Maryland Law Review

Volume 22 | Issue 2 Article 6

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Recommended Citation

Morton A. Sachs, *Survival As An Implied Condition In A Contingent Gift To A Class - The Demill Rule Revisited - Second Bank-State Street Trust Company v. Weston*, 22 Md. L. Rev. 146 (1962)
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Survival As An Implied Condition In A Contingent Gift To A Class — The Demill Rule Revisited

Second Bank-State Street Trust Company v. Weston[1]

Testatrix, a domiciliary of Maryland, gave the residue of her estate in trust to her three daughters for life, and upon the death of the last of the three daughters to die, the trust fund was to be distributed among the issue of the testatrix's daughters *per stirpes*, but in the event of the death of all three daughters "leaving no issue surviving them," the trust fund was to go to the testatrix's "heirs at law." Subsequent to testatrix's death in 1911 all three daughters died without surviving issue. At the death in 1958 of the last surviving daughter a problem arose as

[1] ... Mass. ..., 174 N.E. 2d 763 (1961).

to the proper construction of the alternative remainder gift to the "heirs at law." The question presented was whether the heirs were to be determined as of the testatrix's death in 1911 or as of the death of the last surviving life tenant in 1958.

Applying Maryland law, the Supreme Judicial Court of Massachusetts concluded that the rule of *Demill v. Reid*[2] was controlling and, consequently, distribution was decreed to the heirs at law of the testatrix determined as of 1958. The Court, in referring to the *Demill* case as "an obscure and confusing decision,"[3] commented that the Maryland Court of Appeals, in recent years, has made substantial efforts to avoid application of the doctrine first announced therein, and that there are "indications that the rule may eventually be wholly disregarded or abandoned,"[4] but nevertheless decided it remains the existing rule in Maryland.

The rule declared in the *Demill* case is that "[w]here there is an ultimate limitation upon a contingency to a class of persons plainly described, and there are persons answering the description *in esse* when the contingency happens, they alone can take."[5] Stated another way and as applied in the instant case, the rule is that where there is a contingent remainder to a person or a class and an alternative contingent remainder to a class, in the event that the first remainder fails, the members of the class taking the alternative remainder will be determined as of the time of the failure of the first remainder, *i.e.*, an implied condition precedent of survivorship to the happening of the contingency will be raised. The effect of the rule is that the class of takers does not open until the happening of the contingency upon which the first remainder is limited, and then it closes immediately with the gift vesting in those members who have survived to that point. If possible takers were in being at the time the alternative contingent remainders[5a] were created, but failed to survive to the occurrence of the contingency, their heirs take nothing through them and are cut off. Only those persons answering the class description who survive to the happening of the contingency will be held to have had a trans-

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[2] 71 Md. 175, 17 A. 1014 (1889).

[3] *Supra*, n. 1, 767.

[4] *Supra*, n. 1, 769.

[5] *Supra*, n. 2, 191.

[5a] Sometimes called contingent remainders with a double aspect.

missible interest between the time of testator's death and the time of vesting in possession.[6]

The *Demill* rule is a rule of construction only.[7] As with all rules of construction, it has binding force only when the testator has failed to clearly indicate in his will the time at which class members of the alternative contingent remainder are to be determined. The intent of the testator remains supreme.[8] As expressed by Judge Delaplaine in *Chism v. Reese*:[9]

> "The cardinal rule for testamentary construction is that the intention of the testator must be gathered from the language of the entire will, particularly from the clause in dispute, read in the light of the surrounding circumstances at the time the will was made. The intention of the testator will be carried out whenever it can be done without violence to the language employed, unless it conflicts with some established rule of law."[10]

Since in the instant case testatrix used the term "heirs at law" without qualification by limiting words sufficient to indicate her intent as to the time of determination of the heirs,[11] *e.g.*, "to my then heirs at law," or "to my surviving heirs at law," the Court felt constrained to give full force and effect to the rule first announced in the *Demill* case.

The rule of the *Demill* case has been severely criticized over the years.[12] Critics have questioned the propriety of a court superimposing a second contingency, *i.e.*, implied survivorship to the happening of the contingency, where

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[6] Reno, *Alienability and Transmissibility of Future Interests in Maryland*, 2 Md. L. Rev. 89, 116 (1938); Reno, *Further Developments as to the Alienability and Transmissibility of Future Interests in Maryland*, 15 Md. L. Rev. 193, 212 (1955).

[7] Boynton v. Barton, 192 Md. 582, 588-592, 64 A. 2d 750 (1949); Carter, *Recent Developments Relating to Devolution and Descent of Future Interests in Maryland*, 11 Md. L. Rev. 187, 213-220 (1950); Reno, *supra*, n. 6, 1955 article, pp. 219-220.

[8] Grace v. Thompson, 169 Md. 653, 658, 182 A. 573 (1936).

[9] 190 Md. 311, 316, 58 A. 2d 643 (1948).

[10] To the same effect: Marty v. First Nat'l. Bk. of Balto., 209 Md. 210, 120 A. 2d 841 (1956); Jones v. Holloway, 183 Md. 40, 36 A. 2d 551, 152 A.L.R. 933 (1944); Robinson v. Mercantile Trust Co., 180 Md. 336, 24 A. 2d 299, 138 A.L.R. 1427 (1942); Gent v. Kelbaugh, 179 Md. 343, 18 A. 2d 595 (1941); Grace v. Thompson, *supra*, n. 8, 657-658; Hutton v. Safe Dep. & Trust Co., 150 Md. 539, 554, 133 A. 308 (1926); West v. Sellmayer, 150 Md. 478, 133 A. 333 (1926).

[11] Boynton v. Barton, 192 Md. 582, 64 A. 2d 750 (1949).

[12] 3 POWELL, REAL PROPERTY (1952) 223; Reno, *supra*, n. 6 (1938 art.) 117-118; Reno, *supra*, n. 6 (1955 art.) 214-216, Note, *Implication of Survivorship in Contingent Gifts to a Class*, 9 Md. L. Rev. 367 (1948).

the creator only imposed one, *i.e.*, that the substitutional gift to a class will take effect only if the primary gift fails.[13] MILLER has pointed out that the result of the rule sometimes is that children of deceased children are excluded from their parent's share, "an unfortunate result, based upon a very technical rule."[14] When one considers that normally the objects of a testator's bounty are those persons he knows and that, by using a group designation, he has indicated his intent to benefit as many as possible, it seems questionable to limit the ultimate takers to those members of the class in being at the happening of the contingency, rather than to allow both those class members in existence at testator's death as well as afterborn members to share. POWELL, in referring to the rule, has stated that "no satisfactory independent rationale for it has been discovered."[15] The only arguments presented in favor of the rule are that "it is not to be supposed that the testator intended that the members of the class should be fixed before it is determined that there is to be a bequest,"[16] and that where a gift to primary remaindermen is conditioned on survival, it is unlikely that the testator would intend the secondary takers to be determined without survival.[17]

Despite frequently expressed doubts as to the desirability of the *Demill* doctrine, many jurisdictions still support it,[18] while others have refused to do so.[19] Had the present case been decided under Massachusetts rather than Maryland law, the result would most likely have been different, as Massachusetts is considered among those states

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[13] Note, *id.*, 372 ff.

[14] MILLER, CONSTRUCTION OF WILLS (1927) § 237, p. 676, n. 4.

[15] POWELL, supra, n. 12.

[16] In re Savela's Estate, 138 Minn. 93, 163 N.W. 1029, 1030 (1917).

[17] In re Power's Will, 210 N.Y.S. 2d 639, 27 Misc. 2d 179 (1960); In re Wiltsie's Will, 203 N.Y.S. 2d 298, 24 Misc. 2d 398 (1960); In re Sayre's Will, 1 A.D. 2d 475, 151 N.Y.S. 2d 506 (1956).

[18] Evans v. Safe Deposit & Trust Co., 190 Md. 332, 58 A. 2d 649 (1948); Cowman v. Classen, 156 Md. 428, 144 A. 367 (1929); Schapiro v. Howard, 113 Md. 360, 78 A. 58 (1910); In re Schmidt's Will, 256 Minn. 64, 97 N.W. 2d 441 (1959); Coley v. Lowen, 357 Mo. 762, 211 S.W. 2d 18 (1948); In re Maxwell's Will, 28 Misc. 2d 913, 213 N.Y.S. 2d 415 (1961); In re Waessel's Will, 27 Misc. 2d 694, 210 N.Y.S. 2d 647 (1960); Jones v. Holland, 223 S.C. 500, 77 S.E. 2d 202 (1953).

[19] Cox v. Danehower, 211 Ark. 696, 202 S.W. 2d 200 (1947); Kimberly v. New Haven Bank N.B.A., 144 Conn. 107, 127 A. 2d 817, 821 (1956); Close v. Benham, 97 Conn. 102, 115 A. 626 (1921); Beckley v. Leffingwell, 57 Conn. 163, 17 A. 766 (1889); LeSourd v. Leinweber, 412 Ill. 100, 105 N.E. 2d 722 (1952); Himmel v. Himmel, 294 Ill. 557, 128 N.E. 641 (1920); Wilson v. Miller, 25 N.J. Super. 280, 96 A. 2d 283 (1953); Tuttle v. Woolworth, 62 N.J. Eq. 532, 50 A. 445 (1901); Davis v. Lynchburg National Bank & Trust Company, 198 Va. 14, 92 S.E. 2d 278 (1956).

which refuse to imply a condition precedent of survivorship unless the testator had indicated he so desired the imposition of this additional contingency.[20]

States which refuse to apply the *Demill* rule often apply in its stead the rule of the RESTATEMENT, PROPERTY.[21] Section 261 provides that:

> "In the limitation purporting to create a remainder, or an executory interest, the presence of a condition precedent, or of a defeasibility, dependent on other facts is not a material factor in determining the existence of the requirement of survival to the time of the fulfillment or elimination of such other condition precedent or defeasibility."[22]

To the same effect is Section 296(2):

> "From the fact that a class can increase in membership until a certain future date, no inference should be made that only such members of the class as survive to such future date become distributees."

Section 308, stating the approach which an increasing number of courts have adopted,[23] provides:

> "When a limitation is in favor of the 'heirs,' 'heirs of the body,' 'next of kin' or 'relatives' of a designated person, or in favor of other groups described by words of similar import, and the persons who come within the term employed to describe the conveyees are to be determined by a statute governing the intestate succession of property, then the statute is applied as of the death of the designated ancestor, *unless an intent of the conveyor to have the statute applied as of some other date is found from additional language or circumstances.*"[24]

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[20] Second Bank-State Street Trust Company v. Weston, ... Mass. ..., 174 N.E. 2d 763, 767 (1961).

[21] RESTATEMENT, PROPERTY (1940) §§ 261, 292(2), 308.

[22] Comment to § 261:
"The rule stated in this Section would be almost too obvious for statement, if it were not for the erroneous view, often expressed in cases concerning class gifts, that the members of the class necessarily remain subject to the condition precedent of survival so long as the ultimate ascertainment of the class is postponed by another defeasibility or condition precedent [of survivorship]. . . . "

[23] *Supra*, n. 19.

[24] For discussion, see: 57 Am. Jur. 846, WILLS, § 1279; American Law of Property (1952) § 22.60, pp. 434-435; 3 POWELL, REAL PROPERTY (1952) §§ 372, 375; SIMES AND SMITH, FUTURE INTERESTS (2d ed. 1956), § 734.

In essence, the view adopted by the RESTATEMENT is that survival is a question of construction in all types of gifts, rather than an implied condition precedent in an alternative gift to a class. If the RESTATEMENT does not directly deny the rule as to alternative remainders in *Demill v. Reid*, it seems to do so by implication.[25] Had the RESTATEMENT rule[26] been applied to the present case, those persons answering the class description of testatrix's "heirs" at the time of her death in 1911 would have comprised the class of takers at the happening of the contingency, *i.e.*, death of all daughters without surviving issue, since the testatrix did not indicate any intent to limit the takers only to those possible class members who survived to the time of distribution in 1958.

The Maryland Court of Appeals, while not expressly repudiating the *Demill* doctrine, nevertheless has gone to great lengths to avoid its application in cases where the result of applying the rule would have been an apparently unsatisfactory distribution in the eyes of the testator. It must be remembered that the rule is applied only to alternative contingent gifts to a class; it does not apply to an alternative contingent gift to designated individuals, *i.e.*, where the person to take is certain. It is well settled in Maryland that all contingent estates of inheritance in an individual are transmissible by descent, and are devisable and assignable.[27] Therefore, whenever the Court of Appeals has been able to construe an alternative contingent remainder clause as not referring to a class gift in the sense of Maryland's accepted definition of a class gift, *i.e.*, predicated on the intention of the testator to make a gift to "a body of persons uncertain in number at the time of the gift, to be ascertained at a future date," but rather as referring to designated individuals, the rule of the *Demill* case has been held inapplicable and survivorship to the time of the happening of the contingency is not implied.[28]

[25] Evans v. Safe Deposit & Trust Co., 190 Md. 332, 339, 58 A. 2d 649 (1948).

[26] *Supra*, ns. 21-22. Massachusetts has adopted the RESTATEMENT rule; Boston Safe Deposit and Trust Company v. Northey, 335 Mass. 201, 138 N.E. 2d 613 (1956).

[27] McClurg v. Myers, 129 Md. 112, 121, 98 A. 491 (1916); Fisher v. Wagner, 109 Md. 243, 249, 71 A. 999 (1909); Buck v. Lantz, 49 Md. 439 (1878); Snively v. Beavans, 1 Md. 208 (1851); MILLER, CONSTRUCTION OF WILLS (1927) § 233; Reno, *Alienability and Transmissibility of Future Interests In Maryland*, 2 Md. L. Rev. 89, 114, 116 (1938); Reno, *Further Developments as to the Alienability and Transmissibility of Future Interests in Maryland*, 15 Md. L. Rev. 193, 214 (1955).

[28] Davis v. Mercantile Trust Co., 206 Md. 278, 111 A. 2d 602 (1955); Boynton v. Barton, 192 Md. 582, 590, 64 A. 2d 750 (1949); Chism v. Reese, 190 Md. 311, 58 A. 2d 643 (1948); Stahl v. Emery, 147 Md. 123, 126, 127 A.

In *Hammond v. Piper*[29] the alternative contingent remainder to testator's "other children" was construed as referring specifically to those children previously mentioned in the will, rather than to a class. The clause "to revert" to the testator's "grandchildren, the issue of my sons Charles . . . and Francis" was held in *Chism v. Reese*[30] to mean to return to designated persons, and not to go to a future class. By thus avoiding the *Demill* requirement of a class gift, Maryland has permitted the children, issue, etc., of deceased class members to take their ancestor's share, thus more closely approximating the average testator's desire to distribute his property to the people he knows rather than only to those who survive to a future time. However, by terming the disputed clause a gift to individuals rather than to a class, only those persons designated, irrespective of whether they survive to a future time or not, will be permitted to share. Therefore, all afterborn persons will be cut off, even though they too would seemingly have been encompassed in the testator's thoughts when he used words which commonly indicate a class, *i.e.*, children, issue, etc.

Of the three possible constructions: (1) applying the *Demill* rule and permitting only those members of the class who survive to the happening of the contingency to share, (2) applying the RESTATEMENT rule and permitting all members of the class who are alive at testator's death as well as all afterborn members to take in the absence of a contrary intent by testator, and (3) seizing on particular words in order to convert what is ostensibly a class gift into a gift to designated individuals, and then permitting only those designated persons to share, regardless of survivorship, the RESTATEMENT view seems to more reasonably reflect what the average testator would have in mind. It fulfills the usual desires of a testator when he makes a gift to what is commonly thought of as a class by distributing the property both to those people whom he knew as well as benefiting the entire membership of the group designated. The *Demill* rule, by permitting only a limited group of possible class members to take, dismally fails in carrying out either of the aforementioned intentions of an ordinary testator who makes a gift to a class. The approach of more recent Maryland decisions,

760 (1925); MILLER, CONSTRUCTION OF WILLS (1927) § 67, pp. 185, 187; RESTATEMENT, PROPERTY (1940) § 279, p. 1445; 61 A.L.R. 2d 212 (1958), a thorough discussion of what constitutes a gift to a class.

[29] 185 Md. 314, 318-319, 44 A. 2d 756 (1945).

[30] *Supra*, n. 28.

as evidenced in the *Hammond* and *Chism* cases, in seizing upon particular words to convert what seems to have been intended as class gifts into gifts to individuals, while satisfying a testator's common desire to distribute his property to those people he knows, fails to satisfy the second desire usually present when he makes a "class-like" gift, *i.e.*, to benefit as many members of the class as possible namely the afterborn.

The *Hammond* and *Chism* approach has certainly stripped the *Demill* rule of much of its vitality. The rule itself has not been applied vigorously in this state, as evidenced by Judge Henderson's comment in *Boynton v. Barton*:

> "Though *Demill v. Reid* has frequently been cited by this court, the result in that case has seldom been reached in subsequent cases."[31]

Despite the inroads on the doctrine of the *Demill* case made by the *Hammond* and *Chism* decisions, the Court in *Evans v. Safe Deposit and Trust*[32] refused to hold that it had been modified or changed and applied it to an alternative contingent remainder to "children" of the grantor, "the child or children of any deceased child . . . to take and have the part or share to which the parent, if living, would have been entitled." It is noteworthy, however, that under the facts of the *Evans* case, the ultimate course of descent was to the same persons who would have taken had *Demill* not been followed. Although taking cognizance of the shift away from the *Demill* rule, at least in emphasis, the Massachusetts Court in the principal case concluded that "It cannot now be said, however, in view of *Evans v. Safe Deposit and Trust Company*, . . . that the rule no longer exists."[33] It is also of interest that Justice Cutter, in writing the Massachusetts opinion, impliedly cautioned all Maryland lawyers with the following comment:

> "The parties have presented to us a question of interpretation of somewhat conflicting decisions of a court of last resort of a sister State. We cannot predict what treatment the Maryland court will give to the Demill rule when next confronted with its application."[34]

MORTON A. SACHS

[31] 192 Md. 582, 590, 64 A. 2d 750 (1949).
[32] 190 Md. 332, 58 A. 2d 649 (1948).
[33] ... Mass. ..., 174 N.E. 2d 767, 769 (1961).
[34] *Ibid.*