Washington and Lee Law Review

Volume 15 | Issue 2 Article 12

Fall 9-1-1958

The Time To Which Words Of Survivorship In A Will Refer

the fact that no comparable federal statute exists to permit federal courts to retry a defendant for a greater offense when there has been substantial legal error in the first trial, it would appear that reasoning analogous to that of *Palko* might have been used in the principal case when the accused obtained a reversal of an erroneous lesser conviction, which, while unappealed, clearly operated as a benefit to him. When the defendant elected to appeal his beneficial lesser conviction, a retrial for the greater offense would not appear to deprive the accused of any constitutionally protected right. By such a judicial interpretation of the fifth amendment, the defendant's safeguard against a government appeal would still be preserved in the federal courts.

Although the maxim of double jeopardy is based upon the principle of finality of judicial proceedings, the function of courts is to settle controversies *according to law*. It is imperative, therefore, that when jeopardy is involved, it must be a real and continuing jeopardy through every stage of the prosecution. With such a requirement the double jeopardy provision of the fifth amendment would serve its true purpose and would thereby effectuate and perpetuate the intent of its framers.

OWEN A. NEFF

THE TIME TO WHICH WORDS OF SURVIVORSHIP IN A WILL REFER

The question frequently arises in the construction of a will as to whether words of survivorship relate to the death of the testator or of the life tenant. Thus, if A devises property to B for life with remainder to the surviving children of B, it is clear that B's children must survive some point of time. But whether the takers need only survive A or whether they must also survive some other period of time, such as the death of the life tenant B, is a problem of construction to be faced by the courts. If the construction adopted is that B's children must survive A, the remainder interest vests in the children immediately upon the death of A. If the takers must survive the life tenant B, however, the remainder is contingent, and surviving the life tenant is a condition precedent to the vesting of the estate.

Some courts in the United States follow the early English rule

---

principal case: "At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny." Kepner v. United States, 195 U.S. 100, 134 (1904) (dissenting opinion).

that survivorship is referable to the time of the testator's death.[1] Various reasons are given in support of this rule. Such a construction precludes the possibility of a state of intestacy resulting from the contingent nature of the estate.[2] It is also suggested that this rule accords with the well-settled rule of construction that a remainder will, if possible, be constructed as vested rather than contigent.[3] Further, this approach avoids the harsh result of excluding the representatives of children who predecease the life tenant.[4] The rule is also said to promote equality of distribution.[5]

The majority of American jurisdictions, however, have adopted the rule that words of survivorship presumptively refer to the death of the life tenant, unless a manifest intent to the contrary is expressed in the will.[6] It has been pointed out that this interpretation gives the words their natural and ordinary meaning.[7]

---

[1]Crossley v. Leslie, 130 Ga. 782, 61 S.E. 851 (1908); Bruce v. Bissell, 119 Ind. 525, 22 N.E. 4 (1889); In re Nass's Estate, 320 Pa. 380, 182 Atl. 401 (1936); Jameson v. Major, 86 Va. 51, 9 S.E. 480 (1889). Georgia by statute makes survivorship referable to the death of the testator. Ga. Code Ann. § 85-708 (1933).

[2]In Alsman v. Walters, 184 Ind. 565, 111 N.E. 921 (1916), where the testator devised land to his son for life and "after his death to his children surviving him in fee simple," it was argued that the remainder to each child was contingent upon such child's surviving the life tenant. In holding that survivorship referred to the testator's death, the court stated that "partial intestacy is to be avoided unless the language of the will compels it." Id. at 922. See In re Montgomery Estate, 258 App. Div. 64, 15 N.Y.S.2d 729 (2d Dep't 1939), aff'd without opinion, 282 N.Y. 713, 26 N.E.2d 824 (1940); In re Alhart, 189 Misc. 473, 71 N.Y.S.2d 141 (Surr. Ct. 1947).

[3]The Supreme Court of Indiana, in Aspy v. Lewis, 152 Ind. 493, 52 N.E. 756 (1899), declared that the rule of construction referring words of survivorship to the testator's death rather than to the death of the life tenant is a corollary of the rule of construction favoring the vesting of estates. In Cottrell v. Mathews, 120 Va. 847, 92 S.E. 808 (1917), the testator devised his estate to his wife for life and after her death to be equally divided among any surviving children. The Virginia Supreme Court of Appeals said that survivorship referred to the death of the testator and that the result was in accord with the policy of the law that favored vested rather than contingent remainders.

[4]Grimmer v. Friederich, 164 Ill. 245, 45 N.E. 498 (1896); Aspy v. Lewis, 152 Ind. 493, 52 N.E. 756 (1899); In re Groninger's Estate, 268 Pa. 184, 110 Atl. 465 (1920).

[5]In re Nass's Estate, 320 Pa. 380, 182 Atl. 401 (1936). The testator devised property in trust for his daughters or their issue, and in case of the death of the daughters without issue, then to the surviving children. The court said that to adopt any other rule of construction would work an inequality and what was presumably the testator's scheme would not be carried out.

[6]Hurst v. Hilderbrandt, 178 Ark. 337, 10 S.W.2d 491 (1928); In re Winter's Estate, 114 Cal. 186, 45 Pac. 1063 (1896); Hawke v. Lodge, 9 Del. Ch. 146, 77 Atl. 1090 (1910); Sutherland v. Green, 191 Iowa 711, 182 N.W. 785 (1921); Ridgely v. Ridgely, 147 Md. 419, 128 Atl. 131 (1925); Welch v. Williams, 237 Mass. 373, 129 N.E. 677 (1921); Stevens v. Edson, 82 N. J. Eq. 105, 87 Atl. 343 (1913).

[7]The Supreme Judicial Court of Massachusetts, in Conveny v. McLaughlin, 148 Mass. 576, 20 N.E. 165 (1889), emphasized the fact that it would be unnecessary to

The New York courts have often held that words of survivorship relate to the testator's death.[8] There are, however, some decisions which as a general rule refer survivorship to the time of distribution.[9] Where there is an instruction "to divide and pay over," survivorship is easily referred to the period of distribution.[10] In the case of a gift to a class, survivorship has been referred to the termination of the intervening estate.[11] The fact that the interest of the remainderman will only arise if the life tenant dies without issue has been held to indicate that the remainderman must survive the life tenant in order for the estate to vest in him.[12] Where the gift in remainder is of personalty, as distinguished from realty, survivorship has been referred to the period of division and enjoyment.[13]

In the case of *In re Gautier's Will*,[14] the question was presented to the New York Court of Appeals as to whether the word "surviving" referred to the testator's death or to the death of the life beneficiary. The testator's will directed that half of the residuary estate be divided into eight shares, four of which were to be held in trust for his sister, Clara Bird, for life, and at her death in trust for his nephews and nieces, Oliver Bird, Claire Bird Lewis, Dudley Bird, and Marie Louise Bird, for their lives. On the death of any of them "the one share held

---

use the word "surviving" if the testator intended that all those living at the time of his death would take. In Hall v. Blodgett, 70 N.H. 437, 48 Atl. 1085 (1901), it was held that to refer survivorship to the death of the testator would conflict with the natural meaning of the language used.

[8]Stevenson v. Lesley, 70 N.Y. 512 (1817); Moore v. Lyons, 25 Wend. 119 (N.Y. 1840); In re Montgomery Estate, 258 App. Div. 64, 15 N.Y.S.2d 729 (2d Dep't 1939), aff'd without opinion, 282 N.Y. 713, 26 N.E.2d 824 (1940); Runyon v. Grubb, 119 App. Div. 17, 103 N.Y. Supp. 949 (2d Dep't 1907), aff'd without opinion, 192 N.Y. 586, 85 N.E. 1115 (1908); In re Alhart, 189 Misc. 473, 71 N.Y.S.2d 141 (Surr. Ct. 1947); In re Rhodes' Estate, 169 Misc. 395, 7 N.Y.S.2d 765 (Surr. Ct. 1938); In re Woodruff's Will, 135 Misc. 203, 237 N.Y. Supp. 417 (Surr. Ct. 1929); Esslie v. Kraft, 70 Misc. 144, 126 N.Y. Supp. 416 (Sup. Ct. 1910).

[9]Mullarky v. Sullivan, 136 N.Y. 227, 32 N.E. 672 (1892); May v. May, 209 App. Div. 22, 204 N.Y. Supp. 408 (2d Dep't 1924); In re Van Ghele's Estate, 57 N.Y.S.2d 287 (Surr. Ct. 1943); In re Farmer's Loan and Trust Co., 82 Misc. 330, 143 N.Y. Supp. 700 (Surr. Ct. 1913).

[10]In re Buechner, 226 N.Y. 440, 123 N.E. 741 (1919); In re Leonard, 218 N.Y. 513, 113 N.E. 491 (1916); In re Leverich's Will, 125 Misc. 130, 210 N.Y. Supp. 605 (Surr. Ct. 1925).

[11]When a gift is made to a class, its benefits are usually confined to those persons within it when distribution is to be made. Teed v. Morton, 60 N.Y. 502 (1875); Clark v. Grosh, 81 Misc. 407, 142 N.Y. Supp. 966 (Sup. Ct. 1912). See also United States Trust Co. v. Baker, 51 Misc. 657, 102 N.Y. Supp. 194 (Sup. Ct. 1906).

[12]Truesdale v. Pierce, 152 App. Div. 453, 137 N.Y. Supp. 349 (2d Dep't 1912); In re Woodruff's Will, 135 Misc. 203, 237 N.Y. Supp. 417 (Surr. Ct. 1929).

[13]In re Stocum's Will, 94 N.Y. Supp. 588 (Surr. Ct. 1905); In re Walker's Estate, 39 Misc. 680, 80 N.Y. Supp. 653 (Surr. Ct. 1903).

[14]3 N.Y.2d 502, 146 N.E.2d 771 (1957).

in trust for the one so dying shall cease and the share of such nephew or niece shall be paid to his or her children, if any, and in the event that the nephew or niece dies leaving no children the share shall be divided equally amongst her[15] or her brother and sisters surviving."[16]

Clara, the primary life beneficiary, died, and trusts were established for the benefit of each of her children. After the death of Oliver and Claire the corpus of the trust set up for them passed to their children. Marie Louise died without issue, survived only by Dudley. The trustee brought a bill to obtain a construction of the will.

The Appellate Division determined that the word "surviving" referred to the death of the testator, but the Court of Appeals reversed, holding that survivorship referred to the death of the life beneficiary. Since only Dudley survived the childless Marie Louise, he was said to be entitled to the entire corpus of the trust set up for her benefit. The court recognized that "the testator's intention as gathered from the will is, of course, controlling and, in seeking it, we must give to his words their natural and ordinary meaning."[17] It was thought that the testator indicated a clear-cut intention to create a remainder interest contingent upon survival of the life beneficiary. The opinion points out that when, in another portion of the will, the testator wished distribution to depend on mere survival of himself, he said so explicitly.[18] The court announced the following rule of construction: "Absent language pointing a contrary intention words of survivorship refer to the time of the testator's death 'only in the case of an absolute devise or bequest to one and in case of his death to another;' they carry no such implication where, as in the will under consideration, the first devisee or legatee takes a life estate."[19] This rule of construction is contrary to that announced earlier in New York in the case of *Moore v. Lyons*.[20] That decision held that words of survivorship in a will refer to the death of the testator, unless there is special intent manifested to the contrary. In the *Moore* case the testator devised his dwelling house and lot of land to Mary for life, and after her death "to Susan, Jane, and Betsey, three daughters of said Mary, or to the survivors or survivor of them, their or her heirs and assigns forever."[21] Susan and

[15]To whom does "her" refer? The court has apparently read the pronoun "her" as "his." Otherwise there is an ambiguity which cannot be resolved from the will itself.

[16]146 N.E.2d at 772.

[17]Ibid.

[18]Id. at 773.

[19]Ibid. This language is taken from Mullarky v. Sullivan, 136 N.Y. 227, 32 N.E. 762, 763 (1892), a case almost identical on its facts with the principal case.

[20]25 Wend. 119 (N.Y. 1840).

[21]Id. at 119.

Jane survived the testator but predeceased Mary, the life tenant. The court determined that the remainders were vested, not contingent, and that the interest of Susan and Jane descended to their legal representatives. It was pointed out by the court that a whole series of decisions from earlier times up to the time of the decision had adhered to this rule.[22] It was also determined that the words of survivorship in *Moore* were inserted in the will to prevent a lapse.[23]

The majority of New York cases have followed *Moore v. Lyons*,[24] though some authority in that state has referred survivorship to the date of distribution.[25] The question now arises as to the present authority of *Moore*. The court in the *Gautier* case did not cite *Moore v. Lyons*, nor did it mention any cases adhering to that view. This indicates perhaps that it did not wish to abolish the rule of *Moore v. Lyons*, but merely sought to lay down a canon of construction to be followed in similar cases. The principal case can be harmonized with *Moore*, since the rule of the latter was held not to apply in cases where the testator had expressly manifested his intention to postpone vesting until the termination of the life estate. Furthermore, the New York courts have not applied the rule of *Moore v. Lyons* when certain facts were present. Some of the circumstances which point to a contingent construction are present in the *Gautier* case. For example, the direction to "divide and pay over" indicates that the gift is contingent and not vested; the gift is to a class which cannot be ascertained until the date of distribution; the gift to the survivors is to be effective only in the event the life tenant dies without issue. On its facts the principal case is clearly distinguishable from *Moore v. Lyons*. In the latter there is a gift to A for life, with remainder to three named individuals or the survivors of them; in the *Gautier* case a life estate is given to A, B, C, and D, and on the death of any of them there is an alternative gift over of the remainder of his interest to two classes, neither of which can be determined until the death of the life tenant.

It is submitted that the testator in the *Gautier* case created alternative contingent remainders whereby two conditions precedent must take place before the estate vests in the surviving nephews or nieces. The first such condition is the death of a nephew or niece without children, and the second is that the other brothers and sisters must be living at his or her death. If the New York Court of Appeals had de-

[22]Id. at 146.
[23]Id. at 143.
[24]33 Am. Jur., Life Estates, Reversions, and Remainders § 123 (1941).
[25]Ibid.