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J. Michael Dougherty Jr.

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By J. Michael Dougherty, Jr.

In a 5-4 decision, *Key v. Doyle (Estate of French)*, 98 S. Ct. 280 (1977), the Supreme Court dismissed an appeal for lack of jurisdiction because the Court concluded that the Mortmain provision of the D.C. Code which was held unconstitutional by the District of Columbia Court of Appeals was not a statute of the United States. Inasmuch as the Supreme Court never ruled on the merits of the case, an examination of the District of Columbia Court of Appeals' decision is appropriate.

MORTMAIN STATUTE

When confronted with the basic issue of the constitutionality of the D.C. Mortmain statute, the D.C. Court of Appeals struck down the statute because it was found irrational and arbitrary.

The facts before the court showed that a District of Columbia woman executed a will in which she left one-third of her residuary estate to the Calvary Baptist Church and one-third to St. Matthew's Cathedral. Twenty days after the execution of the will, the testatrix died. Subsequently, the executor instituted this suit seeking a ruling from the Probate Division of the Superior Court of the District of Columbia in light of D.C. Code § 18-302 (1973). The code provides: "A devise or bequest of real or personal property to . . . a religious sect, order, or denomination, or to or for the support, use, or benefit thereof . . . is not valid unless it is made at least 30 days before the death of the testator." The purpose of this statute, commonly known as a "Mortmain statute," is to invalidate gifts to religious institutions and to charities by individuals who make improvident dispositions in apprehension and contemplation of death.

The salient characterisitc of the provision in question is the classification scheme that it establishes. If a testator devises property to a religious organization, and the testator fails to survive the execution of the will by thirty days, the devise is null and void. However, as noted by the lower court in *French*, "gifts to charitable, educational and artistic organizations, even though operated by religious institutions, have been held to be beyond the aegis of the statute." *Key v. Doyle (Estate of French)* 365 A.2d 621 (D.C. App. 1976). As a result of the D.C. Code provision, two categories of beneficiaries developed: one category consisting of religious devises and bequests and another category of devises and bequests to nonreligious beneficiaries. Since this classification did not involve a "suspect class," the D.C. Court of Appeals applied the rational relation test to the case.

Under the rational relation examination, the court analyzed the statutory classification to see whether it rationally related to a legitimate governmental objective. The court ruled that classifications created by section 18-302 were arbitrary and unreasonable. The law created

a loophole by establishing a distinction between gifts to religious organizations and gifts to charitable organizations owned and operated by religious institutions, with only the latter valid. *Key v. Doyle (Estate of French)* 365 A.2d at 624. Since the court found dissimilar treatment for similarly situated beneficiaries and no rational relationship between the law and the governmental objective, the statute was ruled unconstitutional for denying the religious legatees the equal protection-due process guarantees of the fifth amendment.

As a result of the D.C. Court of Appeals' decision, the testatrix's heirs and next-of-kin appealed to the Supreme Court under the provisions of 28 U.S.C. § 1257(1)(1970). This provision authorizes appeals to the Supreme Court in cases "where is drawn in question the validity of a . . . statute of the United States and the decision is against its validity." The Supreme Court, with Mr. Justice Stewart speaking for the majority, dismissed the appeal for lack of appellate jurisdiction, based on its determination that the District of Columbia Code provision, applicable only in the district, was not a "statute of the United States" within the compass of 28 U.S.C. § 1257(1)(1970). A decision invalidating a statute of the D.C. Code is not reviewable by direct appeal to the Supreme Court, but only by writ of certiorari in conformance with 28 U.S.C. § 1257(3) (1970).

In its decision, the Supreme Court outlined the ramifications of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970), and the impact of the act on the court system in the District of Columbia. Prior to the act, decisions rendered by the local courts of the District of Columbia were appealable to the United States Court of Appeals. When the U.S. Court of Appeals for the District of Columbia Circuit invalidated a state statute, the avenue for the right of appeal to the Supreme Court was under 28 U.S.C. § 1254 (1970). When the validity of statutes applicable solely in the District of Columbia was challenged, appeal to the Supreme Court was only by writ of certiorari.

The Supreme Court's interpretation of the 1970 act, which restructured the District of Columbia courts and their jurisdiction, is that the Congress did not intend the act to enlarge the right of appeal to the Supreme Court from the courts of the district. Congress' objective was that the District of Columbia courts were to be viewed as state courts and "[a]ccordingly § 1257, the jurisdictional provision concerning Supreme Court review of state-court decisions, was amended to include the District of Columbia Court of Appeals as the highest court of a state." 98 S. Ct. at 283. Although the D.C. Court of Appeals was made equivalent to the "highest court of a state," there was no indication that statutes of the D.C. Code were to be treated as state statutes. *See Palmore v. United States*, 411 U.S. 389 (1973).

The majority concluded its decision stating, by way of analogy, that since there is no automatic right of appeal to the Supreme Court when a state court invalidates a state statute on federal grounds, likewise, there is no right of appeal when a D.C. court annuls a law applicable solely to the District of Columbia. In such cases, review by the Supreme Court will be carried out by writ of certiorari in cognizance of section 1257(3).

FOUR DISSENT

Mr. Justice White, joined by Mr. Chief Justice Burger, Mr. Justice Powell and Mr. Justice Blackmun, wrote the Court's dissenting opinion. The dissent pointed out that the 1970 District of Columbia Court Reform and Criminal Procedure Act shifted the review of D.C. court judgments from section 1254 to section 1257 and, therefore, expanded the Supreme Court's mandatory appellate jurisdiction. The dissent stressed that when Congress amended 28 U.S.C. § 1257 (1970), it could have excluded laws applicable to the District of Columbia, but since Congress did not, "statutes relating to the District of Columbia would continue to be viewed as they have in the past, as statutes of the United States." 98 S.Ct. at 287.

One implication of the majority's decision is that D.C. Code provisions are in legalistic limbo. The D.C. statutes have been uniquely categorized as being neither statutes of a state nor statutes of the United States. The dissent noted that if Congress, with its constitutional power to legislate for the District of Columbia under U.S. Const. art. I, § 8, had wanted such an interpretation of the D.C. Code, Congress would have made it clear in previous legislative acts. In summation, Mr. Justice White's dissent stated that the majority's narrow construction of the Supreme Court's appellate jurisdiction based on 28 U.S.C. § 1257 will result in a lessening of the Court's work load. The dissent reprimands the majority for enacting self-legislation since an objective of lessening the work load "should be effectuated by statutory amendment, not strained construction." 98 S.Ct. at 289.

IMPLICATION OF DECISION

In that the Supreme Court declined to address the merits of the case before it, the D.C. Court of Appeals decision, ruling the district's Mortmain statute unconstitutional, was left intact. Since the Supreme Court's pronouncement means that no higher court has reviewed the merits of the decision of the D.C. Court of Appeals by either appeal or by writ of certiorari, more litigation involving Mortmain statutes is imminent. The Supreme Court of Pennsylvania in *In re Estate of Cavill*, 459 Pa. 411, 329 A.2d 503 (1974), ruled that since the Pennsylvania Mortmain statute failed to satisfy the rational relationship test and therefore denied beneficiaries the equal protection of the laws, the statute was unconstitutional. Six other states (Florida, Georgia, Idaho, Mississippi, Ohio, and Montana) have Mortmain statutes similar to the District of Columbia's section 18-302 except that none of these is restricted to religious bequests. Since the states do have power to regulate testamentary dispositions, the latest developments must be balanced against the fact that it is sound public policy to prevent the testator from making improvident dispositions of his property when he is in a weakened mental condition and is unable to deliberate calmly the needs of his family.

The Supreme Court is certain to be presented with the Mortmain statute con-