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Decedents' Estates and Trusts—More Remote Descendants Excluded from a Disposition to “My Grandchildren Then Living"

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Division,[4] directed that if at a hearing before the county court, the defendant proves the allegations, the judgment of conviction must be vacated and the sentence must be imposed on the verdict. Thus the time to appeal would commence anew.

The writ of coram nobis is usually held to matters occurring during the trial; however, the Court of Appeals has not hesitated to expand the scope of the writ to cases where no other judicial relief is available.[5] The right to a criminal appeal is not a necessary part of constitutionally-guaranteed due process,[6] but if the defendant has been prevented from complying with the statutory requirements for the taking and perfecting an appeal because of action by law enforcement or prison authorities, he has been denied a right guaranteed by the equal protection clauses of the Federal Constitution[7] and the New York Constitution,[8] and some method of judicial review must be afforded him.[9]

In *People v. Guhr*,[10] a case with facts analogous to the present, the Appellate Division declined to state whether coram nobis or habeas corpus was the correct remedy in such a case. The court, in an effort to avoid distinguishing between the remedies, placed the burden of affording adequate relief on the district attorney and the trial court at a subsequent hearing. The Court of Appeals in the present case made no attempt to distinguish between coram nobis and habeas corpus, as the Court was more interested in affording adequate relief to a defendant whose constitutional rights had been impaired.

From these four cases, it can be seen that specific boundaries beyond which the writ of coram nobis will not lie have been drawn. The Court of Appeals, however, will not hesitate to readjust these boundaries within reason. The Court will, in reality, examine the particular fact situation and manipulate the boundaries in order to achieve substantial justice.

Bd.

DECEDENTS' ESTATES AND TRUSTS

More Remote Descendants Excluded from a Disposition to "My Grandchildren Then Living"

In the case of *In re Welles Will*,[1] decided by the Court of Appeals in 1961, the Court held that a trust for the testator's daughter for life with remainder

4. 12 A.D.2d 721, 208 N.Y.S.2d 138 (4th Dep't 1960).
5. People v. Sullivan, 3 N.Y.2d 196, 165 N.Y.S.2d 6 (1957); People v. Kronick, 308 N.Y. 866, 126 N.E.2d 307 (1955); People v. Hill, 9 A.D.2d 451, 195 N.Y.S.2d 295 (2d Dep't 1959), aff'd, 8 N.Y.2d 935, 204 N.Y.S.2d 172 (1960).
6. People v. Gersewitz, 294 N.Y. 163, 61 N.E.2d 427 (1945), cert. denied, 326 U.S. 687 (1945).
7. U.S. Const. amend. XIV, § 11.
8. N.Y. Const. art. I, § 11.
9. Dowd v. United States ex rel. Cook, 340 U.S. 206 (1951). See also Cochran v. State of Kansas, 316 U.S. 255 (1942).
10. 5 A.D.2d 688, 169 N.Y.S.2d 256 (2d Dep't 1957).

1. 9 N.Y.2d 277, 213 N.Y.S.2d 441 (1961).

to "my grandchildren then living" if she dies without issue, creates an interest in those grandchildren who survive the life tenant only, and excludes the descendants of those grandchildren who predeceased the life tenant. The Court of Appeals, therefore, upheld decisions to the same effect in the Appellate Division[2] and the Surrogate's Court.

The will creating the trust was executed in 1892 and a codicil thereto was executed in 1898. On both occasions the testator had four children and five grandchildren. His son Benjamin had two children and one of his daughters, Helen, had three children.

The will as modified by the codicil:

> (a) made provision for Benjamin and *his descendants;*
> (b) created a trust for Catharine (a daughter) for her life with remainder to "my other children, Helen, Benjamin and Harriet" and if any child should die before Catharine, his or her share "to be equally divided among the descendants of the one so dying";
> (c) created a trust for Helen and Harriet (both daughters) of ½ of the residuary each. Helen and Harriet were to receive the income therefrom for their lives and at their death the principal was to be divided equally among the *children* of each daughter. It was also provided that if Benjamin, Helen or Harriet should die without *issue* surviving them, the amount held in trust for the one dying without issue surviving was to be divided equally among *"my grandchildren then living."* (Emphasis added.) At the end of the same clause the testator provided: "It being my express wish that my property shall be enjoyed by those of my own blood."

The testator had a total of five grandchildren but before the termination of Harriet's life estate two grandchildren had died. Harriet was unmarried at the time of the execution of the will and died when over 100 years of age, unmarried and without issue. Testator's descendants at Harriet's death were three grandchildren, seven great-grandchildren, and seventeen great-great-grandchildren. A special guardian was appointed for fifteen great-great-grandchildren who were minors.

When Harriet died without issue the trustees began a construction proceeding to determine who was to receive the remainder of Harriet's share. Although the phrase "my grandchildren then living" seems quite clear, many problems are raised in light of other provisions in the will.

The provisions for disposition of the children's shares at their death differ. Benjamin's share was to pass to his descendants. No provision was made for Catharine's offspring but rather her share was to pass to Helen, Benjamin and Harriet or their descendants. Helen's and Harriet's share was to go to the children of each. If Helen, Benjamin or Harriet died without issue then that one's share was to pass "to my grandchildren then living."

2. 11 A.D.2d 780, 205 N.Y.S.2d 300 (2d Dep't 1960).

The terms descendants and issue generally are interchangeable.[3] Although descendant is often used to mean successive children, its legal meaning is issue of a deceased person and does not include the child of a parent who is still living.[4] Thus, these two terms indicate that the testator contemplates children of deceased children sharing with those of their parents' level. The children take by representation.

The term children does not by itself evidence such an intent.[5] However, the testator here provided for Helen's and Harriet's children but made the limitation over to grandchildren dependent upon the daughter dying without issue. Therefore, the testator might have used children and issue to mean the same thing. Thus, the descendants of deceased grandchildren raised the question whether grandchildren was also assumed by the testator to mean descendants or issue.

Even if this was not so, it was contended that the will of the testator as a whole evidenced an intent to benefit all branches of his family equally. The provision in the will that blood relatives were of primary concern was specifically pointed to. This general intent, it was argued, overrides the limitation to "grandchildren then living" which, because Harriet lived over 100 years, cut off two lines of grandchildren.

Section 29 of the New York Decedent Estate Law provides that an estate devised or bequeathed to a child or other descendant, or to a brother or sister shall not lapse if such legatee or devisee dies in the lifetime of the testator, but shall vest in the child or other descendant of such legatee or devisee. This section does not apply in the instant case because (1) this is a class gift[6] and (2) the grandchildren did not die in the lifetime of the testator. The descendants were thus forced to rely on the intent of the testator without the aid of this statutory presumption.[7]

There is a considerable body of case law which has interpreted a limitation to children to include more remote descendants whenever the "reason of the thing demands it."[8] There are fewer cases interpreting the word grandchildren

3. In re Radt's Will, 6 Misc. 2d 716, 167 N.Y.S.2d 817 (Surr. Ct. 1957).

4. In re Plaster's Estate, 179 Misc. 80, 37 N.Y.S.2d 498 (Surr. Ct. 1942), aff'd, 266 App. Div. 439, 43 N.Y.S.2d 1 (3d Dep't), aff'd, 293 N.Y. 822, 59 N.E.2d 181.

5. A gift to children, descendants, etc., is a gift to a class, In re Rumph's Will, 205 Misc. 404, 129 N.Y.S.2d 730 (Surr. Ct. 1954), and where there is an intervening estate with a direction to divide and pay over to a class as remaindermen, if none of the exceptions to the divide and pay over rule apply and no contrary intent is found, the members of that class are to be determined at the time the remainder becomes possessory. The gift is contingent until that time. Therefore, if a child dies before that time, his share is lost even though survivorship is not expressly made a condition. Dickerson v. Sheehy, 209 N.Y. 592, 103 N.E. 717 (1913); In re Pulis, 220 N.Y. 196, 115 N.E. 516 (1917). Arguably, then, for the purposes of this note we may consider the term grandchildren apart from the limitation to those of that class then living since the divide and pay over rule would imply such a condition even if the limitation were merely to my grandchildren.

6. In re Stebbins-Vallois' Estate, 99 N.Y.S.2d 402 (Surr. Ct. 1950).

7. This provision evidences a legislative concern for branches of descendants losing their interests by lapse. Arguably, this policy should be considered even though the case is not one covered by the narrow wording of the statute.

8. Prowitt v. Rodman, 37 N.Y. 42 (1867) is commonly cited as authority.

so broadly, but it was here argued that the cases involving the interpretation of a limitation to children applied to this case by analogy.[9]

Where there is a clear limitation to a specific class such as children, the courts often require an unmistakeable intent to the contrary to be shown before they will extend such a limitation to include more remote descendants.[10] However, where some ambiguity is found in the limitation to that class, *i.e.*, to my children then living, together with those who may have died leaving a child or children, their lawful issue, the courts are likely to hold that an interpretation which favors more remote descendants is preferred.[11] This is because of a presumption against disinheritance.[12] If the court is not willing to go quite that far, it is often reasoned that the intent as it appears in the whole will must be given effect.[13] The above generalizations are not strictly adhered to by the courts.

The burden of showing an unmistakeable intent to include within the limitation to children more remote descendants is much lighter when all of the children (using the term in its primary sense) have died. This is especially true where the alternative to opening the class, children, to more remote descendants is either intestacy or giving the estate to collaterals on a limitation over. In *In re Villalonga's Will*,[14] where the remainder after a life estate was to any children of the life tenants surviving them but if no children survive then to the children of the testator's nephew, the court held that the child of a deceased daughter of the life tenant could not share in the estate with a surviving daughter. The court distinguished *Prowitt v. Rodman*,[15] where all of the children were deceased and the question was whether the limitation to children included more remote descendants or whether the donee over would take.

In re Villalonga's Will was cited by the majority in the instant case as authority for their holding that the issue of deceased grandchildren could not share with then living grandchildren.[16] The majority distinguished *Prowitt v. Rodman*, as was done in the *Villalonga* case, and then went on to state that if all grandchildren, as used in its primary sense, were dead, it would be easy

9. Restatement, Property § 291, recognizes this analogy. The argument may even be stronger for the term grandchildren including more remote descendants since a testator may refer to children as those for whom he is legally responsible. This possibility is not usually present when the limitation is to grandchildren.

10. In re Villalonga's Will, 6 N.Y.2d 477, 190 N.Y.S.2d 372 (1959); In re Schaufele's Will, 252 N.Y. 65, 168 N.E. 831 (1929); In re Loghry's Will, 113 N.Y.S.2d 301 (Surr. Ct. 1952).

11. In re Weil's Will, 151 Misc. 841, 843, 272 N.Y. Supp. 477, 480 (Surr. Ct. 1934). In that case it was also said that where two interpretations are possible that which under any contingency would avoid intestacy is to be preferred. See also In re Brown, 93 N.Y. 295 (1883); Matter of Patton, 111 N.Y. 480, 18 N.E. 625 (1888).

12. See Scott v. Guernsey, 48 N.Y. 106 (1871); Matter of Patton, supra note 11.

13. In re Buechner, 226 N.Y. 440, 123 N.E. 741 (1919).

14. Supra note 10.

15. Supra note 8.

16. In re Loghry's Will, supra note 12, held that a limitation to "my then surviving grand-children, share and share alike" only gave an interest to grandchildren, rejecting a contention that the testator did not intend to disinherit a complete line of grandchildren.

to find that grandchildren included more remote descendants. The Court reasoned that where the language is clear and unambiguous there must be a clear showing of unmistakeable intent to the contrary to raise a construction problem.

The three dissenting judges stated that the intent as found in the whole will was controlling and that there did appear an overall stirpital intent which was contrary to the limitation over to "my grandchildren then living." The dissent, accordingly, would have allowed the descendants of the deceased grandchildren to share with the grandchildren who survived the life tenant.

P. D. C.

TRUST DISPOSITION, NOT AMBIGUOUS, NOT CONSTRUED TO INCLUDE AFTER-ADOPTED CHILDREN

In *In re Ricks' Trust*,[17] the Court of Appeals construed a provision of Section 115 of the Domestic Relations Law as restricting the over-all purpose of the section; that of enlarging on the rights of adopted children.

The action was for construction of a trust agreement. The agreement provided for the income from the trust to go to James Ricks during his life, then to his descendants during a secondary measuring life, and the remainder to his descendants. At the time the trust was created in 1950 James Ricks had only natural born children. Subsequently he adopted children, thus giving rise to the question of whether the adopted children are entitled to share in the trust income during the secondary measuring life along with the natural born children.

The Appellate Division held that they were not so entitled.[18] In general, a limitation in favor of "issue" or "descendants" will be construed to include only persons who have a blood relationship to the ancestor.[19] Only when the instrument itself, or certain extraneous facts show contrary intent, will the words be held to include adopted children. In this case the word "descendants" is used in the same manner in other clauses of the agreement, and this, along with provisions for distribution *per stirpes*, reflects concern only with regard to the blood lines. The Appellate Division noted that

> It has been consistently held in similar circumstances, where a child has been adopted after the death of the testator, that the adopted child does not fall within the class of persons designated as "issue" or "descendants" in the will.[20]

The Appellate Division also distinguished the present case from *In re*

17. 10 N.Y.2d 231, 219 N.Y.S.2d 30 (1961).
18. 12 A.D.2d 395, 212 N.Y.S.2d 548 (1st Dep't 1961).
19. 3 Powell, Real Property 132 (1952); New York Life Ins. & Trust Co. v. Vicle, 161 N.Y. 11, 55 N.E. 311 (1899).
20. Supra note 18 at 397, 212 N.Y.S.2d at 548. See In re Peabody's Will, 17 Misc. 2d 656, 185 N.Y.S.2d 591 (Surr. Ct. 1959); In re Cook's Will, 8 Misc. 2d 103, 165 N.Y.S.2d 806 (Surr. Ct. 1957); In re Hilt's Estate, 5 Misc. 2d 862, 160 N.Y.S.2d 801 (Surr. Ct. 1957), aff'd, 4 A.D.2d 1013, 168 N.Y.S.2d 925 (1st Dep't 1957).