Buffalo Law Review

Volume 9 | Number 1 Article 80

10-1-1959

Decedents' Estates and Trusts—Construction of Meaning of Term "Children" as Used in Testamentary Disposition

Buffalo Law Review

DECEDENTS' ESTATES AND TRUSTS

CONSTRUCTION OF MEANING OF TERM "CHILDREN" AS USED IN TESTAMENTARY DISPOSITION

The testatrix in *In re Villalonga's Will,*[1] provided by the seventh clause of her will: "I give . . . the residue . . . of my property . . . in trust . . .to pay the income to my son John . . . and upon his death, . . . the income to go to his wife Constance C. Villalonga, and upon the death of both my son . . . and his wife I direct the principal to be paid over to any children surviving him, or his wife and if no children survive them, I . . . direct that the property be distributed between the children of my nephew, R. F. Graves."[2] The life beneficiaries had two daughters, Amy and Jane C. . . . Jane C. did not survive the life tenants, but left a daughter Jane T. The issue before the Court was whether the testatrix meant to include only the first generation, or intended to include more remote descendants of the life tenants, within the phrase, "children surviving them." The Court of Appeals, in 5-2 opinion, held children did not include grandchildren and that Amy Villalonga was entitled to the entire remainder, as the sole surviving child of the life tenants, to the exclusion of Jane T., the granddaughter.

The majority relied heavily upon *In re Schaufele's Will,*[3] as a leading authority for the rule that the word "children" does not include more remote offspring than the first generation, unless the will as a whole shows an unmistakable intent to include grandchildren. The Restatement of Property[4] states that there is a presumption that the word "children" means only the first generation, and enumerates factors which, if present, tend to show an intent to include more remote descendants. The most common factors tending to establish a contrary intent are: (1) the will as a whole shows an intent to benefit equally two or more groups, and this is more effectively accomplished by a broader construction of the word "children"[5] (2) a gift to the children of A with a gift over upon a failure of the children of A, tends to show that the term "children" included more remote descendants, since a testator is seldom likely to prefer collaterals over direct descendants.[6] The preceding proposition is found in *Prowitt v. Rodman,*[7] much relied upon by the granddaughter of the life tenants in the instant case. The majority, in distinguishing the *Prowitt* case, found that in that case there were no surviving children, so either grandchildren of the life tenants or collaterals would take. But in the instant case the question was whether a child of the life tenants took, to the exclusion of a grandchild, rather than both taking *per stirpes*. The majority then reasoned

1. 6 N.Y.2d 477, 190 N.Y.S.2d 372 (1959).
2. *Id.* at 479, 190 N.Y.S.2d 374 (1959).
3. 252 N.Y. 65, 168 N.E. 831 (1929).
4. RESTATEMENT, PROPERTY § 285.
5. *Id.* § 285(b).
6. *Id.* § 285(f).
7. 37 N.Y. 42 (1867).

that the presumption against disinheritance of descendants in favor of collaterals, expressed in the *Prowitt* case, did not apply when the gift over to collaterals was inoperative. They further distinguished the *Prowitt* case, on the ground that the words "issue" and "children" were used interchangeably, justifying an inference that "issue" and "children" were used loosely, to refer to descendants in general, whereas the instant case used only the word "children" when referring to issue of the life tenants. The majority held fast to the rule in the *Schaufele* case, and concluded that no such unmistakable intent to include grandchildren had been shown by other language or expressions in the will.

The dissent reasoned thus: New York cases could be cited on both sides of the issue, but reason and justice required that "children" be construed to include grandchildren, so a more equitable distribution to descendants would result.[8] The very strict construction of the term "children," by the majority, was only required in cases where the testator appeared to be referring to his own children as named individuals.[9] If there were no surviving children of the life tenants, the testatrix could not have intended the gift over to grandnephews and grandnieces to take effect, to the exclusion of such life tenant's own grandchild, a direct descendant of the testatrix.[10]

Both constructions of the term "children" are reasonable, but the more equitable one appears to be that taken by the dissent. The majority concedes this by saying, "The fact that the distribution made in this will may not be in complete accord with individual notions of equitable distribution, is not sufficient to warrant the interference of the courts." They felt compelled by the *Schaufele* Case to rule against the grandchild Jane T., yet that case appears distinguishable from the instant case. There, the testatrix had divided her estate into three parts, one going to a daughter, one to a son, and the other to two children of a deceased son. She provided that if her remaining son died without issue, his part should go to her children then living. The son died without issue and the daughter took the gift over to the exclusion of the two grandchildren. This was a secondary devise rather than a primary bequest, to which the presumption against disinheritance is not usually applied,[11] and the testatrix had only one child who could possibly survive her son, justifying a conclusion that she was using the word children to refer to her only daughter

8. In re Paton, 111 N.Y. 486, 18 N.E. 625 (1888); In re King, 217 N.Y. 361, 155 N.E. 1060 (1916).

9. In re Barnes' Will, 2 N.Y.2d 787, 158 N.Y.S.2d 331 (1955).

10. In re Stecher, 190 Misc. 502, 81 N.Y.S.2d 131 (Sup. Ct. 1942).

11. In re Keogh, 126 App. Div. 285, 110 N.Y. Supp. 868 (2d Dep't 1908), the presumption that a testator did not intend to disinherit a descendant in favor of a collateral heir, does not apply to a case where the gift is not a primary bequest, but is a gift over upon the failure of a primary bequest . . . *e.g.* to "A" for life and at his death to the children of "A" then living. The gift to "A's" children is a primary devise. To "A" for life and at "A's" death to the children of "A" then living, but if no children be then living, to the children of "B" living at "A's" death. The gift to the children of "B" is a secondary devise and a gift over from a primary devise. The presumption against disinheritance does not apply to the gift to the children of "B".

as a named individual. This is in accord with the dissent's viewpoint that a very strict construction of the term children is only required when the testator appears to be referring to his own immediate offspring as named individuals. Davids' The New York Law of Wills[12] states that there is a conflict between the presumption that the term children means immediate offspring, and the presumption that the testator did not intend to discriminate between his direct descendants, when either could apply in the same case. Other factors in the will may then be decisive in determining the meaning of the word "children." As previously stated, other provisions of the will appear to have thrown the balance in favor of an equality of distribution among direct descendants.

The majority in the instant case, fix the time, when the presumption is to be applied at the death of the life tenant, instead of at the death of the testatrix, or at the time the will was executed. This is contrary to the settled proposition that a will is not to be construed in the light of events taking place long after the death of a testator, but by what was probably in his mind when the will was executed.[13] If the majority did not construe the testatrix' intention as of the death of the life tenant, it must then have held that at the time of execution, the testatrix intended to give a gift to the immediate issue of the life tenant, or in the alternative, a gift to grandchildren and more remote descendants if no immediate issue survive the life tenant, or further, in the absence of remote issue, to grandnephews and grandnieces. To arrive at such an extreme construction of the phrase "to any children surviving him" without the aid of a presumption can hardly be justified.

DISCRETIONARY POWER OF TRUSTEE TO INVADE CORPUS

"In the absence of an express grant of such power to the trustee, either by the settlor or by statute, the trustee has no power to modify or terminate the trust. His ordinary duty is to enforce the trust, not to end it. The settlor may lawfully vest in the trustee power to modify the trust or terminate it either in the discretion of the trustee or on the happening of certain events."[14]

It is not infrequent that the settlor gives the *cestui* power to end the trust or to demand a conveyance from the trustee.[15]

The exercise, by a trustee, of a power to encroach upon corpus, necessarily involves an authority to end the trust in whole or in part. In many instances, the extent to which a discretionary power in regard to corpus

12. Vol. 2, § 661 (1923).

13. In considering the effect of the codicil, we do not look to what happened, when it became operative. We seek for what the testator intended by it when arranging the disposition of his residuary estate. The intention of testator is to be ascertained not by what occurred long after the execution of his will, but by what was apparently, or presumably, in his contemplation, at the time he was making it. In re Hoffman, 201 N.Y. 247, 255, 94 N.E. 990, 993 (1911).

14. 4 BOGERT, TRUSTS AND TRUSTEES § 1000 (1948 ed.); see also, Schreyer v. Schreyer, 101 App. Div. 456, 91 N.Y. Supp. 1065 (1st Dep't 1905), *aff'd* 182 N.Y. 555, 75 N.E. 1139.

15. In re Woollard, 295 N.Y. 390, 68 N.E.2d 181 (1946); In re Morse, 280 App. Div. 171, 112 N.Y.S.2d 392 (4th Dep't 1952).