Maryland Law Review

Volume 5 | Issue 2 Article 4

Premature Closing of a Class Upon Death of a Member - Sale Deposit & Trust Co. v. Forbes

Comments and Casenotes

PREMATURE CLOSING OF A CLASS UPON DEATH OF A MEMBER

Safe Deposit & Trust Co. v. Forbes[1]

Dr. Emory died in 1916 and his will, made two days before his death, contained the following provision:

> "All the rest and residue of my estate of whatsoever kind and wheresoever situate to the Safe Deposit and Trust Company of Baltimore in trust to hold the same, with power of sale, investment, and reinvestment, to collect the income therefrom and pay over the same to the natural or legal guardians of the infant children of my friend, Theodore W. Forbes, for their benefit, share and share alike, until such time as they shall respectively reach the age of thirty years, at which time said children shall receive their respective shares of such rest and residue absolutely."

Another item of the will left $10,000 to the same trustee for the benefit of the testator's housekeeper for life, and at her death to become a part of the residue of his estate. In 1922 one of the children died at the age of thirteen and his parents petitioned the Circuit Court of Baltimore City for distribution to them, as next of kin, of one-fourth of the trust fund and for direction to the trustee to allot to them one-fourth of the fund held for the benefit of the housekeeper. The trustee and the three surviving children were made parties to the petition, and a decree was passed granting the relief sought by the parents. In 1924 another child was born to Mr. and Mrs. Forbes, and in 1939 the eldest child reached thirty. The trustee then petitioned the Circuit Court of Baltimore City for instructions as to any distribution, and the surviving children, including the child born after the first decree, were made parties.

Held: (1) That the child born after the decree of 1923 is not bound by it; (2) That the class should have remained open to include after-born children until the eldest child reached thirty, but since under the decree of 1923 part of the trust fund has already been distributed the decree of 1923 should be adhered to, and therefore the child who

[1] Circuit Court of Baltimore City, per Smith, J., The Baltimore Daily Record, January 16, 1940.

has attained thirty is entitled to one-third of the residue being administered for the benefit of the Forbes children, to the exclusion of this child born after the first decree; and (3) that the after-born child is not excluded from sharing in the $10,000 fund being administered for the benefit of the housekeeper during her life, and as to that fund the request to determine distribution is premature.

The first point listed above raises the important problem of the need for a procedural device whereby unborn or unascertained members of a class can be bound by a decree where the living and ascertained members of the class are properly before the court. Discussion of this problem is beyond the scope of the present note, but it should be pointed out that the simplest answer lies in having the matter clarified by statute.[2]

As to the second point listed above, the basis of the decree passed in 1923 was the doctrine that the death of a legatee, receiving the annual income with enjoyment of the principal postponed, entitles his next of kin to immediate payment.[3] The testator's probable object in postponing distribution in such a case is to preserve the property intact until the beneficiary attains sufficient discretion to handle the property in a careful manner. When the legatee-beneficiary dies before reaching the age specified in the will, the concern which the testator expressed about the care of the property becomes moot. If, as here, he does not specify who shall then take, and has not indicated any concern about *their* ability to handle the corpus, it may be presumed that he was ignorant of or indifferent to these matters. It then becomes plausible to give the corpus at the death of the legatee-beneficiary to those who take from the legatee-beneficiary, since no intention of the testator would be carried out by further postponing distribution. The income from the property will also be payable to these persons, and allowing the trustee to continue to manage the estate will result in no benefit to others, because the income he accumulated would ultimately be turned over to the very persons entitled to the corpus.

---

[2] For example, see Ill. Revised Statutes (1937) Ch. 22, Sec. 6, which permits the appointment of a guardian *ad litem*, in suits in equity, whose duty is to protect the rights of unborn persons. See, also, Roberts, *Virtual Representation in Actions Affecting Future Interests* (1936) 30 Ill. L. Rev. 580.

[3] Crickett v. Dolby, 3 Ves. Jr. 13, 30 Eng. Rep. 866, 34 Eng. Rep. 809 (1795); Jacobs v. Bull, 1 Watts 372 (Pa. 1833); Felton v. Sawyer, 41 N. H. 202 (1860); McReynolds v. Graham, 43 S. W. 138 (Tenn. 1897); and Bowman's Appeal, 34 Pa. St. 19 (1859).

The doctrine is, therefore, reasonable and salutory when a gift to individuals is involved and has generally been applied in such cases.

In *Savin v. Webb*,[4] the Court of Appeals of Maryland carried this doctrine one step farther, but the result in that case was just as sound as in those involving gifts to individuals. There the gift was $5,000 to each of X's children when they should attain twenty-one. Interest on the money was payable to these children from the date of the testator's death. X was dead when the will was made so there was no possibility of the size of the class increasing. Furthermore, a specific sum was left to each child, and each took a vested interest so that the amount to be received did not depend on the ultimate number of persons in the class. The same reasoning was applicable as in the case of a gift to individuals because here also the sole object of the testator in postponing distribution was to keep the property intact until the legatees reached an age of discretion. Thus the Court held that the administrator of a child who died under twenty-one was entitled to immediate payment.

In the instant case, the decree of 1923, which was left undisturbed, extends the doctrine to a gift to a class so as to close the class and cut off after-born members from the time of the death of one member. When there is a gift to a class with payment postponed until the members attain a given age (thirty in this case), the testator has two intentions between which the law must choose. One is his intention that all persons answering the class description should share in the gift, and the other is that when a member reaches the required age he should obtain his share. These two intentions conflict because no distribution can be made until the class is closed so that the share of each member can be ascertained. It is necessary, therefore, either to disregard his intention as to the time of payment and keep the class open until the possibility of increase in the membership becomes extinct, or to disregard his intention that all persons answering the class description should be included so as to give effect to his desire that each member receive his share upon attaining the named age. The law has chosen the latter alternative because it is in conformity with the policy for the early settlement of estates.[5] The result of this rule of conven-

[4] 96 Md. 504, 507, 54 A. 64, 66 (1903).
[5] Thomas v. Thomas, 149 Mo. 426, 51 S. W. 111 (1899).

ience is to cut off persons answering the class description who are not *in esse* when the eldest reaches the stipulated age.

Prior to the instant case, no reported controversy seems to have involved the question of whether this rule of convenience should be extended so as to cut off those born after the death of one member under the appointed age. Such an extension of the rule is unwarranted because there is no necessity to choose between conflicting intentions of the testator. He has expressed no intention that the death of a member should entitle the personal representative of that member to immediate payment; but, on the contrary, the earliest time he has indicated that distribution should take place is when the eldest member should attain a particular age. Thus, there is no other intent which conflicts with his desire that all who answer the description should participate. The court should not consider itself to be choosing between intentions but as giving effect to the only one which is present.[6]

The opinion in the instant case indicated that if the question had arisen at the time of the second construction of the will, the decision would have been that the class remained open until the eldest Forbes child reached thirty. Although the child born after the 1923 decree was not precluded from challenging it, it was felt that it would be unwise to make conflicting determinations of the same question in the same case, particularly after money had been paid out of the fund in obedience to the first decree. Thus the opinion enforced a rule whose reasonableness it criticized. It is submitted that in the future the discussion contained in the opinion should be followed rather than the actual result which the case reached.

With respect to the third point, dealing with the remainder in the $10,000 after the gift for life to the housekeeper, the opinion did not follow the allotment as directed in the first decree. The child born in 1924 was allowed to share in this part of the residue of the testator's estate, and no determination was made of how it should be distributed, leaving the class open until the death of the life tenant. The effect of the original construction of the will on this part of the estate was not followed because nothing had been paid out under it and no change in administration of the $10,000 fund had resulted from the earlier decision.

---

[6] Casner, *Increase in the Class Membership* (1937) 51 Harv. L. Rev. 254, 288, n. 93.

The question was re-examined because the youngest child was not bound by the decree of 1923 and no rights had vested in reliance on it. This result seems to be clearly desirable.

Elsewhere, the authorities are divided on the question of exactly how distribution of such a remainder should be made. The English authorities[7] hold that the residue, when left to a class, must be distributed as a whole so that when the class is first closed to make a distribution of any part of the residue the question of what persons share in the remaining portion is determined, and future-born members are excluded from any participation. The cases involving this problem arose where there was a residue consisting of present interests and future interests. The English courts have reasoned that when a residue is left to a class the intention of the testator is to make an immediate gift at his death. The result is that the class closes at his death, and the fact that a part of the residue consists of a future interest will not keep it open either as to the entire residue or as to that part of it which consists of a future interest. The policy of settling estates as soon as possible led the courts to distribute the present interests when the testator died, and they felt that it would be inconsistent to construe part of the residue to go to one group of persons and the other part to another group. This result has also been reached in a New York case where it is pointed out that the mere fact that a gift for life occurs in another part of the will with remainder to fall into the residue, does not alter the apparent intention to make an immediate gift of the residue, so the class must close forever at the testator's death.[8] Applying this rule to the instant case would result in excluding the youngest child from sharing in any part of the residue. Since the class was closed in 1923 in order to make a partial distribution of the residue, the English and New York courts would consider it closed for all purposes.

The instant case, however, bases its conclusion on reasoning contrary to the English and New York cases and follows a North Carolina decision.[9] Then, when faced with the same problem as the English decision above, the North

---

[7] Hill v. Chapman, 1 Ves. Jr. 405, 30 Eng. Rep. 408 (1791); Hagger v. Payne, 23 Beav. 474, 53 Eng. Rep. 186 (1857); Coventry v. Coventry, 2 Dr. & Sm. 470, 62 Eng. Rep. 699 (1865).

[8] Baylies v. Hamilton, 36 App. Div. 133, 55 N. Y. S. 390 (1899), affirmed 165 N. Y. 641, 59 N. E. 1118 (1901).

[9] Britton v. Miller, 63 N. C. 268 (1869).

Carolina court held that after-born children could participate in property in which there was an outstanding life interest but not in present interests in other property covered by the residuary gift. The theory behind their decision is that the testator did not anticipate such a situation and that any attempt to determine his intention would result in a fiction.

Two principles are generally considered in such cases; first, avoiding inconvenience through an early distribution of the estate; and second, letting in as many children as possible consistent with this principle of convenience. Allowing the after-born children to share in the future interests included in the residue, works out a satisfactory compromise between these two principles. No inconvenience results because all property which can be distributed at the testator's death is immediately divided among the then existing class members, the property in which after-born children are allowed to participate being incapable of distribution at that time. As to these future interests, the class is closed when the preceding estate ends as that is the earliest time at which the interest can be distributed. Since such a method of distribution does not violate this rule of convenience, the principle of letting in as many members as possible should govern. Thus, the decree in the present case is based on a sound principle which has met with approval in several articles and textbooks.[10]

[10] 2 SIMES, FUTURE INTERESTS (1936) 140; Warren, *Future Interests* (1921) 34 Harv. L. Rev. 639; Casner, *Increase in the Class Membership* (1937) 51 Harv. L. Rev. 254, 279.