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Rule against Perpetuities - Equitable Modification - Private Testamentary Trust

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RULE AGAINST PERPETUITIES—EQUITABLE MODIFICATION—PRIVATE TESTAMENTARY TRUST—The Supreme Court of Appeals of West Virginia has adopted a doctrine of equitable modification, to be applied to a non-charitable devise or bequest which violates the Rule Against Perpetuities in order to revise the instrument in a fashion that effectuates a testator's general intent within the limitations established by the Rule.


On June 20, 1975, Clara Clayton Post died testate.1 Her will contained a series of specific bequests2 and created a private educational trust in favor of descendants of her late husband's brothers and sisters.3 The class of descendants who were to benefit from the trust were those who gained admission to an accredited institution of higher learning, and maintained satisfactory standing in scholarship and in other requirements of the institution.4 The trust was to last for twenty-five years or until the principal was reduced to five-thousand dollars, whichever occurred first.5 At the termination of the trust, the principal and interest were to be distributed per stirpes to the then-living descendants of the testatrix' husband's brothers and sisters.6

The executrix, Josephine Berry, recognized that the trust potentially violated the Rule Against Perpetuities7 and entered into a trust ter-

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2. Id. at 767-68. The specific bequests were made to the testatrix' heirs at law and to others. Id. The heirs at law challenged the validity of the testamentary trust because they would further benefit if the trust property passed through intestacy. Brief of Appellant at 5.
3. 262 S.E.2d at 768 & n.1. The instrument declared that the purpose of the trust was to fulfill the testatrix' late husband's wishes for the disposition of the funds involved. Id. at 768 n.1.
4. Id. at 768 n.1. The trustee had absolute discretion to determine whether potential trust beneficiaries qualified as members of the class, whether all or part of the income and principal should be used to meet educational expenses, and for what particular expenses the funds would be used and how they would be paid. Id. at 768 & n.1.
5. Id. at 768 & n.1.
6. Id. The distribution on termination of the trust was not conditioned by the educational requirements imposed upon those who benefitted during the life of the trust. Id.
mination agreement with the trustee, Union National Bank of Clarksburg, to amend the twenty-five year provision to twenty-one years. The agreement also required the executrix to initiate a declaratory judgment action to determine whether the trust violated the Rule and whether the agreement itself was appropriate.\textsuperscript{8}

The trial court held that the trust violated the Rule and was therefore void, and granted a summary judgment to the testatrix' heirs at law. It also ruled that the executrix and trustee had no authority to agree to amend the trust.\textsuperscript{9}

On appeal,\textsuperscript{10} the Supreme Court of Appeals of West Virginia unanimously reversed\textsuperscript{11} the lower court's ruling that the trust was void under the Rule.\textsuperscript{12} It held that in order to effectuate the testatrix' interests of all potential trust beneficiaries would have had to vest within 21 years after lives in being when the trust was created. By its terms, the trust could have lasted for 25 years after the testatrix' death. Therefore, there was no assurance that the interests of all beneficiaries would have vested within 21 years after her death. Similarly, there was no assurance that all interests would have vested within 21 years of any other measuring life as the others may have died within four years after the testatrix. Because the class of potential beneficiaries included unborn descendants, no member could have been considered a measuring life for the gift. See DUKEMINIER, supra, at 8. For these reasons, the interest of any potential beneficiary could have vested beyond the period of the Rule. Under the common law Rule, if a gift is to be divided among a class of persons, and the interest of any one of them could vest too remotely, the entire class gift fails. See 6 AMERICAN LAW OF PROPERTY § 24.26 (A.J. Casner ed. 1952); GRAY, supra, § 373; Leach, The Rule Against Perpetuities and Gifts to Classes, 51 HARV. L. REV. 1329 (1938). Because the interests of the trust's remaindermen could vest 25 years after the testatrix' death, the same possibility of vesting more than 21 years after the lives in being renders them invalid. See G.G. BOGERT & G.T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 213 (2d rev. ed. 1979) [hereinafter cited as BOGERT].

8. 262 S.E.2d at 768.
9. Id.
10. The appeal was taken by the executrix. Id. The testatrix' heirs at law claimed that she lacked standing to challenge the declaratory judgment as she was not a potential distributee of the trust. Id. at 768-69. They also argued that she was breaching her fiduciary duty to remain impartial in the distribution of the estate. Motion to Dismiss and Reply Brief of Ellen Clayton and Arthur Clayton, Appellees, at 3-4. The court held that under the West Virginia Code an executrix is a necessary party to, and may appeal from, a declaratory judgment on the construction of a trust. 262 S.E.2d at 769 & nn.3, 4 & 5. See W. VA. CODE §§ 55-13-4, -7, -11, -12 (1981); W. VA. CODE § 58-5-1 (1978); W. VA. CONST. art. 8, § 3.
11. Justice Harshbarger wrote the opinion of a unanimous court.
12. 262 S.E.2d at 772. The court quoted its prior statement of the Rule that: "[E]very executory limitation, in order to be valid, shall be so limited that it must necessarily vest, if at all, within a life or lives in being, ten months and twenty-one years thereafter, the period of gestation being allowed only in those cases in which it is a factor." Id. at 770 (quoting Goetz v. Old Nat'l Bank, 140 W. Va. 422, 441-42, 84 S.E.2d 759, 772 (1954). See Greco v. Meadow River Coal and Land Co., 145 W. Va. 153, 113 S.E.2d 79 (1960); First Huntington Nat'l Bank v. Gideon-Broh Realty Co., 139 W. Va. 130, 79 S.E.2d 675 (1953); Prichard v. Prichard, 91 W. Va. 398, 113 S.E. 256 (1922); McCreery v. Johnston, 90 W. Va. 80, 110 S.E. 464 (1922). See also note 7 supra.
general intent of providing for the education of the designated beneficiaries, the trust would be equitably modified to fall within the limitations established by the Rule.\textsuperscript{13} The court therefore reduced the trust's durational provision from twenty-five to twenty-one years.\textsuperscript{14} Because of its disposition of the case on the merits, the court did not rule on the propriety of the agreement between the executrix and trustee.\textsuperscript{15}

In reaching its conclusion, the court discussed four general principles which govern the interpretation of wills.\textsuperscript{16} The court first noted that a testator's intent should be ascertained and implemented\textsuperscript{17} unless it violates a positive rule of law or public policy.\textsuperscript{18} Furthermore, the strong presumption against intestacy requires that a will be construed to avoid total or partial intestacy.\textsuperscript{19} The court also determined that a general intent is given preference over a specific one if the two appear to be contradictory.\textsuperscript{20} The court stated that these principles which require a court to honor a testator's intent and avoid intestacy conflict with the Rule's purpose of preventing a testator from controlling the devolution of his property for an inordinate time.\textsuperscript{21}

To remedy this conflict, the court adopted a doctrine of equitable modification to be applied to a non-charitable devise or bequest which violates the Rule.\textsuperscript{22} According to the court, the purpose of equitable modification is to revise an instrument in a fashion that effectuates a testator's general intent within the limitations established by the

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  \item \textsuperscript{13} 262 S.E.2d at 771-72.
  \item \textsuperscript{14} Id. at 772.
  \item \textsuperscript{15} Id. at 768 n.2.
  \item \textsuperscript{16} Id. at 769. The court cited only West Virginia cases as authority for these general principles, declaring that those cases are in accord with the vast majority of other jurisdictions. Id. at 769 n.6.
  \item \textsuperscript{17} See Wheeler Dollar Savings & Trust Co. v. Hanes, 237 S.E.2d 499 (W. Va. 1977); Wheeler Dollar Savings & Trust Co. v. Stewart, 128 W. Va. 703, 37 S.E.2d 563 (1946); Bell's Adm'r v. Humphrey, 8 W. Va. 1 (1874).
  \item \textsuperscript{18} 262 S.E.2d at 769. See Emmert v. Old Nat'l Bank, 246 S.E.2d 236 (W. Va. 1978).
  \item \textsuperscript{19} 262 S.E.2d at 769. See Rastle v. Gamsjager, 151 W. Va. 499, 153 S.E.2d 403 (1967); Cowherd v. Fleming, 84 W. Va. 227, 100 S.E. 84 (1919).
  \item \textsuperscript{20} 262 S.E.2d at 769. See Hope Natural Gas Co. v. Shriver, 75 W. Va. 401, 83 S.E. 1011 (1915).
  \item \textsuperscript{21} 262 S.E.2d at 770.
  \item \textsuperscript{22} Id. at 770-71. Justice Harshbarger stated that the equitable modification doctrine is akin to the doctrine of cy pres which was adopted by the West Virginia legislature in the area of charitable trusts. Id. See W. Va. CODE § 35-2-2 (1966). He noted 18 states that have adopted a cy pres approach to non-charitable gifts; 15 statutorily and 3 judicially. 262 S.E.2d at 770 n.8. Citing a developing trend to ameliorate the harsh consequences of "remorseless application" of the Rule, the court noted that other theories have been employed to modify the effect of the Rule. Id. at 770. Alternative theories include the "wait-and-see" doctrine, abolition of the fertile octogenarian and unborn widow rules, and the theory of "separable alternative contingencies." See id. at 770 n.8. See also notes 36 & 37 infra.
\end{itemize}
The court declared that an otherwise void instrument will be revised to effectuate a testator's intent if four conditions are met: The testator's intent must be expressed in the will or be readily determinable; the testator's general intent cannot violate the Rule; the particular intent, which does violate the Rule, must not be a critical aspect of the testamentary scheme; and the proposed modification must effectuate the testator's general intent, avoid the consequences of intestacy, and conform to the policy considerations underlying the Rule.

The court then applied these criteria to the Post trust. The court found that the testatrix' general intent to provide for the education of the designated beneficiaries was clearly expressed in the will. Although her particular intent, to maintain the trust for twenty-five years or until the principal was reduced to five-thousand dollars, violated the Rule, the court found no indication that the testatrix intended the duration of the trust to be critical to the testamentary scheme. Because modifying the duration of the trust would effectuate the testatrix' general intent and avoid intestacy without contravening the purpose of the perpetuities limitation, the court held that the trust qualified for equitable modification.

The common law Rule Against Perpetuities emerged as a tool for enhancing the alienability of property by prohibiting a testator from

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23. 262 S.E.2d at 771. The court announced that it supports the policies underlying the Rule and will deny validity to an interest which vests beyond its prescribed period. However, before allowing an application of the Rule to "totally obliterate" a testamentary scheme, the court will determine whether an instrument can be equitably modified to comport with the Rule's underlying policy. Id.

24. Id.

25. Id. The court found a clear expression of intent in the testatrix' statement that it was the desire of her late husband that the funds be used for the education of the designated beneficiaries. Id.


27. 262 S.E.2d at 771.

28. Id. The guardian ad litem, appointed by the trial court to represent the interests of unborn beneficiaries of the trust, had claimed on appeal that there were potentially three classes of infant beneficiaries whose interests were adverse to one another. He claimed that he could not represent all three without conflict. Id. Therefore, the Supreme Court of Appeals directed that, on remand, additional guardians ad litem be appointed to represent the interests of the various classes of infant and unborn beneficiaries who were not represented in the first action. Id. at 772. See Chapman v. Branch, 72 W. Va. 54, 78 S.E. 235 (1913); Hays v. Camden's Heirs, 38 W. Va. 109, 18 S.E. 461 (1893); W. VA. CODE § 56-4-10 (1966).

29. See notes 7 & 12 supra.
controlling its devolution for an inordinate period of time. An orthodox application of the Rule renders void any contingent future interest if there is a possibility that it could vest more than twenty-one years after the deaths of certain persons who were alive when the interest was created. The result is that property passes as though the testator had died intestate.

Recognizing this result as harsh, a number of jurisdictions have modified the common law Rule. The Berry court has joined those jurisdictions which have adopted a cy pres approach to modification.

32. See DukeMinier, supra note 7, at 9-14; Gray, supra note 7, § 214. Under the common law Rule, an interest is void if, at the time it was created, there existed a mere possibility that it would vest beyond the period of the Rule. It is irrelevant that the interest probably will vest or actually did vest within the period. Id. See, e.g., Johnson v. Preston, 226 Ill. 447, 80 N.E. 1001 (1907) (gift conditioned on probate of testator's will void, because possibility existed that probate would not be completed until more than 21 years after testator's death).
34. See DukeMinier, supra note 7, at 44.
35. See Brown, Perpetuities Reform: Approaches & Reproaches, 49 Notre Dame Law. 611, 611 (1974) (reasonable intentions are snuffed because of short-sighted draftsmanship); Leach, Perpetuities Legislation, Massachusetts Style, 67 Harv. L. Rev. 1349, 1349 (1954) (Rule usually operates to defeat reasonable dispositions of property); Leach, Perpetuities: What Legislatures, Courts and Practitioners Can Do About the Follies of the Rule, 13 U. Kan. L. Rev. 351, 351 (1965) (penalty inflicted, not on testator, but on innocent intended beneficiaries) [hereinafter cited as What Legislatures, Courts and Practitioners Can Do].
36. See Bogert, supra note 26, § 214 (discussion of the status of the Rule in each state). Some states have adopted a "wait-and-see" approach. Instead of determining at the time the interest is created whether it is possible that it will vest beyond the period of the Rule, the parties wait until the end of the 21-year period to see if the interest actually does vest. If so, it is valid. Otherwise, it is void. See Pa. Stat. Ann. tit. 20, § 6104(B) (Purdon 1975); Wash. Rev. Code § 11.98.010 (1967) (statute applies only to trusts). Several states have enacted more limited "wait-and-see" legislation. Instead of waiting until the end of the 21-year period to see if the interest actually has vested, these states examine the interest at the end of the lives in being to determine whether it is possible that it will vest beyond the period of the Rule. See Conn. Gen. Stat. Ann. § 45-95 (West 1958); Fla. Stat. Ann. § 689.222(2) (West Supp. 1980); Me. Rev. Stat. Ann. tit. 33, § 101 (1964); Md. Est. & Trusts Code Ann. § 11-103(a) (1974); Mass. Gen. Laws Ann. ch. 184A, § 1 (West 1977).
Under *cy pres*, an instrument that violates the Rule is reformed to approximate the intention of the testator as nearly as possible within the limits of the Rule.\(^{38}\) The doctrine traditionally was applied only to charitable trusts,\(^{9}\) but recently has found wider application to private, non-charitable gifts such as the educational trust in *Berry*.\(^{40}\) Adoption of the equitable modification doctrine in *Berry* has made West Virginia one of only four states to have judicially modified the Rule’s application to non-charitable gifts using this approach.\(^{41}\)

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\(^{38}\) See *Cy Pres on the March*, supra note 38, at 1383-85.

\(^{39}\) See *Cy Pres on the March*, supra note 38 (evolution of the *cy pres* doctrine in the area of non-charitable gifts). As early as 1891, New Hampshire adopted the doctrine and applied it to a private trust. Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891). However, the doctrine lay dormant for the period of about 60 years following. *Cy Pres on the March*, supra note 38, at 1383-85.

\(^{40}\) See *Cy Pres on the March*, supra note 38 (development of *cy pres* in the area of charitable trusts). See also note 22 supra.


Before the *Berry* decision, the common law Rule Against Perpetuities was strictly applied by the West Virginia courts. See Greco v. Meadow River Coal and Land Co., 145 W. Va. 153, 113 S.E.2d 79 (1960); Brookover v. Grimm, 118 W. Va. 227, 190 S.E. 697 (1937); Prichard v. Prichard, 91 W. Va. 398, 113 S.E. 255 (1922). Both the West Virginia Constitution and the West Virginia Code provide that any change in a common law rule is to be made by the legislature. See *W. Va. Const.* art. 8, § 13; *W. Va. Code* § 2-1-1 (1979). Until *Berry*, the West Virginia court consistently refused to modify the Rule, holding it within the province of the legislature to do so. See, e.g., First Huntington Nat’l Bank v. Gideon-Broh Realty Co., 139 W. Va. 130, 152-53, 79 S.E.2d 675, 687 (1953). Perhaps the initiative taken by the court in *Berry* was influenced by judicial modification in other jurisdictions and by advocates of judicial, rather than legislative reform. See 52 Hawaii at 43, 469 P.2d at 185 (Rule is a creature of judicial construction and its growth purely one of judicial wisdom unless legislature acts); *Gray*, supra note 7, § 870 (process of adjudication is one of clearing and simplification; tendency of legislation is to make Rule more stringent); *Brown*, *Perpetuities Reform: Approaches & Reproachs*, 49 *Notre Dame Law.* 611, 626 (1974) (specific statutes for specific situations create an inflexible and complicated system
Proponents of *cy pres* urge that its expanded application to non-charitable gifts is long overdue because of the Rule's destruction of otherwise legitimate future interests. However, critics of the approach fear that it provides a court with unfettered discretion to rewrite a will and substitute a new intent for that of the testator. Critics aver that courts applying *cy pres* will reform limitations on gifts in an unpredictable manner, making nebulous speculations about testators' intentions and adopting strained interpretations of wills solely for the purpose of saving contingent interests.

A response to these criticisms emerges in a *cy pres* approach that appraises the importance of a testator's invalid particular intent before modification of an instrument that violates the Rule. In *Carter v. Berry* the Mississippi Supreme Court adopted a doctrine of equitable approximation and applied it to a private testamentary trust. The *Carter* court found that the testator's dominant intent was to provide for his grandchildren. An intent that no grandchild benefit until the youngest reached age twenty-five was found to be secondary. The court reduced the age contingency to twenty-one years, effectuating the dominant intent. However, the court modified the instrument only after determining that the invalid secondary intent was not such an integral part of the testamentary scheme that the testator would prefer the entire instrument to be inoperative.


43. *See, e.g.*, 52 Hawaii at 48, 469 P.2d at 188 (Kobayashi, J., dissenting); Gray, *General and Particular Intent in Connection with the Rule Against Perpetuities*, 9 Harv. L. Rev. 242, 251 (1895) [hereinafter cited as *General and Particular Intent*].

44. Simes, *supra* note 30, at 736,


46. 84 Harv. L. Rev. 738, 745 (1971). See also Schuyler, *The Art of Interpretation in Future Interest Cases*, 17 Vand. L. Rev. 1407, 1423-24 (1964) (events completely unanticipated by testator occur and it is impossible to infer what he would have wanted; but courts see function as preventing intestacy and stretch judgment to feign discovery of intent that never existed).

47. 243 Miss. 321, 140 So. 2d 843 (1962).

48. *Id.* at 376-78, 140 So. 2d at 855-56.

49. *Id.* at 377, 140 So. 2d at 855.

50. *Id.*

51. *Id.*

52. *Id.* at 366, 367-77, 140 So. 2d at 850, 855.
Like the Mississippi court, the West Virginia court in Berry has adopted a *cy pres* approach that requires a survey of a testator's particular intent. The Berry court's four-step checklist for modification enunciates the requirement even more explicitly than did the Mississippi court. 53 The Berry court held that a devise or bequest will *not* be modified if the testator's particular intent violates the Rule and is critical to the testamentary scheme. 54 Therefore, despite the court's recognition that an orthodox application of the Rule conflicts with the principles of avoiding intestacy and effectuating intent, 55 it has refused to rescue an interest if the testator's critical purpose cannot be served by the modification. Thus, the Berry approach represents an exercise of caution; that is, the court will hesitate to speculate about a testator's probable intent in those cases in which the court has determined that the essence of the testator's dispositive plan exceeds the limitations of the Rule.

In contrast, the courts of New Hampshire and Hawaii more liberally effectuate general intent without requiring an examination of the importance of the violative particular intent. In Edgerly v. Barker 56 the Supreme Court of New Hampshire adopted a *cy pres* approach 57 and reduced a forty-year age contingency on a gift to the testator's grandchildren to twenty-one years. 58 Without discussing the possible importance of the forty-year limitation, the court held that a testator's particular intent will be sacrificed in order to effectuate the general one. 59 The Edgerly court declared that it would refuse to effectuate a general intent only if the instrument expressly stated that the testator preferred dying wholly or partially intestate. 60 The court's proclivity to effectuate any general intent to avoid intestacy is illustrated by its declaration that only a testator suffering from a mental disorder would prefer intestacy. 61

53. *See* 262 S.E.2d at 771.
54. *Id.* The Carter court stated that if it could be inferred that the testator would not prefer the valid part of the instrument to stand alone, then the entire gift should fail, rather than reducing the age contingency. 243 Miss. at 366, 376-77, 140 So. 2d at 850, 855.
55. *See* text accompanying notes 16-21 *supra*.
56. 66 N.H. 434, 31 A. 900 (1891).
57. *Id.* at 467, 31 A. at 912. In 1953, New Hampshire also judicially adopted a "second look" approach, which is analogous to "wait-and-see." If a decision on the validity of an interest is made at a time when events which have actually occurred indicate that the interest will vest within the period of the Rule, the interest is valid. This is so, even though a possibility of its vesting beyond the Rule existed at the time the interest was created. *See* Merchant's Nat'l Bank v. Curtis, 98 N.H. 225, 231-32, 97 A.2d 207, 212 (1953). *See also* 6 *AMERICAN LAW OF PROPERTY* § 24.35 (A.J. Casner ed. 1952) (discusses the "second look" doctrine as it has traditionally applied to powers of appointment).
58. 66 N.H. at 475, 31 A. at 916.
59. *Id.* at 467, 31 A. at 912.
60. *Id.* at 474-75, 31 A. at 916.
61. *Id.* at 475, 31 A. at 916.
The *Edgerly* decision has been criticized as a substitution of the court's intent for that of the testator.\(^{62}\) John Chipman Gray argued that by disregarding the forty-year provision, the court may have enlarged the intended class of beneficiaries and distributed shares of the testator's estate to persons whom he never meant to benefit.\(^{65}\) In addition, enlarging the class would give intended beneficiaries an unintended smaller share of the estate. The *Berry* test for modification would require a determination of the significance of the forty-year provision. If the age contingency were critical to the testator's plan, modification would be denied. The *Berry* approach would allow an orthodox application of the Rule to render the interest void rather than supply beneficiaries with capital at a time when the testator may have determined they are not sufficiently mature to manage it.

The Supreme Court of Hawaii, in *In re Estate of Chun Quan Yee Hop*,\(^{64}\) was confronted with a private testamentary trust which was to terminate at the death of the testator's wife or thirty years after the testator's death, whichever last occurred.\(^{65}\) The Hawaii court adopted an equitable approximation doctrine\(^{66}\) and reduced the thirty-year alternative to twenty-one years.\(^{67}\) The court held that equitable approximation requires that an interest which violates the Rule be reformed in a manner which most closely approximates the intention of the testator.\(^{68}\) The Hawaii court did not discuss the difference between the general and particular intents, nor did it discuss the possible significance of the thirty-year limitation. The approach is a liberal one and permits reformation restrained only by an obligation to carry out a testator's general intent.\(^{69}\) Contrasted with *Berry*, such an approach may more readily become the target of *cy pres* critics. For example, if the thirty-year provision were critical to the testator's plan, the *Berry* court would presumably discover its importance and deny modification. If the Hawaii court, however, does not consider the importance of the provision, it risks abandoning the essence of the testator's scheme as it begins its search for a general intent. To critics, the court has also begun to impose its own intent on the testator.

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63. Id. at 246-47. Gray argued that the *Edgerly* court assumed that the persons whom the testator intended to benefit remained the same, and only the time limitation had changed. Gray admonished that six grandchildren may reach age 21 but only one reach 40. Thus, shares are given to five persons whom the testator never meant to take. Id.
64. 52 Hawaii 40, 469 P.2d 183 (1970).
65. Id. at 41, 469 P.2d at 184.
66. Id. at 46, 469 P.2d at 187.
67. Id. at 47, 469 P.2d at 187.
68. Id. at 46, 469 P.2d at 187. The court's holding reflects its definition of the equitable approximation doctrine.
Several states have legislatively adopted a *cy pres* approach to modification of non-charitable gifts which violate the Rule. Some have enacted full *cy pres* statutes. Full *cy pres* statutes provide for a liberal reformation of an instrument in order to fully effectuate a testator's general intent, regardless of the particular reason that the instrument violates the Rule.

In 1974, the California Court of Appeal interpreted the state's full *cy pres* statute for the first time. In *Ghiglia v. Ghiglia* the court held that the statute requires a full and liberal effectuation of a testator's general intent. The court therefore reduced a thirty-five year age contingency to twenty-one years, despite its recognition that it may have been of importance to the testator that his grandchildren not benefit until the mature age of thirty-five. The court reasoned that the thirty-five year provision did not necessitate a conclusion that the testator would want his general trust plan to fail.

In *Reed v. McGinness* the California Court of Appeal reduced a fifty-year age contingency to twenty-one years. The court, citing *Ghiglia*, held that the statute imposes a duty on the court to liberally effectuate a testator's intent in order to save testamentary gifts whenever possible. The court did not discuss the importance to the testator of the fifty-year limitation.

The interpretations of the California full *cy pres* statute result in a disregard for a testator's particular intent and mandate liberal effectuation of the instrument in order to fully effectuate a testator's general intent, regardless of the particular reason that the instrument violates the Rule.

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70. See note 37 supra.
71. See, e.g., CAL. CIV. CODE § 715.5 (West Supp. 1981) which states that:
   No interest in real or personal property is either void or voidable as in violation of [the common law rule against perpetuities] if and to the extent that it can be reformed or construed . . . to give effect to the general intent of the creator of the interest, whenever the general intent can be ascertained. This section shall be liberally construed and applied to validate such interests to the fullest extent consistent with such ascertained intent.
   Id.

See also IDAHO CODE § 55-111 (1979) (applies only to trusts); MO. ANN. STAT. § 422.555(2) (Vernon Supp. 1981); OKLA. STAT. ANN. tit. 60, § 75 (West 1980-1981); TEX. CIV. CODE ANN. tit. 1291b, § 2 (Vernon Supp. 1978).

72. See *Cy Pres on the March*, supra note 38, at 1386; *What Legislatures, Courts and Practitioners Can Do*, supra note 35, at 357.
74. Id.
75. Id. at 442, 116 Cal. Rptr. at 833.
76. Id.
77. Id.
78. 70 Cal. App. 3d 355, 138 Cal. Rptr. 687 (1977) (residuary gift in will to grandnieces and grandnephews to vest when the youngest reached 50 years of age).
79. Id. at 365, 138 Cal. Rptr. at 690.
80. Id. at 364, 138 Cal. Rptr. at 689.
tuition of a general one in an effort to save testamentary gifts. The California decisions may reinforce critics' fears that courts applying the *cy pres* doctrine will be inclined to speculate and adopt strained interpretations of wills in order to save contingent interests. To critics, a modification made in disregard of an age contingency as great as fifty years may reflect a clearly unintended dispositive scheme. Under the *Berry* approach, if the fifty-year provision were critical to the testator, the instrument would not be modified, thereby preventing an effectuation of intent that would surprise the testator.

A paucity of cases in other jurisdictions interpreting full *cy pres* statutes similar to California's renders speculative a conclusion that these statutes will be interpreted in conformity with the California cases. This is possible, however, if the California decisions are deemed persuasive by other jurisdictions.

Other states have adopted more limited *cy pres* legislation which permits reformation of age contingencies to twenty-one years if the sole reason an interest violates the Rule is because it is contingent upon someone reaching an age in excess of twenty-one.

New York is the only jurisdiction that has applied its limited age reduction statute. The New York courts have effectuated reductions in age contingencies to twenty-one years without regard to their importance to the testators. In *In re Molyneaux' Will* part of the principal of a testamentary trust was to be paid to the testator's daughter when she attained age thirty-five. The testator imposed additional condi-

81. See text accompanying notes 43-46 supra.
82. See, e.g., N.Y. EST., POWERS & TRUSTS LAW § 9-1.2 (McKinney 1976) which provides that:
Where an estate would ... be invalid because made to depend, for its vesting or its duration, upon any person attaining or failing to attain an age in excess of twenty-one years, the age contingency shall be reduced to twenty-one years as to any or all persons subject to such contingency.

*Id.*

*See also* CONN. GEN. STAT. ANN. § 45-96 (West 1958); FLA. STAT. ANN. § 689.22(4) (West Supp. 1980); ILL. ANN. STAT. ch. 30, § 194(C)(2) (Smith-Hurd Supp. 1980-1981); ME. REV. STAT. ANN. tit. 33, § 102 (1964); MD. EST. & TRUSTS CODE ANN. § 11-103(b) (1974); MASS. GEN. LAWS ANN. ch. 184A, § 2 (West 1977). Professor Leach has referred to age reduction statutes as merely as limited victory for *cy pres*. See *Cy Pres on the March*, supra note 38, at 1385. *See also What Legislatures, Courts and Practitioners Can Do*, supra note 35, at 358-59 (age reduction statutes and other "bits and pieces" perpetuities legislation).

84. 44 Misc. 2d 159, 253 N.Y.S.2d 75 (1964).
85. *Id.* at 161, 253 N.Y.S.2d at 78. The testator created the trust by exercising a power of appointment granted to him by his father. *Id.* The court held that in this situation the gift in trust "relates back" and is deemed to be part of the father's will. *Id.* at 163, 253 N.Y.S.2d at 80. The court stated that because the testator's daughter was not
tions upon the gift expressly for the child's benefit. If she failed to complete two academic years of college or another accredited school by age thirty, a portion of the trust was to be paid instead to three educational institutions. If, before age thirty-five, the testator's daughter joined a religious order that required her to surrender her property, her interest was forfeited to named charitable and educational institutions. Pursuant to the statute, the New York Surrogate's Court reduced the age limitation to twenty-one years. The court noted that it had, in effect, excised the conditions imposed by the testator. It concluded, however, that the testator would not prefer the trust estate to pass by intestacy, and therefore effectuated an unconditional gift to the daughter at age twenty-one. To *cy pres* critics, the resulting gift in *Molyneaux* may bear insufficient resemblance to the testator's original plan. Because the terms of the age reduction statutes mandate blanket reductions of age contingencies, it is not unlikely that they will be applied to reduce age limitations despite their significance to the testators. Moreover, courts may not be at liberty to refuse to apply the statutes, and, inevitably, a testator's intent will become that which happens to surface after a reduction. The *Berry* court has retained the flexibility of assessing the importance of an age limitation and refusing a reduction if it would reflect a testamentary design manifestly unintended by the testator.

The jurisdictions which have applied *cy pres* to non-charitable gifts have been guided by the principles of avoiding intestacy and effectuating a testator's intent. Those jurisdictions which liberally effectuate a general intent, elevate the avoidance of intestacy over the effectuation of a testator's intent. In order to avoid intestacy, these jurisdictions may deviate further from a testator's true purpose when modifying an instrument which violates the Rule. To *cy pres* critics,

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alive at the death of her grandfather, she could not be a measuring life for her own gift which thus fails as being payable more than 21 years after the death of the last valid measuring life. *Id.* See N.Y. PERS. PROP. LAW § 11 (repealed 1967) (current version at N.Y. EST., POWERS & TRUSTS LAW § 9-1.1 (McKinney 1976)); N.Y. REAL PROP. LAW § 42 (repealed 1967) (current version at N.Y. EST., POWERS & TRUSTS LAW § 9-1.1(a) (McKinney 1976)).

86. 44 Misc. 2d at 161, 253 N.Y.S.2d at 78.
87. *Id.*
88. *Id.* at 162, 253 N.Y.S.2d at 79.
89. See N.Y. PERS. PROP. LAW § 11-a (repealed 1967) (current version at N.Y. EST., POWERS & TRUSTS LAW § 9-1.2 (McKinney 1976)). See note 82 supra.
90. 44 Misc. 2d at 164, 253 N.Y.S.2d at 81.
91. *Id.*
92. *Id.*
93. *Id.*
94. See, *e.g.*, text accompanying notes 59-61 supra.
this result represents an impermissible willingness to invent a dispositive scheme too alien to the testator's original plan.

The *Berry* court deviated from the liberal approach which seeks always to effectuate a general intent, and chose a test for modification that is more likely to result in intestacy in cases where a testator's intent can only be served in a fashion proscribed by the Rule. Thus, the *Berry* court's approach to modification constitutes a balance between the two principles. On one hand, the equitable modification doctrine adopted by *Berry* is a tool for avoiding intestacy caused by an orthodox application of the Rule. However, modification will not occur in cases where it would demand too great a deviation from a testator's true intent and reflect surmise about his preference when his critical testamentary strategy has failed. *Berry* did not suggest standards to be used to determine when a particular intent is critical. However, its *cy pres* approach provides a foundation for the development of a doctrine which mitigates the harshness of the Rule without creating an unintended purpose for a testator.

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