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Decedent Estates—Construction of Will

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Construction Of Will

In re Hosford's Will[1] was a proceeding for the construction of a will to determine persons entitled to the remainder of a trust. All the complexities of a class gift were present,[2] but the court had no trouble in resolving the problems by merely finding the intent of the testator.

The residuary estate was given in trust for testator's wife during her life, then to be divided into three equal parts, with one part being subdivided "into as many shares or portions as I may have grandchildren surviving me," and the testamentary trustees were directed "to pay the income from one such share unto each of such grandchildren for and during the term of its natural life and upon its death to pay the principal sum from which it has been receiving the income unto its issue, if any, and if it leaves no such issue, unto my remaining grandchildren in equal shares or portions, the children of any such grandchildren who may be then dead to take the share or portion which their parent would have received had it lived."

Was it the testator's intent that a grandchild born a year and a half after testator's death was to share in the principal of the terminated trust as one of the "remaining grandchildren?" That is, did the unqualified language, "my remaining grandchildren," encompass afterborn grandchildren and thus all grandchildren who were alive when the contingency occurred, or was it limited by reference back to those grandchildren who were alive at the time of the death of testator and who had been previously designated as "grandchildren surviving me?"

The Surrogate's Court[3] found a limitation by reference back to the previous clause, based on *Matter of Watson's Will*,[4] where a clause providing for "said surviving grandchildren" was interpreted as referring to the grandchildren who were living at the time of testator's death.

The Appellate Division affirmed,[5] with one dissent in which *Matter of Watson's Will*[6] was distinguished. The dissent maintained that "said," as used in the *Watson* case, related back to the antecedent phrase which was limited to those surviving at the death of the testatrix.

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1. 309 N. Y. 23, 127 N. E. 2d 735 (1955).
2. Class gift as within the accepted definition contained in *Herzog v. Title Guaranty & Trust Co.*, 177 N. Y. 86, 69 N. E. 283 (1903).
3. 203 Misc. 146, 116 N. Y. S. 2d 138 (1952).
4. 262 N. Y. 284, 186 N. E. 787 (1933).
5. 282 App. Div. 1026, 126 N. Y. S. 2d 886 (1st Dep't 1953).
6. Note 4, *supra*.

The Court of Appeals reversed, finding that testator intended to provide for afterborn grandchildren. The court stressed the fact that the testator could not establish a trust for the life of a grandchild not in being at the time of his death, for that would have violated the rule against perpetuities[7] The court also used other sections of the will to show that testator wanted to provide for afterborn grandchildren, thus once again affirming the appropriateness of examining other portions of a will for the purpose of ascertaining testator's intention.[8] While speculative, since the court acted under the cloak of intention, it is suggested that the court may have been influenced by Professor Casner's statement,[9] cited in the appellant's brief.[10]

It should be noticed that by the court's decision, since the class determination of testator's grandchildren was at the date of the last life tenant's death and not at the date of testator's death, futurity attached to the gift.[11] That is, vesting took place in those who answered the description at the time of distribution.[12] Where a gift to a class is preceded by a life or trust estate, and no time has been designated for the ascertainment of the identity of the class, membership will be determined as of the date of the termination of the intervening trust.[13] Thus, the court has not followed its favored policy of early vesting.

The opinion is also of interest for its brevity. Even though futurity attached, there was no suggestion of the application of the "divide and pay over" rule, thus once again lending support to the statement: "that . . . the only rule actually applied by the courts is that the expressed intention of the person creating the remainder governs; and the troublesome divide and pay over rule is merely a canon of construction to get at such intention."[14]

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7. PERSONAL PROPERTY LAW § 11; REAL PROPERTY LAW § 42; *Seitz v. Faversham*, 205 N. Y. 197, 98 N. E. 385 (1912).

8. *Livingston v. Ward*, 247 N. Y. 97, 159 N. E. 875 (1928).

9. Casner, *Class Gifts to Others than to 'Heirs' or 'Next of Kin'—Increase in the Class Membership*, 51 HARV. L. REV. 254 (1938).

10. *Id.* at 280: "It must be kept in mind that the probable desire of the average transferor, when he describes his transferees by a group designation, is to benefit as many persons who comply with the description as he can, without at the same time causing too much inconvenience. Thus, his intention might very well be different as to the composition of the described class under different provisions in the same instrument."

11. *Salter v. Drowne*, 205 N. Y. 204, 98 N. E. 401 (1912); *N. Y. Life Ins. & Trust Co. v. Winthrop*, 237 N. Y. 93, 142 N. E. 431 (1923); *Matter of Crane*, 164 N. Y. 71, 58 N. E. 47 (1900); RESTATEMENT, PROPERTY § 295 (1940).

12. *Teed v. Morton*, 60 N. Y. 502 (1875).

13. *Matter of Pulis*, 220 N. Y. 196, 115 N. E. 516 (1917); *Matter of Coolidge*, 85 App. Div. 295, 83 N. Y. Supp. 299 (3rd Dep't 1903), *aff'd* 177 N. Y. 541, 69 N. E. 1121 (1904).

14. Gluck, *The "Divide and Pay Over" Rule in New York*, 24 COL. L. REV. 8 (1924).