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Future Interests - Trusts - Time for Ascertainment of Heirs After Life Estate In Trust With Unexercised Power of Appointment and No Gift in Default

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FUTURE INTERESTS—TRUSTS—TIME FOR ASCERTAINMENT OF HEIRS AFTER LIFE ESTATE IN TRUST WITH UNEXERCISED POWER OF APPOINTMENT AND NO GIFT IN DEFAULT—The testator set up a testamentary trust for the benefit of his wife for life and gave her a general testamentary power to appoint the remainder in fee. No gift in default was provided. The life beneficiary died without exercising the power. On petition by the trustee for directions for the final distribution of the trust property, the trial court held that the property went to those who were the heirs of the testator at the time of his death. On appeal, *held,* reversed, two judges dissenting. The trustees took full title to the trust property and no interest in this property remained in the testator's estate undisposed of by the will. When the life beneficiary

died without exercising the power of appointment, the trust property reinvested in the testator's estate by virtue of a resulting trust and descended to those who were the heirs of the testator at the time of the death of the life beneficiary. *Butler v. Citizens & Southern National Bank,* 211 Ga. 414, 86 S. E. (2d) 520 (1955).

The old common law rule that "seizin is the stock of descent" necessitated the determination of the heirs at the end of the preceding freehold.[1] This rule has been universally abrogated except in a minority of jurisdictions which hold that their statutes of descent and distribution do not apply to possibilities of reverter and rights of entry for condition broken.[2] In the leading case of *Blount v. Walker* the South Carolina court drew an analogy between a possibility of reverter after a fee conditional and a resulting trust after a fee simple in the trustee.[3] Because that court was committed to the minority viewpoint concerning the descendability of possibilities of reverter, it held that the time for ascertainment of heirs in the resulting trust situation should be at the end of the preceding freehold. To the extent that this analogy to the possibility of reverter cases was relied upon by the South Carolina court, the *Blount* case should not have been cited as authority for the result reached in the principal case unless the Georgia court meant to abandon its past indication of alignment with the majority viewpoint.[4] In the principal case, the Georgia court based its decision on the theory that, for the duration of the life beneficiary's equitable estate, all other legal and equitable property interests remained vested in the trustees, leaving nothing to vest in the heirs of the testator at the time of his death. Therefore, it concluded, when the property returns by way of resulting trust to the testator's estate at the time of the life beneficiary's death, it descends to those persons who would have been the testator's heirs had he died at that time.[5] Other courts have also used the existence of a fee in

[1] Seizin was regarded as necessary for the descent of interests in land. Thus, if *A*, possessing the fee interest, conveyed to *B* for life and thereafter died without having disposed of the reversion, it descended at the moment of the life tenant's death to the persons who would have been *A*'s heirs had *A* died at that later time. This also applied to remainders. 3 SIMES, FUTURE INTERESTS §722 (1936). Cited in the past to support the result reached in the principal case was Conner Exr. v. Waring, 52 Md. 724 (1879). This case was based upon the rule of seizin, and was overruled by Perkins v. Iglehart, 183 Md. 520, 39 A. (2d) 672 (1944).

[2] Thus in the states that have adopted the minority point of view, these interests are treated much as they were at common law. See 37 VA. L. REV. 117 (1951); 77 A.L.R. 344 (1932).

[3] 31 S.C. 13, 9 S.E. 804 (1888). This was a two to one decision with a strong dissenting opinion pointing out that the trustee's interest ought not prevent the vesting of the reversionary interest. Cf. Waller v. Waller, 220 S.C. 212, 66 S.E. (2d) 876 (1951).

[4] Cooper v. Davis, 174 Ga. 670, 163 S.E. 736 (1932).

[5] Principal case at 420. The court apparently misinterpreted some loose language in an adverse possession case [Cushman v. Coleman, 92 Ga. 772, 19 S.E. 46 (1893)] which held that when the legal fee is in the trustee an adverse possessor can cut off all legal and equitable interests. The court in that case did not hold that the title to the equitable remainder is in the trustee. In actuality, the case has very little relevance to the problem in the principal case. Nor should the unexercised power of appointment have any effect. Bienvenu v. First National Bank of Atlanta, 193 Ga. 101, 17 S.E. (2d) 257 (1941). See also 92 A.L.R. 363 (1934).

the trustees as a rationale for postponing the ascertainment of heirs. For example, in *In re Estate of Mooney* the Nebraska court reasoned that since the resulting trust arises at the end of the preceding freehold estate, the heirs are determined at that time, arguing that the existence of the fee in the trustees prevents intestacy until then.[6] A sounder approach to the problem was demonstrated by the Georgia court in *Lane v. Citizens & Southern National Bank.*[7] In that case, the court recognized that when the equitable title is split from the legal title, it should be treated in equity just as the legal title is handled at law.[8] On this basis, a more logical solution to the problem in the principal case would be to recognize that although the entire legal estate is disposed of, the entire equitable or beneficial interest is not. In other words, the testator, possessing both a legal and equitable fee simple and having disposed of merely an equitable life interest, with a general power to appoint the full remainder by will, retains a vested equitable reversion in fee subject to complete defeasance upon exercise of the power. This reversion should be regarded as vesting in his heirs immediately upon his death. A similar analysis has been made by a majority of the courts.[9] In addition, in view of the general ill repute of the old English doctrine of seizin,[10] the fact that the result under the theory of the principal case is similar is not in its favor. Nor can the result be justified as a rule of intent. The testator probably has not considered this contingency at all, or, if he has, the fact that the trustee holds the legal fee cannot be considered any indication of an intent to postpone the ascertainment of those who take as his heirs. The best explanation of the result probably lies in the particular facts of the case: by virtue of the decision the property descended to the testator's brother instead of to his wife's twenty-five relatives.[11] This is probably justification enough.

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6 131 Neb. 52, 267 N.W. 196 (1936). The courts are never too clear whether the word "reversion" describes the act of the estate becoming reinvested in the grantor or the right to this future enjoyment. The Nebraska court seems to ignore the latter meaning.

7 195 Ga. 828, 25 S.E. (2d) 800 (1943). In this case, a contingent remainder had failed and the court held that the trust estate reverting to the estate of the testator should be divided into six shares, the testator having died leaving six children. The widow of one child who died before the life beneficiary, but after the testator, took a child's share as the sole heir of her husband.

8 Id. at 833.

9 The New Jersey court has stated that whenever it appears that the grantee or devisee takes only the legal estate, the equitable interest that remains undisposed of goes to the testator's heirs determined as of the testator's death. Mulford v. Mulford, 42 N.J. Eq. 68, 6 A. 609 (1886). In a well-considered opinion criticizing Blount v. Walker, note 3 supra, as contrary to the weight of authority, the Rhode Island court reasoned that since the resulting trust arises solely by operation of law and not by any intention of the testator, the only persons who can take under a resulting trust are the heirs at law, these being the persons who take immediately upon the death of the ancestor. The court concluded that it is not critical in cases of this kind whether the heirs take a legal or only an equitable interest. Champagne v. Fortin, 69 R.I. 10, 30 A. (2d) 838 (1943). See, generally, 27 A.L.R. (2d) 691 (1953).

10 3 SIMES, FUTURE INTERESTS §723 (1936).

11 See also In re Estate of Mooney, 131 Neb. 52 at 57, 267 N.W. 196 (1936), for another pragmatic application of this rule.