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Wills - Lapse of a Residuary Gift

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WILLS—LAPSE OF A RESIDUARY GIFT—Testatrix left a will containing the following bequest: ". . . I give, devise and bequeath to my brothers and sisters, A, B, C, D and the children of E (naming them), and F and G, all the . . . residue . . . of my Estate . . . both real and personal of whatsoever kind . . . and wherever situated should be sold and distributed in equal share, share and share alike. . . ." G died before the testatrix, and her share

lapsed. The trial court held that G's share passed as intestate property of the testatrix. On appeal, *held,* reversed. The lapsed share of a residuary legatee inures to the benefit of the surviving residuary legatee unless a contrary intention is clearly expressed. *Schroeder v. Benz,* (Ill. 1956) 138 N.E. (2d) 496.[1]

At common law the overwhelming weight of authority is to the effect that the lapsed portion of a residuary devise or bequest does not inure to the benefit of the other residuary legatees or devisees, but passes to the testator's next of kin as intestate property.[2] In support of the rule it is commonly argued that there can be no residue of a residue, or in other words, the residuary clause cannot "catch" property itself included in the residue.[3] Other cases following the rule proceed on the assumption that to allow the remaining residuary legatees to benefit from the lapse would violate the testator's probable intent that each legatee get a certain portion of the residue and no more.[4]

The general rule, however, is not applicable in a number of situations. Where the gift is to the legatee or devisee as members of a class or as joint tenants there is no lapse because the legatees are not determined until the testator's death, and as long as there are survivors in the class or other joint tenants living at that time, they can take everything under the terms of the will.[5] More generally, the rule does not apply where the testator has evidenced an intention that there be no lapse in this particular situation, either by using words of substitution,[6] thus allowing the legatee's heirs to take, or by providing for a gift over to some other surviving legatee.[7] This latter exception, looking to the testator's intent, has provided the courts with a means of avoiding the harshness of the general rule even where the evidence of intent is negligible.[8]

The principal case is only the third one to reject the majority view outright,[9] although the courts in one other state have reached the same result

[1] The terms legatee and devisee will be used interchangeably in this note since, in most cases, the law on this point is the same for personalty and real property.

[2] Bagwell v. Dry, 1 P.Wms. 700, 24 Eng. Rep. 577 (1721), 28 A.L.R. 1237 (1924); In re McCoy's Estate, 193 Ore. 1, 236 P. (2d) 311 (1951), 36 A.L.R. (2d) 1117 at 1120 (1954); 4 PAGE, WILLS, 3d ed., §1430 (1941).

[3] Aitken v. Sharp, 93 N.J. Eq. 336, 115 A. 912 (1922); ATKINSON, WILLS, 2d ed., p. 784 (1953).

[4] Skrymsher v. Northcote, 1 Swanst. 566, 36 Eng. Rep. 507 (1818); Re Burnside's Will, 185 Misc. 808, 59 N.Y.S. (2d) 829 (1945).

[5] Re Dunster, [1909] 1 Ch. 103; Roberts v. Trustees of Trust Fund for Town of Tamworth, 96 N.H. 223, 73 A. (2d) 119 (1950); Shearin v. Allen, 137 N.J. Eq. 276, 44 A. (2d) 210 (1945). As to what constitutes a class, see the cases collected in 75 A.L.R. 774 (1931).

[6] In re Pinhorne, [1894] 2 Ch. 276; Leary v. Liberty Trust Co., 272 Mass. 1, 171 N.E. 828 (1930); 4 PAGE, WILLS, 3d ed., §1435 (1941).

[7] Gardner v. Knowles, 48 R.I. 231, 136 A. 883 (1927); 4 PAGE, WILLS, 3d ed., §1435 (1941).

[8] E.g., Estate of Hoermann, 234 Wis. 130, 290 N.W. 608 (1940); 128 A.L.R. 89 (1940).

[9] Corbett v. Skaggs, 111 Kan. 380, 207 P. 819 (1922); Commerce Nat. Bank of Toledo v. Browning, 158 Ohio St. 54, 107 N.E. (2d) 120 (1952).

without reference to the rule.[10] The attitude of the court in the principal case is, however, in harmony not only with a noticeable trend in statutory regulations,[11] but also with the perennial criticism of the general rule by writers and judges.[12] Its value as a precedent is weakened somewhat by the fact that Illinois had recently passed a statute which, although inapplicable to the case, indicated that the legislative policy of the state was to favor the surviving residuary legatees over the testator's next of kin.[13] There is little doubt, however, that the court would have reached the same result even without the aid of the statute. In holding that the lapsed portion of the residuary disposition inured to the benefit of the other residuary legatees, the court relied chiefly on the accepted rule of construction that there is a presumption against intestacy which must be applied if at all possible.[14] The court thus rejects the argument that this violates the testator's intention of giving each legatee only a certain portion of his estate.[15] Also implicit in the holding is a rejection, as a mere play on words, of the argument that there can be no residue of a residue.[16] The court's position can be both commended and criticized. Certainly the presumption against intestacy is a sound policy in most cases, since the testator by making a will with a residuary clause has evidenced an intent to dispose of his entire estate, and the courts should construe the will liberally so as to give effect to this intent.[17] By applying the presumption in this situation the court has avoided the inconsistency of refusing, on the basis of the testator's intent, to augment the residue where a residuary gift lapses when it would permit such an augmentation if the lapse were in another part of the will.[18] At any rate, there can be little criticism of the result reached in the principal case since evidence of an intent to limit the shares of the residuary legatees was negligible.[19] The ultimate distribution also satisfies the testator's wish that each legatee receive an equal share of the residue. The chief

10 Gray v. Bailey, 42 Ind. 349 (1873); Hedges v. Payne, 85 Ind. App. 394, 154 N.E. 293 (1926).

11 *Illinois:* Ill. Rev. Stat. (1955) c. 3, §200; *New Jersey:* N.J. Stat. Ann. (1953) §3a:3-14; *Ohio:* Ohio Rev. Code (Baldwin, 1953) §2107.52; *Pennsylvania:* Pa. Stat. Ann. (Purdon, 1950) tit. 20, §253.

12 Skrymsher v. Northcote, note 4 supra; Wright v. Wright, 225 N.Y. 329, 122 N.E. 213 (1919); ATKINSON, WILLS, 2d ed., p. 785 (1953).

13 Principal case at 499. The statute was not applicable because the testatrix had died prior to its enactment.

14 Principal case at 499; In re Moloney's Estate, 15 N.J. Super. 583, 83 A. (2d) 837 (1951).

15 See the cases in note 4 supra.

16 Principal case at 499, citing Corbett v. Skaggs, note 8 supra.

17 In re Moloney's Estate, note 14 supra.

18 It is everywhere recognized that lapsed bequests in other parts of the will fall into and augment the residue. In re Boyle's Estate, 121 Colo. 599, 221 P. (2d) 357 (1950). See 4 PAGE, WILLS, 3d ed., 192, 200 (1941); Bordwell, "Statute Law of Wills," 14 IOWA L. REV. 172 at 190 (1928). On the relation of this rule to the common law on lapsed residuary shares, see Bronson v. Pinney, 130 Conn. 262 at 271, 33 A. (2d) 322 (1943).

19 ". . . in equal share, share and share alike. . . ." Principal case at 497.

criticism that can be leveled at the holding is that the court seems to require too much evidence to overcome the presumption against intestacy.[20] In some cases this interpretation may well read more into the will than was intended by the testator,[21] and thus defeat the very purpose of the presumption. It is doubtful that other courts will follow the principal case since most of them, in spite of their frequent criticisms of the majority view, are already too firmly committed to it to change.[22] There are indications from the later cases, however, that while the courts will not totally reject the general rule, they will make every possible effort to avoid it by a liberal construction of the residuary clause.[23] The real hope for a change would appear to lie with the legislatures and, as previously noted, the trend, although as yet weak,[24] follows the principal case in allowing the surviving residuary legatees to benefit from the lapse of one of the residuary gifts.

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[20] Principal case at 499, citing Glaser v. Chicago Title & Trust Co., 393 Ill. 447, 66 N.E. (2d) 410 (1946).

[21] In re McCoy's Estate, note 2 supra.

[22] Bronson v. Pinney, note 18 supra.

[23] Re Baumann's Will, 97 N.Y.S. (2d) 478 (1950).

[24] See note 12 supra.