Michigan Law Review

Volume 41 | Issue 4

1943

# WILLS - CLASS GIFTS - LANGUAGE AND CIRCUMSTANCES NECESSARY TO CONSTITUTE

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WILLS — CLASS GIFTS — LANGUAGE AND CIRCUMSTANCES NECESSARY TO CONSTITUTE — By the second and third clauses of his will Lester Evans bequeathed to his son and daughter $35 each. The fourth clause disposed of "all the rest, residue, and remainder of my estate" to seven named persons of no relation to the testator or among themselves. One of the named persons was his bride-to-be, and she was included for the purpose of carrying out the antenuptial contract to leave her one-seventh of his estate if he were to predecease her. The clause concluded, "each person shall take an equal undivided one-seventh (1/7) share, absolutely and forever." The fifth clause explained the testator's intention regarding his children as "I give nothing, except the two legacies above provided for, to the immediate members of my family because in the separation from my wife [the first] I paid a large sum which I feel is all they are entitled to out of my estate." At some date subsequent to the execution of the will, the testator erased one of the names and crossed out two others of the residuary legatees. Also, the wife named in the will died before the testator, with a resulting lapse of her share. The son and daughter, as next of kin, claim four-sevenths of the property as intestate property. The three remaining residuary legatees claim that as members of a class they are entitled to divide the entire estate into thirds, because the intent of the testator was to die testate as to all his property. *Held*, the fourth clause naming seven unrelated persons to take equal one-sevenths of the residuary estate did not create a class gift, and the subsequent obliterating of three of the names and lapse by law of a fourth created a partial intestacy as to four-sevenths of the testator's property, which the son and daughter take as next of kin.[1] *Cattell v. Evans*, 301 Mich. 708, 4 N. W. (2d) 67 (1942).

Faced with a full residuary clause, a limiting clause as to participation of relatives, and the presumption against intestacy, the court in the principal case nevertheless followed the old-line idea as to what language and circumstances are sufficient to create a class gift. According to various courts and text writers the requirements for the constituting of a class gift have been said to be: (1) A common attribute among the donees, as relationship among themselves or to

[1] The court also decided that the specific bequests to the son and daughter, plus the limiting clause, did not prevent them from sharing the intestate property. 2 PAGE, WILLS, 3d ed., § 929 (1941).

the testator.[2] (2) The members of the class should not be named; but it should be "a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time." [3] (3) The beneficiaries are to be indefinite in number at the time of the gift and until the death of the testator.[4] (4) Avoidance of words or phrases that are indicative of a distributed gift rather than one to a class. Dangerous words and phrases are "each," [5] "equally divided," [6] "share and share alike," [7] and even more so, the "one-seventh absolutely and forever" [8] set out in the instant case. (5) Use of words of survivorship.[9] Some writers and cases indicate that the above requirements need not be present in order to establish a class gift to prevent partial intestacy, if the testator has executed a will with necessary formalities, and has included a full residuary clause.[10] Profesor Page [11] has written that if the will shows the testator intended that lapsed residuary gifts should fall into the remainder of the residuum (e. g. where a clause limits participation by next of kin in the estate, there is a presumption against partial intestacy), full effect will be given to such provision.[12] There seem to be no definite rules by which to judge a gift

[2] The testator should use language or terms which could be applied to all members of the group. That they are in the position of being residuary legatees is of no avail. Denton v. Schneider, 80 Wash. 506, 142 P. 9 (1914); Strout v. Chesley, 125 Me. 171, 132 A. 211 (1926).

[3] JARMAN, WILLS, 7th ed., 310 (1930). A gift to persons named in equal shares creates a tendency in common. Dildine v. Dildine, 32 N. J. Eq. 78 (1880); Byrd v. Wallis, 182 Miss. 499, 181 So. 727 (1938). If the gift is made to beneficiaries by name, the gift is, prima facie, not one to a class, even if the individuals who are named possess some quality or characteristic in common. 3 PAGE, WILLS, 3d ed., § 1046 (1941); Hatt v. Green, 180 Mich. 383, 147 N. W. 593 (1914); In re Coots' Estate, 253 Mich. 208, 234 N. W. 141 (1931).

[4] It is contemplated that there might be either an increase or decrease in the number of members of the class. Clearly in situations such as the present, where there is naming of specific beneficiaries, an increase is not anticipated. 3 PAGE, WILLS, 3d ed., § 1046 (1941); In re Watson's Will, 241 App. Div. 842, 271 N. Y. S. 329 (1934), affd. sub nom. In re United States Trust Co. of N. Y., 264 N. Y. 697, 191 N. E. 632 (1934).

[5] 3 PAGE, WILLS, 3d ed., § 1050 (1941).

[6] Travero v. Travero, 99 N. J. Eq. 514, 133 A. 705 (1926); Gordon v. Jackson, 58 N. J. Eq. 166, 43 A. 98 (1899); Ashley v. Lester, 281 Mass. 261, 183 N. E. 498 (1932); Estate of Kelleher, 205 Cal. 757, 272 P. 1060 (1928).

[7] Wessborg v. Merrill, 195 Mich. 556, 162 N. W. 102 (1917).

[8] The courts are prone to hold that the named beneficiaries take only the amount specified, regardless of the number of names in force at death of testator. Matter of Kimberly, 150 N. Y. 90, 44 N. E. 945 (1896); Lyman v. Coolidge, 176 Mass. 7, 56 N. E. 831 (1900); 40 CYC. 1474 (1912).

[9] Principal case. In Stahl v. Emery, 147 Md. 123, 127 A. 760 (1925), the use of the phrase "joint tenants" was held to indicate a desire for a class gift.

[10] ATKINSON, WILLS 766 (1937).

[11] 2 PAGE, WILLS, 2d ed., § 1258 (1928), 4 id., 3d ed., § 1431 (1941).

[12] Strauss v. Strauss, 363 Ill. 442, 2 N. E. (2d) 699 (1936); Corbett v. Skaggs, 111 Kan. 380, 207 P. 819 (1922) (named residuary legatees divide the lapsed shares). The court in the principal case distinguishes several Michigan cases where there was a limiting clause on next of kin and a full residuary clause where legatees

as one to a class or not; but as Thomas M. Cooley II points out,[13] the problem is to determine under what circumstances and limitations the court will decree the testator intended a gift to a class. Through the decisions finding a class gift regardless of the technique used by the draftsman runs this common thread: when it appears the testator has been so interested in the welfare of the group to whom he was giving something that, had he thought of it, he would have wanted those members who survived him to take it all in preference to having part of it lapse, the court will construe a class gift to have been intended.[14]

were named with the share each was to take, followed by a lapsed residuary share, and subsequent court distribution of the lapsed share to the remaining residuary legatees as a class, on the basis that these cases show that the named legatees formed a natural class of brothers and sisters. In re Ives' Estate, 182 Mich. 699, 148 N. W. 727 (1914); In re Hunter's Estate, 212 Mich. 380, 180 N. W. 364 (1920).

[13] "What Constitutes a Gift to a Class," 49 HARV. L. REV. 903 (1936).

[14] The conveyor must have been "group minded," 3 PROPERTY RESTATEMENT, § 279 et seq. (1940). A similar definition has been evolved by a writer in 75 A. L. R. 773 at 779 (1931): "a testamentary gift is one to a class where the aggregate property given to the group, or the several items assigned to the members, may, according to the intent of the testator, be taken by such of the persons indicated as are in being at the time of the testator's decease, or at such time subsequent to the date of the will as the membership of the class is to be effectually ascertained."

Other discussions of class gifts include: Casner, "Class Gifts—Definitional Aspects," 41 COL. L. REV. 1 (1941); Casner, "Construction of Gifts 'to A and his Children,'" 7 UNIV. CHI. L. REV. 438 (1940); Casner, "Class Gifts to Others than to 'Heirs' or 'Next of Kin'—Increase in the Class Membership," 51 HARV. L. REV. 254 (1937); Casner, "Construction of Gifts to 'Heirs' and the Like," 53 HARV. L. REV. 207 (1939); Leach, "The Rule against Perpetuities and Gifts to Classes," 51 HARV. L. REV. 1329 (1938).