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Decedents' Estates, Trusts and Future Interests—1963 Tennessee Survey

*Herman L. Trautman**

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The subject matter will be discussed under the three headings indicated above. The developments of the year include court decisions and relevant new legislation enacted by the Eighty-Third General Assembly of the State of Tennessee.

I. DECEDENTS' ESTATES

A. *Intestate Succession–Tort Recoveries*

Three interesting cases represent significant developments in the laws concerning the distribution of amounts received by the administrator in wrongful death actions, two[1] of which arose under the Tennessee wrongful death statute[2] and the other[3] arising under the Federal Employers' Liability Act.[4] The two cases arising under the Tennessee statute were problems of somewhat first impression, reasoned upon analogy, and the case arising under the federal statute resulted in the Tennessee Supreme Court overruling its prior decision.

In *Anderson v. Anderson*,[5] the question was whether or not a father who had completely abandoned a minor child is entitled to share in the distribution of proceeds recovered in an action for the wrongful death of the child, there being no nearer next of kin than mother and father. While the deceased child had been reared by and lived with his mother, the parents had never been divorced, nor had custody

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1. Anderson v. Anderson, 366 S.W.2d 755 (Tenn. 1963); Damron v. Damron, 367 S.W.2d 476 (Tenn. 1963).
2. TENN. CODE ANN. §§ 20-607, 20-609 (1956).
3. Lawrence v. White, 211 Tenn. 81, 362 S.W.2d 464 (1962).
4. 35 Stat. 65 (1908), 45 U.S.C. §§ 51-59 (1958).
5. *Supra* note 1.

been awarded to the mother. Tennessee Code Annotated sections 20-607 and 20-609 provide that the damages for wrongful death shall pass to the next of kin where there are no spouse or children. The court held that the reference to next of kin in the wrongful death statute makes necessary the application of Tennessee Code Annotated section 31-201(4), concerning the intestate succession of personal property owned by decedent. It is there provided that the father and mother share in equal parts unless they have been divorced by a valid decree which commits the custody of the decedent to one parent "to the exclusion of the other," in which case the distribution is to be made wholly to the parent having custody. Since there was no such decree, the father was entitled to share under the statute. The court said that absent a statutory provision otherwise it is a general rule that a surviving parent's misconduct, *e.g.*, abandonment or unfaithfulness does not bar a right of succession. It was said that New York and other states have a statute which expressly provides that a father who abandons an infant child is not allowed to receive a distributive share of the child's estate.

In *Damron v. Damron*,[6] the minor child was killed in an automobile accident after the parents were divorced under a decree which awarded the custody of the child to the mother, with the right of visitation for reasonable lengths of time and the obligation of support to the father. The question was whether the granting of reasonable rights of visitation to the father prevented the award of custody to the mother from being "to the exclusion" of the father. While the divorce decree did not use the word "exclusive," a settlement agreement upon which the decree was based provided that the exclusive custody of the child should be awarded to the mother. It was held that there is a recognized difference between custody and the right of visitation, and that it is the award of custody which determines the right of intestate succession under Tennessee Code Annotated section 31-201(4). A previous case[7] had determined that where the custody of the child has been awarded to the mother, she is the sole next of kin where there is no mention of visitation rights. Also, another previous case[8] has decided that a temporary award of custody will not determine intestate succession from the child.

Lawrence v. White[9] involved the proper distribution of money paid in settlement of a claim for wrongful death of an employee under the Federal Employers' Liability Act.[10] The decedent left a

6. *Supra* note 1.
7. Black v. Roberts, 172 Tenn. 20, 108 S.W.2d 1097 (1937).
8. Shelton v. Shelton, 198 Tenn. 346, 280 S.W.2d 803 (1955).
9. *Supra* note 3.
10. *Supra* note 4.

widow who was entirely dependent upon him and an adult son by a former marriage, who was not a dependent. The chancellor had held that the amount of the settlement should be divided between the widow and son in accordance with the Tennessee statute on intestate succession. This decision was based upon the decision of the Tennessee Supreme Court in *In re Smith's Estate.*[11] In that case the county court had ordered distribution of the proceeds among the widow and four minor children of the decedent on the basis of the proportion of the number of years of support from the decedent that each beneficiary was entitled to the total number of years of support that all beneficiaries were entitled, as determined by the life expectancy of the deceased and the respective ages of the minor children. Thus the widow was allowed to inherit on the basis of her life expectancy,[12] and the children were allowed to inherit for the number of years, or fraction thereof, that each lacked being twenty-one years of age at date of death. The eldest son, who was entitled to less than one year of additional support, filed a petition insisting that he was entitled to a one-fifth share under the Tennessee statute on intestate succession. The court in *Smith's Estate* applied the Tennessee statute of distribution, thus sustaining the petition of the eldest son and reversing the county court. It is this decision which is expressly overruled by the supreme court in *Lawrence v. White.* In the instant case the court decided that the entire amount of the settlement proceeds should be distributed to the dependent widow under the provisions of the Federal Employers' Liability Act, and that the Tennessee statute on intestate distribution was not applicable. Actually, a previous decision[13] by the same court, cited but not discussed, had held that the Tennessee statute was not applicable. There the court attempted to distinguish *Smith's Estate,* whereas in the instant case the court overrules it. Presumably, an apportionment of the settlement proceeds on the basis of the number of years of expected support of each beneficiary in relation to the total number of years of expected support for all dependents will be the appropriate method of distributing compromise settlements under the Federal Act, since it limits recovery to "next of kin dependent upon such employee."[14]

B. *Wills*

The efficacy of a well written attestation clause to establish the due execution of a will is illustrated in *Bradford v. Bradford,*[15] a case

11. 191 Tenn. 69, 231 S.W.2d 569 (1950).
12. Query, should it not have been on the basis of the husband's life expectancy, or period to retirement?
13. Oakley v. Nashville C. & St. L.R.R., 196 Tenn. 395, 268 S.W.2d 110 (1954).
14. *Supra* note 4.
15. 364 S.W.2d 509 (Tenn. App. E.S. 1962).

which was tried four times before a jury and on former appeals by both the court of appeals and the Supreme Court of Tennessee. The recitals of the attestation clause give rise to a legal and controlling presumption of fact and it is only where there is positive testimony to the contrary that a question is raised for submission to the jury.[16] Accordingly, it was held that there was no error in first admitting the will in evidence on the basis of the present recollection of one subscribing witness, and then directing a verdict on the issue of due execution at the close of the contestant's proof, where there was no contradiction of the recitals of the attestation clause. The inability of the second subscribing witness to recall the execution of the will was held not sufficient to make the execution of the will a question of fact for the jury. The second subscribing witness was able to identify her signature as a witness and that of the first subscribing witness—her former employer. The court distinguished *Fann v. Fann*,[17] where one of the subscribing witnesses contradicted the attestation clause by positive testimony that he did not sign in the presence of the other witness.

Holographic wills continue to exact a heavy toll in Tennessee in terms of expense, time and probably ill-feelings. *In re Padgett's Will*[18] is a typical example—one in which there were incurred the expense of three teams of lawyers, a trial in the circuit court, an appeal to the court of appeals, which reversed and remanded for a new trial to determine which of two different groups were intended by the testator to be his residuary legatees. In this case there were two holographic wills. One was dated April 10, 1959; it was witnessed and executed with the formalities of an attested will. The other will was written on two pieces of paper; the first of which was dated January 15, 1959 at the top and the second page was dated August 31, 1959 at the bottom. Testator handed the April will to the named executor for safe-keeping, together with a list of his assets; he made references to it as his will in 1960 and prior to his death in 1961, and made additions to the accompanying list of assets. The double-dated will was found in his desk. The circuit court directed a verdict for the double-dated will because of the later date on the second page. The court of appeals reversed, holding that the issues should have been submitted to the jury to determine which was intended by the testator to be his effective will. On retrial the jury rendered a verdict for the double-dated will and the court of appeals affirmed. A petition for certiorari was filed June 24, 1964. Is it not time to consider the holographic will on public

16. Fann v. Fann, 186 Tenn. 127, 208 S.W.2d 542 (1948).
17. *Ibid.*
18. 364 S.W.2d 947 (Tenn. App. M.S. 1962); *decision on appeal from retrial aff'd*, unpublished opinion, Tenn. App. M.S. March 27, 1964, Maury law.

policy grounds? Tennessee is one of only nineteen states which permit them. Every year it seems that there are one or more cases reaching the appellate courts of this state to determine a most elementary—yet fundamental—problem concerning the intention of the decedent. While there is a school of thought which abhors the legalistic language of lawyers and argues for the dignity implicit in the personal mystery of each human being who wishes to write his own will, one often suspects that the predominant motive is to avoid the small expense of having a capable lawyer write the will. So frequently an expense of many thousands of dollars and countless time is incurred by the estate because of this small saving.

C. *Fiduciary Administration and Estate Planning*

The significant developments in this area were in legislation enacted by the Eighty Third General Assembly of Tennessee. Among these perhaps the most interesting is chapter 110 of the Public Acts of 1963, designated as Tennessee Code Annotated sections 35-616—35-619. It provides that wills and trust instruments may by appropriate reference to the statute incorporate by reference the fiduciary powers of administration set forth in the introductory paragraph and in any one or more subparagraphs of section 35-618 numbered "1" to "32". It would seem that the purpose of the statute is a commendable one—to shorten the length of trust instruments by providing a short-hand method for including those more flexible powers of fiduciary administration which are generally desirable in trust and estate management.[19] It also provides in statutory form an accessible catalogue of fiduciary powers from which the draftsman can select those which might seem desirable. Among the powers enumerated are the authorization of an executor to join a surviving spouse in the execution and filing of joint income and gift tax returns; authority of an executor to continue the operation of a decedent's business in unincorporated form for so long as he considers it desirable; authority to permit beneficiaries of an estate to have the possession and use of real property and tangible personal property without charge "to the extent that such action will not adversely affect the rights and interests of any creditor";[20] the power to lease real or tangible personal property for terms which may exceed the duration of the estate or trust; the power to borrow from the fiduciary in his or its individual capacity; the power to retain investments initially received even though not productive of income or otherwise authorized; the power to keep all or any portion of the estate in liquid form or uninvested for such time as the fiduciary

19. See McMurray, *Wills and Fiduciary Powers*, 31 TENN. L. REV. 191 (1964).
20. TENN. CODE ANN. § 35-618(4) (Supp. 1963).

may consider advisable, without liability for loss of income for so doing; and the power to make distributions in kind or in cash. The statute is not a Model Act nor one proposed by the Commissioners on Uniform Laws, and investigation indicates that it was not sponsored by any business or professional organization in Tennessee; apparently it was a privately sponsored statute which incurred no opposition in the legislature.[21]

It would seem, however, that care must be exercised in selecting some of the enumerated powers. The investment powers[22] include the power to retain original investments even though not productive of income and the power to keep all or any portion of the estate uninvested for such time as the fiduciary may deem advisable. If these investment powers are applicable to a marital deduction trust, will it not put a cloud on the allowance of the federal estate tax deduction?[23] Internal Revenue Code section 2056(b)(5), requires that the surviving spouse "is entitled for life to all the income" of the marital deduction trust. The regulations[24] state that administrative powers will not have the effect of disqualifying an interest passing in trust unless the grant of powers evidences the intention to deprive the surviving spouse of the beneficial enjoyment required by the statute. Such an intention will not be considered to exist if "the applicable rules for the administration of the trusts require, or permit the spouse to require, that the trustee either make the property productive or convert it within a reasonable time."[25] If the fiduciary is given the power to retain investments which are not productive of income "for such time as the fiduciary may deem advisable,"[26] can it be said that the applicable rules of the trust require, or permit the spouse to require, that the trustee make the property productive within a reasonable time?

Also, in the case of wills and other trust instruments creating a pecuniary marital deduction gift executed on or after October 1, 1964, the draftsman should not incorporate the language of Tennessee Code Annotated section 35-618(31). The language of this subsection permits the executor to make distribution of estate assets in kind in satisfaction of pecuniary gifts. In order to preserve the federal estate tax marital deduction it will be necessary to use language which imposes a duty on the executor to select assets in such manner that the cash and other property distributed will have an aggregate fair

21. Thus it differs from some of my proposals.
22. TENN. CODE ANN. § 35-619 (18 and 19) (Supp. 1963).
23. Treas. Reg. § 20.2056(b)–5(f)(4) (1958).
24. *Ibid.*
25. *Ibid.*
26. TENN. CODE ANN. § 35-618(19) (Supp. 1963).

market value which is fairly representative of the distributee's proportionate share of the appreciation and depreciation in the value to the date or dates, of distribution of all property then available for distribution, as required by Revenue Procedure 64-19, dated April 13, 1964, issued in TIR-553 on March 19, 1964.[27]

While there are other areas of caution, no doubt the statute will serve a useful purpose in drafting wills and trusts. But care will be needed in selecting and supplementing the powers enumerated in the new statute.

Chapter 65 of the Public Acts of 1963, amends the Tennessee Uniform Gifts to Minors Act[28] to permit gifts to minors in custodial form of life insurance and endowment policies and annuity contracts.

Chapter 204 amends the Inheritance Tax Law, Tennessee Code Annotated section 30-1604, to extend the forty-thousand dollar life insurance exemption to proceeds payable to the insured's estate for the benefit of class A beneficiaries, even though it will thus be commingled with other estate assets and subjected to claims, if the residuary estate, of which the insurance has become a part, is ultimately given to or for the benefit of class A beneficiaries. Prior to this the statute provided an exemption of life insurance to the extent of forty-thousand dollars "payable to Class A beneficiaries of the decedent and/or to a trustee . . . for such." In *American National Bank & Trust Co. v. MacFarland*,[29] the testator-insured had life insurance in the amount of 26,385 dollars made payable to his executors and used apt words in his will to commingle the insurance with other estate assets and subject it to claims; he then gave his residuary estate in trust to his wife and issue—class A beneficiaries. The court interpreted the statute literally to hold that because the life insurance proceeds *qua* life insurance were not payable to either class A beneficiaries or to a trustee for such, the tax exemption was lost; the court held that when the life insurance proceeds were commingled with other estate assets in the hands of the executor, they lost their identity as life insurance, so that the exemption could not be applied. It was pointed out in a previous survey article[30] that while the court decision seems to be an accurate interpretation of the statute as formerly written "the statute ought to be revised either (1) to allow the exemption regardless of how the insurance is made payable, or (2) to not allow the exemption at all, as in the development of the federal statute."[31] The legislature

27. Rev. Proc. 64-19, 1964 INT. REV. BULL. No. 15, at 30.
28. TENN. CODE ANN. § 35-801–810 (Supp. 1963).
29. 209 Tenn. 263, 352 S.W.2d 441 (1961).
30. Trautman, *Decedents' Estates, Trust and Future Interests—1962 Tennessee Survey*, 16 VAND. L. REV. 741, 747-49 (1963).
31. *Id.* at 748.

responded by extending the life insurance exemption to proceeds payable to the estate if the estate is given ultimately to or for the benefit of class A beneficiaries.

This would seem to be a desirable change. As pointed out in the previous article,[32] there is in fact a genuine need for some insurance to be made payable to the executor so that he has the cash with which to pay claims, taxes, and expenses. The statute in its former state discriminated in a sense against people of modest means; a person with more than forty-thousand dollars of life insurance had no difficulty in having that amount paid to class A beneficiaries or to a trust for them and the balance paid to his estate to provide the needed cash. The insurance money paid to or for the benefit of class A beneficiaries would probably not be needed for the settlement of the estate. A person with less than forty-thousand dollars had to go the more complicated and expensive route in order to get the tax exemption, *i.e.*, a life insurance trust for class A beneficiaries, with authority in the trustee to use the proceeds to purchase estate assets from the executor—thus providing the needed cash. While the life insurance trust with a pour-over arrangement in the will is an excellent estate planning device, a tax exemption ought not to be conditioned upon doing indirectly, through complex and expensive methods, what can be done more conveniently and directly through the executor without loss to the public revenue.

Does the statute accomplish the intended purpose? The 1963 amendment simply inserted the words "his estate or the executor(s) or administrator(s) thereof (whether or not subject to claims against his estate) for the benefit of such, and/or to" so that the forty-thousand dollars life insurance inheritance tax exemption is provided for the following: "the proceeds of such policies as may be payable to Class A beneficiaries of the decedent and/or to his estate or the executor(s) or administrator(s) thereof (whether or not subject to claims against his estate) for the benefit of such, and/or to a trustee . . . for such."

Literally, the statute exempts life insurance made payable to the estate for the benefit of class A beneficiaries "(whether or not subject to claims against his estate)." Since the rationale of *American National Bank & Trust Co. v. MacFarland*[33] was that when life insurance proceeds are commingled with other estate assets and made subject to claims, they lose their identity as life insurance proceeds and become a part of decedent's general residuary estate, might it be argued that there remains a tracing requirement on the part of the executor —to show that the assets turned over to or for the benefit of class A beneficiaries includes in fact the life insurance proceeds paid to the

32. See note 30 *supra*.

33. *Supra* note 29.

executor? Or, could the Commissioner defeat the tax exemption by showing that in fact the life insurance proceeds were used to pay claims, taxes and probate expenses so that the residue consisted only partially of life insurance proceeds, or wholly of assets other than life insurance proceeds? The argument of the Commissioner would probably concentrate on the words *"for the benefit of such," i.e.*, class A beneficiaries, to argue that life insurance proceeds used for the payment of claims, taxes and expenses are not for the benefit of such beneficiaries. Clearly, the purpose of 1963 amendment is otherwise, and it would seem that the language used by the legislature is adequate to accomplish the legislative purpose. When the residuary gift is either to or for the benefit of class A beneficiaries, it would seem clear that life insurance payable to the estate is payable to or for the benefit of class A beneficiaries even though used to meet the cash requirements of the estate, because it has increased the residuary estate distributable to or for the benefit of such beneficiaries. But for the insurance proceeds other estate assets would have to be used to meet the estate's cash requirements, so that the residuary gift to class A beneficiaries would be smaller by the amount of claims, taxes and expenses so paid. One of the primary reasons for life insurance in estate planning is to provide the cash to the estate for such items so that there will be no need for a forced sale of estate assets.

In re Jennings' Estate[34] held that the proceeds recovered by an administrator under the medical payment clause of a liability insurance policy are free from the claims of creditors under Tennessee Code Annotated sections 26-213 and 26-214. The exemption was applied to the claim of the hospital which rendered services in an effort to save the life of the decedent because of injuries sustained in an automobile accident. While the court affirmed the result reached by the probate court, it based the decision on the above statutory exemption from creditors' rights of accident, health and disability insurance rather than on the wrongful death statute. This is apparently a case of first impression in Tennessee.

II. Trusts

A. *Cy Pres—Charitable Trusts and Corporations*

Two cases, *Bell v. Shannon*[35] and *Hardin v. Independent Order of Odd Fellows*,[36] permitted a deviation from the express terms of the trust instruments in order to accomplish the charitable purposes found to have been intended by donors. In both cases the courts rejected the suggestion that they were applying the judicial cy-pres doctrine, which

34. 368 S.W.2d 289 (Tenn. 1963).
35. 367 S.W.2d 761 (Tenn. 1963).
36. 370 S.W.2d 844 (Tenn. App. E.S. 1963).

has often been said to "have never obtained in Tennessee."[37] But the court quotes good authority[38] for the proposition that the power of a court of equity to permit or direct a deviation from the terms of the trust is at least as extensive in the case of charitable trusts as it is in the case of private trusts; the courts will direct or permit a deviation from the terms of the trust where compliance is impossible or illegal, or where owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or substantially impair the accomplishment of the purposes of the trust. It seems clear that this rationale will be liberally applied to redirect, or change the method or manner of accomplishing what is an admittedly charitable purpose in Tennessee, notwithstanding the rule that we must not say that this is an application of the judicial cy-pres doctrine of equity. As has been pointed out before,[39] to hold that equity has the inherent power to direct or permit a deviation from the terms of the trust in order to accomplish the purpose of the settlor is to announce a principle which is in substance as effective as the judicial cy-pres doctrine concerning charitable trusts, and, indeed, it is broader than cy pres because it is applicable to private trusts. Perhaps this is a form of acceptance by rejection.[40]

In *Moore v. Neely*,[41] the court sustained the gift of a remainder interest to Western State Hospital, a charitable corporation for the care and treatment of the poor insane. Since the gift to the hospital was "for the use of said institution in taking care of some other persons not able to do so," it was contended that the gift to the hospital was in trust, that the hospital has no corporate power to act as trustee, and that the gift was too vague and uncertain to be enforced as a charitable trust. The court rejected the contention that the gift was in trust, holding it to be a direct gift to the hospital for its use as a public, charitable corporation.

B. *Spendthrift Policy and the Consent Decree*

The question has been previously asked whether the beneficiary of a spendthrift trust can effectuate an assignment of his interest by entering into a consent decree in a court proceeding.[42] While this is an in-

37. *Id.* at 849, and cases cited therein. See also Henshaw v. Flenniken, 183 Tenn. 232, 191 S.W.2d 541, Annot., 168 A.L.R. 1010 (1947).
38. 3 Scott, Trusts § 381 (2d ed. 1956).
39. Trautman, *Decedents' Estates, Trusts and Future Interests—1961 Tennessee Survey*, 15 Vand. L. Rev. 882, at 887 (1962).
40. See 17 Vand. L. Rev. 633 (1964).
41. 370 S.W.2d 537 (Tenn. 1963).
42. Trautman, *Decedents' Estates, Trusts and Future Interests—1961 Tennessee Survey*, 14 Vand. L. Rev. 1253, at 1266 (1961), commenting on Burton v. Burton, 208 Tenn. 11, 343 S.W.2d 867 (1961).

teresting abstraction, in *Third National Bank v. Scribner*,[43] the court makes clear that where there is a suit to construe the trust instrument and the court finds that there is an ambiguity to be clarified, a consent decree interpreting the trust instrument will not be subject to the later attack that the beneficiary had no capacity to enter into a consent decree. The court affirms the principle of *Burton v. Burton*,[44] in which the ambiguity was not so obvious.

C. *Trust Purpose Accomplished Before Activation*

Where the trust purpose has been accomplished, the trust will be terminated and the legal title vested in the beneficiaries. The most frequent illustrations of this principle are trusts to pay the income for the life of a beneficiary, or until the beneficiary reaches a designated age. In such cases the trust will be terminated upon the death of the income beneficiary, or when the beneficiary reaches the designated age.[45]

First American National Bank v. Cole[46] involved the construction of a testamentary trust instrument where the will created residuary trusts for two daughters, the share of each to be held until she attained twenty-five years, at which time she should receive one-half of her distributive share, the other half to be paid as each child attained thirty years, "but in no event sooner than five (5) years after payment of the first installment." The life beneficiary predeceased the testatrix and at the latter's death both daughters were more than thirty years of age. The problem was whether the executor should make distribution to the trustee so that the trust should be activated and administered for a period of years. It was held that the executor should make distribution directly to the daughters, that there was no longer a reason for activating the trust, its purpose having been fully accomplished. The court said that the five year holding period was intended to apply only in case the trust distributions were to be made in two installments. Presumably, if one of the daughters had been twenty-nine when she received one-half of her share, she would have had to wait five years for the second half.

III. Future Interests

A. *Perpetuities—The Charitable Exception*

Whitaker v. House[47] is an interesting development in probate law. It seems to be a case of first impression in Tennessee, and it may be so

43. 370 S.W.2d 482 (Tenn. 1963).
44. *Supra* note 42.
45. 3 Scott, Trusts § 334 (2d ed. 1956).
46. 364 S.W.2d 875 (Tenn. 1963).
47. 372 S.W.2d 194 (Tenn. 1963).

also in other jurisdictions. In 1938 the grantors made a deed of land to the State of Tennessee "for . . . so long as said property is used as an Armory or for Military purposes, but if said property should cease to be used for Armory or Military purposes, the title therein to vest in the City of Columbia, in fee simple." In 1940 the grantors made a second deed conveying any remaining interest they may have to the state. In 1950 a small triangular part of this land was taken for the construction of a new highway. The plaintiff is the lessee of the state and the defendant is the lessee of the city. The court decided that the executory interest granted to the City of Columbia violated the rule against perpetuities, that it was not within the exception for a gift to one charity followed by a gift over to another charity, because this was not a *gift* for *charitable purposes* at all. It was pointed out that in 1938 the state had acquired the land in a commercial transaction from the grantors for twelve-hundred dollars pursuant to enabling legislation for the purpose of building an armory, a project in which the city cooperated. The court said that it would stretch the rules of construction beyond the breaking point to include a sale of land for twelve-hundred dollars to a state government within the definition of a *gift* for a *charitable purpose.*

This is a policy decision defining the scope of the charitable exception to the rule against perpetuities. The policy values supporting this exception to the rule against perpetuities have not been clearly or fully developed.[48] Normally the rule against perpetuities will be applied to destroy remote contingent interests irrespective of whether their origin was a commercial or a donative transaction. This exception to the rule, however, may well be limited to donative transactions, *i.e.*, a public policy intended to encourage gifts for continuous charitable purposes.[49] While discussions of this exception to the rule are usually phrased in terms of a "gift over" from one charity to another upon a remote condition,[50] there is no precedent cited in either the instant case or the treatises which makes clear that the efficacy of this exception depends upon whether the remote interest arose in a gift transaction, as distinguished from a commercial transaction. Nevertheless, a policy decision limiting the scope of this exception to the rule against perpetuities to *gifts* to charity seems to be both consistent and wise.

48. 5 POWELL, REAL PROPERTY § 770 (1962).
49. *Ibid.*
50. 6 AMERICAN LAW OF PROPERTY § 24.40 (Casner ed. 1952); 4 SCOTT, TRUSTS § 401.5 (2d ed. 1956); 3 SIMES & SMITH, FUTURE INTERESTS § 1281 (2d ed. 1956); 5 POWELL, REAL PROPERTY § 770 (1962).