expert management, and reduction of risk of loss through diversification. The trust's proportionate interest in the securities held by the common trust fund is similar to its proportionate ownership of the securities in the portfolio of the mutual fund in which it invests. Recognizing that the investment company, unlike the common trust fund, is a separate entity from the trustee, the Court in the *Tait* case observed that it should not be significant that realized gains of the common trust fund are not distributed to the participating trust while those of the investment company are. "If a trustee elects to take shares of the investment company in payment of any distribution made to him of capital gains, he will be able to achieve the same substantive result as that achieved by the common trust fund."⁷ By dropping the entity concept and treating the investment company as though it were a conduit for the passing of gains to the trust, the economic facts of the transaction are acknowledged with only a minor conceptual casualty.

The *Tait v. Peck* decision conflicts with the prevailing decisional law of other jurisdictions.⁸ The ordinary rule making stock dividends income when the fiduciary has the option to receive the dividends in cash or shares of stock has been held applicable to a

⁵ *Anderson v. Bean*, 272 Mass. 432, 172 N.E. 647 (1930); *Brownell v. Anthony*, 189 Mass. 442, 75 N.E. 746 (1905); *Rand v. Hubbell*, 115 Mass. 461 (1874); *Heard v. Eldredge*, 109 Mass. 258 (1872); *Deland v. Williams*, 101 Mass. 571 (1869).

⁶ *Leland v. Hayden*, 102 Mass. 542 (1869).

⁷ 346 Mass. 521, 530, 194 N.E.2d 707, 713 (1963).

⁸ *Rosenburg v. Lombardi*, 222 Md. 346, 160 A.2d 601 (1960); *Coates v. Coates*, 304 S.W.2d 874 (Mo. 1957); *In re Snitzer's Estate*, 33 Misc. 2d 692, 226 N.Y.S.2d 279 (Surr. Ct. 1962); *In re Bailey's Will*, 20 Misc. 2d 539, 188 N.Y.S.2d 1005 (Surr. Ct. 1959); *In re Appleby's Estate*, 15 Misc. 2d 200, 175 N.Y.S.2d 176 (Surr. Ct. 1958); *In re Hurd's Will*, 203 Misc. 966, 120 N.Y.S.2d 103 (Surr. Ct. 1953); *In re Byrne's Estate*, 192 Misc. 451, 81 N.Y.S.2d 23 (Surr. Ct. 1948).

mutual fund's distribution of its shares representing capital gains.⁹ Such an approach would have its merits in the ordinary case because it relieves the trustee of the obligation to make an investigation of what may be complicated corporate financing and accounting to determine the source of the dividend. In the case at hand, however, no inquiry need be made as to the source of the distribution since a regulated investment company, by statute, must announce by written statement to the shareholder the source of the dividend.¹⁰

Most of the other cases in opposition to *Tait* emphasize that the sale of securities by a mutual fund is in the ordinary course of its business; that the securities held by the investment company are the equivalent of the inventory of the corporation; and that when a corporation is in the business of buying and selling inventory from which it realizes profits, such profits are income and not principal. The dividend by the investment company is analogized to that received from a corporation engaged in the buying and selling of real estate.¹¹ These cases place weight on the entity concept. It may be of some significance, however, that the Internal Revenue Code for income tax purposes treats the mutual fund as a conduit in characterizing the distribution in the hands of the shareholder, placing the financial realities in the forefront.¹²

The rule of *Tait v. Peck* appears to be more equitable in its application. Its opposite would give all capital gains to the life beneficiary and thrust all capital losses on the remainderman. Under *Tait* the gains allocable to corpus would not only benefit the remainderman but would give the income beneficiary additional income produced by the increased principal.¹³

§4.6. Charitable trusts: Cy pres. If a trust manifests a general charitable intent in addition to more particular charitable purposes, the doctrine of cy pres will be applied if it becomes impossible or impracticable to carry out the particular purposes.¹ The doctrine

⁹ *Coates v. Coates*, note 8 *supra*.

¹⁰ See Investment Company Act of 1940, §19, 54 Stat. 789, 15 U.S.C. §§80a-1 to 80a-19 (1962).

¹¹ *Rosenburg v. Lombardi*, 222 Md. 346, 160 A.2d 601 (1960); *In re Bailey's Will*, 20 Misc. 2d 539, 188 N.Y.S.2d 1005 (Surr. Ct. 1959); *In re Byrne's Estate*, 192 Misc. 451, 81 N.Y.S.2d 23 (Surr. Ct. 1948).

¹² Int. Rev. Code of 1954, §852(a)(1), 26 U.S.C. §852(a)(1) (1962).

¹³ Sec. 6(c) of the revised Uniform Principal and Income Act promulgated in 1962 provides: "Distributions made from ordinary income by a regulated investment company or by a trust qualifying and electing to be taxed under Federal law as a real estate investment trust are income. All other distributions made by the company or trust, including distributions from capital gains, depreciation or depletion, whether in the form of cash or an option to take new stock or cash or an option to purchase additional shares are principal." Sec. 6(e) of the Uniform Act provides: "The trustee may rely upon any statement of the distributing corporation as to any fact relevant under any provision of this Act concerning the source or character of dividends or distributions of corporate assets."

§4.6. 1 *Grimke v. Attorney General*, 206 Mass. 49, 91 N.E. 899 (1910); *Jackson v. Phillips*, 14 Allen 539 (Mass. 1867).

is, of course, inapplicable if the donor expresses his desire that his charitable gift be limited to a specified objective and no other.

In *Rogers v. Attorney General*,² although a testatrix set forth specific charitable objectives and failed to express a general charitable intent, a general charitable objective was inferred and the doctrine of cy pres applied. Her will devised her homestead in North Andover in trust

to establish a home for aged women of said town, to be called "The Johnson Home for aged Women." I also give and devise to the said trustees the sum of twenty thousand dollars to help support and finish furnishing the house. . . . I request that no woman under sixty-five years of age, or who smokes or drinks be admitted as a member. I do not restrict as to nationality.³

She also bequeathed specified furnishings and utensils to "the before mentioned trustees of the 'Johnson Home for Aged Women' for said home. . . ."⁴ She gave the residue of her estate to her three closest relatives.

The testatrix died and her will was allowed in 1918. All interested parties (including the Attorney General) concluded that it was impossible to comply literally with the terms of the trust. The Probate Court in 1962 entered a decree instructing the trustees not to make distribution to the residuary legatees and to present a plan for administering the trust in accordance with the doctrine of cy pres. The Supreme Judicial Court affirmed the decree and recommended that some effort be made to frame a scheme that would include a suitable reference to the donor's family.

Although the will contained no express statement of a general charitable purpose, and despite the specificity of the testatrix's desires to preserve the family homestead as a home for certain aged women of the town and to perpetuate the family name, the finding of a general charitable intent was not foreclosed.⁵ The decision corresponds to the prevailing attitude to find a general charitable purpose when there is no expression of an intent to the contrary.⁶ The Supreme Judicial Court observed that there was no gift over in the event the trust should fail. Although a general residuary clause serves a function somewhat similar to a remainder over on the failure of a prior gift, it is not the same. "The use of a residuary clause does not per se manifest a desire to benefit the residuary

² 1964 Mass. Adv. Sh. 377, 196 N.E.2d 855.

³ Id. at 377-378, 196 N.E.2d at 858.

⁴ Ibid.

⁵ See *Anna Jaques Hospital v. Attorney General*, 341 Mass. 179, 167 N.E.2d 875 (1960), 1960 Ann. Surv. Mass. Law §2.12; *Ford v. Rockland Trust Co.*, 331 Mass. 25, 116 N.E.2d 669 (1954); *Norris v. Loomis*, 215 Mass. 344, 346, 102 N.E. 419, 420 (1913); *Grimke v. Attorney General*, 206 Mass. 49, 91 N.E. 899 (1910). See also 2 Restatement of Trusts Second §399, Comment *i* (1959).

⁶ See 4 Scott, Trusts §399 (2d ed. 1956).

legatees if the trust cannot be executed in the precise manner described in the will.”⁷

§4.7. Legislation: Time of determining heirs. In justifying the canon of construction that a gift over to testator’s “heirs” means those who answer that description at testator’s death, Mr. Justice Holmes once remarked:

The reasons for this rule are, that the words cannot be used properly to designate anybody else; that such a mode of ascertaining the beneficiary implies that the testator has exhausted his specific wishes by the previous limitations, and is content thereafter to let the law take its course; and, perhaps, that the law leans toward a construction which vests the interest at the earliest moment.¹

It may well be that the canon does correspond to the desires of the average testator who inserts an end limitation in his will in favor of his “heirs” or “next of kin.” After having made his specific desires known in the earlier provisions of the will, he in effect says “let the law take its course.”² Yet, partly because of the mass of litigation on the question whether a testator means “heirs” as of the date of his death or those who would have answered that description had he died at the time set for distribution, the canon may be suspect.³ Whether the testator would have desired the results flowing from the application of the rule of construction had he actually anticipated them is a question which may be legitimately posed.

In the ordinary case it may be argued that the rule would not correspond to the actual wishes of the donor had he thought about the results.⁴ The “heirs” or “next of kin” do not get to enjoy the gift until many years after the testator’s death. It often happens that the application of the canon makes it necessary to reopen estates which have been closed many years — or new administration may be required because there was no will and otherwise no reason for administering the estate. The early vesting of the gift over to the “heirs” or “next of kin” of the donor would also seem to benefit those who would in no way be considered the objects of testator’s bounty if the “heirs” or “next of kin” did not survive the period of distribution.

Two jurisdictions have altered the rule of construction by statute.⁵

⁷ 1964 Mass. Adv. Sh. 377, 384, 196 N.E.2d 855, 862.

§4.7. ¹ Whall v. Converse, 146 Mass. 345, 348-349, 15 N.E. 660, 662 (1888).

² See Casner, Construction of Gifts to “Heirs” and the Like, 53 Harv. L. Rev. 207, 228-241 (1939).

³ See §4.3 *supra*.

⁴ See Perkins, A Suggested Statute Concerning Gifts to Heirs, 48 Mass. L.Q. 333 (1963).

⁵ See Ind. Stat. Ann. §6-601(c) (Burns, 1953); Pa. Stat. Ann., tit. 20, §§180.14(4), 301.14(1) (Purdon, 1947).

In the 1964 SURVEY year Massachusetts became the third by enacting Chapter 307 of the Acts of 1964 which provides in part:

In a limitation of real or personal property to a class described as the "heirs" or "next of kin" of a person, or described by words of similar import, to take effect in enjoyment upon the happening of an event within the period of the rule against perpetuities, the class shall, unless a contrary intention appears by the instrument creating such limitation, be determined as if such person died at the time of the happening of such event.

The act specifically provides that it shall be effective only as to instruments executed after its effective date, January 1, 1965.

§4.8. Other legislation. Chapter 288 of the Acts of 1964 amends General Laws, Chapter 191, Section 15, by increasing to \$25,000 the dollar amount which a surviving spouse who elects against a will may claim in addition to designated portions of the remaining estate.

Chapter 352, amending General Laws, Chapter 167, Section 48A, authorizes national banks and savings and loan associations to pay funds not exceeding \$750, standing in the name of a deceased depositor, to the surviving spouse or next of kin, if no demand for payment is made by the personal representative within sixty days of death.

Chapter 470 of the Acts of 1964 amends General Laws, Chapter 65, Section 20, and requires the filing of an inventory with the Inheritance Tax Bureau within three months of the appointment of a personal representative or trustee or within one year after the death of the deceased, whichever occurs first.