Buffalo Law Review

Volume 8 | Number 2 Article 6

1-1-1959

Delayed Disposition of Remainder Interests to Testator's Heirs Where Life Tenant Is Sole Heir

Alan Vogt

Board ruled that it would not entertain an unfair labor practice charge unless the parties had exhausted remedies available under the contract.

The present case answers another of the many questions raised by §301 and represents a further recognition of the valuable function of arbitration in labor-management relations.

John H. Galvin

Delayed Disposition of Remainder Interests to Testator's Heirs Where Life Tenant is sole Heir

Testatrix in her will provided a life estate for her husband with a power to invade principal in the case of necessity. The remainder of her estate she devised as follows: "Upon the death of my husband, I give, devise, and bequeath such of my property as shall then remain to my distributees under the laws of the State of New York." The Surrogate in construing the will determined the beneficiaries of the remainder to be the testatrix's distributees at the time of her death. At that time her husband was her sole distributee under New York law,[1] and because of the merger of his life estate and his remainder, he would have received the whole of her property in fee. In *In re Carlin's Will* the Appellate Division reversed the Surrogate and held that the will on its face evidenced an intention that the husband should receive no more than a life interest in the property.[2] To give effect to that intention the Court held that the beneficiaries of the remainder should be determined at the husband's death.

The basic canon of will construction is that the intention of the testator evidenced by the will will be given effect. Where the intention is shown by clear, unambiguous language in the will there is little difficulty in giving effect to the intention. However, where the language is less clear, some standards or rules must be applied in construing the will. Over a long period of time certain more or less arbitrary canons and rules of construction have developed. These rules, which are applied only when the will is ambiguous and clear intent is lacking, reflect both an attempt to give effect to the probable intention of the average testator and the general policies concerning property with which the courts have been concerned. One of these rules, which has developed largely out of the preference for the early vesting of future interests, is that in the absence of clear and direct intention to the contrary, heirs and distributees under a will will be determined at the death of the testator.[3]

1. N.Y. DECEDENT ESTATE LAW §§47-c, 83-d.
2. 6 A.D.2d 281, 176 N.Y.S.2d 112 (4th Dep't 1958).
3. 5 AMERICAN LAW OF PROPERTY §22.60, note 23 at 442 (Casner ed. 1952).

Many jurisdictions hold that when a testator devises a limited estate to one party and a remainder to a class, the fact that the holder of the limited estate subsequently turns out to be the sole member of the class of remaindermen, would result in an incongruity which is some evidence that the testator did not intend the class to include the life tenant.[4] This inference of intention is strengthened in a case like *Carlin* in which at the time the will was drawn it was fairly certain that the life tenant would be testator's sole heir,[5] but unless there is some additional evidence indicating testator's intention to exclude the life tenant from the remainder, the courts generally will not do so.[6] If it is determined that testator did not intent to include the holder of the limited estate in the class of remaindermen there are two means by which this intention can be given effect. The class membership can be determined at testator's death as if the life tenant were then also dead, or the class membership can be determined as if testator died at the time of the life tenant's death.

In the absence of express language directing the postponement of the determination of heirs or a class of beneficiaries under a will, New York courts have seldom found sufficient intention to do so. In *In re Bump's Will* the fact that a life tenant was a member of the class receiving a present gift of a remainder was not sufficient to delay determination of the class.[7] The decision in that case relied on the general rule in favor of early vesting and the fact that the will did not evidence a clear, contrary intention. The rule of that case has been followed where the will provided an immediate gift of the remainder.[8] However, it has not been followed in those cases where the gift was not a present gift. Where the will provided that the remainder be divided and distributed upon the death of the life tenant,[9] or where the gift was substitutional or conditional upon the happening of a future event,[10] the determination of the distributees has generally been delayed. *In re Sayre's Will* delayed the determination of testator's heirs principally because the gift was substitutional in nature, but in its discussion of the case the court placed some weight upon the fact that an opposite result would be incongruous with the intention testator had shown in the will.[11]

---

4. RESTATEMENT, PROPERTY §308(k) (1940); 5 AMERICAN LAW OF PROPERTY §22.60 (Casner ed. 1952).
5. 5 AMERICAN LAW OF PROPERTY §22.60 at 442 (Casner ed. 1952).
6. 5 AMERICAN LAW OF PROPERTY §22.60 at 443 (Casner ed. 1952).
7. 234 N.Y. 60, 136 N.E. 295 (1922).
8. In re Roth, 234 App. Div. 474, 255 N.Y.Supp. 307 (1st Dep't 1932); In re White's Will, 213 App. Div. 82, 209 N.Y.Supp. 433 (1st Dep't 1925); Safffford v. Kowalik, 278 App.Div. 604, 101 N.Y.S.2d 876 (3d Dep't 1951).
9. In re Crane, 164 N.Y. 71, 58 N.E. 47 (1900); Delaney v. McCormack, 88 N.Y. 174 (1882); In re Newkirk's Will, 233 App.Div. 168, 251 N.Y.Supp 337 (3d Dep't 1931).
10. Salter v. Drowne, 205 N.Y. 204, 98 N.E. 401 (1912); In re Fishel's Estate, 167 Misc. 145, 3 N.Y.S.2d 669 (Surr.Ct. 1938) *aff'd* 256 App. Div. 915, 10 N.Y.S.2d 859 (1st Dep't 1939); In re Sayre's Will, 1 A.D.2d 475, 151 N.Y.S.2d 506 (4th Dep't 1956), *aff'd mem.*, 2 N.Y.2d 929, 161 N.Y.S.2d 890 (1957).
11. In re Sayre's Will, *supra* note 10 at 511.

The *Carlin* will on its face contained no express language clearly excluding testatrix's husband from a share in the remainder or directing that the distributees be determined at a date later than testatrix's death. Therefore, unless such a clear, direct intention was indicated by the will viewed in its entirety, the general rule should have applied and the distributees should have been ascertained as of the date of the testatrix's death. From a reading of the will in its entirety the court found sufficient contrary intention to warrant disregard of the general rule. It based its finding of intention on the incongruity which the granting of the remainder to the testatrix's husband would cause. If testatrix's distributees were determined at her death, her husband would then have taken all of her property in fee. The court indicated that such a result would be incongruous with the plan testatrix had established by giving him a life estate with a limited power of invasion of principal. The fact that the limited power of invasion would be meaningless if the husband took in fee was a crucial factor in the court's finding of an intention that testatrix's heirs should be determined at her husband's death rather than at her own death, as normally would be the case.

The court relied heavily on the discussion of incongruity in the *Sayre* case, and discounted the effect of the substitutional nature of the gift in that case. On the basis of cases before the *Sayre* case, the substitutional nature of the gift, rather than the incongruity of results, would seem to be the sounder ground for that decision. No case prior to the *Carlin* decision has delayed the determination of distributees solely on the basis of incongruity, and for this reason the case would seem to be a departure from, or at least an extension of, New York law on the subject. The decision in this case raises two questions. First, was there actually any clear intent shown with which the application of the normal rule would be incongruous? The will was admittedly ambiguous as to the inclusion or exclusion of testatrix's husband in the class. It would seem possible that her intention, beyond providing for her husband, was to let the law of distribution take its course in the distribution of her property. If such were her intention, application of the normal rule would not be incongruous with that intention. The greater discretion which this case accords to judges in implying intention and disregarding established rules on the basis of the intention implied, is not conducive to stability and predictability in will construction. In some cases the relaxed rule may result in closer approximation of the testator's actual intention; however, in others, the courts may imply an intention contrary to the actual intention of the testator and come to a result incongruous with his actual intention. It would seem that unless a clearer intention than that indicated in the *Carlin* will is shown, the law would be best served by the application of the established rules of construction.

Secondly, even if the testatrix did intend to exclude her husband from the class of distributees, did she intend that the determination of those distributees

be delayed until his death? It is possible to imply from the will an intention to exclude the husband from the remainder, but this is an exclusionary not a donative intent. An intention to delay the determination of the distributees cannot even be implied from the will. Without a showing of intention to delay, as distinguished from an intention to exclude, the distributees should be determined at testarix's death, whether or not the husband is excluded from those distributees. A contrary result would fly in the face of testatrix's presumed intention, the rule of early vesting, and the policy reasons behind that rule. In all, it would seem that the grounds for excluding the husband in this case are weak, but the grounds for delaying the determination of the distributees are almost nonexistent. On the latter ground, if not the former, this case is a serious departure from existing law.

Alan Vogt

Defamation in Political Radio Broadcasts: More Grist for the Mill

Section 315 of the Federal Communications Act provides in effect that, when radio time is granted to a candidate for a political office, the station must grant the use of its facilities under substantially the same conditions to opposing candidates.[1] Censorship of the speeches is forbidden but no station is required to grant time for political speeches initially.[2] A primary candidate for U.S. Senator made use of a station following his opponent's speech. He and the radio station were sued for libel. *Held*: The radio station is immune from suit since in prohibiting censorship, Congress could not have intended that a radio station should be held liable for speech or statement over which it could have no control.[3]

Defamation by radio is generally determined by the law of libel, although in some instances it has been construed to constitute slander or a completely new and different tort.[4]

Suits against radio stations for defamatory remarks made by political speakers have been comparatively few and have resulted in conflicting rules. The divergence of opinion may be attributed both to different interpretations of section 315

1. 48 STAT. 1088 (1943), 47 U.S.C. §315 (1946).
2. *Ibid.*
3. Lamb v. Sutton, 164 F.Supp. 928 (M. D. Tenn 1958).
4. Sorensen v. Wood, 123 Neb. 340, 243 N.W. 82 (1932) (libel); Hartmann v. Winchell, 296 N.Y. 296, 73 N.E.2d 30 (1947) (libel, material read from script); Locke v. Gibbons, 164 Misc. 877, 299 N.Y.S. 188 (Sup.Ct. 1937) *aff'd mem.* 253 App.Div. 887, 2 N.Y.S.2d 1015 (1st Dep't 1938) (slander, ad lib); Summit Hotel v. National Broadcasting Co., 336 Pa. 182, 8 A.2d 302 (1939) (ad lib, held neither libel nor slander, but a different kind of defamation). A discussion of whether defamation by radio is libel or slander is beyond the scope of the note. For a general discussion, see Donnelly, *Defamation by Radio: A Reconsideration,* 34 IOWA L. R. 12 (1948). For argument that it is neither libel nor slander, see Newhouse, *Defamation by Radio; A New Tort,* 17 ORE. L.R. (1939).