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WILLS - CONSTRUCTION - LIMITATION OF DEFEASANCE CLAUSE

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WILLS — CONSTRUCTION — LIMITATION OF DEFEASANCE CLAUSE — Testatrix died leaving as her only heirs at law and next of kin a son, Thomas, and a grandaughter, Malinda, to whom she devised her estate in approximately equal shares. At the time she executed her will Thomas was twenty-two years of age and unmarried and Malinda was eleven. The principal case turns on the construction of a clause in her will, devising a parcel of land to Malinda, which reads as follows: "I give and bequeath . . . the same to the said Malinda McK. Young and her children but if the said Malinda McK. Young shall die before she attains the full age of twenty-one years without having been married, but if she marries and dies without leaving child or children then in such a case I give the same to my said son, Thomas H. Young." [1] Malinda married at the age of twenty-four and had issue, but both her husband and the child predeceased her. Devisees of the testatrix' son, Thomas, claimed an executory interest in the property on Malinda's death without surviving issue. *Held*, the fee vested in Malinda subject to defeasance on one event only, namely, if Malinda died without having married and borne a child before her twenty-first birthday. *Young v. Munsey Trust Co.*, (App. D. C. 1940) 111 F. (2d) 514.

The general rule that each will is to be determined according to the intention of the testator often clashes with the antipathy of the courts toward the defeasance of estates.[2] In the principal case the gift over is practically nullified by the intent attributed to the testatrix. This case involves an ambiguity arising from imperfect use of language in a will. The second "but if" in the clause granting the fee is the cause of the difficulty. Was this used to introduce a new and separate event on which defeasance should take place? If "but if" is interpreted to mean "or if," such would seem to be the case. A similar result is reached if the devise is construed as an attempt to keep the property in the direct descendants of the testatrix, or as an attempt to prefer her son over a possible future husband of Malinda. On the other hand it may have been used, as the court decides, merely to make an exception to the phrase "without having been married." Under the latter view the fee will leave Malinda and her heirs only if she dies before she reaches twenty-one, unmarried, and without having borne a child. The intent of the testator is normally determined by the language employed in his will, read in its entirety and in the light of the circumstances surrounding its formulation.[3] The court in the principal case followed this rule

[1] The words "to Malinda and her children" involved a discussion of the rule in Wild's Case, 6 Co. Rep. 16b, 77 Eng. Rep. 277 (1599). The court decided that whether they followed that rule or not Malinda had at the date of her death a fee simple title to the property devised. Application of the rule to the principal case would give Malinda a fee simple estate. If the rule were rejected the son of Malinda would have taken a vested estate in the remainder at his birth and on his death before Malinda that estate would pass to Malinda by inheritance.

[2] In re Singer's Estate, 116 Pa. Super. 32, 176 A. 519 (1935); In re Squier's Estate, 199 Wis. 51, 225 N. W. 184 (1929); Carmichael v. Cole, 83 Colo. 575, 267 P. 408 (1928); Meriden Trust & Safe Deposit Co. v. Squire, 92 Conn. 440, 103 A. 269 (1918).

[3] Frederick v. Alling, 118 Conn. 602, 174 A. 85 (1934); In re Donovan's Estate, 153 Misc. 593, 275 N. Y. S. 142 (1934), affirmed 243 App. Div. 597, 277 N. Y. S. 615 (1935); Tetlow v. Taylor, 54 R. I. 363, 173 A. 88 (1934); Domestic & Foreign

explicitly. Though all rules of construction have been devised merely as aids to the ascertainment of testamentary intent and are not to be applied where the intent can be ascertained from the instrument itself,[4] it is interesting to note that the result here would have been the same had the court not found clear indications of intent in the will and had applied a rule of construction. There are several such rules which the court could have used in construing this will. (a) Preference for equality of distribution. Where there are two or more constructions possible the courts will frequently take the one which accomplishes the more equal distribution, on the theory that a testator normally seeks to distribute his property equally between those who have equal claims on his bounty and intends to preserve equality between the lines of descent.[5] Thomas and Malinda were given nearly equal estates subject only to the questionable disposition of the clause in question. Consequently the rule would seem to apply here with whatever force it has. (b) Preference for early indefeasibility. For various reasons[6] indefeasibility at the earliest possible moment consistent with the manifest intent of the testator is a desirable objective in construing gifts of this kind. To this end a number of rules have been devised by the courts.[7] Among them appears the rule that a fee will be found indefeasible unless the testator has made a clear and unambiguous expression of intent to the contrary.[8] This presumption against defeasibility would be enough on which to base the present decision should the court so desire. (c) Construction of "dies without leaving child or children." "When property is limited by an otherwise effective conveyance 'to B and his heirs, but if B dies without issue, then to C,' or by other language of similar import, and (a) the conveyance further provides that for a described period the interest of B shall be subject . . . to a defeasance, and (b) the ending of such described period is likely to occur between the date upon which the conveyance speaks and the date of B's death, then, unless a contrary intent of the conveyor is found from additional language or circumstances, the interest of C can become a present interest if, and only if, B dies

Missionary Society v. Crippled Children's Hospital, 163 Va. 114, 176 S. E. 193 (1934).

[4] Will of Waterbury, 163 Wis. 510, 158 N. W. 340 (1916); Quarton v. Barton, 249 Mich. 474, 229 N. W. 465 (1930); In re Jarvis' Will, 152 Misc. 252, 273 N. Y. S. 294 (1934).

[5] Fidelity & Columbia Trust Co. v. Lucas, (C. C. A. 6th, 1933) 66 F. (2d) 116; In re Corlies' Will, 150 Misc. 596, 269 N. Y. S. 890 (1934), affirmed 242 App. Div. 703, 273 N. Y. S. 412 (1934); Bierly's Executor & Trustee v. Nelson, 228 Ky. 116, 14 S. W. (2d) 201 (1929).

[6] "So long as an interest remains defeasible (1) the uncertainty thereby injected makes such interest not readily marketable; (2) a transfer of complete property requires the joinder not only of the owner of such interest but also of the interest which may defeat it; (3) the present unrestricted enjoyment of the full value of the thing is postponed." 3 PROPERTY RESTATEMENT, § 243, comment j (1940).

[7] 2 SIMES, FUTURE INTERESTS 41 (1936). That the courts look with disfavor upon defeasance, see In re Field's Estate, 266 Pa. 474, 109 A. 677 (1920); Kibbe v. City of Rochester, (D. C. N. Y. 1932) 57 F. (2d) 542; Meriden Trust & Safe Deposit Co. v. Squire, 92 Conn. 440, 103 A. 269 (1918).

[8] Williams v. Williams, 167 Tenn. 26, 65 S. W. (2d) 561 (1934).

at or before the end of such described period and is unsurvived by issue at the time of his death." [9] The clause in testatrix' will "but if the said Malinda . . . shall die before she attains the full age of twenty-one years without having been married" makes available an intermediate date to which Malinda's death can be referred under the above rule. This rule is established on the basis of the early indefeasibility it attains and—what is more important—on the theory that it embodies the intent most reasonably to be inferred from the use of such a limitation.[10] Thus it is apparent that the court in the principal case could have resorted to the use of rules of construction to reach a similar result. That it did not feel so inclined is evidence of the general tendency of the courts to decide problems of construction on a basis of pure intent whenever possible. Whether such a tendency is desirable may be open to question in cases where no clear indication of intent appears.[11]

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[9] 3 PROPERTY RESTATEMENT, § 268 (1940).
[10] 3 PROPERTY RESTATEMENT, § 268, comment a (1940).
[11] GRAY, THE NATURE AND SOURCES OF THE LAW 317 (1909).