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Property—Trusts and Future Interests—Construction of Testamentary Grants

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In the case of In Re *Jones' Will*,[64] the court followed the general rule and held that where a will gives a trustee full power and authority at any time to sell the trust realty the will should be construed by the court as giving the trustee an unrestricted power of sale which survives the trust. It was pointed out however, that when the trust terminated, the trustees could not exclude the remaindermen from managing the property or performing acts of administration in respect thereto, including collection of rents.

In the instant case the contention of the trustee was that he had the power to manage and control the trust property, to the exclusion of the remaindermen, pending final accounting and discharge by the court. The court approved this contention where personal property is concerned,[65] but stated that where real property is involved the title immediately vests in the remaindermen upon expiration of the trust[66] hence the remaindermen have complete power of control over the property.

Construction of Testamentary Grants

Among the many rules available to the courts for use in the construction of grants of property are: (1) the presumption of early vesting of interests, with its ancillary rule favoring early indefeasibility of vested interests;[67] (2) the preference for the blood line of the grantor;[68] (3) the rule that a devise of an absolute interest will not be deemed to be cut down by later language in the instrument unless such language is clear and unambiguous.[69] The application of these rules is supposedly for the purpose of ascertaining the intent of the grantor where the language of the grant is not clear.[70] The courts are, however, in search of their own version of the intent (what has been described as "judicially ascertained intent"[71]), which may actually differ from the actual intent and even from what the court believes to be the actual intent.[72]

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64. 306 N.Y. 197, 117 N.E. 2d 250 (1954).

65. Where personal property belonging to a terminated trust is involved the rule is that the duty remains with the trustee to divide the personalty and to distribute it, and the trust is not complete until the trustee has finally accounted, distributed the property to the person entitled to it and been discharged. *See Matter of Millers' Will*, 257 N.Y. 349, 355, 178 N.E. 555, 556 (1931); *Neary v. City Bank Farmers' Trust Co.*, 260 App. Div. 791, 24 N.Y.S. 2d 264 (2d Dep't 1940).

66. See REAL PROPERTY LAW § 109; *Watkins v. Reynolds*, 123 N.Y. 211, 25 N.E. 322 (1890); *Townshend v. Frommer*, 125 N.Y. 446, 26 N.E. 805 (1891).

67. *Connelly v. O'Brien*, 166 N.Y. 406, 60 N.E. 20 (1901).

68. *Matter of Rooker's Will*, 248 N.Y. 361, 162 N.E. 283 (1928).

69. *Matter of Krooss*, 302 N.Y. 424, 99 N.E. 2d 222 (1951).

70. *Close v. Farmer's Loan & Trust Co.*, 195 N.Y. 92, 87 N.E. 1005 (1901).

71. RESTATEMENT, PROPERTY § 241 (2).

72. See *Matter of Watson's Will*, 262 N.Y. 284, 299, 186 N.E. 787, 791 (1933).

In a recent case,[73] a will before the Court of Appeals for construction provided for a trust for the lives of the sister and cousin of the testatrix, the corpus to go to her nephew on the termination of the trust, but in the event the nephew predeceased the sister and the cousin the corpus was to go to charity. The nephew outlived the cousin but predeceased the sister. The court, bolstering its opinion with the rules mentioned above, construed the will literally holding that the nephew's interest vested indefeasibly on his surviving the cousin. The remainder passed to his estate, therefore, and the gift to the charity was defeated.

Judge Van Voorhis, the sole dissenter, maintained that the intent of the testatrix that the nephew survive the termination of the trust in order to take was manifest, and that in view of this intent the rules of construction should not be applied.

Judicial Correction of Invalid Trust Provisions

It is the established rule in this state that invalid portions of a will may be excised by the court so that the remaining provisions may be preserved and the intent of the testator carried out as far as possible.[74] The proper application of this rule was the issue before the Court of Appeals in In re *Fischer's Will.*[75]

In this case the testator had provided for the creation of a trust, the income to be paid to his wife for her life and upon her death the principal to become a part of his residuary estate. A further provision set up a trust of the residuary estate, which was to be charged with an annuity to be paid to the testator's mother for her life, the balance to be held until his grandson became twenty-one, or if he should die before reaching that age until the grandnephew of the testator should die or reach twenty-one. On the termination of the trust the corpus was to be distributed to residuary legatees named in the will. The Surrogate ruled that the trust set up for the widow violated the rule against perpetuities since the corpus might not be alienable until the testator's wife, grandson and grandnephew had died. In order to effectuate the intent of the testator as far as possible, the Surrogate preserved the trust for the widow by deleting the third measuring life insofar as it applied to the corpus of the widow's trust. He further determined that (since the remainder interests of the residuary legatees were contingent and, therefore, not subject to acceleration[76]) the residue of the corpus of the widow's trust

73. In re *Campbell's Will,* 307 N.Y. 29, 119 N.E. 2d 577 (1954).
74. *Kalish v. Kalish,* 166 N.Y. 368, 59 N.E. 917 (1901).
75. 307 N.Y. 149, 120 N.E. 2d 688 (1954).
76. *Matter of Durand,* 250 N.Y. 45, 164 N.E. 737 (1928).