Michigan Law Review

Volume 37 | Issue 4

1939

WILLS - CONSTRUCTION - MEANING OF "ISSUE" IN TESTAMENTARY GIFTS

Daniel Hodgman
University of Michigan Law School

WILLS — CONSTRUCTION — MEANING OF "ISSUE" IN TESTAMENTARY GIFTS — Two recent cases illustrate a trend in the judicial construction of the word "issue"[1] in wills which seems to be divergent from the view expressed in the older cases.

[1] This comment is concerned only with the word "issue" when used as a word of purchase and not as a word of limitation. The meaning of the word "issue" in the

In *Re Thompson's Estate*[2] there was a bequest to *A* and *B* for their lives and at the death of the survivor "one half thereof to the living issue of each daughter, if there then be such issue of each, whether of the first or succeeding generations." At the death of the survivor there were six children of *A* and two grandchildren, issue of living children, and there were two children of *B* and one grandchild, the issue of a living child. It was held that the property should be distributed among the living children and not per capita among all the living descendants of *A* and *B*.[3]

In *Dolbeare v. Dolbeare*[4] there was a bequest to "issue" to "take the share to which their mother would have been entitled had she been living." It was held, contrary to the older view, that "issue" although used in conjunction with the word "mother" did not mean "children," but rather meant "descendants."

I.

It seems to have been the English view that in a testamentary gift to the issue of *A*, all descendants of *A* should participate in the gift per capita.[5] The leading case presenting this construction is *Freeman v. Parsley*.[6] In that case there was a gift to certain tenants for life "but in case" of their decease "to be equally divided among the lawful issue of such deceased and in default of such issue then such shares to be equally divided among the survivors." The question to be decided was

phrase "death without issue" will not be discussed. Many other problems arise in connection with the construction of the word "issue" in wills or other instruments. For example, does the word embrace adopted children? See Friedman v. Andreson, 257 Mass. 107, 153 N. E. 337 (1926), and McCoy v. Lewis, 166 Okla. 245, 27 P. (2d) 350 (1933). Does the word "issue" mean "heirs"? See Newport Trust Co. v. Newton, 49 R. I. 93, 139 A. 793 (1928), and Connertin v. Concannon, 122 Ore. 387, 259 P. 290 (1927). Can the word "issue" be construed to mean "heirs of the body"? See Thomson v. Russell, 131 S. C. 527, 128 S. E. 421 (1925), and In re Mayhews Estate, 307 Pa. 84, 160 A. 724 (1932). Where the word "issue" is construed to mean a stirpital distribution, who are the stirpes? See 16 A. L. R. 15 at 150 (1922) and 78 A. L. R. 1385 at 1415 (1932). For exhaustive treatment of the subject generally, see 2 A. L. R. 930 (1919); 5 A. L. R. 195 (1920); 16 A. L. R. 15 (1922); 31 A. L. R. 799 (1924); 78 A. L. R. 1385 (1932); 83 A. L. R. 164 (1933); and PROPERTY RESTATEMENT (Tentative Draft No. 9, 1938), § 265.

[2] (Minn. 1938) 279 N. W. 574.

[3] It is difficult to determine whether the court placed its decision on the ground that it favored a per stirpes distribution over a per capita distribution, or whether it merely construed the word issue in that case to mean children. Either construction would support the decision and the court discusses both. The decision goes to some length in criticizing the per capita rule and refers to many cases preferring a per stirpes construction.

[4] (Conn. 1938) 199 A. 555.

[5] KALES, FUTURE INTERESTS, 2d ed., §§ 575-577 (1920); 2 A. L. R. 930 (1919); 5 A. L. R. 195 (1920).

[6] 3 Ves. Jr. 421, 30 Eng. Rep. 1085 (1797).

whether or not the children of surviving children, i. e., grandchildren, of the life tenant were to participate. Lord Loughborough, in deciding that the grandchildren should participate per capita with their living parents, stated:

> "In the common use of language as well as the application of the word 'issue' in wills and settlements it means all indefinitely. I very strongly suspect, that in applying that to this will I am not acting according to the intention: but I do not know, what enables me to control it. If a medium could be found between a total exclusion of the grand-children, and the admission of them to share with the parents, the nearest objects of the testator, that would be nearer the intention; as by letting in those, whose parents were deceased, to take the share, the parents, if living would have taken; but that construction would be setting up my own conjecture against the obvious sense of the words. . . . They are therefore all entitled."[7]

It was not urged by counsel in the case that the middle ground of a per stirpes construction might have been adopted.

Professor Kales favored the English common-law view.[8] He argued that the primary meaning of the word "issue" is "descendants to remote degree"; that to restrict it to mean only descendants who represent deceased ancestors is contrary to that meaning; and that it gives certainty to the law to adopt the primary meaning of words. Courts should not try to guess at the testator's probable intent. Mr. Willard Brooks of the Chicago bar in a reply to Professor Kales[9] criticized the per capita construction and argued that the proper view is to regard it not merely as a matter of adopting the primary meaning of a word, but rather of adopting a rule of construction which would get a normal result. It was his contention that a per stirpes distribution would reach a more normal result. Probably most testators never really think what the word actually means when they make their wills, so it is better to adopt a rule of construction which will effect the meaning they would probably adopt if they thought about it. Most testators would think of issue as the representatives of deceased ancestors. Such a construction is supported by the policy of the law in most statutes of descent.

Professor Schnebly discussed this subject in 1926[10] and was of the opinion that, although "the authorities generally hold that it must

[7] Ibid., 3 Ves. Jr. 421 at 423-424.

[8] Kales, "Meaning of the Word 'Issue' in Gifts to 'Issue,'" 6 ILL. L. REV. 217 (1911). Also see KALES, FUTURE INTERESTS, 2d ed., § 577 (1920).

[9] Brooks, "Meaning of the Word 'Issue' in Gifts to 'Issue'—Another View," 6 ILL. L. REV. 230 (1911).

[10] Schnebly, "Testamentary Gifts to Issue," 35 YALE L. J. 571 (1926).

be per capita, even though as a result children of living issue will take with their parents,"[11] nevertheless the modern tendency leans toward a prima facie construction in favor of a per stirpes division. A per stirpes construction is fairer. Usually a testator has not thought about the meaning of the word issue; hence, the courts should adopt that construction which will most nearly approximate the probable desires of the largest number of testators as to the effect of their gifts to "issue." A testator usually thinks of issue as a class and usually has in mind only the immediate descendants. The more remote the descendants the farther they are from his contemplation. Therefore it would not be probable that he would want great-grandchildren to share equally with their ancestors.

Other eminent authorities have criticized the rule of *Freeman v. Parsley*. The Massachusetts courts departed from it many years ago.[12] Justice Holmes adverted to it, saying: "The difficulty which was felt by Lord Loughborough, in *Freeman v. Parsley* in finding a medium between total exclusion of grandchildren and the admission of them to share with their parents, does not strike us as insuperable . . . . 'issue' is a word which lends itself very easily to the expression of representation."[13] In a later case the Massachusetts court flatly stated "that issue should include all lineal descendants, and that they should take *per stirpes*, unless from some other language of the will a contrary intention appears."[14] In New York, where the rule of *Freeman v. Parsley* has been followed, it is departed from on the slightest pretext.[15]

It is submitted that the overwhelming weight of authority since Professor Schnebly's article supports the view advanced by him and Mr. Willard Brooks, tends to depart from the rule of *Freeman v. Parsley* and to adopt a per stirpes construction rather than a per capita

[11] Ibid. at p. 592. It is the purpose of this comment to discuss the trend of authorities since Professor Schnebly's article.

[12] Dexter v. Inches, 147 Mass. 324, 17 N. E. 551 (1888).

[13] Ibid., 147 Mass. at 325.

[14] Jackson v. Jackson, 153 Mass. 374 at 378, 26 N. E. 1112 (1891).

[15] In re Park's Will, 158 Misc. 866, 286 N. Y. S. 798 (1936); Central Hanover Bank & Trust Co. v. Pell, 268 N. Y. 354, 197 N. E. 310 (1935). In the latter case, the court said (268 N. Y. at 358): "When the word 'issue' . . . is found in a formal legal document, with nothing in the text to modify it, it is entitled to its strict legal meaning. To this course the courts have felt constrained by authority. When, however, there is a slight indication of another meaning being intended, the courts readily deviate from this presumption of *per capita* distribution. In other words, a gift to issue will be distributed *per stirpes* whenever there is slight evidence that the author so desired, because that mode of distribution is often more equitable and works less hardship and inequalities." The court found evidence of a contrary intent in the scheme of the whole will. It found that the "underlying purpose" was "to provide for succession equally among the respective stocks."

one. The courts in Delaware,[16] Connecticut,[17] Vermont,[18] Ohio,[19] Massachusetts,[20] Illinois,[21] Wisconsin,[22] Rhode Island,[23] Pennsylvania,[24] Kentucky,[25] and Minnesota[26] have all indicated a preference for the per stirpes construction. Other courts have professed to follow the per capita rule, but say that it may be rebutted by slight evidence of a different intent.[27] The Iowa court, in adopting the per stirpes construction recently, said: "The relation of a testator to his grandchildren is a class relation. They stand as prospective representatives of the testator's children, and as the ultimate beneficiaries of that which is bestowed upon the child of the testator."[28] A few courts have in recent cases indicated their intention to stand by the per capita rule.[29]

The reasons why the courts have departed from the rule of *Freeman v. Parsley* and substituted the per stirpes rule may be summarized as follows:

(1) A testator probably thinks of "issue" as a class of persons who are descendants. He undoubtedly has in mind only the more immediate descendants, who are closer to his heart than the more remote descendants; hence he would probably expect the distribution to follow the line of the more immediate descendants.

(2) This follows the general policy of the law and the understanding of the average man as evidenced by the statutes of descent and distribution. The average testator probably would think it fairer to have equality among branches of his family than to permit that branch of the family having the most numerous descendants take the greater share. It would probably shock the feeling of the average testator to

[16] Wilmington Trust Co. v. Chapman, 20 Del. Ch. 67, 171 A. 222 (1934).

[17] Mooney v. Tolles, 111 Conn. 1, 149 A. 515 (1930).

[18] In Re Beach's Estate, 103 Vt. 70, 151 A. 654 (1930).

[19] Watson v. Watson, 34 Ohio App. 311, 171 N. E. 257 (1929).

[20] Dexter v. Inches, 147 Mass. 324, 17 N. E. 551 (1888); Jackson v. Jackson, 153 Mass. 374, 26 N. E. 1112 (1891).

[21] Northern Trust Co. v. Wheeler, 345 Ill. 182, 177 N. E. 884 (1931).

[22] In re Morawetz' Will, 214 Wis. 595, 254 N. W. 345 (1934).

[23] Newport Trust Co. v. Newton, 49 R. I. 93, 139 A. 793 (1928); Rhode Island Hospital Trust Co. v. Fitzgerald, 49 R. I. 319, 142 A. 330 (1928).

[24] Mayhew's Estate, 307 Pa. 84, 160 A. 724 (1932).

[25] The Kentucky court indicates that in absence of any showing of contrary intent it will apply the per capita rule, but is quick to find a per stirpes construction intended from a perusal of the whole will. See Slattery v. Ryan, 233 Ky. 611, 26 S. W. (2d) 544 (1930).

[26] In re Thompson's Estate, (Minn. 1938) 279 N. W. 574.

[27] Ward v. Ottley, 166 Va. 639, 186 S. E. 25 (1936); Central Hanover Bank & Trust Co. v. Pell, 268 N. Y. 354, 197 N. E. 310 (1935).

[28] Claude v. Schutt, 211 Iowa 117 at 122, 233 N. W. 41 (1930).

[29] Thomson v. Russell, 131 S. C. 527, 128 S. E. 421 (1925); In re Thomson's Estate, 168 Wash. 32, 10 P. (2d) 245 (1932).

permit children to share in his bounty along with their living parents.

(3) The per capita rule was early construed to be a presumption which yielded to a "faint glimpse."

(4) A per stirpes distribution provides the middle ground which counsel in the *Freeman v. Parsley* case failed to urge upon the court as the solution of its dilemma.

2.

The other view of the word "issue" in wills, which seems to be abandoned in the modern cases, is known as the rule of *Sibley v. Perry*.

> "The rule in *Sibley v. Perry* is stated very accurately in these words: 'It is an established rule that where the parent of issue is spoken of, the word "issue" is prima facie restricted to children of the parent.' "[30]

Sibley v. Perry[31] involved a gift to *A*, *B*, *C*, and *D* "and if all or any of them shall die before I do, then I will, that the lawful issue of every one of them so dying before me shall share and share alike have and enjoy that £1000 stock, which their respective parents if living would have had and enjoyed." Lord Eldon, in holding that the use of the word "parent" along with the word "issue" restricted the meaning of the latter to "children," observed:

> "I take the Will to mean, that in general he meant to give to children, that he has given to children *eo nomine*; that he has given to children under the name of daughters and by the terms 'lawful issue'; and that in different parts as to many of the legacies he has considered 'children, daughters' and 'lawful issue' synonymous."[32]

He also stated that he arrived at this construction by construing the will "upon all its parts." It was a long and rather complex will.

Since it has often been held that where the word "issue" and the word "children" are used in the same instrument synonymously, the word "issue" should be construed to mean children if there be nothing to the contrary in the instrument,[33] it would seem that that reasoning

[30] In re Timson, [1916] 2 Ch. 362 at 365.

[31] Sibley v. Perry, 7 Ves. 523, 32 Eng. Rep. 211 (1802).

[32] Ibid., 7 Ves. 522 at 532.

[33] See Schnebly, "Testamentary Gifts to Issue," 35 YALE L. J. 571 (1926). It has sometimes been held that where the word "children" is used interchangeably with the word "issue" the former means the latter (the reciprocal of the usual finding); in other words "children" may mean "issue"; or, where the context demands it, "issue" may mean "children." See Hodge v. Lovell's Trustee, 262 Ky. 504, 90 S. W. (2d) 683 (1936); Munger v. Munger, (Tex. Civ. App. 1927) 298 S. W.

alone would support the decision. The courts, however, have very generally regarded the case as authority for the rule of construction above quoted, and the rule became firmly established in the English common law. It was followed in *Pruen v. Osborne*[34] where the vice-chancellor said:

> "I have always considered it as settled that, in a will or in a deed, if it is a question whether the word 'issue' shall be taken generally or in a restricted sense, a direction that the issue shall take only the shares which their parents would have taken, if living, must be taken to shew that the word 'issue' was used in its restricted sense [i.e., to mean children]."[35]

The rule, however, was somewhat cut down in *Ross v. Ross*[36] where the court said:

> "It is clear that the 'issue' of the 'parent' must mean the 'children' of the 'parent,' but it is not certain, in every case (and it must be so before that rule can apply), that the testator has, by the word 'parent,' meant to signify the first taker, the child in the first instance. That was the case of *Sibley v. Perry* and also of *Pruen v. Osborn*. . . ."[37]

In *Ralph v. Carrick*[38] the court said that the rule did not apply to the use of the word descendants along with the word parent.

The rule, however, was confirmed as late as 1915. In *Re Timson*,[39] Lord Cozens-Hardy, M. R., said that the rule

> "seems to me to be perfectly good sense and establishes a guide to some extent. It is quite true that Brett L. J. in *Ralph v. Carrick* said he should be happy to attend the funeral of *Sibley v. Perry*,

470. In Allen v. Reed, (App. D. C. 1927) 17 F. (2d) 666, it was held that even where in part of the will "issue" was used interchangeably with "children," nevertheless it may mean descendants in another clause of the same will. In Re Hawaiian Trust Co., 29 Haw. 278 at 282 (1926), it is said: "The modern tendency is strictly in favor of holding the word 'issue' to be the equivalent of children unless the text indicates a contrary intention." That case involved a devise to testator's wife for life and at her death "in case my said wife shall die leaving issue by me her surviving at the time of her death . . . to such issue." The court reasoned that the word "issue by me" as used in the will, should be construed as being equivalent to "issue by me begotten," and, as a man does not beget his grandchildren, it cannot be said that the testator had grandchildren in mind when he made his will.

[34] 11 Sim. 131, 59 Eng. Rep. 824 (1840).

[35] Ibid., 11 Sim. at 138.

[36] 20 Beav. 645, 52 Eng. Rep. 753 (1855).

[37] Ibid., 20 Beav. at 649.

[38] 11 Ch. Div. 873 (1879).

[39] [1916] 2 Ch. 362 at 365-366.

but I am not one of those who would like to follow that funeral. I think it is a good rule, although, like all other rules of the kind, its application may be cut down by the context of the will."

Professor Kales defended the rule and distinguished cases where more remote descendants were permitted to share by the argument that in those cases the word "parent" does not refer to the members of the original class who are to take and those alone, but refers to whoever may be a parent of *any* issue.[40] "The word parent then is regarded as used in a recurring or sliding sense, so as to apply to successive generations of issue."[41] This argument was used to explain or distinguish cases where the courts had given the word "issue" a per stirpes construction. Again Mr. Willard Brooks criticized this view saying that the word "parent" may just as well mean parent of a stock or "ancestor" and that the average testator probably means a single ancestor rather than parent in a "recurring or sliding sense."[42]

The Massachusetts court, which we have seen early abandoned the rule of *Freeman v. Parsley*, also took the lead in criticizing and departing from the rule of *Sibley v. Perry*. The court said:

"We think that, as a matter of verbal construction, it would be as easy and natural to say that where the words 'parents' and 'issue' are used in connection with each other, the word 'parents' means ancestors as that the word 'issue' means children; and in the construction of any instrument it is always necessary to look beyond the literal meaning of words."[43]

The rule was severely criticized by Justice Cardozo in *Matter of Farmers' Loan & Trust Co.*,[44] where he held that the word "issue" will be held to mean children only when to hold otherwise would "divert the gift from the direct line of descent." In that case "issue" were to take "what would have been the parents' share" and it was held that "issue" meant "descendants," who took per stirpes. It was also critically examined in a recent Delaware case, *In re Frist's Estate*,[45] where the court found that it was not "an inflexible rule of construction"; that the principal objection to it is that it "results in favoring one branch of the family to the exclusion of another, and if applied

[40] Kales, "Meaning of the Word 'Issue' in Gifts to 'Issue,'" 6 ILL. L. REV. 217 (1911); KALES, FUTURE INTERESTS, 2d ed., § 580 (1920).

[41] 6 ILL. L. REV. 217 at 218 (1911).

[42] Brooks, "Meaning of the Word 'Issue' in Gifts to 'Issue'—Another View," 6 ILL. L. REV. 230 at 232 (1911).

[43] Jackson v. Jackson, 153 Mass. 374 at 377, 26 N. E. 1112 (1891).

[44] 213 N. Y. 168 at 172, 107 N. E. 340 (1914).

[45] 18 Del. Ch. 409 at 414, 417, 161 A. 918 (1932).

to its logical end to the enrichment of strangers to the blood as against testator's own descendants." The court found that the testator intended a "stirpital equality" and "In view of the whole will . . . 'father' should be enlarged rather than that 'issue' should be restricted."

In *Dolbeare v. Dolbeare*, stated at the beginning of this comment, the court said that the use of the word "parent" with the word "issue" was merely a circumstance to be considered and not a rule of construction. "In the common parlance of today, issue is not ordinarily used when children are intended; indeed, its use with that meaning would sound to us strange and stilted."[46] The court in construing a gift to issue to "take the share to which their mother would have been entitled had she been living" decided that "issue" meant descendants and not children because to construe as "children" would cut out children of deceased children and "disinherit the natural objects of his bounty."

Professor Schnebly was of the opinion that the American cases tend to disapprove of the rule of *Sibley v. Perry*.[47] The writer has been able to find cases in only one American jurisdiction following it since 1925.[48]

The reasons why the word "parent" when used in conjunction with the word "issue" should not restrict the meaning of the word "issue" to "children" unless the whole will indicates that is the meaning intended may be summarized as follows:

(1) The word "parent" in such cases may just as readily mean "ancestor" as the word "issue" may mean children.

(2) The restricted meaning often excludes children of deceased children who would be the natural objects of the testator's bounty.

(3) The rule was probably adopted to avoid the consequences of the per capita rule which permitted children to share with their living parents. Where a per stirpes construction is followed the same result is achieved where the parents of issue are alive. The per stirpes construction avoids the harshness of the per capita rule and at the same time permits children of deceased children to share.

(4) The meaning of the words used should in any event be gathered from the whole will.

Daniel Hodgman

[46] Dolbeare v. Dolbeare, (Conn. 1938) 199 A. 555 at 557.

[47] Schnebly, "Testamentary Gifts to Issue," 35 YALE L. J. 571 at 591 (1925).

[48] Pierson v. Jones, 108 N. J. Eq. 453, 155 A. 541 (1931); Central Hanover Bank & Trust Co. v. Helme, 121 N. J. Eq. 406, 190 A. 53 (1937).