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Vested and Contingent Remainders - Safe Deposit & Trust Co. of Baltimore v. Bouse

VESTED AND CONTINGENT REMAINDERS

Safe Deposit & Trust Co. of Baltimore v. Bouse[1]

The testatrix died in 1922 and bequeathed one-fourth of the residue of her estate in trust for her son, Alfred, for life, and after his death to his child or children living at the time of his death, but if he should die without leaving any surviving children, or if his children should all die before the age of twenty-one years, then to the other children of the testatrix, naming them. A similar bequest was made to her daughter, Mary Helen. Both bequests were made upon condition that the life tenants make similar provision for the devolution of certain other property; these conditions were complied with by the life tenants, both of whom executed deeds of trust containing similar limitations, shortly after the death of the testatrix. Alfred died in 1940 without any surviving children;[2] Mary Helen died in 1941 leaving three children surviving.[3] After the death of the testatrix and after the execution of the trusts by the life tenants, but prior to the death of the life tenants, legislation was passed imposing certain inheritance taxes which, if applicable, would subject the remainders to taxation. *Held:* The remainders passing upon the death

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[1] 181 Md. 351, 29 A. (2d) 906 (1943).

[2] He was a widower and apparently never had any children. See transcript of record, p. 56.

[3] All of the surviving children were born prior to 1922; two other children were born to Mary Helen but had died prior to 1922. *Ibid.*

of Alfred are subject to the tax, but the remainders passing upon the death of Mary Helen are not.

The Court construed the inheritance tax to be an excise tax levied on the privilege of receiving property upon the death of the former owner, a privilege granted by the state subject to the payment of the tax. Such a tax, they held, can be constitutionally applied only to a succession taking place after the enactment of the statute, and the vesting in interest constitutes the succession. The question then became one of determining whether the remainders were vested or contingent prior to the death of the life tenants. Accepting the Court's analysis of the problem and their construction of the statute,[4] the importance of the case lies in its discussion of the distinction between vested and contingent remainders, for it is the latest expression which the Court of Appeals has made on this subject. In discussing these concepts they defined a vested remainder as "one which is limited to a person in being, whose right to the estate does not depend upon the happening or failure of any future event", and a contingent remainder as "one which is either limited to a person not in being or not certain or ascertained, or so limited to a certain person that his right to the estate depends upon some contingent event in the future".[5] These definitions are taken almost verbatim from local texts[6] and are typical of the attempts which have been made to state in a simple, concise rule

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[4] Although there is ample authority for construing such a tax to be a transfer tax, one may well question some of the dicta regarding the application of inheritance taxes to vested remainders. For example, the Court said: "It is our decision that even though a remainder may have to be opened to let in after born children, or may be divested as a result of the death of the remainderman without issue, nevertheless if it is a vested remainder it is not subject to a subsequent inheritance tax statute, although enacted prior to the end of the life estate". 29 A. (2d) 906, 909. But they had previously said: ". . . the rate of inheritance tax is to be determined according to the law in effect at the time when remainders vest in interest, when the rights of the parties become fixed and certain, and not when the remainders pass in possession upon the death of the life tenant. This rule is applicable whether the remainder be vested or contingent". *Ibid.* Now it should be apparent that there is an inconsistency in those statements; it is true that remainders which are subject to open up or which may be completely divested by the happpening of some event are technically vested, but it is also true that they are not *fixed and certain* until they become indefeasibly vested. Consequently, courts which employ an economic test should sustain taxes imposed at any time before the interest becomes indefeasibly vested on the theory that something of value passes at that time. See Bankers Trust Co. v. Higgins, 136 F. 2d 477, 478 (C. C. A. 2d, 1943).

[5] Safe Deposit & Trust Co. of Baltimore v. Bouse, 29 A. (2d) 906, 909 (Md., 1943).

[6] MILLER, CONSTRUCTION OF WILLS (1927) Sec. 213; VENABLE, SYLLABUS ON THE LAW OF REAL PROPERTY IN MARYLAND (1892) 76-77.

the distinction between vested and contingent remainders.[7] Although one cannot quarrel much with the above definitions as an abstract statement of the difference between vested and contingent remainders, the application of them in the instant case and the results which the Court reached are subject to criticism.

The remainders following the life estate in Alfred were properly held contingent since the gift to his sisters was upon the express conditions that he die without leaving any surviving children, or that all his children should die before the age of twenty-one years.[8] Thus at the time of the death of the testatrix, and when the trust deed was executed, the right of Alfred's sisters to the property passing upon his death depended upon the happening or failure of a future event; although the persons who might take under the limitation to the sisters were in being and certain, their right to the estate depended upon the happening of a contingent event in the future. Consequently, the Court had little difficulty in holding the remainders to the sisters contingent prior to the death of Alfred in 1940. The fact that the gift to Alfred's sisters was preceded by a gift to the children of Alfred, and that at the death of the testatrix he did not have any children and none were subsequently born, undoubtedly influenced the Court in holding the remainders following Alfred's life estate contingent. Obviously a remainder limited to persons not in being is contingent upon their birth, and since the first limitation following the life estate thus created a contin-

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[7] For other definitions see 2 BL. COMM. *168-169; FEARNE, CONTINGENT REMAINDERS (4th Am. ed. 1845) *3-4; GRAY, THE RULE AGAINST PERPETUITIES (4th ed. 1942) Secs. 25, 27; 1 SIMES, FUTURE INTERESTS (1936) Secs. 67-68. For a criticism of such attempts to frame a universal test and to use it as the determining factor in the solution of all cases involving remainders see Jones, *Vested and Contingent Remainders, a Suggestion With Respect to Legal Method* (1943) 8 Md. L. Rev. 1.

[8] It would seem that this last clause could operate only as a divesting condition creating an executory interest in the children of the testator, other than the life tenant, which would take effect in case the life tenant died leaving children surviving who failed to reach twenty-one; otherwise the condition would be included in the clause providing for a gift over on death of the life tenant without leaving surviving children. That the Court construed the clause as creating an executory interest seems clear from their opinion for, in discussing the nature of the remainder to the children of the life tenant, they said: "The defeasible nature of the remainders resulting from the defeat of the remainder interest upon the death of any child before the age of 21 years does not have the effect of making the remainders contingent. This possibility of such a loss is a condition subsequent, not a condition precedent". Safe Deposit & Trust Co. of Baltimore v. Bouse, 29 A. (2d) 906, 909 (Md., 1943). As to the validity of construing a limitation to create a contingent remainder on one event and an executory interest on another see 1 SIMES, *op. cit. supra*, n. 7, Sec. 110.

gent remainder, the Court seemed to assume that all following limitations must likewise be contingent.[9]

On the other hand the Court held the remainders following the life estate in Mary Helen vested as of the date of the death of the testatrix in spite of the fact that these interests were created by language similar to, if not identical with, that used in the gifts following Alfred's life estate. Can such a result be justified? The only difference between the situation of the remaindermen who took following the death of Alfred and those who took following Mary Helen's life estate was the fact that at the time of the death of the testatrix Alfred had no children and none were subsequently born to him, so upon his death the property passed to his sisters, while at the time of the death of the testatrix Mary Helen did have children, and the children ultimately survived their mother and received the property upon her death. It seems that it was this fact (the existence of the children) which caused the Court to classify the remainders as vested, for they state:

> "The law is established in Maryland that where there is a bequest to a person for life, with remainders to his children, the remainders are contingent until one of such children is born; * * *. But when a child is born, and the remainderman is then ascertainable, the remainder immediately becomes vested, * * *".[10]

All of which is perfectly good law, quite consistent with the definitions of vested and contingent remainders quoted above, and entirely orthodox. But the Court then continues by saying:

> "So a bequest to a certain person for life, and at his death to any surviving child or children, but in event he should die without issue, his estate should go to a third person gives a vested remainder to any child of the life tenant immediately upon its birth.

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[9] The Court made the following statement: ". . . the remainders under the testamentary trust for the benefit of Alfred . . . and under his deed of trust were contingent, *since he had no children*, and these remainders did not vest in interest until his death in 1940" [Italics supplied]. Safe Deposit & Trust Co. of Baltimore v. Bouse, 29 A. (2d) 906, 909 (Md., 1943). As to whether it is possible to have a vested remainder following a contingent remainder see Loddington v. Kime, 1 Salk 224, 91 Eng. Rep. 198 (1695); Egerton v. Massey 3 C. B. (N. S.) 338, 140 Eng. Rep. 771 (1857); FEARNE, *op. cit. supra*, n. 7, *225; GRAY, *op. cit. supra*, n. 7, Sec. 113.1; 1 SIMES, *op. cit. supra*, n. 7, Sec. 75; 2 TIFFANY, REAL PROPERTY (3rd Ed. 1939) Sec. 333.

[10] Safe Deposit & Trust Co. of Baltimore v. Bouse, 29 A. (2d) 906, 909 (Md., 1943).

> * * * It is therefore our opinion that since Mrs. Plummer [Mary Helen] had children, the remainders passing under the testamentary trust for her benefit and under her deed of trust were vested remainders".[11]

There, it is submitted, is where the Court fell into error; they failed to distinguish between a remainder to all children of the life tenant and one limited only to those children who are living at the time of the life tenant's death, and to note that in the instant case the remainders were of the latter type. When the remainder is limited to children living at the death of the life tenant, there is imposed an express condition of survivorship which makes the remainder contingent until after the termination of the life estate, for prior to then the right of the remainderman to the estate depends upon a contingent future event—whether or not he survives the life tenant.[12] In such a case not only must a child be born but he must survive the life tenant in order to qualify as a remainderman. Consequently, the fact that Mary Helen had children at the time of the death of the testatrix, while Alfred did not, should have made no difference since the remainders were so limited as to remain contingent in any event prior to the death of the life tenants. Therefore, according to the traditional common law tests, all the remainders in the principal case should have been held contingent and subject to the inheritance tax.

Two questions immediately arise: (1) Was there any indication, previous to the decision in the *Bouse* case, that the Court of Appeals had in similar situations abandoned the traditional common law concepts of vested and contingent remainders? (2) To what extent does the *Bouse* case indicate such an abandonment? Both questions are difficult to answer categorically, but a brief review of the Maryland authorities indicates that previous to the *Bouse* case the Court of Appeals had, with one possible exception, adhered to the orthodox common law concepts. Thus re-

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[11] *Ibid.*

[12] That this is the common law is recognized by all the authorities. For example see GRAY, *op. cit. supra*, n. 7, Sec. 108, where it is stated that ". . . on a devise to A for life, remainder to such of his children as survive him, the remainder is contingent"; and 2 TIFFANY, *op. cit. supra*, n. 9, Sec. 321, where the author says, "A gift in remainder to those of a class of persons who may be surviving at a future time, as at the termination of the particular estate, is contingent because, until then, the remaindermen cannot be ascertained. So a gift to A for life, with a remainder to his children or issue living at his death, creates a contingent remainder, since the remaindermen cannot be ascertained until A's death . . .".

mainders limited simply to children were classed as vested subject to open up prior to the termination of the life estate, provided there were some children in existence.[13] On the other hand remainders limited only to children who survived the life tenant were generally held contingent prior to the death of the life tenant.[14] For example, in the case of *Lansdale v. Linthicum*,[15] the testatrix left property to her husband for life, followed by a remainder, upon the death of the husband, to "such of my three children * * * as shall be then living", and the remainder was held contingent until the death of the husband, the Court saying:

> "The words 'then living' clearly refer to the time of the death of the husband of the testatrix, the life tenant, and as the will describes those who were to take in remainders as 'such' of her children as were living at the death of her husband * * * the evident intention of the testatrix was to postpone the vesting of the remainders until the death of her husband. The devise was not to the testatrix's children, but only to *'such of'* them as were living at the death of her husband * * *".[16]

Likewise, remainders limited to children (or more remote issue) where there were none in existence, or to children (or more remote issue) who survived the life tenant, and in default of such then to others were held to create alternative contingent remainders which would not vest until the death of the life tenant.[17] In one of the leading cases, *Lamour v. Rich*,[18] the Court stated:

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[13] Stump v. Jordan, 54 Md. 619 (1880); Gilman v. Porter, 126 Md. 636, 95 A. 660 (1915). A similar result was reached when the remainder was to the issue of the life tenant. Bishop v. Horney, 177 Md. 353, 9 A. (2d) 597 (1939), noted (1940) 5 Md. L. Rev. 98. And in the recent case of Robinson v. Mercantile Trust Co. of Baltimore, 180 Md. 336, 24 A. (2d) 299 (1942), a remainder limited to "all my nephews and nieces" was held to vest in the nephews and nieces living at the time of the death of the testatrix rather than in those living at the death of the life tenant; the court stressed the absence of any words indicating an intent to limit the gift only to those nephews and nieces living at the time of the death of the life tenant. 180 Md. 343, 24 A. (2d) 302.

[14] Reid v. Walbach, 75 Md. 205, 23 A. 472 (1892); Lee v. Waltjen, 141 Md. 450, 119 A. 246 (1922); Reilly v. Mackenzie, 151 Md. 216, 134 A. 502 (1926).

[15] 139 Md. 155, 115 A. 116 (1921).

[16] 139 Md. 158, 115 A. 117.

[17] Demill v. Reid, 71 Md. 175, 17 A. 1014 (1889); Numsen v. Lyon, 87 Md. 31, 39 A. 533 (1898); Thom v. Thom, 101 Md. 444, 61 A. 193 (1905); Lewis v. Payne, 113 Md. 127, 77 A. 321 (1910); Schapiro v. Howard, 113 Md. 360, 78 A. 58 (1910); MILLER, *op. cit. supra*, n. 6, Sec. 225.

[18] 71 Md. 369, 18 A. 702 (1889).

> "The law, it may be conceded, favors the early vesting of estates, and the courts will, as a general rule, where there is more than one period mentioned, adopt the earlier one, if there be no expressions or no intent plainly deducible from the terms used, indicating that the testator meant to select the later and not the earlier period. * * * But the testator may, if he chooses, fix the period of vesting to suit himself, provided he does not transcend the time allowed by the rules of law. He may defer that period and make the vesting of the estate depend upon a contingency. When he has done this with *reasonable certainty* his wishes will prevail and the estate will not vest until the happening of that contingency".[19]

But in *Hans v. Safe Deposit & Trust Co.*,[20] a remainder, following a trust for the lives of various persons, limited to the "grandchildren then living" (referring to the death of the last beneficiary) was said to be vested, prior to the death of the beneficiaries, subject to being divested if the grandchildren did not survive the termination of the trust. The Court purported to distinguish other cases in which similar interests had been held to be contingent by saying that in those cases the testator had indicated an intention that the estate should not vest until the death of the life tenant; yet it is hard to imagine language which more clearly indicates an intention to defer the vesting of the interests than the words *then living* as used in the *Hans* case. However, the case is of little significance as an authority that such remainders are vested, because of the alternative ground upon which the Court based its opinion—*res judicata;* the latter theory amply justified the holding. And in the more recent case of *Safe Deposit & Trust Co. v. Sanford*,[21] property was placed in trust for the life tenant and upon her death in further trust for the period of twenty-one years, during which time the "net interest and income" was to be paid to the "child or children" of the life tenant; upon the termination of the trust (after the expiration of the twenty-one year period) it was provided that the property "* * * shall then vest in and become the absolute property and estate of any child or children of [the life tenant]". The interest of the children

[19] 71 Md. 383, 18 A. 703-704. There are similar statements in the recent case of Gittinger v. Farmers & Mechanics Nat. Bank, 180 Md. 640, 26 A. (2d) 414 (1942).

[20] 178 Md. 52, 12 A. (2d) 208 (1940), noted (1940) 5 Md. L. Rev. 98.

[21] 29 A. (2d) 657 (Md., 1943).

was held vested prior to the termination of the trust. However, this result can be justified because the gift of the income to the remaindermen prior to the termination of the trust overcomes the apparent postponement of the vesting indicated by the use of the words *shall then.*[22] Thus, with the exception of the equivocal decision in the *Hans* case, the Court of Appeals had given no indication that it was abandoning the traditional common law distinction between vested and contingent remainders in such situations.

The answer to the second question is more difficult; this difficulty is caused by the fact that there is nothing in the opinion in the *Bouse* case to indicate that the Court realized its holding was not consistent with the accepted common law principles. Although the decision reaches a result which is not in accord with the traditional concepts of vested and contingent remainders, the rules and principles which the Court states and purports to follow are entirely orthodox. It is a case in which there is a conflict between the body of the opinion and the holding; a case in which the reasoning does not sustain the decision. Under such circumstances to attempt a prediction as to the future effect of a decision is most hazardous; it is, in fact, too hazardous an undertaking to attempt in the absence of an absolute necessity. One feels extremely sorry for lawyers who, in drafting instruments, must decide just what language is necessary in order to indicate with *reasonable certainty* whether a vested or contingent remainder is intended. But such a hazard ought not to exist; the Court of Appeals should resolve this uncertainty at their first opportunity and indicate with *reasonable certainty* just what is the distinction between vested and contingent remainders, just what language is necessary to create the one or the other. And having done so they should consistently follow the line of demarcation so that testators will not be forced to choose their language subject to the risk of judicial indecision.

[22] In re Williams, L. R. [1907] 1 Ch. 180; Steinway v. Steinway, 163 N. Y. 183, 57 N. E. 312 (1900); Smith's Estate v. Commissioner of Internal Revenue, 140 F. (2d) 759 (C. C. A. 3d, 1944); 2 SIMES, *op. cit. supra*, n. 7, Sec. 356; RESTATEMENT, PROPERTY (1940) Sec. 259. Compare Poultney v. Tiffany, 112 Md. 630, 77 A. 117 (1910) where property was placed in trust, the income to be paid to the testator's widow for life, and upon her death it was provided that ". . . this trust shall cease, and the property shall then become the property of all my children . . ."; the Court quite properly held the remainder contingent prior to the death of the widow because, in the absence of a gift of the income to the remaindermen prior to the widow's death, the words used indicated an intent to postpone the vesting until that time.