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Distribution To "Issue" - Clarke v. Clarke

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Distribution To "Issue"

Clarke v. Clarke[1]

Testator by will, which was probated in 1913, left his estate in trust for his son Ernest Clarke for life and *"from and after the death of my son * * * then to his issue, absolutely."*[2] Ernest Clarke died in 1958 and was survived by two sons: Thomas with no children, and Robert Fulton with one child — Robert Fulton Clarke, Jr., an infant.[3] When the trust estate was ready for dis-

[1] 222 Md. 153, 159 A. 2d 362 (1960).

[2] *Id.*, 155.

[3] In 1950, while the life tenant was still living, the infant by his mother (the divorced wife of Robert Fulton Clarke), brought suit for a declaration of his interest in the trust, for an accounting by the trustee and for protection against dissipation of the estate. The court held that "issue" meant all descendants and the infant had a potential future interest in the corpus but all other questions including distribution were "reserved for future determination as the need may arise." See In re Clarke's Will, 198 Md. 266, 274, 81 A. 2d 640 (1951).

tribution, Robert Fulton Clarke, Jr., claimed that he was entitled to share the estate equally and concurrently with his uncle and father. The chancellor held that the uncle and father took in equal shares to the exclusion of the infant because the testator had used "issue" as the equivalent of "children." Robert Fulton Clarke, Jr., appealed.

On appeal all parties agreed that "issue" was used as a word of purchase,[4] indicating the class who would take at the death of the life tenant, and that no evidence of the testator's intent by the use of the word "issue" could be found in the will or in the evidence.[5] The Court of Appeals accepted the infant appellant's contention that the word "issue" was used by the testator to mean "descendants,"[6] but held that the descendants of different generations did not take equally; the younger generation took only as representatives of deceased ancestors, and therefore a child could not compete with a living parent. The Court expressly adopted the rule of the Restatement of Property that:

> "When a conveyance creates a class gift by a limitation in favor of a group described as the 'issue of B,' or as the 'descendants of B' . . . then, unless a contrary intent . . . is found . . . distribution is made to such members of the class as would take, and in such shares as they would receive, under the applicable law of intestate succession if B had died intestate. . . ."[7]

The appellant argued that the case was controlled by the English rule that descendants of whatever generation take *per capita,* which he claimed the Maryland cases long ago made the law of the State. This position was sustained by Judge Prescott in a dissent in which Judge Horney concurred. The reasoning of the dissent was that the English rule of construction, that a gift to "de-

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[4] 222 Md. 153, 156. The Rule in Shelley's case would not apply because the will was executed after the abolition of the Rule by MD. LAWS 1912. Ch. 144, 8 MD. CODE (1957) Art. 93, § 366. Furthermore, the estate of the life tenant was equitable while those of the remaindermen were legal; it is fundamental that for the Rule to apply both the estate of the life tenant and the remainderman must be of the same quality. Cowman v. Classen, 156 Md. 428, 435-36, 144 A. 367 (1929).

[5] *Supra,* n. 1, 157.

[6] *Id.,* 157. It is well established in Maryland and by the weight of authority in this country that issue embraces all lineal descendants. For the rule in other jurisdictions see annotations in 2 A.L.R. 930 (1919), 5 A.L.R. 195 (1920) and 117 A.L.R. 692 (1938).

[7] *Id.,* 157-158. See 3 RESTATEMENT, PROPERTY (1940) § 303. The Restatement Rule is also called the Massachusetts Rule.

scendants" simply is distributed *per capita,* was well established in Maryland and encompassed the instant case,[8] notwithstanding the fact that this meant a child would share equally with a living parent. Judge Prescott acknowledged that the Restatement rule might be the better one, but stated that if it was desirable to reverse the rule in Maryland the appropriate agency to do so was the Legislature and not the Courts.[9]

Judge Hammond, for the Court, did not deny that the English rule had been applied in Maryland. Instead, he maintained that the rule was not binding in the instant situation because the basis of the decision in each case which had referred to the English rule had been the intent of the conveyor as disclosed by the instrument.[10] On the other hand, the cases cited by Judge Hammond as approving the Restatement rule do not enlist the rule in the context of a case where a child was competing with a living parent for a share of a class gift and the intention of the conveyor was not apparent.[11] Thus, in *Henderson v. Henderson*[12] *and Thomas v. Safe-Dep. & Tr. Co.,*[13] there was no contest between a child and a living parent; in *Mazziotte v. Safe-Dep. & Tr. Co.*[14] the testator directed that the trust be distributed *per capita;* and in *Patchell v. Groom,*[15] *Ballenger v. McMillan,*[16] and *Robinson v. Mercantile,*[17] the testator directed that the gift was to be distributed *"per stirpes* and not *per capita."* The latter two cases, with *Mazziotte v. Safe-Dep. & Tr. Co.,* were cited by Judge

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[8] *Id.,* 168-172.

[9] In 1921 New York enacted the following statute: "If a person dying after this section takes effect shall devise or bequeath any present or future interest in real or personal property to the issue of himself or another, such issue shall, if in equal degree of consanquinity to their common ancestor, take per capita, but if in unequal degree, per stirpes, unless a contrary intent is expressed in the will." 13 McKINNEY'S CONS. LAWS OF N.Y. ANN. (1949), § 47-a.

[10] In McPherson v. Snowden, 19 Md. 197 (1862), a concession was made that "issue" meant "children"; in Alexander v. Keplinger, 62 Md. 7 (1884), the will directed the distribution of the corpus "equally" and "share and share alike" among the issue; in Levering v. Orrick, 97 Md. 139, 54 A. 620 (1903), the will expressly ordered a per capita distribution among the descendants; and in Requardt v. Safe Deposit Co., 143 Md. 431, 122 A. 526 (1923), the will declared that the "corpus be divided equally among their surviving children."

[11] See dissent, 222 Md. 153, 174-175, 159 A. 2d 362 (1960).

[12] 64 Md. 185, 1 A. 72 (1885).

[13] 73 Md. 451, 21 A. 367 (1891).

[14] 180 Md. 48, 23 A. 2d 4 (1941).

[15] 185 Md. 10, 43 A. 2d 32 (1945).

[16] 205 Md. 94, 106 A. 2d 109 (1954).

[17] 214 Md. 30, 132 A. 2d 841 (1957).

Hammond as indicating "approval of the Restatement rule . . . at least implicitly."[18]

The cases cited merely beg the question. The real reason behind the Court's adoption of the Restatement rule, apparently, is that the rationale of the English cases which form the basis of the English rule is anachronistic. When the English rule gained its vogue the share of a member of a class who died before the testator passed to the other members of the class and not to his heirs or legal representatives.[19] As pointed out by Professor Page:

> "The courts felt that they had no choice between permitting grandchildren to share equally with their parents and excluding them entirely, although they conceded that testator probably intended grandchildren whose parents were dead to take their parents' shares, and grandchildren whose parents were alive, to take nothing. Being unable to give effect to testator's entire intention they preferred not to disinherit the grandchildren whose parents had died before testator, even at the expense of permitting the other grandchildren to take equally with their parents."[20]

Today statutes preventing the lapse obviate this result.[21] Now the courts by restricting "issue" to the first generation and distributing *per capita*, with representation if any of the first generation have died after the will was made and before the testator died, can "reach the result the English courts wished to reach but could not."[22] And the current trend, as observed by both the Court and the dissent, is in favor of the Restatement rule.[23]

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[18] *Supra*, n. 11, 164.

[19] *Ibid.*

[20] *Id.*, 164-165, quoting 3 PAGE, WILLS, (Lifetime ed. 1941) § 1079.

[21] In Maryland see 8 MD. CODE (1957) Art. 93, § 355.

[22] 222 Md. 153, 165, 159 A. 2d 362 (1960), quoting 3 PAGE, WILLS (Lifetime ed. 1941) § 1079.

[23] *Id.*, 165, 176. In England the rule of the Restatement was adopted as early as 1856. In Robinson v. Sykes, 23 Beav. 40, 53 Eng. Rep. 16 (Rolls Ct. 1856), by a settlement, a trust fund was settled after the death of the husband and wife upon the children equally who should survive them. The trust provided if any child should die in the life of the husband and wife, and leaving "issue" then living, his share should go equally between the issue of such child, when and at such time as the respective shares of such child would have become due and payable. Held, that the "issue" of such "children" took per stirpes, and that the successive generations of "issue" took their respective shares by substitution, and not concurrently, so that grandchildren and great grandchildren could not take together as a class. See 34 HALSBURY'S LAWS OF ENGLAND (3rd ed. 1960) § 1070.

The dissent is an accurate recapitulation of the Maryland cases that have involved gifts to "issue" or "descendants." But, as pointed out by the majority opinion, in each Maryland decision in which the English rule was cited the conveyor disclosed his intention in the instrument,[24] and hence it was unnecessary for the Court to resort to a rule of construction to determine how the gift was to be distributed. It would seem then that the *Clarke* case presented the first instance where the English rule — that bequests to descendants simply are distributed per capita unless a contrary intent appears[25] — could have been properly invoked. Thus the Court was not bound by any prior decision, and its adoption of the Restatement rule was the better one because the reasons for the English rule, as stated by Professor Page, no longer existed.

It is submitted, however, that the English rule is obsolete for another reason in addition to the explanation offered by Professor Page. This other reason is that the rule was employed by the English courts for the purpose of creating joint tenancies, thus manifesting the common law presumption of joint tenancies.[26] In the leading English case of *Davenport v. Hanbury*,[27] involving the construction of the word "issue," the gift was to "Mary Davenport or her issue."[28] Mary Davenport died in the life of the testator leaving one child living, a son, and two grandchildren, the children of a deceased daughter. There were two questions: (1) whether the grandchildren were entitled with the son; and, if so, (2) whether they should take *per capita* or *per stirpes*.[29] The Master of the Rolls held that "issue" included the grandchildren; and as there were *"no words of severance,"*[30] nor anything to show that the testator intended a *per stirpes* distribution, the son and the children of the deceased daughter would take *per capita* as joint tenants.[31] A *per stirpes* distribution would not have excluded the grandchildren but it would have created a tenancy in common because the respective interests of the parties would not have been equal; the son

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[24] *Supra*, n. 10.

[25] See Levering v. Orrick, 97 Md. 139, 145, 54 A. 620 (1903).

[26] 2 TIFFANY, REAL PROPERTY (3rd ed. 1939) § 421. The common law favored joint tenancies because it lessened the feudal burdens of the tenants since only one suit and service was due from all the joint tenants.

[27] 3 Ves. Jr. 257, 30 Eng. Rep. 999 (Ch. 1796).

[28] *Id.*, 257.

[29] *Ibid.*

[30] *Id.*, 260.

[31] *Ibid.*

would have received one-half the estate and the grandchildren one-fourth of the estate each.[32]

The common law preference for joint tenancies which prompted the result of the *Davenport* case no longer prevails. Today, in fact, the courts do not favor joint tenancies.[33] In the *Clarke* case it would have been incongruous for the Court to have used a rule of construction which was formulated for the purpose of reaching a tenancy which the law no longer favors. It is more important for the courts to consider that when a testator uses "issue" or "descendants" without qualification, he almost certainly has no idea of the legal consequences which are wrought by his failure to use *per stirpes* or *per capita,* or words which have been held by the courts to have like effect.[34] The average testator probably would prefer his more immediate descendants to share in his estate in the same manner as prescribed by the statutes of descent, and he probably would think it fairer to have an equal distribution among the branches of his family.[35]

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[32] The English courts thought that the word "equally" indicated the testator's intention that the distributees should hold the estate as tenants in common. *Id.*, 259-260. In Maryland the word "equally" has been held to signify the testator's intention that there be a per capita distribution. See Alexander v. Keplinger, 62 Md. 7 (1884).

[33] See 5 MD. CODE (1957) Art. 50, § 9; Williams v. Dovell, 202 Md. 351, 358, 96 A. 2d 484 (1953).

[34] See Comment, *Wills-Construction-Meaning of "Issue" in Testamentary Gifts*, 37 Mich. L. Rev. 630, 632 (1939).

[35] See Schnebly, *Testamentary Gifts to "Issue"*, 35 Yale L.J. 571, 592 (1926).