Michigan Law Review

Volume 41 | Issue 5

1943

WILLS-CONSTRUCTION-IMPLIED CONDITION OF SURVIVAL WITH PARTICULAR REFERENCE TO MICHIGAN LAW

L. M. S.
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Estates and Trusts Commons

Recommended Citation
L. M. S., *WILLS-CONSTRUCTION-IMPLIED CONDITION OF SURVIVAL WITH PARTICULAR REFERENCE TO MICHIGAN LAW*, 41 MICH. L. REV. 953 (1943).
Available at: https://repository.law.umich.edu/mlr/vol41/iss5/12

This Response or Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

WILLS—CONSTRUCTION—IMPLIED CONDITION OF SURVIVAL WITH PARTICULAR REFERENCE TO MICHIGAN LAW—If the language of a will creates a future interest, when is there an implied condition that the one to whom the interest is given must survive the termination of prior interests? In general, this question is answered by applying the proposition that the law prefers to construe an interest as vested rather than contingent and as indefeasible rather than defeasible.[1] Hence it would seem that, in order to imply a condition precedent of survival, there must be some language on which to base the implication. This, however, does not tell the entire story. There are numerous special rules applicable to particular language.[2] And while most of

[1] Authorities to this effect are very numerous. See 69 C. J. 597-602 (1934).

[2] In general, on the requirement of survival, see 3 PROPERTY RESTATEMENT, c. 19 § 249 et seq. (1940); 2 SIMES, FUTURE INTERESTS, c. 22 (1936).

these tend in the direction of the general doctrine just stated, a few, developed in particular jurisdictions, operate in the opposite direction.

In view of the number of Michigan decisions on the question of implying a condition of survivorship, not all of which appear to be entirely consistent, the recent case of *In re Hurd's Estate*[3] is one of considerable interest. In that case a will was involved which provided for a trust for the testator's nephew, George Stimpson, for his life, and on his death the trustee was directed "to pay over the said trust funds in equal shares to Grant, Carl, Earl, and Reed Stimpson, the children of the said George Stimpson; and should any of the four above-named sons of George Stimpson predecease him, leaving children, then upon the termination of this trust the share of such deceased son shall be turned over to his children by right of representation." Testator died in 1929. Carl Stimpson died in 1926, leaving a son, Jack Stimpson, who died intestate in 1933, leaving plaintiff as his heir. George Stimpson, the life tenant, died in 1941. Plaintiff petitioned the probate court to award her a one-fourth interest in the trust estate as heir of Jack Stimpson. The probate court so held. This decision was reversed in the circuit court. But in the supreme court the decision of the probate court was affirmed, on the ground that Jack Stimpson took an indefeasible interest on the death of the testator, and such interest was not divested on his failure to survive the life tenant.

Defendant first contended that this was a class gift; but since each remainderman was separately named and there was no specific language to indicate that they were thought of as a group of children, the conclusion of the Supreme Court of Michigan that a class gift was not created would seem to be correct.[4]

The court also referred to the so-called divide-and-pay-over rule "or theory," and stated that it had no application. Such a rule is found in some jurisdictions to the effect that, if the only words of gift are found in the direction to divide and pay over, or in similar language, then the gift is contingent and not vested.[5] But the better authorities

[3] 303 Mich. 504, 6 N.W. (2d) 758 (1942).

[4] In general, if the members of the group are named, this tends to show that a class gift was not intended. See 3 PROPERTY RESTATEMENT, § 280 (1940). This case is distinguishable from In re Hunter's Estate, 212 Mich. 380, 180 N.W. 364 (1920), where, although the members of the class were named, it was clear from the express language of the will that it would defeat the testatrix' intent not to hold that it was a class gift. For a later Michigan decision as to the requisites of a class gift, see Cattell v. Evans, 301 Mich. 708, 4 N.W. (2d) 67 (1942), noted in 41 MICH. L. REV. 749 (1943).

[5] The rule is thus stated in the leading case of Matter of Crane, 164 N.Y. 71 at 76, 58 N.E. 47 (1900): "Where the only words of gift are found in the direction to divide or pay at a future time the gift is future, not immediate; contingent and

disapprove of any such rule; [6] for it would seem that whether a testator uses the words "divide and pay over" or uses language of direct gift is largely a matter of accident and has nothing to do with his intent to impose a condition precedent of survivorship. At first blush, it might seem that the court in this case has repudiated the divide-and-pay-over rule. But a more careful reading indicates that it may be merely deciding that, if the possession is postponed only for the purpose of letting in a life interest, then the rule is inapplicable. Of course, such an exception to the rule enables the court to refuse to apply it in almost all situations. There is some language supporting the divide-and-pay-over rule in earlier Michigan cases,[7] but there are no decisions in which it has been applied to support a contingent construction.

The conclusion of the court that the remainder interest of Jack Stimpson was indefeasibly vested from the time of the testator's death is believed to be sound. It should be noted, however, that the court is not deciding that the remainder interests of the three children of George Stimpson who survived the testator are indefeasibly vested. Those remainders are, by the express terms of the will, vested subject to defeasance on their death leaving children prior to the death of the life tenant. In substance, we have here a gift to *A* for life, with remainder to *B, C, D* and *E,* but should any remainderman die before *A* leaving children, the children shall take the parent's share. The testator has made an express condition divesting the original shares on failure to survive the life tenant; but he has made no provision as to the failure of the takers of the substituted shares to survive. Under the well-recognized preference of the law for a vested interest, it would seem that only those remainders should be divested for nonsurvival of the life tenant which the testator has said shall be so divested. But since nothing is said as to the substituted remainder, it is not divested. The authorities support the decision of the court on this point.[8] The court

not vested." And see Gluck "The 'Divide and Pay Over' Rule in New York," 24 COL. L. REV. 8 (1924).

[6] See, for example, Mead v. Close, 115 Conn. 443, 161 A. 799 (1932). 3 PROPERTY RESTATEMENT, § 260, (1940), is as follows: "In a limitation purporting to create a remainder or an executory interest, the fact that the only words of gift to the intended taker thereof consist of a direction to divide and pay over, or to convert, divide and pay over, at the end of the created prior interests or at some other future date is not a material factor in determining the existence of a requirement of survival to the date of distribution."

[7] See Palms v. Palms, 68 Mich. 355 at 381, 36 N.W. 419 (1888); Wessborg v. Merrill, 195 Mich. 556, 162 N.W. 102 (1917).

[8] To this effect are the following: Wade v. Wade, 203 Mass. 1, 88 N.E. 926 (1909); Crane v. Bolles, 49 N.J. Eq. 373, 24 A. 237 (1892); Wright v. Dugan, 34 Hun (41 N.Y. S. Ct.) 634, 15 Abb. N.C. 107 (1884); In re Carstensen's Estate, 196 Pa. 325, 46 A. 495 (1900); Porter v. Bryant, 273 Pa. 435, 117 A. 190 (1922); Tindal v. Richbourg, 91 S. C. 404, 74 S.E. 932 (1912); Lanphier v. Buck,

was not deciding, however, as some courts have done, that all the remainders were indefeasibly vested at the death of the testator because the phrase "should any child of George die leaving children" could be construed to mean "should any child of George die leaving children in the lifetime of the testator." Such a construction would be a distortion of the testator's meaning and is opposed to a considerable body of authority.[9]

The preference for a vested and indefeasible construction finds support in a rather extreme line of decisions of which *Porter v. Porter*[10] is typical. In that case testator gave his estate to his widow for life, and further provided that, on the decease of his wife, the property was to be equally divided between "my surviving children." It was held that the remainder was to children surviving the testator and that children who did not survive the wife were to be included. While a number of decisions support this view, the weight of authority is to the effect that, if express words of survivorship are used in this way, they are presumed to be referable to the time of distribution and not to the testator's death.[11]

2 Dr. & Sm. 484, 62 Eng. Rep. 704 (1865); 3 PROPERTY RESTATEMENT, § 254, comment d (1940); 2 JARMAN, WILLS, 7th ed., p. 1300 (1930). *Contra*: Barnes v. Johnston, 233 Ill. 620, 84 N.E. 610 (1908).

Similar to this situation is that of a gift in remainder to a group of named persons with a provision that, if any die before the life tenant, or die without leaving issue before the life tenant, his share is to go to the survivors. It is commonly held that no condition of survivorship of the life tenant is implied as to the accrued shares. Boggs v. Boggs, 69 N.J. Eq. 497, 60 A. 1114 (1905); Goodin's Estate, 328 Pa. 548, 196 A. 1 (1938); 3 PROPERTY RESTATEMENT, § 271 (1940); and see cases collected in 69 C. J. 349 (1934).

It appears, however, that a different conclusion was reached as to accrued shares in L'Etourneau v. Henquenet, 89 Mich. 428, 50 N.E. 1077 (1891).

[9] One of the leading cases holding that "die without leaving issue" means "die without leaving issue at the time of the testator's death" is Mickley's Appeal, 92 Pa. 514 (1880). For an analysis of the conflicting decisions on this point, see Warren, "Gifts Over on Death Without Issue," 39 YALE L. J. 332 (1930). The Restatement of Property takes the position that such phrases as "death without issue" or "death without children" are not normally construed to mean death in the lifetime of the testator. See 3 PROPERTY RESTATEMENT, §§ 266-269 (1940). In a case involving land only, the Supreme Court of Michigan has held that "death without issue" does not mean "death without issue in the lifetime of the testator." Mullreed v. Clark, 110 Mich. 229, 68 N.W. 138, 989 (1896). The court based its decision on the statute as to the meaning of "death without issue." See Mich. Comp. Laws (1929), § 12942, Stat. Ann. (1937), § 26.22.

[10] 50 Mich. 456, 15 N.W. 550 (1883). Other cases to the same effect are Rood v. Hovey, 50 Mich. 395, 15 N.W. 525 (1883) (remainder to testator's children "now living or who may be at the time of her decease"); In re Patterson's Estate, 227 Mich. 486, 198 N.W. 958 (1924); Sturgis v. Sturgis, 242 Mich. 52, 217 N.W. 771 (1928) (to D for his natural life and to descend "to his male children, if any shall survive him. . .").

[11] See cases collected in 114 A.L.R. 4 (1938); 3 PROPERTY RESTATEMENT, § 250 (1940).

There is still another line of Michigan decisions which the lawyer must sometimes consider in determining the existence of an implied condition of survivorship. These are cases where there is some express condition precedent other than survival, and because of this other condition precedent, the court implies also a condition precedent of survivorship. Perhaps the leading case in this group is *In re Coots' Estate.*[12] Testator devised a life estate in trust to his wife and son *W* and to the survivor of them, and provided that, upon the decease of both, $10,000 should be held in trust for the son's widow, and the residue in equal shares to the child or children of testator's son, and in case the son should die without leaving issue or lineal heirs, the residue should be divided equally among seven named persons. *W* survived his mother and died without issue. Three of the seven persons died during the life of *W*. The other four survived. It was held that the shares of the three who predeceased *W* became intestate property and passed to testator's heirs.

A short time after the decision in the *Coots* case, the legislature enacted the following statute,[13] which would seem to reverse the rule laid down in that decision:

> "In all cases where the owner of an expectant estate, right or interest in real or personal property shall die prior to the termination of the precedent or intermediate estate, if the contingency arises by which such owner would have been entitled to an estate in possession if living, his heirs at law if he died intestate, or his devisees or grantees and assigns if he shall have devised or conveyed such right or interest, shall be entitled to the same estate in possession."

It should be noted, however, that this statute has no retroactive effect. And in *Stevens v. Wildey,*[14] it was held that, as to the will of a testator who died before this statute was enacted, the rule of *In re Coots' Estate* applies.

Although the doctrine of the *Coots* case has been applied in a number of other decisions in other jurisdictions, it is believed to be neither sound nor in accordance with the weight of authority.[15] Probably John

[12] 253 Mich. 208, 234 N. W. 141 (1931), noted in 29 MICH. L. REV. 954 (1931). A similar decision is Hadley v. Henderson, 214 Mich. 157, 183 N.W. 75 (1921).

[13] Mich. Pub. Acts (1931), No. 211, now Mich. Stat. Ann. (1937), § 26.47.

[14] 281 Mich. 377, 275 N.W. 179 (1937), noted in 17 MICH. S.B.J. 54 (1938).

[15] See, for example, Massey's Estate, 235 Pa. 289, 83 A. 1087 (1912). Cases are collected in the notes in 29 MICH. L. REV. 954 (1931) and 17 MICH. S.B.J. 54 (1938). 3 PROPERTY RESTATEMENT, § 261 (1940), is as follows: "In the limitation purporting to create a remainder, or an executory interest, the presence of a condition precedent, or of a defeasibility, dependent on other facts is not a material factor in determining the existence of the requirement of survival to the time of the fulfillment or elimination of such other condition precedent or defeasibility."

Chipman Gray was the first to point out that the terms vested and contingent are used by the courts in two different senses.[16] First, contingent may mean subject to a condition precedent other than the termination of prior estates; and vested may mean subject to no condition precedent other than the termination of prior estates however and whenever that may happen. Second, contingent may mean subject to a condition precedent of survival, and vested may mean transmissible by descent or devise. It is believed that some courts have confused these two meanings of contingent, and have held that, because there is a condition precedent, it follows that there is also implied a condition precedent of survival. Of course, the very fact that contingent future interests are made devisable and descendible by statute[17] would seem to be one reason why we should not imply a condition precedent of survival merely because there is some other condition precedent. Moreover, to imply a condition precedent of survival is to go counter to the recognized preference for vested interests.

Doubtless the Michigan court will continue to follow the *Coots* case in construing wills which took effect before 1931. But in other situations involving implied conditions of survivorship, we may expect decisions in accordance with the broad rule of policy under which vested and indefeasible interests are to be preferred. The recent decision in the case of *In re Hurd's Estate* would seem to indicate a desirable tendency in that direction.

L. M. S.

[16] GRAY, RULE AGAINST PERPETUITIES, §§ 101, 118 (1886); id., 4th ed., §§ 101, 118 (1942). See, also, KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS, 2d. ed., § 495 (1920); 2 SIMES, FUTURE INTERESTS, §362 (1936).

[17] "Expectant estates are descendible, devisable and alienable, in the same manner as estates in possession." Mich. Comp. Laws (1929), § 12955, Stat. Ann. (1937), § 26.35.