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WILLS - LAPSE - CONSTRUCTION - EXECUTION OF CODICIL AFTER DEATH OF LEGATEE AS INDICATING INTENT TO AVOID LAPSE

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WILLS — LAPSE — CONSTRUCTION — EXECUTION OF CODICIL AFTER DEATH OF LEGATEE AS INDICATING INTENT TO AVOID LAPSE — Testator provided in his will for the division of his real and personal estate into twenty-five equal parts, one part for each of his nieces and nephews. One of the nephews predeceased testator by seven months, leaving a minor son. Thereafter testator executed a codicil expressing his desire that a nephew by marriage be a distributee of his estate, and directing that his personal and real estate be divided into twenty-six equal parts in order to include the new distributee. In proceedings brought for construction of the will, *held*, that the legacy to the nephew who predeceased testator did not lapse, but that it vested in deceased nephew's minor son. *Ex Parte Newton*, 183 S. C. 379, 191 S. E. 59 (1937).

At common law a legacy or devise lapses if the legatee or devisee dies during the lifetime of the testator, and the property passes into the residue or descends to the testator's heirs at law under the rules of intestate distribution.[1] Statutes commonly change this rule in respect to certain classes of beneficiaries.[2] In the absence of an applicable statute, however, the testator may prevent the operation of the rules concerning lapse by any language which shows his intention with sufficient certainty.[3] This is in accord with the generally accepted

[1] ROOD, WILLS, 2d ed., § 666 (1926); Brett v. Rigden, 1 Plowd. 340, 75 Eng. Rep. 516 (1568); Jackson v. Alsop, 67 Conn. 249, 34 A. 1106 (1896); Lawrence Nat. Bank v. Smoot, 145 Kan. 189, 64 P. (2d) 22 (1937); Mann v. Hyde, 71 Mich. 278, 39 N. W. 78 (1888); McKiernan v. Beardslee, 72 N. J. Eq. 283, 73 A. 815 (1906); Will of Johnson, 199 Wis. 154, 225 N. W. 818 (1929).

A legacy which is given upon a valuable consideration, as in payment of a debt of testator, does not lapse at common law. Turner v. Martin, 7 DeG. M. & G. 429, 44 Eng. Rep. 168 (1857); Ward v. Bush, 59 N. J. Eq. 144, 45 A. 534 (1900); McNeal v. Pierce, 73 Ohio St. 7, 75 N. E. 938 (1905). This is a recognized exception to the rule as above stated, and is justified on the theory that it is in accordance with the testator's intention. See, however, 2 PAGE, WILLS, 2d ed., § 1245 (1926).

[2] 2 PAGE, WILLS, 2d ed., § 1249 (1926); 3 WOERNER, LAW OF AMERICAN ADMINISTRATION, 3d ed., § 435 (1923).

[3] 3 WOERNER, LAW OF AMERICAN ADMINISTRATION, 3d ed., § 434 (1923); Davis' Heirs v. Taul, 6 Dana (36 Ky.) 51 (1837); Farnsworth v. Whiting, 102 Me. 296, 66 A. 831 (1906); Livingston v. Safe Deposit & Trust Co., 157 Md. 492, 146 A. 432 (1929). It is to be understood that the intention of the testator must be to appoint a substituted beneficiary who is living at the testator's death. See infra, note 5.

Testator intended to devise land to his daughter-in-law, but by agreement of all concerned, he devised it to his son-in-law, who in turn executed notes payable to the daughter-in-law after testator's death. Son-in-law predeceased testator. Held, that the devise did not lapse because it was in the nature of a discharge of testator's obligation under the agreement with his son-in-law. Ballard v. Camplin, 161 Ind. 16, 67 N. E. 505 (1903).

A will gave testator's wife and niece a life estate in property which on their deaths was to go to testator's brothers and sisters. The wife predeceased testator. Held, that the legacies did not lapse, since the testator intended that his brothers and sisters should take as substituted beneficiaries upon the respective deaths of his wife and niece, whether such deaths should occur prior or subsequent to that of testator. Philbert v. Campbell, 317 Mo. 556, 296 S. W. 1001 (1927). Under the statute of descents and distributions, however, the same result would have obtained.

principle that the expressed intention of the testator prevails over all rules of construction, provided it is not inconsistent with the rules of law.[4] In determining what is a sufficient manifestation of intention to avoid lapse, the courts are guided by certain definite criteria. It is said, for example, that a simple declaration in a will that the bequest or devise shall not lapse does not ipso facto prevent such lapse, but that such a declaration is sufficient if some other recipient is indicated.[5] Although the technical rule requiring a mention of heirs to pass a fee simple estate is no longer adhered to, yet a bequest or devise to one "and his heirs," or "his heirs and assigns," or "his administrators or executors" lapses upon the death of the legatee or devisee during the testator's lifetime,[6] unless the will indicates an intent that the phrase shall effect a substitutionary gift.[7]

[4] Estate of Hoover, 16 Cal. App. (2d) 529, 60 P. (2d) 1010 (1936); Hartwick v. Heberling, 364 Ill. 523, 4 N. E. (2d) 965 (1936); Old Colony Trust Co. v. Richardson, (Mass. 1937) 7 N. E. (2d) 432; Will of Loewenbach, 222 Wis. 467, 269 N. W. 323 (1936).

[5] 3 WOERNER, LAW OF AMERICAN ADMINISTRATION, 3d ed., § 434, p. 1467, note 3 (1923), where the reason given is that "the only mode of excluding the title of him whom the law constitutes the successor, in the absence of testamentary disposition, is to give it to some one else."

In Re Smith, 115 L. T. R. (Ct. App.) 161 at 162 (1916), the following clause in a will is held to avoid a lapse: "I declare that no legacy given by this my will shall lapse by reason of the death of the legatee before me, but that the same shall take effect as if the death of such legatee had happened immediately after my death, and such legacy shall accordingly pass to the legal personal representative of such deceased legatee." A similar clause was likewise upheld in Re Morris, 115 L. T. R. (Ch.) 915 (1916).

[6] Brett v. Rigden, 1 Plowd. 340, 75 Eng. Rep. 516 (1568); Doe ex dem. Turner v. Kett, 4 T. R. 601, 100 Eng. Rep. 1198 (1792); Gibbons v. Ward, 115 Ark. 184, 171 S. W. 90 (1914); Jackson v. Alsop, 67 Conn. 249, 34 A. 1106 (1896); Lawrence Nat. Bank v. Smoot, 145 Kan. 189, 64 P. (2d) 22 (1937); Farnsworth v. Whiting, 102 Me. 296, 66 A. 831 (1906); In re Spier's Estate, 224 Mich. 658, 195 N. W. 430 (1923); Kutschinski v. Bourginynon, 102 N. J. Eq. 89, 139 A. 596 (1927); Matter of Tamargo, 220 N. Y. 225, 115 N. E. 462 (1917); Evers v. Williams, 43 Ohio App. 555, 184 N. E. 19 (1933); Estate of Judson, 168 Wis. 361, 170 N. W. 254 (1919).

[7] In Gittings v. M'Dermott, 2 My. & K. 69, 39 Eng. Rep. 870 (1834), the will gave bequests to testator's two sisters "and upon their deaths respectively, to their heirs."

In Wettach v. Horn, 201 Pa. St. 201, 50 A. 1001 (1902), the testator used the words "heirs at law" in the sense of "children" in earlier portions of the will as words of purchase, thus giving to the word "heirs" the same meaning throughout the instrument.

In Re Burrows, 139 Misc. 802, 250 N. Y. S. 257 (1931), the court holds that a bequest to a named legatee, "her heirs and assigns," did not lapse, stressing the intent of the testator as gathered from the will and subsequent codicil, and pointing out that the word "heirs" in a will of personalty is not a term of art as it is in a devise of real estate.

In Re Murphy, 165 App. Div. 783, 151 N. Y. S. 529 (1915), where the bequest was to Charles Ritchie, "absolutely and in fee to his heirs, executors, administrators and assigns, according to the nature of the property," the court holds that it

The reason consistently advanced for that result is that such words are not words of purchase, description, or substitution, but are words of limitation defining the extent and duration of the gift.[8] On the other hand, a bequest or devise to one "or his heirs" is held to prevent a lapse, since such words show an intent on the part of the testator to substitute the heirs of the legatee in case the latter should predecease him.[9] Mere republication of the will after the death of a legatee does not operate to alter the rules concerning lapse.[10] While it is generally said that the execution of a codicil republishing or confirming a will makes the will speak from the date of the codicil,[11] this rule is not applicable for all purposes,[12] and consequently there are numerous decisions to the effect that such a codicil does not revive a legacy which has lapsed intermediate the execution of the will and the codicil.[13] The cases which hold to the contrary, of which the principal case is an example, may all be justified on the basis of the testator's intention as evidenced by the language of the will and codicil and by

was testator's intention that if the named legatee predeceased him, the legatee's heirs, executor or administrator should take, the heirs taking the real property and the executor or administrator, the personal, for the benefit of the next of kin, which would be "according to the nature of the property."

[8] 78 A. L. R. 992 at 994 (1932), and cases cited supra, note 6.

[9] 3 WOERNER, LAW OF AMERICAN ADMINISTRATION, 3d ed., § 434 (1923); Gilmor's Estate, 154 Pa. St. 523, 24 A. 614 (1893), where it is said also that courts will sometimes transpose the clauses of a will and construe "or" to be "and" and "and" to be "or," but only when absolutely necessary to support the evident meaning of the testator. There is language to the same effect in Jackson v. Alsop, 67 Conn. 249, 34 A. 1106 (1896).

In Leary v. Liberty Trust Co., 272 Mass. 1, 171 N. E. 828 (1930), the will provided for a gift over "to my said brother James if he be then living, and in event of his death to his, said James' estate." Holding that the legacy did not lapse because the words were words of purchase, the court says (272 Mass. 1 at 4): "To hold that the words 'James' estate' meant the amount of the estate James was to take would ignore the words 'if he be then living and in event of his death.' These words are disjunctive and are sufficient to prevent a lapse." But compare Re Glass, 164 Cal. 765 at 767, 130 P. 868 (1913), where the court holds that under a similar phrase in the will the legacy did lapse. "Thomas Glass' estate is not a person or entity which can take under the will." See also Gardner v. Anderson, 114 Kan. 778, 227 P. 743 (1923), 116 Kan. 431, 227 P. 743 (1924).

[10] Campbell v. Jamison, 8 Pa. St. 498 (1848).

[11] 1 WOERNER, LAW OF AMERICAN ADMINISTRATION, 3d ed., § 56 (1923); 135 L. T. 32 (1913).

[12] Gibbons v. Ward, 115 Ark. 184 at 191, 171 S. W. 90 (1914); Estate of Matthews, 176 Cal. 576 at 582, 169 P. 233 (1917); Dunn v. Kearney, 288 Ill. 49 at 54, 123 N. E. 105 (1919). If a general legacy is adeemed by satisfaction, or a specific legacy by alienation or destruction, such ademption is not prevented by republication by a later codicil. 1 PAGE, WILLS, 2d ed., § 519 (1926).

[13] Simpson v. Hornby, Gilb. Rep. 115, 25 Eng. Rep. 80 (1716); Doe ex dem. Turner v. Kett, 4 T. R. 601, 100 Eng. Rep. 1198 (1792); Gibbons v. Ward, 115 Ark. 184, 171 S. W. 90 (1914); Estate of Matthews, 176 Cal. 576, 169 P. 233 (1917); Dunn v. Kearney, 228 Ill. 49, 123 N. E. 105 (1919).

the circumstances surrounding the execution thereof.[14] The conclusion in the instant case is supported by an earlier South Carolina decision,[15] the leading facts of which coincide closely with those of *Ex Parte Newton*. In each instance it is clear that the testator's purpose was to dispose of all his property in equal shares; in each the legacy would have lapsed but for the codicil; and while in the earlier case the codicil merely recited the fact of death of one of the three legatees and appointed a new executor to fill his place, in *Ex Parte Newton* there are the additional circumstances that the testator in his codicil insisted upon equal shares and increased the number thereof by one in order to provide for an additional legatee. It is not to be disputed that the rules of lapse often operate to thwart a testator's wishes in the distribution of his estate.[16] In view of the desire of the courts to avoid a partial intestacy wherever possible,[17] and to effectuate the testator's purposes to an extent which is consistent with a reasonable interpretation of his language, the decision in the instant case appears to be both justifiable and commendable.[18]

Bertram H. Lebeis

In Estate of Matthews, supra, the court holds that when the will was republished by the codicil, the legacy to the deceased daughter was void as being an attempted gift to a dead person. Judge Shaw in a vigorous dissent urges that when the legatee died, the anti-lapse statute operated to transfer the legacy to the deceased legatee's son, and that the codicil only reaffirmed what had taken effect by law. For a criticism of the majority ruling, see notes in 31 HARV. L. REV. 901 (1918); 16 MICH. L. REV. 429 (1918).

[14] Davis' Heirs v. Taul, 6 Dana (36 Ky.) 51 (1837); Re Burrows, 139 Misc. 802, 250 N. Y. S. 257 (1931), summarized supra note 7; Dent v. Dent, 113 S. C. 416, 102 S. E. 715 (1919).

[15] Dent v. Dent, 113 S. C. 416, 102 S. E. 715 (1919).

[16] 2 PAGE, WILLS, 2d ed., § 1245 (1926).

[17] In re Greenwald's Estate, (Cal. App. 1937) 65 P. (2d) 70; Brown v. Coxson, 118 N. J. Eq. 114, 177 A. 551 (1935); In re Walter's Estate, 270 N. Y. 201, 200 N. E. 786 (1936).

[18] In the principal case, the court says (191 S. E. at 65): "To hold he died intestate as to the 1/26 would do away with the real scheme and intention of the maker, divide his property so that a 1/26 specifically set apart as one share must be again divided into 1/130 to 1/204; or to give to each, instead of an equal 1/26 part, varying portions from 3/65 to 9/204, and divide his estate in part per capita, as he had declared his intention and affection, and in part per stirpes under the statute of distribution. Such certainly was not his intention."