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Future Interests - Construction - Implied Condition of Survivorship

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FUTURE INTERESTS—CONSTRUCTION—IMPLIED CONDITION OF SURVIVORSHIP—Decedent's will gave the income from his estate to his widow for life. After her death the estate was to be held for an additional ten years, during which time the income was to be equally divided among his named daughters, Jennie, Bertha, Ida and Martha. At the end of the ten-year period, the estate was to be divided among the four daughters in equal shares, with the children of a daughter not surviving the ten-year period to take her share. Martha died three years after decedent's widow died. Plaintiff, as administrator of Martha's estate, objected to the payment by the defendant trustees of the entire income to the surviving daughters, rather than paying one-quarter to Martha's estate.[1] The circuit court affirmed a probate court order allowing the annual account of the trustees. On appeal, *held,* affirmed. Consideration of the entire will leads to the conclusion that decedent intended that if any daughter died during the ten-year period, the surviving daughters should take her share of the income during the remainder of that period. *In re Hicks Estate,* 345 Mich. 448, 75 N. W. (2d) 819 (1956).

It is axiomatic that in giving effect to a will the court will seek the testator's intent. Since specific intent is generally obscure, resort to the process of construction is necessary.[2] In support of his contention that the gift of income to the daughters was to them individually and not to them as a class, the plaintiff in the principal case advanced four so-called rules of construction. These are that a gift to individuals is evidenced by (1) listing the beneficiaries individually by name, (2) the lack of an express survivorship condition, (3) the express provision that the income be equally divided, and (4) the fact that distribution of both the ten-year income and the corpus were to be along the same general lines of cleavage.[3] Only the first of these is generally accepted.[4] The court neither affirmed nor denied the validity of the rules contended for. Rather, it found from a consideration of the will as a whole[5] sufficient indication to persuade it that the decedent's intent was to create a class gift, with gifts over to the remaining daughters of a deceased daughter's share.[6] The grounds given for this finding were (1) the gift at issue

[1] The eventual distribution of the corpus was not at issue.

[2] See generally 1 SIMES AND SMITH, FUTURE INTERESTS, 2d ed., 448 (1956); 5 AMERICAN LAW OF PROPERTY 125 (1952); 3 PROPERTY RESTATEMENT 1189 (1940).

[3] See In re Brown's Estate, 324 Mich. 264 at 268, 36 N.W. (2d) 912 (1949); Cattell v. Evans, 301 Mich. 708 at 711, 4 N.W. (2d) 67 (1942), noted in 41 MICH. L. REV. 749 (1943); In re Coots's Estate, 253 Mich. 208 at 212, 234 N.W. 141 (1931), cert. den. sub nom. Delbridge v. Oldfield, 284 U.S. 665 (1931), noted in 29 MICH. L. REV. 954 (1931); Wessborg v. Merrill, 195 Mich. 556 at 569, 162 N.W. 102 (1917). But see In re Ives' Estate, 182 Mich. 699 at 705, 148 N.W. 727 (1914); In re Hunter's Estate, 212 Mich. 380, 180 N.W. 364 (1920). Cf. In re Hurd's Estate, 303 Mich. 504, 6 N.W. (2d) 758 (1942), commented on in 41 MICH. L. REV. 953 (1943).

[4] See 3 PROPERTY RESTATEMENT §280 (1940). See generally 105 A.L.R. 1394 (1936). Cf. 36 A.L.R. (2d) 1117 at 1129 (1954). Compare 3 PROPERTY RESTATEMENT §282 (1940).

[5] See In re Brown's Estate, note 3 supra.

[6] The possibility that the implied condition of survivorship would result in Martha's

was of income for a fixed term and not a disposition of corpus, from which the court implies a purpose to support the daughters during the ten-year period, rather than a purpose to effect a distribution of his property and (2) in disposing of the corpus after the ten-year period, the decedent expressly provided for the contingency of a daughter not then being alive, from which the court concluded that the decedent was not unmindful of the possibility that one of the daughters might not survive the period and therefore intended separation into shares only in regard to the final distribution of corpus. While the nature of the construction process is such that it is always difficult in any given case to conclude flatly that a court has misconstrued a testator's "intent,"[7] it seems clear that most courts would consider these two factors insufficient[8] to warrant the result reached in the principal case.[9]

The unfortunate aspect of this decision is that it may be cited to support the broad proposition that there is an implied condition of surviving the time of distrbution in a gift to a class of a remainder interest in income. That question was never really at issue in the principal case, for the plaintiff apparently conceded that a condition of survivorship would exist if the court were to find a class gift.[10] While the rule in Michigan on this point is perhaps obscure,[11] the great weight of other authority holds that such condition is not properly implied merely because a class gift is involved.[12] Certain situations might properly call for an implication of a survivorship condition,[13] but such situations would be the exception and not the rule. In the usual case, there is no more

share reverting to decedent's estate rather than going over to the other daughters was not discussed. Cf. In re Coots's Estate, note 3 supra.

[7] The principal case does not successfully distinguish Wessborg v. Merrill, note 3 supra, where an opposite result was reached. Indeed, if the words "and their respective heirs" had had the significance in the Wessborg decision which the court in the principal case attributes them, then the income in the Wessborg case should have gone directly to the heirs of plaintiff's wife and not to the wife's estate as was actually decided.

[8] See 5 AMERICAN LAW OF PROPERTY §21.16 (1952).

[9] See 5 AMERICAN LAW OF PROPERTY §§22.5, 22.8 (1952). See generally 166 A.L.R. 823 (1947). Cf. 6 A.L.R. (2d) 1342 (1949); 140 A.L.R. 841 (1942).

[10] In his appellate brief the plaintiff relied on a statement to that effect in 1 SCOTT, TRUSTS, 1st ed., §143 (1939). The statement does not appear in the second edition of that work.

[11] See Brake, "The 'Vested vs. Contingent' Approach to Future Interests: A Critical Analysis of the Michigan Cases," 9 UNIV. DETROIT L.J. 61, 121, 179 (1946); 41 MICH. L. REV. 953 (1943). The rules in other specific states are discussed in Ferrier, "Implied Conditions of survivorship in Gifts of Future Interests in California," 40 CALIF. L. REV. 49 (1952); Schuyler, "Future Interests in Illinois," 50 N.W. UNIV. L. REV. 457 (1955); Long, "Class Gifts in North Carolina," 22 N.C. L. REV. 297 (1944); 22 TENN. L. REV. 943 (1953); King, "Future Interests in Colorado," 20 ROCKY MT. L. REV. 227 (1949); 21 ROCKY MT. L. REV. 1, 123 (1948-49).

[12] 1, 2 SIMES AND SMITH, FUTURE INTERESTS, 2d ed., §§146, 578, 653 (1956); 5 AMERICAN LAW OF PROPERTY §§21.10, 21.11 (1952). Cf. 3 PROPERTY RESTATEMENT §296 (1940); 2 POWELL, REAL PROPERTY §327 (1950); Bolich, "Some Common Problems Incident To Drafting Dispositive Provisions of Donative Instruments," 35 N.C. L. REV. 17 (1956).

[13] E.g., see 5 AMERICAN LAW OF PROPERTY §21.17 (1952).

justification for implying a survivorship condition than there is for implying any other kind of condition.[14] This is true whether the gift involved is to individuals or to a class.[15] In view of the plaintiff's failure to contest an essential issue, the weak grounds which the court gives for the intent it finds, and the citation of authority clearly not in point,[16] this case should be treated as having decided nothing more than that the specific account before the court be approved and should not be cited to establish any point of law involved.[17] The moral of the case is for the draftsman, who has power to minimize resort to the process of construction.[18]

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[14] Cf. Wessborg v. Merrill, note 3 supra, at 569. Automatic implication of conditions is frowned upon simply because no good reason exists generally for implying conditions where testator has expressed none. Further, an oft-repeated canon of interpretation is that the law favors the early indefeasible vesting of interests. See 1 SIMES AND SMITH, FUTURE INTERESTS, 2d ed., §165 (1956). One of the Michigan court's previous implications of a survivorship condition [In re Coots's Estate, note 3 supra] was reversed by the legislature. Mich. Comp. Laws (1948) §554.101.

[15] See note 12 supra. Compare 2 SIMES AND SMITH, FUTURE INTERESTS, 2d ed., §613 (1956).

[16] E.g., all seven of the non-Michigan cases cited dealt with situations in which the gift of remainder was postponed until the death of the *last survivor* of the income beneficiaries. See 140 A.L.R. 841 (1942).

[17] This conclusion is strengthened by the fact that the opinion incorporates the plaintiff's incorrect use of the words "tenants in common" as synonymous with the word "individuals" in discussing the takers of the gift at issue. This confusion has been embodied in the headnotes of the case report in the regional reporter, from which point it is likely to spread. Cf. 2 SIMES AND SMITH, FUTURE INTERESTS, 2d ed., §617 (1956).

[18] Cf. Browder, "Future Interests—Is It Necessary?" 9 OKLA. L. REV. 151 at 159, 161 (1956); Bolich, "Some Common Problems Incident to Drafting Dispositive Provisions of Donative Instruments," 35 N.C. L. REV. 17 (1956); Brake, "Avoiding Litigations Hazards Arising From Survivorship Problems in Wills," 17 BROOKLYN L. REV. 1, 171 (1950-51).