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# Wills - Issue of Devisee or Legatee Dying Before - Execution of Will - Original vs. Substitutional Gifts to a Class

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# RECENT CASES

WILLS—ISSUE OF DEVISEE OR LEGATEE DYING BEFORE— EXECUTION OF WILL—ORIGINAL VS. SUBSTITUTIONAL GIFTS TO A CLASS—

A bill was filed to construe the limitations set forth in a class gift. Of the testator's seven brothers and sisters who originally comprised the class, five were living when the will was executed, two brothers having died prior thereto. The heirs of the deceased brothers claimed shares of the estate, alleging that they were within the limits set forth in the class gift. The language in question states:

> I devise to my brothers and sisters, living at the time of my death, or to the heirs of brotners and sisters who may precede me in death, all of my real estate in the County of Benton, State of Indiana, described as follows: . . . ."

Originally, the lower court had found that the intent of the testator to exclude heirs of his deceased brothers was evidenced by his limiting the gift to his living brothers and sisters. Therefore, the heirs of the deceased brothers could not share in the estate. Reversing the lower court's decision, the appellate court *held* that without the testator's manifest intent, heirs could not be disinherited. If the words of a will are ambiguous, they are to be construed in favor of the heirs, against disherison. *McAvoy v. Sammons*, 224 N.E. 2d 323 (Ind. 1967).

The instant case presents the problem of determining which heirs fulfill the limitations set forth in the class gift. In this case, the class limitation is the contingency of predeceasing the testator. If the class members die before the testator, a second named group of possible heirs take in their stead.

In general, when a devise is made to a class in which some members have predeceased the testator, the surviving members take the shares of those who died. However, if the testator makes specific provisions to deal with the failure of beneficiaries to survive him, this language must be given effect.[1] Problems arise when the language employed is ambiguous and incomplete. In the landmark English case, *Christopherson v. Naylor*,[2] the court de-

1. See 5 AMERICAN LAW OF PROPERTY § 22.52, § 22.53 (A. J. Casner ed. 1952).
2. 1 Mer. 320, 35 Eng.Rep. 693 (Ch. 1816).

veloped a theory which distinguished between original and substitutional gifts to a class. The language to be construed contained the following provision:

> . . . to each and every child and children of my brother and sisters, . . . which shall be living at the time of my decease, . . . But if any child or children of my said brother or sisters or any of them. . . , shall happen to die in my lifetime, and leave any issue lawfully begotten of the body or bodies of any such child or children living at or born in due time after his or their decease, then in such case the legacy or legacies hereby intended for such child or children so dying shall be upon trust for and I give and bequeath the same to him, her or their issue; such issue taking only the legacy or legacies which his, her or their parents or parent would have been entitled to, if living at my decease . . . ."[3]

The English court held that the original gift was to benefit only those persons who satisfied the group limitation, namely, the testator's nieces and nephews. The provision for their issue was substitutional and, as with substitutional gifts, could not be effective unless there had been a gift to the original beneficiaries. If the original beneficiaries in the *Christopherson* case were dead at the execution of the will, they could not be considered to have taken as original beneficiaries. Thus their issue could not be substituted.[4] Therefore, the court set forth the theory that unless the devise specifically includes the issue of these deceased class members as original beneficiaries, they are excluded. Only the issue of those class members who died after the execution of the will can share in its benefits. Since the gift to the issue is substitutional, there must be a prior gift to the ancestor.[5] A number of courts, when faced with this situation, have followed the line of reasoning develped in *Christopherson*.[6] However, others have found both the gift to the issue and the gift to the ancestors to be original.[7] Due to the lack of consistent decisions, courts must carefully evaluate the words of devise, the language of the rest of the will, and doctrines of testamentary construction.[8]

Because the appellate court, in the instant case, felt that the

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3. *Id.* at 693.
4. 5 AMERICAN LAW OF PROPERTY, *Supra* note 1, at 404.
5. *Id.* at 404.
6. In re Throm's Estate, 378 Pa. 159, 106 A.2d 818 (1954); Love v. Love, 208 S.C. 363, 38 S.E.2d 231 (1946); Tiffany v. Emmet, 24 R.I. 411, 53 A. 281 (1902).
7. Mfr. Nat'l Bank v. McCoy, 212 A.2d 53 (R.I., 1965); In re Belser's Will, 23 Misc. 176, 199 N.Y.S.2d 826 (1960); In re Burggraf's Estate, 12 Misc. 152, 176 N.Y.S.2d 905, (1958); Gardner v. Knowels, 48 R.I. 231, 136 A. 883 (1927); Baldwin v. Tucker, 61 N.J.Eq. 412, 48 A. 547 (1901); Outcalt v. Outcalt, 42 N.J.Eq. 500, 8 A. 532(1887).
8. Hancock v. Maynard, 72 Ind. App. 661, 126 N.E. 461 (1920); 5 AMERICAN LAW OF PROPERTY, *Supra* note 1, at 406.

language of the will was so ambiguous as to permit two possible interpretations, it based the decision on applicable canons of construction.[9] Trying to discover the testator's intent,[10] the court felt that the absence of specific language to disinherit was an indication of inclusion of the issue in question. The canons also presume inclusion, requiring disherison to be specifically stated.[11] Applying another rule of construction, the court may distribute in accordance with the law of intestacy,[12] which enable the issue of the deceased to inherit.

If the language of the will is not so ambiguous as to obscure the intent of the testator, it must be given effect.[13] A careful reading of the language used by the testator in the instant case would tend to disprove the need to resort to artificial canons. His will contained the following provision: ". . . devise to my brothers and sisters, living at the time of my death, . . . ." The testator imposed survivorship as a condition of the gift. Those brothers and sisters not fulfilling this condition can not be included in the class,[14] and their issue should not inherit.

The testator's language further contained the clause, ". . . or to the heirs . . . ." These words are considered to be words of substitution.[15] The word "or", as it appears in this commonly used phrase, is usually interpreted in its natural disjunctive sense, designating those who take by substitution.[16] Another possible consideration is that a devise is void when made to persons who are dead before the will is executed. Unless there are statutory provisions to alter such situations, the devise to the deceased brothers would be void.[17]

It would seem that the circumstances surrounding the class gift in the instant case would tend to support a devise to the living brothers and sisters, with an alternative gift to the issue of the deceased brothers. By its decision favoring two groups of

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9. The canons of construction employed by the lower court in its decision of the instant case were the following: 1) determination of the testator's intent, 2) presumption against disinherison, and 3) distribution according to the laws of intestacy when the intent of the testator cannot be determined.

10. Indus. Nat'l Bank v. Clark, 204 A.2d 310 (R.I., 1964); Spicely v. Jones, 199 Va. 703, 101 S.E.2d 567 (1958); McCoy v. Houck, 180 Ind. 634, 99 N.E. 97 (1912).

11. Guipe v. Miller, 94 Ind. App. 314, 180 N.E. 760 (1932); McCoy v. Houck, *Supra* note 10, at 101; Crew v. Dixon, 129 Ind. 85, 27 N.E. 728 (1891).

12. Guipe v. Miller, *Supra* note 11, at 764; Hancock v. Maynard, *Supra* note 8, at 454.

13. Churchfield v. First Nat'l Bank, 418 P.2d 1001 (Wyo. 1966); Indus Nat'l Bank v. Clark, *Supra* note 10, at 312; Spicely v. Jones, *Supra* note 10, at 569.

14. In re Fitzpatrick's Estate, 21 N.Y.App.2d 946, 251 N.Y.S.2d 389 (1964).

15. Fatheree v. Gregg, 20 Ill.2d 620, 170 N.E.2d 600 (1960); Brown v. Neeld, 26 N.J.Super. 240, 97 A.2d 718 (1953); In re Spruce's Will, 114 N.Y.S.2d 505 (1952); Pearson v. Olson, 310 Ill. 252, 141 N.E. 736 (1923).

16. Howard v. Batchelder, 143 Conn. 328, 122 A.2d 307 (1956); In re Brunet's Estate, 34 Cal.2d 105, 207 P.2d 567 (1949); Batrtlett v. Mut. Ben. Life Ins. Co., 358 Ill. 452, 193 N.E. 501 (1934); Boys v. Boys, 328 Ill. 147, 159 N.E 217 (1927).

17. Mfr. Nat'l Bank v. McCoy, *Supra* note 7, at 59.

original takers, the lower court possibly read "or" to have been interchangeable with "and". Although courts have done so in the past,[18] they are inclined to do so only when this carries out the intent of the testator.[19] Generally, "and" and "or" are given their common meanings unless this construction obviously is contrary to the intent of the testator.[20] It is not the job of the court to rewrite a will so as to make it most fair to all concerned, but rather to enforce the will of the testator as he instructed.

The appellate court states that this is a case of first impression in Indiana and the question involved could become one of significant economic import. Conflicting court opinions within the same jurisdiction indicate that a state supreme court decision or legislative action would be helpful. Some aid is necessary to clarify who takes under a class gift which provides for an alternative if a contingency is fulfilled as to part of the members. In North Dakota there is neither reported case law precedent nor legislative pronouncement. Therefore, careful legal draftsmanship is necessary to avoid the possible exclusion of persons the testator intends to include in his class gift.

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CONCLUSIVENESS OF JUDGMENTS—PERSONAL INJURY—DISCRETION OF THE COURT—Plaintiff brought an action for injuries he sustained in a fall on the defendant's stairway. A Stipulation of dismissal was executed by the attorneys for both parties and the trial court ordered judgment of dismissal with prejudice. Three years later the trial court granted plaintiff an order setting aside and vacating the judgment. At the time of the judgment, the plaintiff had not been aware of an injury to his hip resulting from the fall. Surgery and extensive hospitalization were ncessary for treatment of the hip injury. The Minnesota Supreme Court *held* circumstances justified vacating the judgment. *Simons v. Schiek's, Inc.*, 275 Minn. 132, 145 N.W.2d 548 (1966).

Once a final judgment is obtained against a tortfeasor it is

18. In re Braun's Estate, 256 Ia. 55, 126 N.W.2d 318 (1964); Howard v. Batchelder, *Supra* note 16, at 311; In re Ginsburgh's Estate, 102 N.Y.S.2d 827 (1950); Nat'l State Bank v. Morrison, 7 N.J.Super. 333, 70 A.2d 888 (1949); Smith v. Dellitt, 249 Ill. 113, 94 N.E. 113 (1911).

19. In re Braun's Estate, *Supra* note 18, at 321; Howard v. Batchelder, *Supra* note 16, at 311; Nat'l State Bank v. Morrison, *Supra* note 18, at 893.

20. In re Braun's Estate, *Supra* note 18, at 321; Howard v. Batchelder, *Supra* note 16, at 311; Boys v. Boys, *Supra* note 16, at 219.