Buffalo Law Review

Volume 11 | Number 1 Article 69

10-1-1961

# Decedents' Estates and Trusts—Interest of Remainderman Predeceasing Life Tenant Vested Subject To Divestment

Donald G. McGrath

that the settlor states in the affidavit that had the problem arisen in 1950 she would have made provisions in the instrument for adopted children, indicates that the possibility of an adopted child had never occurred to her when the word "descendants" was used.

It seems that except for the affidavit, the dissent's points are well taken. The courts take a step backward when they narrowly construe a statute to arrive at a conclusion opposed to the stated public policy of the state. Given that public policy, the Court should not have enlarged upon a restriction in the statute that was intended to be a limited one. Nor should it have so narrowly construed the word "descendants," for, as the dissent pointed out, a construction more in keeping with public policy was available. Given the decision, however, it appears that it would be wise to consider the possibility of adopted children and make appropriate provisions, when drawing up a will or trust agreement.

*T. C. L.*

INTEREST OF REMAINDERMAN PREDECEASING LIFE TENANT VESTED SUBJECT TO DIVESTMENT

In *In re Larkin's Will*[28] the Surrogate's Court held that the interest of a remainderman dying prior to the life tenant was divested by his death and his share passed to his children. The Appellate Division reversed, holding that the remainder interest was indefeasibly vested and was not contingent upon the remainderman surviving the life tenant.[29] The Court of Appeals reversed the Appellate Division and reinstated the decree of the Surrogate's Court.[30]

The third paragraph of testator's will bequeathed a life estate to his wife and disposed of the remainder interest in the following language: "I give, devise and bequeath said residence property and the furnishings in the residence thereon, at the death of my said wife, Catherine C. Larkin, to my three sons . . . , share and share alike." The fourth paragraph set up a trust fund for his wife with two of the sons as trustees and provided: "At her death, my said trustees shall divide the securities and balance then remaining in their hands. . . ." The eleventh paragraph stated: "In the event that any of my said sons should die leaving descendants, said descendants shall take the share of any such deceased son, per stirpes and not per capita."

One of the remaindermen predeceased the life tenant survived by a widow and three children. His will provided that his widow was to take his entire estate. The contest is between the widow and one of the children of the remainderman. Under the construction adopted by the Appellate Division the remainder interest became property of the remainderman at the death of the testator and passed to his widow under the terms of his will.

28. 9 N.Y.2d 88, 211 N.Y.S.2d 175 (1961).
29. 11 A.D.2d 596, 200 N.Y.S.2d 565 (3d Dep't 1960).
30. Supra note 28.

The Court of Appeals, in reversing the Appellate Division, stated that the basic purpose of construction proceedings is to determine the intention of the testator which, if not clear, must be found from reading the whole document, not just a single word or phrase.[31] In accord with this theory the Court read the third and fourth paragraphs with the conditions of the eleventh paragraph superimposed on them and concluded that the proviso for the surviving descendants of remaindermen applied to remaindermen predeceasing the life tenant, not the testator. This construction gives the remainderman a vested estate subject to divestment if he should fail to outlive the life tenant.

In support of this construction the Court cited *In re Krooss*,[32] in which a testator bequeathed a life estate to his wife with the remainder to his two children "absolutely and forever," but further provided that if either child predeceased the life tenant, leaving descendants, then the descendants should take the share of the parent. One of the remaindermen died before the life tenant but did not leave descendants. The Court held that the remainder interest was vested subject to divestment. This treatment follows early English[33] and New York[34] decisions and is perfectly consistent with the canon of construction that dictates early vesting, because the interest is vested and alienable subject only to the contingency that will effect the divestment.

In deciding the case of *In re Gulbenkian's Will*,[35] the Court of Appeals applied the same reasoning and arrived at the result that the remainderman's interest was vested subject to divestment. The fifth paragraph of Gulbenkian's will left a trust to his wife and stated that, "I give and bequeath the remainder of said trust fund, upon her death, to my brothers, . . . in equal shares and their several descendants per stirpes."

Both of the remaindermen predeceased the life tenant and by their wills bequeathed their interest to the Gullabi Gulbenkian Foundation. The Foundation contended that the remaindermen's interests were indefeasibly vested and that substitution, if intended, was to take place only if the remaindermen failed to outlive the testator. In rejecting the second contention, the Court again reiterated the addition to the rule that a gift over to another, in case of the death of the former, is to be construed as referring to the death of the testator except where there is a life tenant. In that case the death referred to is that of the life tenant.[36]

The main problem was whether the concluding phrase of the paragraph was only an expression of limitation of the estate or whether the testator intended the children to take as substitutes under any condition. In determining that a

31. In re Fabbri, 2 N.Y.2d 236, 159 N.Y.S.2d 184 (1957).
32. 302 N.Y. 424, 99 N.E.2d 222, 47 A.L.R.2d 894 (1951).
33. Burrell v. Baskerfield, 11 Beav. 525 (1849); Salisbury v. Petty, 3 Hare's Rep'ts 86 (1843).
34. Lyons v. Ostrander, 167 N.Y. 135, 60 N.E. 334 (1901).
35. 9 N.Y.2d 363, 214 N.Y.S.2d 379 (1961).
36. Lyons v. Ostrander, supra note 34; In re Larkin's Will, supra note 28.

substitutionary gift had been intended, the Court started with the principle that words are not to be rejected if they can reasonably be made consistent,[37] and then construed the whole will in order to determine the testator's basic intent.[38] The Court on reading the entire will found ample evidence that the testator knew how to provide for an indefeasibly vested remainder in the eleventh paragraph of the same document and concluded that since he knew the correct method of accomplishing this, his use of different words meant he had a different intention.

As pointed out by Judge Fuld in his dissenting opinion, it is equally clear that the testator knew how to provide for substitutionary gifts when he intended them.[39]

It appears that there is a basic difference between the *Larkin* and *Gulbenkian* cases in that in the *Larkin* case there were explicit words of survivorship. The only question to be answered was survive whom. In the *Gulbenkian* case it is doubtful if survivorship was intended at all.

*D. G. M.*

FRAUDULENT DESTRUCTION OF WILLS

Section 143 of the Surrogate's Court Act provides that "A lost or destroyed will can be admitted to probate in a surrogate's court, but only in cases where the will was in existence at the time of the testator's death, or was *fraudulently destroyed* in his lifetime." (Emphasis added.) The issue of what constitutes the fraudulent destruction of a will arose in *In re Fox's Will*.[40] In that case decedent was an American citizen residing in Germany during World War II. Fearing that the German Government would confiscate a United States trust of which he was the beneficiary, he executed a will exercising a power of appointment in favor of petitioner, a United States resident. The corpus of the trust was seized in the United States by the Alien Property Custodian. In 1944 the will was destroyed in a bombing raid. The decedent learned of the destruction of the will but failed to execute a new one. He died two years later at which time petitioner brought this action under Section 143. The Surrogate, finding that the will had been fraudulently destroyed, admitted it to probate.[41] The Appellate Division reversed, dismissing the petition.[42]

The Court of Appeals found that the will was fraudulently destroyed.

37. In re Buechner, 226 N.Y. 440, 123 N.E. 741 (1919).
38. In re Gautier's Will, 3 N.Y.2d 502, 169 N.Y.S.2d 4 (1957).
39. In re Gulbenkian's Will, 9 N.Y.2d 363, 368, 214 N.Y.S.2d 379, 385 (1961): In each of paragraphs Third and Fourth, for instance, he gave $50,000 to a named sister and explicitly provided that, "in case of her prior death," the bequest was to go to her decendants per stirpes.
40. 9 N.Y.2d 400, 214 N.Y.S.2d 405 (1961).
41. 17 Misc. 2d 773, 184 N.Y.S.2d 747 (1959).
42. 9 A.D.2d 365, 193 N.Y.S.2d 794 (1st Dep't 1959). The petition was dismissed on the grounds that the destruction of the will had been orally adopted by the decedent. This was error since it is clear that oral declarations of the decedent are incompetent to establish or revoke a will. In re Staiger's Will, 243 N.Y. 468, 472, 154 N.E. 312, 314 (1926); In re Kennedy's Will, 167 N.Y. 163, 170, 60 N.E. 442, 444 (1901).