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FUTURE INTERESTS-CONSTRUCTION OF "SURVIVING" IN SUBSTITUTIONARY GIFT OF REMAINDER

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FUTURE INTERESTS—CONSTRUCTION OF "SURVIVING" IN SUBSTITUTIONARY GIFT OF REMAINDER—Testator's will provided that his property should go to his wife *W* for life, then in equal shares to his sister *A* and his brothers *B* and *C*. The language used was appropriate to create vested remainders in *A*, *B* and *C*.[1] The will then provided, "And in case of the death of my said sister or either of my said brothers before the death of my said wife, the share that he or she would have taken shall be divided equally between his or her surviving children, by right of representation." *A* and *B* died before testator; *C*, shortly

[1] On the vesting of remainders after life estates, see L.R.A. 1918E, 1097. As to the effect of substitutionary provisions on the vesting of a primary gift, see 37 L.R.A. (n.s.) 728 (1912); 3 PAGE ON WILLS, 3d ed., § 1266 and cases cited, note 5 (1941).

after him. *A*'s three children, *B*'s three children, and *C*'s four children all survived testator, but at the time of this proceeding for construction of the will, only the four children of *C* and one child of *B*, together with *W*, were still living. *C*'s children asserted that the petition was premature, on the ground that only such "children" as might survive the life tenant could take under the will. The lower court ruled that the petition was not premature; that at testator's death a one-ninth interest in the estate vested in each child of *A* and *B*, and a one-third interest vested in *C*; and that *C*'s interest vested in his children upon his decease. *C*'s children appealed. *Held*, affirmed. The local lapse statute was deemed to control the interests of *A* and *B*.[2] "Surviving children" meant those who survived their parent, not those who survived *W*. *In re Colman's Will*, (Wis. 1948) 33 N.W. (2d) 237.

Although the result of the principal case is sound, the court's conclusion that the local lapse statute was controlling seems doubtful. Since a gift over was provided for in the event that one or more of the primary legatees predeceased the life tenant, and since the substituted legatees survived testator, there was no lapse, and distribution should have been made on the basis of a construction of the will.[3] Under either approach,[4] the crucial issue was whether testator intended the word "surviving" to relate to the death of the primary legatee, or to the period of distribution.[5] "Surviving" has often been held to refer to the period of distribution, if not otherwise limited,[6] but the decisions so holding have usually involved a gift to the surviving children of the testator or the life tenant, or a gift where the described class is not substitutionary.[7] Where the interest of the "surviving" class divests a vested interest of a remainderman, an intent that the term relate to the death of the remainderman seems more probable,[8] especially if the first taker is the parent of the substitutionary legatees. It has been argued that,

[2] Wis. St. 1947, § 238.13. For analysis of lapse statutes in all states, see 3 PROPERTY RESTATEMENT, § 298 (1940).

[3] 2 PAGE ON WILLS, 3d ed., § 913 (1941); 2 SIMES, FUTURE INTERESTS, § 307 (1936). The court seemed to take the position that, where the construction of the provision which prevented lapse was not certain, the lapse statute should be applied to resolve the uncertainty. "The testator is presumed [to have had in mind] that the statute would take effect in the absence of a provision of the will clearly applying to the death of a relative prior to testator's death [giving the property to other than the issue of the first taker]." Principal case at 241.

[4] It was conceded that a clear showing of a disposition different from that under the statute would have been given effect. Principal case at 241.

[5] Under the latter construction, since *A*'s issue had failed, the gift to him was void and would pass by intestacy. A similar result was possible as to *B*'s share, a possibility made more remote by appellants interpretation of "children" as including all descendants. See principal case at 241.

[6] 3 PROPERTY RESTATEMENT, § 251 (1940); 2 SIMES, FUTURE INTERESTS, § 349 (1936); 69 C.J., § 1346 (1934); 114 A.L.R. 4 (1938). Contra: Eberts v. Eberts, 42 Mich. 404, 4 N.W. 172 (1880).

[7] See, for example, cases cited in 40 WORDS AND PHRASES 892, 907 (1940), under "Surviving" and "Surviving Children."

[8] A few cases have held the substituted interest to be vested even though the primary gift was clearly contingent. 2 SIMES, FUTURE INTERESTS, § 395 at p. 185 (1936). In support of this result, see KALES, ESTATES, FUTURE INTERESTS, 2d ed., § 351 (1920).

by providing for substitution of issue for a deceased legatee, testator must have intended to postpone the vesting of the interest, since otherwise he simply described what normally takes place under the laws of descent and distribution.[9] It seems an equally acceptable construction, however, that he intended to prevent disherison of issue of the first takers.[10] Factors which lead to the construction that no condition precedent of survival of the life tenant was intended in connection with the original gift would seem to apply equally to the substitutionary gift, once the original interest has been divested, absent some independent indication to the contrary in the will.[11] Thus the general rule seems to be that the substituted class need survive only the parent, not the life tenant.[12] In jurisdictions which hold that "surviving," not otherwise qualified, refers to the death of the testator, no difficulty should be encountered in reaching the conclusion of the principal case upon the facts, since the same children who survived the primary legatees also survived the testator.[13]

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[9] Matter of Tienken, 131 N.Y. 391, 30 N.E. 109 (1892); Clark v. Cammann, 160 N.Y. 315, 54 N.E. 709 (1899).

[10] 69 C.J., § 1348 (1934). See also L.R.A. 1918E, 1097 at 1131; 2 SIMES, FUTURE INTERESTS, § 395 (1936). Some courts argue that such a provision should give the primary legatee an absolute interest; ibid. and cases cited, note 45.

[11] 2 SIMES, FUTURE INTERESTS, § 395 (1936). For a discussion of the various factors which bear on construction of remainders as vested or contingent, see id., §§ 351, 355-362. Cf. note 1, supra.

[12] 2 SIMES, FUTURE INTERESTS, § 395 and cases cited, notes 49, 50 (1936); 3 PAGE ON WILLS, § 1291 (1941); 69 C.J., §§ 1280, 1368 (1934); Masters v. Scales, 13 Beav. 59, 51 Eng. Rep. 23 (1850); Boulden v. Dean, 167 Md. 101, 173 A. 26 (1934); Pyne v. Pyne, (App. D.C., 1945) 154 F. (2d) 297; McArthur v. Scott, 113 U.S. 340, 5 S.Ct. 652 (1884), cited in principal case at 240. Although the class is determined at the date of the parent's death, the interest cannot vest, of course, until the effective date of the will.

[13] Re Hurd's Estate, 303 Mich. 504, 6 N.W. (2d) 758 (1942); discussed in 41 MICH. L. REV. 953 at 954 (1943). For criticism of the decision as being out of harmony with earlier Michigan decisions, see Brake, "The 'Vested vs. Contingent' Approach to Future Interests—A Critical Analysis of the Michigan Cases," 9 U. DET L.J. 179 at 193 (1946).