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Decedents' Estates And Trusts—Devolution of a Lapsed Residuary Legacy: A Departure from the "No Residue Of A Residue" Rule

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be commensurate with what is reasonable for her support with due regard for the prime object of the trust—the beneficiary.[19]

The majority in the instant case succinctly announces a new rationale for allowing the wife to seize the portion of the income trust, grounded neither upon implied intent of the settlor nor of a debtor creditor relationship, but rather one of public policy. The spirit and policy behind the statute is simply that there is a societal duty of support on the part of this husband. The dissent however, argues that the relationship of debtor-creditor is only to be substituted by legislative fiat. It attempts to distinguish the support agreement in this case as being pro forma outside those upon which the Court has previously allowed the wife to recover.

The husband may be compelled to support his family out of trust income under four possible theories: the unity theory of husband and wife, the idea of an implied intent by the settlor, a debtor creditor relationship, or by a statutory duty. The anachronistic theory, of the unity of husband and wife now for all practical purposes is judicially absolete. The second would be the implied intent of the settlor to include the family of the beneficiary. This again would be unmanageable and might lead to specific exclusions of the beneficiaries' family by the settlor. The third approach, that of debtor and creditor, in a sense secularizes the matrimonial contract and would again allow the settlor to frustrate the husband's duty to support by explicity excluding the family from the benefits of the trust. The last approach and the one adopted by the majority puts the husband in a position of duty and adequately protects the family of the beneficiary from starvation or public assistance; and at the same time leaves the judicial portals open for a modification of the argument in light of changed circumstances of the beneficiary.

William Carnahan

DEVOLUTION OF A LAPSED RESIDUARY LEGACY: A DEPARTURE FROM THE "NO RESIDUE OF A RESIDUE" RULE

The original proceeding was for a final settlement of the account of the executor and for a construction of certain paragraphs of decedent's will. Mary M. Dammann died at the age of eighty-five, an adjudged incompetent, leaving a will executed sixteen years before her death. She had never married and her closest living relatives were cousins. With minor exceptions, her will was devoted to bequests and devises to the eight relatives named in the residuary clause.[1] One of these pre-deceased the testatrix by a few months. The question therefore arose, whether paragraphs eighteen and nineteen[2] of the will directed

1942), *aff'd*, 288 N.Y. 697, 43 N.E.2d 87 (1942), *rehearing denied*, 289 N.Y. 756, 46 N.E.2d 357 (1942).

19. In the Matter of Estate of Moller, 157 Misc. 338, 283 N.Y. Supp. 365 (Surr. Ct. 1935).

1. Record pp. 26-31.

2. *Id.* at 31.

a division of the lapsed share among the seven surviving legatees, or whether absent such valid direction, this share passed to the statutory distributee, a first cousin in West Germany, who had not been given consideration in any part of the will. Paragraph eighteen specified that four second cousins and the wife and three children of one second cousin should share in eight equal parts all the rest, residue and remainder of the estate. Paragraph nineteen stated that the testatrix "not unmindful" of the existence of other relatives, nevertheless desired that "no part of my estate shall go to any except those hereinbefore mentioned."[3] The Surrogate's Court, Queens County entered a decree,[4] affirmed by the Appellate Division,[5] that the lapsed residuary legacy devolved by intestate succession upon a first cousin in West Germany. On appeal, *held*, order modified, one judge dissenting. The negative and affirmative expressions of testatrix's intent, construed as a whole, revealed a dominant purpose to distribute the residue of her estate to the legatees named in paragraph eighteen, and to no others. *Matter of the Estate of Dammann*, 12 N.Y.2d 500, 191 N.E.2d 452, 240 N.Y.S.2d 968 (1963).

That segment of the law devoted to the administration of wills suffers not from a lack of guiding precepts but rather abounds in rules and canons which either dictate an inexorable result or impose a direction to the resolution of most issues. Co-existing in the area of wills are not only the historically entrenched rules of property law, but also the pervasive maxims of equity. The common law recognized no inherent right to bequeath, devise or inherit.[6] These were privileges gradually bestowed by the grace of the sovereign and are today granted by statute.[7] The instant case involves the area of law pertaining to residuary legacies as it is colored and reacted upon by several common law principles: the canon of construction that the intent of the testator should be implemented, the strict concept of class and the restriction upon the power to disinherit. The underlying rule governing residues, that

> . . . on failure of the intended legacy of part of the residuum, the part as to which disposition has failed will go as in case of intestacy and the residuum passing under the residuary clause will not be augmented by a "residue of a residue"[8]

was initially justified as a means to preserve the true intent of the testator. Sir Thomas Plumer, M.R., expressed the reason for the rule as follows:

> In the instance of a residue given in moieties, to hold that one moiety

3. *Ibid.*
4. *In re* Dammann's Will, 220 N.Y.S.2d 358 (Surr. Ct. 1961).
5. In the Matter of the Estate of Dammann, 16 A.D.2d 953, 230 N.Y.S.2d 674 (2d Dep't 1962) (Memorandum decision).
6. 14 N.Y. Jur. *Decedents' Estates* § 14 (1960).
7. In broad leaps, the development may be marked by the Ordinance of William the Conqueror, 1072 (intestate succession), the British Statute of Wills, 1540, and the N.Y. Deced. Est. Law, art. 2, Wills, and art. 3, the Statute of Descent and Distribution.
8. Wright v. Wright, 225 N.Y. 329, 340; 122 N.E. 213, 217 (1919).

> lapsing should accrue to the other, would be to hold that a gift of a moiety of the residue shall eventually carry the whole.[9]

But the rule also bears the overtones of the sovereign's reluctance to permit the individual to control succession to his property at death, and of the stern consequence—that the privilege is lost and statutory distribution automatically substituted—if the testamentary provision did not meet legal standards.[10] One such standard is the strict notion of class.[11] Where there is no gift over, courts have generally upheld a bequest to a group only if the latter constitutes an identified but unnamed, homogeneous class, uncertain in number, and to take by shares. An imperfectly created class, moreover, could not defeat the statutory distributee, where a class member pre-deceased the testator, even though the latter clearly expressed in the will a desire to exclude distributees outside the class.[12] This "words alone cannot disinherit" rule, in conjunction with a narrow concept of class and the restriction against augmenting non-class residuary shares has frequently produced a direct conflict with the cardinal principle of effectuating the testator's intent and with the common-sense proposition that an integral element of that intent was a desire to avoid intestacy.

The case law of New York exhibits that conflict. The judicial conviction that the testamentary intent must be discovered and carried out permeates the decisions.[13] But in many instances, the three restrictions upon testamentary freedom discussed above and pertinent to the instant case may operate to expunge true intent. Failure of a portion of a residuary bequest has resulted, in the great majority of cases, in intestacy as to that part.[14] Despite some judicial reservations,[15] this limitation has been regularly applied as a part of the common law governing the construction of wills. The courts have also customarily held that the legal rights of an heir or next of kin cannot be nullified unless the testator has effectually disposed of the property by will,[16] notwithstanding an identification of those specifically to be excluded.[17] Similarly, strict adherence to a limiting concept of class has resulted in intestacy as to a lapsed

9. Skrymsher v. Northcote, 1 Swan. ch. 565, 571, 36 Eng. Rep. 507, 509 (1818).
10. 14 N.Y. Jur. *Decedents' Estates* § 35 (1960).
11. Herzog v. Title Guar. & Trust Co., 177 N.Y. 86, 69 N.E. 283 (1903).
12. Matter of the Will of Trumble, 199 N.Y. 454, 92 N.E. 1073 (1910).
13. Matter of Warren, 11 N.Y.2d 463, 184 N.E.2d 304, 230 N.Y.S.2d 711 (1962); Cammann v. Bailey, 210 N.Y. 19, 103 N.E. 824 (1913); Meeks v. Meeks, 161 N.Y. 66, 55 N.E. 278 (1899); Schult v. Moll, 132 N.Y. 122, 30 N.E. 377 (1892); Matter of the Estate of Foster, 174 Misc. 933, 22 N.Y.S.2d 252 (Surr. Ct. 1940).
14. Wright v. Wright, 225 N.Y. 329, 340, 122 N.E. 213, 217 (1919); Beekman v. Bonsor, 23 N.Y. 298 (1861). Matter of the Estate of Tiers, 32 Misc. 2d 450, 222 N.Y.S.2d 709 (Surr. Ct. 1961); Matter of the Estate of Watkins, 7 Misc. 2d 871, 166 N.Y.S.2d 855 (Surr. Ct. 1957); in the Matter of Bogardus, 5 Misc. 2d 607, 164 N.Y.S.2d 485 (Surr. Ct. 1957); Matter of the Estate of Cokefair, 173 Misc. 196, 17 N.Y.S.2d 431 (Surr. Ct. 1939).
15. Oliver v. Wells, 254 N.Y. 451, 173 N.E. 677 (1930).
16. Matter of the Will of Trumble, 199 N.Y. 454, 92 N.E. 1073 (1910).
17. Pomroy v. Hincks, 180 N.Y. 73, 72 N.E. 628 (1904). *Contra*, Matter of the Estate of Weissmann, 137 Misc. 113, 243 N.Y. Supp. 127 (Surr. Ct. 1930), *aff'd mem.*, 247 N.Y. Supp. 901 (2d Dep't 1931); *In re* Leitiser's Estate, 125 N.Y.S.2d 133 (Surr. Ct. 1953); *In re* Klopsch's Estate, 125 N.Y.S.2d 320 (Surr. Ct. 1951).

share where the residue was willed to named beneficiaries,[18] even though they were relatives of the same degree of consanguinity[19] and to share and share alike.[20] But it is in the area of the class requirement, that a relaxation of technical requirements has gradually emerged. Surviving beneficiaries have been permitted to take, even though they are named, and whether they are of the same[21] or of varying degrees of relationship[22] to the testator. The instant case falls within this pattern of decisions having "the obvious merit of observing the average testator's desires as manifested by his residuary clause which purports to pass his entire estate."[23]

The determination of the courts below was supported by the weight of precedent in applying the rules of "no residue of a residue" and of "words alone cannot disinherit." Paragraphs eighteen and nineteen of the will[24] were construed separately to produce intestacy as to the lapsed share. Paragraph eighteen was held to fall short of creating a legally cognizable class gift; paragraph nineteen was viewed merely as evidencing testamentary capacity. But the Court of Appeals found ample authority in the substance of the will to hurdle these technical obstacles and to fullfill, in the tradition of chancery, its role as guardian of the testamentary wishes of one who could no longer clarify imperfectly expressed directions. Paragraphs eighteen and nineteen were read as one,[25] and as an unequivocal desire that only the named beneficiaries should share in the residue. The fact that the decedent had named her excluded relatives, including the first cousin who would take any intestate share, in a list which was incorporated in the will was considered highly significant.[26] The Court recognized the force of the residue rule but, without expressly overturning it, emphasized the long-existing judicial doubts that the rule had a convincing raison d'être. It was a rule "reluctantly enforced . . . when tokens are not at hand to suggest an opposite intention."[27] In the instant case the opposite intention was found in the testatrix's unmistakable command that those not named in the residuary clause were intentionally excluded from her testamentary scheme. To distribute the lapsed share among the surviving legatees was, in the Court's opinion, the disposition most likely to conform to the wishes of the decedent.

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18. Moffett v. Elmendorf, 152 N.Y. 475, 46 N.E. 847 (1897); In the Matter of Seaman, 196 Misc. 202, 91 N.Y.S.2d 854 (Surr. Ct. 1949).
19. In the Matter of Kimberley, 150 N.Y. 90, 44 N.E. 945 (1896); Matter of Bogardus, 5 Misc. 2d 607, 164 N.Y.S.2d 485 (Surr. Ct. 1957); In the Matter of Forde, 201 Misc. 198, 108 N.Y.S.2d 715 (Surr. Ct. 1951).
20. In the Matter of Pepper, 208 Misc. 513, 146 N.Y.S.2d 281 (Surr. Ct. 1955).
21. *In re* Long's Estate, 121 N.Y.2d 183 (Surr. Ct. 1953); In the Matter of Young, 133 Misc. 454, 232 N.Y. Supp. 427 (Surr. Ct. 1928).
22. *In re* Damask's Estate, 43 N.Y.S.2d 648 (Surr. Ct. 1943); In the Matter of the Estate of Stebbins, 125 Misc. 150, 210 N.Y. Supp. 424 (Surr. Ct. 1925).
23. Atkinson, Wills 785 (2d ed. 1953).
24. Record p. 31.
25. Instant case at 506, 191 N.E.2d at 454, 240 N.Y.S.2d at 971.
26. *Ibid.*
27. Instant case at 506, 191 N.E.2d at 454, 240 N.Y.S.2d at 971-72.

Ultimately, the problem confronting the Court in *Matter of Dammann* revolves around the concept of class. On the one side, is the persevering, strict definition which, negatively stated, excludes legatees *nominatim*, who are awarded definite shares, and who are of disparate degrees of relationship to the testator. This view is firmly embedded in history and precedent. On the other side, is the presumption against intestacy and the creative approach of the courts in seeking out the testamentary design as gathered from the whole will, in the light of all the circumstances.[28] Of itself, the inclusion of a residuary clause may reveal an uncertainty as to the final, distributable estate, and a priori, the individual shares will be indefinite, thus satisfying one criterion of a class gift. Several questions are presented. Did the testator intend total disposition of his property by will? Did the testator intend to benefit a line of the family; was he "group-minded"? Did the testator intend to achieve the incidence of a class-survivorship among members—in preference to suffering an unforeseen lapse? In the instant case, the legatee whose share was in dispute pre-deceased the testatrix by a matter of months, and the testatrix at the time of her death was an incompetent. In ascertaining her preference that the lapsed legacy be distributed among the surviving residuary beneficiaries, the Court could draw upon the following circumstances which, singly, may not have been determinative but which, compositely, support the decision in this case: in their relationship to the testatrix, the legatees were second cousins and the spouse and children of one second cousin, all living in proximity to the testatrix; they comprised all her living relatives in the United States; other portions of the will incorporated specific bequests of family jewelry, etc. to some of these legatees; each legatee was assigned an equal share of the residuary estate; in paragraph nineteen, the testatrix acknowledged other relatives and clearly expressed the desire to exclude them. From these facts, the law might imply the "beneficent fiction" that the testatrix intended a class, and the Court might find that the declaration excluding all other relatives supplied a negative intent buttressing the affirmative inclusion only of the named legatees. In refusing to be bound, on the facts of this case, by the "no residue of a residue" rule, the Court joins New York with other states[29] adopting a critical approach to technicalities which tend to defeat a scheme of testamentary distribution, and concentrates upon what Chief Judge Desmond terms "the first, safest and most urgent rule of testamentary construction": to give effect to the actual intent of the testator.

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28. Casner, *Class Gifts—Effect of Failure of Class Member to Survive the Testator*, Harvard Selected Essays on Wills, Future Interests, and Estate Planning 138 (1958).

29. Commerce Nat'l Bank v. Browning 158 Ohio St. 54, 107 N.E.2d 120 (1952); Annot., 36 A.L.R.2d 1117, 1121-22 (1954).